



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mr J Snarey

AND

**Respondent**  
Magnox Ltd

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT SOUTHAMPTON**  
(By video – CVP)

ON 30 November to 3 December 2020

**EMPLOYMENT JUDGE GRAY**

**MEMBERS MS R GODDARD**  
**MR R SPRY-SHUTE**

## Representation

**For the Claimant:**  
**For the Respondent:**

**Miss R Owusu-Agyei (Counsel)**  
**Mr R Powell (Counsel)**

## RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the Claimant's complaints that he has been subject to detriments, due to Health and Safety (sections 44 (1) (a) and (b) of the Employment Rights Act 1996) and/or Union Membership or Activities (section 146 Trade Union and Labour Relations (Consolidation) Act 1992), fail and are dismissed.

## REASONS

1. In this case the Claimant Mr Snarey claims that he has been subject to detriments pursuant to Health and Safety (sections 44 (1) (a) and (b) of the Employment Rights Act 1996) and/or Union Membership or Activities (section 146 Trade Union and Labour Relations (Consolidation) Act 1992).
2. The Respondent denies the claim.

**THE HEARING**

3. The hearing was conducted remotely by video, initially to be held by CVP+ but owing to technical difficulties on the first day it was converted to CVP. However, as the morning had been provisionally timetabled for reading, fortunately this did not have an impact on the proposed hearing timetable.
4. It was at 12:30 on the first day that housekeeping matters were addressed.
5. The Tribunal had been provided with an agreed pdf documents bundle running to 262 pages.
6. We were also provided with the following witness statements:
  - a. The Claimant – 61 paragraphs

And for the Respondent:

- b. Kevin McIntyre (Project Delivery Manager and Reactors Programme Manager) – 35 paragraphs
  - c. Tony Smith (Decommissioning Manager for the Dragon Project) – 29 paragraphs
  - d. Susan Adams (Integration Winfrith Manager and Regional Infrastructure Manager – effectively Site Manager) – 6 paragraphs
7. The parties confirmed the agreed list of issues (a copy of which is at pages 49 to 51 of the bundle) as follows:

**“List of Issues**

**(Detriments) - Health and Safety: s 44 (1) (a) and (b) ERA 1996 and/or Union Membership or Activities: s 146 TULR(C)A 1992**

1. Was the Claimant designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work?
2. Was the Claimant a representative of workers on matters of health and safety at work or member of a safety committee?
3. Did the Claimant take part or propose to take part in the activities of an independent trade union prior to the detriments alleged?

4. What were those activities conducted or proposed activities to be conducted at an 'appropriate time' (as set out in section 146 (2) TULR(C)A 1992?
5. Was the Claimant subjected to one or more of the following detriments in respect of the allegations made under s 44 (1) (a) and (b) ERA 1996? And/or were the following actions of the Respondent for the sole or main purpose of preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so contrary to s 146 (1) (a) TULR(C)A 1992; or preventing or deterring the Claimant from taking part in the activities of an independent trade union at an 'appropriate time', or penalising him for doing so contrary to s 146 (1) (b) TULR(C)A 1992?
  - a) The Respondent's Deputy Project Manager, Tony Smith telling the Claimant during a meeting between the two in Mr Smith's office, in March 2018 that he would need to think about his union role and general activities if he wanted to remain on the Dragon Project permanently. Tony Smith telling the Claimant at the same meeting that the alternative would mean him being given jobs that no one else wanted to do.
  - b) Tony Smith on 8 September 2018 taking the Claimant aside on the shopfloor and informing him that his continued employment was at risk unless he stopped "*this Union s\*it*".
  - c) Senior Manager, Susan Adams instructing the Claimant on 13 September 2018 that he would need to remain in the canteen or her office, until matters he discussed at the National Safety Representatives meeting had been investigated.
  - d) The Respondent, as a result of Susan Adams' instruction, requiring the Claimant to remain in the canteen for approximately 3 weeks from 13 September 2018.
  - e) The Respondent referring to him in writing on 1 October 2018, in its investigation report as a troublemaker, having mental health issues, untrustworthy, work shy, awkward, having a reputation and that no one wished to work with him. Kevin McIntyre, Senior Manager, in the same report suggesting the options were to move him to a smaller team and that if that failed there would be nowhere else to go, implying that his continued employment would be at risk.

- f) Referring him to the Respondent's Occupational Health department due to concerns raised in the Respondent's investigation report about his mental health.
6. If and to the extent that the Claimant was subject to the detriments alleged, does the Respondent prove on a balance of probabilities that the act or acts complained of was/were not done on the ground(s) set out in s. 44 (1) (a) and (b) ERA 1996? Or did R's actions come about as a result of other reasons, including that C was not pursuing genuine health and safety matters?
  7. Can C demonstrate to the ET that these all formed continuing acts, and as such all are potentially within time? If not all are within time, was it reasonably practicable for C to bring them within time?
  8. If and to the extent that the Claimant was subject to the detriments alleged, does the Respondent prove on a balance of probabilities that the act or acts complained of was/were not done on the ground(s) set out in s 146 (1) (a) - (b) TULR(C)A 1992. Or did R's actions come about as a result of other reasons, including that C was not pursuing genuine union or union related matters?
  9. Can C demonstrate to the ET that these all formed continuing acts, and as such all are potentially within time? If not all are within time, was it reasonably practicable for C to bring them within time?
  10. Did R's alleged actions bring about their alleged desired result? If not, can threats in themselves be a detrimental act?

**Remedy**

11. If the Claimant was subjected to a detriment what compensation should be awarded?"
8. Respondents Counsel confirmed that issues 1 and 2 were admitted. It was also confirmed that the time limit jurisdictional issue only applied to allegation (a). The claim had been received on the 11 January 2019. The ACAS early conciliation certificate was dated from 3 December 2018 to 18 December 2018. Therefore, complaints on and after the 4 September 2018 would be in time.
9. The timetable as set out by Employment Judge Midgely in his case management order (this can be seen at page 36 of the bundle), was discussed:

"Day 1 Tribunal reading time until 2pm

	Claimant's evidence until 4pm
Day 2	Claimant's supporting evidence until 11am Respondent's evidence until 4pm;
Day 3	Respondent's evidence until 12am, Parties to file and exchange brief written submissions, Oral closing submissions/arguments, limited to expansion of key points and replies (30 mins each); Deliberations,
Day 4	Judgment and remedy, if appropriate."

10. The parties Counsel confirmed that the timetable was still appropriate, albeit there were now fewer witnesses. In short, both Counsel thought it would be tight, but agreed they would aim to comply with the times stated.
11. Counsel also agreed the running order of the evidence, with the Claimant going first, as the Respondent either denied the things the Claimant complains about were done, or if they were done that they amount to detriments.
12. The evidence then commenced just after 2pm with the Claimant being sworn in by affirmation. Cross examination of the Claimant continued until just before 4:30pm on the first day, with the intention it would resume at 10am on the second day.
13. On the second day of hearing, evidence could not start until 10:38am due to technical issues the Claimant had connecting to the CVP hearing. After connection issues had been resolved the Claimant's evidence then concluded just after midday.
14. The Respondent's evidence then began around 12:30 pm on the second day, with Kevin McIntyre being sworn in by affirmation. His evidence concluded around 15:55pm. A review of the timetable was then taken and a discussion had with the parties as to what the Tribunal could expect from Counsel by way of written closing submissions and if a chronology was to be provided. It was agreed that Counsel would provide full written submissions to assist the Tribunal, joint authorities bundle and an agreed chronology. Further, it was anticipated that evidence would finish about 1pm on the third day and then closing written submissions provided with supplemental oral submissions. It was therefore anticipated that evidence and submissions would conclude at around 15:30 on the third day so that the Tribunal could commence its deliberations.

15. On the third day the Respondent's second witness, Tony Smith was sworn in by affirmation at 10am and his evidence concluded around 12:30pm. Then the Respondent's third witness, Susan Adams, was sworn in by swearing on the bible and her evidence concluded around 1.10pm.
16. Counsel asked for more time to prepare their detailed written submissions and it was therefore agreed they would get these to the Tribunal by 15:30, we could then read them and hear Counsel's supplemental oral submissions from 9:30am to 10:30am on the fourth and final day.
17. On the fourth day the hearing commenced at 9:30am and oral submissions concluded around 10:45am. During submissions Claimant's Counsel confirmed that no complaint was being pursued in respect of section 146(1)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992. Further, that the first alleged detriment was being pleaded only because of trade union activities and not health and safety activities.
18. After a short adjournment following the conclusion of submissions, it was determined that it seemed proportionate to reserve our decision and it would be on liability only for the following reasons:
  - a. The original timetable had anticipated us to be deliberating from yesterday afternoon.
  - b. We had not heard any submissions from Counsel on the question of remedy. Case Management orders can be made for this to be progressed and determined as appropriate, after provision of our reserved judgment.
  - c. We can work to reach judgment today, but not seek to hold the parties over for oral judgment.
  - d. We anticipated that this may well be a case that one or both parties would seek written reasons.
19. Both Counsel agreed with this approach.

## **THE FACTS**

20. We have heard from the Claimant, and we have heard from Kevin McIntyre (Project Delivery Manager and Reactors Programme Manager), Tony Smith (Decommissioning Manager for the Dragon Project) and Susan Adams (Integration Winfrith Manager and Regional Infrastructure Manager – effectively Site Manager) on behalf of the Respondent.

21. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after reading and listening to the factual and legal submissions made by and on behalf of the respective parties.
22. The Respondent is (as explained in paragraph 2 of the witness statement of Mr McIntyre) ... "... a nuclear decommissioning Site Licence Company (SLC). It operates under contract for the Nuclear Decommissioning Authority and is responsible for the decommissioning of ten Magnox nuclear power stations in the United Kingdom. The Respondent's primary function is to safely decommission the 12 nuclear sites in the UK, including at Winfrith where the Claimant works. The nuclear industry is one of the most regulated sectors in the UK and rightly so, given the potential consequences of any unsafe or inappropriate practices in a nuclear power station. The Respondent works closely with various regulators including the Office of Nuclear Regulation (ONR), Health and Safety Executive, Environment Agency and the Civil Nuclear Security (CNS). The Magnox executive team, the Head of Safety and the Programmes Environment Safety Security Health and Quality Manager EHSS&Q and the TUSR's all work together to ensure compliance with accepted Health and Safety standards. The programs are independently reviewed by the Safety Working Party (SWP) and the Nuclear Safety Committee (NSC). We also work with the Agency Site Worker (ASW) organisation representatives to ensure that all aspects of health and safety are properly considered and dealt with."
23. The Claimant has been employed since 1 October 2013 as a Decommissioning Operative (paragraph 1 of his witness statement). As at paragraph 7 of his witness statement "Unite the Union are recognised by the Respondent. I was elected as a local representative in 2016 and Lead Health and Safety Representative in 2017..."
24. The Respondent accepts that the Claimant was designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. It also accepts that the Claimant was a representative of workers on matters of health and safety at work or member of a safety committee.
25. We now consider the six alleged detriments in order, although it would appear that alleged detriment 5 could be viewed as two alleged detriments, making 7 in total, so for ease of reference we have referred to alleged detriment 5 as having two parts.

**FIRST ALLEGED DETRIMENT**

26. **“The Respondent’s Deputy Project Manager, Tony Smith telling the Claimant during a meeting between the two in Mr Smith’s office, in March 2018 that he would need to think about his union role and general activities if he wanted to remain on the Dragon Project permanently. Tony Smith telling the Claimant at the same meeting that the alternative would mean him being given jobs that no one else wanted to do.”**

27. The Claimant describes matters about this alleged detriment at paragraphs 16, 17 and 18 of his witness statement:

“16. I spoke to the Deputy Project Manager. Tony Smith around 18 March 2018. I said I did not want to go back to SGHWR as it was toxic. I accept that I did become emotional about the issue and told Tony that on previous occasions I had been driving into work at SGHWR and had considered turning around and returning home.

17. Tony Smith said that I could stay on the project permanently and that he was happy for me to do so. However, I would need to think about my union role and involvement. He said that this would include facility time, meetings related to my union role and general union activities. I was told that it was a smaller team and that unless I pulled back on my union work I would be given the jobs no one else wanted to do. I was told that if I agreed I could stay in the team.

18. I said to Tony that I would look at what I could reduce to fit in, but did not want to alter my union or health and safety activities....”

28. Tony Smith deals with this alleged detriment in his witness statement at paragraphs 4, 5 and 6:

4. However, around March 2018 those employees were due to return to SGHWR and resume their duties. The Claimant came to see me in my office and he was clearly distressed and emotional and burst into tears during our meeting. He told me that he enjoyed working at Dragon and that he dreaded going back to SGHWR. I promised him I would do what I could and would speak to the Dragon Senior Project Manager about it. I was however concerned at what appeared to be the Claimant’s fragile mental state. I therefore spoke with the mental health first aider, Bob Meaden, about the Claimant and to be aware of any signs that he wasn’t coping. This was an informal discussion in confidence with Bob, and with the sole purpose of ensuring that the Claimant had sufficient support at work. To be very clear, I did this only because of my view of the Claimant’s mental state. I would



have taken the same action with any other employee if I felt it was warranted.

5. I then spoke with the Senior Project Manager, Andrew Philips, who, after fully understanding the situation gave his consent for the Claimant to remain at Dragon.

6. I then spoke with the Claimant and confirmed that we had been able to arrange his move. I re-emphasised to him that we were a small team in Dragon and that it was essential that he worked as part of the team. I did ask him about the extent of his trade union activities, just so that I could have a better handle on the amount of time he would be able to carry his contracted duties. The Claimant informed me that he only needed to do “half that sh\*t” (referring to those union activities). I was surprised at the way he described those duties. The Claimant continued that he did not have enough union duties to cover his allocated two half days set aside for this purpose and that he used that time as a way of getting back at the SGHWR project, he did not elaborate on this statement but I assumed he took the allocated time but used it for something else and that now at Dragon this union time would be less than before.

29. There does appear to be a lot in agreement between the two accounts.

30. The Claimant does not want to return to the SGHWR project and he was emotional about doing so. He asks to stay with the Dragon project and Mr Smith agrees. There is discussion about the extent of the Claimant’s trade union activities.

31. As to the differences. The Claimant says he was asked to pull back on his union work and if he didn’t he “... would be given the jobs no one else wanted to do. I was told that if I agreed I could stay in the team.”.

32. Mr Smith says he asked about the Claimant’s union duties to “... have a better handle on the amount of time he would be able to carry his contracted duties.”.

33. The Claimant then says he confirms to Mr Smith “... I said to Tony that I would look at what I could reduce to fit in, but did not want to alter my union or health and safety activities....”.

34. There is no evidence from the Claimant or otherwise, that he did make any alterations to his union or health and safety activities.

35. In cross examination the Claimant accepted that it was correct that he didn’t feel he had suffered a detriment in respect of this allegation. In her

- submissions Claimant's Counsel cautions us about this ... "15. The Claimant's evidence that he did not consider the March 2018 conversation to be a "detriment" does not assist the tribunal in making its findings. The Claimant is a lay person. The definition of a "detriment" is clear in law. It is a wide definition...". Both Counsel in their legal submissions highlight a detriment is to be considered as putting at or under a disadvantage.
36. In her submissions Claimant's Counsel submits that the disadvantage is the "... threat or suggestion that he might not be able to stay on that Dragon project".
37. The Claimant has not acted as if he were under such a threat or suggestion. There is no evidence from the Claimant that he did make any alterations to his union or health and safety activities because of such a threat or suggestion.
38. In cross examination the Claimant appeared to accept that he had no issue with Mr Smith until September 2018. This is also consistent with the documents that we have been referred to by Respondent's Counsel in his submissions. Page 156, which notes that the Claimant informs Occupational Health that he had "No problems initially" in dragon. Also, page 250, which is the interview notes from the Claimant's stage 2 grievance meeting on the 6 February 2019, and notes the Claimant saying ... "JS outlined that he felt there was hostility towards Trade Union activities within his former workplace (SGHWR) at Winfrith.". Also, "... JS continued and explained that he was included in overtime working from the outset within the DRAGON team. Towards the end of the 3 month temporary period in DRAGON JS approached Management with a request to remain on the DRAGON project as he enjoyed the work and preferred it to SGHWR. Whilst responding positively to JS's request, DRAGON Management asked him to consider the scope of his TU duties, which JS had done.".
39. This does not support the Claimant was under ... "threat or suggestion that he might not be able to stay on that Dragon project". We also note that this is not an allegation that was part of the Claimant's original grounds of claim (as can be seen at page 19 of the bundle).
40. Under cross examination Mr Smith stood by his account of the meeting and we have no reason to not accept it. The Claimant has not proven on the balance of probability that he was subjected to such a "threat or suggestion" as is now pleaded as an alleged detriment.
41. Even if we were to find such a detriment, Claimant's Counsel submits it would be in breach of section 146 because ... "Mr Smith's statements in March... explicitly invited the Claimant to perform less trade union work, fitting squarely within the s.146(b) definition;". We have not found that the

Claimant was explicitly invited to perform less trade union work and we have been presented with no evidence of the Claimant performing less trade union work.

## SECOND ALLEGED DETRIMENT

42. **“Tony Smith on 8 September 2018 taking the Claimant aside on the shopfloor and informing him that his continued employment was at risk unless he stopped *“this Union s\*it”*.”**

43. The Claimant describes matters about this allegation at paragraphs 19, 20 and 21 of his witness statement:

“19. I remained on the Dragon Project and in early September 2018 I raised some safety concerns about PAT testing, the cutting of scaffolding by unqualified and unsupervised scaffolders and the use of an old band saw. The band saw looked like it had not been used in 20 years and I considered that it needed to be shown as fit for use. The Respondent had said PAT testing had been completed but they were giving out stickers to be put on tools that had not actually been tested. I refer to pages 68 — 72 and 73 — 74 of the bundle of documents.

20. On Saturday 8 September 2018 I was approached by Mr Smith and he made what I consider to be threats to my employment. I was at my workstation when he came through the doors into the area in which I was working. He had come specifically to see me, he pulled me to one side out of earshot of my colleagues. He said he did not want me to get into the same situation as at SGHWR and that I could come and see him with concerns. However, if I ‘didn’t stop this Union s\*it’ he would have me out of the Dragon Project.

21. I made it clear to him that I would not ignore blatant safety issues and that he should not ask me to do so. He suggested that his main concern was that I had taken pictures of machinery that had been brought in to be used that day, but I did not have a camera to use and had not taken any pictures. However, based upon what he said it was clear to me that he did not want me to raise concerns about safety.”

44. Tony Smith deals with this allegation in his witness statement at paragraphs 10, 11 and 12.

“10. I will now explain what happened on Saturday 8th September, when the Claimant and I were both at work. The Chargehand, Dave Mellon, came to me and said that I needed to speak with the

Claimant. Dave told me that the Claimant had been winding up his fellow employees and threatening to take photos on site and naming those employees whom he believed were at fault. I assumed that this was around alleged unsafe practices, and if so, this approach went entirely against the Respondent's company procedures, which set out detailed processes for raising health and safety concerns. More to the point, I was very concerned that this approach actually meant that H&S matters were not being dealt with properly and in a timely manner, or at all. What should happen is that the concern is raised, and is then addressed and resolved. It seemed here that the Claimant went about threatening his work colleagues and then walked away without actually doing anything about resolving the H&S issue. I was also worried about the impression this sort of action made on employees, who would think that H&S was not a serious issue, when the appointed H&S rep dealt with H&S matters in this way, namely to wind up and point score against his colleagues. In response I informed Dave that I knew that employees would sometimes windup the Claimant up as they had very little respect for him and promised to have a word with him, however, Dave would need to speak to the team as well if appropriate.

11. I found the Claimant in A544, another separate facility the project is responsible for, he had been sent there to tidy the area up ready for a visit the following week. I entered the main area and gestured him over to an area out of earshot of his colleague who was using a vacuum cleaner. I asked the Claimant if he was okay to which he indicated he was, I informed him that I was here to speak to him because there had been a complaint about him, in that he was threatening his colleagues by taking photographs of them and showing them to others. I told the Claimant that we had an agreement that he was not to go back to his old ways, and that if he did not want to work with the team in Dragon he would have to find a job outside the project.

12. He responded by telling me it was his job and did not deny his actions, but denied actually taking any photos. I acknowledged that he was a safety rep but told him that winding up the other lads with this sort of behaviour was not the way to do it. The Claimant responded with, well, they wind me up all the time. I acknowledged that that may well happen but it should stop. He referred to PAT not being done, I assumed he was talking about the band saw that had been borrowed from the maintenance team earlier in the week, I told him that it was okay and had been tested appropriately, (evidence is in the Investigation report within the Bundle at page 111). He also mentioned scaffolding and I replied that that had already been resolved. I was not on site when these issues came to light so was

playing catch up trying to understand what issues there were if any and after speaking with colleagues concluded there to be no issues.”

45. These accounts differ and the account of the Claimant in his witness statement about this interaction is less detailed than Mr Smith’s.
46. Where there are such differing accounts of the same thing, then considering documents produced contemporaneous to the incident can assist us in determining which account (or parts of it) are proven on the balance of probability.
47. The Claimant confirmed during cross examination that he had made notes of what was said near to the time of the alleged detriment and possibly still had those notes. These notes though have not been provided as part of the documents for this hearing. We have also noted that the Claimant did not want to give any such notes to Mr Cuthbert who was tasked with investigating this matter at the Respondent and who interviewed the Claimant about his complaint about this allegation in September 2018. This is noted in his interview on 18 September 2018 at page 79 ... “IC asked if JS was happy for him to have a copy of the notes JS had brought with him. JS said not really, they are my notes”.
48. We have also noted a difference in the description of what the Claimant says Mr Smith said to him when comparing his witness statement to the contemporaneous documents from the relevant time.
49. Within the interview notes of the Claimant at page 76 it is noted ... “JS explained that TS had told JS to 'bench his TU shit'.”. There is no mention of the use of this phrase by Mr Smith in the Claimant’s witness statement. When asked about this in cross examination the Claimant said that it had the same meaning to him.
50. Then at the top of page 77... “not a threat but a promise that if union shit doesn’t stop, he would remove him from Dragon or will have JS out”. As highlighted to us within Respondent’s Counsel’s submissions the words “not a threat but a promise” and “will have JS out” do not appear in the Claimant’s witness statement.
51. There is then the minutes from the HESAC meeting on the 12 September 2018 (at page 116) which reads:

“A discussion proceeded following an incident at the site. JR concerns over a poor safety culture, only half the equipment has been PAT tested, this has been raised and told this is the way It’s always been done. Scaffolding is altered and changed by guys themselves not the scaffolders which have been raised as well. JR has been informed by his manager to address his

- union position and stop raising concerns, if not he will remove JR from his position.”
52. The Claimant accepted that the reference to JR in the minutes is to him. There is no reference to the word “shit”. The Claimant explained this in cross examination as being due to him not wanting to use inappropriate language at the HESAC meeting.
53. The Claimant refers us in his evidence (paragraph 22 of his witness statement) to page 105 of the bundle which is the interview of Mr Puffett (the Industrial Safety Co-ordinator) by Mr Cuthbert on the 26 September 2018.
54. Mr Puffett is, as confirmed in evidence and the agreed chronology, the person who the Claimant speaks to about his conversation with Mr Smith on the afternoon of the same day. Within those interview notes Mr Puffett is noted as saying ... “GP stated JS had contacted him on 8<sup>th</sup> September 2018 in the afternoon (estimated to be early afternoon). JS was in distress regarding how he had been spoken to by Tony Smith (TS). TS had told JS [not verbatim quote but along the lines of] “if he carries on with the actions in the work area he will find him somewhere else to work — off site”.
55. We acknowledge that this is not a verbatim account, but it contains no reference to Union, Health and Safety or the word “shit”.
56. At page 106 of the interview notes Mr Puffett is asked about his previous interactions with JS ...
- “GP said that Management had spoken to him about JS. GP explained that JS is a new Rep both TU and Safety. As there is limited number of Reps at Winfrith, there is no one to mentor him. GP suggested that Nick Simpson could act as mentor - noting that he is a member of a different Trade Union. GP said that JS has a challenging style but should be commended for challenging.
- IC asked if JS was abrasive.
- GP stated that he does not know JS that well. GP gives advice to JS over the phone but recognised the limitations of this method. GP advised that JS has an ongoing medical condition which may be a factor in the way he interacts with others.”
57. We have noted these comments as they are relevant to the alleged fifth detriment. We also have noted that there has been no criticism of Mr Puffett by the Claimant for making these comments.

58. In cross examination the Claimant accepted that he did tell Dave Mellon that he had photographed the machines, but told Mr Smith he had not taken any photos. He explained to the Tribunal that he had not actually taken any photos but he hoped the threat of him saying he had would be a deterrent to not use the machine. In his interview with Mr Cuthbert (at page 76) the Claimant is noted as saying ... "JS confirmed that he had taken a photo of the machine/plug.". The lack of consistency here does suggest either the Claimant's recollection is inaccurate or he is not confident that his actions of threatening to take a photograph were the right thing to be doing.
59. Contrasting this then to the account of Mr Smith. At paragraph 13 of his witness statement Mr Smith refers us to pages 87 to 89 of the bundle which is a copy of his witness statement that he prepared for Mr Cuthbert. It is noted that a copy of this statement is handed to Mr Cuthbert at his interview (page 86).
60. The account at page 87, which was written closer to the time, appears to match what Mr Smith says in his witness statement. It is also consistent with how Mr Puffett describes what the Claimant told him. The flow of events is that Dave Mellon raises the issue with Mr Smith. Mr Smith then raises this with the Claimant and the complained about comment is then made, which is then followed by discussion between them about PAT testing and scaffolding. As set out in Mr Smith's witness statement at paragraph 10 ... "The Chargehand, Dave Mellon, came to me and said that I needed to speak with the Claimant. Dave told me that the Claimant had been winding up his fellow employees and threatening to take photos on site and naming those employees whom he believed were at fault.". This is what Mr Smith then does as he says at paragraph 11... "I asked the Claimant if he was okay to which he indicated he was, I informed him that I was here to speak to him because there had been a complaint about him, in that he was threatening his colleagues by taking photographs of them and showing them to others. I told the Claimant that we had an agreement that he was not to go back to his old ways, and that if he did not want to work with the team in Dragon he would have to find a job outside the project.". It is only after that; the discussion moves to PAT testing and Scaffolding.
61. We prefer Mr Smith's account of this interaction. It appears to us to be Mr Smith acting as a manager and managing the Claimant as a member of his team after a complaint was raised with him about the Claimant winding up his work colleagues. We accept how he described it in cross examination that he was speaking to the individual, not the TU/H&S representative. We therefore do not find the alleged detrimental treatment to have been proven by the Claimant.
62. Even if we were to find such a detriment, we do not find, as we are invited to do by Claimant's Counsel in her submissions, that .... "Mr Smith only told

the Claimant to stop his union work because the Claimant raised legitimate concerns about PAT testing and scaffolding;" ...and/or... "Mr Smith's statements in ... September 2018 explicitly invited the Claimant to perform less trade union work, fitting squarely within the s.146(b) definition." The discussions about PAT testing and scaffolding happened after the alleged comment not before. We have not found that Mr Smith made statements that explicitly invited the Claimant to perform less trade union work.

63. We have been presented with no evidence of the Claimant performing less health and safety or trade union work. After the alleged comments are made the Claimant (as he sets out in paragraphs 22 and 23 of his witness statement) then attends the 2-day HESAC meeting.

### THIRD ALLEGED DETRIMENT

64. **"Senior Manager, Susan Adams instructing the Claimant on 13 September 2018 that he would need to remain in the canteen or her office, until matters he discussed at the National Safety Representatives meeting had been investigated."**

65. The Claimant describes matters about this allegation at paragraphs 22, 23, 26 and 27 of his statement:

"22 I raised what I consider to be a grievance on or around 10 September 2018, although I accept that it was not a formal written grievance sent direct to the Respondent. I was distressed after my conversation with Tony on 8 September 2018, afterwards I called the senior workplace representative for both the Respondent's sites, Gary Puffett. I said that I could not keep hearing all these threats. I said I had to go to the joint health & Safety Committee ('HESAC') meeting the following week and would be travelling on Monday, but was happy to come in to work if need be. Gary said he would be in on Monday and was happy to raise the matter with Rob Gentry, Harwell/Winfrith Site Closure Director. I know that Gary raised it with both Rob and Gill Brown, Regional EHSSQ Manager as confirmed in his statement. I refer to a copy of his statement given as part of the investigation and the Respondent's grievance procedure shown at pages 105 - 106 and 161 — 163 of the bundle of documents."

"23 On Tuesday 11 and 12 September 2018 I was attending the HESAC meeting. I told the other representatives about what had happened with Tony and they advised me to raise it at the meeting, they were aware of other incidents but felt this was important as it was happening personally to me. I raised the issue during the meeting and the Chair, Michael Dummett expressed concern about the allegations and decided an investigation would commence. I



understand that he immediately phoned Rob Gentry to speak to him about it. I refer to the minutes of the HESAC meeting, which are shown at pages 253 - 257 of the bundle of documents.”

“26 Susan Adams asked me directly ‘what do you think you are doing raising this nationally?’ and told me that I would need to be kept apart from Tony whilst it was investigated.

27 I have seen the e-mail that Susan Adams sent to Rob Gentry and others on the afternoon of 13 September and that is not consistent with what I was told. Susan Adams told me I would need to either work from her office or from the canteen and she made it clear that she could not discuss it and did not want to know what was going on. I refer to a copy of the e-mail shown at page 138 of the bundle of documents.”

66. We have noted that the relevant part of the HESAC meeting minutes are actually at page 116 of the bundle.

67. By way of background we have considered page 137 of the bundle as referred to us in the agreed chronology, which is an email dated 13 September 2018 and timed at 15:20 sent internally at the Respondent, which sets out the action steps following the issue being raised, which is to...

“- Undertake a formal investigation about this incident that will be chaired by Ian Cuthbert and commence next week.

- The two parties involved have been notified about the investigation and have been advised to stay apart and only work in certain areas (I advised suspension of the other party but this was agreed as an alternative; suspension remains as an option on the table if needed)

- I have advised his TU Officer about the investigation

- There are two incidents that have been reported in QPlus the below about how PAT testing is undertaken in a controlled area and a second about the use of out of date scaffold - these will be subject to separate technical investigation as per usual process...”

68. Susan Adams describes her involvement at paragraph 2 of her statement:

“2. I was made aware of the allegations that the Claimant made against Tony Smith. As I recall the matter was dealt with through John’s line management route. Owing to the sensitivity and nature of the matters raised, I was involved in a discussion (involving Rob

Gentry, Andy Philps, Mike Scanlon) quite early on about the need to separate the Claimant and Tony whilst the investigation took place. It was agreed that the Claimant should be asked not to visit B70/B78 and Tony would be asked to restrict his activities to B78, B70 and BS44.”

69. In cross examination Susan Adams denied she would have said the words the Claimant credits her with in paragraph 26 of his witness statement. She referred to her email summarising what she said and that she wrote this on the same day (13 September 2018) timed at 13:37 and sent to Rob Gentry; Gill F Brown; Ian Cuthbert; Mike Scanlon; Andy Philps; and Kevin McIntyre and which is at page 138 of the bundle:

“Dear All,

Just to let you know that I have spoken to John Snarey as agreed; I have explained that we take his comments very seriously and that as a result we are instigating an investigation into the circumstances surrounding his comments. I said that in order for the investigation to succeed, and for the sake of everyone involved, we wanted to make sure that there was a separation between him and Tony Smith. He, John, should stick to the mess cabin and B70. I understand from both Andy and John that John’s medical has expired so he cannot do anything in B70. if we need him to do any paperwork he can sit in B71. I don’t think that he should be in A60 at the moment. We will need to agree specifically if we want John to work anywhere else.

I asked after his health (following his absence) which led indirectly to him highlighting that he was having trouble with others in the Dragon team.

I believe that John understands the position and will stick to "his patch".

We will need to discuss further in due course.”

Do let me know if you have any queries”

70. This is a contemporaneous note of what was said on that day. Susan Adams accepts there is a typo within it – it should have said “stick to the mess cabin and B71”, not “B70”, however, there is nothing to suggest this is not an accurate account and we accept what Susan Adams says. We also accept, as there is no evidence to the contrary, that she had no further involvement on this aspect with the Claimant and nothing was raised with her about it, by the Claimant.
71. With reference to the Claimant’s health and absence we have noted from the agreed chronology that the Claimant was on sick leave from 23 July

2018 to the 23 August 2018. This is also referenced at page 91 of the bundle.

72. We also note the subsequent email in reply to Susan Adams (which is above hers on page 138) as a record of what was said to Mr Smith. There is no reason to not accept this either. It reads:

“Dear All,

In a similar vein to Susan's message below, I have spoken to Tony Smith as agreed. I explained that an investigation would be taking place and that it was necessary to keep Tony and John apart. Tony has agreed to this of course.

As Susan has stated below, John does not currently have access to B70 so until he does I do not intend to prevent Tony from carrying out his normal duties there. However, for the time being, Tony will not visit the mess cabin and will restrict himself to B78, B70 and A544 if John's medical is done before the investigation has been carried out, then I will allow him into B70 and restrict Tony to B78 and A544.

In the meantime EBRs for the two events that John put in Q pulse earlier today are in progress.

Best regards,

Andy”

73. In her submissions Claimant's Counsel submits that what happened to the Claimant is a detriment because .... “the restrictions to the Claimant's working area inherently put him at a disadvantage – he wasn't able to do the work for which he was employed.”
74. We accept that restricting the Claimant in this way would put him at a disadvantage, although not potentially as disadvantageous as it could have been had it been a suspension.
75. Considering then the reason for it.
76. The Claimant accepted in cross examination that this alleged detriment was not against Susan Adams. He also accepted that the reason he was restricted was because of the complaint against Mr Smith. That reason is also confirmed in the contemporaneous emails we have referred to.
77. Claimant's Counsel submits that we should find in respect of health and safety that ... “(b) The Claimant was only restricted in his working areas

because he alerted others about Mr Smith's statements during the HESAC meeting – a joint Health and Safety Committee [C w/s para 22];" and in respect of trade union that ... "(b) The restrictions applied to the Claimant's work between 13 September and 9 October 2018 were in fact to penalise him for having raised health and safety issues at the HESAC – a necessary part of his trade union duties. This is supported by Susan Adam's comments to the Claimant on 13 September 2018 [C w/s para 26], and Mr Smith's live evidence that he was upset that the Claimant had raised his health and safety concerns specifically at the HESAC meeting;".

78. We do not find this however. It appears clear to us why what has happened has happened which is because the Claimant raised his complaint about Mr Smith via Mr Puffett, which the Claimant describes at paragraph 22 of his statement, and this then needs to be investigated. How the Claimant explains this in paragraph 22 is not how the Claimant's Counsel seeks to describe it in her submissions as quoted above. We also note at paragraph 43 of the Claimant's statement that ... "I had raised the allegation in relation to a specific incident and individual.". Further we have not found that Susan Adams said what the Claimant says she said. Further, we note that it is clear from the contemporaneous records of what is said on the 13 September 2018 that both the Claimant and Mr Smith are faced with restrictions while the investigation is carried out.

#### **FOURTH ALLEGED DETRIMENT**

79. **"The Respondent, as a result of Susan Adams' instruction, requiring the Claimant to remain in the canteen for approximately 3 weeks from 13 September 2018."**

80. This detriment is really an extension of the third alleged detriment. There does not appear to be any evidence that Susan Adams' instructed the Claimant to remain in the Canteen for approximately 3 weeks. The 3-week time period appears to be as a consequence of the time taken to carry out and review the investigation into the Claimant's complaints about Mr Smith. It appears to come to an end because the Claimant is unfortunately becoming unwell and is signed off. As the Claimant confirms at paragraph 52 of his statement "I was absent from work with stress and anxiety from the 10 October 2018 and did not return until 2 January 2019.

81. Claimant's Counsel in her submissions sets out this detriment as follows:

"19. It is not in dispute between the parties that the Claimant was a manual worker. Allowing to sit in the tea bar or attend an office block did not provide with sufficient or useful work to do. The Claimant's evidence is that he found the period between 13 September 2018 and 9 October 2018 humiliating [C w/s para 40].

20. At most, the Claimant was able to a 20 minute trade union DERM meeting in the morning during his period restriction and plan safety walkaround for the future. There was nothing else for him to do. Patently, the Claimant suffered a detriment by the significant reduction in the work he was allowed to perform in this period.”.
82. We accept as for the third alleged detriment, a restriction on where the Claimant works would put him at a disadvantage. Unfortunately, the Claimant’s ability to undertake certain tasks in certain locations at the Respondent’s site was further restricted at this time by him having a lapsed electronic personal reader (EPD). The Claimant notes this at paragraphs 30 and 31 of his witness statement. As the Claimant is noted as saying in his interview with Mr Cuthbert on the 18 September 2018... “explained it was his IRR medical which had run out in August 2018 and a month's grace is given. Now expired so seeing OH.”. The lapsed EPD is due to a lapsed medical which has nothing to do with the Claimant’s union and/or health and safety duties.
83. Then to consider what the Claimant could do in this period we have considered the documents that Respondent’s Counsel, within his submissions (in the square brackets), submits supports what the Claimant did:
- “169. Invited to meet Rob Gentry to discuss electrical safety [149].
170. Invited to a do a tool Box talk for recruitment of safety reps [147] ...
- ...171. Asked to do safety review of ALES “as a means of keeping him fully employed [146].
172. Reminded him his role as TU Safety rep requires him to carry out regular inspections of other facilities anyway and many of these do not require him to be a classified person [146].
173. Carry out a recruitment exercise for TUSRs at Winfrith and Harwell [141].
174. Organise/planning 2 or 3 TUSR inspections of areas at Winfrith... [142] ....”
84. We have though noted the Claimant’s position on this as at paragraphs 37, 38 and 39 of his witness statement ...
- “37. I can see from the e-mails that Kevin McIntyre responded to Susan Adams’ e-mail on 2 October, 7 further working days after it had originally

been sent, asking Andy Philips to instruct me that I could undertake those tasks. However, I was not advised of this by Andy until the 5 October 2018, a further 3 working days later. I had at that point been restricted to the tea bar since 13 September. I refer to a copies of the e-mails, which are shown at pages 261 — 262 of the bundle of documents]”

“38. I have seen a copy of an e-mail from Kevin McIntyre dated 18 September 2018 addressed to Rob Gentry and others suggesting that I was invited to a tool box talk at SGWHR and asked to do a safety rep campaign. However, I was never asked or offered that opportunity. I refer to a copy of the e-mail shown at page 147 of the bundle of documents.”

“39. Michael Dunnet had previously agreed that I could attend a course with the Institute of Health and Safety. This had been processed locally and by coincidence the dates to attend came up during the time I was restricted to the tea bar on 24 to 27 September. This was the only respite during this period...”

85. Although in dispute as to how much work and in particular union or health and safety duties/activities the Claimant undertook while restricted, the reality is that union and health and safety duties/activities are the bulk of what he did do while restricted.
86. Claimant’s Counsel in her submissions submits that this detriment is because ..... “(c) The Claimant was restricted to the canteen as a result of the investigation in connection with the health and safety concerns he had raised;” and/or ... “(b) The restrictions applied to the Claimant’s work between 13 September and 9 October 2018 were in fact to penalise him for having raised health and safety issues at the HESAC – a necessary part of his trade union duties. This is supported by Susan Adam’s comments to the Claimant on 13 September 2018 [C w/s para 26], and Mr Smith’s live evidence that he was upset that the Claimant had raised his health and safety concerns specifically at the HESAC meeting;”
87. We do not find this however. It appears clear to us why what has happened has happened which is because the Claimant raised his complaint about Mr Smith, which he describes at paragraph 22 of his statement and as is also noted at paragraph 43 of his statement that ... “I had raised the allegation in relation to a specific incident and individual.”. This then needed to be investigated. It is clear from the contemporaneous records of what is said on the 13 September 2018 that both the Claimant and Mr Smith are faced with restrictions while the investigation is carried out.
88. The Claimant’s lapsed EPD, which has nothing to do with his trade union or health and safety role, also has an impact on what the Claimant could do and where he could go. Also, the reason of the Respondent is further

supported as not being a prohibited reason because it appears to be predominantly union and health and safety related work and tasks that the Claimant undertakes in the restricted period.

**FIFTH ALLEGED DETRIMENT – PART ONE**

89. **“The Respondent referring to him in writing on 1 October 2018, in its investigation report as a troublemaker, having mental health issues, untrustworthy, work shy, awkward, having a reputation and that no one wished to work with him”.**

**AND FIFTH ALLEGED DETRIMENT – PART TWO**

90. **“Kevin McIntyre, Senior Manager, in the same report suggesting the options were to move him to a smaller team and that if that failed there would be nowhere else to go, implying that his continued employment would be at risk”.**

91. The investigation report in question was prepared by Mr Cuthbert the B462 Complex Manager and is dated 1 October 2018 and is at pages 107 to 113 of the bundle. The interview notes are within the bundle prior to the report at pages 75 to 106.

92. The terms of reference for the investigation are in summary that (as at page 108 of the bundle) “... the formal investigation was undertaken as a neutral fact-finding process. The investigation concerned related to an incident on 08 September 2018 in B70, Dragon Project, Winfrith Site concerning a TU Safety Representative and an officer of the company.”.

93. How the interviews are then conducted is set out in the report as can be seen at page 109 of the bundle...

“The interview strategy:

The first interview with John Snarey enabled the investigation team to understand the nature of the concerns raised by him about the incident. Following this, the investigation team identified potential witnesses to the incident and a number of other persons that it required to interview.

The initial strategy was to secure witness accounts of the incident from Dave Mellon and Bob Meaden. In addition, the investigation team interviewed Kevin McIntyre and Andy Philps to establish the management position with regard to TU Safety Representatives. It was also decided to speak with Gary Puffett who John contacted on the afternoon of the event.

All interviews followed a standard format against a set of questions. A record of all interviews was produced from notes taken at the time. These were a summary of the discussions and not a verbatim record. interviewees were asked to sign the interview record to confirm that it was an accurate record. Copies of the interview notes are attached in Appendices 1 to 8

To ensure that the investigation was conducted as fairly as possible, all persons interviewed were asked to keep anything discussed during the interview strictly confidential. All those interviewed were offered support to be accompanied by a TU Rep or work colleague.”

94. This interview strategy notes the Claimant is the first to be interviewed to enable ... “... the investigation team to understand the nature of the concerns raised by him about the incident. Following this, the investigation team identified potential witnesses to the incident and a number of other persons that it required to interview.”. The Claimant’s interview therefore sets the direction of the investigation. As the Claimant himself records in paragraph 41 of his statement:

“41. I attended a fact finding interview on 19 September 2018. I was advised that it was not a disciplinary hearing. I was told that Ian Cuthbert was only interested in the facts associated with the allegations, but if I provided any other information during the investigation that was outside of the terms of reference and it would be noted. I refer to the minutes of my fact finding interview, which are shown at pages 75 - 80 of the bundle of documents.”

95. The substance of the Claimant’s alleged detriment is then set out at paragraph 43 of his statement...

“43 I consider the Respondent’s report to be an assassination of my character and a deliberate attempt to further undermine my position as the health and safety representative. I had raised the allegation in relation to a specific incident and individual. The Respondent when conducting interviews deliberately went beyond the allegations, asking unjustified, unreasonable, open and loaded questions. The Respondent was selective in who it spoke to and to my knowledge did not speak to any of my immediate colleagues on the shop floor who might have witnessed an interaction with Tony Smith or have been able to comment further on my role. I know this because they have told me as much, I had 9 colleagues on the shop floor including Finch, Palmer, Hilmy, Anthony, Rich, Kenny and Dave Williams. Steve Vine was a Charge-hand like Dave Mellon and it was his team that I worked in more than Dave's, but only Dave was spoken to.”

96. The Claimant confirmed in cross examination that he did not have an issue with the author (Mr Cuthbert), it is what the various witnesses said about him that he has issue with. In his responses about the evidence in the report



the Claimant confirmed that he didn't say Mr Cuthbert had treated him badly but that he was upset by the individuals' comments. He said that his complaint is how they were asked those things but he also accepted in cross examination that he was not saying the questions were asked because he was a union or health and safety representative.

97. Although distinguished in the agreed list of issues to refer specifically to the comments of Mr McIntyre, they are not distinguished by the Claimant, who refers to it all collectively as part of his witness statement at paragraph 45 ... "...For example it referred to concerns that I had not been myself, that I could not be trusted, that I was seen as a trouble maker, was going to be moved to another area, was out of my comfort zone, was floundering. maybe suffering from mental health issues, had given the impression that I was work shy, had been moved from my previous role as I was a trouble maker, came with a reputation and that if a further move failed there would be nowhere else for me to go."

98. As the focus is what is recorded as being said we have looked carefully at the questions and responses and how these are recorded by Mr Cuthbert within the interview notes and the investigation report. To assist us in identifying all the comments we have referred to the page and paragraph numbers provided by Claimant's Counsel in her submissions (as quoted below in the square brackets after the quotes) as well the actual interview notes that generated the comments, where relevant.

99. "Troublemaker" [111, Andy Philps; 112, para 6, 8, 11] –

- a. The question in the interview that results in this comment can be seen at page 98... "IC stated the Investigation related to a TU Safety Rep. IC understood that John Snarey (JS) was transferred to Dragon. IC asked why JS was transferred."
- b. Mr Philps response is... "... "AP did not know the full details but potential troublemaker. However, Dragon took an open-minded approach and anyway, didn't know the details of what had occurred at SGHWR."
- c. Then there is Mr Cuthbert's summary at page 112 paragraph 6 ... "it is clear to all concerned that John has a long term sickness with feedback from Occ Health of "My understanding is that any chronic health conditions can plausibly have an impact on mental and emotional health. There are of course lots of factors at play such as condition management, medication, impact on daily living etc." Despite this John is seen as a trouble maker and yet again moves are afoot to move him to another area, Where is the management, empathy and pastoral care?"

- d. Page 112, paragraph 8 does not appear to make reference to “trouble maker”.
  - e. Page 112, paragraph 11, Mr Cuthbert notes ... “Concerns have been raised that the TU duties interfere with the running of such a small team but it is understood that the management are looking to move John to a smaller team; this does not seem to make sense. it is concerning that John is seen as a “trouble maker” who was moved from his previous role and the management now seem to wish to move him again, how many moves are there before we deal with the issue?”
100. “Has mental health issues” [112, para 6]. This paragraph has already been referred to above but we have also noted that at paragraph 8 on page 112 Mr Cuthbert notes ... “... it is further deeply concerning that we have someone who maybe suffering from mental health issues and he is treated in this manner. This treatment seemed to be acceptable to the management of Winfrith.”.
101. “Untrustworthy” [111, Tony Smith; 112, para 5] -
- a. The questions and responses in the interview that results in this comment can be seen at page 86 ...  

“IC stated that at the end of this JS could return to team?

TS said, no he’s not-to do this and wind the guys up can’t trust him or work with him

IC confirmed JS will return to work

TS said, he is telling others that he will stay and others will go

IC said that JS could return to the project?

TS said JS isn’t. This could continue to disciplinary. Not accepting that situation, my reputation is at stake and he is malicious and untrustworthy.”
  - b. The reference to the “trust” reference on page 111 is Mr Cuthbert’s summary of the interview with Mr Smith which includes some of the quotes already referred to above.
  - c. Then there is Mr Cuthbert’s summary at page 112 paragraph 5 ... “It is a concern that Johns future role has been discussed and probably

decided before the investigation had commenced and comments like “I cannot trust him” from a senior manager are of concern.”.

102. “Work shy” [110, Dave Mellon; 112, para10] –
- a. The questions and responses in the interview that results in this comment can be seen at page 103:
- “IC asked DM to explain the difficulty with JS?
- DM explained JS makes guys feel on edge, to get them in trouble in some way, makes it awkward but luckily JS not often here
- IC asked DM to explain, JS is a TU Safety Rep, is it safety or generally?
- DM explained not just safety stuff, JS can be awkward and can be work shy, not keen, finds a way to get out of stuff, not often there. Set to work on escorting jobs as JS has to go off and do union stuff”
- b. Then there is Mr Cuthbert’s summary at page 110 – “Dave explained that John makes guys feel on edge, to get them in trouble in some way, makes it awkward but luckily John not often here. Dave explained not just safety related stuff, John can be awkward and can be work shy, not keen, finds a way to get out of stuff, not often there. When asked what Tony's style of management is like, replied good, Tony's always good especially when issues with daughter last year, very supportive, John have an illness and Tony helps him. Dave further stated that John had originally settled in well with the team, however, he has been different since returning from sickness. When asked, asked how you / team would feel about John coming back? Dave confirmed he would be wary but all adults, team don't really know what's going on, couple of guys not too keen on working with John but would.”
- c. Page 112, paragraph 10, Mr Cuthbert notes “10. it is quite clear that all parties concerned have no clear idea what, when and for how long John needs to carry out his TU duties. This has perhaps allowed John to give an impression of being work shy. Who is managing this situation? it does seem unclear. It is not unreasonable to understand when John has appointments.”
103. “Awkward” [110, Dave Mellon]. This is as already detailed above.
104. “Has a reputation and no one wished to work with him” [111, Tony Smith]. This does not seem to have been expressly said by anyone so we

understand it to be an inference from the below quotation which is a summary of what Mr Smith said about trust and working with the Claimant (and the interview that generated these comments has already been referred to above), which Mr Cuthbert requotes:

- a. "Asked about John returning to work on the Dragon project, Tony replied, "No he's not - to do this and wind the guys up, can't trust him and work with him". This does raise concerns about re-building bridges and maintaining management expectations."

105. Mr McIntyre's statements that the options were to move the Claimant into a smaller team and that if that failed there would be nowhere else to go [96; 111].

- a. The questions and responses in the interview that results in this comment can be seen at page 96:

"IC asked what did KM see is future for JS? What if RG says is back at Dragon?"

KM explained had already talked to RG about this. JS behaviours in a repeat position of before at SGHWR. Option is to move JS to a smaller team to perhaps grow into the role. If that fails then will be nowhere else to go.

IC asked are we not just moving the problem?

KM agreed but explained that Winfrith short of TU Safety reps and have invested time. Got to keep trying. JS can practice how he interacts. JS needs close supervision. Mentor needed - not voluntary. Conversation needed with senior staff and TU."

- b. Page 111 Mr Cuthbert notes ... "When asked what Kevin saw as the future for John he explained had already talked to Rob Gentry about this. John's behaviours in a repeat position at before at SGHWR. Option is to move John to a smaller team to perhaps grow into the role. if that fails then will be nowhere else to go."

106. As quoted above with reference to page 112 and paragraph 11 Mr Cuthbert expresses his concern at this ... "Concerns have been raised that the TU duties interfere with the running of such a small team but it is understood that the management are looking to move John to a smaller team; this does not seem to make sense. it is concerning that John is seen as a "trouble maker" who was moved from his previous role and the management now seem to wish to move him again, how many moves are there before we deal with the issue?" .

107. We also note that Mr McIntyre does appear to convey a desire to make it work with the Claimant in his follow up response to Mr Cuthbert ... "Winfrith short of TU Safety reps and have invested time. Got to keep trying. JS can practice how he interacts. JS needs close supervision. Mentor needed - not voluntary. Conversation needed with senior staff and TU".
108. Claimant's counsel in her submissions describes the alleged detriment as ... "23. Those comments are disparaging. In the context of an investigation conducted to make findings of fact on whether Mr Smith threatened the Claimant that his employment was at risk if he made health and safety issues/carried out his trade union duties, they are incongruous. It is in that context that the tribunal must assess these comments. A Claimant in receipt of such a report containing these comments would obviously consider themselves to be at a disadvantage."
109. We can see how the Claimant, as he says in his witness statement would find such comments an assignation of his character. We accept that the comments would be a disadvantage to the Claimant whether truthful or not. We accept it would have been upsetting to the Claimant. But the context of such comments, how they are generated and how they are acted upon is important to understand the reason for them.
110. The conclusions of the report as written by Mr Cuthbert show support for the Claimant's position and do not suggest his "position as the health and safety representative" (as at paragraph 43 of the Claimant's statement) was undermined. As Mr Cuthbert notes at paragraph 10 on page 112 ... "10. it is quite clear that all parties concerned have no clear idea what, when and for how long John needs to carry out his TU duties. This has perhaps allowed John to give an impression of being work shy. Who is managing this situation? it does seem unclear. It is not unreasonable to understand when John has appointments."
111. We have also already noted the comments Mr Puffett made about the Claimant at his interview. We note that these have not been quoted by the Claimant as an assignation of character. However, they do appear to contribute to the narrative referring to him as challenging (albeit that's a good thing) and that his medical condition may be a cause of how he reacts to others. These comments are also noted in Mr Cuthbert's summary at page 110 ... "Gary said that John has a challenging style but should be commended for challenging. Gary gives advice to John over the phone but recognised the limitations of this method. Gary advised that John has an ongoing medical condition which may be a factor in the way he interacts with others."

112. We have also already noted that the Claimant was on sick leave from the 23 July 2018 to 23 August 2018, so this could legitimately raise a health concern perception. Further, the comments referred to at page 112 paragraph 6 are generated with feedback from Occupational Health rather than one of the Claimant's work colleagues.... "it is clear to all concerned that John has a long term sickness with feedback from Occ Health of "My understanding is that any chronic health conditions can plausibly have an impact on mental and emotional health. There are of course lots of factors at play such as condition management, medication, impact on daily living etc.".

113. The Claimant suggested that he had work colleagues which would give positive comments about him if asked by Mr Cuthbert or at this Tribunal, however no evidence of these has been presented to us.

114. Mr Smith accepted in cross examination that he was upset about what the Claimant said about him, so his views expressed at the interview about continuing to work with the Claimant should be taken in that context.

115. Mr Cuthbert concluded that Mr Smith had no case to answer. The Report records (at pages 112 and 113):

"6. Summary of Findings

6.1 Allegation 1: Conduct unbecoming

It is a finding of this investigation that there is no case to answer by Tony Smith against this.

7. Mitigating Factors

1. There are no witnesses to the conversation between John and Tony. The only possible witness was using a vacuum cleaner and could not hear as agreed by both parties.

2. In his own words, Tony removed John from a position that the conversation could be overheard."

116. As we have found we accept the account of Mr Smith as to what happened on the 8 September 2018.

117. Then there are the report's recommendations themselves (page 113)

"9. Management Recommendations

1. Stand down the Dragon project and brief them on the law with regard to TUSR, roles and responsibilities.
  2. Management and Trade Unions to work together to ensure support and mentoring for John Snarey. John needs a Senior Trade Union Representative who he can seek advice along with a Senior Manager who will listen to John and guide him on the correct method to achieve the actions he requires. This will require a clear structure and implementation plan to which all parties have agreed.
  3. Dragon Project Manager (TS) to attend training on how to interact with members of staff.
  4. Re-invigorate the safety culture- What are we trying to achieve - Set up new walk downs and ensure the TUSR attend. Empower the TUSR to have their own walk downs and ensure that a TUSR attends Senior Managers safety walk downs. Senior Management to carry out Audit to ensure compliance.”
118. Of these four recommendations the Claimant raises no criticism and we can understand this as they all appear to be intended to assist the Claimant in fulfilling his TUSR, roles and responsibilities. The fifth and final management recommendation relates to the sixth alleged detriment and is considered below.
119. We accept that the comments would be a disadvantage to the Claimant whether truthful or not. We accept it would have been upsetting to the Claimant and as he says were in his view an assignation of character. But as already noted the context of such comments, how they are generated and how they are acted upon is important to understand the reason for them.
120. We accept the purpose of the report is to investigate the grievance related issues that the Claimant initiated and make findings and then recommendations about how matters should proceed. The Claimant does not criticise the author of the report. Without Mr Cuthbert’s investigation and report, the comments that aggrieve the Claimant would not be recorded. They are comments generated by Mr Cuthbert’s questions. Without the Claimant raising his issues about Mr Smith the report and investigation would not have been commissioned and Mr Cuthbert would not then have asked his questions.
121. Therefore, the comments the investigation generates are not as Claimant’s Counsel submits ... “only made, and recorded, because the Claimant had performed his health and safety duties; ...” or ... “... are made

in the context of antipathy towards the Claimant for carrying out his trade union health and safety duties...”

## SIXTH ALLEGED DETRIMENT

122. **“Referring him to the Respondent’s Occupational Health department due to concerns raised in the Respondent’s investigation report about his mental health”.**

123. The Claimant describes this detriment in paragraphs 48, 49, 50 and 51 of his witness statement....

“48 The report recommended that subject to my consent I should be referred to Occupational Health so the Respondent could better understand the impact of my condition and the referral should also cover my mental health. I refer to a copy of the report, which is shown at pages 107 - 113 of the bundle of documents.

49. I had only ever shown any kind of emotional distress once whilst at work when my return to SGHWR was discussed. There had been no further issues or reports regarding this and I had no personal matters or distress in my life. I was happy working on the Dragon Project and my underlying health condition was under control. Andy Philips apparently was aware of concerns about my mental wellbeing being raised by colleagues. However, I was never told who they were or when these concerns arose. I accept that I found events at work stressful and that is referenced in some aspects of my Occupational Health record, but that was a direct result of my role and livelihood being questioned and put at risk. I found it deeply offensive that non-qualified managers were suggesting my mental health may be in question and that this was perhaps a reason for my actions.

50. I can see that the Respondent will argue that it was concerned for my mental wellbeing and general health and that this prompted its position on a referral to Occupational Health. However, I don’t accept that, it was already fully aware of my underlying medical condition, it was long standing and the adjustments I required if I suffered a flare up of the condition were well documented. The Respondent was also aware from reports that stress was an exacerbating factor in respect of my underlying condition that was previously well under control. However, the unsubstantiated suggestions of mental ill health were used without further consideration, explanation or investigation to justify a referral to Occupational Health.

51. I was not happy about or engaged openly with regard to the referral to Occupational Health. I had no mental health issues before the incident with Tony Smith and never understood how or why my mental health was questioned as part of the investigation. The issues in respect of my authority



and the questions that were put forward are shown in the e-mail correspondence from the time. Ultimately I agreed to be seen by Occupational Health, I had suffered mentally as a result of the way I had been treated and shortly afterwards I was signed off by my doctor with stress. I refer to copies of the e-mail correspondence shown at pages 199 - 205 of the bundle of documents.”

124. Within her submissions Claimant’s Counsel submits that the asserted detriment is ... “... 24. It is quite clear from the investigation report that assumptions were made about the Claimant’s mental health in the course of the investigation. Those assumptions underly the Respondent’s decision to refer the Claimant to occupation health. The Respondent began that process at least on 8 October 2018 [146].”

125. When this alleged detriment was explored in evidence during cross examination of the Claimant, in his responses the Claimant acknowledged that he should probably have been referred to Occupational health earlier and with more detail about his circumstances. This does appear to be consistent with the way the Claimant responds to this issue as set out in the email dated 9 October 2018 from Andy Philps circulated internally (at page 145 of the bundle):

“... John Snarey came to see me first thing this morning. I spoke to him about his mental wellbeing and the fact that concerns had been highlighted by colleagues. I explained that the company had a duty of care in this respect and asked him if he had sought any support from the Mental Health First Aiders or Occupational health.

He said he hadn’t but he "probably should have”.

I then asked him if he would make an appointment to see OC. He agreed to do so.”

126. The Claimant is quoted as acknowledging he “probably should have” sought “... support from the Mental Health First Aiders or Occupational health”. The Claimant acknowledged the accuracy of this note in cross examination.

127. We have also considered the relevant management recommendation from the investigation report itself (page 113), which reads:

“5. Subject to consent from John, the investigation team recommend that he is referred to Occupational Health to better understand the impact that the medical condition may have at work and whether any reasonable

- adjustments need to be put in place. The referral should also cover his Mental Health wellbeing.”
128. It is unclear why the Claimant asserts that referring him to the Respondent’s Occupational Health department in this way is putting him to a disadvantage and therefore a detriment. As the Claimant himself acknowledges at paragraph 51 of his witness statement... “Ultimately I agreed to be seen by Occupational Health, I had suffered mentally as a result of the way I had been treated and shortly afterwards I was signed off by my doctor with stress....”.
129. We therefore do not see this as a disadvantage to the Claimant, but in any event, we have gone on to consider the reason the Claimant asserts it is prohibited either because of health and safety or union activities.
130. Claimant’s Counsel submits in her written submissions (at paragraph 26(e) that it is health and safety related because ... “... The Respondent referred the Claimant to OH because of assumptions made about him in that report.”. This really goes back to the issues we are considering in respect of the fifth alleged detriment and we have found that those assumptions were generated by Mr Cuthbert’s investigations, initiated in response to issues the Claimant raises about Mr Smith. We have also noted that if assumptions were made about the Claimant’s health these were contributed to by the comments made by Mr Puffett... “GP advised that JS has an ongoing medical condition which may be a factor in the way he interacts with others.”. We have noted that these comments have not been subject to criticism by the Claimant. Further, the Claimant did have a month of sickness absence not long before the alleged incident and the investigation was initiated.
131. Claimant’s Counsel submits in her written submissions (at paragraph 32(d) that it is union activities related because ... “... The Respondent wanted to push the narrative that the Claimant was mentally unwell without having appropriately explored the matter with him. The action to refer him to OH on the back of the investigation report fits with the existing matrix of facts demonstrating that the Respondent’s purpose was to prevent, deter or penalise the Claimant from carrying out his trade union duties. The Claimant explains the nature of his deteriorating health in detail to the OH doctor – it is solely because of victimisation from the Respondent [155-156].”.
132. We have not found this however. The referral is made ... “to better understand the impact that the medical condition may have at work and whether any reasonable adjustments need to be put in place. The referral should also cover his Mental Health wellbeing.”. This is made in the context of comments raised by Mr Puffett and the Claimant having been sick for a month before the incident with Mr Smith.

**THE LAW**

133. Having established the above facts, we now consider the law.

**The Statutory sections**

134. Health and safety cases - the relevant sections of the Employment Rights Act 1996 are sections 44 and 48:

**“44 Health and safety cases**

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such committee...”

**“48 Complaints to employment tribunals**

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section ... 44, ...

(2) On a complaint under subsection (1), ... it is for the employer to show the ground on which any act, or deliberate failure to act, was done.”

135. Trade Union cases – the relevant sections of the Trade Union and Labour Relations (Consolidation) Act 1992 are sections 146, 147 and 148:

**“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—...

... (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 or (as the case may be) make use of trade union services;

and for this purpose “working hours”, in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work....”

**“147 Time limit for proceedings**

(1) An Employment Tribunal shall not consider a complaint under section 146 unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable...”

**“148 Consideration of complaint**

(1) On a complaint under 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act...”

### **Detriment**

136. As to what amounts to a detriment Claimant's Counsel has reminded us that the term 'detriment' has no statutory definition.
137. Both Counsel invited us to adopt the approach taken in the discrimination context that a detriment means no more than putting at a disadvantage (**Ministry of Defence v Jeremiah [1979] IRLR 436, per Brandon LJ, para 22**).
138. As further expanded by Respondent's Counsel he notes ... "Brightman LJ stated that detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment".

### **The burden of proof**

139. Despite the requirements of the statute there is a difference of view between Counsel on the question of who needs to prove what and when in a trade union activities detriment claim.
140. We have noted from the summary note of **Yewdall v Secretary of State for Work and Pensions EAT 0071/05** which, "Held that, it is necessary for a claimant under s 146 to establish a prima facie case of a purpose relating to trade union activities so as to shift the burden of proof to R..."
141. Claimant's Counsel in her written submissions (by reference to paragraphs 20, 21 and 22 of the EAT judgement in **Yewdall**) submits that ... "It is incorrect to say that the Claimant bears a burden of proof to show that the sole or main purpose for which the Respondent acted or failed to act was prohibited by s.146 TULRCA."
142. In our view the EAT authority assists us by recognising as it states, "it is necessary for a claimant under s 146 to establish a prima facie case of a purpose relating to trade union activities so as to shift the burden of proof to R.". Then with reference to paragraph 23 of the EAT judgment (as referred to by Respondent's Counsel) it offers a structure for us to follow:
- "23. We nevertheless find that, although clearly this is not necessarily a binding way for a tribunal to approach this statute, a very sensible way to do so would be to follow this structure which, in effect, follows the route of the Act as we see it to be:

- (i) Have there been acts or deliberate failures to act by an employer? On this, of course, the employee has and retains the onus;
- (ii) Have those acts or deliberate failures to act caused detriment to the employee?...
- (iii) Are those acts in time?
- (iv) In relation to those acts so proved which are in time, where detriment has been caused, the question of what the purpose is then arises. We are satisfied that Mr Russell was right to concede - and, in any event, this is our judgment - that there must be establishment by a claimant at this stage of a prima facie case that the acts or deliberate failures to act which are found to be in time were committed with the purpose of preventing or deterring or penalising i.e. the illegitimate purpose prohibited by s146(1)(b)."

143. Respondent's Counsel then further submits as to what is a prima facie case that there is ... "a simple and fundamental logic expressed in discrimination cases such as *Madarassy v Nomura International plc* [2007] ICR 867 per Mummery LJ:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

144. He submits that applying considerations of what is a "prima facia" case in discrimination law should lead us to consider the presence of three factors:

- "(1) the protected position (TU Rep / safety rep)
- (2) The proven detriment
- (3) Something more – which connects (1) and (2)"

145. He acknowledges that "the "something more" which is needed to create a claim requiring an answer need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances, it may be furnished by the context in which the act has allegedly occurred."

146. We note that this order of consideration of factors suggested by Respondent's Counsel is consistent with the agreed list of issues, as abbreviated below to reflect the now pursued section 146 complaint, namely:

- “3. Did the Claimant take part or propose to take part in the activities of an independent trade union prior to the detriments alleged?
4. What were those activities conducted or proposed activities to be conducted at an ‘appropriate time’ (as set out in section 146 (2) TULR(C)A 1992?
5. ... were the ... [alleged] actions of the Respondent for the sole or main purpose of ... preventing or deterring the Claimant from taking part in the activities of an independent trade union at an ‘appropriate time’, or penalising him for doing so contrary to s 146 (1) (b) TULR(C)A 1992? ...
8. If and to the extent that the Claimant was subject to the detriments alleged, does the Respondent prove on a balance of probabilities that the act or acts complained of was/were not done on the ground(s) set out in s 146 (1) ... (b) TULR(C)A 1992. Or did R’s actions come about as a result of other reasons, including that C was not pursuing genuine union or union related matters?
- 9 Can C demonstrate to the ET that these all formed continuing acts, and as such all are potentially within time? If not all are within time, was it reasonably practicable for C to bring them within time?
- 10 Did R’s alleged actions bring about their alleged desired result? If not, can threats in themselves be a detrimental act?”
147. Then as to the section 44 (health and safety) complaint:
148. Under section 48(2) of the Employment Rights Act 1996, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
149. Respondent’s Counsel draws our attention to the case authority of **NHS Manchester v Fecitt [2011] EWCA Civ 1190 [2012]; ICR 372**, and that with reference to section 48 “.... the burden rests on the employer to establish that its reason for its act or deliberate omission was not materially influenced by the claimant’s protected status/conduct; Feccitt.”.
150. Respondent’s Counsel submits “... the prime consideration in these cases is often the mindset of the respondent; what belief operated on the respondent at the time of the proven act or deliberate omission.” ... And that “.... What matters, in this case is the respondent’s motivation, even if that motivation was based on erroneous information, that remains the genuine motivation operating on the mind of the decision maker.”.

151. Claimant's Counsel submits that there "... is no requirement that the Claimant must act reasonably in the discharge of his health and safety functions. An employee's motive or purpose in pursuing a safety concern is irrelevant, as long as there is a genuine safety concern to be pursued - *Shillito v Van Leer (UK) Ltd* [1997] IRLR 495." ... and "In order to challenge a detriment claim based on the Claimant's behaviour, the Respondent must prove that the Claimant acted in bad faith." Further ... "... The tribunal must consider what was the reason for the act or omission found. The Respondent's motive for performing the act is immaterial. It does not matter whether there is or is not an intention to subject the Claimant to a detriment. The burden of proof rests on the Respondent to show that the act or omission was not done for a prohibited reason."

152. As the case authority of **Shillito** itself notes in the head note (copied at page 104 of the authorities' bundle) what "an industrial tribunal has to determine is whether the employee was subjected to a detriment by the employer on the ground that he was performing the functions of a safety representative, acknowledged by the employer. If that was the reason for the employer's action, the complaint is made out."

153. We also remind ourselves of the issues within the agreed list of issues (as abbreviated below to reflect those that remain in dispute on the now pursued Section 44 complaint), namely:

"5. Was the Claimant subjected to ... the [alleged] detriments [numbers two to six] in respect of the allegations made under s 44 (1) (a) and (b) ERA 1996? ...

6. If and to the extent that the Claimant was subject to the detriments alleged, does the Respondent prove on a balance of probabilities that the act or acts complained of was/were not done on the ground(s) set out in s. 44 (1) (a) and (b) ERA 1996? Or did R's actions come about as a result of other reasons, including that C was not pursuing genuine health and safety matters?"

## **THE DECISION**

154. So, applying these legal principles to the facts we have found.

155. The starting point in respect of both types of detriment complaint is whether the Claimant has proven a detriment or not, whether on the balance of probability he has proven that something has happened to him (or should have happened but didn't) putting him at a disadvantage.



**The alleged detriments**

156. Our findings of fact have led us to conclude that:
157. First alleged detriment... ***Tony Smith telling the Claimant during a meeting ... in March 2018 that he would need to think about his union role and general activities if he wanted to remain on the Dragon Project permanently and ... the alternative would mean him being given jobs that no one else wanted to do.*** As submitted by Claimant's Counsel the detriment is this "threat or suggestion". We preferred the account of Mr Smith about this meeting and have not found that the Claimant has proven on the balance of probability that he was subjected to such a "threat or suggestion".
158. Second alleged detriment... ***Tony Smith on 8 September 2018 taking the Claimant aside on the shopfloor and informing him that his continued employment was at risk unless he stopped "this Union s\*it".*** We have not found Mr Smith said this. We prefer Mr Smith's account of this interaction. It appears to us to be Mr Smith acting as a manager and managing the Claimant as a member of his team after a complaint was raised with him about the Claimant winding up his work colleagues. We accept how he described it in cross examination that he was speaking to the individual, not the TU/H&S representative. We therefore do not find the alleged detrimental treatment to have been proven by the Claimant.
159. Third alleged detriment... ***Susan Adams instructing the Claimant on 13 September 2018 that he would need to remain in the canteen or her office, until matters he discussed at the National Safety Representatives meeting had been investigated.*** We have accepted Susan Adams account of what she said to the Claimant on the 13 September as recorded in her email of the same date ... "I have explained that we take his comments very seriously and that as a result we are instigating an investigation into the circumstances surrounding his comments. I said that in order for the investigation to succeed, and for the sake of everyone involved, we wanted to make sure that there was a separation between him and Tony Smith. He, John, should stick to the mess cabin and [B71]." We do though accept that this restriction would have put the Claimant at a disadvantage as he would not be able to perform all the normal work tasks he would perform.
160. Fourth alleged detriment... ***as a result of Susan Adams' instruction, requiring the Claimant to remain in the canteen for approximately 3 weeks from 13 September 2018.*** We have not found that Susan Adam's instructed the Claimant to remain in the canteen for approximately 3 weeks. The duration of any restriction placed on the Claimant appears to be a consequence of the time taken to carry out and

review the investigation into his complaint about Mr Smith. It appears to come to an end because the Claimant becomes unwell and is signed off. As the Claimant confirms at paragraph 52 of his statement “I was absent from work with stress and anxiety from the 10 October 2018 and did not return until 2 January 2019. The Claimant’s ability to undertake certain tasks in certain locations at the Respondent’s site was further restricted at this time by him having a lapsed electronic personal reader (EPD). The Claimant notes this at paragraphs 30 and 31 of his witness statement. As the Claimant is noted as saying in his interview with Mr Cuthbert on the 18 September 2018... “explained it was his IRR medical which had run out in August 2018 and a month's grace is given. Now expired so seeing OH.”. The lapsed EPD is due to a lapsed medical which has nothing to do with the Claimant’s union and/or health and safety duties. We do accept though, as with the third alleged detriment, the restriction put in place while his complaint was investigated would have put the Claimant at a disadvantage as he would not be able to perform all the normal work tasks he would perform.

161. Fifth alleged detriment ... PART ONE - ***The Respondent referring to him in writing on 1 October 2018, in its investigation report as a troublemaker, having mental health issues, untrustworthy, work shy, awkward, having a reputation and that no one wished to work with him...*** AND PART TWO - ***Kevin McIntyre, Senior Manager, in the same report suggesting the options were to move him to a smaller team and that if that failed there would be nowhere else to go, implying that his continued employment would be at risk.*** As can be seen from our careful review of the interview notes and investigation report, these references to using those specific words were made about the Claimant, save the words “having a reputation and that no one wished to work with him” do not appear to have been expressly stated. We accept the Claimant would perceive these comments as an “assignation of character”, so putting him at a disadvantage.
162. Sixth alleged detriment... ***Referring him to the Respondent’s Occupational Health department due to concerns raised in the Respondent’s investigation report about his mental health.*** The investigation report states as its fifth management recommendation “Subject to consent from John, the investigation team recommend that he is referred to Occupational Health to better understand the impact that the medical condition may have at work and whether any reasonable adjustments need to be put in place. The referral should also cover his Mental Health wellbeing.”. As we have noted above it is unclear why the Claimant asserts that referring him to the Respondent’s Occupational Health department in this way is putting him at a disadvantage and therefore a detriment. As the Claimant himself acknowledges at paragraph 51 of his witness statement... “Ultimately I agreed to be seen by Occupational

Health, I had suffered mentally as a result of the way I had been treated and shortly afterwards I was signed off by my doctor with stress....". We do not see this as a disadvantage to the Claimant.

163. Although we have only found that the Claimant has proven he has been put at a disadvantage in respect of detriments three, four and five, we have gone on to consider the structure provided by Yewdall to each alleged detriment in relation to section 146 (trade union) and then what we find to be the reason for the alleged detriments.

164. We have then applied the same process with regard to section 44 (H&S) but considering, whether the Claimant was subjected to detriments and then if so does the Respondent prove on a balance of probabilities that the act or acts complained of was/were not done on the ground(s) set out in s. 44 (1) (a) and (b) ERA 1996. We also note the authority of Fecitt in this regard and that the burden rests on the employer to establish that its reason for its act or deliberate omission was not materially influenced by the Claimant's protected status/conduct.

#### **Section 146 (trade union)**

165. Considering the structure offered in Yewdall, and applying our findings to each point:

- a. Have there been acts or deliberate failures to act by an employer? On this, of course, the employee has and retains the onus; - ***We have found that the acts alleged by the Claimant as detriments one and two have not been proven on the balance of probability. For three, four, five and six we have found the acts proven as we have set out above.***
- b. Have those acts or deliberate failures to act caused detriment to the employee? ***We have found that the Claimant has proven detriments in respect of acts three, four and five as we have set out above.***
- c. Are those acts in time? **Yes**
- d. In relation to those acts so proved which are in time, where detriment has been caused, the question of what the purpose is then arises. ... - that there must be establishment by a claimant at this stage of a prima facie case that the acts or deliberate failures to act which are found to be in time were committed with the purpose of preventing or deterring or penalising i.e. the illegitimate purpose prohibited by s146(1)(b)."

166. Considering then the reasons the Respondent did what it did against what the Claimant asserts was the motive:
167. Even if we were to find there was the first alleged detriment, Claimant's Counsel submits it would be in breach of section 146 because ... "Mr Smith's statements in March.... explicitly invited the Claimant to perform less trade union work, fitting squarely within the s.146(b) definition;". We have not found that the Claimant was explicitly invited to perform less trade union work and we have been presented with no evidence of the Claimant performing less trade union work.
168. Even if we were to find there was the second alleged detriment, we do not find, as we are invited to do by Claimant's Counsel in her submissions, that .... "Mr Smith's statements in ... September 2018 explicitly invited the Claimant to perform less trade union work, fitting squarely within the s.146(b) definition.". We have not found that Mr Smith made statements that explicitly invited the Claimant to perform less trade union work. We have been presented with no evidence of the Claimant performing less trade union work. After the alleged comments are made he (as he sets out in paragraphs 22 and 23 of his witness statement) then attends the 2-day HESAC meeting.
169. As to the third detriment Claimant's Counsel submits that we should find in respect of trade union that ... "(b) The restrictions applied to the Claimant's work between 13 September and 9 October 2018 were in fact to penalise him for having raised health and safety issues at the HESAC – a necessary part of his trade union duties. This is supported by Susan Adam's comments to the Claimant on 13 September 2018 [C w/s para 26], and Mr Smith's live evidence that he was upset that the Claimant had raised his health and safety concerns specifically at the HESAC meeting;". We do not find this however. It appears clear to us why what has happened has happened which is because the Claimant raised his complaint about Mr Smith via Mr Puffett. The Claimant describes this in detail at paragraph 22 of his statement. This then needs to be investigated. We also note at paragraph 43 of the Claimant's statement that ... "I had raised the allegation in relation to a specific incident and individual.". Further we have not found that Susan Adams said what the Claimant says she said. Further, we note that it is clear from the contemporaneous records of what is said on the 13 September 2018 that both the Claimant and Mr Smith are faced with restrictions while the investigation is carried out.
170. As to the fourth detriment Claimant's Counsel in her submissions submits that this detriment is because ..... "(b) The restrictions applied to the Claimant's work between 13 September and 9 October 2018 were in fact to penalise him for having raised health and safety issues at the HESAC – a necessary part of his trade union duties." We do not find this however.

It appears clear to us why what has happened has happened which is because the Claimant raised his complaint about Mr Smith, which he describes at paragraph 22 of his statement and as is also noted at paragraph 43 of his statement that ... “I had raised the allegation in relation to a specific incident and individual.”. This then needed to be investigated. It is clear from the contemporaneous records of what is said on the 13 September 2018 that both the Claimant and Mr Smith are faced with restrictions while the investigation is carried out. The Claimant’s lapsed EPD, which has nothing to do with his trade union or health and safety role, also has an impact on what the Claimant can do and where he can go. Also, the reason of the Respondent is further supported as not being a prohibited reason because it appears to be predominantly union and health and safety related work and activities that the Claimant undertakes in the restricted period.

171. As to the fifth detriment we accept the purpose of the report is to investigate the grievance related issues that the Claimant initiated and make findings and then recommendations about how matters should proceed. The Claimant does not criticise the author of the report. Without Mr Cuthbert’s investigation and report, the comments that aggrieve the Claimant would not be recorded. They are comments generated by Mr Cuthbert’s questions. Without the Claimant raising his issues about Mr Smith the report and investigation would not have been commissioned and Mr Cuthbert would not then have asked his questions. Therefore, the comments the investigation generates are not as Claimant’s Counsel submits ... “... made in the context of antipathy towards the Claimant for carrying out his trade union health and safety duties...”

172. As to the sixth alleged detriment Claimant’s Counsel submits in her written submissions (at paragraph 32(d) that it is union activities related because ... “(d) The Respondent wanted to push the narrative that the Claimant was mentally unwell without having appropriately explored the matter with him. The action to refer him to OH on the back of the investigation report fits with the existing matrix of facts demonstrating that the Respondent’s purpose was to prevent, deter or penalise the Claimant from carrying out his trade union duties. The Claimant explains the nature of his deteriorating health in detail to the OH doctor – it is solely because of victimisation from the Respondent [155-156].”. The referral though is not made for these reasons but... “to better understand the impact that the medical condition may have at work and whether any reasonable adjustments need to be put in place. The referral should also cover his Mental Health wellbeing.”. This is in the backdrop of the Claimant’s sickness absence and comments by Mr Puffett, who is not criticised for what he says by the Claimant. We accept, as Respondent’s Counsel submits at paragraph 272 of his submissions ... “... If seeking advice upon a current mental health impairment is a detriment then the motivation is self evidently

the claimant's undisputed anxiety in September, which worsened in October 2018. That is motivation is wholly unrelated to the claimant's protected status/conduct."

**Section 44 (H&S)**

173. Even if we were to find there was the second alleged detriment, we do not find, as we are invited to do by Claimant's Counsel in her submissions, that .... "Mr Smith only told the Claimant to stop his union work because the Claimant raised legitimate concerns about PAT testing and scaffolding;". The discussions about PAT testing and scaffolding happened after the alleged comment not before. So, the comment, even if it were made, was not materially influenced by discussions about PAT testing and scaffolding. We have also noted from Respondent's Counsel's submissions ... "... if the tribunal finds for instance that, on the 8<sup>th</sup> September Mr Smith believed the information from Mr Dave Mellon that the claimant was "winding up his colleagues" rather than actually engaged in any health and safety practice. And if he believed that the claimant had been dishonest to those colleagues (when he said he had taken photographs) and if he believed the claimant had a history of winding up/ point scoring rather than being involved in a health and safety activity, then his genuine belief would not be one which fell within the scope of the act; he would not have acted for reason connected with health and safety; because he did not believe the claimant was engaged in a health and safety activity."

174. As to the third detriment Claimant's Counsel submits that we should find in respect of health and safety that ... "(b) The Claimant was only restricted in his working areas because he alerted others about Mr Smith's statements during the HESAC meeting – a joint Health and Safety Committee [C w/s para 22];". We do not find this however. It appears clear why what has happened has happened which is because the Claimant raised his complaint about Mr Smith via Mr Puffett, which the Claimant describes at paragraph 22 of his statement. This then needs to be investigated. How the Claimant explains this in paragraph 22 is not how the Claimant's Counsel seeks to describe it in her submissions as quoted above. We also note at paragraph 43 of the Claimant's statement that ... "I had raised the allegation in relation to a specific incident and individual.". Further, we note that it is clear from the contemporaneous records of what is said on the 13 September 2018 that both the Claimant and Mr Smith are faced with restrictions while the investigation is carried out. This is not therefore materially influenced by the Claimant alerting others about Mr Smith's statements during the HESAC meeting.

175. As to the fourth detriment Claimant's Counsel in her submissions submits that this detriment is because ..... "(c) The Claimant was restricted to the canteen as a result of the investigation in connection with the health

and safety concerns he had raised;”. We do not find this however. It appears clear why what has happened has happened which is because the Claimant raised his complaint about Mr Smith, which he describes at paragraph 22 of his statement and as is also noted at paragraph 43 of his statement that ... “I had raised the allegation in relation to a specific incident and individual.”. This then needed to be investigated. It is clear from the contemporaneous records of what is said on the 13 September 2018 that both the Claimant and Mr Smith are faced with restrictions while the investigation is carried out. This is therefore not materially influenced as a result of an investigation in connection with the health and safety concerns the Claimant had raised. This was not the purpose of Mr Cuthbert’s investigation or the separation and restriction of the Claimant and Mr Smith. The health and safety concerns the Claimant raised were completely separate as noted in the email at page 137 of the bundle.

176. As to the fifth detriment we accept the purpose of the report is to investigate the grievance related issues that the Claimant initiated about Mr Smith and make findings and then recommendations about how matters should proceed. The Claimant does not criticise the author of the report. Without Mr Cuthbert’s investigation and report, the comments that aggrieve the Claimant would not be recorded. They are comments generated by Mr Cuthbert’s questions. Without the Claimant raising his issues about Mr Smith the report and investigation would not have been commissioned and Mr Cuthbert would not then have asked his questions. Therefore, the comments the investigation generates are not as Claimant’s Counsel submits ... “only made, and recorded, because the Claimant had performed his health and safety duties; ...” We have found that the comments are made in response to Mr Cuthbert’s questions and are recorded because Mr Cuthbert has been commissioned to carry out an investigation and produce a report about the Claimant’s complaint about Mr Smith. The performance of the Claimant’s health and safety duties is therefore not the grounds (or a material influence) on why the comments were made and recorded.

177. As to the sixth alleged detriment Claimant’s Counsel submits in her written submissions at paragraph 26(e) that it is health and safety related because ... “... The Respondent referred the Claimant to OH because of assumptions made about him in that report.”. This really goes back to the issues we are considering in respect of the fifth alleged detriment and we have found that those assumptions were generated by Mr Cuthbert’s investigations, initiated in response to issues the Claimant raises about Mr Smith. The Claimant also had sickness absence of a month prior to the interaction with Mr Smith. Mr Puffett (who the Claimant raises no criticism of) suggested the Claimant “... has an ongoing medical condition which may be a factor in the way he interacts with others”. The reason appears to be a management recommendation to protect the Claimant’s health and not on

the grounds (or materially influenced by) the Claimant having performed his health and safety duties.

178. Our decision reflects that, as confirmed by Claimant's Counsel during submissions, no complaints were being pursued in respect of section 146(1)(a) of the Trade Union and Labour Relations (Consolidation) Act 1992. Further, the first alleged detriment was being pleaded only because of trade union activities and not health and safety activities.

179. The unanimous judgment of the tribunal is that the Claimant's complaints that he has been subject to detriments, due to Health and Safety (sections 44 (1) (a) and (b) of the Employment Rights Act 1996) and/or Union Membership or Activities (section 146 Trade Union and Labour Relations (Consolidation) Act 1992), fail and are dismissed.

180. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 7 as then focused on the question of liability only, and with the concession noted at paragraph 178 above; the findings of fact made in relation to those issues are at paragraphs 22 to 132; a concise identification of the relevant law is at paragraphs 134 to 153; how that law has been applied to those findings in order to decide the issues is at paragraphs 155 to 177.

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Employment Judge Gray  
Dated 14 December 2020