EMPLOYMENT TRIBUNALS

Claimants: Ms E Wallace and others (see Schedule)

Respondent: Wiltshire Council

Heard at: **Bristol Employment Tribunal**

On: **5-9 February 2024**

Before: **Employment Judge Ferguson**

Members: **Ms S Maidment**
Dr C Hole

Representation
Claimants: Ms M Stanley, counsel
Respondent: Mr P Doughty, counsel

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The complaint that the Claimants were subjected to a detriment on grounds related to union activities under section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 is well-founded.

2. Case management orders relating to remedy are contained in a separate document.

REASONS

INTRODUCTION

1. The 21 Claimants were all civil enforcement officers ("CEOs", known colloquially as traffic wardens) or senior civil enforcement officers employed by the Respondent at the relevant time. They are all members of the GMB union. This case is about an email sent by the Chief Executive of the Respondent to the Claimants, which the Claimants say unlawfully sought to deter them from

voting in a ballot for industrial action and/or from voting in favour of industrial action, and/or unlawfully sought to prevent, deter or penalise them for being members of an independent trade union, contrary to s.146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA").

2. The claim form was presented on 24 February 2023, following collective early conciliation between 5 and 25 January 2023. The Claimants originally brought claims under sections 146 and 145B (unlawful inducements relating to collective bargaining) of the 1992 Act. The claims under section 145B of the 1992 Act were later dismissed on withdrawal.

3. The final hearing took place over four days and was limited to liability. On the fifth day the Tribunal deliberated in chambers.

4. The issues for us to determine are:

   4.1. Did the Respondent subject the Claimants to a detriment by sending the email dated 9 November 2022?

   4.2. Was the Respondent's sole or main purpose in sending the email of 9 November 2022 to prevent, deter or penalise the Claimants for being members of an independent trade union?

   4.3. Was the Respondent's sole or main purpose in sending the email of 9 November 2022 to deter the Claimants from taking part in the activities of an independent trade union at an appropriate time, namely voting in the ballot and/or voting in favour of industrial action in the ballot?

5. On behalf of the Claimants we heard evidence from Andy Newman, branch secretary for the GMB union, and from four of the Claimants, Emma Wallace, Nicholas Carroll, John Chirgwin and Andrew MacKrill. We also had a signed witness statement from a fifth Claimant, Chloe Emery, who was unable to attend the hearing for personal reasons. On behalf of the Respondent we heard from Terence Herbert and Tamsin Kielb.

FACTS

6. Our findings of fact are as follows. In making these findings we are conscious that we do so in the context of a live industrial dispute. Nothing we say should be taken to express any view on the relative merits of the parties' positions in the industrial dispute.

7. The 21 Claimants were all CEOs or senior CEOs employed by the Respondent at the relevant time. They are all members of the GMB union.

8. Most of the Claimants worked full time. They each worked on two Sundays a month. The three Claimants who were part time worked on at least one Sunday a month.

9. The Claimants were each paid a basic salary plus 10% unsociable hours "plussage" on their basic salary. It is not in dispute this plussage applied to staff who worked a certain number of hours a month at times considered to be

unsociable, which included Sundays. All of the Claimants qualified for the 10% plussage.

10. The system of paying a percentage of basic pay as plussage to reflect working during unsociable hours applied to other employees of the Respondent, some of whom received 20% and some 33%.

11. The Respondent accepts that the Claimants had a contractual entitlement to receive the 10% plussage.

12. The Respondent recognises three trade unions, GMB, Unison and Unite the Union, pursuant to a joint recognition agreement. Collective bargaining took place via a Joint Consultative Committee (JCC).

13. At the material time the majority of CEOs were GMB members.

14. In November 2021 the Respondent informed the unions of their intention to set up a subcommittee of the JCC in order to consult on proposals to reduce staffing costs. The Respondent said it intended to have an agreed approach in place before 1 April 2022.

15. In December 2021 Terence Herbert, the Chief Executive of the Respondent, presented to the subcommittee a number of proposals relating to staff pay. These included a proposal to remove the existing unsocial hours plussage and instead pay 33% plussage only on actual hours worked before 6am or after 10pm on any day. CEOs only work during the day so under this proposal they would receive no plussage and their pay would be reduced by the whole amount of the 10% plussage in their contracts. This has been widely referred to as a 10% pay cut, although strictly speaking it amounts to a reduction in pay of around 9.1%.

16. The proposals were presented to all staff in an email update from Mr Herbert on 17 January 2022.

17. On 14 February 2022 Andy Newman, GMB branch secretary for the Wilshire and Swindon branch, wrote to Mr Herbert, Joanna Pitt, then Director of HR and Tamsin Kielb, then Deputy Director of HR, to give notification of a formal dispute between GMB and the council. The email raised seven points relating to procedural issues about provision of information and engagement with staff.

18. On 16 February a further JCC meeting took place. Mr Newman and Keith Roberts attended for GMB. It was agreed at the meeting that two of the Council's proposals, relating to a two-year increment freeze and changes to the overtime policy, would be separated from the other proposals including the issue of pay for unsocial hours. Mr Herbert referred to this in the meeting as "decoupling". He proposed that a separate working group be set up "to look at how to mitigate the impacts for groups of staff who are most affected". They would then bring proposals back to the negotiations for formal consultation with the aim of agreeing an approach by the end of June 2022. Mr Newman said that GMB agreed to participate in the working group, but that if the proposals would lead to less take-home pay for staff in the groups they represent (including CEOs) then they would anticipate industrial action.

19. On 18 February 2022 Ms Pitt responded to Mr Newman's email of 14 February saying that there was no dispute procedure provided for in the recognition agreement in respect of this dispute, but responding to the points raised.

20. On 16 March 2022 comments of Mr Roberts of GMB were reported in the local press. He said, among other things, that GMB had "proposed talks to resolve differences with the council, but they have point blank refused to talk to us." He also said that GMB members were incensed by the proposals that would have resulted in a 20% pay cut for social workers and a 10% pay cut for traffic wardens, noting "The council has paused these cuts but not taken them off the table". He said "GMB is now talking to our members about what our next steps are – up to and including strike action".

21. On 23 March 2022 the Respondent sent an email to all staff entitled "Joint Statement by Wiltshire Council, Unison and Unite the Union". This confirmed the agreement made at the JCC meeting on 16 February to decouple the increment freeze and overtime policy from the other issues. It said "At that meeting we also agreed to pause the negotiations on proposals to make some changes to the unsocial hours, call out and standby policies so that we could form a working group with the trade unions and senior officers of the Council to consider how we might mitigate the impact of these proposals on staff who are in receipt of these allowances." The statement said that the press statement by GMB did not "represent an accurate reflection of the position we are in with the negotiations and do not align with the Council's communications to you."

22. Mr Herbert's evidence was that he considered GMB's press statements were misleading as to the process being followed and he thought it was important for staff to have accurate information.

23. Meetings of the working group commenced in April 2022. During this period GMB balloted its members on industrial action and on 28 April it notified the Respondent of the intention of the CEOs to take industrial action on 7 and 17 May 2022.

24. A meeting of the working group took place on 10 June 2022. At that meeting the Council put forward a revised proposal which included Sundays and Bank Holidays in the definition of unsocial hours, so the CEOs would receive 20% additional pay on any hours worked on those days. It was also suggested that it might be possible to offer pay protection until 1 April 2023. Mr Newman said at the meeting that GMB members would not accept this proposal. He asked if the Council would rule out "fire and rehire" and was told that was not for discussion at the working group.

25. Further industrial action by the CEOs was scheduled to take place for 7 days from 30 June.

26. On 17 June 2022 Mr Newman wrote to Mr Herbert raising a number of concerns about the working group process, alleging that the Council were not holding meaningful discussions, and were deliberately prevaricating in order to support a fire and rehire process in the future. He asked Mr Herbert to confirm that they would not seek to dismiss and re-engage staff who had contractual unsocial hours payments if they declined a voluntary variation of contract.

27. In the meantime there were discussions about possible talks via ACAS between GMB and the Respondent relating to the dispute concerning CEOs.

28. A conciliation meeting ultimately took place on 29 June, attended by Mr Newman and Mr Roberts, as well as two shop stewards, on behalf of GMB. The attendees for the Council included Ms Kielb (by now Director of HR) and Adrian Hampton, head of Parking. Mr Herbert did not attend. There is a dispute about what happened at this meeting, but for a number of reasons we do not consider it necessary or appropriate to make factual findings as to the actual agreement reached, and nor are we in a position to do so satisfactorily. First, the Tribunal should not make findings beyond those necessary to determine the case. For reasons explained below, we do not consider it necessary to resolve the factual dispute. Secondly, there is a live industrial dispute which makes it particularly important that we do not comment or make findings on matters that are not essential to our decision-making. Thirdly, the factual dispute turns in large part on information conveyed between the parties by an ACAS conciliator, from whom we have not heard evidence.

29. It is sufficient to note that it is the Claimants' case that an agreement was reached in principle at the meeting to limit the introduction of the proposed changes to unsocial hours payments to new starters or, to put it another way, that existing employees would have "lifetime pay protection". The Respondent disputes that there was any such agreement at all. They contend that the only agreement made was fully reflected in an agreed statement. The agreed statement was as follows:

> "Wiltshire Council acknowledge the concerns of the CEOs over unsocial hours and commit to bring back to the working group consideration of paying an ongoing protected amount to staff to reflect any difference in pay caused by the introduction of the new policy.
>
> Wiltshire Council confirms they have not and are not contemplating fire and rehire and remain committed to working through the working group and formal negotiation process to find a resolution. The next phase of formal consultation with the three unions concerning unsocial hours will not begin with giving notice to the unions of the intention to dismiss.
>
> Wiltshire Council states that a works council has never been contemplated to supplement negotiations with recognised trade unions.
>
> We remain committed to good industrial relations with all of our recognised unions, supported by ACAS where appropriate.
>
> GMB will suspend the 7 days of industrial action scheduled to begin on 30 June 2022."

30. Ms Kielb accepts that GMB had raised the idea of the new terms for unsocial hours being applied to new starters only, and that it was agreed that idea could be taken back to the working group, but she did not accept that there was any agreement on the Respondent's part to support the proposal.

31. We consider it possible there was a misunderstanding as to the position the Respondent would take on the proposal when it returned to the working group.

It is possible that GMB genuinely believed they had an agreement in principle that the Respondent would support the proposal but that the Respondent did not in fact make any such promise. We cannot resolve that without knowing what information was conveyed by the ACAS conciliator. The Claimants argue that the Respondent must have understood that was the agreement because otherwise GMB would not have called off the industrial action. We do not accept that. The Respondent could have believed that the agreement set out in the statement would satisfy the union sufficiently. These are strategic decisions and as far as the Respondent knew there could have been other reasons why GMB would have considered it advantageous to call off the industrial action, even without any express promise to support the proposal.

32. The Respondent relies heavily on a report of an interview with Mr Newman by the BBC after the meeting as evidence of what was agreed. Mr Newman is quoted in the report as saying:

> "The council have given us sufficient reassurances that they have no immediate plans to fire and rehire. Although they will put a proposal to their staff about a potential pay cut, it will be up to their staff to vote 'yes' or 'no' to it. On that basis, we're not in 100 per cent agreement with the council, but we are in a position where we are close enough that we don't think strike action is justified."

33. We do not consider that evidence helps to determine what was actually agreed at the meeting, as opposed to the message GMB wished convey in the press. We accept that it appears to be inconsistent with GMB's position that there was an agreement the Respondent would support a proposal for lifetime pay protection, but Mr Newman said in his evidence that both sides knew there was a process to go through and he did not want to reveal the deal to the press before those processes had happened. Given that we are not making a finding as to the agreement reached, we need not express any view on this evidence.

34. On 6 July 2022 the final meeting of the working group took place. The proposal for "lifetime" protection for CEOs was discussed. A representative from one of the other unions raised the possibility of future equal pay claims and Ms Kielb said she was "taking legal advice on this". It was noted at the end of the meeting that Ms Kielb would "take the request away to senior management".

35. The next meeting of the JCC subcommittee took place on 9 August. Mr Newman was on holiday, so Mr Roberts represented GMB at the meeting. Mr Herbert presented new Council proposals regarding pay for unsocial hours. The notes record that he "outlined that following careful consideration at CLT [Corporate Leadership Team], along with external legal advice regarding risks with length of pay protection that it would not be a responsible approach to sign the council up for a never ending protection arrangement". He proposed a four-year protection arrangement for existing staff. The notes then record:

> "The Unions recognised that the offer of a 4 year pay protection arrangement was significant and generous compared to other protection arrangements that they were aware of, and something that they would want their members to have the opportunity to consider."

36. It was agreed that the unions would review the proposals and confirm by 15 August whether they could be taken forward for ballot.

37. On 22 August Mr Newman, having returned from holiday, had a telephone call with Mr Herbert. It is not in dispute that Mr Newman asked Mr Herbert to provide a summary of the Council's business reasons for making the changes that he could pass on to members. Mr Newman's evidence to us was that he was "agnostic" about the proposals at this stage. Mr Herbert said his impression from the call was that GMB intended to adopt a neutral stance when the proposals were put to members. Mr Newman accepted that he did not say anything during the call along the lines that the Council had reneged on an agreement made via ACAS on 29 June.

38. The ballot on the proposals opened on 22 September.

39. On 23 September GMB issued a press release in the following terms:

> "ALL OPTIONS BACK ON THE TABLE AS ROGUE WILTSHIRE COUNCIL BOSSES BREAK AGREEMENT THAT AVERTED GMB STRIKE ACTION IN JUNE
>
> Members are scandalised that Wiltshire Council's top bosses have walked back from a deal, says GMB
>
> GMB, the union for Wiltshire Council staff, is calling for members to reject a revised proposal from Wiltshire Council after bosses reneged on the agreement negotiated through the offices of Acas (the governments advisory and conciliation service) in June.
>
> The council's proposed pay cuts to council staff amount to £2,000 for traffic wardens and £7,000 for social workers per year.
>
> Ballots are running from now until 13th October among the 300 staff affected by the pay cut.
>
> Keith Roberts, GMB Regional Organiser, said:
>
> "GMB members are scandalised that Wiltshire Council's top bosses have walked back from a deal where their own 'working party' on terms and conditions had agreed to protect the pay of existing staff for the lifetime of their contracts.
>
> "This deal was agreed in July, but the council announced on 9th August, that they were breaking their word. From GMB's point of view, this puts all options back on the table.
>
> "Staff in parking services have already taken two days strike action to oppose the pay cuts, but traffic wardens are far from the only staff affected.
>
> "None of our members can afford this pay cut – and they should not have to.

> "GMB is confident of a no vote from our members, then the ball will be back in the council's court.
>
> "Wiltshire Council needs to start treating their staff with respect and understand the extreme worry they are causing with their threats of pay cuts.""

40. Mr Newman acknowledged in his evidence that GMB had changed its position in the period between his telephone call with Mr Herbert on 22 August and this press release. He said the change was a result of a further meeting with shop stewards.

41. Mr Herbert's evidence was that he was surprised to hear of the press release and, given that the proposal for four years' pay protection had been described as generous at the meeting on 9 August, he was "concerned that the GMB were now misrepresenting what had happened in that meeting and misleading their members."

42. The Council issued a response to the media saying that lifetime protection had never been agreed, neither at the ACAS meeting or any subsequent working group meeting.

43. A further JCC meeting took place on 19 October 2022. GMB were represented at the meting by David McMullen, Regional Organiser. Mr Newman's evidence was that they had deliberately decided that an officer who had not previously been involved should attend, to give a fresh start.

44. Mr Herbert started the meeting by saying that it would be recorded because there had been "some confusion as to what has been said in previous meetings". It is apparent from the notes of the meeting that there had been a breakdown in trust between the Respondent and GMB.

45. The unions each reported the results of the ballots. Unison and Unite both reported that their members had voted in favour. Mr McMullen reported that GMB members had voted against. Mr Herbert expressed some frustration at GMB's change of position since the meeting on 9 August and referred to "erroneous statements" made in the press release. He said, "The reality is savings are going to have to be made and the 4 year proposal, which has been stated as generous by GMB, is now going to be off the table because new proposals are going to be put through."

46. GMB officers repeated the allegation in a radio interview on 28 October, and in video clips on GMB's own website around the same time, that the Council had reneged on an agreement for lifetime pay protection. In the interviews the officers also referred to the proposals as a 10% pay cut.

47. By this time, individual CEOs had been notified by HR of the impact of the proposals on their pay. This was not expressed in percentage terms, but set out the figures for the pay protection period and afterwards. For the purposes of these proceedings the Respondent has produced a spreadsheet showing the impact of the proposals on each of the Claimants. For those working full time they would have faced a reduction in their pay of 8.13% after the end of the 4-year protected period.

48. On 3 November GMB notified the Council of a further ballot for industrial action by the CEOs, due to open on 10 November. The letter confirmed that of the 23 CEOs, 21 were GMB members.

49. Mr Herbert's evidence was that he was concerned that the public messages from GMB "did not reflect the true position of the consultation and negotiations, and it appeared that inaccurate information was being provided to frustrate attempts to resolve the dispute". He said he did not feel GMB were acting in the best interests of his staff. He therefore felt it was appropriate that he should write to the group of staff directly.

50. On 7 and 8 November 2022 Mr Herbert consulted with the HR team about the wording of an email from him to all of the CEOs. On 9 November 2022 at 9.04am Mr Herbert sent an email to all 23 CEOs, including each of the Claimants, with the subject "Message from Terence to civil enforcement staff". The full text of the email is set out here:

> "Dear colleagues
>
> I wanted to write to all of the civil enforcement team directly as I have been notified by the GMB that those of you who are members of that union will be balloted later this week about whether you would support further strike action in relation to the ongoing discussions around proposed changes to the unsocial hours policy. I recognise and value the work that the team does and I understand that you might be disappointed that we did not offer a "lifetime" pay protection offer to all existing staff who currently receive an unsocial hours plussage on their basic pay.
>
> The GMB have suggested that the council "went back" on a promise to offer this. This is not the case. Ahead of the ACAS meeting in June with GMB and civil enforcement team representatives we made it clear that no format agreements could be made due to the fact that:
>
> - staff at the council are represented by three Unions and we are not able to make agreements with just GMB; and
> - proposed policies would impact all services across the council which operate during unsocial hours, therefore nothing could be agreed with a single service on a policy that potentially impacts alt staff
>
> At that meeting it was agreed that we would bring back to the working group for discussion a proposal around ongoing pay protection for existing staff. This was discussed at length in the meeting on 6 July 2022, attended by GMB and other recognised unions as well as representatives from council services.
>
> The outcomes of the working group were fed back to myself and the corporate leadership team and we gave very serious consideration to the changes proposed to the policies and the

feedback that staff were looking for ongoing pay protection of unsocial pay.

In deciding what proposals to bring to the negotiation meeting on 9 August I had to balance the suggestion of lifetime protection with risks to the council of making a commitment to have a never-ending arrangement which treated existing staff differently to those coming into the council, together with the ongoing financial liability this created.

Our normal approach when terms and conditions change is to protect pay for up to one year, and I am not aware of any council offering pay protection beyond two years. In offering a four year pay protection arrangement. I hoped that this would show that we recognised the impact of the current cost of living rises and would give our current staff certainty until 2027.

In the negotiation meeting there was nothing raised by any Union to suggest that this went against any previous promises and, in fact the conversation was around the fact that this was a realistic mitigation and substantial protection period, something alt three Unions felt their members should have an opportunity to vote on.

As you know both UNISON and Unite the Union voted to accept these proposals. As GMB have rejected the proposals we are now in the process of arranging an ACAS conciliation meeting to see if there is a way to move this forward and I am not sure what the GMB's plan for strike action is intended to achieve. I am concerned that the GMB continue to present the proposals both to staff and in the media as a "10% pay cut for staff" — this is really misleading.

I understand that most CEO's work on average 15 hours unsocially a month and therefore, under the current proposals, would receive a 20% plussage on those hours amounting to around £37 per month (based on the middle spinal point of Grade F with the pay award applied). The pay protection arrangement would top up this amount by around £160 to ensure that, for the next 4 years, there is no reduction in your take home pay. It is really important that the council has policies which are standardised, fit for purpose, financially viable and support delivery of the council's business plan whilst ensuring our staff are fairly and appropriately rewarded.

I believe that the proposals which UNISON and Unite the Union have now accepted meet this need, and that the four year pay protection offer was one made in good faith to support existing staff through the introduction of these changes. However should we be unable to reach agreement we will need to review whether this offer remains on the table.

I hope that, through the ACAS conciliation process, we are able to resolve this matter, remove the ongoing uncertainty for staff and move forward. I would ask you to please consider carefully whether further strike action will support this approach.

> Please do speak to Jo Pattison and Adrian Hampton if you have any further queries or questions or want to discuss this further.
>
> Terence"

51. Mr Herbert's evidence was that the email intended to "set the record straight" and provide staff with accurate information. He denied that it sought to deter the CEO staff from voting in favour of industrial action, saying that it "wasn't particularly relevant" whether they went on strike or not.

52. It is not in dispute that Mr Herbert had never emailed the CEO team directly before.

53. Each of the Claimants who gave evidence described their response to receiving the email. Mr Carroll said it was shocking to receive such an email directly from the Chief Executive before the ballot. He said that GMB members in the team "felt like we had a target on our backs". He said he felt under pressure and intimidated. In a WhatsApp group for GMB members in the CEO team, he wrote:

> "I have just read the email to us all from Terence Herbert dated today. My focus and attention was drawn on the veiled threat at the third paragraph from the end (last sentence). He is turning up the thumbscrews and upping the pressure. Just my opinion."

54. Mr MacKrill said that the email felt threatening in tone, and that it made him feel anxious, worried and unsure what to do. Mr Chirgwin also found the email threatening and he said he was shocked to receive it.

55. Ms Wallace, who was a shop steward, said that she and her colleagues were all shocked to receive the email. She said it made her life more difficult because it put more questions on the shop stewards which they did not know how to answer. She forwarded the email to Mr Newman and wrote "Feels like a hidden threat from Terence".

56. Later that day GMB sent an email to the CEO members responding to Mr Herbert's email. The email reiterated the union's position in the dispute. It concluded: "Our advice is to just disregard Herbert's bluff and bluster about him reviewing whether the 4 year pay protection is still on the table. This is just an attempt to scare you into voting against strike action, so that when GMB goes back into negotiate with him, he hopes we will go in with a weaker hand of cards."

THE LAW

57. Section 146 of TULRCA provides, so far 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) 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,

…

(2) In subsection (1) "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 … ; 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.

…

58. Article 11 of the European Convention on Human Rights provides:

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

59. Under section 1 of the Human Rights Act 1998 Article 11 is given effect as a matter of domestic law. Section 3(1) of the Human Rights Act 1998 provides:

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

60. In Mercer v Alternative Future Group Limited and another [2022] ICR 1034 the Court of Appeal considered the question of whether the activities protected by section 146 TULRCA extend to participation in lawful industrial action. It held:

60.1. When section 146 is viewed as part of TULRCA as a whole, industrial action is not included within the phrase "activities of an independent trade union".

60.2. The failure to give legislative protection to employees against any sanction short of dismissal for official industrial action against the employees who take it may put the United Kingdom in breach of article 11

even in the case of a private sector employer, if the sanction is one which strikes at the core of trade union activity.

60.3. Interpreting section 146 by adding an additional sub-clause (as the EAT had done) would result in impermissible judicial legislation and not interpretation as sanctioned by section 3 of the 1998 Act. Nor would it be appropriate to grant a declaration of incompatibility where there is a lacuna in the law rather than a specific statutory provision which is incompatible, the extent of the incompatibility was unclear and the legislative choices were far from being binary questions.

61. Ms Mercer appealed the decision of the Court of Appeal to the Supreme Court. The Supreme Court heard the appeal on 12 and 13 December 2023. Judgment has not yet been handed down.

62. The meaning of the word "detriment" is well-established as a matter of employment law. The test is whether "the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment" (per Lord Hope at [35] of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337). There are therefore both objective and subjective elements, but the focus is on the perception of the recipient of the treatment.

CONCLUSIONS

Section 146 TULRCA

63. There was a dispute between the parties as to the applicability of s.146 of TULRCA to the facts of this case. The Respondent's position is that voting in a ballot on industrial action and voting in favour of industrial action are equivalent to participating in industrial action, and consequently the Tribunal is bound by the Court of Appeal's judgment in Mercer to find that those are not activities protected by s.146 and we should not read s.146 down pursuant to Article 11 ECHR. Mr Doughty relies in particular on the following sentence in paragraph 54 of the Court of Appeal's judgment:

> "On ordinary principles of statutory interpretation, section 146 does not provide protection against detriment short of dismissal for taking part in or organising industrial action." (emphasis added)

64. Mr Doughty argued that the reference to organising must include voting in a ballot and/or voting in favour of industrial action. Ms Stanley for the Claimants argues that Mr Doughty has taken the sentence entirely out of context.

65. We agree with Ms Stanley. The litigation in Mercer has proceeded entirely on the basis of an abstract preliminary issue agreed by the parties. The precise wording of the issue changed slightly over the course of the appeals, but has always been limited to participation in lawful industrial action. The issue in the Court of Appeal was agreed to be:

> "Whether a worker such as the Claimant, who is suspended and subject to disciplinary action for the purpose of preventing or deterring her

> participation in union-organised industrial action can, as a matter of law, potentially bring a claim under section 146(2)(b) of TULRCA." (para 50)

66. Both the EAT and the Court of Appeal considered there were two reasons why s.146 did not, on ordinary principles of statutory interpretation, include participation in industrial action. First, s.146 had to be viewed as part of TULRCA as a whole. In particular, the unfair dismissal regime in TULRCA distinguishes between dismissals that take place during industrial action or because of taking part in industrial action (dealt with in Part V) and dismissals on grounds related to union membership or activities (dealt with in Part III, at s.152). Both the EAT and Court of Appeal considered that Parliament cannot have intended participation in industrial action to be protected by s.152 because it had created a specific regime in Part V. That was supported by the judgment of the EAT in Drew v St Edmundsbury Borough Council [1980] ICR 513. The definition of "taking part in the activities of an independent trade union" must be the same in both s.152 and s.146, and therefore s.146 cannot include participation in industrial action.

67. None of that reasoning applies to voting in a ballot for industrial action or voting in favour of industrial action. Although Part V of TULRCA includes detailed requirements as to the manner of conducting ballots in order for industrial action to attract the protection of that part, it says nothing about dismissal (or detriment) related to, or because of, those activities.

68. Secondly, the EAT and Court of Appeal focused on the requirement in s.146 for the activity in question to take place "at an appropriate time". That phrase is defined in s.146(2) as meaning outside working hours, or within those hours where the employer consents. Chaudhury J noted that industrial action would not normally fall within that definition. Further, if it did, then it would also fall within s.152 and for the reasons he had already given about the Part V regime, he concluded that cannot be right.

69. Again, that reasoning cannot apply to voting in a ballot for industrial action or voting in favour of industrial action. If those acts constitute taking part in the activities of an independent trade union, there is no difficulty with limiting the protection in s.146 to such acts taking place "at an appropriate time" as defined in s.146(2). One would normally expect the act of voting to take place outside work hours, especially given that it is a statutory requirement (s.230) for ballots to be conducted by post, and for voting papers to be sent to members' home addresses (or any other address they have requested be treated as their postal address).

70. The Court of Appeal's comment at paragraph 54 was in response to those two arguments. It referred to Drew and to Chaudhury J's conclusions as to "at an appropriate time" and said:

> "We agree. On ordinary principles of statutory interpretation, section 146 does not provide protection against detriment short of dismissal for taking part in or organising industrial action."

71. In that context, the words "or organising" cannot have been intended to refer to any activity beyond the industrial action itself. It certainly cannot have been intended to include to voting in a ballot on industrial action, which would

normally take place "at an appropriate" time according to the ordinary interpretation of s.146(2).

72. We also note that counsel for the employer in Mercer accepted that planning or organising industrial action *could* fall within the scope of "activities" within section 146 if it was done at "an appropriate time", a concession that has not been queried at any stage of the litigation (see para 19 of the Court of Appeal's judgment).

73. We therefore conclude that we are not bound by Mercer to find that voting in a ballot for industrial action or voting in favour of industrial action do not constitute "taking part in the activities of an independent trade union at an appropriate time".

74. We must therefore consider for ourselves whether they do, taking into account the principles in Article 11 ECHR insofar as necessary to do so. We note that Mr Doughty's position is that the reasoning of the EAT and CA as to member states being required to provide protection against detriment short of dismissal for participation in industrial action applies equally to voting in a ballot for industrial action or voting in favour of industrial action. He notes that that issue is currently being considered by the Supreme Court, but the Respondent has not requested a stay of these proceedings pending the Supreme Court's judgment.

75. Leaving aside for one moment the requirements of Article 11, we consider there is no difficulty at all in finding that voting in a ballot for industrial action constitutes taking part in the activities of an independent trade union. There is no dispute on the facts of this case as to "at an appropriate time". This was a ballot of GMB members in the civil enforcement team as to whether that team should take further industrial action, organised by the union, in the context of the long-running industrial dispute about proposed changes to their terms and conditions. Voting in that ballot was undoubtedly taking part in the activities of the union.

76. The question of whether voting *in favour of* industrial action also comes within the definition gave us more pause for thought. The language of "taking part" is arguably more consistent with the act of voting, as opposed to the choice of how to vote.

77. We have concluded, however, that the act of voting in favour of industrial action does amount to taking part in the activities of an independent trade union. There are two main reasons for our decision. First, s.146 clearly protects not only the physical act of taking part in activities, such as attending branch meetings, but also the content of such activities, such as remarks made during a branch meeting. In Bass Taverns Ltd v Burgess 1995 IRLR 596, CA, for example, the claimant was demoted for remarks he made while giving a presentation, in his capacity as a union official, during a company induction course for new employees. The Court of Appeal held that the employer, having consented to the presentation, could not then dismiss the claimant on the ground that the presentation had included derogatory remarks. The *content* of the speech was therefore protected as trade union activity (under section 152 TULRCA because the claim was for unfair dismissal), albeit Pill LJ indicated that if it had

been malicious, untruthful or irrelevant, that may have taken the activities outside the statutory protection.

78. Secondly, although ballots for industrial action are secret, it is entirely possible that an employer will come to know whether an individual employee has voted for or against industrial action. Employees may be quite open about it. If voting in favour of industrial action does not constitute taking part in the activities of an independent trade union, then there would be no remedy for an employee subjected to a detriment short of dismissal by a manager seeking to penalise them for doing so. Further, an employee dismissed because they voted in favour of industrial action would have no remedy beyond ordinary unfair dismissal, and therefore no remedy if they do not have at least two years' service. Parliament must have intended to include within the scope of activities protected by s.146 (and s.152) employees voting in favour of industrial action in an official ballot conducted in accordance with the requirements of Part V of TULRCA. Alternatively, s.146 should be read to include protection for voting in favour of industrial action pursuant to Article 11 and s.3 of the Human Rights Act 1998. As noted above, the Respondent effectively conceded that the reasoning in Mercer as to the need for domestic law to provide such protection applies equally to this case. Unlike in Mercer, however, there is no difficulty in interpreting s.146 compatibly with Article 11.

79. In summary, therefore, we accept that voting in a union-organised ballot on industrial action and voting in favour of industrial action in such a ballot are both protected activities under s.146 of TULRCA.

Detriment

80. We must determine whether Mr Herbert's email constituted a detriment to the Claimants.

81. As already noted, we heard evidence from only four of the 21 Claimants. This approach was agreed between the parties and the Respondent accepts that if we find the test for detriment is met, then each of the Claimants suffered a detriment. In other words, the Respondent agreed that it was not necessary for every Claimant to attend the hearing or otherwise give formal evidence that they felt upset or disadvantaged by the email.

82. A preliminary legal issue arose in relation to the applicable test for establishing a detriment. The Respondent relied on Derbyshire v St Helens MBC [2007] IRLR 540, and in particular the following comment of Lord Neuberger:

> "It is hard to imagine circumstances where an 'honest and reasonable' action by an employer, in the context or conduct of an employee's equal pay claim, could lead to 'detriment', as that term has been considered and explained in the cases to which I referred, on the part of the employee. In this case, at any rate, I am content to proceed on the basis that the council would succeed in defeating the claims if it could establish that, in sending the two letters, it had acted as an honest and reasonable employer in the circumstances."

83. Mr Doughty argued in his opening skeleton, “In order for the Claimants to succeed it is necessary for them to show that the Respondent went further than was reasonable when it sent the communication.”

84. Again, this takes the comments out of context. Lord Neuberger was referring to the particular circumstances of correspondence from a solicitor during equal pay litigation, seeking to compromise the proceedings. The House of Lords endorsed the test as set out in Shamoon (above) and did not seek to create an additional “honest and reasonable” defence in all cases. The overarching test was whether any distress caused to a claimant was objectively reasonable.

85. The present case is not equivalent or even analogous to ongoing litigation where correspondence is exchanged between the parties as to possible settlement. Employees involved in litigation expect to correspond with their employer or solicitors acting for their employer about the proceedings. In the present case the Claimants had no reason to correspond directly with the Respondent about the industrial dispute, let alone with the Chief Executive directly. It is the role of the union to engage with the Respondent on their behalf.

86. We must consider whether a reasonable person would or might take the view that in all the circumstances the treatment was to his or her detriment.

87. There can be no doubt that the Claimants from whom we heard evidence did feel upset on receiving Mr Herbert’s email of 9 November 2022. They felt threatened and pressured by it. That is supported by contemporaneous evidence of the reaction of Mr Carroll and Ms Wallace. The Respondent suggested in cross-examination of the Claimants that they were influenced in their perception of the email by the views of GMB. Given that we must consider the question of detriment from the Claimants’ perspective, the relevance of those questions was not entirely clear. In any event, the contemporaneous evidence of the Claimants’ reaction to the email shows that at least two of them were shocked and felt threatened by it before GMB’s response later that afternoon.

88. It is significant that Mr Herbert had never written to the CEO team directly before. This was a highly unusual email. His position of seniority was bound to put additional pressure on the recipients of the email.

89. Read objectively, the email seeks to dissuade the recipients who were GMB members from voting in favour of further industrial action. The email opens with: “I wanted to write to all of the civil enforcement team directly as l have been notified by the GMB that those of you who are members of that union will be balloted later this week about whether you would support further strike action in relation to the ongoing discussions around proposed changes to the unsocial hours policy.” The email is therefore expressly about the ballot. Having set out the Council’s position, he writes, “I am not sure what the GMB plan for strike action is intended to achieve” and “I would ask you please to consider whether further strike action will support this approach”.

90. The email also contains a threat to withdraw the offer of four-year pay protection:

> "I believe that … the four year pay protection offer was one made in good faith to support existing staff through the introduction of these changes. However should we be unable to reach agreement we will need to review whether this offer remains on the table."

91. On one view, the statement is obvious. The four-year offer was not guaranteed unless and until there was an agreement. Reading the letter as a whole, however, the implication is that the Council's position on the four-year offer could be negatively influenced by further industrial action.

92. We conclude that a reasonable person would or might take the view that receiving an email in those terms, and in those circumstances, was to his or her detriment. We give significant weight to the fact that the Claimants from whom we heard evidence did feel that way. We do not consider their reactions to have been unreasonable.

93. The Respondent argued that if it is not entitled to write directly to the Claimants in this way, there would be no lawful mechanism for it to correct what it considered to be incomplete and misleading information being provided by the union. It was argued that the Respondent must be able to correct misleading information in the way that Mr Herbert did, including doing so in a "robust manner", so long as what they do is fair. The Claimants' reaction was therefore "an unjustified sense of grievance". We do not accept that argument. We note that previously when the Respondent took issue with GMB's public statements, it issued a joint statement to *all staff*. That statement was more measured in tone, importantly it did not come from the Chief Executive personally, and it was not sent to one particular team whom the Respondent knew were almost all GMB members. The Respondent perhaps could have chosen the same approach here. It is also possible that managers could have communicated directly with individual employees about the issue. Otherwise, the proper forum for raising concerns, particularly if adopting a "robust" stance, is in discussions with the union.

94. We do not need to determine whether other possible types of communication would have constituted a detriment. Applying the test, we are satisfied that in the circumstances of this case the email did constitute a detriment.

<u>Sole or main purpose</u>

95. We must determine whether Mr Herbert's sole or main purpose in sending the email was to deter the Claimants from voting in favour of industrial action in the ballot.

96. As already noted, the email begins by referring to the ballot. It was also sent the day before the ballot was due to open. There can be no doubt that the subject-matter of the email was the ballot. We have also found that, read objectively, it sought to dissuade the recipients who were GMB members from voting in favour of further industrial action. We consider that the natural reading of the email is the best evidence of Mr Herbert's purpose in sending it.

97. We reject Mr Herbert's evidence that it did not matter, or "wasn't particularly relevant", to the Council whether there was a further strike. That is simply implausible. The dispute had been ongoing for almost a year. The Council were

naturally very keen for the GMB members to accept the offer that had been accepted by the other unions. Further industrial action would not be conducive to that aim, as Mr Herbert said himself in the email.

98. The Respondent's position is that Mr Herbert's purpose in sending the email was to correct inaccurate information he believed was being shared with the staff, and to ensure they had all the facts. Even if that is right, it is not inconsistent with the sole or main purpose being to deter the GMB members from voting in favour of industrial action. Even if he was seeking to correct inaccurate information, the natural reading of the email is that he was doing so *in order to* deter the GMB members from voting in favour of further industrial action.

99. Further and in any event, to the extent that Mr Herbert was seeking to "correct misleading information", he did not do so in an entirely neutral way. He described GMB's characterisation of the Council's proposals as a "10% pay cut for staff" as "really misleading". He then set out what the position would be for an average CEO during the four-year pay protection period, without spelling out the position after that period and without explaining what it amounted to in percentage terms. In fact, the effect of the proposals was to remove the 10% plussage the CEOs were entitled to under their contracts. The new plussage proposal would have some effect on the overall pay cut, but as the Respondent's spreadsheet shows, the cut in pay was still over 8%. That cut in pay was the headline that GMB and its member were concerned about. Everyone knew that there were discussions about the extent to which pay protection could be applied to the CEOs. Mr Herbert cannot have believed that the CEOs were being misled to any material degree by GMB describing the proposals as a 10% pay cut.

100. This part of Mr Herbert's email was not therefore neutral. It reflected the Council's position in the negotiations. It was designed to recommend the proposals and thereby deter the Claimants from voting in favour of industrial action.

101. As to the comments about the Council reneging on an agreement for lifetime pay protection, even if Mr Herbert genuinely believed that GMB had deliberately misled their members about this, his decision to "set the record straight" in this email was *designed* to deter the GMB members from voting for further industrial action.

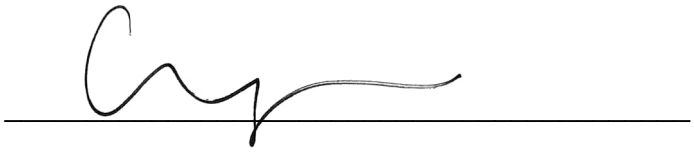
102. We note that Mr Herbert was not present at the ACAS meeting on 29 June. He did not know definitively what was agreed at that meeting. He may have genuinely believed there was no express promise by the Council to support lifetime pay protection at that meeting, but that can only have been based on reports of the meeting. We find that the real driver for Mr Herbert's email was his annoyance at GMB's change of position. Whatever was agreed at the ACAS meeting, it is clear that by 9 August 2022 GMB were willing to consider the idea of pay protection being limited to four years, and indeed later in August 2022 Mr Newman spoke to Mr Herbert directly and gave the impression that GMB would adopt a neutral stance on that proposal. At no stage during those discussions did GMB allege that the Council had gone back on the ACAS agreement. The press release on 23 September therefore represented a significant shift in GMB's position and it blindsided the Council.

The language of "rogue bosses" and being "scandalised" also represented a significant escalation in hostility. Mr Herbert's frustration and irritation is evident from the minutes of the meeting on 29 October.

103. In those circumstances we find that the email of 9 November 2022 was a reaction to GMB's renewed hostility. Mr Herbert set out the Council's arguments in favour of the proposals, not in neutral terms but arguing strongly for the Council's position. He also included a threat that the CEOs may end up in a worse position if they did not accept the proposals. His immediate concern was the ballot, as is clear from the opening and closing of the email, and his sole or main purpose in sending the email at that time was to deter the GMB members, including the Claimants, from voting in favour of industrial action.

104. Having found that that was the sole or main purpose of the email, we do not accept that the sole or main purpose was to deter the Claimants from voting at all in the ballot. Nor do we accept that Mr Herbert was seeking to prevent, deter or penalise the Claimants for being members of a trade union.

105. The claims therefore succeed.

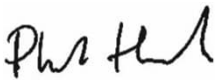


Employment Judge Ferguson

Date: 8 March 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27th March 2024



FOR EMPLOYMENT TRIBUNALS

SCHEDULE OF CLAIMANTS

1. Mr C Adams 1400926/2023
2. Mr A Bell 1400927/2023
3. Ms B Binstead 1400928/2023
4. Mr N Carroll 1400929/2023
5. Mr J Chirgwin 1400930/2023
6. Mr P Dables 1400931/2023
7. Mr J Dungey 1400932/2023
8. Mr J Elms 1400933/2023
9. Ms C Emery 1400934/2023
10. Ms C Evans 1400935/2023
11. Ms D Hall 1400936/2023
12. Ms D Lowe 1400937/2023
13. Mr A MacKrill 1400938/2023
14. Mr A Old 1400936/2023
15. Ms R Michaels 1400940/2023
16. Ms S Reeves 1400941/2023
17. Mr J Tidd 1400942/2023
18. Mr H Todoric 1400943/2023
19. Ms D Vaccaro 1400944/2023
20. Ms E Wallace 1400925/2023 & 1400945/2023
21. Mr I Watson1400946/2023