EMPLOYMENT TRIBUNALS

Claimant: **MR K DEMPSEY**

Respondents: **LONDON UNDERGROUND LIMITED**

Heard at: Watford **On:** Monday 25 to 28 April 2022 & 8 June 2022 (in chambers)

Before: Employment Judge Skehan
Ms Thompson
Mr Bhatti MBE

Appearances
For the claimant: Mr N.Toms, counsel
For the respondent: Ms R.Thomas, counsel

RESERVED JUDGMENT

1. The claimant's claim for detriment contrary to section 146 Trade Union and Labour Relations (Consolidation) Act 1992 is successful to the extent set out below.
2. The claimant's claim for detriment contrary to section 47B Employment Rights Act 1996 is successful to the extent set out below.
3. The remainder of the claimant's claims are unsuccessful and dismissed.

REASONS

1. At the outset of the hearing, we revisited the list of issues. These were agreed to be comprehensive and were:

   <u>Detriment due to union activities contrary to (section 146 Trade Union and Labour Relations (Consolidation) Act 1992 (TULR).</u>

   1.1. Did the claimant carry out the following trade union activities his capacity as a health and safety representative:

      1.1.1. On or around 27 April 2019, raising health and safety concerns about trackwork with Mr Ellas, (a contractor) including over the scope of works, whether the track was safely secured and in relation to certification;

      1.1.2. On or around 3 May 2019, sending an email to Mr Davis (Head of TransPlant) informing him about various health and safety concerns including that uncertified contractors were working on the track;

      1.1.3. On 20 May 2019, raising concerns with Mr McFall (Maintenance Performance Manager) on behalf of his union members including about the working arrangements relating to protection arrangements when working

on the track which he said were in breach of the respondent's agreed health and safety procedures;

1.1.4. On or around 20 May 2019, discussing his health and safety concerns about protection arrangements with Mr Maggenneder.

1.2. If the claimant did carry out all or any of the trade union activities in the above paragraph, did he do so at an appropriate time as defined by section 146 (2) TULR?

1.3. Was the claimant subject to the following detriments as an individual by the respondent:

1.3.1. being suspended by the respondent on 23 May 2019;

1.3.2. Mr Davis' comment that the claimant needed to 'slow down and rest' and that he had been referred to occupational health prior to the start of the Tier 2 meeting on 23 May 2019 which implied that the claimant had issues relating to mental health when this was not the case;

1.3.3. the subsequent correspondence from Mr McNaught (Director of operational readiness for LUL and TfL Rail) to Mr Leach on 23 May 2018 also implying that the claimant had issues relating to his mental health;

1.3.4. being subject to the disciplinary investigation conducted by Ms North which remained ongoing until 13 August 2019;

1.3.5. being referred to occupational health in late June 2019 without any or any proper basis.

1.4. If the claimant was subject to the alleged detriments by the respondent, was the respondent's sole or main purpose to prevent or deter the claimant from taking part in the activities of an independent trade union at any appropriate time or to penalise the claimant for doing so.

<u>Detriment related to protected disclosure</u>

1.5. Were the alleged disclosures made by the claimant on 3 May 2019 (1.1.2 above) and/or 20 May 2019 (1.1.3 (expressly not 2.2.4)) protected disclosures within the meaning of section 43A ERA.

1.6. Were they qualifying disclosures as defined by section 43B(1)(a) ERA in that in the claimant's reasonable belief they:

1.6.1. disclosed information that the health and safety of some of his members had been was being or was likely to be endangered and safe working practices on the railway;

1.6.2. were in the public interest;

1.7. It is accepted that the disclosures, if found to be qualified disclosures, were made to the claimant's employer;

1.8. Was the claimant subject to the detriment set out above because he had made all or any of the alleged protected disclosures;

1.9. Both parties confirmed that there were no limitation issues for the tribunal to consider within this litigation.

The Facts

2. We heard evidence from the claimant and Mr Jones on behalf of the claimant. We heard evidence from Mr McFall, Ms North, Ms Curniffe, Mr Davis and Mr McNaught on behalf of the respondent. All witnesses gave evidence under oath or affirmation, their witness statements were accepted as evidence in chief and all witnesses

were cross-examined. We were provided with a witness statement from Mr Leach and he made himself available for cross examination. There were no questions in cross-examination for Mr Leach and his witness statement evidence was accepted as his evidence in chief.

3. As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents. This is a unanimous decision of the employment tribunal.

4. The claimant was employed by the respondent in 2003 and remains within the respondent's employment. At the relevant time the claimant worked as an advanced train maintainer within 'TransPlant', being a division of the respondent that is responsible for providing engineering trains along with plant and equipment to support maintenance renewal and the upgrade of the respondent's track, trains, signals and other infrastructure. At all material times the claimant was an elected health and safety representative for the RMT trade union. It is common ground that the claimant is a diligent, committed and passionate trade union representative. The respondent has a long and established relationship with its trade unions. Mr Davis said that when he took over his role as head of TransPlant in October 2018 the industrial relations situation was very strained, including the maintenance side of the depot where the claimant worked. Mr Davis told us that his predecessor, Mr Pereira was removed from his management position as head of TransPlant due to issues relating to his dealing with health and safety matters. On Mr Davis' arrival there had been a pay dispute in which the claimant had negotiated on the part of the union. Mr Davis notes a lot of conflict between workshop floor staff and management and describes the workplace as having a 'toxic atmosphere that presented a considerable challenge as an incoming manager'.

5. Prior to the issues giving rise to this litigation the claimant also describes a difficult working environment. Over the years he has raised various health and safety issues for which the claimant alleges that he has been repeatedly investigated, victimised and subjected to detriments for expressing, preventing and reducing risks to health and safety in the workplace. We make no findings of fact in relation to any of these matters referred to by the claimant as we have not heard of them in any detail and they are not in issue in this litigation.

6. In his capacity as health and safety representative, the claimant had been persistently pursuing health and safety concerns about 'protection' on the track and it is these issues that give rise to this litigation. Anyone working on a London Underground line requires specific track licensing. All of London Underground lines are graded to reflect different health and safety requirements. The grades, in very basic terms, are Area A that includes the depot, maintenance sheds etc. Area B that includes all track within depot limits and Area C that includes all stabling sidings where the traction current is on 24 hours. Protection is the process by which measures are put in place to make the track safe in Areas B and C for engineering works. The respondent uses specialist protection staff called PWT- D (protection workers on the track – depot).

7. Protection issues were not new within the respondent. These had been raised repeatedly by the claimant's predecessor, Mr White prior to the claimant taking up

his health and safety rep role and prior to Mr Davis taking up his role. There was a conflict between the union position expressed by the claimant and Mr Davis' position in respect of protection issues. The claimant considered that the respondent must comply with the London Underground rulebook, he placed considerable emphasis on protection issues and advocated for this to be brought in-house and for London Underground staff to be trained in providing protection rather than external contractors.

8. Mr Davis told the tribunal that the London Underground rulebook was written with London Underground passenger trains in mind. This caused issues when applied to TransPlant, as elements of the published rulebook did not allow for engineering vehicles. Mr Davis sought to devise safe ways of working that involved fencing off areas of track that would effectively reclassify it to 'area A', being effectively a shed without a roof and avoiding the protection issues. His plan was to review areas of TransPlant with the approach of making all area safer to work for staff and have the London Underground rulebook amended. Mr Davis said that he considered his plans were safer than those proposed by the claimant because should London Underground staff be providing protection for their own colleagues, they would risk being distracted and potentially tempted to assist with tasks being undertaken by those being protected. Further within his statement Mr Davis queries the claimant's motivation in relation to his protection concerns stating that, '…the claimant's focus seemed to be to use it as a lever for additional pay for him and his members'.
9. Mr Davis said that the claimant was initially on-board with a desire for approved industrial relations and mentions that the claimant persuaded the workshop floor to drop industrial action and they established a reasonably constructive working relationship. Mr Davis is himself a union member over 25 years and considers the union contribution to be important within the industry. Mr Davis was cross-examined in relation to the world 'initially' that suggested the situation subsequently changed. Mr Davis denies that this is the case but states that relationships became strained around protection issues. Mr Davis described the claimant as a determined advocate who regularly raised issues and lots of those issues were resolved.
10. The dispute between the union and the management encompassed the TransPlant technical notice dated 17 January 2018 ('the disputed technical notice') signed by Mr McFall and Mr Sadler amongst others. This notice purports to deal with '…a safe system of work to be followed when working on non-electrified track within the TransPlant Ruislip depot. This instruction will negate the need for a possession or protection provided this safe system of work is followed….' Union agreement was sought and that agreement was initially provided by union official, Mr White. There was an email from Mr White to Mr McFall within the bundle dated 13 February 2018 withdrawing that union agreement which stated, '… I should not have agreed this procedure as it contravenes protection rulebook…. For now I will be instructing my members not to follow this process..'. There was further correspondence within the bundle indicating that the union had objected to the continued use of the disputed technical notice on the basis that it was a breach of the rulebook.
11. There is a set process for the union to raise health and safety issues with the respondents. These are initially raised with management at a local level If agreement between the trade union and management cannot be reached this is escalated to a Tier 2 meeting, and should it remain unresolved, it can be escalated

to director level or a full company council meeting. Mr Davis chaired the Tier 2 meetings at the relevant time.

12. On 27 April 2019, the claimant, in his capacity as a union health and safety representative, informed his duty manager of his intention to speak to a contractor about their certification of trackwork and thereafter spoke to Mr Ellas, a long serving contractor who had an established relationship with the respondent. This is referred to as the 'first incident'. The claimant says that he wished to assure himself that safe working practices had been put in place and the staff were appropriately licensed as it had come to light that agreed practices were not being adhered to. The claimant describes Mr Ellas as 'bolshie' but following a relatively long interaction, the claimant concludes that his initial bolshie reaction was likely to be a result of frustration and describes a relatively amicable long discussion. Mr Davis said that the claimant was entitled, as a health and safety representative, to look at the work carried out by Mr Ellas and his team and in doing so he was carrying out his duties as a health and safety representative. He drew a distinction in respect of the manner in which the claimant was alleged to have acted in that he was not entitled to behave aggressively.

13. On 29 April 2019 Mr Ellas sent a letter of complaint in relation to his interaction with the claimant on 27 April 2019. Mr Ellas' complaint includes the following:

    13.1. in a very aggressive manner I was asked what I was doing…..

    13.2. ….It appeared to me that he was trying to find every way of stopping the work by asking me a barrage of questions..

    13.3. … He kept raising his voice asking me question after question which I started to feel verbally threatened with the loaded questions he was asking me..

    13.4. At this point the PWT was not happy with the way he was being asked loaded questions to be caught out……. The PWT felt very much disrespected and the overall demeanour [of the claimant] towards him was rude and aggressive.

    13.5. …..he kept pointing out that he wasn't happy with the TransPlant management and how they allow things to go on by putting everyone at risk and that he wasn't trying to blame me for anything. I felt this wasn't true because if that was the case why didn't he bring this to the TransPlant management team's attention instead decide to come and harass me and my staff…..

    13.6. ….It appeared to me that his intention was clear that he was not only out to stop my works were also to stop all the works completely

    13.7. When we was up in my port-cabin …. I showed him the permit to work and by now he had relaxed and started to be more friendly. He reassured me that he wasn't out to get me but he was out to prove a point to TransPlant management team that they can't get away with 'just doing what they want when they want' they must be held to account….

    13.8. … at this point [the claimant] said that he was happy with everything we had in place especially fact we have a PWT with us on-site and that he will bring certain things up at the rep meeting on Wednesday … he then left…..

    13.9. I have worked in this depot for over 5 years……. feel very much part of the TransPlant family but this is the first time that I was made to feel that me and my staff were being targets to push over peoples [objections] across

especially in this aggressive, threatening, intimidated, bullied and rude manner which we were subjected to…..

14. This complaint was received by Mr McFall, on 1 May 2019, who informed Mr Davis. Mr Davis considered whether to suspend the claimant on receipt of this complaint but was advised not to by Ms Curniffe, who suggested that he manage the situation. Mr Davis considered that the matter should be investigated. Ms North was appointed to investigate this matter. Mr Davis stressed that he wished to ensure that the complaint was investigated independently and by somebody who was properly trained within bullying and harassment issues. Mr Davis had not met Ms North previously believed that she was an appropriate person to conduct the investigation. For reasons unexplained, the claimant was not informed that an investigation had commenced.

15. The claimant, Mr Davis and others including Mr Sadler, Mr Maggenneder and Mr Carter (Head of Access) all attended a further ad hoc health and safety meeting relating to Tamper maintenance on 1 May 2019. The minutes of this meeting record the claimant raising protection issues and stating that a 'consistent safe working approach' was required and the meeting should not focus just on Tampers. The notes of this meeting show management seeking to curtail issues to Tampers but the discussion evolving into a discussion of the contentious ongoing protection issues.

16. The claimant sent an email entitled 'uncertified contractors working on A+ B' to Mr Carter, head of access and Mr Davis on 3 May 2019 timed 06.03. It states inter alia:

    16.1. Please ensure that this activity ceases immediately we cannot allow staff or contractors to work in Area B of the depot without valid certification as this is not only a breach of the rule book and simply put poor, dangerous and unsafe practise and one would think after the discussions at Wednesday meeting this would be at the forefront of everyone's mind. Yet I am still receiving reports of unsafe working practices are still being used, which undermines and is an insult to everyone at Wednesdays meeting including yourselves…….

    16.2. ….. It has been reported to me that on Thursday, 2 May Teloc training was be done by an external company…. When staff were ready to do the practical Mark Sadler came into the training room with the PWT and briefed ..on safety measures and informed everyone that the tamper had been moved to A road the barrier would be closed and the points scotched and clipped to prevent traffic from …entering A road for our protection ….. He was overheard saying in front of the PWT although you don't have the correct certification but you will be fine.

    16.3. I've also heard although I can't confirm that the PWT was only asked to scotch and clip but had nothing to do with protecting the work party. As a matter of the utmost urgency can you please make the necessary enquiries and ensure TransPlants compliance with the rule book and prevents staff and contractors be put in dangerous circumstances as I understand this is again the plan for today….

17. When asked about this email Mr Davis said that it is related to unsafe practices within the respondent that endangered health and safety. Mr Davis said that he took the email very seriously and that he took immediate steps to move Mr Sadler and thereafter Mr Sadler was no longer involved in issuing permits to work but had been refocused on other duties.

18. The claimant followed up this email with a further email on 3 May 2019 timed 13.47. This email confirms that the need to understand the details of the plan and how arrangements are set up and how it protects new members and it goes on to ask various questions. The claimant refers to the earlier email and states that the RMT are appalled by the action of local management and because of that they are in the process of drafting their complaints to the Office of Rail and Road (ORR). Mr Davis acknowledged that it was a serious step to make a complaint to the ORR but one that the claimant was entitled to take he [Mr Davis] did not have an issue with the claimant making that complaint.
19. On 16 May 2019 the claimant emailed a 'Tier 2 agenda' for a meeting that was due to take place on 23 May 2019. Mr Davis was a recipient of this email. This agenda escalated the protection matters that were in contention between the RMT and the management.
20. On 20 May 2019 the claimant was approached by members raising concerns relating to the protection arrangements. He had a further discussion with Mr McFall relating to protection issues and asked Mr McFall why members were still being asked to carry out tasks when he had raised serious safety concerns and highlighted non-compliance with the London Underground rulebook.. He asked Mr McFall why his members were being asked to carry out tasks in accordance with the disputed technical notice. The claimant reminded Mr McFall that the disputed technical notice was not agreed by the union and should be withdrawn. Within his statement Mr McFall said that, 'I explained to [the claimant] that as far as I was aware, there was a process and risk assessments still in place that had previously been agreed and signed off, including with the previous RMT health and safety representative. To my knowledge this had not been removed and was in place on the system. I made [the claimant] aware that I had not been told this process was being removed by my manager and that [the claimant] would be best placed to take this issue up with Mr Sadler…..' The claimant describes Mr McFall's contribution as bewildering and disingenuous as Mr McFall was fully aware of the disputed technical notice and told Mr McFall that should the management continue to make members work in what were unsafe and non-compliant working practices it would leave them little option but to refuse to work on the grounds of health and safety.
21. On the morning of 20 May 2019 the claimant had a discussion with his colleague and fellow union member Mr Maggenneder, this is referred to as 'the second incident'. The claimant said that Mr Maggenneder commenced the conversation by being rude about a fellow union representative and Mr Maggenneder questioned the claimant's proposal in relation to bringing the protection duties in-house, and asked if the claimant wanted everybody to be trained to PWT. Mr Maggenneder told the claimant that people did not want protection brought in-house and questioned the claimant why he had not been invited to a union meeting. The discussion was heated and came to a conclusion when the claimant tossed an A5 pamphlet (the rulebook) on the ground and both gentlemen walked away from the discussion. Neither raised any complaint to the respondent about the other. The claimant spoke to his direct duty manager Mr Bennett immediately after the altercation and was told not to worry about it, but chill for a bit.
22. Mr McFall prepared a note as contained within the bundle said to be prepared on the day of the incident, 20 May 2019. However he accepted in cross examination that it was not as the note concludes with '[the claimant's] next planned attendance on site was on 23/05 where he was suspended' and accepted that the note was prepared on 23 May at the earliest. Mr McFall's note records that:

22.1. Mr Maggenneder had approached [the claimant] to query several topics that were being raised by [the claimant] in relation to protection around the depot. Mr Maggenneder is a union member represented by [the claimant]

22.2. Mr Maggenneder stated that when he questioned [the claimant] he appeared 'agitated and defensive'…..' When he then disagreed with [the claimant's] answer and rationale that [the claimant's] temper quickly amplified by way of his voice been raised to a point that Mr Maggenneder felt he was being shouted at.

22.3. Mr Maggenneder stated that he did not raise his voice but told [the claimant] to calm down and not shout at him

22.4. Mr Maggenneder said that [the claimant] went from shouting to throwing his book that he was holding on the floor and screaming at Mr Maggenneder, his body language was aggressive by way of flexing both arms downwards letting out the aggression….[The claimant] then walked off.

22.5. Mr Clack said he could hear screaming outside while he was sitting at his desk and stated it was quite shocking and that [the claimant] appeared to lose control.

22.6. Mr McFall spoke to Mr Bennett, the claimant's direct duty manager. Mr Bennett explained that [the claimant] had approached him following an argument with Mr Maggenneder, he noted that [the claimant] was upset and teary-eyed. Mr Bennett had asked him to sit in the back office and calm himself down and he would be taking him for a coffee at lunchtime to have a chat. Mr Bennett indicated that everything was getting on top of [the claimant] and that he was struggling to cope. Mr Bennett said it would be best for [Mr Bennett] to manage this. Mr McFall advised Mr Bennett to supply [the claimant] with the EAP [employee assistance program] and update Mr McFall after their discussion.

22.7. Mr McFall updated Mr Sadler of the situation.

22.8. Mr Bennett updated Mr McFall that afternoon that he had discussed with [the claimant] the issues and stresses he was experiencing and that [the claimant] appeared composed now was okay to return to work.

22.9. Mr McFall worked with [the claimant] later that day and evaluated him as completely composed and Mr McFall would not have detected that anything had occurred that day.

22.10. Mr McFall did not raise the matter with [the claimant].

22.11. Mr McFall informed Mr Davis of the events. [the claimant]'s next planned attendance on site was 23/05 where he was suspended.

23. On 21 May the claimant received reports from members who were being asked to carry out work in accordance with the disputed technical notice. The claimant advised his members of the right to refuse to work on the grounds of health and safety and assured them that he would raise the matter as a matter of urgency.

24. On 21 May 2019 the claimant sent a long email to Mr McNaught and Ms Sheridan (director of TfL engineering delivery) copied to Mr Davis. The email commences with, 'I am asking for your immediate intervention in regards to issues of Area B working and Protection arrangements and TransPlant Ruislip and request an emergency ad hoc TfL safety Forum resolve this issue once and for all ….'. The claimant raises the issues that were discussed at the previous meeting of 1 May 2019 and the managements continued use of the disputed technical notice that the

claimant considered to be a breach of the rule book. It concludes with, '…Today I have received calls from staff across the depot were very uncomfortable with the situation, they feel as if they and their colleagues are being pressurised into working unsafely. Staff still expressing concerns and believing that raising complaints and refusal to work on the grounds of health and safety will lead to reprisals , despite my constant reassurances. I ask that you take immediate action to prevent TransPlant pressurising my members into unsafe situations which directly contradict their training and guidance material and are in breach of the protection rulebooks.'

25. Ms Sheridan responded to the claimant by email stating that, 'I'm advised that discussions are ongoing and they have not been exhausted to the point with the needs escalation to director level at this time'

26. There is email correspondence between Mr McFall, Ms Curniffe from HR and Mr Davis on 22 May 2019:

    26.1. Mr McFall notes 'based on the rationale of the decision being based on the well-being of the individual and other employees within the workplace' and suggests that the claimant is 'stood down' rather than suspended.

    26.2. Ms Curnliffe flags that being 'stood down' has a different meaning to suspension

    26.3. Mr Davis says in response, 'I feel we should stick with suspension. We need to completely remove the individual from the operational business so we can aid his recovery. [Mr McFall] are you planning to do a LUOH referral after you have had a conversation and issued?

27. Ms Curnliffe is an experienced HR adviser. Within her statement she notes that:

    27.1. Mr Davis felt it was appropriate to suspend the claimant following the second incident and they discussed that at some length. She states 'this was in relation to [the claimant's] alleged conduct and the fact there was a risk of future incident.' Mr Davis also raised concerns about the claimant's heath and the fact that his mental health might be impacting on his conduct at work. Mr Davis talked a lot about wanting to protect the claimant and he wanted to take him out of a stressful environment. Mr Davis referenced the fact that the claimant had burst into tears after the incident and that his immediate line manager had observed the claimant was struggling to cope. It was put to Ms Curnliffe during the course of cross-examination that her reference to the claimant having 'burst into tears', did not appear elsewhere in the evidence. Ms Curniffe said that she may have been mistaken in including that reference.

    27.2. Ms Curniffe cautioned Mr Davis about involving concerns about the claimant's health in the decision to suspend noting that one wouldn't ordinarily suspend somebody if they were medical concerns about their fitness to work. She states that Mr Davis took on board that advice and the discussed the basis of suspension being the conduct of the two allegations that had been levied in relation to him. They discussed that management should definitely address the concerns in relation to his mental health through an occupational health referral separately and that might be put into the mitigation a relevant consideration in any subsequent disciplinary about the health concerns should not themselves be the reason for suspension. She was confident that Mr Davis understood her advice. She made no decision in relation to suspending the claimant.

27.3. She noted the special provision within the respondent's disciplinary policy requiring that if disciplinary action involving a trade union official is being contemplated, the case will be discussed with a full-time official prior to any action be taken. She discussed this provision with Mr Davis and confirms that he was aware of it. She recalled that Mr Davis was concerned that if a full-time official was notified in advance of suspending the claimant, there would be a breach of confidentiality so that the claimant would find out from the full-time official before he found out from managers. This was considered more likely because of the claimant's closer relationship to the full-time official than a lot of other trade union representatives.

28. Mr Davis says that he understood the claimant's discussion with Mr Maggenneder related to Mr Maggenneder telling the claimant that he and the other union members didn't actually want the training and responsibility that the claimant was seeking for them in relation to protection issues and a disagreement of some kind thereafter ensued with the claimant apparently shouting and acting in an aggressive way towards Mr Maggenneder. Mr Davis said the inference was that the claimant's struggling to cope was manifesting itself in aggressive outbursts and unreasonable behaviour towards colleagues, which was unacceptable. He took HR advice and felt clear that it was appropriate to suspend the claimant. He states, 'first and foremost these were potential allegations of misconduct, gross misconduct in terms of unacceptable aggressive behaviour….' The first incident was already under investigation, and it seemed sensible to us that Ms North should be asked to extend her investigation to include the second similar incident, given the circumstances. Mr Davis stresses the safety critical environment of the respondent and that the respondent needs to be able to trust people to interact with each other appropriately.

29. Mr Davis says in his witness statement, 'whilst I had observed the claimant losing his temper raising his voice and becoming very animated in meetings previously, I felt what was been reported here was different and it has escalated to a more serious level'. He said during cross examination that previously he had witnessed the claimant passionately arguing his case, he was not making any allegation that he had witnessed any improper conduct on the claimant's part. Mr Davis says that he felt the safest course of action would be temporarily removing the claimant from the workplace, preserving the safety and relationships of him and his colleagues. Mr Davis says he was concerned that the claimant may lash out against one of the staff members or have been on the receiving end. Mr Davis says that the claimant's trade union activities on the protection issue were a very real source of stress for the claimant to the point that he was concerned it was adversely impacting his mental health and in turn, his behaviour at work. He denies that the concern for the claimant's mental health were the reason for the suspension but describes it as important context. Mr Davis says that 'standing down from duties' was not an appropriate alternative for the claimant in the circumstances as the claimant would have continued his trade union duties. Mr Davis says that he was trying to avoid another aggressive outburst and needed to remove the claimant from the workplace altogether while the respondent established the facts. Mr Davis considered whether it was appropriate to conduct a fact-finding interview before suspending the claimant, however he was conscious that the claimant would want to be represented at that meeting by a senior/full-time trade union representative which is the service offered to trade union representatives and this would have

been difficult to arrange at short notice. No steps were taken to explore that possibility further.

30. The claimant attended the respondent's head office for the scheduled Tier 2 health and safety meeting on 23 May 2019. Prior to this meeting Mr McFall on the instruction of Mr Davis, told the claimant that he was suspended. The accompanying letter states that the reason for suspension is because the respondent has received two separate reports in relation to the claimant's conduct over the last three weeks. The claimant told Mr McFall that he could not believe that he was being suspended with immediate effect when he knew the claimant was about to make representations over serious safety issues regarding protection. Mr McFall responded that, 'that was just the way it was'.

31. Shortly after the claimant's suspension on 23 May 2019, Mr Davis attended the Tier 2 safety meeting that had been scheduled to take place. The agenda for this meeting included protections issues. Mr Davis says within his witness statement that he can't recall exactly what he said but that he explained that the claimant would not be attending the meeting. He recalled stating that the claimant would not be attending because unfortunately he had been suspended that morning.

32. Mr Jones told the tribunal that on arriving at the Tier 2 meeting Mr Davis said that the claimant had been suspended due to his occupational health and Mr Jones thought that sounded ominous. The claimant's whereabouts was questioned again when the meeting commenced and Mr Davis stated that the claimant had been suspended with immediate effect pending an occupational health interview and that the claimant needed to slow down for his own mental health and that his comment was 'not for the minutes'. The Tier 2 meeting scheduled for 23 May 2019 was adjourned and did not proceed at that time. Within Mr Leach's letter to Mr McNaughton of 28 May 2019 he states, '…. It is also the case that [Mr Davis] advised the other reps present that the claimant had been suspended for occupational health reasons and that he needs to slow down and rest…..'. We find it more likely than not considering the evidence from Mr Jones, the contemporaneous email from Mr Leach using this type of language and Mr Davis' own explanation provided to Mr McNaught as to the part the claimant's mental health played in his decision to suspend the claimant, that these comments were made as alleged at the commencement of the Tier 2 meeting.

33. On 23 May 2019 Mr Leach emailed Mr McNaught raising issues in respect of victimisation of the claimant. Mr Leach finishes with. 'I ask that you immediately intervene. Claimant must be immediately reinstated……. And the managers who are behind the actions that they themselves be removed from any activity that involves the management of my members health and safety.'

34. Mr McNaught contacted Mr Davis and Ms Curniffe prior to responding to find out what happened. Mr Davis set out his rationale for suspending the claimant in an email of 23 May 2019 timed 16:06. We note the following in respect of this email:

    34.1. it states that the claimant has been involved in two incidents over the last three weeks that resulted in verbal altercations … Both are being independently investigated…

    34.2. It states that several members of the TransPlant management team have noticed a significant shift in the claimant's behaviour and after the second observation the claimant was seen to be teary eyed and very emotional resulting in him receiving care and comfort from a maintenance duty manager.

Mr Davis said during his oral evidence that the 'several members of management' relates only to the two incidents and matters set out above.

34.3. It states 'I can see that the claimant has been placed under immense pressure as an RMT representative, resulting in him emailing and calling from home when he is meant to be resting, then trying to maintain workforce support through various disputes while at work.'. Mr Davis told the tribunal that he noted emails sent by the claimant at unusual times and referred to his concern that the claimant and other members of staff including Mr McFall were working unduly long hours.

34.4. Mr Davis states that the claimant appears to be displaying many of the key symptoms and trends that the respondent's management were advised to look out for within recent training on mental health and suicide prevention.

34.5. Mr Davis refers to his duty of care to all staff and colleagues within TransPlant and stated that he was concerned if this was not acted upon the situation would escalate possibly involving the physical alteration or worse. …… Everyone was in agreement that suspension seems quite harsh, however, we believe that if the claimant was asked to take time off we would still conduct his trade union duties from home possibly make himself worse

34.6. the suspension is stated to be 'not for punitive reasons'… Mention is made to advice for the claimant to see his GP and referral to occupational health and the employee assistance details. Mr Davis says that he plans to contact the claimant tomorrow in an effort to assure him that we are trying to act in his best interests.

35. Mr McNaught replies to Mr Leach on 23 May 2019 by email time 16:55 a states inter-alia:

35.1. '…. I can confirm that [the claimant] has been suspended on full pay whilst investigations continue into two instances of his behaviour that have caused concern. The management team are concerned … and have asked him to see his GP and referred him to occupational health. The local manager also made sure that he had all employee assistance details….. I will not intervene and reinstate him. There is a genuine concern about his health affecting his behaviour.

36. Mr McNaught told the tribunal that he had worked with Mr Davis over many years and considered him to be an extremely experienced manager in dealing with trade union issues and he had confidence in Mr Davis as a manager. In his response to Mr Leach, Mr McNaught sought to explain that, 'people were genuinely worried about the claimant and wanted to make sure that he had any support he needed..'. Mr McNaught considered his response to be appropriate in this context.

37. We were referred to applicable disciplinary process the relevant parts of which are:

clause 10- There are four principal steps which the company follows to manage disciplinary matters:

1. initial assessment
2. full investigation
3. disciplinary hearing
4. appeal

Clause 11 -The line manager will arrange to meet with the employee on an informal basis to determine key facts from the employee's perspective and to identify any

mitigating factors. The employee can be accompanied by a fellow employee or trade union representative at this stage and this will be offered by the line manager.

Clause 12 - In any case where formal disciplinary action is taken there will always be a full investigation and a disciplinary hearing. In some cases the facts may be so clear, or the need for action is so pressing, that an initial assessment will be inappropriate.

Initial assessment

Clause 13 -The initial assessments to determine whether a full investigation may be required will normally be carried out by the line manager (unless he or she is involved) as soon as possible after an alleged breach of conduct has been identified.

Clause 14 - Where the line manager decides that a full investigation is not required the employee will be notified. Where there has been a minor breach of company rules that does not warrant taking formal action the line manager will make the employee aware of the required standard and agree any actions required to prevent a recurrence. In such circumstances a file note will be made that the note will not be admissible in any future disciplinary is

Clause 15- Where the line manager considers formal disciplinary action to be necessary line manager will inform the employee and draw their attention to the disciplinary procedures and their rights under the procedure. In some exceptional circumstances employees may be suspended on full pay while the full investigation is conducted. Examples of where suspension might be appropriate include:

> allegations of gross misconduct…
>
> Where other employees at the workplace are involved and it would not be possible to continue working as usual……
>
> Where safety might otherwise be compromised

38. Ms North's evidence to the tribunal was confused to the extent that she told the tribunal that she had completed the 'full investigation' part of the process and understood that the initial assessment was completed by either Mr Davis or Mr McFall. This is not consistent with her email to Ms Sheridan of 9 September 2019, which suggests that Ms North had taken responsibility for both the initial assessment and full investigation stage. No other individual within the respondent stated that they had conducted an 'initial investigation'. In reality, no 'initial investigation' as envisaged by the respondent's policy was completed prior to the claimant's suspension.
39. Ms North sought to meet with the claimant on 13 June 2019. Thereafter there were various delays for reasons including unavailability of trade union representatives, holiday absence and unfortunately, Ms North breaking her wrist.
40. The claimant attended occupational health review on 1 July 2019 and a report was provided to the respondent, concluding that the resolution of work issues would help the claimant's health and well-being.
41. Ms North informed Mr McFall in early August 2019 that the claimant's suspension could be lifted and arrangements could be made for him to return to work. There was nervousness on the part of the Mr Sadler and Mr McFall in respect of the claimant's return to work without their knowledge of the detail of Ms North report. Mr McFall unsuccessfully sought to speak to the claimant by telephone and wrote to the claimant on 13 August 2019 stating that from 14 August, he was no longer suspended. The letter was mistakenly sent by second class post. The letter is a pro

forma one stating that it is the respondent's decision to take 'no further action in the case'. There was miscommunication between the parties and the claimant did not return from suspension. The claimant was told by Mr Leach that Ms North had determined there was 'no case to answer'. The claimant says that upon receipt of Mr McFalls letter he felt distressed, anxious and panicked and really upset that the letter from the respondent did not reflect the, 'no case to answer' outcome of Ms North. The claimant was signed off sick following receipt of this letter on 16 August 2019.

42. Ms North submitted her final report on 9 September 2019 to Ms Sheridan and Mr Carter confirming that there was 'no case to answer' against the claimant. She considered that she had completed a full investigation as envisaged by the disciplinary policy. The relevant parts of Ms North's report in relation to the first allegation are:

    42.1. Mr Ellas was likely to have known that the claimant was a health and safety representative;

    42.2. The questions that the claimant asked were focused on his role as a health and safety representative seeking to confirm the arrangements in place for staff from TransPlant;

    42.3. Mr Ellas was unlikely to have understood the role of the health and safety representative and his legitimacy in asking health and safety related questions;

    42.4. From the questions asked, Mr Ellas may have perceived the claimant as aggressive as he was checking their working arrangements;

    42.5. Ms North believed that both Mr Ellas and TransPlant management had anticipated that the claimant would ask questions in respect of protection because protection was continued ongoing issue in the view of the health and safety representative;

    42.6. Mr Ellas had described the discussion on the day as amicable. Ms North concludes that Mr Ellas's statement that he felt threatened and that the claimant was going to stop work reflects his fear but not the reality of the situation;

    42.7. Ms North concludes that she did not believe the evidence shows that Mr Ellas was intimidated or threatened by the claimant as he invited him to travel in his car for a 20 minute journey to the SES cabin. They thereafter spent time in the office talking about the depot and both individuals shared their frustrations.

43. The relevant parts of the report in relation to the second incident are:

    43.1. Ms North concludes that the conversation was in relation to the protection issue and that the matter of protection is very much a matter under review at TransPlant;

    43.2. The evidence demonstrates that both parties were equally upset and their difference of opinion has affected them both. Both parties walked away from a confrontation;

    43.3. Mr Maggenneder instigated the conversation and began a conversation in a manner that could be seen as confrontational;

43.4. Mr Ware was told by Mr Bennet that the claimant was upset and close to tears. Mr McFall records that he was told by Mr B that, 'everything was getting on top of the claimant and he was struggling to cope';

43.5. Ms North spoke to Mr Bennett, as recorded her notes of their discussion l of 24 June 2019. Mr Bennett comments that the claimant had taken on a lot with his union duties and it gets on top of him. The claimant was clearly upset when Mr Bennett took him outside and calmed him down. He had never seen the claimant like that before. The claimant puts a lot into what he is doing, he's doing a good job. When it comes back on him, it upsets him - people are never happy. Mr Bennett said that on that day the claimant was clearly stressed but the rest of the time his perfectly fine. The claimant enjoys what he is doing and that day just got the better of him. Mr Bennett noted that Mr Maggenneder can be argumentative and fly off the handle quite easily.

44. Ms North's report concludes with a finding that there is no case to answer on the claimant's part in respect of either incident. Ms North also makes recommendations in respect of communication for both the claimant and Mr Maggenneder. Mr Davis says in his witness statement that he did not see any of the outcomes of Ms North's report until he was shown them as part of preparing his witness statement for this litigation.

45. The claimant issued these proceedings in the employment tribunal on 30 September 2019.

46. Ms Curniffe informed Mr Sadler on 17 October 2019 that the claimant should be informed that the disciplinary has concluded and found 'no case to answer' as soon as possible. This is escalated to Mr Davis who responds, 'I have still not seen the outcome myself and I believe it wasn't as straightforward as no case to answer and there was something around communicating….'.. Mr Sadler informed the claimant by letter dated 18 October 2019 that the investigation had been concluded and 'there was to be no further action in the case'.

47. On 22 October 2019 Mr Leach wrote to Mr Sheridan stating inter-alia that, '… I welcome your clarification of 'no case to answer' but I'm left concerned by the fact local management wrote to [the claimant] stating, 'it is our decision to take no further action'. These terms imply very different outcomes and from our perspective appear local management have put their own twist on it to ensure [the claimant] remains fearful…….'

48. Following the issues that give rise to this litigation there was a 'TransPlant exceptional health and safety meeting' between unions and staff on 28 February 2020. This was attended by union representatives including Mr Leach, Mr Davis and Ms Sheridan amongst others from management. This meeting notes reflect the following:

48.1. The meeting commences with Mr Leach stating that the rules are not being adhered to ….

48.2. Ms Sheridan responds that the rules must be adhered to, ….we must work together there will be consequences if the rules are not followed. We are committed to ensuring that this creates a platform to change the culture and working practices at TransPlant.

48.3. It is recorded that there had been fear of reprisal for people working at TransPlant if IRFs were raised and it is agreed that a senior management

bulletin will be issued to confirm that no repercussions would be tolerated if an IRF was raised

48.4. it is stated that 'we discussed the importance of escalation of concerns to senior management as we recognise that the attitude of middle management does not always mirror our intent to change the culture of TransPlant'

49. The claimant attended a long-term sickness review on 21 January 2020 with Mr Sadler. During the course of this meeting the claimant stated his understanding that Ms North's report had concluded that there was no case to answer and requested that this outcome was put in a letter to him. He noted that the respondent had agreed to do this within a meeting between Mr Leach and Ms Sheridan.

50. Following this meeting Mr Sadler emailed Mr Carter on 24 January 2020, copying Mr Davis querying the respondent's position on 'no case to answer'. Mr Carter responds that 'Caroline does not concur….' . Mr Sadler thereafter respond's to the claimant, and Mr Leach complains to Ms Sheridan in respect of this response.

51. On 2 March 2020 Ms Sheridan writes to Mr Leach stating, '… I will take on the employee manager responsibilities for [the claimant] going forward…… I don't understand why the outcome letter with the recommendations of the investigation has not been shared with [the claimant]. I would like to do that so [the claimant] has sight of it as soon as possible……'. Mr Davis accepted that it was unusual for a manager of Ms Sheridan's seniority to become directly involved in the claimant's direct line management.

52. Ms Sheridan sent an email to Mr Leach on 2 March 2020 stating, 'I agreed to write to you following the exceptional health and safety Forum on Friday 28 February to restate the step change required TransPlant and to set out how we would start the cultural change required…… We mutually agreed that the culture TransPlant needs to change to ensure safe practices are undertaken every day. We agreed that, from now on, work will be undertaken to the current, published rules for all activities undertaken at TransPlant. Work that does not comply with these rules will be stopped. Any breaches of the rules must be reported and will be addressed in a timely manner……. We recognise that local practices have been ingrained and that management do not always take the steps expected of them to ensure that the rules are being adhered to. We will actively encourage reporting and create the environment where that was no fear of reprisals that anyone who has a concern……. The underlying principle we must adhere to is that the rules will be followed, issues must be reported then addressed and the work should stop if we are not satisfied that the rules are being followed……'

53. On 11 May 2020 Ms Sheridan writes to the claimant confirming that Ms North's report was prepared 9 September 2019 and that 'no case to answer' is the outcome of the investigation.

54. The tribunal notes that the claimant did return to a separate part of the business for a short period of time following his suspension and there is reference in the documentation to the claimant being back at work in October 2020.

55. On 29 October 2020 the respondent received an occupational report saying the claimant is fit to return to work. The claimant says that he was keen to return to his old role before Christmas 2020. He also says that he really wanted to return to work to get some structure back into his life. The claimant did not return to work at that time as envisaged. The email correspondence highlights various issues

causing delay, including training. It is common ground that the claimant required considerable retraining likely to last approximately two weeks prior to resuming his previous duties. Mr Davis told the tribunal that the pandemic, and social distancing requirements, had a significant effect on the respondent's ability to provide training. Training was concentrated on that considered to be emergency and required on a critical basis to keep the respondent functioning. The claimants retraining requirements were assessed as 'low priority'.

56. Further, on 19 March 2021, the respondent informed the claimant that, '…. An issue had come up this week that I must address before that training begins….'. Mr Leach was informed on 22 March 2021 that the claimant was being investigated over two complaints. No more information was provided to the claimant. This had a substantial negative effect on the claimant's mental health. Mr Davis told us that he discussed the outcome of Ms North's response of September 2019 with Mr Maggenneder in around March 2021. Following his discussion with Mr Maggenneder, Mr Maggenneder along with Mr Clack raised a grievance and these are the complaints referred to within the email of 19 March 2021.

57. The claimant was informed by Ms Curniffe on 3 September 2021 that the respondent had 'undertaken a review of the grievance in question and can confirm that it is our belief that the grievances are not against you personally..'. The claimant participated within a mediation exercise with Mr Maggenneder and Mr Clack and thereafter returned to work in December 2021.

The Law

58. The law on this matter was uncontentious and was set out in the written submissions received from the parties. Both counsel were requested to highlight any practical difference the tribunal should note in the application of the two statutory tests under TULR and ERA and submitted that in practice there was no real difference between the two statutory tests to be applied by the tribunal in these circumstances.

<u>Detriment on the grounds of a protected disclosure</u>

59. The provisions in respect of protected disclosures can be found within the Employment Rights Act 1996 (ERA). To be a protected disclosure:

    59.1. it must be a 'disclosure of information'

    59.2. it must be a 'qualifying' disclosure — i.e. one that, in the reasonable belief of the worker making it, is made in the public interest and tends to show that one or more of six 'relevant failures' has occurred or is likely to occur, in this case (d) that the health and safety of any individual is endangered.

    59.3. In this case, it is accepted that any protected disclosure was made was made to the employer.

60. Section 47B of the ERA provides that a worker has the right not to be subjected to any detriment by his employer, done on the ground that the worker made a protected disclosure.

    <u>Detriment for union activities under section 146 Trade Union and Labour Relations (Consolidation) Act 1992 (TULR).</u>

61. Section 146(1) TULR states that: 'A worker has the right not to be subjected to any detriment as an individual by any act.. by his employer if the act ..takes place for the sole or main purpose of … (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.

62. Within this litigation, the phrase 'an appropriate time' means within the claimant's working hours at which, in accordance with arrangements agreed with or consent given by his or her employer, it is permissible for him or her to take part in the activities of a trade union.

63. Before an employment tribunal can uphold a detriment complaint under S.146(1), it must be satisfied that the employer's sole or main purpose in subjecting the worker to a detriment was preventing or deterring him from taking part in the activities of the union at an appropriate time or penalizing the worker for taking part in union activities.

64. In *Yewdall v Secretary of State for Work and Pensions EAT 0071/05* the EAT set out what it considered to be a 'very sensible' approach for tribunals to adopt, at least in respect of detriment claims under S.146. The tribunal should ask itself:

- have there been acts or deliberate failures to act on the part of the employer?
- have those acts or omissions caused detriment to the claimant?
- were those acts or omissions in time?
- (in relation to those acts proved to be within the time limit, and which caused detriment), has the claimant established a prima facie case that they were committed for a purpose prescribed by S.146?

65. According to the EAT in Yewdall, it is only after the last question has been answered in the affirmative that the onus transfers to the employer to show the purpose behind its acts or omissions. Were it otherwise, the employer would have the burden of giving some explanation in a case where it is not clear what it is it has to explain.

66. According to the Court of Appeal in *Dahou v Serco Ltd 2017 IRLR 81, CA*, an employer's failure to show what the reason for the detriment was does not necessarily lead to the conclusion that the reason was as asserted by the employee. In *Kuzel v Roche Products Ltd 2008 ICR 799, CA* the Court of Appeal held that in a case of unfair dismissal, if an employment tribunal rejects an employer's purported reason for dismissal, it does not necessarily have to accept the reason advanced by the employee and may instead conclude that the real reason for dismissal is one that was not advanced by either side. The Court in Dahou considered that as a proposition of logic, this principle applies no less to detriment cases. Nonetheless, the Court acknowledged that in practice, the employee's reason would usually be accepted.

Deliberations

67. We make some general observations in relation to the facts of this matter. We heard argument and cross examination during the course of this litigation in respect of the claimant being wrongly said to have mental health issues. The prospect of an employer querying or considering the possibility of the claimant having mental health issues or 'struggling to cope with his work ' was, viewed by the claimant in a very negative fashion. We do not criticise the claimant for his view and note that it reflects the stigma with which potential existence mental health issues may be viewed within the workplace. We also acknowledge the claimant's circumstances in

that he did not consider that he had exhibited any 'flags' that may suggest that he had any mental health issue, he did not in the event have 'mental health issues', and he questions the genuineness of the respondent's approach. We note that potential warning signs associated with everyday stresses that may escalate to 'mental health issues' may be varied, confused and misinterpreted. We consider it good employment practice for any employer who has concerns in respect of an employee's potential mental health issues, no matter how clumsily expressed or potentially wrong, to seek to discuss those concerns with the employee and/or offer any available support. This is particularly so in large organisations were employees have the benefit of employee assistance programs and occupational health. Nothing within this judgment is intended to criticise or suggest an employer is acting in any way inappropriately when offering such support.

68. The claimant issued proceedings on 30 September 2019. We heard arguments in respect of the relevance of matters that occurred after 30 September 2019. We were asked by Mr Toms to draw inferences that the respondent actively prevented the claimant from returning to work by unreasonably dealing with the required training to return and unreasonably entertaining complaints by Mr Maggenneder and Mr Clack in 2021. We declined to draw these influences because:

    68.1. in respect of the training, the Covid pandemic obviously had an extreme effect on the respondent's operations. We are unable to gain any clear picture of the reason for any delay with training;

    68.2. We have no information in relation to the matters raised by Mr Maggenneder and/or Mr Clarke. The documentation was not provided within the bundle and the tribunal was left somewhat in the dark;

    68.3. When the claimant did return to his original position, the claimant was not returning from a period of suspension but returning from a period of sickness absence, and again we do not consider we have sufficient information relating to all relevant circumstances to draw inferences;

69. However we have taken the event's post 30 September 2019 into account in the following ways:

    69.1. The notes and related correspondence of the meeting of early 2020 provide us with further understanding in relation to health and safety issues that had been previously pursued by the claimant and the environment within which the claimant worked;

    69.2. We have considered all available documentation, including that post 30 September 2019 to assist us in assessing the likely motivation of Mr Davis when suspending the claimant as set out below.

Union activities and/or protected disclosures?

70. We find that the claimant's interaction with Mr Ellas on 27 April 2019 related to his legitimate concerns in respect of health and safety being a trade union activity raised in his capacity as a RMT health and safety union representative.

71. The claimant sent two emails to Mr Davis on 3 May 2019, the second a follow-up on the first. We consider it unduly restrictive to seek to distinguish them and we have read the list of issues as if it referred to 'emails' of 3 May 2019, in the plural. If we are wrong, we consider the relevant email is the first email timed 6:03 and our findings below are equally applicable to this single email and should be read accordingly. We find that the emails of 3 May 2019 to Mr Davis inform him about serious health and safety concerns including (within the email timed 6:03) a

specific complaint that uncertified contractors were working on the track. We conclude that the emails were sent by the claimant when carrying out his trade union activities in his capacity as an RMT health and safety representative.

72. The emails of 3 May 2019 are also alleged to be protected disclosures. We consider that the email timed 06:03 is a protected disclosure as it disclosed specific information: the claimant was raising serious issues in relation to staff and contractors working on Area B without valid track certification. He identified a specific concern relating to Thursday, 2 May 2019 and identified specific concerns in respect of Mr Sadler that tended to show that the health and safety of the union members had been, or was likely to be endangered by unsafe working practices on the railway. This was accepted by Mr Davis during cross examination, who considered the disclosure to be serious one warranting an immediate change in Mr Sadler's duties. We consider that any genuine serious health and safety concern of this nature in relation to safety on the railways is obviously in the public interest and we heard no arguments to suggest otherwise from the respondent.

73. The claimant's discussion with Mr McFall on 20 May 2019, related to his legitimate concerns in respect of health and safety matters being a trade union activity raised in his capacity as a RMT health and safety union representative. The content of this discussion included the claimant informing Mr McFall that the respondent was not acting in accordance with the London Underground rule book and was placing union members health and safety at risk. We consider this discussion to also constitute a protected disclosure. We also note Mr McFall's unwillingness to acknowledge the disputed technical notice in circumstances where it is more likely than not that he is fully aware of it, is an example of the difficult nature of the relationship between the unions and the local management at that time.

74. The claimant's discussion on 20 May 2019, with Mr Maggenneder was fundamentally a discussion relating to justification of the union's position on protection to a union member. The claimant was questioned by Mr Maggenneder in his capacity as an RMT health and safety representative and carrying out union activities in providing this explanation. Leaving aside the manner of the interaction, there is no suggestion that the claimant should not have engaged with Mr Maggenneder to provide clarification of the union position at that time as requested and we conclude that the interaction was at an appropriate time. The claimant does not allege that this interaction constitutes a protected disclosure.

Detriments?

75. In relation to the detriment's alleged, it is common ground that the claimant was suspended and it was not disputed by the respondent that suspension in the circumstances constituted 'a detriment'.

76. We have found that Mr Davis' made the comments at the commencement of the Tier 2 meeting on 23 May 2019 that the claimant needed to 'slow down and rest', and that he had been referred to occupational health. These comments were made publicly and imply that the claimant has been suspended for reasons connected to his mental health. This improperly discloses personal sensitive information relating to the claimant to his colleagues, it was incorrect by reference to both the respondent's own case and our findings below and unwanted by the claimant. We consider it to be a detriment.

77. Mr McNaught sent an email on 23 May 2019 responding to Mr Leach, the claimant's union representative. Mr McNaught was asked a question by Mr Leach, he was careful and considered within his response as set out above, seeking

confirmation of the position from both Ms Cunliffe and Mr Davis. We do not consider that his response, addressed to the claimant's union representative genuinely addressing the situation as he saw it, can reasonably or sensibly be considered 'a detriment'. Even if we are wrong, we find Mr McNaught to be a straightforward and convincing witness. He responded to questions raised by Mr Leach in a straightforward manner and we conclude that his sole purpose in doing so was to provide an accurate explanation for the claimants suspension as requested. This was unconnected with the claimant's union duties or protected disclosures in any way.

78. It is common ground that the claimant was subject to the investigation conducted by the North which remained ongoing until 13 August 2019. We consider this to be a detriment.

79. The final allegation of detriment is the occupational health referral in late June 2019 without any or any proper basis. We refer to our general comments in respect of mental health issues within the workplace. For such a referral to go any further requires consent from the individual. We do not consider that an offer, suggestion or referral to occupational health assistance alone, can be reasonably or sensibly viewed as a detriment even in circumstances where it transpires that the no adverse health condition exists. This is in essence an offer of help. We conclude that this is not a detriment.

Prima facie case?

80. We consider that the claimant has shown a prima facie case by reference to:

80.1. the timing of his suspension by Mr Davis, being immediately before a Tier 2 health and safety meeting to be chaired by Mr Davis in circumstances whereby the issue of protection was increasingly contentious where the main advocate for the union position was the claimant. This element of timing relates to all alleged detriments;

80.2. references within Mr Davies evidence and the documentation referring to suspension being required to remove the claimant from his union activities;

80.3. Mr Davis stated reasons for the claimant suspension at the time relating to concerns in respect of his mental health, being inconsistent with the respondent's stated reasons for suspension;

80.4. Mr Davies decision to abandon basic steps of the respondent's disciplinary process such as any initial fact-finding exercise or 'the initial assessment' prior to suspension.

We conclude that the burden of proof has therefore passed to the respondent and we turn to look at Mr Davis' motivation in suspending the claimant. We are requited to determine whether or not Mr Davis' sole or main purpose in suspending the claimant was to prevent or deter the claimant from taking part in the activities of an independent trade union at an appropriate time or penalise him for doing so. The decision to suspend the claimant was that of Mr Davis alone and it is obvious from the evidence and documentation we have seen that there was more than one reason or purpose for the claimant's suspension. We examine each one in turn.

81. Mr Davis says that the main reason for the claimant suspension was related to the claimant's conduct. Particular emphasis is placed upon the fact that the respondent operates a 'safety critical environment'. While the respondent's day-to-day operations such as track working is an obvious safety critical environment, we conclude that the claimant's removal from the safety critical environment was a

minor factor for Mr Davis actions in suspending the claimant. Mr Davis expressly states that he ruled out a possible 'standing down' of the claimant, which would remove the claimant from a dangerous working environment. Mr Davis clearly suspends the claimant because he wishes to ensure that the claimant does not continue with this union duties. The claimant's continuation of his union activities would not involve him working in a 'safety critical environment'. We conclude that while it may have been a factor, Mr Davis' main purpose in suspending the claimant was not removing him from a 'safety critical environment'.

82. We also look at the incidents themselves. When considering the first incident we note that:

82.1. Mr Davis was aware that there were ongoing tensions with the union in respect of protection issues. Further, he knew that the claimant as a health and safety rep had a legitimate purpose in questioning Mr Ellas's arrangements in respect of health and safety matters.

82.2. When considering this background, alongside a fair reading of the subsequent complaint lodged by Mr Ellas, we are unable to identify any matter that gives rise to any obvious concern in respect of 'escalation in the claimants behaviour' that would potentially compromise safety or indicate potential mental health issues on the part of either the claimant or Mr Ellas. It is the case that Mr Ellas' complaint includes words such as 'aggressive, threatening, intimidated, bullied', however we consider that a fair reading of the complaint points to Mr Ellas' main issue being his perception that the claimant was seeking to 'stop the work' or behaving inappropriately in questioning the health and safety provisions. Mr Davis know that the claimant had a genuine trade union health and safety related reason for broaching protection matters with Mr Ellas.

82.3. Mr Davis was advised by Ms Curniffe not to suspend the claimant following the first incident but, to try to manage the situation. If it was the case that Mr Davis had serious concerns in respect of potential further instances of this nature on the claimant's part to the extent alleged, we consider it odd that he took no steps to address the issue or 'manage the situation' as advised. Further, Mr Davis decision not to inform the claimant of the complaint made by Mr Ellas, is inconsistent with Mr Davis' stated level of concern for the claimant or recurrence of any inappropriate behaviour.

82.4. Mr Davis attended meetings with the claimant following the first incident discussing protection matters that were hotly contested between the union and the management to the extent that the claimant was advising the union members to cease work where they considered their health and safety to be compromised. The fact that Mr Davis' did not directly observe any matter that would give him cause for concern in relation to the claimant's behaviour does not sit comfortably and is inconsistent with his stated concerns in respect of the first incident.

83. In relation to the second incident we note that:

83.1. While the absence of a complaint does not prevent an employer from taking appropriate action, it can make identifying events and potential culpability or potential misconduct more difficult. The tribunal has the benefit of Ms North's subsequent report on this incident and we conclude that the claimant was not in the wrong or guilty of any misconduct in respect of either incident. We appreciate that at the time of suspension, this report was not

available to Mr Davis. However, the respondent is a large organisation with substantial administrative resources, extensive and established policies and procedures to assist management in dealing with such scenarios.

83.2. Mr Davis knew there had been a heated exchange between two members of staff, he was aware that the topic under conversation was protection being a very contentious matter. Mr Davis was aware that the claimant is a passionate health and safety representative who was consistently pushing for staff to be made up to PWT and this is at odds with the views held by Mr Maggenneder. Mr Davis is likely to have been fully aware of their difference of opinion. Mr Maggenneder is described by Mr Bennett as, 'can be argumentative and fly off the hand[le] quite easily' and we consider it more likely than not that Mr Davis is aware that Mr Maggenneder may be viewed in this way. He was told that the claimant had been reported as shouting and had dropped the rulebook during the course of this argument. In light of differing views and personalities and the contentious subject matter, it was unsurprising that the discussion became heated. Mr Maggenneder is said by Mr McFall to be 'red-faced and visibly distressed' following this discussion and the claimant was reported by Mr Bennett's to be 'teary-eyed'. Neither employee made any complaint in respect of the others conduct. Mr McFall had not produced anything in writing at this stage, contrary to his witness statement. The matter had been handled by Mr Bennett who, we can see from Ms North's notes considered the claimant was stressed on that day but the rest of the time 'fine'. Mr Davis places unexplained focus on a single reported comment from Mr Bennett that 'everything was getting on top of [the claimant] and that he was struggling to cope'. Mr Davis is an experienced manager yet he overlooks any basic fact finding exercise.

84. We note the respondent's own disciplinary policy provides that where suspension is mentioned at clause 15 of the policy, it is envisaged that there would have been an initial investigation, similar to the 'fact find' referred by Mr Davis. We are not concerned with adherence to internal policy or matters of general fairness when looking at the claimant's suspension. However we do consider it relevant that Mr Davis chose to disregard these basic first steps provided within the respondent's policy and common within any fair procedure, with the explanation being a desire to avoid delay. We consider it relevant that the claimant was due to attend an Tier 2 meeting to discuss hotly contested protection issues on the day of his suspension.

85. Mr Davis said, '…..Whilst I have observed [the claimant] losing his temper, raising his voice becoming very animated in meetings previously, I felt what was been reported here was different and it has escalated to a more serious level…..'. We consider this part of Mr Davis statement to be misleading, it implies minor inappropriate conduct on the claimant's part that was previously overlooked by the respondent and the identification of an escalation in the claimant's conduct. In the course of his oral evidence Mr Davis was referred to this and said that the claimant's behaviour outside of the two alleged instances was properly described as passionately arguing in respect of health and safety matters but not inappropriate. There was nothing outside of the two instances, (and the reference to timing of the claimant's emails), said to give rise to any concern either in respect of the conduct or well-being of the claimant. Further the claimant's behaviour as witnessed by Mr Davis personally (and indeed many other member of the management) directly around the time of both incidents, when directly discussing

the very contentious protection matters that formed the subject matter of both incidents, did not raise any concerns.

86. We conclude that while the claimant's conduct or behaviour in respect of both incidents was a factor within Mr Davis' decision-making process, it was not the main factor giving rise to his suspension. Mr Davis' main purpose in suspending the claimant was not to remove the claimant from the workplace for reasons connected with the claimant's conduct.

87. We now turn to examine Mr Davis' stated concerns in respect of the claimant's mental health. Mr Davis said that these were a significant factor in his decision decision-making process. We note that should the claimant have been suspended for a reason connected to genuine concerns in respect of his mental health, this would not be in accordance with the respondent's policy. However we are unconcerned in relation to the fairness or reasonableness of Mr Davis' actions or his compliance with the respondent's own policies. If it was the case that Mr Davis purpose in suspending the claimant was to remove him from the workplace due to genuine concern in respect of the claimant's mental health, however misguided, this would defeat the claimant's claims. Mr Davis is a senior manager and has a large number of people who report directly or indirectly to him, many of whom he has little day-to-day contact with. He had a closer relationship with the claimant than most of his indirect reports, due to the claimant's position as a health and safety union rep. Mr Davis had personal interaction with the claimant when discussing very contentious protection issues during the time in question. When asked if he had personally observed any instance that caused him concern in respect of the claimant's ill health, Mr Davis told the tribunal that he had not but noted the timing of the claimant's emails which suggested that the claimant was not getting proper rest. Mr Davis noted that Mr McFall had a similar tendency to send such emails. Mr Davis' first-hand interaction with the claimant and personal observations are inconsistent with his stated concerns for the claimant's mental health.

88. We have considered the reference within Ms Curniffe's witness statement that she was told by Mr Davis that the claimant, 'burst into tears'. We consider that this is unlikely to be error of recollection on Ms Curniffe's part and more likely to be an exaggerated comment made by Mr Davis when seeking HR 'approval' to suspend the claimant.

89. We have considered Mr Davis' email of 23 May 2019 to Mr McNaught explaining his rationale for suspending the claimant: This email refers to 2 incidents that are under investigation. It goes on to state, 'several members of the TransPlant management team have noticed a significant shift in [the claimant's] behaviour'. This is not the case. The reality was that no member of the management team had noticed any 'significant shift'. Mr Bennett's comment to Mr McFall related to a single isolated incident and we can see from Ms North's notes that he had noticed no shift, significant of otherwise, in the claimant's behaviour. The email states '… Everyone was in agreement that the suspension seems quite harsh, however, we believe that if [the claimant] was asked to take time off he would still conduct his trade union duties from home and possibly make himself worse…. I plan to call [the claimant] myself tomorrow in an effort to reassure him that we are trying to act in his best interests…' We consider this email from Mr Davis to Mr McNaught to be misleading. At best, it exaggerates potential concerns Mr Davis may have had in respect of the claimant's mental health.

We conclude that the steps taken by Mr Davis to provide misleading and/or exaggerated concerns to his colleagues at the time indicate a hidden purpose on Mr Davis part in suspending the claimant. We conclude that, at the time the motivating factor for the claimant's suspension communicated by Mr Davis' internally within the respondent was a desire to protect the claimant's mental health, and this was reflected within Mr Davis' comments to the claimant's colleagues at the Tier 2 meeting on 23 May 2019.

90. We note that Mr Davis stated concern for the claimant's mental health, and his desire 'to aid the claimants recovery' as stated to Ms Curniffe not to make the claimant 'worse' appear at odds with his actions post suspension, in particular:

    90.1. Mr Davis did not make any attempt to contact the claimant following the suspension contrary to his stated intention within his email to Mr McNaught.

    90.2. Mr Davis was advised by Ms Curniffe in October 2019 that the claimant should be informed of the outcome of Ms Norths report i.e. that there was no case to answer, but declines to do so. Mr Davis is aware that failure to articulate, 'no case to answer' to the claimant is having a detrimental effect on the claimant's mental health. The situation had morphed from a scenario whereby Mr Davis claims to have implemented a suspension he considered 'harsh', motivated by a desire to protect the claimant's mental health, to a reluctance to share the 'no case to answer' outcome, where he had been urged to do so by HR and was aware that the failure was having a significant negative effect on the claimant's mental health and potential return to work.

91. Taking the entirety of the available evidence into account we conclude that while concern in respect of the claimant's mental health was a factor in Mr Davis suspending the claimant, the claimant was not suspended by Mr Davis for the main purpose of protecting the claimant's mental health.

92. In assessing Mr Davis purpose in suspending the claimant we have considered the claimant's trade union activities at the time. In a similar fashion to issues relating to discrimination, had Mr Davis sought to suspend the claimant any reason connected to his trade union activities he would be unlikely to set his rationale out in writing or even communicate it openly to his colleagues:

    92.1. in the time immediately before the suspension, the row in respect of protection between the union, articulated and passionately pursued by the claimant and the TransPlant management position, articulated by Mr Davis had escalated. This was a fundamental difference of opinion. The claimant was openly advising his union members to stop work in circumstances identified by the claimant as unsafe by reference to the rulebook. Mr Davis queries the fundamental motivation of the claimant in pursuing protection issues suggesting that these were effectively more connected with a wish for further payment the members than genuine safety concerns. The relationship between the union and the management was toxic, they had reached an impasse where the protection issues repeatedly raised by the claimant were simply not being resolved.

    92.2. While the matter had been escalated to a Tier 2 meeting, all indicators suggested that agreement would be incredibly difficult to reach without further escalation to director level.

    92.3. Both the documentation and Mr Davis own evidence shows that his aim in suspending the claimant was to remove the claimant from his trade union activitiesand we acknowledge that his stated reasons for wishing to do so are

disputed between the parties. We refer to the information available to Mr Davis at the time and Mr Davis' exaggeration supporting his stated concerns in respect of the claimant's mental health to both Ms Curniffe and to Mr McNaught.

93. We conclude that Mr Davis' main purpose in suspending the claimant was a desire on Mr Davis' part to remove the claimant from his role as the trade union representative due to his previous union activities in brining protection issues set out at 1.1.2 and 1.1.3 above to his employer's attention and to prevent the claimant from raising continued health and safety concerns in respect of protection issues, particularly at the Tier 2 meeting.

94. We repeat our findings as set out above and conclude for essentially the same reasons that the claimant was suspended on the grounds that he had brought health and safety concerns relating to protection that constitute protected disclosures as set out in 1.1.2 and 1.1.3 above to the respondent's attention.

95. We have found that Mr Davis made the comment as alleged at the commencement of the Tier 2 meeting on 23 May 2019. Mr Davis referred to occupational health and the requirement for the claimant to 'slow down and rest'. While we consider that such comments were inappropriate in that they disclosed sensitive information relating to the claimant and implied that the claimant had issues relating to his mental health, we consider it more likely than not that the main purpose of these comments was to provide an explanation for the claimant's suspension to the claimant's union colleagues. While we have not found that this was the main reason for suspension, we do accept that such concerns existed and conclude that these comments were not made for the sole or main purpose to prevent or deter the claimant from taking part in the activities of an independent trade union at any appropriate time or to penalise the claimant for doing so. Nor were these comments made on the grounds of the protected disclosures.

96. It is common ground that the claimant was subjected to the disciplinary investigation conducted by Ms North that remained ongoing until 13 August 2019. This was commenced prior to and independently from the suspension. This investigation was launched following the receipt of the initial complaint from Mr Ellas. This was subsequently expanded to include the second incident with Mr Maggenneder. The length of the investigation was unfortunate but was entirely unconnected with any matter related to the claimant's union membership. We conclude that the main purpose of the claimant being subjected to the investigation was to determine what happened during the claimant's discussion with Mr Ellas and thereafter, Mr Maggenneder. While both incidents under investigation involved circumstances where the claimant was carrying out his trade union activities as set out at paragraph 1.1.1 and 1.1.4, the investigation was in respect of the manner in which the claimant carried out those activities rather than the union activities themselves. This investigation was unconnected to the claimant's union activities or protection matters raised by the claimant with the respondent.

97. Similarly in relation to the protected disclosure claim, we conclude that the claimant was not subject to the investigation on the grounds of his protected disclosures as identified above.

Conclusion

98. The claimant's claims for detriment relating to his suspension contrary to both section 146 TULR (trade union activities) and section 47B ERA (protected disclosures) are well founded and successful. The remainder of the claimant's claims are dismissed.

99. This matter has been set down for a remedy hearing and directions will be provided to the parties separately. The parties were aware at the conclusion of the main liability hearing that a further deliberation day was required by the tribunal to conclude this matter. That deliberation day was held on 8 June 2022 and this judgement was prepared following this time. We apologise to the parties for the unavoidable delay within this timetable.

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Employment Judge Skehan

Date: 16 June 2022

Sent to the parties on:

17 June 2022

For the Tribunal: