



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr J Ogundemuren**

**v**

**Clarion Housing Group Ltd**

**Heard at:** Watford

**On:** 5 to 7 June 2023

**Before:** Employment Judge Bedeau  
**Members:** Mr D Sutton  
Mr D Wharton

**Appearances**

**For the Claimant:** Miss S Stanley, counsel  
**For the Respondent:** Mr H Dhorajiwala, counsel

## RESERVED JUDGMENT

1. The claim of detriment on grounds of trade union membership or activities, section 146 Trade Union and Labour Relations (Consolidation) Act 1992, is not well-founded and is dismissed.
2. The claims of harassment and victimisation are dismissed upon the claimant's withdrawal.

## REASONS

1. In a claim form presented to the tribunal on 3 July 2021, the claimant claimed trade union detriment; discrimination because of race; disability discrimination; victimisation; harassment related to trade union activities; breach of contract, and unauthorised deductions from wages.
2. To these claims the respondent in its response presented on 26 August 2021, denied liability and asserted that the claimant cannot pursue a breach of contract claim before the tribunal as he was still employed by the respondent. It requested further information on the claims as they were inadequately particularised.
3. On 28 October 2021, Employment Judge Lewis, dismissed the race discrimination and disability discrimination claims based on the claimant's withdrawal.

4. At the case management preliminary hearing held on 5 May 2022, before Employment Judge George, the case was listed for a final hearing for three days, starting on 5 June 2023, before a full tribunal. The parties were ordered to agree a list of the claims and issues by 24 June 2022.
5. On 26 May 2023, the claimant's representatives emailed the tribunal, copying the respondent's representatives, in which they withdrew the unauthorised deductions from wages claim but reserving the right to pursue such a claim in the County Court. They clarified that the tribunal would only hear and determine the trade union detriment claim.

### **The issues**

6. The parties are agreed that the issues for the tribunal to hear and determine in relation to trade union detriment are as follows:
  - 6.1 Has the claimant been subjected to any form of detriment by the respondent due to his trade union status or activities contrary to the Trade Union Relations (Consolidating) Act 1992 "TULRCA"?
  - 6.2 The claimant relies on the detriment of terminating his secondment to the role of Operations Manager on 1 February 2021.

### **The evidence**

7. The tribunal heard evidence from Mr Jak Pugh, Head of Estates Services, North London, on behalf of the respondent. The claimant gave evidence on his own behalf.
8. In addition to the oral evidence, the parties produced a joint bundle of documents comprising of 467 pages. References will be made to the documents as numbered in the joint bundle.

### **Findings of fact**

9. The respondent is the United Kingdom's largest registered provider of social housing with more than 350,000 residents. It is a not-for-profit organisation. The income it generates is reinvested in its business, enabling it to deliver social aims. Latimer is its development arm and builds homes. Clarion Futures is its charitable foundation that runs social investment programmes.
10. The respondent was formed on 29 November 2016, following a merger between two housing associations, Affinity Sutton Group Limited, and Circle Anglia Limited.
11. The claimant commenced employment with Circle Anglia Limited which was part of Circle Housing Group Limited, on 13 April 2011, as a Security Officer, covering residential blocks in the Bow area of east London. (80-86)
12. In February 2013, he was promoted to the role of Security and Lifestyle Manager on a permanent contract basis. The role required him to provide management support to 12 block-based Security Officers, and 6 mobile

Patrol Officers, as well as 2 Mobile Patrol Supervisors delivering a 24-hour security service to 7 residential blocks in Bow.

13. On 29 November 2016, following the merger of Anglia and Circle Housing Group, his employment was transferred to the respondent.

The union recognition agreement and Staff Council

14. On 4 May 2017, the respondent entered into a union recognition agreement with Unison, the recognised trade union. (110-112)
15. As part of the agreement a Staff Council would be established comprising of 15 members. This would include 8 Unison representatives and 7 other staff representatives, as well as the Group Director of Human Resources and Corporate Services, the Chief Executive, and the Head of Employee Relations. (111)
16. The Staff Council would meet every two months and its role is set out in paragraphs 5.3 and 5.4 of the agreement. (112)
17. The claimant has been an accredited elected trade union official of Unison, since June 2016 and held titles of Elected Workplace Steward, and Health and Safety Representative, attached to the Greater London Housing Association Branch. He told the tribunal that he is still a member of the Branch. In May 2019, he became a member of the respondent's National Health and Safety Committee. He represented workers at grievance and disciplinary meetings and raised issues of concern relevant to his union role. (113-114)

Secondment to the role of Operations Manager

18. On 9 March 2020, he was issued with a Confirmation of Secondment letter informing him that he had been promoted by the respondent to the role of Operations Manager, effective for six months commencing from 16 March 2020 to 18 September 2020. His line manager would be Ms Zoe Pratten, Head of Housing. His salary was increased to £40,220 a year. The upper limit was £47,310. We find, contrary to his assertion that this was not a promotion, that he was promoted to this role and was not either a linear or sideways shift from the position of Security and Lifestyle Manager. Even in his witness statement, paragraph 8, he acknowledged that he had been promoted to the post of Operations Manager (115-121).
19. In the job description for the post of Operations Manager, he was required to ensure that there was a strong and robust performance management culture and framework embedded within his teams while ensuring external contracts were effectively managed and procured including cleaning, grounds maintenance and parking. He was to deliver a high quality, efficient and compliant management service, and to work with the Senior Operations Manager of Estate Services, making sure residents were receiving good value for money and leading his team to deliver on the agreed key performance indicators. He was also to assist the Service

Charge Team by providing accurate information about service delivery costs in good time to meet the timescales for producing estimates and actuals (115).

One-to-one meetings

20. During his secondment he had regular one-to-one meetings with Ms Pratten.
21. We find that the contemporaneous evidence comes from notes taken by her, and subsequently, by Mr Jak Pugh, her replacement. The claimant did not produce any notes of his meetings with these two managers to challenge their accounts of events.
22. In relation to the monthly one-to-one meeting with Ms Pratten held on 20 April 2020, she discussed with the claimant the adjustment he was having to make from overseeing the Security and Lifestyles Team, to his work as Operations Manager. Various matters were discussed in relation to his work with team leaders and on recruitment methods within the team. In relation to his “overall performance”, she wrote:

“Joseph is finding his feet in the role and developing an understanding of the team and his colleagues. Joseph is working on thinking as an Operations Manager and balancing this with his expensive (expansive) knowledge as a union representative. I expect him to find this a challenge at times and not always be comfortable. I will be working with him to challenge his thinking and consider the bigger picture when he approaches problems.” (122-124)

23. At the review meeting on 4 May 2020, he was required to give a list of works for a particular employee to complete. The original request was on 16 April and had been significantly delayed. He was also required to inform Ms Pratten whenever there were issues with staff members. His relationship with his peers was also discussed. His colleagues had raised concerns with Ms Pratten about him not working as part of a team; obstructing progress; and intimating that he was very experienced and knowledgeable. The action required was for him to “clear the air” by holding a meeting with his colleagues by the end of the following week (125-128).
24. From Ms Pratten’s record of the one-to-one meeting on 20 May 2020, she noted that, on 18 May 2020, she had advised the claimant that a number of deadlines had been missed and that it would be discussed at his next one-to-one meeting. It is recorded that he apologised and “held up his hands”. Ms Pratten explained that his role was a promotion from his previous role as the workload was much larger. She accepted that he had other responsibilities, such as trade union work, and emphasised that his substantive post was that of Operations Manager. She voiced concerns that his job may be too big for him and was concerned whether she had done enough to support him and/or had missed something in the first few months. She questioned whether there was enough communication between the two of them. It is further recorded that he confirmed that that was not the case and his time management had been an issue previously.

She advised him to look online at e-learning for time management techniques. She clarified that if he did not improve then they may have a difficult conversation about his future in the role and his returning to the role of Security and Lifestyle Manager, however, she did not want to have such a conversation with him. Various aspects of his work were discussed, and comments made by her, much of which were to state that there was either no progress, or progress was continuing, or to highlight the difficulties he was experiencing at the time.

25. In the feedback section of Ms Pratten's notes she recorded that time management and meeting deadlines had been an issue for the claimant throughout his career and would need to implement time management techniques on his objectives and put time aside to do so (129-133).
26. In relation to the review meeting held on 18 June 2020, under "General feedback", she wrote:

"I am pleased that JO has begun to address his time management issues and prioritisation needs. This is something which he has to bring under control – his own career development will thank him for it.

I was disappointed that JO had not made contact with Dawn. This was an action from a previous one-to-one which was not carried out. I will expect JO, with all of his experience, to understand and action these HR issues and treat them with a higher priority. Failure to do so will leave Clarion exposed should any future action come in, and as JO knows, he cannot defend it. We need to see improvement here!"

(137-139)

27. At the 25 June 2020 review meeting, it was noted that the issue in relation to Dawn, who had lodged a grievance against the claimant, that Ms Pratten expressed her disappointment that the grievance had been raised regarding his conduct as it was discussed at previous one-to-one meetings. She stated that he would need to ensure that he was honest about his own shortcomings in any meetings. She was also concerned about the handover between him and the Security and Lifestyle Manager who replaced him. (140-142).
28. At the review meeting held on 20 July 2020, Ms Pratten discussed the claimant's father's health who said that he was improving. The claimant said that he was looking to claim for life insurance and possible critical illness cover. He was helping his family but was finding it stressful.
29. In relation to his workload and time management, Ms Pratten discussed and gave examples of where he had not met deadlines. Time management permeated all areas of concern, also managing people and achieving objectives. In relation to his training, he had four outstanding assignments which were not handed in on time. His more recent assignment was submitted on time. He was to put study time in his diary. In relation to the reputational impact of not completing tasks as suggested by human resources, he felt there was a breakdown with the heads of HR. It was

noted that as there was now a new Human Resources Director, it was open to him to have a discussion with that person. Ms Pratten explained that his first priority should be his substantive role. The claimant said that should things become too hectic then he would drop the union Convenor role but understood that he must focus on his Operations Manager role. Ms Pratten discussed with him that he was:

“Too thinly spread – union, personal issues, course work and the demands of the role. This is impacting his ability to do the role. Structure will help him manage this.”

(148-149)

#### Informal Performance Improvement Plan

30. On the same day he was put on an informal Performance Improvement Plan. The concerns highlighted were time management; managing human resources cases; and achieving objectives. It was to last for four weeks and meetings would take place twice weekly on a Monday and Friday to discuss priorities for the week and then to review any achievements. Various actions were listed with agreed deadlines. Ms Pratten wrote,

“I believe that JO will be able to meet this action plan, however we both understand that if the improvement is not there, then the action plan would revert to a formal action plan.” (150-154)

31. During the follow up meetings held on 24 and 27 July, it was noted that the claimant had improved in the areas of concern (148-173).
32. At the review meeting held on 7 September 2020, Ms Pratten wrote under “Any other business”, that she had discussed with the claimant that given that the Improvement Plan was successful and that he had improved, his secondment contract would be extended to end of March 2021. His pay would be up for discussion. However, he needed to show consistent improvement in his performance, and to deliver on the objectives and tasks set. She then wrote:

“JO had hoped to come in on a higher salary but given the issues faced he was not going to challenge this decision not to increase pay.”

33. Under “General feedback” she stated:

“Really good to see improvement and pleased to be able to extend JO further in the role. ZP (Ms Pratten) hopes that he can really thrive in the role and really deliver on objectives”.

(177-178)

34. A letter dated 10 September 2020, sent to the claimant by Human Resources, confirmed the extension of his secondment as Operations Manager to 18 March 2021, at which point it would be reviewed. At the end of his secondment, he would return to his substantive role as Security and

Lifestyle Manager with associated duties, salary and terms and conditions (180)

35. At the review meeting held on 22 October 2020, Ms Pratten noted that the claimant had made improvements but must continue to improve as the new line manager would push him (181-183).
36. Although he did well under the informal PIP, we find that Ms Pratten still had concerns about his performance.
37. The claimant did not receive the notes of the review meetings held on 20, 24 July, 17, 24 August, and 7 September 2020, until 13 November 2020 (477-490).

The claimant's new line manager Mr Jak Pugh Head of Estate Services

38. On 2 November 2020, Mr Jak Pugh, was promoted to Head of Estate Services. He was previously an Operations Manager who had worked with the claimant. He read Ms Pratten's one-to-one meeting notes with the claimant. He noticed that she had raised performance issues with him, particularly, in relation to meeting deadlines and the prioritisation of workload.
39. Mr Pugh had one-to-one meetings with the claimant, at least once a month, as well as weekly operations meetings with the claimant and his colleagues, Mr Ben O'Brien, and Mr Andy Lyon, Operations Managers. Mr Lyon joined the team on 30 November 2020.
40. On 12 November 2020, the claimant featured in the respondent's weekly newsletter, Clarion Call, in which he gave an account of his role and responsibilities as an Operations Manager (190-192).
41. During Mr Pugh's first one-to-one meeting with the claimant on 12 November 2020, he noted that the claimant raised the issue of being owed money and being on-call for the Security and Lifestyle Team. It was further noted:

“We revisited earlier in the week conversation about time spent doing union activity as I wanted to double check what we discussed – Joseph confirmed that he takes up to one day per week of worktime to complete his union activity, as the business has to give him this time. He further said that it wasn't one set day per week but various times during the week that would add up to one day maximum. Joseph also confirmed that if he didn't utilise his union time in one week, he wouldn't make this time up on the following week. I said that as a colleague, I was always told by Joseph that he does his union time in his personal time, and he said that was correct whilst he was in S & L Manager role, but not since he became the Operations Manager. He said that Zoe would ask him how many hours he was doing union activity, but mostly let him get on with it.

Joseph added further that he is juggling a lot of balls. He has not had a work life balance for a number of years. He is working on things to create more capacity, but he is doing so much stuff and spread very thin. I asked whether he considered

giving up some of these involvements as I didn't want it to impact his day-to-day job."

42. There was then a discussion about the claimant's studies and the decision to remove him from the degree apprenticeship course because he did not meet several deadlines for his assignments. Various agreed actions were listed including recording all out of hours calls/attendances relating to the three-month period of Operations Manager and looking after Security and Lifestyle Service. He was also to submit his recent three months expenses. They discussed him studying one day a week and submitting modules on time. (199-205)
43. The claimant said in evidence that during this meeting Mr Pugh invited him to give up some of his trade union activities. When we explored this further, this significant statement was singularly missing from his witness statement. In paragraph 16 of it he stated that Mr Pugh questioned the budget for which the respondent was paying him to conduct his trade union duties and activities. He stated that he replied by saying that he had no idea but there was a union recognition agreement in place. He further stated that Mr Pugh said that residents should not be paying for his trade union activities and duties and that he would investigate this to find out how it should be paid for. Those statements by the claimant were in the notes of the meeting as recorded by Mr Pugh, but not the specific reference to giving up some of his trade union activities. The notes were sent to him on 20 November 2020, to which were not corrected nor amended by him.
44. Mr Pugh was under the impression that the claimant did his union duties in his personal time. The claimant told him that that was the case when he was Security and Lifestyle Manager, but not so since he became Operations Manager.
45. Mr Pugh is a member of the union and has been a member for over 10 years.
46. At the one-to-one meeting held on 3 December 2020, he talked about the claimant's workload and again about meeting deadlines. The claimant said that he may be suffering from Attention Deficit Hyperactive Disorder and was waiting for a medical appointment. Mr Pugh reiterated that he wanted to help and gave him guidance on managing his diaries and scheduling tasks and objectives. He confirmed that they needed to try to find a solution to ensure that he regularly meet his deadlines and was not there to make him fail but to provide help and support him. They went through the objectives the claimant still needed to meet which were behind set targets. They agreed to a few extensions to early January 2021 for completion of some of the objectives. The claimant was told by Mr Pugh that he, Mr Pugh, needed to respond to complaints on his behalf. He identified a number of agreed learning and action points, most of which the claimant should have already completed but had not done so. Mr Pugh stated that he did not want to micromanage him, but he needed to improve and gave a list of all the actions required and what needed to be done, and by when.



47. They also discussed the issue of members of staff within the claimant's team not having taken their annual leave which would have to be forfeited. They agreed to have a separate conversation about it as Mr Pugh wanted to investigate the matter with Human Resources (214-224).
48. We find that at this point in December 2020, Mr Pugh was speaking to Human Resources and to Ms Pratten, his line manager, about the claimant's performance and how best he could be supported. He was concerned that performance issues had been ongoing for months and had pre-dated his management of the claimant, but he had not seen any useful improvements. They agreed that the claimant was not making the most out of his secondment and development opportunity and that they would need to see significant improvements. We further find that Mr Pugh did not have the same concerns in relation to time management with the other Operations Managers.

#### Annual leave

49. On 9 December 2020, the claimant together with Mr Pugh, met with Human Resources to discuss the issue of his staff's annual leave. A summary of what was discussed at the meeting was emailed to him on 15 December 2020 by Mr Pugh. It showed, in respect of each named individual, their annual leave entitlements over a certain period and the leave in hours remaining, as well as what had been forfeited (452-454).
50. The claimant's case was that as Operations Manager he should not be responsible for annual leave of his staff when he was Security and Lifestyle Manager. He was invited to state whether or not what was detailed in the email was a true account as most of the periods in issue covered the time when he was Security and Lifestyle Manager. During the hearing we were not shown any correspondence from the claimant challenging the content of the email (452-454).
51. During the one-to-one meeting on 18 December 2020, Mr Pugh covered the claimant's tasks list and reviewed his progress against priorities and objectives. There were deadlines missed and tasks he had not completed within the required timescales. Mr Pugh reiterated that he was concerned about the number of late tasks and missed deadlines and made it clear that should the claimant experience any problems in meeting deadlines, he must raise them with him at the earliest opportunity. The claimant gave him the impression that he agreed with the feedback and said that he would take it on board. The issue of annual leave was again discussed, and Mr Pugh noted that the claimant did not respond to his email of 15 December 2020, as requested. It was for Mr Pugh another example of the claimant failing to meet deadlines and following up instructions. The claimant said that he would respond to Mr Pugh's email that day, but Mr Pugh did not recall receiving a response from him to his email (239-246).

Guidance on home visits during Covid-19

52. On 7 January 2021, at 2pm, the claimant attended an Operations Management Team Meeting at which Ms Pratten, Mr O'Brien, Mr Pugh and others were in attendance. One of the items discussed was "Guidance on home visits". This was about the policy on home visits during the Covid-19 pandemic. The claimant asked for clarification on the reasons for some apparent discrepancies in the home visits in the Guidance document which the respondent had published. He suggested that the Guidance should be corrected to ensure that the respondent was following government guidance on working safely during the pandemic.
53. According to the claimant, neither Ms Pratten nor Mr Pugh acknowledged him raising health and safety concerns and in giving suggestions. His concerns, however, were noted by the Chairperson, Ms Helen Wilson, Head of Housing. After the meeting Mr Pugh had a discussion with him along with two Estate Services Departmental Managers who questioned the claimant's suggestions. Mr Pugh agreed to liaise with the Director of Health and Safety, Mr Paul Johnstone, to seek clarification on them.
54. In evidence before us, Mr Pugh said that at the Operations Managers Team meeting on 7 January 2021, the claimant raised concerns about the Covid-19 Guidance. The claimant worked in the Estates Team as Operations Manager and the Estates Teams would conduct estate inspections. Estate inspection should occur in relation to five risk assessments in relation to health and safety issues. At the meeting Mr Pugh's issue was whether they should be called Quality Assurance Checks when the claimant's concern was that it should state Estate Inspections and Quality Assurance Checks. Mr Pugh was not saying that estate inspections should not take place, only whether quality assurance should be part of estate inspection.
55. On 7 January at 4.30pm, the claimant attended a Staff Council Hot Topics Catch-Up meeting. It was agreed that "Home and estate visits during lockdown" should be added as an agenda item to be discussed at the next Staff Council meeting scheduled to take place on 19 January 2021.
56. On 13 January 2021, Mr Pugh emailed his three Operations Managers with an update on his discussion with the Director of Health and Safety regarding some of the suggestions made by the claimant to guidance document on home visits during Covid. In Mr Pugh's email he wrote:

"Hi all,

I'll add to our Monday morning agenda to discuss, but please read below/cascade where necessary. Alternatively, if you have immediate views on this, please get back to me asap.

Quality assurance checks.

I have sought clarification from H and S about the requirement for Estate Services to continue with quality assurance checks as part of the cleaning/performance monitoring process. In regard to whether the "estate inspection" heading covers

our control measures on the covid guidance, we agreed it was just semantics and effectively like most descriptions it was not prescriptive to each role and activity but a guide to be used as to whether a service should continue.

While concerns have been raised about continuing this work it is clear within government guidance that you continue your work where you are unable to complete this work from home. This work is a valuable part of confirmation of our standards, our service and is critical part of our relationship with tenants and leaseholders to hold us to account for the services and the service charge.

Under normal circumstances, a portion of those inspections would also involve meeting staff on site to check that the methods of operation were compliant. Currently, with a covid pandemic the direct supervision elements are challenging, and these where possible should be virtual, or completed following social distance requirements, in accordance with the latest controls and risk assessments.

The reduced direct contact with colleagues means that the actual assessment of cleaning and related services is more important in that it confirms work has been done and is of a sufficient standard and that we have played our part in providing residents with confidence in the cleaning and hygiene of our blocks during the covid outbreak.

Line managers have a role to play in supporting our staff and supervision by the above means as a way of auditing to ensure standards for our residents.

To ensure safety, a separate risk assessment and safe system of work has been produced to ensure safety of our teams when completing this work. There is also a plentiful supplies of PPE at stores.

Any questions come back to me.”

(273-274)

57. On 18 January 2021, the claimant attended a weekly Departmental Operations Managers meeting during which several items were discussed. He questioned Mr Pugh's email sent on 13 January 2021. Under "Estate/Inspections Quality Assurance", item 11, he wanted the main version of the Covid Guidance document updated. Mr Pugh confirmed that his email had input from Mr Johnstone, Director of Health and Safety. It is recorded that the claimant confirmed that he would speak to Mr Johnston directly to agree a way forward. The notes of the meeting do not suggest that what Mr Pugh had stated was an instruction to the claimant to speak to Mr Johnstone directly. (299-305).
58. The claimant wrote in his witness statement, at paragraph 28, that he expressed apprehension about approaching the Director of Health and Safety. He was raising a legitimate health and safety concern, but it was not seen as positive and constructive by the respondent. He agreed to speak to Mr Johnstone to discuss a way forward.
59. He attended a Staff Council meeting on 19 January 2021, at which various items on the agenda were discussed including "Home and Estate visits during lockdown". In paragraph 8.4, it is recorded that he explained that in the

Covid 19 pandemic Guidance document, in relation to home visits, some job roles, such as Security Guards, were overlooked. He also said that estate inspections should not be carried out, but the respondent was being advised to do these. It was agreed that a member on the Council would look into it and to consider it in the Guidance (306-310).

60. The 15 January 2021 version of the Guidance states that estate inspections should only be carried out for fire risk actions and in relation to health and safety issues (280).
61. A one-to-one meeting was held on 19 January 2021. Mr Pugh informed the claimant that he was unable to progress with new tasks and objectives for him because he could not complete the old tasks and objectives. It was clear that various tasks were set at earlier one-to-one meetings but had either not been met or partially met. The claimant gave his account of why the deadlines were not met. He said that he was “juggling too many balls” but did not refer to the time he spent on union activities as a reason for missing the objectives or targets. In any event, Mr Pugh did not believe that the claimant’s engagement in union activities was a factor. They discussed the recommendations by a consultant in relation to the claimant’s ADHD but for financial reasons they were not progressed. Mr Pugh was concerned about his ability to complete tasks and that the outstanding tasks were affecting the wider team and the team’s progress, and that it better not to give him any new tasks as they would impact on his colleagues’ work. They discussed his union activities and he agreed that his priority was the Operations Manager role. The following was recorded;

“JO agreed with my understanding regarding ensuring that priority was the job itself. JP said that JO values the work he does with Unison and must morally feel supportive to Unison however JO needs to concentrate on business and the job. JO is getting to the point where his performance is negatively skewed, there’s too much of a pattern of and common theme of:

- Missing targets/deadlines relating to normal course of work ie emails.
- Missing objectives.
- Agreeing tasks and then changing mind later example the Quality Assurance inspections by team leaders to complete in January 2021 in the rest of Tower Hamlets, to changing that he wanted staff to buy into it and feel part of the process.
- Focussing on minor points during team meetings and not able to move on swiftly.

JO said that he is a work in progress/developing. JO said that he took the decision to step down as Convenor. JO said he finds it difficult for anyone outside to understand. JO said he know the organisation has put a target on his back. JP asked if he felt the same about JP. JO said he didn’t feel that JP has a target on JO’s back as they were able to talk through things.

JO also self-assessed that he felt he was not delegating where he could. JO said he doesn’t have confidence that his direct reports can do what he has instructed. JP confirmed that JO should take action on performance if he has those competency issues with staff.” (316)

62. Mr Pugh informed the claimant that he, Mr Pugh, felt like he was being ignored by him by repeatedly asking him for information and not completing agreed tasks. When tasks were due, he would then try to agree different deadlines without forewarning Mr Pugh in advance that the tasks may be delayed. He did not refer to his union activities when describing an average day nor did Mr Pugh believe that his union activities were impacting on his ability to meet deadlines. Advice was given by Mr Pugh on managing his workload. Mr Pugh was unable to progress future objectives or tasks with him because they were still trying to get the old ones completed. (320).
63. The claimant's management of his team's performance was also discussed. He had not sent his direct reports' notes of their one-to-one meetings and there was a backlog. Mr Pugh reiterated the importance of carrying out this work. In relation to the annual leave issue, the claimant stated there was no holiday policy and he felt that he had not operated outside of it. In Mr Pugh's view, the claimant's performance worsened as he, Mr Pugh, was an Operations Manager prior to his current role as Head of Estates Services, and was aware of what the role entailed. The claimant had repeatedly shown that not only did he not complete tasks on time, but the situation was getting worse and was not sustainable.

#### Termination of the secondment

64. Around this time, Mr Pugh discussed with HR the possibility of terminating the secondment. He spoke to Ms Jenny Stark, Head of Employee Relations, in December 2020 and in early January 2021. He asked whether it would be better for the claimant to go back to his substantive post as Security and Lifestyle Manager as he was struggling in the role of Operations Manager. After the meeting with the claimant on 19 January 2021, he resumed his discussion with HR and was satisfied that despite extensive support offered to the claimant, he was not meeting the requirements of the role. Mr Pugh stated that his decision to terminate the claimant's secondment was not taken solely by him but also on the advice of HR. He was advised by Ms Stark not to initiate a formal Performance Improvement Plan as the claimant had already been through an informal one. Sustained improvement had not happened and as he had a substantive role as Security and Lifestyle Manager, it was appropriate to terminate the secondment.
65. We find that in relation to the one-to-one meeting held on 19 January 2021, Mr Pugh had not informed the claimant that he was contemplating terminating the secondment and had set him a target to compete by 31 January 2021 (325).
66. On 21 January 2021 at 12:31, he wrote to the claimant:

"I understand that you have recently raised concerns at Staff Council regarding estate inspections and quality assurance checks continuing to take place. Catherine has asked me to ensure that you understand the process and the required outputs from these tasks. The quality assurance checks take place to ensure that the caretakers and operatives are completing their tasks as directed, which is more

important than ever given the current pandemic. The Operations Managers complete further checks to ensure that our highest priority blocks are being maintained to a high standard and that the Team Leaders /Estate Managers are monitoring standards effectively.

As I have previously advised, I have taken advice from the Director of Health and Safety who has confirmed that this is appropriate conduct as long as the correct H&S Guidance has been followed – ie social distancing, wearing PPE, staggering staff times to avoid public transport. This has been in place in North London since the beginning of the pandemic. It should also be noted that all staff have a personal risk assessment in place so that we consider their personal circumstances and make adjustments where necessary. I have also checked the position in South London who also have in source estate services provision, and they are also completing quality assurance checks.

I was surprised to note that this has been raised in a public forum given the previous clarity that I have provided on this matter by email (attached and sent to you on 13 January 2021) and agreed actions at our team meeting on 18 January 2021 (I have inserted the extract below from the weekly ops teams minutes sent to you on 18 January 2021). This guidance represents Clarion's positions on the issues raised and that this is clear. I shall be sending this email on to Catherine Kyne and Michelle Reynolds to assure them that guidance has been issued."

(331-332)

67. The claimant replied at 12:55 the same day stating the following:

"Hi Jak,

There is clearly a misunderstanding here and I don't appreciate the inaccuracies in your email. It would have been better for you to have called me to speak about this before sending your email, so you had an understanding of what was said and the context.

I would also like to clarify that as an accredited trade union representative of Clarion Housing Group, I have the right to speak about whatever I like in a confidential staff council setting. This is now the second time a member of management within the North London Region has attempted to express surprise or dictate how I should speak at staff council which is completely unacceptable and needs to be formally investigated.

I will be liaising with Michelle directly on this so its crystal clear what the truth is on this issue."

(455)

68. On 24 January 2021 at 16:39, Mr Pugh emailed the Operations Managers, including the claimant, in relation to the updated Guidance on home visits during Covid-19. He wrote:

"Hi everyone

Please find attached an updated version of the guidance. There are only three amendments this time which are all points of clarification rather than change.

- Surveyors legal disrepair visits fall within the guidance for surveyor's visits.
  - Security and lifestyle team concierge and block patrols have been added.
  - Estate team leader manager's quality assurance checks have been added.
- I will add to agenda to ensure this is understood." (354)

69. The claimant responded on 25 January 2021 at 8:01am, acknowledging the updated version of the Guidance and welcoming the recommendations. He went on to suggest four further recommendations. In relation to Mr Pugh's email of 13 January 2021, in which he stated that estate inspections and quality assurance checks were the same thing, the claimant wrote that it was important to point out and seek clarity on whether estate inspections encompassed checking the quality of caretaker and Mobile Operative cleaning and Team Leader/Estate Manager Rating Standards, reporting repairs and tenancy management issues.
70. He then concluded:
- "Hopefully we can discuss this further at our meeting to ensure guidance is much clearer for housing staff who are working on Clarion estates during the Covid 19 pandemic." (353)
71. Mr Pugh responded by emailing the claimant stating that he had passed the claimant's recommendations to Ms Sally Daw, Head of Housing – Project. He advised that there was more than sufficient information in the Guidance for managers to be clear with staff what they continue to do and how it should work. Should he remain unsatisfied with the response he should contact Ms Daw directly. (353)
72. An Operations Managers' Team meeting was held at 9.30am on 25 January 2021, at which the three Operations Managers attended as well as Mr Pugh. During the meeting there appeared to be a disagreement between the claimant, Mr Pugh, Mr O'Brien and Mr Lyons about the "semantics and the intended coverage this covid guidance". Mr Lyons explained that the Guidance, as intended, was an evolving document which, by the end of the day, may need to be updated. The agreed action was that the claimant and Mr Pugh would discuss the next steps after the meeting. There is no reference in the notes of the claimant saying that he was raising the issue of the Guidance in his role as a health and safety official (357-365)
73. At the end of the meeting Mr Pugh met with the claimant to discuss how to approach the Health and Safety Director in the hope of resolving the issues raised. Mr Pugh then informed the claimant that he had decided to terminate his secondment based on performance and their discussions during previous one-to-one and at other meetings. The claimant requested that his decision be put in an email and repeatedly spoke over Mr Pugh accusing him of not knowing what he was doing which Mr Pugh found to be quite threatening. When he mentioned it to the claimant, the claimant responded by saying that he, Mr Pugh, did not know what threatening was.
74. On the same day Mr Pugh sent the claimant an email at 11:35am, confirming that his secondment would be terminated, and that he would

return to his substantive role in the Security and Lifestyle Team effective from 1 February 2021. He would continue to receive an Operations Manager's pay until 28 February 2021. Mr Pugh wrote:

“To confirm the conversation we have just had; and our one-to-one last week, we spoke of your performance levels and since last week you have not prioritised, responded, completed anything that's been due or been agreed.

I have given thought to this since our one-to-one last week, looking back at all our one-to-ones and your time reporting to Zoe Pratten where there was an informal performance improvement plan where you have been supported.

I have also sought advice regarding your unsatisfactory performance and conclude that I will be ending your secondment of “Operations Manager” with one month's notice. You will move to your substantive position as Security and Lifestyle Manager from 1 February 2021, which is currently vacant. You will continue to receive Operations Manager pay until 28 February 2021.

I explained and re-explained this on multiple occasions throughout today's conversation. On each occasion you interrupted me saying repeatedly “I don't understand, and to put it in an email”.

You also told me I didn't know what I was doing, in a manner that I perceived to be threatening. When I told you of my perception, you told me I didn't know what threatening was, which I also found to be further threatening.

I understand you will need some time to process this. We can have a meeting on Thursday 28 January 2021 at 10am to discuss the practical arrangements (diary invite to follow). In the meantime, please submit anything that is outstanding including any tasks that is not complete. I will need you to complete some handover notes in preparation for this meeting time above.”

(351-352)

75. On 28 January 2021, the claimant called in sick with work-related stress and was signed off for four weeks. He spoke to Mr Pugh that morning who sent an email in which he stated that he was sorry to hear that the claimant was unwell with work-related stress and asked whether there was anything he could do to support him. He also referred to the conversation with the claimant who said that it was up to Mr Pugh to do what he thought was best. The claimant had no reservations about the secondment coming to an end. (366-367).
76. He was off work on long-term sickness due to anxiety and work-related stress, and later had Cognitive Behavioural Therapy.
77. On 29 January 2021, Mr Pugh sent a formal letter to him terminating the secondment in which he set out his reasons and stated that he had decided that it would be unfair to apply the performance improvement process because it would result in the claimant not being entitled to a pay increase or bonus payment. He would revert to the Security and Lifestyle Manager's salary of £35,693. (673)



78. The claimant was paid his salary as Operations Manager up to 28 February 2021.
79. On 14 May 2021, he lodged a formal grievance as well as a whistleblowing claim which was investigated and the outcome given in writing on 16 July 2021, in which his grievance was not upheld. He appealed on 30 July 2021 but was unsuccessful.
80. In answer to a question put to him by a member of the tribunal, the claimant said that he spent 50% of his work time engaged in trade union activities. This was the first time he stated that he spent that proportion of time on trade union activities. This percentage is not referred to in any of the one-to-one documents put before us by the parties.

### Submissions

81. We have taken into account the submissions of Ms Stanley, counsel on behalf of the claimant, and by Mr Dhorajiwala, counsel on behalf of the respondent. We have also taken into account the authorities which they have referred us to. We do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013.

### The law

82. The relevant section on detriment for a union reason is section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992. It states,

**“146 Detriment on grounds related to union membership or activities.**

- (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
  - (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
  - (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,
  - (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or
  - (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.
- (2) In subsection 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.

(2A) In this section—

(a) “trade union services” means services made available to the worker by an independent trade union by virtue of his membership of the union, and

(b) references to a worker’s “making use” of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

(2B) If an independent trade union of which a worker is a member raises a matter on his behalf (with or without his consent), penalising the worker for that is to be treated as penalising him as mentioned in subsection (1)(ba).

(2C) A worker also 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 because of the worker’s failure to accept an offer made in contravention of section 145A or 145B.

(2D) For the purposes of subsection (2C), not conferring a benefit that, if the offer had been accepted by the worker, would have been conferred on him under the resulting agreement shall be taken to be subjecting him to a detriment as an individual (and to be a deliberate failure to act).

(3) A worker also 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 enforcing a requirement (whether or not imposed by a contract of employment or in writing) that, in the event of his not being a member of any trade union or of a particular trade union or of one of a number of particular trade unions, he must make one or more payments.

- (4) For the purposes of subsection (3) any deduction made by an employer from the remuneration payable to a worker in respect of his employment shall, if it is attributable to his not being a member of any trade union or of a particular trade union or of one of a number of particular trade unions, be treated as a detriment to which he has been subjected as an individual by an act of his employer taking place for the sole or main purpose of enforcing a requirement of a kind mentioned in that subsection.
- (5) A worker or former worker may present a complaint to an industrial tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.
- (5A) This section does not apply where—
- (a) the worker is an employee; and
  - (b) the detriment in question amounts to dismissal.”
83. An unjustifiable sense of grievance cannot amount to detriment, and a claimant does not have to show that he or she suffered some economic or physical consequence. Detriment means putting a claimant at a disadvantage, Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, House of Lords.
84. In relation to section 146(1) TULR(C)A, on the issue of the “sole or main purpose” the test is subjective. It is what was either the sole or main purpose of the person who committed the act or deliberately failed to act? “For the purpose of” means “an object which the employer desires or seeks to achieve”, UCL v Brown [2021] IRLR 200.
85. Section 148(1) provides,
- “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.”
86. Although the onus is on the employer show the sole or main purpose for which they acted or failed to act, a claimant under section 146 has to raise a prima facie case of detrimental treatment. If established, then the employer has to show the main or sole purpose of his or her act, or failure to act. In other words, “what were the factors operating on the mind of the decision-maker.”, Dahou v Serco Ltd [2016] EWCA Civ 832, Laws LJ at paragraphs 29-30.
87. An employer does not have to be motivated by malice or a deliberate desire to be rid of a trade union activist in order to fall within section 152(1), dismissal for a trade union reason, or section 153, selection for redundancy for a trade union reason, Dundon v GPT Ltd [1995] IRLR 403, a judgment of the Employment Appeal Tribunal, Mrs Justice Smith.

## Conclusion

88. We accept that the claimant was an elected member of a recognised trade union, Unison, and attended Staff Council meetings as part of his union role. We agree with Ms Stanley that he was engaged in union activities in representing members at grievance and disciplinary hearings; advising on pay issues; in raising issues at the Hot Topic Catch Up meeting on 7 January 2021; and at the one-to-one meeting on 19 January 2021, when he said that he was juggling too many balls. On the face of it, he was engaged to a limited extent in trade union activities, the equivalent of one day a week.
89. He was involved in a disagreement with Mr Pugh over how those in the Estates team should be treated during Covid-19. During their discussion on 25 January 2021, his secondment contract was terminated. He has suffered detrimental treatment because the termination which put him at a disadvantage as it was a promotion and was not terminated at the end of the revised term, Shamoon.
90. The issue is whether the sole or main reason in terminating his secondment, was his trade union activities?
91. We accept that by 25 January 2021, in the claimant's mind, there were unresolved issues in relation to the coverage of the Guidance during Covid and he was advised to speak to Mr Johnstone, Director of Health and Safety. He raised these issues in his capacity as a trade union representative. As far as Mr Pugh was concerned the issue was one of semantics and not a serious concern. It must have, however, been an issue that played on his mind at the time, though its significance was comparatively minor as he, Mr Pugh, was a member of the union and had never discouraged his staff from participating in union membership and/or activities.
92. We have come to the conclusion, having regard to the history of the claimant's secondment to the Operations Manager role, that there were issues with his performance, such as not adhering to deadlines; deadlines having to be extended; serious time management issues, and holiday leave having to be forfeited. As we have found that performance issues were first raised by Ms Pratten at her one-to-one meetings with him resulting in him being on an informal Improvement Plan and his secondment being extended. Although he achieved many of the tasks set by Ms Pratten, and his performance did improve, she had reservations when he was taken off the Plan and his secondment extended as she wrote on 22 October 2020, that he must continue to improve as Mr Pugh would push him.
93. Mr Pugh also had similar concerns to those highlighted by Ms Pratten in relation to the claimant's performance. At his first one-to-one meeting the claimant did not want to take on additional staff on the same salary. Mr Pugh flagged up the possibility of him returning to his substantive role as Security and Lifestyle Manager. Mr Pugh was concerned that the performance issues were adversely impacting on his other colleagues' work. There was also the issue of forfeited leave to which the claimant said should

not concern him as it was during the time when he was Security and Lifestyle Manager but some of his direct reports lost their accrued leave.

94. Mr Pugh did speak to Human Resources as early as December 2020, about terminating the claimant's secondment. He also discussed putting him on a Performance Improvement Plan but advised that such a course of action was not necessary as he had been on an informal Plan. Performance concerns continued into January 2021, which, by then, Mr Pugh had decided that the claimant's performance in the role was unlikely to improve significantly and that his secondment be terminated. While it might have been desirable to have allowed the period of the extended secondment to run its course, there was little to convince Mr Pugh that there would be significant improvements within the remaining period. We accept the reasons given by him in terminating the secondment. He wrote,

“To confirm the conversation we have just had; and our one-to-one last week, we spoke of your performance levels and since last week you have not prioritised, responded, completed anything that's been due or been agreed.

I have given thought to this since our one-to-one last week, looking back at all our one-to-ones and your time reporting to Zoe Pratten where there was an informal performance improvement plan where you have been supported.

I have also sought advice regarding your unsatisfactory performance and conclude that I will be ending your secondment of “Operations Manager” with one month's notice.”

95. We have come to the conclusion that the main reason why Mr Pugh terminated the claimant's secondment was his poor performance which had been a consistent theme in his role as Operations Manager. Accordingly, this claim is not well-founded and is dismissed.

#### Withdrawal of the victimisation and harassment claims

96. The claimant withdrew his claims of victimisation and harassment, but through Ms Stanley, he invited the Tribunal not to dismiss them as he may pursue similar claims in the civil courts at an unspecified date in time. If the claims were dismissed, he would be unable to pursue them because of the application of res judicata.
97. The application was opposed by Mr Dhorajiwala who submitted that arguing res judicata is not a good reason the tribunal should decline to dismiss the claims. The claims should be dismissed by the tribunal upon withdrawal.

#### The law

98. Rule 52 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, states,

“Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless –

- (a) the claimant has expressed at the time of withdrawal a wish to reserve a right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
- (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.”

99. The claimant’s case is that he may, at some unspecified point in time, issue similar claims in an unspecified civil court and that to issue a judgment would effectively prevent him from raising similar claims. We find that argument unpersuasive. There has to be finality in litigation. The respondent is expected, if the application is allowed, to wait indefinitely to respond to either one or both claims. The default position is to issue a dismissal judgment unless either rule 52(a) or (b) applies. We have come to the conclusion that the harassment and victimisation claims should be dismissed upon the claimant’s withdrawal. They are, accordingly, dismissed upon withdrawal.

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Employment Judge Bedeau

5 September 2023

Date: .....

Sent to the parties on:

5 September 2023

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For the Tribunal Office