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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123425/2018 and 4107742/2019

Heard in Glasgow on 23, 24 and 25 February 2022

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**Employment Judge: L Wiseman
Tribunal Members: R McPherson
G Mackay**

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Mr Richard Bell

**Claimant
Represented by:
Mr K McGuire
Counsel**

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Dumfries and Galloway Council

**Respondent
Represented by:
Ms K Graydon
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the claim.

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REASONS

1. The claimant presented a claim to the Employment Tribunal on 4 December 2018 in which he complained of age discrimination (in terms of sections 13 and 19 of the Equality Act) and detrimental treatment on grounds of his trade union activities (in terms of section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992).
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2. The claimant presented a further claim on 17 July 2019 in which he complained of further detrimental treatment on grounds of his trade union activities.
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3. The claims were combined and subsequently the complaints of age discrimination were withdrawn. Accordingly the only claim before this Tribunal for determination was one of detrimental treatment on grounds of trade union activities in terms of section 146 TULRCA. The detrimental treatment was said to be:-
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 - (i) in June 2018, deciding not to appoint the claimant to the post of Principal Teacher (PT) at Castle Douglas High School;
 - (ii) in May 2019, deciding not to provide the claimant with any geography classes;
 - (iii) in May 2019, requiring him to vacate his geography classroom and
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 - (iv) in June 2019, providing him with fewer geography classes than previously agreed with the PT Curriculum.
4. We heard evidence from the claimant, and from Mr James Smith, Head Teacher, Castle Douglas High School and Mr John Thin, Head of Education Resources.
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5. We were also referred to a number of jointly produced documents.

6. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

5 7. The claimant commenced employment with the respondent in 2003. He was employed as a Teacher of Geography at Castle Douglas High School.

8. The claimant was appointed to the role of acting Principal Teacher (Social Subjects), which includes the teaching of geography, in 2015.

10 9. The claimant is a member of the National Association of Schoolmasters Union and Women Teachers (NASUWT) trade union. He became Vice President of the NASUWT in Scotland and is a National Executive Member for Scotland.

10. The claimant has been secretary of the local NASUWT association and school representative. He has been a health and safety representative. He is a member of the Local Negotiating Committee for Teachers (LNCT) which negotiates with the respondent at local level.

15 11. The respondent has a Facilities Time Agreement governing paid time off for trade union activities. A guidance note regarding Time Off for Trade Union Duties was produced at page 63. This confirmed that time off is governed by the number of members.

20 12. The respondent employs a number of Teachers, Principal Teachers and a Depute Head Teacher involved in trade union activities. The President for Head Teachers in Scotland is employed by the respondent in one of their schools.

13 — The claimant, in the period 2016 — 2019, had one half day off per week for trade union duties, and additional time off to attend the National Executive Council meetings in Birmingham, Scottish Executive Council meetings in
25 Edinburgh and local LNCT meetings.

14. Mr James Smith was appointed Head Teacher at Castle Douglas High School in or about January 2018. Mr Smith has been employed with the respondent

for 29 years. He was a Principal Teacher for 12 years in Kirkcudbright, then Depute Head Teacher for 12 years before taking on an acting Head Teacher role at Dalbeattie High School.

- 5 15. Mr Smith denied that he regarded time off for trade union activities as a burden. He described requests for additional time off (for meetings) as “a challenge” because classes required to be covered and supply teachers and budgets had to be balanced.
- 10 16. Castle Douglas High School has a teaching staff of 44. A partnership was created between Castle Douglas High School and Dairy School, which is a small rural school with 42 pupils. An agreement was entered into at the time the partnership was formed, which provided that only teachers appointed after the partnership was formed, could be asked to teach at both schools.
- 15 17. Mr Smith obtained authority in early 2018 for the acting Principal Teacher (Social Subjects) to be made substantive. The advert for the post was produced at page 123; the job description at page 124; the key responsibilities at page 125 and the person specification at page 126.
- 20 18. The claimant and seven other candidates applied for the post. Mr Smith and the Depute Head Teacher, Ms Lorraine Gillies, carried out a shortlisting process involving reading the applications and scoring them against the person specification and assessment form (page 129). It was agreed four candidates, including the claimant, would be invited for interview. The candidates comprised three teachers of geography and one of religious studies.
- 25 19. The interview panel comprised Mr Smith, Head Teacher; Ms Gillies, Depute Head Teacher; Ms Mary Aitchison, Principal Teacher (Curriculum) at Dairy School and Mr Simon Meane, Principal Teacher from Dalbeattie High School.
- 30 20. Mr Smith was aware of the claimant’s trade union activities. He believed Ms Davies would also have been aware. Mr Smith did not know if the other two panel members knew of the claimant’s trade union activities, but he believed it unlikely.

21. The respondent granted the claimant's request that someone from HR be present during all interviews.
22. The interviews took place in accordance with the respondent's Recruitment and Selection procedure (page 83) and the Principal Teacher Appointments procedure (page 65). The format of the interview was that candidates were given a management task, asked to do their presentation and then asked questions by the panel. The questions had been selected from a standard bank of questions provided by the respondent.
23. Mr Smith had undertaken the respondent's training in recruitment and online training in equality and diversity.
24. The panel members each completed an Interview Record Sheet in respect of each candidate. There was discussion at the end of the interview process to prepare the interview debriefing (feedback form) for each candidate. No notes were taken of those discussions because they were based on the scores awarded.
25. Mr Smith's interview record sheet for the claimant was produced at page 159. The three other interview record sheets were produced at pages 163, 167 and 171. (The panel member who completed the interview record sheet was not identified).
26. The successful candidate was Mr Graham Prentice (a former pupil at Castle Douglas High School). Mr Prentice was a Teacher of Geography and had held an acting Principal Teacher (Curriculum, Raising Attainment) post since December 2016. The interview record sheets for Mr Prentice were produced at pages 175, 179 (Mr Smith's), 183 and 187.
27. The interview record sheet comprised a first page on which overall assessment and scores were noted. This comprised four points, although panel members had been advised by HR to delete the first point dealing with general appearance/presence. The three other points were enthusiastic/motivating; voice and delivery and general relevance of answers. The second page comprised comments and a score for the presentation; the

third page comprised comments and a score for the practical management task; the fourth page comprised comments and a score for each of the panel questions and concluded with a summary.

- 5 28. The rating (that is, score) given was between 1 and 4, with 1 being poor and 4 being very good. The panel members used "split scores" on occasion: for example 2/3. This reflected the panel members' view that although the score of 3 would count (because the higher score was used in any split score), it was a weak 3 which had only just been achieved.
- 10 29. The total scores of the claimant and Mr Prentice were shown on page 191/192. The claimant scored a total of 99 points. Mr Smith gave the claimant a total score of 30. Panel member (referred to as MB) gave the claimant 25 points; MC gave him 15 points and MD gave him 29 points.
- 15 30. The panel member MD gave the claimant zero points for his response to question 3 (page 174). Mr Smith explained this was done because the panel member felt the claimant's response to the question had been so poor it did not merit a score.
31. Mr Prentice scored a total of 113 points. Mr Smith gave him a total of 29 points; MB gave him 32 points; MC gave him 20 points and MD gave him 32 points.
- 20 32. Mr Smith noted on page 192 that, looking at split scores, even if the claimant had been awarded the higher score and Mr Prentice the lower score, Mr Prentice would still have scored higher than the claimant.
- 25 33. The claimant was critical of the scores awarded to him because he believed there had been a negative bias towards him and a positive bias towards the successful candidate insofar as areas where Mr Prentice's performance was weaker were not reflected in the scores. For example, on page 175, panel member MB, noted Mr Prentice's answers had "drifted a bit later on Q2 - 4", but he had still scored a 3. Also, on page 182, the Head Teacher had noted in the summary that Mr Prentice "didn't really know anything about nurture,
- 30 but he had still scored him a 4.

34. The claimant contrasted this with the scores he had been awarded even when no negative comments had been made. He also considered negative comments had been made regarding his presentation which were not justified.
35. The claimant was devastated when advised by Mr Smith that he had not been successful in obtaining the post. The claimant raised a grievance on the 15 September 2018 (page 197). The grievance was investigated and not upheld.
36. The claimant returned to work as a Geography teacher at Castle Douglas High School. Mr Henderson was also employed as a Teacher of Geography at that school. They were joined, in August 2018, by Mr Prentice, the Principal Teacher (Social Subjects) who was also a geography teacher. Geography classes were split in order to provide the teachers with classes and teaching.
37. The claimant requested an increase to the time off granted for trade union activities. This request was granted and time off for trade union activities increased to two days per week.
38. The timetable for an academic year starting in June, will be developed over the period January to May. Schools are staffed using a formula and a budget.
39. The preparations for the timetable for the 2019/2020 academic year revealed there was an over-capacity of geography teaching. The number of geography periods required to be taught in the school amounted to 37. The departmental teaching capacity was for 67 geography periods (page 239). There was surplus capacity within geography.
40. Mr Smith, as Head Teacher, was informed of this and had a duty to report the over-capacity to the respondent.
41. The respondent's policy for the Redeployment of Extra Numerary Teaching Staff was produced at page 235. The policy provides that in the first instance volunteers would be sought for those interested in redeployment to another school. If there were no volunteers, the extra numerary teacher would be identified in accordance with length of service.

42. Mr Smith spoke to both the claimant and Mr Henderson to enquire whether they wished to volunteer to be redeployed to another school. Mr Henderson confirmed he did not wish to volunteer. The claimant was accordingly identified for redeployment to another school because he had less service than Mr Henderson. (Mr Prentice was not considered because he held a PT position).
43. The claimant was removed from the 2019/2020 timetable because a school will try to avoid allocating classes to a teacher who is to be redeployed and Mr Prentice wished to avoid having split classes.
44. The claimant raised a grievance regarding removal from the timetable. The "status quo ante" applied until the grievance had been resolved. This meant the claimant would remain at the school and not be redeployed until such time as the grievance was resolved.
45. The claimant produced a timetable for consideration by Mr Prentice (page 274). Mr Prentice revised the proposal and put in place a timetable for the claimant comprising less teaching periods. The claimant believed Mr Smith had influenced Mr Prentice to bring forward the revised timetable.
46. The claimant was asked to vacate the classroom he had been based in throughout his 14 years at Castle Douglas High School. The claimant could not continue to be based in a classroom where he was not teaching.
47. The claimant went off on sickness absence in August 2019 and did not return to work until January/February 2020. He moved to Dalbeattie High School to take up a Teacher of Geography post.
48. The claimant agreed an 18 month career break with the respondent in January 2022 when he took up an employed post with the General Teaching Council for Scotland as an Education Officer.

Credibility and notes on the evidence

49. There were no issues of credibility regarding the claimant, apart from the fact the claimant could not countenance there being any reason other than trade

union activities to explain why he was not successful at interview. The claimant's case was based on his belief Mr Smith found his trade union activities threatening because having someone so high up in the trade union did not fit with his autocratic management style. The claimant suspected Mr Smith viewed time off for trade union activities as a burden and he would prefer a PT not involved in trade union activities. Further, the claimant believed Mr Smith saw the appointment of a geography teacher to the PT post as an opportunity to make the claimant surplus and have him redeployed.

50. The claimant went through the interview record sheets for himself and the successful candidate and pointed to comments made which, he believed, did not support the score given. He described comments made about Mr Prentice ("energetic, confident", "engaging, confident, very impressive", enthusiasm evident" and "very clear, energising, excellent") as demonstrating a positive bias. He disagreed with the comments made by the panel members that he had not been engaging, that his presentation had not been motivating and lacked detail, that he focussed too much on the theory and what he had done, and got others to do, rather than on a visionary strategy as to what he actually would do.

51. The claimant asserted Mr Smith had exerted a negative influence over the other panel members before the claimant arrived for interview. Further, that Mr Smith sought to ensure his scores were not the lowest, because this would have been too obvious, but he had influenced the scoring of the other panel members to ensure the claimant was not successful.

52. The claimant also took issue with being identified as surplus, because Dairy School had not been included in the equation. We did not find this aspect of the claimant's evidence to be credible against a buckyiuund where (here was no dispute regarding the fact only teachers appointed after the partnership came into existence could be asked to teach at both schools. The claimant, Mr Henderson and the geography teacher at Dairy all pre-dated the partnership and therefore could not be asked to teach at, or across, both schools.

53. There was no evidence to suggest it would have been correct to include Dairy school, and in circumstances where adding Dairy school to the equation would not have resolved the over-capacity at Castle Douglas, we could not accept the claimant's criticism of the process which identified him as being surplus.
54. We found Mr Smith to be a credible and reliable witness. He gave his evidence in a straightforward manner, particularly in relation to the interview scoring process and the reasons why he, and the panel, had found the other candidate the better candidate. We accepted his evidence that each member of the panel had scored each candidate at the time of their interview. Scores were discussed at the end of the process to check people could defend their scores robustly: that discussion formed the basis of the feedback. The candidate with the highest score was the successful candidate.
55. Mr Smith got confused regarding the applicable Appointment of Principal Teachers policy and why a presentation had been done when the updated procedure appeared to suggest one was not required. This confusion arose from the fact two policies regarding the appointment of principal teachers were produced in the productions. The Principal Teacher Appointments procedure (page 65) described the interview process as involving a management task, a presentation and questions from the panel. The updated procedure (page 103), referred to candidates being given a management task and being asked questions. We accepted Mr Thin's evidence that the updated procedure, although dated 2018, did not in fact come into force until May 2019 (as reflected at the end of the policy). Accordingly, at the time of the claimant's interview, a presentation was still part of the interview process.
56. Mr Smith was also questioned about the respondent's Recruitment and Selection procedure (page 83) and in particular at paragraph 18.3 of the procedure where it stated the chair of the panel must ensure a candidate assessment form for each candidate was completed. We accepted Mr Smith's evidence, supported by the documents, that an Interview Record form was

completed by each panel member for each candidate; and the assessment form had been completed by him and the Depute Head at shortlisting stage.

57. Mr Smith rejected the suggestion that he had an autocratic style of management and was biased against the claimant because of his trade union activities. Mr Smith described that requests for additional time off were a “challenge” because classes had to be covered. He denied “challenge” meant “problem”. The school had to ensure there was a teacher in front of a class, supply teachers were limited and they came at a cost: this was the challenge and it was the same challenge which presented itself if staff were off for any reason. Mr Smith rejected the suggestion that this “challenge” could filter into his subconscious and create a bias against the claimant.

58. Mr Smith also rejected the suggestion that he had deliberately influenced the interview panel to appoint a geography teacher to the Principal Teacher post, knowing this would create a surplus which would cause the claimant to have to move school.

59. We also found Mr Thin to be a credible, reliable and straightforward witness. Mr Thin confirmed the respondent’s Recruitment policy had been reviewed in 2018, discussed with the LNCT and the change (no requirement for a presentation) took effect in May 2019.

60. Mr Thin also confirmed it was perfectly compatible for a PT to take on trade union activities and that a number of PTs, a Depute Head and a Head Teacher from other schools were involved in trade union activities.

Claimant’s submissions

61. Mr McGuire referred the Tribunal to the terms of sections 146, 148 and 149 of TULRCA. He submitted the term “detriment” used in section 146 TULRCA was not defined in TULRCA, and should be given the same meaning in the context of trade union discrimination as it has in the context of discrimination law. The term “detriment” means “putting under a disadvantage” (*Ministry of Defence v Jeremiah 1980 ICR 13*) and should be assessed from the

viewpoint of the worker (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337*).

- 5 62. There was a parallel with cases of detriment on grounds related to trade union activity and cases of discrimination (although Mr McGuire accepted the reverse burden of proof provisions did not apply in these cases). It was usually difficult to point to direct evidence of discrimination and so, it was submitted, the Tribunal had to look at the evidence in the round and draw inferences.
- 10 63. Mr McGuire referred to the fact the claimant had done the PT role for 10 months prior to the interview and no criticism of him in this role had been made. The respondent's witnesses were well aware of the claimant's trade union activities and the time they took up (approximately 1 day per week). Mr Smith stated in his evidence that requests for additional time off were "challenges". He would not agree that what he meant by this was that they were a problem, but on a reasonable and practical assessment of his evidence, this is what he meant. Mr McGuire invited the Tribunal to look at the interview process with this in mind.
- 15 64. Mr McGuire submitted the interview process lacked integrity. The claimant had not been awarded a mark for his response to one of the questions, and this flew in the face of the scoring being 1 - 4. It also demonstrated the attitude towards the claimant. Mr Smith was asked about this in cross examination and said it had been discussed. This created the impression of the claimant's interests not being protected.
- 20 65. Mr Smith had also been referred to the scoring total mark of 14 - 15 over 24 and he had not been able to explain what this meant. Further, there were no notes of the discussion which took place after the interviews.
- 25 66. The claimant had prepared pages 255 - 258 being his comments regarding the scoring and some of these points added weight to the suspicion the interview process was not as transparent as suggested.
- 30 67. There was also vagueness and some confusion regarding applicable policies and the fact the assessment form was not used for scoring the interviews.

68. Mr McGuire submitted the Tribunal should, based on the gaps and questions marks raised regarding the interview process, ask why the claimant was not appointed and the reason was because of his trade union activities.

5 69. Mr McGuire acknowledged the second part of the claim was built on the first part of the claim and so if the claimant was not successful in the first part the same reasoning would apply to the second. The new PT was responsible for the timetable, but the Head Teacher would have been aware of what was going on and could have intervened to reach a solution. It was submitted the Head had not intervened because of the claimant's trade union activities.

10 70. The detriment suffered by the claimant was self evident in not being appointed. In relation to the second part of the claim the detriment lay in the fact the claimant had taught at the school for years and to have no geography classes would amount to a detriment. Also, being moved out of his classroom in circumstances where teachers have a base they teach from, was a
15 detriment.

71. Mr McGuire invited the Tribunal to find for the claimant and to make an award of compensation. He confirmed the parties would, if the claim is successful, provide the Tribunal with agreed figures.

Respondent's submissions

20 72. Ms Graydon submitted the claimant had not been appointed because he was not the highest performing candidate on the day. The Head Teacher had no issue with the claimant, or with his trade union activities: there was no vendetta. Mr Thin told the Tribunal that in his role he had experience of dealing with many Head Teachers, and he had not found Mr Smith to be autocratic.

25 73. There were four members of the interview panel and Mr Smith had rejected the suggestion he had had influence over the other panel members. Ms Graydon invited the Tribunal to note Mr Smith had not been asked if he had influenced the scoring. The members of the panel had scored each candidate independently. Mr Prentice was 14 points ahead of the claimant. The scoring
30 produced the successful candidate, not Mr Smith.

74. Mr Smith had explained why no score was given by one panel member for the claimant's response to one of the questions. Mr Smith had also explained the claimant had, in contrast to Mr Prentice, focussed on strategy and systems. The panel had found Mr Prentice to be motivating and enthusiastic and he had met the key criteria for the post.
75. The panel members were all senior members of staff and two came from different schools. In order to be biased against the claimant, all would have needed to know of the claimant's trade union activities and all would have needed to have been biased. Mr Smith's evidence that he believed two panel members did not know of the claimant's trade union activities was not challenged.
76. The paperwork provided regarding the scoring and interview process supported the evidence provided and the decision made.
77. Ms Graydon submitted the claimant had offered no basis to support his assumption that trade union activity was the reason for not being appointed. He had not provided any examples of negative behaviour and none had been put forward in cross examination. There was no evidence to support the allegation of bias. The claimant's success in getting the acting PT post through interview undermined his argument.
78. The Tribunal had heard evidence that other PTs, a Depute Head Teacher and a Head Teacher also carried out trade union activities.
79. The claimant had been granted facility time of half a day per week, and his request for this to be increased was granted. Mr Smith told the Tribunal that a request for additional time off could present a challenge, and this was not surprising, but it was a challenge which could be overcome. Mr Thin had supported Mr Smith's evidence.
80. Ms Graydon submitted with regard to the interview process, that the policy which provided for a presentation to be done as part of the interview was not varied until a year after the claimant's interview. There had not been notes of the panel discussion because it was based on each member's notes of the

interview, plus the discussion formed the basis for the feedback forms, which had been produced. Mr Smith confirmed he had carried out Recruitment training and the online equality and diversity training.

5 81. Ms Graydon submitted there had not been any defects in the interview procedure; and, even if there had been, all interviews had been conducted in the same way.

82. Ms Graydon submitted the reason why the claimant was not appointed to the post was because he had not been the best candidate on the day.

10 83. The respondent accepted the claimant had not been given any geography classes, but the reason for this was because the claimant was surplus. The school had an over capacity in respect of geography and the claimant was identified as surplus in accordance with the Redeployment policy. This had nothing to do with the claimant's trade union activities.

15 84. The new timetable provided classes for Mr Prentice and Mr Henderson because they were the geography teachers. The timetable had been prepared by Mr Prentice and the claimant did not make any allegation of bias against him. The timetable had nothing to do with the claimant's trade union activities. Further, the claimant had not been subjected to a detriment in circumstances where he continued to teach at another school.

20 85. The respondent accepted the claimant was asked to vacate the classroom where he had been based. He was required to teach geography from another classroom, and this was because classes had been split and, for the purposes of continuity, the same classroom would be used (that is, the teacher would go to the classroom rather than the class moving). The interests of the pupils
25 7s the 'key' consideration. The claimant was surplus and awaiting redeployment. Ms Smith had not been involved in this.

30 86. The claimant was given fewer geography classes than agreed. The claimant raised a grievance and, in accordance with the respondent's policy, the status quo ante applied, and so the claimant remained in post with classes pending the outcome of the grievance. The timetable proposed by the claimant was

not agreed, but he was given classes. The claimant had not suffered a detriment.

87. Ms Graydon submitted there was no prima facie case of the claimant having been subjected to a detriment on the grounds of trade union activities. The purpose of the respondent's actions was to recruit the best candidate for the post and then to resolve the surplus. The claimant had jumped to conclusions because he was disappointed. There was no basis for suggesting subconscious bias in circumstances where there were four panel members.
88. Ms Graydon referred to the case of *Madarassay (2007 ICR 867)* and submitted that something more than pointing to a difference was needed.
89. Ms Graydon submitted the respondent had proven the reasons for all of the acts. If, however, the Tribunal found for the claimant, an injury to feelings award at the upper level of the lowest band would be appropriate, and no loss of earnings should be made unless the Tribunal was satisfied the claimant would have been awarded the post.

Discussion and Decision

90. We had regard firstly to the relevant statutory provisions. Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that a worker has the right not to be subjected to any detriment by his employer, if the act or failure to act takes place for the sole or main purpose of preventing or deterring him from taking part in the activities of an independent trade union or for penalising him for doing so.
91. Section 148 TULRCA provides that on a complaint under section 146, it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.
92. We next had regard to the case of *Yewdall v Secretary of State for Work and Pensions EAT0071/05* where the EAT set out what it considered to be the correct approach for Tribunals to adopt in respect of claims brought under section 146. The Tribunal must ask itself:

- have there been acts or deliberate failures to act on the part of the employer;
- have those acts or omissions caused detriment to the claimant;
- were those acts or omissions in time and

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

93. The EAT commented that it was only after the last question has been answered in the affirmative that the onus transfers to the employer to show
10 the purpose behind its acts or omissions.

94. There were four acts by the employer which, it was not disputed, occurred. They were (i) the failure to appoint the claimant to the post of Principal Teacher (Social Subjects); (ii) deciding not to provide him with any geography classes in May 2019; (iii) requiring him to vacate his geography classroom in
15 May 2019 and (iv) providing him with fewer geography classes than previously agreed, in June 2019.

95. We asked whether those acts or omissions caused detriment to the claimant. The term "detriment" is not defined in TULRCA. We accepted Mr McGuire's submission that arguably the term detriment in TULRCA should be given the
20 same meaning as it has in the context of discrimination law. The cases referred to by Mr McGuire (*Ministry of Defence v Jeremiah* and *Shamoon v Royal Ulster Constabulary*) provide that detriment means "putting under a disadvantage"; "would or might a reasonable worker take the view that the
-----action of the employer was in all the circumstances to his detriment" and that-----
25 the detriment should be assessed from the viewpoint of the worker.

96. We considered that each of the four acts/omissions complained of amounted to a detriment because they were general unfavourable treatment which impacted on the claimant.

97. There was no issue relating to whether the acts or omissions were within the time limit. Accordingly, the next issue for the Tribunal to determine is whether the claimant has established a prima facie case that the acts/omissions were committed for the purpose of penalising him for taking part in trade union activities. The focus is not on whether the claimant was subjected to a detriment because of his trade union activities, but instead on what purpose the employer was seeking to achieve by subjecting him to the detriment.
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98. The respondent advertised the post of Principal Teacher (Social Subjects) and their purpose in doing so was to recruit and appoint the best candidate for the job. Mr McGuire invited the Tribunal to look behind that purpose and to have regard to (i) the claimant's evidence that Mr Smith did not wish to appoint the claimant to the post because of his trade union activities in circumstances where the time off for these activities was seen as burdensome and (ii) the interview process not being transparent. We examined each of those arguments.
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99. We noted, with regard to the process followed by the employer, that the claimant made a number of criticisms of that process or Mr Smith's knowledge and/or role in it. The claimant, in particular, drew the Tribunal's attention to the following points:
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- Mr Smith was unsure which Principal Teacher Appointments procedure applied;
 - Mr Smith used a presentation as part of the interview process in circumstances where it appeared this should not have been part of the process;
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- the respondent's Recruitment and Selection policy, at point 18.3, stated a Candidate Assessment form for each candidate had to be completed but this was not done;
 - the panel members used split scores;

- one panel member did not give the claimant a score for a response to one of the questions and
- no notes of the panel discussion were taken.

5 100. We have acknowledged (above) that Mr Smith did become confused regarding the issue of the applicable Principal Teacher Appointments procedure and whether a presentation should be part of the interview. This confusion was, we considered, caused by the fact the revised policy (produced at page 103) is dated 2018 on the front page, perhaps suggesting that it was in force as at that date. This however was not the case. Mr Thin
10 explained the procedure had been reviewed in 2018, discussed and approved by the LNCT and introduced in May 2019.

15 101. We considered the fact there was some confusion on the part of Mr Smith was understandable when both policies were produced in the documents for this hearing. We further considered that having clarified the matter, it was clear the earlier procedure was the applicable procedure at the time of the claimant's interview, and that that procedure allowed for a presentation to be part of the interview process. We were accordingly entirely satisfied there was no error in respect of the interview including a presentation. We attached no
20 weight to the fact there had been confusion in Mr Smith's evidence regarding these matters, and there was no basis for drawing an adverse inference from that confusion.

25 102. The respondent's Recruitment and Selection policy, at point 18.3 (The Interview), does state a candidate assessment form for each candidate must be completed. A Person Specification and Assessment Form was produced at page 129, We accepted Mr Smith's evidence that form had been used and
completed in the shortlisting process carried out by himself and the Depute Head Teacher. A form was completed for each of the 8 applicants and from that exercise four applicants were selected for interview.

30 103. There was no evidence to clarify whether the reference in the policy to a candidate assessment form, was the same form as the Person Specification

and Assessment Form. Mr Smith told the Tribunal the Person Specification and Assessment Form would not be used at interview because it dealt with, for example, qualifications required for the post, and this would not be discussed at interview stage. This struck the Tribunal as being a very clear and sensible reason to explain why that form had been used for the shortlisting process and not the interview process, notwithstanding what was stated in the Recruitment and Selection policy.

104. The claimant did not suggest he had been disadvantaged by the Interview Record Form being completed rather than the Assessment Form. The claimant's position appeared to be no more than an assertion the wrong form was used. We concluded that in circumstances where there was no disadvantage to the claimant, we could not attach any weight to this point.

105. There was no dispute regarding the fact the panel members used split scores. This appeared to be a practice which had developed and was widely used. We accepted Mr Smith's evidence that it was a way of indicating whether a score was strongly or weakly held (was it a borderline score of 3, or a borderline miss of 4). The crucial factor was that, regardless of the reason for using split scores, it made no difference to the fact it was the higher score which counted in producing the total score.

106. The claimant was not disadvantaged by the use of split scores. We say that because in any split scores, the higher score was used to produce the total score. The panel members used split scoring in Mr Prentice's interview too.

107. Mr Smith was referred to the Interview Record Sheet completed by MC in respect of the claimant, and asked to explain the score "14/15 over 24". Mr Smith could not explain it without being given time to do the arithmetic. We noted MC also did this on Mr Prentice's Interview Records Sheet (18/20 over 24). We had time to do the arithmetic and we were satisfied the score refers to the total score given if the lower split score is used (14 out of 24 in the claimant's case) and if the higher split score is used (15 out of 24).

108. The sheet produced at page 191/192, which reflected the scores given by each panel member to the claimant and Mr Prentice, confirmed the higher scores were used to produce the total score. So, the document confirms MC gave the claimant a total of 15 points, and gave Mr Prentice a total of 20 points. We attached no weight to the fact Mr Smith could not explain the score without doing the arithmetic, because (as stated above) where split scores were used, the higher score was taken for the purposes of calculating the total score.

109. Mr Smith was also referred to page 192 where he had, for checking purposes, compared what the total scores would have been if the claimant had been given the higher split score, and Mr Prentice the lower. Mr Smith calculated this would have produced a total score of 99 for the claimant and 102 for Mr Prentice. Mr Smith told the Tribunal he carried out this exercise because he liked to look at arithmetical alternatives. We considered that in fact the exercise was done for checking purposes: it was a check and balance on the process, showing that even if Mr Prentice was denied the benefit of the higher split score, he was still the higher scoring candidate.

110. There was no dispute regarding the fact one panel member did not give the claimant a score for one of the questions. Mr Smith told the Tribunal this had been identified in the panel discussions and the member had explained they did not consider the claimant's response to the question merited a mark. This was clearly unusual and appeared to be contrary to the form which indicates a rating of 1 to 4 should be given.

111. Mr Smith gave the claimant a score of 3/2 for his response to the question. Panel member MB gave a 4 and panel member MC gave a 2. We accepted that even if panel member MD had given the claimant a score of 4 for this question, it would not have made any difference to the overall outcome where the claimant scored 99 (+4 would have given 103) and Mr Prentice scored 113.

112. There was no dispute regarding the fact no notes were taken of the panel discussion following the interviews. We noted there was no suggestion scores

were, or could have been, changed following this discussion. We accepted the purpose of the discussion was to ensure scores could be robustly defended and to prepare the feedback forms for the candidates. We considered, in those circumstances, that the interview record sheet scores and comments, and the feedback form were the “notes” of the discussion.

113. We next stood back and considered, in the round, the points raised by the claimant and the submission that the interview process lacked transparency. We considered the points raised were technical points which made no difference whatsoever to the interview process or to the claimant's score. Mr Smith was entitled to include a presentation as part of the interview process; a form was used to record the scores and comments of the panel members in respect of each candidate and split scores were used. We acknowledged that whilst one might question the purpose of split scores, all candidates were given the benefit of having their total score based on the higher split score.

114. The only point which appeared questionable was the fact panel member MD gave the claimant no score for his response to one of the questions. We do not know who panel member MD was, but it was not Mr Smith. We acknowledged that whilst the claimant may have been upset by this, there was no disadvantage to him in circumstances where even if panel member MD had given him the highest score, it would have made no difference to the outcome that Mr Prentice scored more highly than the claimant.

115. Mr McGuire invited the Tribunal to draw an adverse inference from the above points regarding the interview process. We declined to do so. We acknowledged a tribunal may draw an adverse inference that an improper purpose lay behind the decision to subject an employee to a detriment. However, we noted that in cases where an adverse inference has been drawn, the employer has usually behaved in a way which would lead the tribunal to doubt what it has been told. So, for example, where a tribunal finds an employer has overreacted, or has reached a decision in the absence of an adequate investigation, a tribunal is more likely to go on to infer an improper purpose.

116. We did not consider the primary facts lent themselves to the drawing of an adverse inference. Mr Smith provided a clear and reasonable explanation for the points put to him and there was no disadvantage to the claimant arising from any of the points he raised.

5 117. We next considered the claimant's argument that there was a bias against him which came from Mr Smith. The claimant asserted Mr Smith found his time off for trade union activities burdensome and that he would not want to appoint a PT who would not be available at all times. The claimant further asserted Mr Smith influenced the other members of the interview panel; that
10 a negative bias was apparent in the scoring of his interview and that Mr Smith deliberately ensured the panel appointed a geography teacher to the PT post because it would present an opportunity to get the claimant out of the school.

118. We, in considering this argument, noted there was no dispute regarding the fact the respondent recognises a number of trade unions, engages in
15 discussions and bargaining through local negotiating committees and facilitates paid time off for trade union duties and activities.

119. Mr Smith stated in his evidence that on occasion when the claimant asked for additional time off, it could be "challenging". Mr McGuire invited the Tribunal to find that what Mr Smith really meant was that it was a problem. We could
20 not make that finding because we did not consider that Mr Smith had meant it was a problem. Mr Smith's evidence was supported by Mr Thin. He was asked whether he shared the view that it presented a challenge, and he said "yes it can do because of continuity of teachers". Mr Thin referred to the use of supply teachers and budget and concluded it was a balance.

25 120. We concluded, on the evidence before us, that any occasion when a teacher had time off, would present a challenge for the same reasons because classes would need to be covered and bringing in a supply teacher would need to be balanced with the amount of notice the school had been given of the time off and the budget available to pay for supply teachers. This was not
30 something unique to time off for trade union activities.

121. We, in addition to the above, noted the claimant had been carrying out trade union activities and had been granted additional time off to attend meetings, throughout the time he had been in the acting PT post. There was no evidence, and no suggestion, of any adverse comments or reactions having
5 been made regarding this.
122. We also noted a number of PTs and a Depute Head Teacher have time off for trade union activities, and the President of the Head Teachers Association in Scotland is a Head Teacher from one of the respondent's schools. We acknowledged this did not directly impact on Mr Smith, but we considered it
10 an important factor demonstrating the respondent's position.
123. The claimant's position that Mr Smith had a negative bias against him was based on him "feeling" Mr Smith found his trade union activities threatening; that Mr Smith had an "autocratic" leadership style whereas the claimant's style was collegiate and that Mr Smith was dismissive of his ideas. The claimant
15 "suspected" Mr Smith saw time off for meetings as a burden, and that he would prefer a PT who did not do this. The claimant recalled one occasion where he had told Mr Smith of a number of things with which he was involved, and Mr Smith replied "well you chose to do it". The claimant described Mr Smith as "following what had been agreed with [the respondent] but not being
20 supportive.
124. Mr Smith, when these matters were put to him, denied he had a negative bias towards the claimant. Mr Smith described that when he joined the school he had found the claimant to be a very engaging, knowledgeable member of staff, particularly in relation to the history of the school and its policies. Mr
25 Smith also denied he had an autocratic leadership style: he considered the whole purpose of his role was to ensure everyone had a role in leading. Mr Smith did not view time off for trade union activities a burden.
125. We, against that background, considered the particular issues raised by the claimant. He suggested there had been a negative bias against him in the
30 scoring of the interview and that Mr Smith had influenced the other panel members. We deal with the latter point first. The other panel members were

the Depute Head Teacher of Castle Douglas High School, Ms Gillies; a Principal Teacher from Dairy School and a Principal Teacher from Dalbeattie School. It could be said that as Head Teacher, Mr Smith could have exerted influence over the Depute Head Teacher. Dairy School, is in partnership with Castle Douglas High School: but beyond that fact there was no evidence to inform the Tribunal what this meant in practice in terms of the control/influence of the Head Teacher. There was also no suggestion of the basis upon which Mr Smith could have exerted influence over the Principal Teacher from Dalbeattie High School.

10 126. There was also no evidence to suggest how Mr Smith might have influenced the other panel members. Did he influence them before the interviews started? Did he influence the scores they gave? If so, how can the scores of 4 by other panel members be explained?

15 127. Mr Smith gave the claimant a score of 30. He gave Mr Prentice a score of 32. Panel member MB gave the claimant a score of 25, and gave Mr Prentice a score of 32. Panel member MC gave the claimant a score of 15 and gave Mr Prentice a score of 20 and panel member MD gave the claimant a score of 29 and Mr Prentice a score of 29.

20 128. Mr Smith gave the claimant the highest score. The claimant suggested Mr Smith had done this because he knew focus would be on him. This suggests Mr Smith deliberately scored the claimant well, knowing he had influenced the other panel members to score him low. This assertion presupposed the other members of the panel were open to being influenced and were prepared to conspire to produce the result desired by Mr Smith. That is a grave assertion to make without evidence to support it. Furthermore, the claimant undermined his position when, in response to the question "do you say all panel members were biased and scored you down because of your trade union activities", he replied "I think the Head Teacher did and he potentially had a negative influence on the others before I arrived at interview". The claimant's response was difficult to accept in circumstances where Mr Smith gave him the highest score, and an HR Officer was present throughout the interview process.

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129. The claimant told the Tribunal that upon analysis of the scoring, he perceived a negative bias towards him. Mr Smith was asked in cross examination about his score of 3 for the claimant's presentation. Mr Smith confirmed he had found the claimant very easy to listen to but the presentation had been more about processes and systems rather than people. The claimant had scored 3 for his responses to each of the questions. Mr Smith accepted that subconscious bias could filter in to scoring, but he rejected the suggestion it had done so and confirmed that if the claimant had been the best candidate he would have got the job.
- 10 130. Mr Smith was also asked about his score of 4 for Mr Prentice's response to question 2, when Mr Smith had noted that Mr Prentice did not really know anything about nurture. Mr Smith explained this related to Mr Prentice not knowing about nurture in the context of the school, but he did know about effective relationships being of key importance.
- 15 131. The claimant referred to comments made about Mr Prentice, for example on page 187 "first two excellent, last two less well answered", but he was given a score of 3. On page 185, "slightly less well researched about nurture and health and welfare", but he scored a 3. On page 179, "very impressive on Q1 and 2, good on Q3/4" but he scored a 3 / 4. On page 175, "drifted a bit later on Q2 - 4" but he scored a 3. The panel members described Mr Prentice as "energetic, confident"; "engaging, confident, very impressive"; "enthusiasm present" and "very clear, energising, excellent". The claimant considered this demonstrated a positive bias for Mr Prentice and that he had been given the benefit of the doubt.
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- 25 132. The claimant contrasted this with what he saw as a more prejudicial and hostile attitude towards him. The claimant considered Mr Smith's comments about his presentation being too focussed on processes rather than people was inaccurate. The claimant felt his presentation had been very people focussed.
- 30 133. The claimant felt the other panel members had made hostile comments and given low marks. For example, the panel members commented the claimant

was “not engaging”; “not as motivating as other candidates” and “a little laid back”. Also panel member MB made only two negative comments about the presentation which did not justify a score of 2.

5 134. The claimant also took issue with the feedback form (page 193) where he described the hostility of the Head Teacher as being “palpable”. The feedback form gave general feedback from the interview and reflected the view of the panel members. The claimant’s feedback form said *“Very comfortable in educational debate and philosophical issues that underpin. You handled the practical management task well but there was some debate in the panel about your prioritising. The panel did not find your presentation motivating and commented that, like much of your interview, this was about what had been done and theoretical rather than a vision statement of strategy as to what you would actually like to do to move us from “good” to “excellent”. Panel all agreed that you spoke a great deal about what you get others to do and told*
10 *us too little about what you do - how do you share your good classroom practice? The slides on the presentation were cramped and unreadable and generally about what you felt an interview panel would want to see rather than about what you wanted to do to achieve the national priorities you were displaying. There was no performance analysis of the faculty subjects to*
15 *identify areas of strength and areas of relative weakness which you could have used to explain how you would have an impact in the improvement agenda. Overall this was a strong interview but not as strong as the successful candidate. ”*

25 135. We considered it important to note the feedback form, although completed by the Head Teacher, did not simply reflect his views. The feedback form reflected the views of the panel members, and in this regard we considered it reflected the comments and scoring which had been given to the claimant.

30 136. The claimant’s argument that there had been a negative bias towards him was a difficult one in circumstances where much of it came down to the claimant simply having a different view to that of the panel members. We say that because, for example, the panel members said the claimant did not put

forward a strategy to lead, the claimant felt he had. The panel members thought the claimant's presentation focussed too much on systems: the claimant disagreed. The panel members felt the claimant talked too much about what he got others to do and not about what he would do: the claimant disagreed.

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137. We asked ourselves whether there was any basis to draw an adverse inference of bias and influence by the Head Teacher from the primary facts as set out by the Tribunal. We concluded there was no basis upon which to draw an adverse inference. We say that because apart from Mr Smith describing requests for additional time off as being "challenging", there was nothing to suggest, or from which we could infer, a negative bias by Mr Smith towards the claimant.

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138. We acknowledged the claimant felt he had performed well at interview and, indeed, the feedback form confirmed he had given a strong interview. The claimant, however, did not perform as well on the day as Mr Prentice. Mr Prentice had a higher total score than the claimant. Mr Prentice was selected and offered the job on that basis.

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139. The respondent has shown the sole purpose in appointing Mr Prentice to the post was to appoint the best candidate for the job. He was the best candidate because he had, at interview, scored the highest score. The claimant has not been able to establish a prima facie case that the employer subjected him to a detriment for a purpose proscribed by section 146. We accordingly decided to dismiss this part of the claim.

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140. We next considered the claim that the respondent had, for the sole or main purpose of penalising the claimant for trade union activities, not provided the claimant with any geography classes in May 2019. There was no dispute regarding the fact that when the timetable for the academic year 2019/2020 came into being in May 2019, the claimant was not provided with any geography classes. This was an act by the respondent which subjected the claimant to a detriment. The issue for the Tribunal to determine is whether the

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claimant has established a prima facie case that the act was committed for a purpose proscribed by section 146.

141. The claimant had, by May 2019, been declared surplus. The claimant sought to argue that the respondent's policy had not been correctly applied because only he and Mr Henderson had been considered, and because of the school partnership, the geography teacher at Dairy School should have been included. We, having had regard to the evidence of Mr Smith and Mr Thin, could not accept the claimant's argument. We say that because although there is a school partnership, teachers who were in post prior to that partnership agreement, cannot be asked to teach at the other, or both, schools. So, the claimant and Mr Henderson could not be asked to teach at Dairy, and the teacher at Dairy could not be asked to teach at Castle Douglas. There was, accordingly, no sensible basis for including Dairy in the equation because the over-capacity was in Castle Douglas and if (say) the Dairy teacher had been surplus, it would not have addressed the over-capacity in Castle Douglas. In addition to this, we were not referred to any documentation or agreement which supported the claimant's position.

142. We accepted the respondent's evidence regarding the application of the Redeployment policy, and we accepted Mr Smith's evidence that he spoke to the claimant and Mr Henderson regarding volunteering for redeployment and when neither wished to volunteer, the claimant was selected on the basis of length of service.

143. We were entirely satisfied the total geography teaching capacity far exceeded the number of geography periods to be taught and that the claimant was correctly identified as being surplus and subject to redeployment.

144. We accepted the evidence of Mr Smith that teachers who are to be redeployed will not be timetabled for teaching classes. This is because the school will try to avoid allocating classes only for the teacher then to be redeployed.

145. We noted Mr Smith is not involved in the process of fixing the timetable and although, as Head Teacher, he could have intervened in the process, we accepted he had no reason to do so. The decision of the PT (Mr Prentice) was that he did not want to split classes.

5 146. The claimant's representative accepted this part of the claim was built on the first part of the claim and that if the claimant did not succeed in the first part of the claim, it would weaken the second part of the claim. The reasoning of the Tribunal (above) regarding the first part of the claim, is relied upon here. We found there was no basis upon which to draw an adverse inference regarding bias on the part of Mr Smith. In addition to this, Mr Smith was not involved in the decision not to timetable classes for the claimant. There was no suggestion by the claimant that Mr Prentice was influenced by Mr Smith, or that Mr Prentice was biased against the claimant. We accordingly concluded, for all of these reasons, that the claimant had not established a prima facie case that the respondent had acted for a proscribed reason.

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147. We concluded the sole or main purpose of the respondent, in subjecting the claimant to the detriment of not being timetabled for classes, was, in circumstances where the claimant was surplus and going to be redeployed, to avoid split classes and to avoid the allocation of classes only to find the claimant was redeployed. We decided to dismiss this part of the claim.

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148. We next considered the detriment of the claimant being asked to vacate his geography classroom in May 2019. There was no dispute regarding the fact the claimant was asked to vacate the classroom where he had been for the past 14 years. We noted Mr Smith was not the decision - maker in this instance. We also accepted the evidence of Mr Smith and Mr Thin that teachers in secondary schools do not have a base: they have a classroom where they teach.

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149. The claimant's argument in relation to the timetabling of classes and being asked to move out of the classroom was that although Mr Smith was not the decision-maker, he could have intervened to support the claimant, but did not do so because of his trade union activities. Mr Smith rejected that proposition

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because he had no reason to intervene in decisions being taken by the principal teacher. The PT made decisions regarding the timetable, splitting classes and classrooms to be used. We accepted Mr Smith's evidence that there was no reason for him to intervene in decisions taken by the PT.

5 150. We accepted the sole purpose of the respondent in asking the claimant to vacate the classroom was to ensure continuity in split classes, so the class being taught remained in the same room with the teacher moving to the classroom being used. This delivered the key objective of being in the interests of the pupils and ensuring consistency. Further, the claimant was going to be redeployed and would be leaving the classroom in any event, and it was planned that another teacher returning from sickness absence (stress) would use that classroom.

151. We concluded for these reasons that the claimant had not established a prima facie case that the respondent had acted for a proscribed purpose.

15 152. We next considered the detriment of the claimant, in June 2019, of being given less geography classes than previously agreed with the PT. There was no dispute regarding the fact that when the claimant presented his grievance, the status quo ante applied until the grievance was concluded. This meant the claimant would not be redeployed until the grievance was concluded. In the circumstances the claimant was given some teaching classes.

153. The claimant put forward a proposed timetable for Mr Prentice to consider. The claimant "believed" Mr Prentice took it to senior management to discuss, and returned with a revised timetable with fewer classes on it. The claimant "believed" the head teacher would have been involved in this. We noted Mr Smith was not asked whether he had been involved in discussions with Mr Prentice regarding the timetable for the claimant.

154. Mr Smith told the Tribunal he was not involved in issues regarding the timetable but had been kept advised about it. Mr Smith said he "had been told by Mr Prentice" that he did not want to split classes: that was Mr Prentice's decision to make.

155. We accepted Mr Smith's evidence that he was not involved in discussions regarding timetabling for the claimant. We, in addition to this, noted the timetable for 2019/2020 had already been prepared with no classes being timetabled for the claimant, and Mr Prentice had told Mr Smith he did not want to split classes. Further, the claimant was still surplus and would be redeployed (albeit there was a deferment of that occurring until such time as the grievance had been resolved). In those circumstances we accepted the respondent endeavoured to balance the desire to give the claimant a meaningful timetable against the fact he was surplus and going to be redeployed, the timetable had already been prepared and Mr Prentice wished to avoid splitting classes.

156. We concluded, having had regard to the above points, that the sole purpose of the respondent in subjecting the claimant to the detriment of being timetabled for fewer classes was to limit disruption to pupils. We decided to dismiss this aspect of the claim.

157. We concluded the claimant had not established a prima facie case that the detriments were committed for a proscribed reason in terms of section 146 TULRCA. We were entirely satisfied the sole purpose of the respondent subjecting the claimant to the detriments alleged, was to select the best candidate for the job, and then to resolve the surplus which occurred. We decided to dismiss the claim in its entirety.

Employment Judge: Lucy Wiseman
Date of Judgment: 15 March 2022
Entered in register: 18 March 2022
and copied to parties

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