

RESERVED JUDGMENT

HW/MF

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr C. E. McDonald

Respondent

The Secretary of State for
Work and Pension (Job
Centre Plus)

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Stratford

ON: 10-13 July 2006

CHAIRMAN: Mr J Scannell

MEMBERS: Mr G Lane and
Mr P J King

Appearances

For the Claimant: Ms H Gower (Counsel)

For the Respondent: Mr B Cooper (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that the Respondents did not subject the Claimant to any detriment for the sole or main purpose of preventing or deterring him from taking part in the activities in the independent trade union at an appropriate time. His complaint is dismissed.

REASONS

1. In this claim the Claimant alleges that he has been subjected to a detriment for the sole or main purpose of preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time.

2. In his ET1 the Claimant complains about two alleged detriments:-

- (a) that a disciplinary penalty imposed on him on the 8 December 2004:

"Was intended to prevent or deter me from my trade union activities as an elected representative of my union." and

- (b) that the decision to uphold that penalty on appeal, communicated to him on the 7 July 2005, "was for the same unlawful purpose".

3. The disciplinary action in question concerned allegations of bullying and harassment by the Claimant made by two other employees of the Respondent. These were:-

- (1) a complaint by Ravinder Sidhu that on the 16 February 2005 the Claimant harassed and bullied him by using threatening and abusive behaviour towards him when he, Ravinder Sidhu, crossed the official picket line at Stratford SSO. Ravinder Sidhu alleged that the Claimant used derogatory language when he called him "a piece of shit" and went on to say that Ravinder Sidhu should not bother to go to him in the future on any union business. This treatment caused Ravinder Sidhu to feel humiliated and angry. Since that date, and other than the 7 April, the Claimant ignored Ravinder Sidhu and failed to provide information and leaflets regarding union activity to Ravinder Sidhu even though Ravinder Sidhu continued to be a union member. This made Ravinder Sidhu feel excluded and victimised (the Sidhu complaint).
- (2) A complaint by Mike Attridge that on the 13 February 2004 in the Incapacity Benefit section at Stratford SSO, the Claimant harassed and bullied him by using threatening and abusive language towards him and that since that incident the Claimant had either ignored Mike Attridge totally or been abusive towards him when they passed in the corridors. This caused Mike Attridge to feel angry, frightened and stressed (the Attridge complaint).

4. In relation to the action taken in response to the Sidhu and Attridge complaints the only allegation against any individual in support of the complaint of the action taken against him, in the ET1, is the allegation that the decision maker, Ms Dallion Roye was biased. In support of that allegation the ET1 referred to previous "earlier and similar allegations", to an investigation interview which Miss Roye had attended with another employee, (Julia Wiggins) and to a previous "unproven complaint" against the Claimant by Julia Wiggins. A request for further and better particulars of the matters relied on by the Claimant provided clarification by the Claimant. On the basis of that clarification, the further matters relied on by the Claimant in support of his allegations that Miss Roye was biased are:-

- (a) Previous involvement by Miss Roye in three allegations of bullying/harassment against the Claimant relating to his behaviour as a picket during strikes on the 17 February 2004 and the 13 April 2004. Those complaints were made by Lucy Vincent and Mirza Tahir in respect of the 17 February, and Julie Wiggins who complained about an incident on the 13 April ("the Three Complaints").

- (b) Miss Roye accompanying Julie Wiggins at an interview conducted in relation to a complaint brought by the Claimant against Miss Wiggins. The Claimant's complaint related to the same incident during a strike on the 13 April 2004 as the complaint brought by Miss Wiggins against him and the interview took place on the 1 November 2004 ("the Julie Wiggins Incident").

5. An attempt to widen the issues in this case was the subject of a ruling by the tribunal at the beginning of the case preventing the widening of the issues which had been clearly pleaded after further and better particulars had been provided. A further attempt to widen the issues on the part of the Claimant occurred on the sixth day of this hearing and was also rejected by the Tribunal. It was clearly pleaded that the sole or main purpose of the acts complained of was preventing or deterring the Claimant from taking part in the activities of an independent trade union at an appropriate time. It had not been pleaded that the sole or main purpose was "penalising him for doing so". Reasons for both these rulings were given to the parties at the time of the rulings.

6. Therefore the issues for determination by this Tribunal were really very narrow. The issues were:-

- (a) Whether Dallion Roye decided to impose a disciplinary sanction on the Claimant for the sole or main purpose of preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time; and
- (b) Whether Isabelle Morton upheld that decision on appeal solely or mainly for the same unlawful purpose.

The Law

7. Both parties are in agreement as to the applicable law and have referred us to essentially the same cases. It is in the application of the law to the facts of this case that the parties differ.

8. The Claimant's complaint is that the Respondent (by the decisions of Miss Roye and/or Ms Morton) has breached section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) which provides, insofar as relevant:-

"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).....
 - (b) Preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time....."

9. It is accepted by the Respondents that the imposition of a disciplinary sanction such as took place in this case amounts to a detriment. The burden of proving the sole or main purpose of the imposition of the disciplinary sanction is on the Respondent (TULR(C)A, S148(1)).

10. It is clear from the submissions of both parties during this case that the tribunal must examine the principles which apply in relation to:-

- (a) determining the employers "purpose".
- (b) determining what constitutes "the activities of an independent trade union";
- (c) Determining what is "an appropriate time" for carrying out those activities.

"Purpose"

11. The question for the Tribunal is whether the disciplinary sanctions were imposed "for the purpose of" preventing/detering trade union activities. The purpose of an action is not to be inferred simply from its effects (even if those effects are likely or inevitable); "Purpose" _____ "an object which the employer desires or seeks to achieve" (*Department of Transport -v- Gallagher* [1994] ICR 967, CA.)

12. In other words the tribunal must look to see what the **conscious** purpose of Miss Roye and/or Ms Morton was. In that regard we accept the Respondent's submission that the task of determining the employers "sole or main purpose" under TULR(C)A, section 146, is closer to the task of determining the reason or principal reason for dismissal in an unfair dismissal claim than to the task of determining whether action is done "**on grounds of**" a protected characteristic in a discrimination claim. Unlike a discrimination claim, the Tribunal is not simply looking at all the evidence to see whether it can infer that trade union activities were an effective cause of the action (whether by way of conscious or subconscious motivation); rather, the Tribunal must look to see whether the **actual** purpose which Miss Roye/Ms Morton consciously had in mind was to prevent or deter such activities.

13. As in an unfair dismissal claim, the burden is on the Respondent to prove, on the balance of probabilities, the sole or main purpose for which the action is taken (TULR(C)A, S148(1)).

"Activities of an Independent Trade Union"

14. Both Claimant and Respondent have referred us to the same cases and have made their respective submissions. From their submissions and those cases we conclude as set out below.

15. The "activities of an independent trade union" include all lawful union activities which would not ordinarily amount to misconduct. They do **not** include the following:-

- (a) Action on a picket-line, such as swearing or threatening behaviour which constitute bullying or harassment. Such action falls outside the scope of lawful peaceful picketing (TULR(C)A, S220 and the Code of Practice,

Picketing (1992), paragraphs 28-30, 42) and cannot be regarded as an activity of an independent trade union for the purposes of section 146.

- (b) Other action during work time which amounts to misconduct of any kind, but in particular bullying/harassment. Actions which would ordinarily justify disciplinary action do not qualify for protection merely because they are done in the course of a trade union activity.
- (c) The protection afforded by section 146 must not be diluted by finding too easily that acts done for trade union purposes are not protected because of the manner in which they are done. However in our judgment analysis of the relevant authorities establishes the following principle namely, **trade union activities carried out in a manner which is merely unreasonable or "over the top" still qualify for protection; however, where an act crosses the line such that it would ordinarily constitute misconduct justifying disciplinary action, that act will not be protected merely because it is done in the course of a trade union activity. There is a difficult boundary between action which is and which is not trade union activity.**

16. It is convenient at this stage to consider briefly the acts of misconduct which were found proven against the Claimant and for which he was disciplined:-

- (a) Miss Gower, for the Claimant, properly conceded in her oral submissions that swearing on the picket-line cannot be a legitimate trade union activity.
- (b) Similarly she conceded that none of the actions of which the Claimant was accused by Mike Attridge would constitute legitimate trade union activities.
- (c) Miss Gower argued, however, that telling Mr Sidhu, as he crossed the picket-line, that he should not go to the Claimant in future if he wanted help from the union would be a trade union activity. It is the Respondent's submission that, whilst saying those words of themselves might fall within the scope of legitimate union activity, if they are said in a way which is threatening and/or forms part of a course of conduct which amounts to bullying/harassment, then the line has been crossed and the Claimant cannot rely on the protection of section 146. The question for the Tribunal is whether Miss Roye and/or Ms Morton had the purpose of deterring/preventing the Claimant from saying such words of themselves, in the future, or whether they had the purpose of deterring/preventing him from behaving in a threatening way which amounted to bullying/harassment (whatever precise words he may use). The Tribunal considers that they had the purpose of deterring/preventing him from behaving in a threatening way which amounted to bullying/harassment.
- (d) Similarly Miss Gower argued that the distribution of leaflets, including the **selective** distribution of leaflets, is a trade union activity. It is the Respondent's submission that, whilst the selective distribution of leaflets

"per se" may be a legitimate trade union activity if it is done in such a way that it amounts to an abuse of power which isolates and excludes the employee who is not given leaflets then such conduct would constitute bullying/harassment under the Respondent's procedures and would ordinarily justify disciplinary sanction. In those circumstances the Respondent submits it would not be a protected union activity for the purposes of section 146. Again the question for the tribunal is whether Miss Roye and/or Ms Morton had the purpose of deterring or preventing the Claimant from selectively handing out leaflets **per se**, or whether they had the purpose of deterring/preventing him from doing so in a way which amounted to bullying/harassment. The Tribunal considers it was the latter purpose.

17. We bear in mind that (having regard to the **purpose test**) we are not engaged in the task of concluding whether what **actually** happened was a trade union activity or not. Our task is to determine what Miss Roye and/or Ms Morton **believed** had taken place and whether their purpose was to prevent the Claimant engaging in legitimate trade union activities, or whether it was to prevent him crossing the line and committing acts of misconduct (in the course of his trade union activities or otherwise). The Respondent submits that if the Tribunal were to conclude that the Claimant's act of not giving union leaflets to people who he considered to be "scabs" is a legitimate trade union activity even if done to isolate and exclude those individuals that would not be an end of the matter. The Respondent submits that the Tribunal would have to go on to consider whether the sole or main purpose of the disciplinary sanction was to prevent/deter him carrying out that activity or whether the purpose which Miss Roye had in mind was to prevent him committing acts which amount to bullying/harassment (whether in the course of his trade union activities or not). This Tribunal does not consider that the act of not giving union leaflets to people whom he considered to be scabs is a legitimate trade union activity where it was done, as we consider it was done in this case, to isolate and exclude Mr Sidhu. But even if we concluded that it was a legitimate trade union activity we consider that the disciplinary sanction was to prevent/deter him from committing acts which amounted to bullying/harassment. In any event, given that the allegation of harassing Mr Sidhu by withholding leaflets was only one of four allegations upheld in total, and was the least significant of the four, we would not be able to say that the sole or main purpose of the disciplinary sanction was to prevent or deter that particular activity.

"At an Appropriate Time"

18. By virtue of TULR(C)A, S146(2), trade union activities are only "at an appropriate time" if they take place outside working hours or if they take place in accordance with arrangements agreed with or consent given by the employer. Part of the sanction imposed on the Claimant was his compulsory transfer from Stratford to Hackney. The Claimant has attempted to show that the restrictions placed on him when implementing his transfer from Stratford to Hackney were unreasonable and he has suggested that the purpose of the transfer was to prevent or deter him from carrying out his trade union activities. However he conceded in cross examination that all of the restrictions on the times at which he could carry out his activities at Stratford were in accordance with the Respondents Employee Relations Framework policy. Therefore, in addition to the point that the **effect** of the transfer is not the same as its **purpose**, since the

restrictions did no more than require the Claimant to comply with the Framework policy its purpose cannot have been to prevent him carrying out union activities at appropriate times, because any activities done outside the scope of their policy would not be "at an appropriate time".

Dallion Roye's Purpose

19. It is the Claimant's submission that Miss Roye's principle purpose was to prevent the Claimant or deter the Claimant from continuing to conduct himself as a trade union representative in ways the Respondent considered to be unacceptable (which includes all the conduct described in the four "offences"). It is the Respondent's case that the purpose for which Miss Roye imposed the disciplinary sanctions upon the Claimant were:-

- (a) In the case of the five year warning, to discipline the Claimant for action which she concluded amounted to bullying/harassment and to deter him from committing acts of bullying/harassment in the future (whether in the course of his union activities or not); and
- (b) In the case of the transfer to Hackney, to ensure that other employees still working at Stratford could work in a safe, congenial environment and to allow the Claimant a fresh start in a new location.

It is the Respondent's submission that neither of those purposes was unlawful for the purposes of section 146.

20. Miss Roye's reasons for her decision are set out fully and carefully in a document which appears at pages 498 to 503 of the bundle. She and Miss Pattinson both explained in their evidence that these reasons were typed up by Miss Pattinson whilst they were discussing the evidence and that they reflect Miss Roye's thought processes during her deliberations. The Claimant has submitted that this document does not reflect what was in Dallion Roye's mind at the time she made her decision. This suggestion is based largely upon a document at page 497A of the bundle known as the "properties page". Also the Respondent relies upon correspondence between Miss Roye and Mr Lloyd in relation to her decision letter. The suggestion is that because Miss Roye did not make fuller reasons available she hadn't prepared pages 498 to 503 at that time. It is clear to us that the Claimant was acting upon Human Resources advice in that matter and there was nothing sinister about it. We have considered the evidence on this point and we find that indeed the reasons were typed up in the way and at the time that Miss Roye and Miss Pattinson said. There is no basis for doubting the honesty or integrity of either of these witnesses.

21. It follows that the reasons document (498 to 503) is a contemporaneous record of Miss Roye's thought processes in reaching her decision. What it shows is that she engaged in a very careful consideration of the evidence, in our judgment, and that her clear purpose was to reach a conclusion as to whether the Claimant was guilty of the misconduct alleged and if so, to impose sanctions appropriate to that misconduct.

22. We accept the Respondent's submission that what is generally striking about the decision making process Miss Roye (and the Respondent generally) adopted is the

care taken to ensure that she had adequate time to give proper consideration to all the evidence and to remove herself from the influence of any possible extraneous factors.

23. In our judgment Miss Roye's approach to her role of decision making and her careful analytical approach to the evidence demonstrates that her purpose was to reach a fair decision on the evidence as to whether the Claimant was guilty of the misconduct alleged and to impose disciplinary sanctions appropriate to such misconduct i.e. to discipline the Claimant for misconduct and to deter him from committing acts of misconduct in the future not to prevent or deter him from carrying out his trade union activities.

Are the Conclusions Dallion Roye Reached Reasonable and Legitimate on the Evidence?

24. It is the Claimant's case that no reasonable person could reach the conclusion that the Claimant was guilty of the misconduct alleged on the basis of the evidence against him. The Respondent submits to the contrary. We have been taken by both counsel to evidence which, each submits, supports her or his case. The Tribunal is firmly of the view that there is certainly sufficient evidence against the Claimant such that it was entirely reasonable for Miss Roye to conclude he was guilty of the misconduct alleged.

25. Indeed, were this a wrongful dismissal case we consider that there is sufficient evidence to indicate that the Claimant was, as a matter of fact, guilty of the misconduct alleged, though we do not have to decide this point for the purpose of the case before us. We mention it only to show the extent to which we think the evidence supported the conclusions of Miss Roye. We do not intend to rehearse the evidence to which we have been repeatedly referred. We have considered it carefully in reaching our conclusion.

The Julie Wiggins Interview

26. On the 1 November 2004, and before she was appointed decision maker in respect of the Sidhu and Attridge complaints Miss Roye had attended an interview with Julie Wiggins during the investigation of the Claimant's complaint about the behaviour of Miss Wiggins. Miss Roye was part of Julie Wiggins direct line management chain and Miss Wiggins asked her to accompany her to the investigation meeting. It is the Claimant's submission that Miss Roye's attendance at this interview demonstrated a sympathetic attitude to Miss Wiggins and that she was antagonistic towards the Claimant as a result of accompanying Julie Wiggins and as a result of what she heard during that meeting.

27. We have the advantage of having seen and heard Miss Roye giving her evidence and under cross examination. We have considered very carefully the evidence and the submissions made to us by both sides in respect to this matter. We accept Miss Roye's evidence to the effect that her attendance at that meeting did not result in her having any animosity towards the Claimant nor in forming any preconceived view about the Claimant's guilt or innocence in relation to either the Julie Wiggins incident on the 13 April 2004 itself or, more importantly, in relation to the Attridge/Sidhu complaints. Also in our judgment Miss Roye's attendance at the Julie

Wiggins interview did not make her unsuitable to act as decision maker in the Attridge Sidhu complaints. There is no evidence that her attendance at the Wiggins interview provides any basis for suggesting that she did not judge the Attridge/Sidhu complaints on the basis of the evidence in that case or that she allowed subjective factors to affect her judgment. There is nothing in her attendance at the Julie Wiggins interview (or more generally) to suggest she did not make her decision in the Attridge/Sidhu complaints in good faith. She had not shown any previous animosity towards the Claimant. There is nothing in her attendance in the Julie Wiggins interview (or more generally) to suggest that she formed any premature judgment on the Claimant's guilt or innocence in the Attridge/Sidhu complaints. Most importantly there is nothing whatsoever in Miss Roye's attendance at the Julie Wiggins interview to suggest that she formed in her mind an aim of preventing or deterring the Claimant from carrying out his legitimate trade union activities.

28. However we do think that, as the matter has turned out, it would have been better if Miss Roye had not accepted the position of decision maker in the Attridge/Sidhu complaints, if only for the reason that it invites criticism and provides a stick with which to beat the Respondent in arguments and evidence which have taken considerable time before this tribunal. However we are impressed by the evidence and the evident probity of Miss Roye in reaching our conclusion that her attendance at that interview had no adverse effects on her decision making in the Attridge/Sidhu complaints.

Miss Roye's Involvement in the "Three Complaints"

29. Complaints had been made by Lucy Vincent and Tahir Mirza about the behaviour of the Claimant on a strike day namely the 17 February 2004. A third complaint had been made by Miss Julie Wiggins about his behaviour on another strike day the 13 April 2004. On or about the 10 June 2004 Miss Pattinson, HR advisor at City SSO, sent a Disciplinary Submission to Miss Roye in her capacity as Deputy District Manager. This Disciplinary Submission contained the following statements by Miss Pattinson:-

"4.0 HR Recommendation

- 4.1 I have attached the relevant disciplinary guidance to this submission see appendix 4.
- 4.2 This file has been referred to you because it is considered that Charlie's actions could be considered to be serious misconduct if found to be proved. I have attached a list of examples of the three types of misconduct with the guidance at appendix 5.
- 4.3 Because the facts of each area of misconduct are clear, a formal investigation has not been commissioned.
- 4.4 In your role as deciding officer you will need to examine the evidence that has been presented to you and decide whether you are satisfied that disciplinary action is appropriate. If you feel further evidence is required you can refer the papers back for further enquiries to be made.

- 4.5 If you consider disciplinary action to be appropriate, the next stage of the process will be to issue a disciplinary letter, setting out the precise nature of the alleged offences.
- 4.6 I have prepared a disciplinary letter for your use, should your decision reflect that of this submission. However if your decision does not reflect that of the recommendation please advise me of your decision so that I can update my records. Please do not hesitate to contact me if I can be of any further assistance to you this matter."

30. It is apparent that Miss Roye's decision reflected that of the human resources recommendation and she used the disciplinary letter prepared by Miss Pattinson which she sent to the Claimant on the 28 June 2004. She told the Claimant that before she made a decision on the matter he had the right to explain his conduct to her which he might do in writing or in an interview with her and that he could do both if he wished.

31. In the event, human resources decided that it would be appropriate, as Miss Roye was part of Julie Wiggins direct line management chain, if Lewis McCleod the other deputy district manager of City and East London, were the decision maker in relation to these incidents (one of which involved Julie Wiggins) to ensure that there was no question of any decision being questioned due to alleged prejudice on Miss Roye's part. She therefore took no further part in this disciplinary process in relation to the three complaints.

32. In the event, by about the 4 October 2004, Mr McCleod concluded that there was insufficient evidence to uphold the disciplinary charges in respect of the three complaints against the Claimant. In the course of the reasons which he gave he stated the following:-

"Procedural guidance allows an investigation to be dealt with by line management where the facts of the case are clear. I do not accept the human resources assessment in this case".

Therefore it is clear that he had taken a different view to the view taken by Miss Pattinson and Miss Roye on this point. The Claimant submits that there were obvious flaws in the evidence presented to Miss Roye and that her conclusion that the facts were clear and that there had been sufficient investigation was very surprising. In effect they submit that she was anxious to deal with the three complaints to be able to punish the Claimant and that her agreement with human resources that the facts were clear is evidence of her bias and her attitude towards the Claimant. From this the tribunal is asked to draw the inference that her actions in the Attridge/Sidhu complaint were done with the sole or main purpose of preventing/deterring the Claimant from carrying out his trade union activities at an appropriate time. We are not prepared to make such a leap. In our judgment there is nothing in Miss Roye's brief involvement in the early stages of the disciplinary process relating to the three complaints from which it could be inferred that she had the purpose of preventing or deterring the Claimant's trade union activities. It is noteworthy that neither the Claimant nor his representative Mr Lloyd thought that Miss Roye's involvement in the three complaints was sufficient to raise a specific objection to her when she was appointed decision maker in the Attridge/Sidhu complaints. In cross-examination the Claimant confirmed that he and Mr Lloyd had no real basis for objecting to Miss Roye until they discovered her involvement in the Julie Wiggins interview. Miss Roye explained in her evidence that the reason she took the decision she took was in order to hear the Claimant's side of

the story before reaching a conclusion on how finally to proceed. That appears to us to be a reasonable and sensible approach in the circumstances. It was entirely in accordance with the Respondent's procedures, which would permit further investigation if that proved necessary after hearing the Claimant's account and it was exactly what Mr McCleod actually did when he was appointed decision maker with the eventual outcome that the complaints were not upheld. In our judgment there is no basis at all for any assertion that Miss Roye's involvement in the three complaints indicates a purpose on her part to prevent/deter the Claimant's trade union activities.

Miss Roye's Attitude to the Claimant's Trade Union Activities

33. For the first time, during his cross examination, the Claimant made a vague allegation that Miss Roye was hostile to trade unions and to trade union representatives. He offered no actual evidence to support this allegation. Miss Roye gave clear, straightforward evidence of her personal experience of the Claimant and her view of his trade union activities. She acknowledged that she had experience of the Claimant behaving in an unprofessional way (on the first occasion when she encountered him in 2002) but stated that when she had subsequently met him, acting as a representative in disciplinary hearings, he had conducted himself in an appropriate manner and had represented his members well. She was aware of his "reputation" but from her own experience did not have any animosity towards him or his union activities. We were particularly impressed by the sincerity of her answers when asked in re-examination whether she was hostile towards the Claimant because of his trade union activities. She said that she had been a member of the union for many many years and was actively involved as branch treasurer for a number of years whilst she was in the department. She said that her late father was a very strong trade unionist and he would be turning in his grave at any thought that she would treat anyone differently because of their union activities she said it was not consistent with her personal or professional background. We consider that her evidence in that respect is truthful and it is clear to us that Miss Roye does not have a hostile attitude towards trade unions or trade union representatives. Similarly we consider that she never displayed and did not have any animosity towards the Claimant personally.

The Penalties Imposed

The Five Year Warning

34. The Claimant considered the guidance contained within the department's disciplinary procedures and, for the purposes of consistency, she also considered the guidance provided by Miss Pattinson of human resources regarding recommended penalties, taking into account other cases. Further she took into consideration as provided for by procedural guidance, that there had been no contrition shown, and that the offence had not been admitted. Also she took into account that no mitigation had been put forward for her consideration. She concluded that there had been no procedural faults or unreasonable delays in the process. She considered that a five year written reprimand was appropriate in this case because of the severity of the allegations and the fact that unusually there were two upheld allegations of bullying and harassment to be taken into account. The Claimant submits that the penalty failed to take into account the fact that the Claimant had a clean disciplinary record and that there had been delays in the initial assessment in both the Sidhu complaint and the

Attridge complaint. As Miss Roye explained during cross examination, she did not feel it appropriate to reduce the penalty to reflect the clean record because there were a number of allegations upheld and the seriousness of those. In our judgment that was a sensible conclusion and provides no basis for any inference that Miss Roye's purpose was anything other than to impose the appropriate sanction for the misconduct in question in relation to not just one but two of the Claimant's colleagues. Furthermore that sanction was upheld on appeal. The Claimant accepted in cross examination that he had not admitted any of the offences and had not shown any contrition or offered any mitigation. In fact his attitude remains that, as he did not commit the misconduct in question, he could not show any contrition or offer any mitigation.

35. Miss Roye concluded that there had not been undue delay. This came as a surprise to the Tribunal seeing that the Claimant was first informed of the charges against him on or about the 10 May 2004, and the disciplinary decision was taken in December 2004. However the initial delay appears to have been caused because attempts to obtain evidence from witnesses were unsuccessful because people were afraid of repercussions from the Claimant if they gave evidence. Indeed the Claimant agreed in cross examination that the delay in this case was not unusual and was not such that he was surprised that there was no reduction in the penalty as a result of that delay. Since the lack of such reduction is unsurprising it provides no basis for an inference that Miss Roye had an unlawful purpose in imposing the five year warning.

36. In considering the question of delay we remind ourselves that it's only relevance in this case is the suggestion that delay may reduce the penalty. We remind ourselves that we are not considering a case of unfair dismissal. However we wish to record our view that we are surprised at the evidence which indicates that investigations by the Human Resources Investigation Service such as this one are rarely completed within six months, frequently take a year, and have been known to take two years. No one seemed to think this remarkable. Since the human resources investigation service specialises in investigating allegations of harassment, bullying, and discrimination the prospect of the victims having to wait so long for any possible redress is highly undesirable. We cannot but think that in any unfair dismissal complaints or discrimination complaints which might be brought against the Respondents the Respondents might find themselves in difficulty giving innocent explanations of such delays.

37. Overall the reasons for which Miss Roye imposed the five year warning appear to us to be clear and unrelated to the Claimant's trade union activities. Her purpose in imposing that warning was to discipline him for actions which she had concluded amounted to serious misconduct and to deter him from committing such acts of misconduct in the future. Her purpose was not to prevent or deter him from taking part in legitimate trade union activities. The fact that such delays are common means that the Claimant was not being treated differently or unusually, so there is no basis for any such inference.

38. We accept as a genuine expression of her views Miss Roye's answer in cross examination that:

"All members of staff should be able to come into work and work in an environment free from bullying and harassment. Charlie was found to have breached the department's standard of

behaviour and as such he was given a five year reprimand. I view harassment and bullying as quite serious and that is why."

The Transfer

39. The Claimant submits that the decision to transfer him from Stratford to Hackney was to deter or prevent him from carrying out his trade union activities. He points out that he had not been moved prior to the decision by Dallion Roye and that he had known about the identity of the complainants and witnesses and that no complaint had been made against him about his behaviour towards them during the course of the investigation. He submits that if there had been genuine concerns he would have been transferred at the start of the investigation. He makes complaints that the facilities available to him at Hackney, though they may have been in accordance with the Employee Relations Framework, did not afford him the same degree of privacy that he had at Stratford.

40. In our judgment the decision to transfer the Claimant away from Stratford was entirely in accordance with the Respondent's policy which provides that such a transfer will generally be appropriate in cases of proven harassment. Miss Roye's written reasons clearly show that her focus was on removing the Claimant from the place where one of the complainants (Mr Attridge), and one of the key witnesses (Miss Bircham) continued to work. Miss Roye explained that because of the various transfers of locations which were taking place at that time what she did was to map out where the complainants and all the witnesses were and where they would be moving to. This illustrates that her focus had nothing to do with the Claimant's trade union activities but was on removing him from the place of work of those individuals in order to protect them and to ensure that he was not put back into a situation where he had been found to harass two of his colleagues. There was certainly an abundance of evidence, of the fear of repercussions which many people had in relation to the Claimant, from which Miss Roye could legitimately conclude that a transfer in order to protect such individuals was appropriate. The fact that the Claimant had not been transferred during the investigation is not indicative of anything which assists the Claimant. The Respondent's procedure states that such temporary transfers should be the exception rather than the rule and the high profile of the Claimant's case would make taking any such exceptional measures difficult and unlikely in any event. As Miss Roye indicated in her cross-examination, what had changed by the time she decided to transfer the Claimant was that the complaints had then been upheld.

41. The Respondent submits that it is striking, and we agree, that the Claimant agreed in cross-examination that his trade union activities appeared to have played no part at all in Miss Roye's thinking before the meeting when she informed him of her decision – she had, he thought, simply not considered them. In our view it cannot be the case that her sole or main purpose was to prevent or deter him carrying out those activities in circumstances where she had simply not considered them.

42. In fact what happened was, when the Claimant raised the question of how the transfer would impact on his trade union activities, Miss Roye said that she would look into it and get back to him. The transfer was then managed in such a way that the Claimant would not be prevented from returning to Stratford to carry out legitimate duties, provided he obtained the relevant permission in accordance with the Employee

Relations Framework policy. The Claimant accepted in cross examination that he had not actually been prevented from attending Stratford to carry out such activities on any occasion. And, although the physical facilities at Hackney may have been less than the physical facilities he had at Stratford, they still comply with the requirements of the Employee Relations Framework policy. Also the Claimant agreed that he has never actually asked for and been denied the use of a private telephone; it is his choice that he uses his mobile and does not claim any expenses in that regard. In any event, it is clear that the changes to the physical facilities available are the effect rather than the purpose of the move. We find that Miss Roye's purpose in transferring the Claimant was to protect individuals still working at Stratford from the stress and possible repercussions of having to continue to work alongside an individual who had been found to have committed acts of bullying/harassment against two of his colleagues.

Overall Conclusions in Relation to Dallion Roye's Purpose

43. In our judgment the evidence generally shows that Miss Roye reached her decision through careful analysis of the evidence and not as a result of any bias or animosity. It shows that she reasonably concluded that the Claimant had committed acts of misconduct; that she imposed a five year sanction for the purpose of disciplining him for that misconduct and deterring him from committing acts of bullying/harassment in the future; that she did not have in mind the object of preventing/deterring him from carrying out his legitimate union activities but only preventing/deterring bullying/harassment whether in the course of his union activities or not; and that she transferred him away from Stratford for the purpose of protecting one complainant and one witness who continued to work there. In our judgment there is no evidence of bias or animosity on the part of Miss Roye and no basis for drawing any adverse inference in relation to her purpose.

Isabelle Morton's Purpose

44. Miss Morton had been employed by the Respondent's and its predecessors in different guises for some 37 years. She became a district manager for West London and was promoted to grade 6 in March 2002. That was her position at the relevant time. During her career she had been involved in many disciplinary cases. Since March 2002 she had been an appeals officer dealing with appeals and discipline cases and at the time she dealt with the appeal raised by Mr MacDonald she was dealing with approximately one disciplinary appeal a month. She was not from the same district as either the Claimant or Miss Roye. In addition, and again in accordance with the departments discipline procedures, she was a grade higher than Miss Roye and was also outside her line management chain. She took advice from the human resources team in her district because appeal officers do not seek advice from the same human resources team as the decision maker but from the human resources team in her own district. This allows for complete independence at a second level as not only was the appeal officer not connected to the decision maker but also the human resources advice given to any appeal officer was independent of the advice given to the decision maker.

45. It is the Claimant's submission that Miss Morton's decision to uphold the appeal was for the purpose of deterring or preventing the Claimant from carrying out his union activities. Miss Morton denies this. The Tribunal has not been presented with any

evidence whatsoever to impugn Miss Morton's honesty or integrity. Miss Morton gave a very clear account of her thinking and her purpose both in her reasons given at the time and in her evidence to the tribunal. In our judgment it is plain that Miss Morton's purpose in the way she approached her decision on appeal was to determine whether a fair decision had been reached and her purpose in upholding the disciplinary sanction against the Claimant was to uphold a sanction which would ensure that he did not commit further acts of misconduct, given her conclusion that the evidence supported the findings which Miss Roye had made against him. There is no basis for inferring any unlawful purpose on the part of Miss Morton from the mere fact that she decided against the Claimant on the evidence.

Wider Allegations of Conspiracy

46. This Tribunal ruled at the outset of the case that the Claimant's pleaded claim does not include the wider allegations of conspiracy which he had subsequently made. However those allegations illustrate a mindset of the Claimant. Some of those allegations are as follows:

- (a) The Claimant alleged bias against Mr McCleod, but that allegation was clearly unfounded given the outcome of the three complaints which Mr McCloud dismissed.
- (b) The Claimant alleged bias on the part of the human resources investigation service. This is extremely far fetched as the HRIS is an independent investigation service with no possible axe to grind against the Claimant.
- (c) The Claimant alleged collusion between Mr Attridge and Mr Sidhu in bringing their complaints. In our judgment that allegation was baseless. At most it was based upon a speculation by Mr Lloyd the Claimant's representative. We note from the transcript that Mr Sidhu could not initially recall Mr Attridge's name and then thought that he had remembered it but got it wrong. It seems unlikely that Mr Attridge and Mr Sidhu knew each other or had spoken.
- (d) The Claimant alleged that Julie Wiggins had prompted or encouraged Lucy Vincent to make her complaint. This appears to have been based entirely on a conversation between the two partially overheard by Mr Andrew Brown a witness called by the Claimant to deal only with that point. It seems to us there is a perfectly straightforward explanation for that conversation namely that Miss Wiggins had been asked by human resources to get a fuller statement from Miss Vincent.

These wider allegations in our judgment are groundless and have played no part in our decision on the pleaded matters. However what they do is to demonstrate the Claimant's tendency to make unsubstantiated allegations of bias and conspiracy, which is what he has done in relation to Miss Roye and Miss Morton in this claim.

Conclusions

47. In our judgment the main purpose of Miss Roye and/or Miss Morton in imposing the disciplinary sanctions on the Claimant and upholding them on appeal was to discipline the Claimant for actions which were found to have constituted misconduct and to deter him from committing further acts of misconduct in the future (whether in the course of his trade union activities or otherwise). That is not an unlawful purpose under TULR(C)A, section 146 and consequently the Claimant's claim fails. His claim is dismissed.

RESERVED JUDGMENT

STRATFORD

DATE AND PLACE OF SIGNING

John Scudell
.....
CHAIRMAN

JUDGMENT SENT TO THE PARTIES ON

25th September 2006
.....
AND ENTERED IN THE REGISTER

[Signature]
.....
FOR SECRETARY OF THE TRIBUNALS