# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mr P Williams** |
| **Respondent:** | **Driving and Vehicle Standards Agency** |
| **Heard at:** | Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE |
| | By cloud video platform |
| **On:** | 1 and 2 February 2021 |
| **Before:** | Employment Judge Adkinson sitting with |
| | Ms N Pratt |
| | Dr G Looker |
| **Appearances** | |
| **For the claimant:** | Mr N Toms, Counsel |
| **For the respondent:** | Ms S Cummings, Counsel |

# JUDGMENT

The Tribunal unanimously concludes that the respondent subjected the claimant to a detriment on 30 January 2020 for the sole or main purpose of preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time contrary to the **Trade Unions Labour Relations (Consolidation) Act 1992 section 146(1)(b)**. The Tribunal will determine the remedy to which the claimant is entitled at a further hearing.

# REASONS

1. On 26 June 2020, the claimant ("Mr Williams") presented his claim to the Tribunal alleging that the respondent ("DVSA"), through Ms R Campbell (head of DVSA's Human Resources ("HR") and Transformation), had subjected him to a detriment because she placed a condition on his application for employment as a higher executive officer ("HEO") in the part of DVSA's HR team called HR Expert Services. The condition was that, if were offered the post, he would not be able to hold any official office or role in his trade union, though he could remain a member. Mr Williams relies on the **Trade Union and Labour Relations (Consolidation) Act 1992 section 146(1)(b)**.

2. DVSA denies the subject of the claimant to a detriment because of his trade union membership. The respondent says that had Mr Williams accepted the role working in the HR Expert Services and remained a trade union official, there would have been an unacceptable conflict of interest. That is why Ms Campbell acted like she did. Therefore, the condition was not because of a reason proscribed by the **section 146(1)(b)**.

**The hearing**

3. The hearing proceeded by way of cloud video platform.

4. It was allocated 2 days.

5. Mr Williams was represented by Mr Toms, Counsel. DVSA was represented by Ms Cummings, Counsel.

6. There was an agreed bundle of documents before the Tribunal and we have considered those documents to which we have been referred.

7. The Tribunal heard live oral evidence from Mr Williams himself, and Ms R Campbell, Mr J Wildash (a workplace adjustments advisor within HR Expert Services) and Ms J Watt (head of Planning, Strategy and Performance) on DVSA's behalf. Each witness has been cross-examined by the other party. We have taken their evidence into account when making our decision.

8. Each party made oral submissions the Tribunal and we have taken those into account in coming to our conclusions. Mr Toms also made written submissions that we have taken into account.

9. We would like to thank Mr Toms and Ms Cummings and their instructing solicitors for their help in this case. It appeared to us there had been work behind the scenes to agree as much as possible. The solicitors had clearly recognised the time allocated was rather limited but managed to agree a timetable to ensure the hearing would be effective. Counsel were particularly efficient, focused and helpful in the way they pursued their client's cases. This meant that the Tribunal was comfortably able to hear all the evidence and submissions in the time available.

10. Neither party required any reasonable adjustments to take part in the hearing.

11. The Tribunal took a break every hour for approximately 5 minutes in order that everybody had a break away from the screen. This is in line with guidance from the Health and Safety Executive. The only exception was that, with his agreement, Mr Williams gave evidence for 1½ hours on the morning of the first day because he was then going to have an hour's break for lunch.

12. Because of the limits on the time available, the Tribunal decided to reserve its decision. This is that decision.

**The Issues**

13. Before the case began the parties agreed a list of issues for the Tribunal to determine.

14. At the end of the hearing, DVSA conceded that it had subjected Mr Williams to a detriment. Lest there be doubt, the Tribunal unequivocally believes the

concession was both realistic and sensible in the circumstances of this case. We are in no doubt that we would have come to that conclusion even if it were contested.

15. Though referred to in its response, there is in fact no issue that the claim was presented out of time. The claim is in time.

16. The issues for us to resolve are therefore:

    16.1. Has Mr Williams established a prima facie case that decision of Ms Campbell had the sole or main purpose of preventing or deterring him from taking part in activities of his trade union at an appropriate time?

    16.2. If so, what has DVSA shown was the purpose behind its acts or omissions.

**Facts**

17. Mr Williams presented his claim to the Tribunal on 26 June 2020. For the purposes of early conciliation, day A is 29 April 2020 and day B is 29 May 2020.

18. Mr Williams employment began in the civil service on 1 April 1982. He has therefore been an employee in the civil service over 38 years. By July 2018 he was an HEO within DVSA. He worked in the external relations team.

19. DVSA is an executive agency of the Department for Transport ("DfT").

20. The exact nature of the relationship is not clear to us but does not matter except to the following extent.

21. Mr Williams gave evidence that DVSA does not create its own policies and does not deal in any significant way with pay issues. He said as to the latter that DfT negotiates with HM Treasury. While there is feedback from DVSA to assist DfT with the negotiations, it is DfT that makes the decisions on pay based on HM Treasury's grant. He said that while agencies may meet with DfT officials, HEOs do not get involved in those negotiations. He accepted they may do some research on pay if requested. He also asserted that policies come from the DfT with only minor amendments permitted by its agencies. While the agency may be involved in the preparation and negotiation, the policy is ultimately a decision for the DfT.

22. We accept Mr William's evidence on this. Firstly, it is credible that pay is determined between HM Treasury and DfT, and that DfT decides pay in the agency. It is also credible HEOs would not be involved directly in those negotiations.

23. Secondly, it is also supported by some of documents we have seen that show the policies come from DfT and are, in short, imposed on DVSA with limited scope for customisation to reflect their particular circumstances. This is obvious, for example, in the "Dispute Resolution Policy and Procedures" which throughout refer not to the DVSA but to the DfT. They also expressly refer to DVLA, another separate agency within the DfT. Similarly, the DVSA's "Grievance Policy" says in the first paragraph [sic.]

"Grievance procedures will be followed where there is a complaint relating to the treatment of an employee. … Please refer to [in yellow highlight] your local policies. [yellow highlighting ends] *[DN: Agencies can decide to delete 'your local policies' and insert name of specific bullying harassment and discrimination policy and include link to it].*"

24. Thirdly it makes sense agencies may have input to the DfT's pay negotiations with HM Treasury and development of policies, but it seems highly improbable that the DfT would allow wild customisation and variation of pay rates across its department.

25. Since 30 of June 1982, the claimant has been a member of the Public and Commercial Services Union ("PCS"). PCS is one of 3 unions representing members in the DVSA. He has held various positions in the PCS.

26. At all times is relevant to these proceedings,

    26.1. Mr Williams was the Branch Secretary, Group Executive Committee President, National Executive Committee ("NEC") member, and a departmental trade union side member; and

    26.2. DVSA had allocated to him 50% facility time (that is time off from his job to enable him to carry out his trade union role) for him to carry out his trade union duties.

27. DVSA accept that Mr Williams has at all times in his employment demonstrated competence and integrity.

28. Within DVSA there is an HR department. Ms J Stone works within HR and is a senior HR Officer. Ms Stone worked in the division that dealt with individual employee's issues such as grievances. Ms Campbell worked in the division that dealt with policy more widely and liaised with the DfT for example.

29. Ms Campbell spoke regularly with Ms Stone. Though Ms Campbell denies it, we conclude that they spoke to each other about Mr Williams and his situation and grievances. The lay members drew on their workplace expertise and found the suggestion that senior HR managers would not discuss something like Mr Williams's situation as incredible. For my part I agree. Our reasons are as follows:

    29.1. This is a case in which an active and senior trade union official who has been at risk of redundancy for some time and who has raised a number of grievances alleging that he has been treated detrimentally because of his union membership and roles. This is a serious allegation, especially in a work place like this, where there is strong union involvement;

    29.2. Ms Campbell and Miss Stone must know that the law protects people from being subjected to a detriment because of their involvement with trade unions;

    29.3. Ms Campbell and Ms Stone must have known that the PCS is an active union in the DVSA and the civil service generally;

    29.4. It is clearly a case the calls out for careful consideration before doing anything that might look like it is seeking to subject a trade

union member and official to a detriment that appears to be related to union activities; and

29.5. In the circumstances we simply cannot accept as believable that 2 senior HR managers would never have discussed Mr William's case.

30. In July 2018, DVSA embarked upon a restructure. This involved all the HEO posts in the external relations team being abolished and the work split between more senior members (called senior executive officers ("SEOs") and more junior members of staff.

31. DVSA therefore put Mr Williams at risk of redundancy. There is no suggestion that there was anything improper about him being put at risk.

32. DVSA has a policy to help those at risk of redundancy. One part of that is the DVSA's "Procedure for Recruiting Staff at Risk of Redundancy and other Priority Movers" ("RRR procedure").

33. The procedure provides:

33.1. all staff who are at risk redundancy are to be treated as priority movers (paragraphs 3 and 4);

33.2. if there are three or fewer priority candidates applying for a role, they should be invited to interview unless they do not have the requisite qualifications or experience, and further that there is no need to carry out a sift (paragraph 10);

33.3. in paragraph 11 the managers must carry out a sift if more than three priority candidates expressing interest in a post or if one or more candidates is not thought to have the requisite qualifications or experience.

33.4. in both paragraphs 10 and 13 that if there is a single priority applicant, they may be appointed either without an interview or on the base of an informal interview or that they may be offered a trial period as an alternative to a formal interview.

34. In particular paragraph 17 of the RRR procedure provides:

"A priority candidate applying for a role on level transfer may only be declined where either:

" * another at risk or priority candidate has been appointed (see paragraph 21 below); or

" * there is clear objective evidence (reflected in feedback) that the candidate would not be able to meet the required standards for the role, even allowing for a six-month period of training and development; or

" * vacancy holders are able to demonstrate that the appointment would introduce a significant risk to the business (e.g. because a role is business critical and requires particular levels of skill and competence); or

" * the priority candidate has been refused security clearance at the appropriate level, or is refusing to be cleared."

35. The RRR procedure's paragraph 20 provides that with the agreement of their line manager, an unsuccessful candidate may challenge the grounds of refusal if the criteria in paragraph 17 have not been met.

36. Paragraph 23 of the RRR procedure allows

"a trial period of up to 4 weeks to assess [the applicant's] suitability for a role."

37. Whilst at risk of redundancy, Mr Williams has applied for over 28 positions. He has been unsuccessful in all those applications. In some of those applications he was sifted out from consideration without an interview. The Tribunal does not know the date of these applications, what positions he has applied for and so is not able to assess his suitability for the roles for which he applied stop the Tribunal does not have any other information from either party to assess why he has been unsuccessful in his applications. However, neither party has suggested the roles were inappropriate e.g. too senior or clearly out with his experience.

38. Aware of the deficiencies of evidence, the Tribunal nonetheless concludes it is surprising at the least that an employee at risk of redundancy with 38 years of experience in the civil service is not able to successfully apply for suitable alternative employment where there is nothing to suggest he is pursuing inappropriate alternative roles or was incompetent.

39. Taken alone, we do not believe these series of unsuccessful applications would show anti-union animus, especially given the lack of detail about them. However, the striking number makes them difficult to ignore. We believe when taken with the other facts in this case the number of unsuccessful applications does support Mr Williams's allegations in the absence of any other explanation.

40. DVSA has a grievance policy. The policy provides as follows (in so far as relevant)

"this policy is not to be used to deal with complaints arising from the application of the policies and procedures that include an appeal mechanism, for example, discipline, poor performance and/or attendance.

"…

"5. All actions in this procedure should normally be taken within the set times. However, it is recognised that this is not always possible due to the complexity of the case or circumstances such as working patterns, shift working, annual leave, public holidays and/or employee absence of disability, in which case all action should be done as soon as reasonably possible. The reason for any delay should be recorded.

"…

"21. When the formal process has started, the decision manager should inform the DfT casework provision in the processes underway. If the grievance cases than not resolved after 40 working days the case should be reviewed by the DfT casework provision the purpose of the review is to ensure that everything is being done to progress the case, that the correct process is being followed and that there are no unnecessary delays.

"22. The decision manager should invite the employee to a meeting to discuss the grievance normally within five working days of its receipt. If an investigation is needed, investigation must be done before the meeting takes place. The decision manager will give the employer at least five working days' notice of the meeting following completion of the investigation. The decision manager must inform the employee of any delay.

"…

"25. At the meeting, the decision manager will assess the complaint and, if appropriate, take time out reflection before giving a same-day decision to the employee. The decision will normally be confirmed in writing within five working days.

"26. If the decision is not to be made on the same day or within five working days of the meeting, for example, because further investigation is needed, the employee must be given a reason for the delay and told when they can expect a decision."

41. On 30 October 2018 Mr Williams lodged a formal grievance under the DVSA's grievance policy. It concerned the application of the RRR procedure and the role of HR in his redeployment.

42. We do not have the grievance itself. However, the DVSA's own notes of the eventual grievance hearing confirm that Mr Williams referred to a recommendation that independent appeal managers should consider grievances relating to DVSA's HR staff, and that this recommendation would be complied with.

43. DVSA failed to appoint anyone to deal with this grievance.

44. On 15 March 2019 Mr Williams presented a further grievance. Again, an element of it was against DVSA's HR. In that grievance he said

"I have been raised the issues of redeployment as a priority mover with the HR business partners and have had no conclusion to this other than the RRR policy continuing to be breached and processes ignored.

"When applying for posts I believe I have received differential treatment as a result of me being a leading trade union representative….

"[Mr Williams goes on to complain about the scoring matrices and the feedback not being in line with RRR policy.]…

"7) for all these reasons I believe that I am being treated in a differential manner to other staff and that this is because of my position as a leading trade union representative."

45. DVSA failed to appoint anybody to deal with this grievance either.

46. On 1 July 2019 Mr Williams secured a trial in an HEO post in the finance team. Other than being a trial, DVSA did not subject Mr Williams to any restrictions or conditions in his trial. In particular the DVSA did not restrict his facility time.

47. During his trial, Mr Williams and his manager continued to try to progress his grievances. They were referred to Ms G Smith in HR. On 23 September

2019, without any formal investigation or appointment of a decision-maker, she responded to the grievances and said that they were out of time and could not proceed any further. It seems to us most likely that she simply did not apply her mind to the grievances properly rather than acted because of anti-union hostility.

48. On 25 September 2019, Mr Williams lodged a further grievance. Ms J Stone acknowledged his grievance and drew up terms of reference for the investigation. She did not consult Mr Williams about those terms of reference. We find that surprising.

49. In September 2019, Mr Williams's trial period in the finance team was extended until 10 October 2019. There is no explanation of why his trial was longer than 4 weeks or why it was extended. There is no suggestion that this extension had anything to do with Mr Williams's performance. DVSA adduced no evidence of the need for an extension.

50. On 18 October 2019 Ms Stone sent emails to colleagues (presumably those colleagues who would decide whether or not to offer Mr Williams a permanent HEO post in the finance team) relating to his facility time if he were to take on the trial role is a permanent position.

51. After setting out the time Mr Williams had taken as facility time in the year, she wrote:

"I think he will argue that this is his entitlement. However, if he insists on having that it throws up the issue of suitability of your post. If he took 50% facility time how long would it take to learn the job? The test of suitability is that the individual can learn the job within a reasonable period. Taking facility time up to 50% would prolong this learning period.

"If someone came into the department and took a long time to learn the job due to various different reasons/absences was that interview that they couldn't come clean to the elements required in the time frame that you expect what would you do? This situation is no different.

"I think you just need to set out your requirements and as David says, suggest a time period for him to think about it."

52. We do not know what enquiry prompted her email.

53. DVSA offered the HEO role in the finance team to Mr Williams permanently on 24 October 2019. It was subject to 2 conditions. The relevant condition was that he would have to reduces facility time from 50% to 20%.

54. DVSA suggest that, as per the email, this was to reflect the need to train and learn. The Tribunal does not accept this explanation. DVSA has not explained why his trial period was extended contrary to the RRR procedure. There is no evidence that his facility time warranted the extension. There is no evidence his performance in the trial was causing some concern that meant a prolonged trial might reasonably be justified. The only obvious factor was his union roles. We note that it is Ms Stone who suggests that the 50% facility time would prolong the learning period, and not the person who would have to manage Mr Williams in the post if he accepted it full-time or be responsible day-to-day for his training. In fact, there is nothing that shows her apparent supposition was to be borne out in reality.

55. We have seen no evidence that suggests even if it did have an impact that the time that it would take into learn the job could be described as “unreasonable”, to use Ms Stone’s language.

56. We have seen no evidence that explains why 50% facility time was not an issue during the trial but was to be an issue if he took up the role full-time.

57. The Tribunal believes that if Mr Williams is 50% facility time were genuinely an obstacle to his performance of this role it would have been apparent before he even started his trial run, or at the very least well within the five months that he undertook the role the trial basis.

58. The Tribunal is also struck by the fact that Ms Stone raises issues only shortly after he lodges his third grievance in which she is involved.

59. We conclude that there is no evidence that justifies the prolonged trial period or the conditions. The only significant factor is Mr Williams’s union roles and facility time has suddenly become an issue. We conclude therefore that the prolonged trial period and the sudden imposition of conditions that appear never to have been an issue before, and that they related to his union activities, and Ms Stone’s senior role in DVSA suggests both Ms Stone and DVSA was motivated by hostility towards him undertaking his union duties.

60. Furthermore, the Tribunal finds that Miss Stone would not have made the suggestion about reduction of Mr Williams as facility time in her email of 18 October without Ms Campbell’s knowledge and approval. We have above expressed our conclusion that Ms Campbell and Ms Stone discussed Mr William’s case. In relation to this particular issue, any suggestion of reducing facility time would be controversial at the least. Discussion among managers would be an obvious thing to do. We think in the circumstances we have described it is incredible to believe such a discussion did not take place.

61. Mr Williams declined the role of HEO in the finance team because of the condition that he reduces facility time from 50% to 20%.

62. On 18 November 2019 he submitted a further grievance. In that grievance he complained again amongst other things that he was being subjected to a detriment because of his trade union membership.

63. In November 2019 it appears as an industrial dispute erupted between the PCS and the DVSA. The details are not known and do not matter. It appears that the PCS had decided to ballot its members on industrial action. Ms Campbell assumed without evidence that Mr Williams was responsible for the decision to ballot members and that he was leading the dispute. In fact, this is not correct. Nonetheless Ms Campbell wrote to Mr Williams on 22 November 2019 to say that the DVSA was withdrawing the use of its facilities from PCS representatives with immediate effect. We conclude this demonstrates anti-union animus and in particular towards Mr Williams because there was no justification to direct the message to him.

64. From January to June 2020, Mr Williams was seconded to a project within HR Expert Services’ specialist support team working on DVSA’s reasonable adjustments policy. That was supervised by Mr Wildash. Mr

Wildash confirmed that Mr Williams's trade union role did not present an issue in the work Mr William's had to undertake. It is suggested that his role was limited and therefore there was no scope for a conflict of interest to arise. We do not accept this is accurate. We understand that there may be some roles more sensitive to conflicts than others. However, working within the team on policy matters at any level is something that we would expect to highlight any potential conflicts simply because of the team in which he worked and the duties of that team. He was working at HEO level. That neither any potential nor actual conflicts of interest appear to have arisen undermines DVSA's case.

65. On 10 January 2020 Mr Williams applied for a permanent HEO post in the HR Expert Services specialist support team.

66. The Tribunal has seen his application. The application asks him to set out (among other matters) his experience and skills relevant to the role in 500 words. It is blatantly clear from reading it that Mr Williams at the time held a role in a trade union who had members in DVSA and he was active with the union. This is because in his examples he relies heavily on his experience in his trade union roles and makes many references to his union membership.

67. The Tribunal presumes there were a number of applications for this role because there was a sift and that would best match the RRR procedures. 2 people carried out the sift. The sifters were Ms B Attwell who was the head of HR Expert Services specialist support team and so would be Mr Williams's ultimate (if not direct) manager were he successful, and Mr Callum McNab, an SEO in that team. Ms Campbell did not form part of the panel involved in sifting the potential applications nor was she to be involved in the interviews.

68. After the sift, Ms Attwell completed a sift board report. In that report she and Mr McNab set out their views on Mr Williams's application and Ms Attwell noted areas that she wanted to question Mr Williams about if he came to interview in order to assess further whether or not Mr Williams was really suitable for the role. None of those things involves the issue of a potential conflict of interest.

69. The Tribunal concludes that Ms Attwell and Mr McNab had the experience and knowledge to decide whether or not potential conflicts of interests existed. This is because of their seniority, that DVSA had entrusted the recruitment sifting to them and in particular that Ms Attwell would manage the successful candidate and the sift board report shows that they were clearly aware of the skills and experience needed for the post and what the post entailed.

70. We are quite satisfied that if there were potential conflicts of interest or at least genuine concerns about potential conflicts of interest, Ms Atwell or Mr McNab would have noted them on the sift board report at the very least. Furthermore, Ms Campbell was Ms Attwell's superior. If Ms Attwell had concerns but was uncertain about how to proceed, we see no reason to believe that she would not have raised them with Ms Campbell. Ms Campbell admitted that Ms Attwell told that she was proposing to interview

Mr Williams. Ms Campbell also admitted that Ms Attwell did not raise any concerns about a potential conflict of interest. The opportunity to do so was there. This confirms Ms Attwell and Mr McNab saw no potential conflicts at the recruitment stage.

71. We also note that DVSA did not call Ms Attwell to give evidence. DVSA suggested Mr Williams should have called her. We think that suggestion is without merit. We find it striking that the person who sifted Mr William's application and who would have been his manager and who must have understood the role for which she was sifting, would have been well placed to help us understand the alleged conflicts of interests between his post and his union roles. It is a most obvious person for the DVSA to call. That they did not in our view undermines the credibility of the DVSA's case that there was a potential conflict of interest.

72. On the basis of the above we conclude in summary both that Ms Attwell and Mr McNab were aware of Mr Williams's union roles, knew what the post he had applied for would involve, carefully vetted his application and concluded that there were no relevant potential risks of conflicts of interest if Mr Williams secured the post.

73. Mr Williams was invited for interview scheduled for Monday 3 February 2020.

74. On Friday 30 January 2020 at 1255 Ms Campbell emailed Mr Williams copying in Ms Attwell. She sent this email without consulting Ms Attwell and so without her agreement. Ms Campbell did not consult anyone else in HR before she wrote the email. Therefore, the views expressed in the email can only be those of Ms Campbell. In the email she wrote:

"I understand you have been invited to attend an interview and assessment for an HEO role in our expert services team. I am concerned that as a trade union representative there is a significant risk of a conflict of interest between your union responsibilities and the work you could be involved with in this role.

"I fully understand the situation you are in have no desire to stand in the way of you finding permanent employment however you need to know that I would not accept your continued involvement in the union if you are successful in gaining the post.

"To be clear I am not withdrawing your offer of the interview but I want you to know there is a condition. You are free to remain a union member but would not be able to hold any office shall office all role.

"The Interview scheduled for Monday, I would like you to consider your position and let [Ms Attwell and me] know on Monday morning whether you wish to continue with the application."

75. On 31 January 2020 at 0859 Mr Williams replied as follows:

"I am seeking some clarification please before I make any decision. In your email you state 'I am concerned that as a trade union representative there is a significant risk of a conflict of interest between your union responsibilities and the work you could be involved with in this role.'

"I'm not clear on what the 'conflict of interest' would be? For example I currently hold a position and role on the PCS [NEC] which deals with a whole the civil service and private companies. It is not specific to DVSA so why is a conflict there? I am involved in pay talks in the DfT for the group executive committee's so why is there a conflict there since it is not DVSA specific?

"I do find it slightly puzzling as a conflict of interest is being cited in DVSA particularly when compared somewhere like GCHQ where they allow union representatives. In all honesty I would suggest that the work carried out in the GCHQ is somewhat of a more sensitive nature than DVSA but nonetheless they allow union reps.

"I'd be grateful if you be more specific place on what you consider is a conflict of interest."

76. In our view the only way this can reasonably be interpreted is as a request for clarification of the potential conflicts of interest.

77. On the same day but five minutes later, Ms Campbell replied:

"The role you have applied for works in the HR Expert Services team as part of a pool of HEO support resources for the whole team. They work on projects such as reward and employee relations strategies and initiatives. The potential for conflict is very clear."

78. Mr Williams decided that he did not want to give up his trade union roles and therefore withdrew his application before interview.

79. Mr Williams relayed all of this to his own PCS union representative, Ms K Prendiville, and she took up his concerns. On 3 February 2020 Mr Williams's trade union representative Ms K Prendiville emailed Ms Campbell saying is follow (so far as relevant):

"It seems that you're implying that no PCS representative could effectively work in HR, given that it would be privy to the information that will be discussed with the unions. This is a rather Draconian response, and one that has never been discussed or agreed with the agency, DfT or documented in our recognition agreement or the DfT Staff Handbook, Chapter 12.

"I do understand there may be sensitivities, or even conflict in some circumstances, we would expect you to come to us with some of these concerns, manage any conflict, rather than impose a blanket ban. …"

80. On 11 February 2020 Ms Campbell replies saying

"Thank you for your email. I have been reflecting on your points about managing the areas which may pose a conflict of interest but I cannot see how we could function as a team with a constraint such as the one you suggest. In addition, I fear it would leave Paul isolated to be treated so differently.

"Paul is working with is temporarily of a specific task which has well-established guidance and practices. He is not party discussions concern the why the work of the team. I do not see this as at all similar.

"It is extremely regretful that Paul felt he had to withdraw the application but the condition I said was one any HR manager would consider reasonable.

"…"

81. The DVSA has in its response to the claim tried to set out what it believes the potential conflict of interest are, namely:

81.1. He would unavoidably have been involved working on projects to reward and employee relationship strategies in which he was also likely to be involved in his official capacity as a PCS NEC and group executive committee member, and that therefore he would have access to confidential and sensitive information or had input into the work developing those projects.

81.2. He would have been involved in developing policies should as those to managing performance attendance disciplinary cases and disputes all of which have to be negotiated with the unions and which in the past the PCS has opposed.

82. We conclude that the reason Ms Campbell did not want Mr Williams to recruited to the post was because she did not want a person who held union roles like he did and undertook activities like he did in the post. She wanted him to stop his union role if he accepted the post. We further conclude the inference to draw from the circumstances was she saw it as having the "enemy within" and so she did not impose the rule to restrict conflicts of interest but to keep a union activist out.

83. The reason we come to this conclusion are as follows:

83.1. Ms Campbell's position completely contradicts the position of those sifting his application for the post and who had considered his application carefully, knowing the role for which he was applying.

83.2. If Ms Campbell were genuinely concerned, we find it surprising she did not consult with Ms Attwell before sending her email to Mr Williams since she is in effect suggesting Ms Attwell has (at least) missed an important factor assessing suitability.

83.3. If Ms Campbell genuinely believed these conflicts of interest existed, we would have expected her to set them out in her first email when they were in her mind.

83.4. The obvious step would be to speak to him or to invite him either to a meeting or to provide comments. She does not do that. Instead, she issues an ultimatum that forces him either to withdraw or agree if successful to abandon his union roles. This in our view supports the suggestion that she has a hostility to his union activities.

83.5. At the very least, we would have expected her in the second email to set out the conflicts. Mr Williams had clearly explained why he believed there was no conflict. It provided a potential riposte to her concerns. It asked for an explanation of her concerns. She had the opportunity to spell out the problems or

to seek consensus. She could have clearly explained why his explanations were not relevant. If she is correct then the conflicts between his union roles and the posts were clear in her mind and she could have spelt them out, having not done it the first time. She did none of these things. The curt, dismissive response leads us to conclude was that she did not want a union activist in that post.

83.6. Ms Campbell says that her second email makes it clear that the conflicts are obvious. Mr Williams clearly struggled to see the potential conflicts. It would have taken no time to set them out. We find it telling it is only after Mr Williams has withdrawn his application and his own union representative Ms Prendiville contacts her, and after a delay of 7 days (which is in contrast to the 5 minutes to reply to Mr Williams) does she start to set out the concerns. This appears to us as someone developing reasons to justify a decision, because if they were genuine, they would have been in the first or second email.

83.7. Further we struggle for own part to see what the conflicts actually are. Ms Campbell did not seem to think there was an issue with a trade union member being employed in this post in particular or HR generally. Anyone in that post would have access to all the sensitive and confidential information which, presumably they could leak to the union if they wanted to. Why Mr Williams, a man who had acted with integrity throughout the whole of his employment, would present a risk that an ordinary union member would not, is not clear.

83.8. The reasons do not appear to stack up to scrutiny. We have already noted how pay and policies develop. We do see how Mr Williams's union roles would undermine his ability to perform the post.

83.9. Ms Campbell cites that she "fear[s] [management of any conflicts] would leave [Mr Williams] isolated to be treated so differently". If there were really a reason, we believe Ms Campbell as an experienced HR manager would have discussed it with Mr Williams. He is the one who would be affected by "isolation". That she did not even mention it suggests to us this is made up to fit the decision.

83.10. If there were an obvious conflict, it is striking that this issue is not covered by agreement between with DVSA, DfT or the union (as Ms Prendiville says and which no-one has suggested is wrong).

83.11. The lay members also emphasised that their experience that the suggestion one cannot hold roles in a union and work in policy posts in HR seems contrary to real-world experience.

83.12. Ms Campbell in evidence cited his NEC role as part of the potential conflicts. However, she did not appear to know what the NEC of the union did. She seemed to be under the impression that the NEC was responsible for negotiation and

individual workplaces. That is not the case. As Mr Williams explained (and which the lay members confirmed was highly plausible based on their own experience), the NEC is responsible for the more general management of the union such as its conference finances and developing general policy and campaigns rather than dealing with specific issues in specific workplaces or with specific employers. If Ms Campbell genuinely believed there was a potential conflict such to justify the ultimatum without discussion, we find it surprising she did not make sure she understood what Mr Williams's roles were. This undermines the suggestion in DVSA's response that

"He would unavoidably have been involved working on projects to reward and employee relationship strategies in which he was also likely to be involved in his official capacity as a PCS NEC and group executive committee member, and that therefore he would have access to confidential and sensitive information or had input into the work developing those projects."

because it is factually wrong.

83.13. Given the dispute about the reality of potential conflicts of interest, she has given no explanation or consideration as to why there should not have been a trial period as recommended by the RRR policy in paragraph 23 to assess them. We note that there was a trial of his HEO role in the finance team so there is no obvious explanation why that was not possible in this HR post.

83.14. Ms Campbell explained in cross examination that she had objected to the positions of the unions are taken in a number of issues for example for example the attendance management policy. This in our view supports the conclusion she does not want a union activist in the team because she would see it as an enemy within. This animus is also apparent in the response where DVSA refers to developing policies

"which in the past the PCS has opposed".

83.15. Ms Stone and Ms Campbell discussed matters often. We have already concluded they discussed Mr Williams. Ms Stone had also imposed a restriction on Mr Williams's union activities without any consultation or justification. Ms Stone was hostile to him undertaking union roles. There is no suggestion that Ms Campbell and Ms Stone disagreed over Mr Williams's case. We conclude this too reflects on Ms Campbell's real purpose for imposing this restriction.

84. O 20 January 2020 Mr Williams had a formal grievance interview with Mr Hunt. In that interview Mr Williams made his complaint about the post the finance team and the proposed reduction in this facility time if he had taken the role on permanently. Mr Hunt agreed that those matters should be part of the investigation.

85. Mr Hunt produced his report on 31 March 2020 and rejected the complaints being subject to a detriment because of his trade union role. Without consultation or explanation Mr Hunt changed his mind about the finance post and decided that should be separately investigated. He explained this was because it had post-dated the terms of reference and that the issue should be pursued under the RRR policy.

86. Mr Hunt does not appear to have given any thought to the fact that if there are allegations of discrimination they should be considered together (because they could together demonstrate hostility), that the RRR policy does not actually allow the challenge in the form that Mr Williams is making and that he had said it should be considered as part of the grievance at the first meeting.

87. On 23 June 2020 Mr Williams met with the decision officer Ms Janette Watt. At this meeting he complained that both Ms Campbell's insistence that he would have to give up his trade union roles if he successfully secured the HR post and would be required to reduce his facility time if he accepted the finance post were instances of trade union in discrimination

88. Ms Watt refused to consider the first matter of 30 January 2020 because of the claim in the employment Tribunal. The Tribunal concludes that is not an acceptable excuse. Firstly, the claim is not presented until 26 June 2020. Secondly, we do not see either legally or factually why the fact a claim exists should prevent a respondent from investigating issues in a grievance. Ms Watt refused to consider the restriction on his acceptance of the financial post because out involve starting the whole process again. Even after hearing her evidence the Tribunal thinks that makes any sense and can see no reason why that would be so in any case.

89. Ms Watt went on to conclude that none of the grievance complaints that she actually did consider were made out. She does not appear to have ever thought about the importance of dealing with all the complaints at once to see whether they disclose a hostile intent or pattern of discrimination.

90. The Tribunal heard that this was Ms Watt's first grievance investigation. We do not know how the DVSA allocates grievances to its decision-makers, but the Tribunal was somewhat surprised that a complaint from an active senior union official alleging trade union discrimination where two grievances had apparently been ignored and who had been at risk of redundancy for quite some time should be referred to someone in her position.

91. Mr Williams appealed Ms Watts decision. The appeal was unsuccessful. The appeal officer was Ms B Thomas. After reflecting on the fact that Mr Williams believes that there have been multiple intentional attempts to prevent him from getting a permanent position and prevent grievances from being properly considered as a result of his trade union role she comments as follows

"This belief is based on assumption that there was wrongdoing by the individuals or groups named. This investigation has found no evidence of wrongdoing by these named individuals or groups. But suggestion there is a motivation for wrongful discrimination in general against the appellant by the named parties to discharge their duties has not been addressed. I'm not

aware of whether this is being addressed through investigation or other grievances and complaints by the appellant. I recommend this needs to be addressed, if not being covered elsewhere than ideally through mediation process, subject to the parties being willing."

92. Mr Williams characterised this as being worthy of Sir Humphrey Appleby, the fictional senior civil servant in BBC's "Yes Minister". We agree. Ms Thomas said there is no evidence of wrongdoing but there has been no investigation into the motivation of the individuals which is right at the heart of the allegation of wrongdoing. To dismiss a complaint as not made out because of a lack of evidence, having not investigated it appears to be either wilful blindness or, at best "incompetent blindness" at best.

93. We find a position wholly illogical. It suggests that DVSA is doing no more than paying lip service to the appeals process rather than genuinely approaching the question an open mind.

94. We however do not believe that the wholesale and woeful failure in the grievance procedures is related to Mr Williams's union membership. While Ms Stone was in charge of the section of HR that dealt with them, we can see nothing that shows all of the various actors in the grievance procedures shared her view about Mr Williams's union roles. We conclude therefore that, while we can understand Mr Williams's allegation that the grievance procedure was part of the anti-union sentiment, we conclude it was in fact not. We can see no reason why any anti-union sentiment would result in the failures DVSA has demonstrated. Rather, we would have expected a more thorough attempt at a whitewash were it as Mr Williams' alleged.

**Law**

95. The **Trade Union and Labour Relations (Consolidation) Act 1992 section 146** provides 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—

" …

" (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 subsection (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 or (as the case may be) make use of trade union services;

"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.

"…

"(5) A worker or former worker may present a complaint to an employment Tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

"…"

96. The act provides that it is for the employer to show what was the sole or main purpose for which they acted or failed to act: **section 148(1)**.

97. The employee is however required to establish a prima facie case: see e.g., **Dahou v Serco Ltd [2017] IRLR 81**.

98. The Employment Appeal Tribunal summarised the approach the Tribunal should take to these cases in **Yewdall v Secretary of State for Work and Pensions EAT 0071/05** as follows

98.1. Have there been acts or deliberate failures to act on the part of the employer?

98.2. have those acts or omissions caused detriment to the claimant?

98.3. were those acts or omissions in time?

98.4. in relation to those acts proved to be within the time limit, and which caused detriment, has the claimant established a prima facie case that they were committed for a purpose prescribed by **section 146**?

98.5. If yes what has the employer shown was the purpose behind its acts or omissions?

This tallies with the approach in **Kostal UK Ltd v Dunkley and ors [2019] EWCA Civ 1009 CA**.

Only paragraphs 98.4 and 98.5 above are relevant to this case.

99. Because there is no dispute that the DVSA has acted in a way that causes a detriment and that the claim is in time, we have referred only to the following cases:

99.1. It is not enough to show what consequences were foreseeable: **Bone v North Essex Partnership NHS Foundation Trust 2016 IRLR 295 CA**;

99.2. The respondent's purpose must be the sole or main purpose. If the employer has more than one purpose but all are equal, then none can be the main purpose: **Kostal (on appeal) [2020] ICR 217 CA**;

99.3. The employer's purpose must be one proscribed by the law. If the employer acts for a different purpose, then the act or omission is not unlawful even if it has the proscribed effect: **Smyth-Britt v Chubb Security Personnel UKEAT/0620/03**;

99.4. Foreseeability of consequence is not enough. For example, in **Kostal UK Ltd v Dunkley and ors [2018] ICR 768 EAT**, (overturned on appeal but not on this issue, in a case relating to

**section 145B** that is the same wording as **section 146** for these purposes) the EAT said

"the terms of **S.145B** make clear that it does not prevent employers from making offers that would merely have the prohibited result; the employer must also have as his sole or main purpose an unlawful purpose, namely achieving the prohibited result"

See also **Gallacher v Department of Transport [1994] IRLR 231 CA** (which reminds the Tribunal not to confuse purpose with effect);

99.5. The question of purpose is subjective answered by enquiring what was in the mind of the employer: **University College Union v Brown UKEAT/0084/19** which requires consideration of all the circumstances.

100. We remind ourselves that we are entitled to look at all the circumstances of the case and in particular to consider any demonstrated anti-union animus when coming to our conclusions **Watson v London Metropolitan University EAT 0208/14**.

101. We also remind ourselves that an employer's failure to show what the reason for the detriment was does not necessarily lead to the conclusion that the reason was as asserted by the employee. If the evidence supports a conclusion asserted by neither the employer nor employee, we can come to that alternative conclusion: **Dahou**.

**Conclusions**

***Has the claimant established a prima facie case that the detriment was committed for a purpose prescribed by section 146?***

***If yes what has the employer shown was the purpose behind its acts or omissions?***

102. Although these are separate questions, we believe that taking the evidence as a whole it would be easier to answer them together.

103. Based on our findings of fact and reasons for them (which we do not propose to repeat) it follows:

103.1. Mr Williams has established a prima facie case, and

103.2. We are satisfied that the reason that Ms Campbell acted as she did was because she wanted to prevent or deter Mr Williams from taking part in his trade union role if he were recruited to the HR post. In very simple terms she did not want the "enemy within". Her explanations do not stand up to scrutiny. It was not to genuinely prevent potential conflicts of interest.

104. We have detailed the grievances above. While we believe these made contributed to a prima facie case, we do not believe that when analysed they support Mr Williams's case.

105. We also referred to the number of unsuccessful applications. Alone these are not relevant but when the striking number is factored in, and one is

aware of Ms Stone's and Ms Campbell's willingness to weigh in on recruitments, we believe it does contribute to a prima facie case.

106. We are aware that just because DVSA does not prove its case does not follow Mr Williams must win. However, on the evidence there is no third explanation. Mr Williams is right: he was treated the way he was for a proscribed reason.

107. Accordingly, the case succeeds on liability.

Employment Judge Adkinson

Date: 8 February 2021

JUDGMENT SENT TO THE PARTIES ON

9 February 2021

FOR THE TRIBUNAL OFFICE

**Notes**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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