EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Philip Hall	**v**	Transport Salaried Staffs' Association (TSSA)

Heard at: Cambridge

On: 27, 28, 29 March 2023
In Chambers: 28 March 2023 (p.m.)

Before: Employment Judge Tynan

Members: Mr J Williams and Mr D Snashall

Appearances
For the Claimants: In person
For the Respondent: Mr L Harris, Counsel

JUDGMENT having been given orally on 28 March 2023 and written reasons having been requested by the Claimant on the same date in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant has brought two claims against the Respondent: the first of which was presented to the Employment Tribunals on 16 September 2020 following ACAS Early Conciliation between 18 July 2020 and 18 August 2020; the second of which was presented to the Employment Tribunals on 10 November 2021 following ACAS Early Conciliation between 4 and 8 November 2021.

2. The first claim was case managed at a Case Management Hearing before Employment Judge M Warren on 26 April 2021, whereas the second claim was simply consolidated with the first claim without further specific case management. Nevertheless, the Respondent endeavoured to agree a List of Issues with the Claimant in relation to the second claim prior to this Hearing. In the course of that exercise the Claimant identified that he may want to pursue complaints against the Respondent under the Equality Act

2010. His first claim form had been completed on the basis that he wished to pursue a complaint of victimisation, but no further particulars were provided by him in that regard. Judge M Warren explored the matter with the Claimant at the Hearing on 26 April 2021 when it became clear that the Claimant was conflating protected acts under the Equality Act 2010 with protected disclosures under the Employment Rights Act 1996. Any s.27 Equality Act 2010 claim was dismissed on the basis that it was withdrawn by the Claimant (page 55 of the Hearing Bundle). Notwithstanding the discussion that had taken place on 26 April 2021, the Claimant identified once again in his second claim form that he was complaining of victimisation, though clearly linked his complaint in this regard to his substantive complaint under TULR(C)A. For the reasons we set out in some detail on the first day of this Final Hearing, and accordingly do not repeat again now, notwithstanding his reference in his claim form to being disabled within the meaning of the Equality Act 2010, we found that the second claim did not include any complaints pursuant to the Equality Act 2010. We went on to determine that the balance of injustice and hardship was such that the Claimant should not be granted permission to amend his claim to include new, essentially unparticularised complaints that he had been victimised or otherwise discriminated against by the Respondent because of the protected characteristic of disability. The Claimant did not request written reasons of that decision though should he now require such he must make a written request for them within 14 days of these written reasons being sent to him.

3. Whilst the second claim did not include claims under the Equality Act 2010, we found that the second claim did include a complaint by the Claimant that in contravention of s.47B of the Employment Rights Act 1996, the Respondent had subjected him to detriment on the ground that he had made a protected disclosure. However, perhaps recognising the difficulties he might have faced under s.47B(1A)(b) establishing that the Respondent, an independent trade union, had acted in the matter as his employer's agent with its authority, the Claimant informed the Tribunal that he was no longer pursuing that particular complaint and that it could be dismissed on being withdrawn by him.

4. The complaints in the first claim are pursued under s.66 of TULR(C)A, namely that the Claimant was unjustifiably disciplined by the Respondent. The Claimant's legal rights in that regard derive from s.64 of TULR(C)A which is to be read in conjunction with s.65 which sets out the meaning of "unjustifiably disciplined". The Claimant's complaints in the second claim are also pursued under s.66 of TULR(C)A, though in the alternative as complaints pursuant to s.174 of the Act that he was impermissibly expelled or excluded from the union.

5. The Claimant represented himself. He gave evidence at Tribunal, having filed a 33-page witness statement in support of his complaints. The complaints ultimately have their origin in events in 2014 when the Claimant claims that he blew the whistle about certain matters at London

Underground/TfL. Following a ten day hearing (two of which comprised of discussions in Chambers), commencing in August 2020 and concluding in May 2021, Employment Judge Gardner sitting with Members in the East London Employment Tribunal determined that the Claimant had not made qualifying disclosures for the purposes of Part IVA of the Employment Rights Act 1996. These related issues have occupied the Claimant now for some nine years. The available evidence in the Hearing Bundle indicates that the Claimant has experienced depression and anxiety throughout much, if not all, of that time. Given the Claimant's evident distress during the second day of the Hearing, it seems unlikely that this litigation has been conducive to the Claimant's health and general wellbeing.

6. On behalf of the Respondent, we heard evidence from Val Stansfield, TSSA's Employment Rights Advisor. We were also due to hear evidence from Mel Taylor, who is employed full time by the Respondent as an Organiser, but she was delayed returning to the UK from Belgium as a result of issues at Eurostar. It was our intention to adjourn the Hearing in order to secure Ms Taylor's attendance at Tribunal, in particular so that the Claimant would have the opportunity to question her and challenge her evidence. However, the Claimant was struggling somewhat and expressed his firm desire that the Hearing should be brought to a conclusion without delaying matters further to hear from Ms Taylor. Whilst we did not have the opportunity therefore to hear Ms Taylor's testimony, we confirm that we have read Ms Taylor's statement; inevitably we have weighed in the balance that we were unable to hear her evidence first-hand or observe how her evidence stood up under cross examination.

7. There was a single agreed Hearing Bundle running to some 272 pages. Any page references in the course of this Judgement are to the corresponding pages in the Hearing Bundle. Although the Claimant made certain observations to the effect that the bulk of the documents within the Hearing Bundle were disclosed by him, and inferred that the Respondent's own disclosure may have been lacking, to our knowledge there have been no applications in the course proceedings for any orders for specific disclosure.

8. We explained to the Claimant that certain parallels can be drawn between a s.66 complaint and a whistleblowing detriment claim of the type he pursued in the East London Employment Tribunal. In order to succeed in his s.66 complaints, the Claimant must establish three things: firstly, that he engaged in protected activities (in the same way a claimant must establish that they made a protected disclosure if they pursue a whistleblowing complaint); secondly, that he was subjected to unjustified discipline by the Respondent (in a whistleblowing claim, a claimant must show that they were subjected to detriment); and thirdly, that the unjustified discipline was by reason that he engaged in protected activities (in order for a whistleblowing claim to succeed, the detriment must be done on the ground that the worker made a protected disclosure). As is

the case in whistleblowing complaints, in order for a s.66 complaint to succeed, the protected activities need not be the sole or main reason that the trade union member was unjustifiably disciplined; it is sufficient that they had a material influence, in the sense of more than a trivial influence, on how they were treated.

9. Notwithstanding the Claimant's experience of pursuing a whistleblowing, and indeed a disability discrimination, complaint in the East London Employment Tribunal, and the existence of two Lists of Issues (one in draft form) to serve as a roadmap in the proceedings, the Claimant had some difficulty in relating the facts of the case to the issues to be determined. Often he could not get much beyond expressing his feelings of being let down by a union of which he was a member for many years. The question, however, is ultimately not whether the Respondent provided a competent or even adequate level of service, including workplace representation, to its members, rather whether the Claimant's rights under §.64, 65 and 174 of TULR(C)A were infringed.

10. We deal with each of the Claimant's two claims in turn.

The First Claim

11. The protected activities relied upon by the Claimant, comprising various email communications with the Respondent, are set out at in the spreadsheet at pages 33 to 36 of the Hearing Bundle. The spreadsheet was prepared by the Claimant in response to Judge M Warren's order on 26 April 2021that the Claimant provide further information about his first claim. The spreadsheet helpfully includes the text of the relevant emails relied upon by the Claimant. Related emails were available to the Tribunal within the Hearing Bundle for the full context. We have re-read the emails in their entirety before reaching our findings and in coming to this Judgment. In each case, the Claimant asserts that the relevant email is conduct within the ambit of s.65(2)(c) of TULR(C)A, namely, asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law.

12. In our Judgment, none of the emails sought to be relied upon by the Claimant in his first claim amount to such conduct, or were believed by the Respondent to amount to such conduct. We shall deal with the emails in their entirety. We refer in this regard to pages 33 to 36 of the Hearing Bundle; the emails are numbered 1 to 13.

13. Emails 1, 3, 5, 9, 12 and 13 do not involve any assertions by the Claimant as against the Respondent. They do not include any element of complaint or expression of concern regarding the Respondent's or its officials etc actions, let alone that any requirement imposed or thought to be imposed

by or under the Respondent's rules etc., were being contravened. The first email, sent on 19 October 2017, was simply keeping the Respondent's representative, Catherine Poole informed that his grievance was on hold. As he said himself in his email, it was *"FYI"*. In his third and fifth emails from summer 2019, the Claimant was seeking the union's support in connection with Employment Tribunal proceedings against TfL that were then afoot. The Respondent's decision itself not to make such support available to him is not pursued in these proceedings as an act of unjustifiable discipline. In his ninth email, dated 23 April 2020, which is part of an exchange with the Respondent's General Secretary, Emanuel Cortez, the Claimant asked for a letter to be sent to TFL, emphasising the union's resolute support for him. We find that he wanted a public demonstration of their solidarity as he hoped this might carry some weight with TFL in their ongoing dealings with him. Strictly, the twelfth and thirteenth emails sent in April 2021 are irrelevant, as they post date the Claimant's first Employment Tribunal claim. As such, they cannot be protected activities in respect of the unjustifiable discipline to which the Claimant alleges he was subjected by 16 September 2020 when he commenced his claim. Nevertheless, for the sake of completeness, both emails seek the Respondent's support on workplace issues, namely a grievance and a draft letter before action. They do not assert a relevant contravention or proposed contravention.

14. The second of the thirteen emails which was addressed to Catherine Poole and dated 22 June 2019, is merely a chasing email. As above, there is no complaint, expression of concern or assertion of any relevant contravention or proposed contravention.

15. The first intimation of concern is in the fourth of the thirteen emails, namely an email to the Respondent's Help Desk dated 7 August 2019 in which the Claimant stated that he wished to raise a complaint. However, there is no further information to indicate the nature of any complaint then in his contemplation. In our judgement, without more, it cannot reasonably be said that the Claimant was asserting a contravention of a requirement under the Respondent's rules, objectives etc or that his email should have been understood by the Respondent to amount to such.

16. The sixth and seventh of the thirteen emails complained that the Respondent had failed to provide the Claimant with a basic level of support. However, this was not with reference to any requirements of the union's rules, objects etc., rather it was expressed with reference to the Claimant's personal perception of the level of support he would have expected to have received, particularly as a long standing member of the union. The extract of the Respondent's Rules at pages 207 – 209 of the Hearing Bundle makes no distinction between longer serving and other members, indeed given the Respondent's legal obligations it would be surprising if they did. In expressing his views in the matter, we do not consider that Ms Taylor ought reasonably to have understood from the Claimant's comments that these were not simply his personal views in the

matter but instead extended to and touched upon requirements imposed under the union's rules, objects etc.

17. The eighth of the thirteen emails merely identifies that the Claimant was dissatisfied with the TSSA and that he considered he had not received any support from it since late 2017. His assertion in that regard is at odds with the available materials in the Hearing Bundle which evidence material support being made available to him. The email itself adds nothing to the sixth and seventh emails and accordingly, for the reasons we have already set out in relation to those two emails, it does not meet the requirements of s.65(2)(c) of TULR(C)A.

18. The tenth of the thirteen emails, sent to Mr Cortez and dated 27 April 2020, is repetitive of the seventh email, quoting that email in its entirety. If the seventh email does not meet the requirements of s.65(2)(c), we cannot see how its repetition might have changed the nature of the communication such as to bring it within the ambit of TULR(C)A.

19. Finally, the eleventh of the thirteen emails is entirely repetitive of the seventh, eighth and tenth emails. Once again, the repetition did not of itself alter the content or meaning of what had previously been expressed, nor in our judgement did it alter the perception and understanding of the recipient. As Mr Harris said in his submissions, that is the beginning and end of the matter in relation to the first claim. Nevertheless, for completeness we have considered whether, as he claims, the Claimant was unjustifiably disciplined from the point in time when he began to articulate concerns, even if such concerns were not assertions within the ambit of s.65(2)(c).

20. The Claimant began to articulate concerns on or around 14 August 2019, even if this was only in very general terms. At page 183 of the Hearing Bundle there is a copy of an email from the Claimant to Caroline Cheales at TFL, who acted as the Respondent's representative at a grievance hearing. The email was sent on 30 June 2021 and in it the Claimant wrote,

> *"… any reference to me being denied services to TU support refers specifically to the time I was being supported by UNITE around the time of the engineering transformation process in 2018-19."*

Accordingly, as at 30 June 2021, some nine months or so after the Claimant had commenced these proceedings, he was identifying that his concerns about being unjustifiably disciplined related to a discrete period in time when he was being supported by UNITE. Be that as it may, as we have noted already, the specific support being sought by the Claimant in summer 2019 was legal support in connection with Employment Tribunal proceedings, yet the Claimant has made clear in these proceedings that he is not pursuing any complaint in respect of the Respondent's decision

not to make such support available to him, including the decision of the Branch not to support any appeal by the Claimant against that decision.

21. The first request for workplace support was the Claimant's request to Mr Cortez of 23 April 2020. Even then, the request was only prompted by Mr Cortez asking the Claimant to identify what support he was seeking from the union. As we have said, the Claimant's request was that the union should 'flex its muscles' and write to TFL demonstrating its solidarity with him, a request he reiterated to Mr Cortez a few days later on 27 April 2020. He asked that the union confirm to TfL that it was "resolute in supporting me". His requests were somewhat unconventional, in that they were not focused upon a specific grievance or workplace issue. Rather, the Claimant had commenced Employment Tribunal proceedings which did not have the Respondent's support as they were assessed as not meeting the requisite merit test, but he hoped that a letter from the union might provide him with some form of leverage to help him in gaining some form of redress or settlement regardless of the merits of his position.

22. In our judgement it was an entirely reasonable decision on the part of Mr Cortez to decline to provide such a letter given that the Respondent was not resolute in supporting the Claimant in his claim against TfL. He wanted the union to issue a misleading statement in circumstances where it had assessed that his claim lacked reasonable prospects of success. He was asking the Respondent to write something that was inaccurate and which it did not believe. In our judgement, its refusal to go along with that proposed course of action was nothing whatever to do with the fact that the Claimant had expressed concerns, it was borne of the union's desire to act professionally, honesty and with integrity.

23. The Claimant next sought the Respondent's support in April 2021; namely, after the first claim had commenced. Accordingly, there is no further identifiable unjustifiable discipline that might be relied upon by the Claimant in terms of his first claim.

24. For all these reasons, the first claim is not well-founded and shall be dismissed.

The Second Claim

25. The protected activities are not identified in the second claim form, or in the draft List of Issues in respect of that claim, or in the Claimant's witness statement. Whilst he has the burden of proof in the matter, nevertheless, we have been through the entire Hearing Bundle with a view to identifying the matters potentially complained of. We note in particular the Claimant's email of 27 September 2021 to Ms Taylor at page 188 of the Hearing Bundle. His complaint in that email relates to Caroline Cheales' alleged failure to make representations to TfL following a grievance appeal hearing on 11 August 2021, rather than any alleged inaction or shortcomings before then.

26. In the third paragraph of his email to Ms Taylor, the Claimant wrote,

> *"From my perspective - TSSA seem exceptionally reluctant to make representations to TFL in writing as previously requested. I am taking this as being that TSSA are currently falling short of the objectives of the union to protect the interests of its members and to oppose actively all forms of harassment, prejudice and discrimination."*

We are satisfied that the reference to the "objectives" of the union was a reference to its formal Rules, specifically Objects (b) and (i) in section 2.1 of the union's Rules,

> *"To … protect the interests of its members"*
>
> *To oppose actively all forms of harassment, prejudice and unfair discrimination."*

(page 207 of the Hearing Bundle)

27. In our judgement, therefore, the Claimant was asserting a contravention of the requirements of the rules, objects etc. of the union, within the meaning of s.65(2)(c) of TULR(C)A.

28. The question is whether the Claimant was thereafter unjustifiably disciplined by the Respondent. The unjustifiable discipline complained of by the Claimant is the Respondent's alleged failure to offer the Claimant support in respect of his historic whistleblowing complaints against London Underground/TfL. The Claimant is right when he says that the Respondent failed to offer him such support. We refer in this regard to a copy of an email from the Respondent's Solicitors dated 29 October 2021 at page 203 of the Hearing Bundle. The email which is from Mr Chorley is emphatic and unequivocal. He wrote,

> *"I am instructed to reply to your recent emails to Mel Taylor and the TSSA Help Desk regarding TSSA's alleged lack of support (which is denied).*
>
> *I refer you to Mel's email of 14 October 2021 and Emanuel's email of 23 April 2020, making the Union's position quite clear about the historical issues you continue to raise, and about which you are already of course litigating with TSSA in the Tribunals.*
>
> *Please note that TSSA have nothing further to add to those emails and will enter into no further correspondence with you about the matter."*

29. Mr Chorley's email was no more than a reiteration of the decision that had previously been communicated to the Claimant by Mr Cortez on 23 April 2020, namely, some 17 months before the protected activity in question. Although Mr Chorley made reference in his email to Ms Taylor's email of 14 October 2021, which post-dates the protected activity, her email in turn

had equally simply reiterated Mr Cortez's 23 April 2020 decision that the Respondent would not support the Claimant's Employment Tribunal claim against TfL, a decision that had been further amplified in Ms Cheales' detailed email to the Claimant of 6 July 2021, written by Ms Cheales before the relevant protected activity. That decision, having been made and unequivocally communicated on 23 April 2020 prior to the protected activity of 27 September 2021, the protected activity plainly did not influence the earlier decision or its communication. In our judgement, it is fanciful to suppose that the mere reiteration of that decision in response to ongoing repetitive correspondence from the Claimant, somehow altered the basis of the earlier decision and tainted it retrospectively.

30. The Claimant's second s.66 complaint is likewise not well-founded and shall be dismissed.

31. Finally, we deal with the Claimant's s.174 complaint.

32. In our judgement there is no evidence to support that the Claimant was excluded or expelled from the Respondent. We conclude that he certainly was not expelled from the union; although he relies upon Mr Chorley's email of 29 October 2021 as tantamount to exclusion, he accepted in the course of his evidence at Tribunal that the email could be read differently to how he had read the email at the time and in response to which he resigned his membership of the union. Given that Mr Chorley merely reiterated what had already been said to the Claimant by Mr Cortez, Ms Taylor and Ms Cheales regarding the union's unwillingness to support him in respect of historic issues that had been dealt with in his Tribunal claim against TfL, which the union had assessed as having insufficient prospects of success and which in fact he had gone on to lose at Tribunal, the Claimant could not explain to the Tribunal why their communications in that regard did not amount to exclusion, whereas Mr Chorley's did.

33. The Respondent continued to represent the Claimant's interests as its member after Mr Cortez first said on 23 April 2020 that there would be no legal support for the Claimant's Employment Tribunal claim against TfL absent a successful appeal, supported by the Branch, against Ms Stansfield's assessment and decision. For example, Ms Cheales was active on the Claimant's behalf in relation to a sick pay issue in May 2021 and beyond. Indeed, in June 2021 the Claimant thanked her for her support. She wrote to TfL on his behalf and she attended a grievance appeal hearing as well as guiding and advising the Claimant throughout the process. Evidence of her guidance and advice is to be found amongst other things in the documents at pages 181 to 183 of the Hearing Bundle. Collectively, as described, these were not the actions of a union excluding a member from the benefits of their membership. The complaint is not well-founded.

34. In the circumstances and for all the reasons we have set out, the Claimant's various complaints are not well-founded and are hereby dismissed.

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Employment Judge Tynan

Date: 13 July 2023

Sent to the parties on: 14 July 2023

GDJ
For the Tribunal Office.