



EMPLOYMENT TRIBUNALS

Claimant: Ms S Gedling
Respondent: Kent Community Health NHS Foundation Trust
Heard at: London South Tribunal via Cloud Video Platform
On: 19 February 2024
Before: Employment Judge Brewer

Representation

Claimant: Mr F Clarke, Counsel
Respondent: Mr J Jupp, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claim that the respondent failed to allow her to take reasonable time of under section 168 and/or section 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 fails and is dismissed.

REASONS

Introduction

1. This case was heard over 1 day. The claimant gave evidence on her own behalf and for the respondent I heard from Denise Wilkes and Sarah Hayden. The witnesses provided written statements supplemented by their oral evidence.
2. I was provided with an agreed bundle of documents running to 351 pages. One extra document was provided during the hearing on my request. Finally, I had written submissions from Mr Jupp. Both Counsel made oral submissions. In reaching my decision I have taken account of all of the material that was before me.

Issues

3. The respondent produced a list of issues which the claimant amended. We discussed this at the outset of the hearing and agreed that the correct material part of the list, the identification of the claims being pursued was in fact the original unamended version prepared by the respondent. The other parts of the list of issues merely sets out the legal questions and either version would be sufficient. The list of issues was as follows:

Time off for Trade Union duties, s. 168 TULRCA

1. Is the Claimant an official of an independent trade union recognised by the Respondent?
2. Did the Respondent fail to permit the Claimant to take time off on two occasions:
 - a. On 17 to 19 April 2023 to attend a health conference?
 - b. On 26 April 2023 to attend equality and diversity training?
3. If so, was the time off:
 - a. For the purpose of carrying out duties concerned with the performance of functions related to or connected with matters falling within the recognition agreement between UNISON and the Respondent (i.e. within s. 168(1)(b))?or
 - b. For the purposes of undergoing training in aspects of industrial relevant to the carrying out of duties related to or connected with matters falling within the recognition agreement between UNISON and the Respondent (i.e. within s. 168(2))?
4. If so, was the amount of time off requested by the Claimant on 17 to 19 April 2023 and 26 April 2023 reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS?

Time off for Trade Union activities, s. 170 TULRCA

5. Is the Claimant a member of an independent trade union recognised by the Respondent in respect of that description of employee?
6. Did the Respondent fail to permit the Claimant to take time off on two occasions:
 - a. On 17 to 19 April 2023 to attend a health conference?
 - b. On 26 April 2023 to attend equality and diversity training?

7. If so, was the time off:
 - a. For the purposes of taking part in any activities of UNISON, or;
 - b. For taking part in any activities of UNISON or any activities in relation to which the Claimant would have been acting as a representative of UNISON?
8. If so, was the amount of time off requested by the Claimant on 17 to 19 April 2023 and 26 April 2023 reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS?

Remedy

9. Is the Claimant entitled to a declaration that her complaint is well founded?
10. Is it just and equitable for the Claimant to be awarded compensation and if so how much?

Law

4. Section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) provides as follows:

(1) An employer shall permit an employee of his who is an official of an independent trade union recognised by the employer to take time off during his working hours for the purpose of carrying out any duties of his, as such an official, concerned with—

(b) the performance on behalf of employees of the employer of functions related to or connected with matters falling within that provision which the employer has agreed may be so performed by the trade union, [or

(2) He shall also permit such an employee to take time off during his working hours for the purpose of undergoing training in aspects of industrial relations—

(a) relevant to the carrying out of such duties as are mentioned in subsection (1), and

(b) approved by the Trades Union Congress or by the independent trade union of which he is an official.

(3) The amount of time off which an employee is to be permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS.

(4) An employee may present a complaint to an employment tribunal that his employer has failed to permit him to take time off as required by this section.

5. Section 170 TULRCA provides as follows:

(1) An employer shall permit an employee of his who is a member of an independent trade union recognised by the employer in respect of that description of employee to take time off during his working hours for the purpose of taking part in—

(a) any activities of the union, and

(b) any activities in relation to which the employee is acting as a representative of the union.

(3) The amount of time off which an employee is to be permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS.

(4) An employee may present a complaint to an employment tribunal that his employer has failed to permit him to take time off as required by this section.

6. In determining what is a reasonable amount of time off, the employer may take into account the particular request by the employee on the occasion in question, the amount of time off that has already been granted on other occasions to that employee, including the employee's general absence record (see for example **Wignall v British Gas Corporation** [1984] ICR 716, EAT and **Hairsine v Kingston upon Hull City Council** 1992 IRLR 212)). It may be appropriate to consider what other time off the employee agreed in the near future.
7. In relation to a claim under s.170, there must be a genuine link between the activity in question and the employment relationship between the employer, the employee and the trade union (see **Luce v Bexley London Borough Council** [1990] ICR 591, EAT).
8. Finally, although I was taken to the case law which suggests that the test I should apply is whether the refusal of time off fell within the band of reasonable response, in my view the correct test is simply whether the respondent has allowed the claimant such time off as is reasonable in all the circumstances (see **Chloride Technical Limited v Cash and ors** EAT 37/84)
9. Although not law, there is also an ACAS Code of Practice on Time Off for Trade Union Duties and Activities (2010) which I have also taken into account.

Findings of fact

10. I make the following findings of fact (numbers refer to pages in the bundle unless otherwise stated).

11. The respondent is a Community Health Trust which delivers healthcare in the community. The claimant is employed by the respondent as a Bladder and Bowel Assistant Practitioner in the Kent Continence Service. Her employment commenced on 11 January 2016.

12. The claimant is a trade union representative for Unison and deputy Branch Secretary. In that role she undertakes a number of duties including consultation and negotiation over various matters, she receives training so better to fulfil her union duties and of course she undertakes so-called ER work, that is supporting and representing members dealing with, for example grievance and disciplinary matters.

13. In her clinical role the claimant is a Band 4 and is the only person undertaking her particular role. Her main duties involve triaging patients, administering bookings, administering the product delivery service, actioning nurses' assessments, answering patient questions relating to continence products, providing education services, and supporting the continence clinic.

14. If the claimant is not available, then her work is undertaken by specialist nursing staff at Band 6 or Band 7, considerably senior to the claimant, which inevitably takes them away from their own normal work.

15. The Kent Continence Service is a service 'at risk'. The impact of that was explained by Caroline Knott the Operational Manager of the continence service (amongst others) in an email to the claimant dated 26 July 2023 [259/260]. She stated:

"The team has been on this risk register since October 2022. This is due to staffing issues and delays in patient care. Therefore, adding more restrictions to the availability of our staff has a significant impact on patients and the remaining clinical and admin teams. This would not be justifiable in the long-term.

Unfortunately, we are not aware of any other Band 4 who can support us on bank as this is a specialist area of care. We would have to train a member of staff. As the hours are ad hoc, with 2 hours 'here and there', this would be really challenging to cover and for the staff member to maintain their competence."

16. Unison is recognised by the respondent. There is a recognition agreement in place with all of the respondent's recognised trade unions. The recognition agreement provides:

6.3 Accredited Union representatives will be permitted reasonable and appropriate working time to enable them to carry out Union duties, examples of these can be seen in Appendix A

“7.1 However the Trust will assist recognised Unions to discharge their responsibility by allowing reasonable time off with pay for representatives to take part in relevant training activities whether organised by their own Union or by other organisations subject to the needs of the service.

7.2 Where a Union has identified a need for training and wishes a representative to attend a course it should inform management of the purpose of the training, confirmation of attendance, and if requested provide a copy of the syllabus.”

17. Appendix A [76] of the recognition agreement provides examples of agreed duties of trade union representatives.
18. In her evidence given under cross-examination the claimant accepted that she had “*an awful lot of time off for job matching*”. The respondent along with all NHS Trusts undertakes job matching which principally involves ensuring that job descriptions are correct. This task is undertaken by the particular Trust, including therefore the respondent, in partnership with its recognised unions. This time off was time off for trade union duties.
19. The respondent believed that at a meeting on 21 November 2022 it had agreed to allow the claimant 10 to 12 hours’ time off each month for trade union duties which was made up of 7.5 hours to deal with preparing for and attending the respondent’s staff forum. The balance of the time could be used as the claimant saw fit. The claimant was allowed time off for job matching. Time off beyond this agreed amount, such as time off for ER work would be agreed on an ad hoc basis.
20. The respondent accepts that the claimant was unhappy with this, but it proved very difficult to arrange a follow up meeting with the claimant to discuss matters further.
21. The claimant booked 3 days off from 17 to 19 April 2023 to attend a Health Conference which she says was related to health, staffing levels and the affect it has on patients health and mental wellbeing, pay and how can the health organisations support staff that are currently using food banks, and also how to support the NHS on getting more funding from the government and how to support this (see ET1). This was refused by the respondent.
22. The claimant also now says that she was refused time off by Denise Wilkes for her to attend legal training on discrimination on 26 April 2023.
23. In the 67 weeks to July 2023 the claimant had taken 176 hours of time off for trade union duties. The unchallenged evidence of the respondent was that, using the Standard Operating Procedure for band 4 in the Kent Continence Service) of 6 face to face contacts per day, plus 20 patients per week for PDS triage, the loss occasioned by the time off taken amounted to 21.15 days of patient contacts, a loss/delay of 129 patient appointments and 12 PDS patients lost/delayed [259/260].
24. In a letter of 6 August 2023 [279] Sarah Hayden summarised the position to the claimant as follows:

“I received an email from you on 11 July 2023 detailing the meetings and events you were wanting time off work to attend. When added up, this totalled 315 hours per annum (6 hours per week) not including training and ER activity which you were unable to quantify. It is important to contextualise this in relation to other leave as well. You have an annual leave entitlement of 307.5 hours per annum (on average) which equates to a further 6 hours per week. The Trust also offer other generous leave entitlements to support a range of responsibilities that we may/may not have outside of work. With the hours of union time and annual leave alone, your requests would reduce patient provision by 32% which is simply not viable.

The service have done a detailed review of your request and equated the loss of patient activity which is already substantial with what we have agreed to support and anything further would make the whole service provision to patients unsustainable. On top of this, the service has been in business continuity since October 2022 due to staffing issues and delays in patient care.”

25. The reference here to business continuity is a reference to the service being ‘at risk’.
26. The claimant undertook early conciliation between 13 June and 25 July 2023. The claimant presented her claim on 25 August 2023.
27. There was an issue between the parties as to which provisions of TULRCA the claimant was relying on. This was clarified in an email of 19 December 2023 from the claimant’s solicitors [56]:

For clarification, the claimant's claim falls under s.168 in that the claimant has been refused permission to take time off to carry out trade union activities contrary to the content of the Recognition Agreement [s.168 (1) (b) and s.168 (2) (a) and (b) - the activities as stated previously are attending training which is covered within s.168 (2) (a) and (b).

Discussion and conclusions

28. In relation to the claim under s.168, the questions I have to answer are as follows:
 - 28.1. is the claimant an official of an independent trade union,
 - 28.2. is the trade union is recognised by the respondent,
 - 28.3. was the time off in issue for the purpose of the claimant carrying out duties as a trade union official concerned with the performance of functions related to or connected with matters set out in the recognition agreement at Appendix A [76], or
 - 28.4. if the time off was concerned with training, that such training was in aspects of industrial relations and was approved by her trade union,

28.5. was the amount of time off, the purpose, occasions, and conditions reasonable in all the circumstances having regard to the ACAS Code of Practice,

28.6. did the respondent fail to permit the claimant to take the time off?

29. It was of course conceded that the claimant was an official of a recognised trade union.

17 to 19 April 2023 Unison Conference

30. I shall deal first with the time off requested from 17 to 19 April 2023 to attend a health conference.

31. For this the conference needed to fall within s.168(1)(b) TULRCA which allows for time off for the purpose of carrying out:

31.1. duties as a trade union official,

31.2. or is concerned with the performance of functions related to or connected with matters within the recognition agreement that the employer has agreed may be so performed by the trade union.

32. In my judgment neither of the above requirements is met in this case. I reach this conclusion for the same reasons set out by Mr Jupp in his written submissions. Although "*Attendance at National/Regional meetings/conferences relating to health policy*" is provided for as an agreed duty within the recognition agreement (Appendix A [76]), the health conference did not fall within the ambit of this provision because:

32.1. the provision in the recognition agreement provides for attendance at union health conferences concerned with health policy relating to "*the agreed machinery for consultation or negotiation*" as opposed to health policy conferences generally,

32.2. the Agenda for the conference shows that it was principally concerned with discussing and voting on adopting motions which set out Unison's position on various matters such as pay, recruitment, campaigning against privatisation and pensions, and whilst I accept that there were some short fringe events and lunchtime sessions, only a very limited number could be said to fall within the ambit of the time off provisions in the recognition agreement.

33. Further, even if attendance at this health conference was agreed as a duty under the recognition agreement that does not mean it falls within s.168(2)(a). For attendance at the conference to be such a duty, the claimant must have attended for the purpose of carrying out her duties as a trade union official and it must be concerned with the performance by her on behalf of employees of functions related to or connected to matters which the respondent has agreed may be performed by Unison. There is no evidence that attendance was for the purposes of the claimant

carrying out her duties as a Unison official within the meaning of TULRCA or the recognition agreement.

34. For those reasons alone the claim fails. I shall consider the reasonableness issue below in any event.

26 April 2023 training

35. It would seem that this training was to be given by the solicitors instructed by Unison and although described as “legal training” I was not presented with any clear evidence as to what the content or purpose of the training was. In her claim form, paragraph 7 at [20], the claimant refers to this training as “*legal training on discrimination... This was Training for Chairs training which was training to chair meetings and separate from the discrimination training that took place on 27 April 2023...*”. So it would seem that the claimant was less than clear on what this training was.

36. However, in her email of 27 March 2023 to Titi Oloruntoba [184/185], the claimant describes the 26 April ‘training’ as “*a Unison event...*” and training she wanted further time off for on 27 April 2023 (not part of this claim) as “*Disciplinary Training*”.

37. So, considering the contemporaneous documentation, it would seem that the training on 26 April 2023 was not legal training on discrimination, it was an unspecified Unison event and without further details this does not seem to me to fall within s.168(2)(a) or (b).

38. I shall again deal with the reasonableness question below.

39. I should add for the sake of completeness that I remain unclear as to why the claim in relation to the 26 April training was ever brought. It seems clear from the contemporaneous documentation that the claimant did not seek time off for the Unison event on 26 April.

40. The allegation about 26 April is quite specific. It is that “*the claimant was refused time off by Denise Wilkes for the claimant to attend training on discrimination on 26 April 2023...*”.

41. We now know that this was in fact a Unison event. Further and importantly, Denise Wilkes only became involved in the issue of the claimant’s time off in March 2023 [169]. Ms Wilkes sent the claimant a letter introducing herself and setting out her understanding of the time off issue.

42. The claimant responded to Ms Wilkes on 16 March 2023. There is no reference to seeking time off on 26 April.

43. There was an exchange of emails between the claimant and Titi Oloruntoba about the refusal of time off for the claimant to attend the Unison 3-day health conference in April [175 – 177]. There was no mention of time off for 26 April in those exchanges.

44. The request for time off on 27 April came in around 27 March 2023 [184] and it is clear that there were some concerns about giving the claimant further time off [183].

45. On 27 March 2023 the claimant wrote an email to Titi Oloruntoba and said this:

“I have advised that I will take 26 April as A/L for me to attend a Unison event I have taken this decision in my attempt to be fair with [the respondent] given the time I need to take off in April...Although 26 April 2023 is training in good faith I am requesting AL due to time off requested in April...”

46. From this I conclude that, first the claimant never asked for, and was therefore never refused time off for any reason on 26 April (other than presumably seeking annual leave) and, second, that she clearly recognised that she was, in general, seeking a significant amount of time off.

47. If not for any other, for those reasons the claim fails.

S170 TULRCA

48. I do not need to consider this provision as it was either expressly or implicitly abandoned by the claimant in the email of 19 December 2023 from her Solicitor [56].

Reasonable time off in general

49. Although for the reasons above the claimant's claim fails, I should for the sake of completeness deal with the reasonableness question in general – that is had there been a refusal of time off, would that have infringed to reasonableness principle? I remind myself that I must look at all the circumstances when determining this issue.

50. The claimant works as a Band 4 specialist in an at-risk service. The respondent allows the claimant one day each month (between 10 and 12 hours) to prepare for and attend the respondent's staff partnership forum and to undertake other union duties. She is given additional paid time off for employee relations matters (or at least there is no suggestion in the evidence that such time off has ever been refused) and time off to undertake job matching.

51. The respondent's analysis in the email of 23 July 2023 [259] which I have cited above, and which was not challenged by the claimant, shows the amount of time off the claimant had in a 67-week period. Time off amounted to 175 hours which equates to about 4 weeks a year when the claimant is away from her role in the respondent on trade union duties or activities. When the claimant is away her Band 4 duties must be undertaken by Band 6 or Band 7 Specialist nursing staff which inevitably takes them away from their normal duties with the inevitable negative impact on patient services as set out by the respondent's witness evidence which was not challenged by the claimant.

52. Considering the amount of time off the claimant was afforded, considering the nature of the claimant's role and the nature of the service she works in, considering the impact of her time away from her work, and considering the ACAS Code of Practice,

I am satisfied that, whether in relation to 17 -19 April 2023 and/ or 26 April 2023, the respondent has not failed to permit the claimant to take time off under either s.168 or s.170 TULRCA.

53. For all of those reasons the claimant's claim fails and is dismissed.

Employment Judge Brewer

Date: 23 February 2024