EMPLOYMENT TRIBUNALS

Claimant: Mr G Duke

Respondent: The City of Liverpool College

HELD AT: Liverpool **ON:** 9, 10, 12, 13 January & 22,23,24 & 26 May & 5 July 2017 (in chambers)

BEFORE: Employment Judge Shotter

Members Ms HD Price
Mr WK Partington

REPRESENTATION:

Claimant: In person
Respondent: Mrs Skeaping, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not automatically unfairly dismissed on trade union grounds, his complaint of automatic unfair dismissal is not well-founded and the claim brought under S. 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 is dismissed.

2. The claimant's claim in respect of detriment number one was not lodged before the end of the period of three months, beginning with the date of the act or failure to act 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 in accordance with S.147(1)(a) of the Employment Rights Act 1996 as amended.

It was reasonably practicable to bring the claim within the three-month time limit, it is not just and equitable to extend the time limit to the date of presentation of the claim form and the Tribunal does not have the jurisdiction to consider the complaint which is dismissed.

3. The claimant's claim in respect of detriments two to four were lodged before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates and the Tribunal has the jurisdiction to consider the complaint.

4. The claimant was not subjected to a detriment on trade union grounds; his complaint of detriment brought under S.146 of the Trade Union and Labour Relations (Consolidation) Act 1992 is not well-founded and is dismissed.

5. The claimant's application to strike out the respondent's Response is unsuccessful and dismissed.

REASONS

Preamble

1. By a claim form received 18 December 2015 following the issue of an ACAS ECC on 20 November 2015, the claimant who had been employed less than 2 years, claimed automatic unfair dismissal under S.152 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A ") and detriment under S.146. The respondent denies the claimant's claims, maintaining he was dismissed for gross misconduct, he was not caused a detriment(s) and the dismissal was not due to trade union activities.

2. The claimant relies on four detriments that allegedly took place contrary to s146 on the grounds of his trade union activities, maintaining the respondent attempted to frustrate the claimant's actions as an active trade union member, as follows:

2.1 The claimant alleges that he was "spied on" by Laura Firth, in relation to an incident in June 2015 after his election as branch secretary of the UCU union. After the claimant and Carol Cody held a meeting in the staff room, Ms Firth allegedly reported the claimant's actions to the head of HR, Mr Harrop, and a record was placed on the claimant's HR file. Mr Harrop also told the claimant on or around 18 June 2015 that talking to staff in this manner was in breach of protocol, which the claimant disputes (this will be referred to as "Detriment 1: Impromptu union meetings");

2.2 The claimant alleges that he was denied access to email and IT systems during the summer break in 2015, and was not informed in advance that this would be done. He discovered this on attempting to use IT systems for his trade union duties and was only told that access had been suspended when

he queried this subsequently (this will be referred to as "Detriment 2: Partial suspension");

2.3 The claimant alleges he was initially told by Cath Marshall at the end of July or the start of August 2015 that he would be returning to work without access to email or IT. When the UCU union queried this action with HR on the claimant's behalf, the claimant alleges that he was then formally suspended from work (this will be referred to as "Detriment 3: full suspension"); and

2.4 The claimant alleges that Mr Harrop subjected him to a detriment on two occasions by deliberately disclosing confidential information about him to members of staff during the claimant's disciplinary process (this will be referred to "Detriment 4: confidentiality.").

3. The agreed issues before the Tribunal are straightforward even though the facts were not:

Detriment

3.1 Was the claimant subject to a detriment by an act, or deliberate failure to act on the part of the respondent?

3.2 Was the claimant prevented or deterred in taking part in the activities of an independent trade union at an appropriate time, or penalised for so doing? If so,

3.3 Was the respondent's sole or main purpose (the burden of showing this is on the respondent) in subjecting the claimant to a detriment was to prevent, deter or penalise him for seeking to become a union member, taking part in union activities or making use of union services?

Automatic unfair dismissal

3.4 Whether the reason for the claimant's dismissal was due to his trade union activities or not, the burden of proof being on the claimant to establish this.

Evidence

4. The Tribunal heard oral evidence on behalf of the claimant and from Carol Cody, lecturer and UCU liaison secretary. On behalf of the respondent the Tribunal heard from Viv Lacey, governor, Elaine Bowker, principal and chief executive, Bill Harrop, HR director, Simon Pierce, vice principal, curriculum, and Angela Cox, who was no longer employed by the respondent. She had been the deputy principal, quality and transformation.

5. There were many conflicts in the evidence. The claimant persisted despite Elaine Bowker's oral evidence, in his assertion that the actions of a group of employees known as the "Lex 57" were trivial; the Tribunal did not agree. The

Tribunal had clear evidence, including contemporaneous documentation, to the contrary, which it preferred in contrast to the claimant's oral evidence.

6. In the earlier Preliminary hearing held on 6 April 2016 the claimant was made aware the burden was on him to prove prima facie facts of trade union victimisation. The Tribunal took the view the claimant lacked credibility; he did not give cogent evidence at times and failed to deal with factual evidence that undermined his case, which he either distorted or ignored. For example, twisting the oral evidence given by the respondent's witnesses in cross-examination beyond recognition. He continued to maintain that Angela Cox had been party to the production of the email sent 9 December 2015 when the evidence of Ms Cox, Bill Harrup and Elaine Bowker was the union campaign and inaccuracies within the campaign and their damaging effect on the respondent was discussed at the senior leadership team meeting. This culminated in an agreement that Bill Harrup and Elaine Bowker go away and consider the matter, which they did taking independent legal advice. It is not the case Angela Cox made the admission as alleged by the claimant.

7. The Tribunal found the Claimant dishonest with regards to the effective date of termination ("the EDT") of his employment at Salford University, and the reason for termination of employment for the reasons set out below. The claimant was invited to make submissions on the effect of the earlier Tribunal judgment in case number 2410422/2009 that gave the EDT 6 August 2009; the claimant responded in closing submissions there was "some ambiguity" in the decision alleging the Tribunal gave the contract position no weight. The Tribunal has considered the promulgated Tribunal decision case number 2410422/2009 in detail. The finding of facts relates how the claimant was suspended by a letter received 19 May 2009 and it appears the claimant remained suspended on termination of his contract without notice on 4 August 2009 - paragraph 12.22. At paragraph 12.84.3 there is a reference to the claimant complaining his post had been advertised prior to the disciplinary hearing and at paragraph 12.50 he alleged the day before the disciplinary hearing on 12 August 2009 HR had decided to dismiss him. The Judgment in case number 2410422/2009 records the witness appearing on behalf of HR disputing the claimant's allegation that his continued employment was an option. The ET1 form together with Grounds of Complaint was received on 5 October 2009. What is clear to this Tribunal is that the claimant did not regard his employment ended on 31 May 2009. The fixed-term contract or its expiry was never brought up in case number 2410422/2009, it was not an issue raised by the claimant because he remained in employment until the effective date of termination when he was summarily dismissed on the grounds of misconduct.

8. The claimant sought to undermine the respondent's witnesses alleging they were colluding. The Tribunal did not agree and it reached a view after a careful assessment there was no evidence whatsoever from which the Tribunal could conclude or infer the respondent's managers had colluded with a view to causing a detriment to the claimant on the grounds of his trade

union membership or activities as alleged or colluded to ensure his dismissal. It was not credible a "golden thread" ran through a campaign of bullying and harassment against the claimant from Katy Spall and Simon Pierce, through to the principal Elaine Bowker, Viv Lacey, Laura Firth and Bill Harrop as alleged; there was no evidence to this effect.

9. The claimant maintains Elaine Bowker has been "caught out in a lie" concerning her membership of the Socialist Workers Party (the "SWP") and this taints her evidence. The Tribunal was of the view Elaine Bowker's membership or otherwise of the SWP was irrelevant to the issues to be decided in this case, apart from her credibility. It agreed with the claimant it is puzzling a note taken by Viv Lacey to this effect could be so wrong. It may be that Macclesfield could be confused with Manchester, but it is difficult to see how a reference to the SWP can similarly be confused. Elaine Bowker denied she was a member; the claimant produced a letter marked "C2" during these proceedings confirming she was not and never had been a member of the SWP. The claimant did not challenge Elaine Bowker's other credentials including her support of the Trade Union movement. The Tribunal accepts there is an anomaly in this evidence; however, Elaine Bowker's oral evidence was convincing; she was in higher management roles, not allowed to be a member of a political party, and may have indicated to Viv Lacey's socialist values which may have been misconstrued. The Tribunal accepted Elaine Bowker had not seen Viv Lacey's notes until this hearing and whist the anomaly is unresolved, it is not a matter which undermines her overall credibility and the cogency of her evidence given the supporting documents plus other witnesses.

10. Regarding Carol Cody, the Tribunal found she attempted to give honest evidence to the best of her ability in the main. On occasion her responses were influenced by the information the claimant had provided previously. Her evidence did not necessarily reflect what had taken place, for example in relation to the Lex 57, an incident she and the claimant played down to such an extent it became a mere clapping of hands by delegates when the reality was much more serous. In this regard the Tribunal preferred the eye witness account of Elaine Bowker. Carol Cody did her very best to support the claimant in difficult circumstances believing him when he stated he had not lied on his application form. She was aware of the earlier ET proceedings in case number 2410422/2009 but the import of these was not understood. Carol Cody was an experienced representative but such matters went well beyond her experience and abilities.

11. Bill Harrop's evidence was found to be wholly credible, in particularly, his description of the day-to-day practices and relationships between the respondent and trade unions. The Tribunal accepted his evidence that a discussion had taken place with Nina Duran (an experienced UCU trade union representative) concerning the impromptu union meeting, and he genuinely believed she had then discussed the matter with Carol Cody and the claimant. The claimant denies this, Carol Cody confirms that she was spoken too, and it

is the Tribunal's view that given the close working relationship between Carol Cody and the claimant it is highly unlikely the matter would not have been discussed as maintained by the claimant. The Tribunal preferred the evidence of Carol Cody that she had "probably" spoken to the claimant about it after Nina Duran had spoken to her, in contrast to the claimant's evidence, Carol Cody and the claimant contradicting each other. This is relevant on time limits, as the claimant's position is that he only became aware when he submitted a request for information in November 2015 the Tribunal preferring Carol Cody's evidence that she had "probably" spoken to the claimant in June 2015, and Bill Harrop's understanding that the claimant had been spoken to.

12. The Tribunal accepted Bill Harrop had received an email from Laura Firth regarding two unnamed employees who had reported to her their unhappiness with an impromptu union meeting held in the staff room. Nina Doran agreed to discuss the matter with the claimant and Carol Cody; she raised no issue of any perceived union detriment when asked to discuss the "appropriateness" of their actions.

13. The Tribunal found the evidence given on behalf of the respondent to be largely credible. Kath Marshall was not called to give evidence. She addressed in her witness statement the HR role and whether she overstepped this role. Kath Marshall's description of the HR role was supported by the contemporaneous documents and the Tribunal's judicial knowledge of HR. Her role was as one would expect of a HR officer. Kath Marshall's explanation for the suspension is borne out by the contemporaneous documentation and Bill Harrop's evidence the claimant was not placed on full suspension for economic reasons. The Tribunal found this evidence to be credible and has given the witness statement of Kath Marshall due weight.

<u>The claimant's preliminary application to strike out the Response.</u>

14. Prior to the liability hearing the Tribunal considered the claimant's application to strike out the respondent's Response at a preliminary hearing, following which oral reasons were given.

15. The claimant alleged the respondent's witnesses had been engaged in intimidatory conduct against Carol Cody. In short, he alleged Carol Cody was not given time off work to undertake union duties, namely attend this liability hearing. She had been informed she could take one day fully paid by Kath Marshall, and given this limit it was alleged she would suffer a financial detriment in contrast to the respondent's witnesses who were being paid for all the time they spent at the hearing.

16. It was submitted the respondent's decision to limit Carol Cody's pay to one day was an attempt to "coerce her" into not attending. This was a barrier to justice given the number of days for the liability hearing was outside Carol Cody's control. The claimant also alleged the requirement for Carol Cody to

carry out her teaching or find cover, apart from the one day, was an implied threat aimed at limiting her involvement in these proceedings.

17. The claimant indicated as he remained a member of the UCU, Carol Cody was acting in her capacity as his representative and the respondent's suggestion that she was attending the liability hearing in the capacity of supporting a former colleague was incorrect. The claimant argued Carol Cody's attendance throughout the hearing should be paid as facilities time, and the respondent's failure was an act of coercion and in breach of the ACAS Code. Finally, the claimant indicated Carol Cody had been intimidated by the communications concerning the emails received from the respondent dealing with her request for clarification regarding whether her attendance at this Tribunal hearing would be treated as facility time and for which she would be fully paid.

18. It is not disputed the respondent agreed to pay Carol Cody for one day's attendance, and it did not accept the argument that she should be covered by facilities time for the entire 4-day hearing. The Tribunal heard evidence from Carol Cody under oath, who indicated she was appearing as a witness on behalf of the claimant and concerned that the respondent had anticipated her attendance to be on the Tuesday in order that she could give evidence, which she found confusing and intimidating, especially the email of 7 January 2016 sent at 8.04. Carol Cody confirmed following a question put to her by the Judge, if she were to be fully paid by the respondent for the entire period she attended the hearing, and it was "accepted" that this formed part of her union duties and she was not "abandoning teaching duties wily nil" she would be able to give evidence fully and unconstrained. It is notable that after Carol Cody had answered the Tribunal's question in the affirmative, the claimant attempted to lead in re-examination Carol Cody into giving evidence to the effect that the respondent's attitude towards her amounted to a "propensity, a pattern of behaviour…. intimidation" impacting on his ability to have a fair trial. There was no satisfactory evidence before the Tribunal to this effect and the issue for Carol Cody was the unfettered ability for her to attend the hearing without a loss of pay.

19. It was clear from the cross-examination of Carol Cody she had not researched whether her attendance at a trial for more than the one day between the 9th to 13th January 2016 in which she was to give evidence, would be covered by the facilities agreement entered between the respondent and union, and this was not a matter on which the Tribunal could come to a judgment; it was open to Carol Cody to issue her own proceedings if she believed she had been caused a detriment by the respondent's actions.

20. On behalf of the claimant the Tribunal was referred to the EAT decision in Force One Utilities Limited v Hatfield UKEAT/0048/08 [2008] ALL ER (D) 130 and Nicholls v Corin Tech Ltd UKEAT/0290/07, a case concerned with judicial proceedings immunity. The Tribunal took the view that the facts in both of those cases are very different to those relating to Carol Cody, where it was

legitimate for the respondent to take the view that she would be paid for a one day's attendance to give evidence, and should ensure her teaching duties are covered.

21. In Force One Utilities Limited during an adjournment in the Tribunal hearing the Claimant, Mr Hatfield, left the building to return to his car and was approached by Mr Shuter, one of the employer's witnesses. Mr Shuter was an Executive Director of a company associated with Force One. Mr Shuter allegedly told Mr Hatfield "Watch how you sleep at night" and when he moved closer to the Claimant said, "You've got one over on me today, you won't get one over on me again. You're getting no f***king money out of me." Some minutes later Mr Shuter drove alongside the Claimant, blocking him in the car park. Mr Hatfield reported that Mr Shuter wound down his electric window and said, "Me and you – 10 minutes up the road now."

22. In Nicholls, the claimant had been pursuing a disability discrimination claim against CT Ltd, whose defence was being conducted by B, a director and ultimate owner of the company. It was alleged that just after he left the Tribunal hearing room, B had subjected him to abuse and threatened him with violence if he continued with his claims.

23. The Employment Tribunals Rules of Procedure permit the striking out of a claim or response because the way the proceedings have been conducted has been scandalous, unreasonable or vexatious. Case law shows that where intimidatory conduct has taken place, the Tribunal must consider whether the conduct: (1) relates to the manner of proceedings; (2) makes it impossible to hold a fair hearing or (3) whether there was any option short of barring the wrongdoing party from taking further part in the proceedings which would be proportionate?

24. The Tribunal accepted submissions made on behalf of the respondent that it was not proportionate to strike out; even on Carol Cody's oral evidence she was clear that evidence could be given fully and unconstrained. The Tribunal was not satisfied, on the balance of probabilities, that intimidatory conduct had taken place. There was no satisfactory evidence before it that the facilities agreement covered Carol Cody's attendance at this Tribunal hearing. It is notable the claimant was representing himself and Ms Cody had no legal experience of the Employment Tribunal and she was not representing him in her capacity as a union official. It appeared to the Tribunal she was, as previously concluded by the respondent, supporting a fellow ex-colleague and giving evidence as to what transpired when she acted for him as his union representative. The Tribunal is satisfied Carol Cody can give unfettered evidence freely and without fear of sanction despite the claimant's best endeavours to persuade it and Carol Cody otherwise. To have struck out the respondent's Response at this juncture would have given rise to a serious injustice in a case where the stakes are high for both parties.

25. The claimant's application to strike out the respondent's Response is unsuccessful and dismissed.

The liability hearing

26. The Tribunal was referred to an agreed bundle of documents together with additional documents referred to above, oral submissions and written submissions presented by the parties which the Tribunal does not intend to repeat, but has attempted to incorporate the points made within the body of this Judgment with Reasons, we have made the following findings of the relevant facts.

Facts

27. The respondent is in business of higher education providing education and training to 10,000 learners aged 14-year-old upwards through to adults employing approximately 800 staff throughout the college's six sites.

28. During the relevant period, Elaine Bowker was the principal and chief executive and she reported to the Board of Governors of which Viv Lacey was a member and vice-chair. Simon Pierce was and remains vice principal of curriculum and he reported to Elaine Bowker and was a member of the respondent's executive team along with deputy principal quality and transformation, Angela Cox. He was one of Elaine Bowker's direct reports. Bill Harrop was and remains director of HR who indirectly reports to Elaine Bowker and he line manages Kath Marshall, senior HR business partner.

29. The respondent recognises two unions, the UCU and UNISON. The principal union for this case is UCU, a national trade union with regional structure and local officers in the respondent's business. There were approximately 20-30 union representatives at local level across 6 sites, including the site on which the claimant was employed known as "City 6." It is not disputed UCU union representatives were very active, vocal and robust. Bill Harrop's dealings were in the main at regional and/or national level. The Tribunal heard evidence that Bill Harrop liaised with Nina Doran, a NEC and chair, whom Carol Cody, in her capacity as branch secretary, described as very experienced and very active.

30. Carol Cody herself was an experienced union representative, she had been chair and secretary at branch level, an equality representative, treasurer, liaison secretary, women's equality officer and on the women's standing committee. Elaine Bowker was chair of the joint negotiating committee and had dealings with both unions in this regard. She was not a member of the SWP.

31. At all material times the respondent was involved in a reorganisation and this entailed numerous communications and meetings with various levels of the UCU and UNISON. It had formally been awarded grade 1 in 2008/2009, the highest grade. Thereafter, performance in some areas had been dropping and the OFSTED inspection in 2014 gave the respondent the lowest award of 4,

with only one area performing well; hospitality and catering. Elaine Bowker's responsibility was to turn the respondent's performance around. Cuts in the educational budget had severely affected the respondent, and this resulted in a period of "transformation," which is a reference to a reorganisation cutting uneconomic courses, reducing staff numbers and improving staff performance. The claimant cross-examined Elaine Bowker on the basis that financial irregularities had taken place and he accused her of mismanagement. The claimant in his evidence referred to Elaine Bowker and senior management giving themselves pay rises, and in cross-examination, accused them of wasting money on legal fees. The claimant produced no evidence to support these allegations and the evidence before the Tribunal pointed to these very serious allegations having no foundation. Had the claimant believed genuine financial irregularities existed, this matter that could have been taken up him or by the UCU in another jurisdiction and not this Tribunal.

32. Bill Harrop had a reasonably good relationship with the higher echelons of the union; an understanding was reached for the good of the respondent and the members on several matters, not least; how the local level union representatives conducted their day-to-day business. It was difficult time in employee relations, primarily at local level, given the changes the respondent wished to introduce, but overall Bill Harrop's relationship with regional and national UCU was positive, the priority being to work together.

<u>The claimant's employment by the University of Salford.</u>

33. The claimant was employed by University of Salford and issued with appointment letters dated 23 October 2008 and 9 March 2009 with an end date of 31 May 2009 at the latest. On the face of it the contracts which were attached to the confirmation of employment letters were for a fixed term. However, the claimant issued Employment Tribunal proceedings on 5 October 2009 under case number 2410422/2009 in respect of his dismissal on 6 August 2009. Had the claimant's last day of service been 31 May 2009 as now alleged by the claimant, his application would have been substantially out of time. There is no evidence before this Tribunal time limits or the effective date of termination were ever in issue and on the face of it the claimant's employment with Salford University extended beyond the 31 May 2009.

34. Judgment & Reasons were promulgated 16 November 2011, following a 6-day hearing. The Judgment makes it very clear the claimant was an employee up until his summary dismissal on the grounds of gross misconduct. The Tribunal finds the claimant could not have been under any illusion about the date and reasons of his termination; he would have known beyond doubt that his employment had not been brought to an end as a result of an expiry of a fixed term contract.

The claimant's completed applications to the respondent.

35. In applications for a 0.5 lecturer in sociology fixed term until June 2014 and government and politics, the following was set out; "Please answer truthfully. If any information is found to be false at any point in the future, it could result in disciplinary action." Under "work history" the claimant confirmed he had worked for the University of Salford 2007-2 and 2008-8, 2009-2 to 2009-8. Under "reasons for leaving" the claimant explained; "part time position with annually renewable contract wasn't renewed by employer." A reference was not sought by University of Salford at the time by the respondent; the two referees given by the claimant were not from the University of Salford. As a result of this case the respondent has changed its policy to seek references from all past employers, and the Tribunal does not accept the claimant's submission that the respondent was at fault because it failed to take up references in his case.

36. The claimant's job application was successful and a fixed term contract was issued on 10 April 2014, his employment commencing 11 March 2014 with continuous employment from 6 January 2014. The first 6 months of employment was a probationary period, as a 0.5 main grade lecturer – sociology. Clause 19.3 in the contract provided the following; "academic staff have freedom within the law to question and test received wisdom concerning academic matters, and to put forward new ideas, and controversial or unpopular opinions about academic matters without placing themselves in jeopardy or losing the jobs…" Clause 22 referred to the claimant's contractual entitlement to invoke the respondent's grievance procedure and in clause 23 the Disciplinary and Dismissal Policy was referred to. Clause 25 confirmed the claimant had a right to belong to a trade union and the UCU was recognised for academic staff. The claimant signed the contract on 6 May 2014.

Disciplinary and Dismissal Policy ("DDP")

37. The applicable DDP at paragraph 2.3 set out the following; "In appropriate circumstances the college reserves the right to suspend…an employee whilst carrying out an investigation, in which case the employee will receive full pay."

38. Appendix 2 at paragraph 5.1 provided; "where an employee is accused of gross misconduct, the continued attendance of the employee cannot be permitted; the college may choose to suspend the employee from duty…during an investigation and pending a disciplinary hearing."

39. At paragraph 5.4 provides "access to IT systems will also be revoked. However, in exceptional circumstances the college may allow permitted supervised access to its IT systems and documents. Any such request must be in writing…"

Grievance Policy & Procedure ("GPD")

40. The GPD under the heading 'General' it provided "If the employee wishes to lodge a grievance after their employment has ended, they can do so within a 3-month period. The college and the employee may either go through the hearing and appeals part of the procedure, or the parties can agree to deal with matters based on a written grievance and response (without a hearing). The parties will discuss which option is easiest at the time."

Bullying & Harassment Policy and Procedure for Staff dated January 2013

41. At paragraph 4.3 "intrusion by pestering, spying or staking" could amount to harassment and bullying.

Unlawful industrial action ("Lex 57")

42. On the 20 June 2014, the claimant, who was a member of the UCU, together with several other people, was involved in an industrial action regarded by the respondent as unlawful. The evidence of the claimant and Carol Cody was that after a meeting carried out with the respondent's consent, they clapped UCU representatives as they were entering a meeting with managers concerning proposed changes. Elaine Bowker was a hand eye witness and she described of the disruption and health and safety risks caused by so many people blocking the stairwell and corridor was credible It is not disputed employees were given 30 minutes either side of their lunch break to attend a meeting off the respondent's premises. Employees, non-employees, local UCU representatives and UCU members, in the words of Carol Cody, were "milling around" the 'Learning Exchange' where the consultative meeting was taking place. Elaine Bowker described how a lot of noise was made, security barriers were deactivated due to the number of people and young students at the free school disrupted as were student's taking examinations. This went on after 2pm when employees should have been back at work in accordance with the agreement reached.

43. CCTV evidence was used, following which 57 individuals were written to including the claimant, known as the LEX 57, on the 15 July 2014. Carol Cody was not sent a similar letter. The 15 July 2014 letter referred to the incident for which there was "no legal mandate" and to employees taking part "in industrial action is extremely serious and potentially gross misconduct." Bill Harrop, who wrote the letter, concluded he was currently in dialogue with the unions. The claimant did not respond.

44. Bill Harrop's letter dated 25 June 2014 to the UCU set out the incident in detail alleging the unlawful industrial action caused a breach of health and safety, a security risk and confusion for staff and students. Positive discussions took place with the unions and in a letter dated 10 September 2014 to the Lex 57 individuals, including the claimant, Bill Harrop confirmed "I am now optimistic that industrial relations will improve within the college and

in the light of this the College will be taking no further action against you." The claimant did not respond, and the 10 September 2014 letter marked the end of that issue.

45. The claimant alleges this was the first step in the victimisation process, although he does not claim the Lex 57 incident amounted to a specific detriment. The claimant's argument that his "card was marked" by management and this resulted in a trail of events that led to his dismissal is not borne out by the evidence. The Tribunal did not accept the claimant's evidence, which was uncorroborated by Ms Cody, although both under-played what transpired on 20 June 2014, and preferred the more credible evidence of Elaine Bowker, who was present in the building and witnessed a "loud roar," clapping, stamping and chanting just before 2pm of the people (including union representatives) who congregated in corridors, blocking stairwells and doors. It was not unreasonable for the respondent to conclude the activity, which had taken place in working hours, was not legitimate or lawful union activity. The respondent's actions dealing with the unlawful union activity were reasonable, and the claimant was treated the same as the other 57 employees against whom no disciplinary actions was taken. The claimant did not respond to the 15 July 2014 letter. He did not challenge the evidence before the tribunal to the effect that executors and governors were unaware of who the Lex 57 were, and had no knowledge of the names of individuals sent the letter, including the claimant. It is difficult to see how the claimant's "card was marked" as alleged, and the Tribunal accept submissions made by Ms Skeating that had the respondent intended to act against the claimant as a result of the part he played in the Lex 57, an option would have been to dismiss before his probationary period was confirmed.

Facebook incident

46. In late 2014 negative press was published about one of the respondent's courses. Laura Firth complained to Katy Spall that the claimant had shared this article together with a video on his Facebook page. Unlike that of Carol Cody, the claimant's Facebook page was open to all members of the public. The claimant's comment was "This short film is well made – good overall production techniques." The "Film" in question concerned the respondent and "furious students…fear they are wasting thousands of pounds on a course which is in 'chaos.'"

47. The matter was investigated by Damien Kilkenny under the DDP and he concluded "there is a reasonable belief GD [the claimant] was being sarcastic by the comment made on Facebook and such action does have the ability to affect the reputation of the College…a sarcastic comment which seems to suggest that GD agrees with the content…sharing the article in an open Facebook page and give the impression to the public that staff of the college agree that the college is in chaos." The claimant was referred extensively to the respondent's Social Media and Policy guidelines under which he faced disciplinary proceedings.

48. On the 3 March 2015, the claimant initiated a grievance against Kate Spall and Laura Firth attaching a lengthy supporting statement.

49. The claimant's disciplinary hearing took place on 17 March 2015 before Sandra Oddy. The claimant was accompanied by Mathew Kay, a union representative, and not Carol Cody.

Disciplinary outcome 26 March 2015

50. Sandra Oddy wrote to the claimant on 26 March 2015 issuing him with a final written warning for adversely affecting the respondent's reputation when he shared an article/video on his open personal Facebook account. The warning was to remain active on the claimant's file for 12 months.

51. On 31 March 2016, the claimant appealed to Bill Harrop in a lengthy 7-page letter setting out his grounds including arguments on freedom of speech repeated during this liability hearing.

52. The claimant was involved in grievance hearings against Katy Spall and Laura Firth in relation to the complaint that lead to the disciplinary action. Justine Smith considered the grievances and on the 24 April 2015 issued a grievance outcome letter. He rejected the claimant's grounds for his grievance that he had been "the subject of disciplinary proceedings as a result of your sharing and commenting on an article taken from the Liverpool Echo and posted on your Facebook page as such your contractual rights to academic freedom have been infringed, that Katie Spall has misused her power and that both statute law and college legal obligations have been breached." The claimant did not refer to any link with the disciplinary outcome to his union activities or membership.

53. The fact the grievances were not upheld and his appeal against the final written warning to Bill Harrop was unsuccessful had no causal link whatsoever to any union activity and so the Tribunal finds.

54. At some date in early May 2015 the claimant was elected branch secretary of the City Branch of UPU encompassing Learning Exchange and Clarence Street sites. There was a dispute as to when the respondent became aware of the claimant's election. The Tribunal took the view that the date of Bill Harrop's formal knowledge was irrelevant. He was made aware of the claimant's election informally by Nina Duran during this period and Kath Marshall was made aware by an email from Carol Cody sent 18 May 2015.

55. The claimant submitted a second grievance to Bill Harrop on 15 May 2015 concerning Kate Spall in relation to the Facebook incident, which Bill Harrop refused to re-hear. Bill Harrop took the view that the tagging into the Liverpool Echo article by an ex-student who made positive comments in Kate Spalls Facebook was not relevant to the claimant's case, which was different. The

Tribunal found Bill Harrop was entitled to take this view given the clear differences between the two events, and it found on the balance of probabilities, there was no causal connection with the claimant's union activities or union membership.

56. On the 11 June 2015, the claimant raised a grievance concerning Bill Harrop alleging bullying, harassment and victimisation. There was no reference to these allegations being union related; had the claimant believed this to be the case he would have set out the allegations in detail, as was his practice. The Tribunal infers from the claimant's omission that he did not believe the alleged bullying and harassment by Bill Harrop, Laura Firth and Kate Spall, was union related at the time.

57. In an email sent 17 June 2015 the claimant raised a further grievance with Simon Pierce, against Kate Spall, to which Simon Pierce responded to Bill Harrop and Kath Marshal "I will acknowledge but I do think we must take a view at some point about these complaints being vexatious?"

Detriment 1: Impromptu union meetings

58. Bill Harrop responded to the claimant's fourth grievance in a letter dated 19 June 2015 that set out the history of the matter and making the point that "no further investigation on this topic will take place…it is not appropriate use of College resource to respond to communications from staff on matters that have already been dealt with and where procedures have been exhausted…we have concerns that your conduct towards Katie Spall in particular is verging on vexatious; this is not acceptable...Additionally it is worth noting that I had a discussion with Nina Doran, UCU liaison committee secretary, last week to tell her about the complaints received from staff about you holding impromptu UCU meetings in a staff room in Clarence Street. Nina agreed to tell you that this could not be repeated as it falls outside the protocol for conducting union business." A note was put on the claimant's and Carol Cody's personnel files in the event of a repeat in the future, which has been made much of by the claimant at the liability hearing.

59. There was extensive correspondence before the Tribunal concerning the claimant's appeals and numerous grievances. His complaints were essentially concerning the final written warning; Kay Spall not being disciplined when he was and the fact he was not allowed to raise a further grievance against Katy Spall. Given the voluminous correspondence and repetition within the claimant's complaints and grievances the respondent's decision not to give the claimant an opportunity to have yet a further grievance hearing in relation to Kay Spall, and not discipline her was unconnected to his union activities. The respondent drew a clear distinction between the claimant's deliberate posting on Facebook and Katy Spall being tagged, the tagging comments were critical of the article unlike the claimant's comment which was not. The Tribunal took the view on the balance of probabilities there was no

satisfactory course of conduct as alleged by the claimant, and no evidence of a "golden thread" through to Kate Spall.

Disciplinary allegations that led to the claimant's dismissal

Detriment 2: Partial suspension

60. Kath Marshall wrote to the claimant on 5 August 2015 inviting him to attend an investigation meeting with Damien Kilkenny concerning a "potentially serious issue…when you applied for the position of main grade lecturer in Government and Politics on 16 December 2013 and for a fixed term 0.5 post in Sociology on 6 March 2015 you stated in your application forms that you had been employed by the University of Salford…you stated that your employment ended when your 'renewable contract' was not renewed….we have recently been made aware…you were in fact dismissed for gross misconduct and specifically we understand for waging a vendetta against University colleagues. If our understanding is correct, then the statement you provided in your application forms…is at best misleading and at worst dishonest…We have considered whether to suspend you from your duties pending our inquiries in to the allegations. At the current time our students are on leave from college and as such we do not consider it necessary to suspend you from your teaching duties although his is something we will keep under review. However, whilst the investigation is ongoing we have disabled your access from the college's system as an alternative to suspension."

61. Carol Cody responded in an undated letter alleging the alternative to suspension was "ultra vires" and a "violation of both Dr Duke's rights and a violating of the rights of all UCU members…your decision to deny IT access has a direct and potentially negative effect on members within the branch…and in direct contravention of the law, specifically Trade Union and Labour Relations (Consolidation) Act 1992 section 146."

62. The claimant sought activation of his IT account on several occasions. In an email sent 10 August 2015 to Carol Cody Kath Marshall, who envisaged the claimant's return to work wrote; "…as the allegation being investigated a potential act of gross misconduct it is appropriate for us to take the decision to restrict access as an alternative to suspension, we will however review this decision after the investigation meeting [which was due to take place on 19 August]…I would expect the impact on Gary's role as a union official and his ability to contact and support members is limited as yourself and other colleague union officials continue to have full access to systems and the ability to forward communications as necessary…when Gary return to work on 17 August details of his actual duties will be clarified for him by Kate Spall."

63. The claimant responded in a letter dated 10 August 2015 seeking clarification as to where in the respondent's Disciplinary Policy it had the right to impose "such a sanction as an alternative to suspension" maintaining it impacted on

his ability to fully represent UCU members and facilities to do so must be provided under statute.

Detriment 3: Full suspension

64. As a result of the claimant's letter and with the prospect of the claimant returning to the workplace after his holidays, Bill Harrop took the decision the claimant should be suspended, there having been an economic advantage to the claimant being partially suspended whilst on holiday. In a letter dated 11 August 2015 he set out the following; "After further consideration and in the light of your pending return to work following the summer break on 17 August 2015 a decision has been taken to suspend you from duty from that date. Your suspension is not a disciplinary sanction… you are specifically instructed not to access any of the college computer systems and access to your email account and other college systems has been suspended."

65. Party-to-party correspondence followed concerning whether the suspension fell outside the band of reasonable responses, the claimant maintaining that it did. The claimant was provided with a copy of the letter obtained from Salford University attached to a letter dated 14 August 2015 from Bill Harrop in which he sought to justify the suspension; "I consider that a possible outcome of the investigatory meeting may be that your actions are seen as being dishonest, causing a breach of trust and confidence."

66. The Tribunal has noted the contents of various emails and correspondence exchanged during this period, including the email from Bill Harrop to Spencer Brew sent 15 August 2015 and the reference to "Happy Days Spencer :-)." The Tribunal accepted Bill Harrop's explanation that the comment was not linked to the claimant but the fact Spencer Brew was just about to go away on holiday. If the Tribunal is wrong on this, it matters not if Bill Harrop was happy at the prospect of the claimant's disciplinary investigation. He was not the investigating officer or decision maker in connection with the disciplinary and appeal.

67. By 15 September 2015 the claimant was informed Damien Kilkenny had completed the investigation and concluded there was a disciplinary case for the claimant to answer. The claimant was invited to a disciplinary hearing before Simon Pierce, in accordance with the ACAS Code of Practice. At no stage did the claimant raise any issue with Simon Pierce hearing the disciplinary case, and there was nothing to put Simon Pierce on notice that it was inappropriate for him to hear it.

68. Several documents were before Simon Pearce including a letter from the University of Salford dated 31 July 2015 confirming the claimant had been dismissed (it did not say what for) and the Employment Tribunal's reserved judgment in case number 2410442/2009 promulgated 16 November 2011. The Reasons recorded a claim form was received 5 October 2009 the claimant brought a claim of unfair dismissal following his dismissal by the

respondent on 6 August 2009, setting out why he had lost his claim for unfair dismissal. Under the paragraph titled "claimant's submissions" it was recorded "the claimant submitted that he had been unfairly dismissed because of procedural irregularities and because the respondent had never proved that anyone had been bullied or harassed or proved that the university had been brought into disrepute by his actions." Nowhere in the judgment and reasons totalling 32 pages is there a reference to the claimant's employment being terminated by the expiry of a fixed term contract.

69. The Tribunal in case number 2410442/2009 found as a matter of fact, having heard evidence form several witnesses, including the claimant, the claimant was suspended on 19 May, investigated, took part in a disciplinary hearing on 4 August and he unsuccessfully appealed the decision to dismiss. At paragraph 39 onwards the Tribunal found the claimant's dismissal fell within the band of reasonable responses and he was unsuccessful in his claim for unfair dismissal which was dismissed.

70. In a letter dated 2 November 2015 the claimant raised a grievance against Laura Firth for "spying on me in the course of undertaking my legitimate trade union activities in the staff room within Clarence Street…on or around June 10 2015. I consider Laura Firth's actions and the outcome of those actions- note on my permanent record – as bullying and harassment in the course of undertaking legitimate and lawful trade union duties."

71. Over a period of some 4-months leading to the disciplinary hearing a "campaign" in the claimant's defence took place, which included distribution of leaflets and posters, weekly protests, a petition, Facebook entries alleging the allegations had been fabricated and the claimant victimised, a crowd funding campaign and the claimant's case was raised at TU conference, with MP's and local councillors. A considerable amount of information concerning the claimant's disciplinary was in the public domain as a result of actions taken by the UCU, Carol Cody and others. There was also the threat of strike action. During this period the respondent did not exercise their right to reply and kept confidentiality despite Bill Harrop's frustration with what he believed to be the circulation of false information.

72. The disciplinary hearing took place on 5 November 2015. the claimant was represented by Roger Grigg, regional UCU representative and non-verbatim notes were taken, which have been considered in full by the Tribunal. The outcome letter dated 25 November 2015 ran to 5-pages. Simon Pierce related how he had carried out his own "direct investigations" and spoken with Viv Lacey concluding she was an "honest and trustworthy witness" who provided a "truthful account of how she had heard of you …" He found there to have been no collusion between management, and that the claimant had not suffered a detriment or been victimised because of trade union activities.

73. Regarding the dismissal, Simon Pierce found the claimant's actions "in withholding the information regarding your dismissal and misleading the

College with regard to how your contract with Salford University came to an end was sufficient to warrant disciplinary action. He took the claimant's mitigation into account, pointing out the respondent "relies heavily on the personal integrity and honesty of all its employees and puts trust in every applicant to be entirely host and trustworthy when providing details of previous employment and reasons for leaving." Simon Pierce held a genuine belief based on a reasonable investigation, [that included consideration of the documents referred to earlier], the claimant had been dismissed by Salford University for gross misconduct…this was not the reason given on your application form…when you were specifically asked why your employment ended…I conclude therefore that you did deliberately mislead the College when completing your application form." In short, the claimant was dismissed for dishonestly and there is no evidence before the Tribunal Simon Pierce's decision was causally connected in any way to the claimant's trade union activities or the fact that he was a trade union representative due to taken up a higher position in the UCU.

Detriment 4: confidentiality

74. Immediately the decision was taken to dismiss the claimant and before the claimant had appealed, Bill Harrop emailed the outcome to all members of staff with the intention to put a stop to several misleading communications on social media concerning the claimant's suspension and disciplinary on which the respondent had been silent before due to confidentiality of the disciplinary process. It is not disputed by the parties that communications concerning the claimant, his trade union status and activities, and the disciplinary process were made in a public forum for staff, students and members of the public to read. It is also not disputed that there was disquiet amongst several union officials and union members, with a possibility of a strike action being taken. The email began "You will appreciate that it is highly unusual for us to comment on any individual case, however, given the untruthful…" and referred to "several false and misleading allegations are being made regarding a HR matter – specifically, the dismissal of Gary Duke."

75. The claimant responded in a letter dated 11 December 2015 to Elaine Bowker confirming he "was dismissed" from his position at Salford, which was not the position taken by the claimant during this liability hearing when he continued to put forward the argument that his employment with Salford University came to an end following eventual expiry of a fixed term contract. The claimant alleged Bill Harrop had breached confidentiality in an act that was "overt harassment and bullying."

76. The appeal hearing took place on 14 January 2016 before Angela Cox. The claimant was supported by Roger Grigg and the minutes of that meeting that ran to 8-pages have been considered by the Tribunal in full. In a 13-page appeal outcome Angela Cox addressed the claimant's grounds of appeal and the substantial detail given by the claimant regarding alleged collusion and trade union detriment, exploring the motivation of the individuals involved. The

Tribunal found Angela Cox to have been a particularly impressive witness at the liability hearing, giving credible evidence supported by contemporaneous documentation.

Law

Detriment for a trade union reason under S.146(1).

77. Section 146(1) states that: 'A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of — (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.'

78. In order to establish a contravention of any of the provisions in S.146 TULR(C)A it is necessary to show the claimant has been subjected to a detriment by an act, or deliberate failure to act, on the part of the employer. The term 'detriment' is not defined in the TULR(C)A. It can include reprimanding, disciplining and demoting, threats of action and has a wide definition. A dismissal cannot amount to a detriment — S.146(5A) TULR(C)A. The only remedy for an employee dismissed on union grounds is a claim of unfair dismissal.

Time Limits

79. A complaint under S.146 must be lodged before the end of the period of three months, beginning with the date of the act or failure to act 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 — S.147(1)(a). Where an act extends over a period, time will start running from the last day of that period — S.147(2)(a).

80. If the Tribunal is satisfied that it was not reasonably practicable to bring the claim within the three-month time limit, it may extend the time limit to such further period as it considers reasonable — S.147(1)(b).

81. A failure to act is to be treated as being done when it was decided on. In the absence of evidence to the contrary, this will be taken to have occurred either: (a) when the employer does an act inconsistent with doing the failed act, or (b) if the employer has done no such inconsistent act, when the period expires within which the employer might reasonably have been expected to do the failed act if it was to be done — S.147(2)(b) and (3).

Unfair dismissal

82. The right not to be dismissed on trade union grounds is contained in S.152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). That section provides that a dismissal is automatically unfair if the principal reason for it is that the employee: (a) was, or proposed to become, a member of an independent trade union, (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.

83. In contrast to 'ordinary' unfair dismissal cases the question of whether the employer was reasonable in dismissing does not arise. Once the reason (or principal reason) for dismissal is shown to be one of those specified in S.152(1) TULR(C)A, the dismissal is deemed to be automatically unfair.. An employee does not have to show any period of qualifying service before he or she can bring a claim for automatically unfair dismissal — S.154.

84. Both Ss.152 and 153 TULR(C)A operate via the unfair dismissal provisions contained in the ERA, stating that a dismissal proscribed by either section will be regarded as unfair for the purposes of Part X of the ERA. The jurisdiction to bring a claim of automatically unfair dismissal, or redundancy selection, for trade union reasons therefore derives from the ERA, and in keeping with unfair dismissal claims under that Act, the claim must be lodged before the end of the period of three months beginning with the effective date of termination. However, an employment tribunal may extend this time limit for a further reasonable period if it is satisfied that it was not reasonably practicable to present the claim in time — S.111(2) ERA.

Conclusion – applying the law to the facts

Detriment 1: Impromptu union meetings

85. With reference to the first issue, namely, was the claimant subject to a detriment by an act, or deliberate failure to act on the part of the respondent in relation to alleged detriment 1, the Tribunal found on the balance of probabilities that he was not.

86. Turning to the first detriment alleged and the issue of time limits, the Tribunal found the claimant was out of time. The alleged act took place on 14 June 2015 following which the claimant received a letter from Bill Harrop on 19 June 2015 concerning the complaints received about the impromptu union meeting. The claimant raised a grievance against Laura Firth complaining she had spied on him on 2 November 2015, when he first became aware of the alleged spying issue.

87. The claimant has made much of Bill Harrop failing to reply to the claimant's request for a copy of the protocols. Bill Harrop explained in oral evidence that he did not reply when asked for protocols, he did not want to start another

"ping pong" exchange with the claimant. There was no evidence this was an issue with Nina Doran; she discussed the matter with Carol Cody and the Tribunal accepted Bill Harrop's evidence that she had agreed to do so. If it was inappropriate the matter would have been taken up by the union, and the Tribunal found the non-production of the protocol did not extend the statutory time limit in any way.

88. The proceedings were issued 18 December 2015 and as the cause of action arose on 14 June 2015 the alleged detriment claim is substantially out of time in accordance with S.147 as referred to above. There was no evidence of a continuing act. The time limit runs from the date of the "act or failure to act" and not when the claimant discovered the act. The claimant had access to the union, and had threatened on numerous occasions to take legal action as set out above, not least the 2 November 2015 grievance letter. "Reasonably practicable" means somewhere between "physically possible" and "reasonable" described in Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 as a test of "reasonable feasibility." It was reasonably practicable for the claimant to have issued proceedings relating to the impromptu union meeting complaint which was brought to his attention on 19 June 2016. With reference to the claimant's allegation of "spying" it was not reasonably practicable for the claimant to have brought proceedings within the statutory time limit given the claimant's lack of knowledge until 2 November 2015 following a subject access request. No satisfactory explanation was given as to why the claimant had failed to issue proceedings earlier than 18 December 2015, and the Tribunal found it was not reasonable to extend the time limit to the date of presentation. There was reference in the document exchange relating to the claimant's grievance to a pre-claim protocol prior to legal action, and there is no reason why the claimant could not have issued proceedings in November 2015 given the public interest in claims being brought promptly against a background where the primary limitation period is three months and taking into account the objective consideration of the factors causing the delay and the period that should reasonably be allowed in those circumstances for proceedings to be instituted. The Tribunal decided it was not reasonable to extend the time limit to 18 December 2015 and that means the claim in respect of the first detriment is out of time and is dismissed.

89. In conclusion, the claimant's claim in respect of detriment number one was not lodged before the end of the period of three months, beginning with the date of the act or failure to act 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 in accordance with S.147(1)(a) of the Employment Rights Act 1996 as amended. It was reasonably practicable to bring the claim within the three-month time limit, and it is not just and equitable to extend the time limit to the date of presentation of the claim form.

90. A failure to act is to be treated as being done when it was decided on. In the absence of evidence to the contrary, this will be taken to have occurred either:

(a) when the employer does an act inconsistent with doing the failed act, or (b) if the employer has done no such inconsistent act, when the period expires within which the employer might reasonably have been expected to do the failed act if it was to be done — S.147(2)(b) and (3).

91. If the Tribunal is wrong on the time limit point, in the alternative, it considered whether the alleged detriment took place, and found on the information before it the claimant had not presented a prima facie case and there was no satisfactory evidence before the Tribunal that he had been caused a detriment. The claimant takes issue with Laura Firth complaining about the undisputed impromptu meeting, alleging it was trumped up despite both the claimant and Carol Cody agreeing the incident had taken place. He and Carol Cody explained they could only put union notices up in the staff room and not on the corridor walls. It is notable Carol Cody does not deny there was not an impromptu meeting. She explained in her oral evidence how rooms were made available when needed for regular branch meetings, and there was no designated room in City Branch and a staffroom or empty room was used.

92. The claimant and Carol Cody maintained the email sent 14 June 2015 consisted of a monitoring of legitimate trade union activities by Bill Harrop requesting Laura Firth to "keep an eye on" their legitimate union activities; in the words of the claimant to "spy" on them. The Tribunal concluded the email cannot be objectively interpreted to mean this. Giving it a straightforward interpretation and the reference to the word "repetition", Bill Harrop asked Laura Firth to let him if know if there are any further complaints from staff concerning the claimant and Carol Cody carrying out impromptu union meetings in staffrooms, the initial complaint having been discussed with Nina Doran who subsequently raised the matter with the claimant and Carol Cody. The request made to Laura Firth did not amount to spying or monitoring the claimant's trade union activities. It is notable no disciplinary action was taken. The note on the file was merely confirmation of the steps that had been taken. In submissions, the claimant stated it was inappropriate for Bill Harrop to get Nina Durran to carry out a management role by having a word. The Tribunal did not agree. Bill Harrrop described normal industrial relations in the work place whereupon disciplinary steps were to be avoided if possible, and the issue resolved without any aggravation. Bill Harrop's response reflected acceptable industrial practice, and given the intention to deal with it informally, there was no requirement for the individual names of complainants to be obtained and divulged to the claimant. Bill Harrop tried to diffuse the situation and he cannot be criticised for this. In short, the claimant was not prevented or deterred in taking part in the activities of an independent trade union at an appropriate time, or penalised for so doing and his claim is dismissed.

<u>Detriments 2 & 3: Partial and full suspension- the time limits</u>

93. Turning to the second and third detriment alleged and the issue of time limits, the Tribunal found the claimant within time. The partial suspension took place on 5 August 2015 and 11 August 2015 in relation to the full suspension. In

response to the partial suspension the claimant, through Carol Cody, objected referring to contravention of section 146 of TUR(C)A and the "violation" of his rights. The claimant was aware at that stage of his statutory rights and had access to legal advice within the union concerning time limits for issuing proceedings. The ACAS referral took place on 20 October 2015 and Early Conciliation ended 20 November 2015, extending the primary limitation date from 4 and 11 November 2015 to 20 December 2015. The proceedings were issued 18 December 2015, the alleged detriment claims 2 & 3 are in time and the Tribunal has the jurisdiction to consider those complaints.

94. With reference to the issue concerning whether the claimant was subject to a detriment by an act, or deliberate failure to act on the part of the respondent in respect of the partial and full suspension the Tribunal found that he was not, and the claimant was not prevented or deterred in taking part in the activities of an independent trade union at an appropriate time, or penalised for so doing.

95. The relevant facts are thus; on 22 July 2015 Viv Lacey found the claimant's name and googled it. She found a Manchester Evening News Article which pointed to a Gary Duke having been dismissed for bullying and harassment from Salford University. The claimant submitted this was part of a conspiracy on the part of the respondent's managers. The Tribunal did not accept the logic of the claimant's submissions. It was however bemused by the email send to Elaine Bowker sent on 22 July 2016 that attached the cut and paste article in the email under the heading "GD" without any further comment. When this article was emailed to Elaine Bowker Viv Lacey was aware Kate Spall had mentioned the claimant by name, and she had noted the claimant's name due to possible family connections. Elaine Bowker rang Viv Lacey immediately upon receipt of her email as she was concerned. Does this interaction point to a conspiracy? The Tribunal was of the view it did not in itself prove collusion, and there was no evidence of a conspiracy. The claimant submitted Viv Lacey took this action because he had become a union official and the respondent believed he would be a "thorn in their side."

96. Despite the oddity of Viv Lacey sending the 22 July 2016 email with no explanation, the Tribunal on the balance of probabilities accepted Elaine Bowker's evidence that she had not discussed the claimant with Viv Lacey before the email was sent. The problem for the claimant is, whatever Viv Lacey's motivation was, her search had found information that subsequently raised serious questions over his honesty given the improperly completed application forms. The claimant has exaggerated a minor fact into a fully blown conspiracy theory. The information was available on the internet to be discovered at any time, and there was no requirement for the respondent to either produce the note made by Viv Lacey, a screen short of her Google search or proof that Duke was a family name, as submitted by the claimant. It is notable the claimant never made this request during the disciplinary process.

97. Viv Lacey's motivation was not relevant to the decision to partially and then fully suspend the claimant as she was not the decision maker in this regard. Kath Marshall was asked by Bill Harrop whether the claimant was the same Gary Duke and she duly investigated this. She looked at the claimant's application form to see what reasons he had given for leaving Salford, contacted Salford University who wrote back and confirmed the claimant had been dismissed and why, and she obtained a copy of the Employment Tribunal judgment. Kath Marshall checked the people who interviewed the claimant, noted the referees, and the reasons the claimant gave for leaving Salford, concluding the evidence amassed pointed to the claimant having a case to answer. The claimant's partial suspension followed, and the Tribunal finds that there were legitimate grounds for that suspension and did not agree with the claimant that it was unreasonable or causally linked to his union activities. Kath Marshall's sole motivation was to protect the respondent pending a disciplinary investigation.

98. The claimant alleges there was a conspiracy against him by Viv Lacey with Elaine Bowker, Bill Harrop, Angela Cox, Simon Pierce and Kath Marshall. There was no satisfactory evidence before the Tribunal that such a conspiracy existed; no other person outside of HR was involved in the decision to suspend. The insurmountable problem for the claimant is that the partial suspension arose following reasonable concerns that he had lied on his application form and this was a possible act of gross misconduct. The Tribunal accepted Kath Marshall had decided not to suspend the claimant as he was on paid holiday leave and the college was closed to students, with a view to not paying the claimant full pay whilst he was on suspension. The Tribunal accepted Bill Harrop's uncontested evidence that a partial suspension resulted in an economic benefit to the respondent, and it was also used in circumstances where an employee was on sick leave but facing a disciplinary investigation.

99. Kath Marshall took the view protection was needed and it was on this basis the claimant's access to the IT network was suspended. The Tribunal accepted there were no causal connection between suspending the claimant's IT access and his union activities. It accepted there were several union representatives who had access to the IT system during this period, the claimant being but one of approximately 20. On 5 August, he successfully accessed IT through Carol Cody, and it is not disputed he could have requested supervised access to the network but chose not to make a request.

Third detriment: full suspension

100. Several the points made by the Tribunal in relation to the partial suspension are relevant also to the full suspension. Given the factual matrix and Tribunal's conclusion that there was no conspiracy; the decision to suspend was taken by Bill Harrop (who had informally been made aware of the claimant's appointment to chair of UCU liaison committee) because the claimant was facing allegations of gross misconduct and was due to return to

work after his holiday. The Tribunal finds this was the sole reason for the full suspension, and it had no causal connection with the claimant having allegedly challenged the principal at the July principals briefing. There was no causal connection with the fact the claimant was to take up the position of chair of UCU liaison committee, or the claimant's perception of his own prominence (a view disputed by the respondent's managers who did not see the claimant in this light) in raising grievances or for the avoidance of doubt, any union activity carried out by the claimant.

Fourth detriment: two breaches of confidentiality

101. The first alleged breach of contract took place on 17 September 2015, the second on 9 December 2015 after the claimant had been summarily dismissed for gross misconduct. With reference to the issue of time limits the Tribunal found the first alleged breach of contract was in time, the referral to ACAS EC took place on 20 October 2015, early conciliation ended on 20 November 2015, and proceedings lodged on 18 December 2015. The second alleged breach of contract was issued within the primary statutory time limit.

102. With reference to the issue concerning whether the claimant was subject to a detriment by an act, or deliberate failure to act on the part of the respondent, the Tribunal found on the balance of probabilities that he was not. It found on the information before it the claimant had not presented a prima facie case and there was no satisfactory evidence before the Tribunal that he had been caused any detriment the Tribunal concluding there was no breach of contract. The facts as set out above are Carol Cody, acting in her capacity as the claimant's union representative, emailed Bill Harrop on 16 September 2015 enclosing an undated letter. She copied the email to 8 recipients, all members of the union liaison committee, including Nina Doran. Bill Harrop responded on 17 September 2015 and copied the same trade union personnel who formed part of the liaison committee, together with Catherine Naylor, HR business partner employed by the respondent.

103. The evidence before the Tribunal was that the liaison committee were fully aware of the claimant's employment dispute, and Carol Cody had shared correspondence with it. It is notable Carol Cody in her undated letter copied to the liaison committee divulged personal details concerning the claimant's health, it referred to the suspension and disciplinary hearing scheduled. Bill Harrop was entitled to assume correspondence in reply was also to be copied to the liaison committee and he did not intend any breach of confidentiality in so doing. It did not cross his mind confidentiality was an issue in this context, and even had the Tribunal found he had breached confidentiality it would have gone to find there was no detriment to the claimant as the liaison committee were fully aware of his case, and further, Bill Harrop's decision to copy the same recipients was not intended to prejudice or cause the claimant a detriment because of his trade union activities.

104. Turning to the second alleged breach of contract, the Tribunal finds the email sent 9 December 2015 to all staff was not a breach of the claimant's right to confidentiality. The respondent was concerned that the campaign run by the union on behalf of the claimant had not been responded to and as far as their employees were concerned only one side of the story had been given. The Tribunal accepts the claimant's submission that there was potentially a breach of contract, but only if he had remained an employee. Given the fact the claimant had been summarily dismissed, no such duty of care was owed to him. The claimant submitted the duty of care relating to confidentiality continued until appeal; the Tribunal did not agree. The claimant, who has referred to case law in support of his claim, has not referred to any decision clarifying whether post-termination an ex-employee is owed the duty of confidentiality in circumstances where the employment contract was brought to an end as a result of the employee's breach of contract.

105. If the Tribunal is wrong on this point, and had the claimant been owed a duty of confidentiality after termination in the particular circumstances of this case, it would have gone on to find the 9 December 2015 communication did not breach the claimant's confidentiality because of the campaign and misinformation already in the public domain. All the information set out in the 9 December 2015 communication was already in the public domain and no detriment had been caused to the claimant. The Tribunal accepted the evidence of Bill Harrop that the sole determining factor for his decision to release the 9 December 2015 missive was to protect the respondent's reputation from information already in the public domain and there was no link to the claimant's trade union activities or the fact he was a trade union representative. The claimant was not prevented or deterred in taking part in the activities of an independent trade union or penalised for so doing by the 9 December 2015 communication, when the claimant was no longer acting in the capacity of a trade union representative in the respondent's business even though he remained a trade union member.

106. In conclusion, the claimant was not subject to a detriment by an act, or deliberate failure to act on the part of the respondent. He was not prevented or deterred in taking part in the activities of an independent trade union at an appropriate time, or penalised for so doing and the main purpose of Bill Harrop's decision to issue to 9 December 2015 communication was not to subject the claimant to a detriment, or prevent, deter or penalise him for seeking to become a union member, taking part in union activities or making use of union services. The claimant submitted the appeal had been tainted by the 9 December 2015 email. The Tribunal held, based on the evidence before it, the appeal decision was unaffected by the 9 December 2015 email accepting Angela Cox's evidence that she was unaware of the 9 December 2015 communication prior to hearing the appeal and even if she had been, there was nothing in the email which was not factually correct and set out in the dismissal letter. The facts of the claimant's dismissal would have been available to Angela Cox, who heard the appeal and the decision she made had no causal connection with the claimant's union membership or duties.

Dismissal

107. This claim (which was received within the statutory time limits taking into account ACAS EC) involves exclusively an automatic unfair dismissal which does not require the Tribunal to consider the procedural and substantive fairness of the decision and whether it fell within the bands of reasonable responses. Nevertheless, the claimant has taken the Tribunal through the process followed, making allegations of unfairness, for example, the alleged breach of confidentiality prior to the appeal hearing taking place that has been dealt with above. In respect of the respondent's procedure, on the evidence before it, the Tribunal found in the main it complied with the ACAS Code of Practice, was not unfair and no adverse inference can be raised from any procedural irregularities such as, possibly, Simon Pearce hearing the disciplinary. The issue before the Tribunal is whether the reason for the claimant's dismissal was due to his trade union activities or not, the burden of proof being on the claimant to establish this. The claimant has failed to discharge this burden, and the respondent has provided, on the balance of probabilities, evidence that the reason for the claimant's dismissal was solely as a result of his gross misconduct.

108. A number of submissions were made by the claimant concerning his dismissal as set out and dealt with above. The Tribunal explored the issue raised by the claimant in respect the objectivity and independence of Simon Pearce and his decision-making process in an attempt to ascertain whether the reason for the claimant's dismissal was due to his trade union activities or not, and it considered the explanation given by Simon Pearce looking to see if it was tainted by the claimant's trade union responsibilities and activities, concluding that it was not.

109. The claimant submitted Katie Spall reported her concerns about him to Simon Pierce who then became "increasingly concerned" the claimant was "unfairly targeting Katie and bullying her" in 2014, and this affected adversely his decision making process against the claimant. In 2015 the claimant raised a grievance against Kate Spall dated 18 June addressed to Simon Pierce, and Simon Pierce arranged for Bill Harrop to respond. In cross-examination when it was put to Simon Pierce he should have recused himself, Simon Pearce responded the claimant knew he was to hear the case and had not mentioned any conflict, nor did he ask Simon Pierce to recuse himself, and this evidence was not disputed. The Tribunal accepted Simon Pierce, as Kate Spall's manager, was aware of some matters concerning the claimant but had distanced himself. The Tribunal took the view that Simon Pierce's knowledge of the claimant did not compromise his impartiality and the claimant was given the opportunity to put forward all his arguments in full at the disciplinary hearing. The claimant's problem was he could not argue against the fact that he had told a lie on the application form, however hard he might try, and Simon Pierce did not believe or trust him. Simon Pearce was entitled to take this view. Procedurally, given the size and recourses of the respondent it may

have been preferable for Simon Pearce not to have dealt with the disciplinary hearing, and the claimant's argument in this regard may have some merit. However, this observation does not assist him given the nature of the complaint before the Tribunal.

110. Simon Pierce set out reasons for his decision to dismiss in a detailed 5-page letter which referred to the claimant's evidence and the investigation conducted by Damien Kilkenny, evidence Simon Pierce tested given the claimant's argument that the only reason for the disciplinary was his trade union activity. He questioned Viv Lacey and found her to be an honest witness. The claimant made much of the fact Simon Pierce had made no record of the interviews, arguing that as there was no record the interviews had not taken place. The Tribunal accepted Simon Pearce's evidence on cross-examination that the interviews had taken place as described. Simon Pierce explained how Viv Lacey said nothing different to the evidence she had given during the investigation process, and he believed her. The Tribunal accepted this evidence as credible; however, it would have been preferable had contemporaneous notes been taken of the discussion and copied to the claimant before the decision to dismiss was made but nothing hangs on this. This omission does not assist the claimant, the Tribunal taking the view Simon Pearce was entitled to believe what Viv Lacey had to say concluding ultimately the claimant had committed the act of gross misconduct, Simon Pierce held a genuine belief that he had done so, based on uncontroversial and clear evidence from a number of sources, not least Salford University. Had this been a section 94 ERA unfair dismissal claim the Tribunal would have found the decision to dismissal fell well within the band of reasonable responses open to a reasonable employer. The Tribunal finds there was no causal connection between the dismissal and the claimant's trade union activities or membership. The claimant had failed to disclose to the respondent the true reason for the termination of his employment, concealing the fact he had been dismissed despite the clear warning on the application form.

111. The claimant submitted he was not obliged to disclose his own wrongdoing when completing the respondent's application form. He put forward in argument the basic rule that employees are under no obligation to disclose their own breaches of duty committed in the course of employment to their employers and referred the Tribunal to Bell v Lever Brothers Ltd [1932] AC 161, HL. In that case the House of Lords held that a chairman and vice-chairman of a subsidiary company were not liable to repay compensation they had received following a corporate reorganisation on account of the fact that the parent company had subsequently learned they had engaged in secret and unauthorised private speculations during their employment. Lord Atkin stated: 'I agree that the duty in the servant to protect his master's property may involve the duty to report a fellow servant whom he knows to be wrongfully dealing with that property. The servant owes a duty not to steal, but, having stolen, is there superadded a duty to confess that he has stolen? I am satisfied that to imply such a duty would be a departure from the well-

established usage of mankind and would be to create obligations entirely outside the normal contemplation of the parties concerned.'

112. The principle was followed by the Court of Appeal in Sybron Corporation and anor v Rochem Ltd and ors 1983 ICR 801, CA, to which the Tribunal was referred to by the claimant. The Tribunal accepted Dr Duke's argument that an employee is not required to disclose his or her own misconduct to the employer, although there may exist a duty to disclose the misconduct of colleagues which is not an issue in this case. In those circumstances, the duty to disclose would be unaffected by the fact that, in complying with it, the employee incriminates him or herself. In Sybron the employee had sought to retain advantageous pension rights in circumstances where he had failed to disclose his own involvement in a major fraud. The Court of Appeal ruled that, given his position as a senior executive, the employee was under a duty to report the fraudulent misconduct of subordinates, even though this would inevitably reveal his own misconduct.

113. The claimant also referred to Item Software (UK) Ltd v Fassihi and ors 2005 ICR 450, CA, in which the Court of Appeal held that Bell v Lever Brothers (above) was 'not authority for the proposition that there are no circumstances in which an employee can have a duty to disclose his wrongdoing'. However, that case was decided primarily on the basis that F, being a director subject to fiduciary duties, owed a positive duty to disclose any breaches. It was held directors owed a duty to disclose their own wrongdoing as part of their overall duty of loyalty and good faith. The Court of Appeal did not expressly consider whether that duty extended to and applied equally to employees, although it did state that a director's duties are more onerous than those placed on an employee.

114. The claimant relied on the EAT decision in Basildon Academies v Amadi and anor EAT 0342/14, where it held that there was no implied contractual obligation on a tutor to inform the school at which he worked part-time that an allegation of sexual assault had been made against him by a pupil at another school where he also worked. The EAT considered that, following Fassihi, there may be circumstances in which an employee can be under a duty to disclose his or her own misconduct. However, it is clearly not the law that an employee must disclose to his or her employer any allegation of impropriety, however ill-founded. Dr Duke argued there was no contractual basis for him to report to the respondent the true reason for his dismissal from Salford University. The Tribunal accepted there may not have been an obligation in contract for the claimant to disclose the fact he had been dismissed for harassing a work colleague, he was however obliged to tell the truth and was made aware in no uncertain terms failing to do so could result in disciplinary action being taken. It was not true that the claimant's annually renewable contract had not been renewed.

115. The Tribunal has considered the claimant's legal arguments and concludes they have little if any merit. His case can be differentiated from

those set out above. The claimant was required to answer the questions set out in the application form truthfully and he was made aware of the consequences if dishonest answers were given. Confronted with a question on the application form the claimant gave a deliberately false response. He was not dismissed by the respondent because he had been found guilty of gross misconduct by Salford University; he was dismissed because he had lied. All the claimant was required to do was tell the truth. Had he completed his application form confirming that he had been dismissed with no other information given, he could not have been dismissed by this respondent for gross misconduct. The claimant's problem is that had he set out the true position the reasons for his dismissal may have been explored and his application would likely have been unsuccessful; thus, he felt he had no option as indicated by his trade union representative during the disciplinary process.

116. The claimant submitted Angela Cox at the appeal hearing stated that non-disclosure and dishonesty were one and the same, he maintained the law had been misinterpreted and HR's advice on this should have been obtained, therefore a perverse decision was made in respect of the appeal. The Tribunal did not agree; Angela Cox confirmed the issue before her was not one of disclosure but dishonesty on the application form.

117. Turning to the claimant's submissions concerning members of the HR team acting as investigating managers and co-authors, the Tribunal did not accept this to be the case. The claimant referred the Tribunal to Ramphal v Department for Transport 2015 ICR D23, an EAT judgment. G was appointed to carry out an investigation and his first draft report found that the alleged misuse was not deliberate and R had plausible and consistent explanations for his excessive fuel expenditure. G's recommendation was for a finding of misconduct, with the sanction of a final warning. Over the next six months, the draft report went back and forth between G and the HR department, leading to favourable comments being replaced by critical ones, the view of culpability changing from misconduct to gross negligence and the sanction changing from a final written warning to summary dismissal. The EAT allowed R's appeal and remitted the case for reconsideration in the light of the Supreme Court's decision in Chhabra v West London Mental Health NHS Trust [2014] ICR 194, SC. The Supreme Court held that an employer had acted in breach of an employee's implied contractual right to a fair process, as well as an express undertaking, where a human resources manager had unduly influenced a case investigator's report. The Supreme Court clarified that it would be legitimate for HR to assist a case investigator in the presentation of a report, for example to ensure that all necessary matters have been addressed and to achieve clarity, but not to go beyond that. In Ramphal the EAT's view was the representations from HR went beyond giving advice on procedure and clarification and appeared to have led to the reshaping of G's views. HR had involved itself in issues of culpability, which should have been reserved for G. The changes to the report were so striking they gave rise to an inference of improper influence and the employment judge should have

given clear and cogent reasons for accepting that there was no such influence. The EAT stressed that while an investigating manager is entitled to seek advice from HR, such advice must be limited to questions of law, procedure and process. HR must avoid straying into areas of culpability or the appropriate sanction, except insofar as the advice addresses issues of consistency. The Tribunal was of the view there was no satisfactory evidence of any such influence improper influence by HR in the case of Dr Duke.

118. The claimant submitted Kath Marshall established the Gary Duke in question was the claimant, and once she had done this the matter should have been left to an investigating officer. The Tribunal's view is that Kath Marshall established some preliminary facts via Salford University and the earlier Employment Tribunal judgment to determine whether there was anything to investigate and a possible case to answer. Damian Kilkenny carried out the subsequent and detailed investigation. The practice by HR of partially drafting letters, conclusions and giving advice in respect of this was not an issue and did not give rise to improper influence, providing HR had not strayed into areas of culpability. There was no satisfactory evidence HR were behind the decisions made by Simon Pierce and Angela Cox. The Tribunal took the view neither Simon Pierce or Angela Cox would have been manipulated by HR, and both arrived at the conclusions they did independently to HR, based on the evidence before them and the inescapable fact that the claimant had not told the truth. The Tribunal did not accept the disciplinary process was a "sham" as submitted by the claimant for the reasons set out above. It is clear from the disciplinary and appeal outcome letters all the issues raised are addressed at an exhaustive length, reflecting the seriousness in which the task was approached, the thoroughness and objectivity that took place and there is no suggestion the decisions were influenced by anybody from HR or by the fact the claimant was a trade union representative and involved in trade union activities.

119. The claimant relied on decision of the ECHR in Sourguc v Turkey [23.09.2009] concerning freedom of expression/speech which the Tribunal found as not relevant to the issues it had to decide in this case, likewise, the High Court decision in Dr Gary Duke v The University of Salford [2013] EWHC 196 to which it was also referred. The claimant's submission relating to freedom of speech and his reference Sorguc is irrelevant. Freedom of speech and academic freedom had no bearing on the respondent's decision to dismiss the claimant for gross misconduct as a result of him lying on the application form.

120. In conclusion, the reason for the claimant's dismissal was due to his act of gross misconduct and not trade union activities or trade union membership. The claimant was not automatically unfairly dismissed on trade union grounds, his complaint of automatic unfair dismissal is not well-founded and the claim brought under S. 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 is dismissed. The claimant was not prevented or deterred in taking part in the activities of an independent trade union at an

appropriate time, or penalised for so doing. The respondent's sole or main purpose in its dealings with the claimant as set out above was not to prevent, deter or penalise the claimant for his union membership, taking part in union activities or making use of union services. The claimant was not subjected to a detriment on trade union grounds; his complaint of detriment brought under S.146 of the Trade Union and Labour Relations (Consolidation) Act 1992 is not well-founded and is dismissed.

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Employment Judge Shotter
10.08.17

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 August 2017

FOR THE TRIBUNAL OFFICE