EMPLOYMENT TRIBUNALS

Claimants: **Mr N Anderson and 128 others on the attached schedule**

Respondent: **First Wessex**

Heard at: **Bristol** **On: 26 and 27 January 2017**

Before: **Employment Judge R Harper**
Members Mrs M Metcalf
Ms J Cusack

Representation:
Claimants: **Mr P Gilroy, QC**
Respondent: **Ms S Clarke, Counsel**

JUDGMENT

1. The unanimous decision of the tribunal is that the claims of detriment under Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") are dismissed.

REASONS

1. This is a claim of alleged detriment contrary to Section 146 TULRCA. In addition the Tribunal has considered Section 148 of TULRCA having regard to the burden of proof and Section 149 of TULRCA.

2. The Tribunal heard evidence on oath or affirmation from Adrian Baker, Peter Walters, Kate McCorriston and Carol Williams.

3. The Tribunal has considered all the documentation to which its attention has been drawn making the point that if its attention has not been drawn to a particular document then it has not considered it.

4. The Tribunal has considered all the evidence both oral and written presented by the witnesses and has considered the oral and written submissions of both Counsel.

5. The Tribunal has considered the following case law:

1 Skiggs v South West Trains Ltd [2005] IRLR 459

2 Ridgway and Fairbrother v The National Coal Board [1987] IRLR 80

3 Associated Newspapers Ltd v Wilson and Associated British Ports v Palmer [1995] 2AC454

4 Wilson v The UK [2002] IRLR 468

5 CEG Carlson v Post Office [1981] IRLR 158

6 Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285

7 Brassington v Cauldron Wholesale Ltd [1977] IRLR 479

8 Carter v Wiltshire County Council [1979] IRLR 331

9 Cleveland Ambulance NHS Trust v Blane [1997] IRLR 332

10 Massey v Unifi [2007] IRLR 902

11 Chief Constable of West Yorkshire v Vento [2003] IRLR 102

12 Da'Bell v NHS PCC [2010] IRLR 19

13 Hackney London Borough Council v Adams [2003] IRLR 402

14 AA Solicitors Ltd and another v Majid UK EAT/0217/15/JOJ

15 Serco Ltd v Dahou [2015] IRLR 30

6. The respondent is a registered provider of Social Housing which at the relevant time employed 863 employees across various sites.

7. On 19 February 2013 a Voluntary Recognition Agreement ("VRA") was reached between GMB UNISON and the respondent. Clause 5 of the VRA provided that:

> *"The Housing Association recognises the Unions as having collective bargaining rights for employees."*
>
> "Employees" were defined in Clause 1.1.2 as:
>
> *"Individuals employed by the Housing Association under a contract of employment."*

8. The respondent believed that although, under the VRA, the Unions were the voice of all members of staff the Unions did not consult with non Union

members regarding issues and only took into account the views of the Union members.

9. A staff survey was commissioned and concerns were clearly expressed by a number of staff that better communication was required. For example see pages 308, 309, 310, 311, 315, 317, 318, 323 and 330.

10. The claimants made much in the presentation of their case before the Tribunal that the respondents were either anti Union, fed up with the Unions, and/or had a negative view of the role of Unions in the workplace. Although various of the respondent's witnesses expressed some disappointment and, to an extent, exasperation of the stance of the Trade Union's relation to various issues the Tribunal make a finding of fact that there was no evidence to support the claimants' concerns. Any reservations expressed by the respondent are to be viewed as part of the rough and tumble of negotiations between trade Unions and management. The fact that the trade Unions and management had, on other matters, worked well together was specifically confirmed by Mr Baker in his evidence. The Tribunal make a finding of fact that nothing which the respondent did was designed to undermine the trade Unions or to sideline them and that everything which the respondent did was designed to try to address the concerns which had been expressed in the 2014 staff survey and also the subsequent concerns expressed in 2015.

11. In 2015 the respondent was in pay negotiations with the Unions under the terms of the VRA which affected all employees.

12. In June 2015, after a ballot of their members only, GMB advised that they were rejecting the pay offer of a two year pay deal of 1% increase per year. The turn out for the pay proposal vote was only 42% and of those 57% voted to reject. The respondent therefore concluded that a small minority were making decisions in respect of the bulk of the workforce.

13. A number of verbal complaints were received from employees about this situation. The claimants made application at the Tribunal hearing that they had never been shown details of any such complaints but since they were verbal it was not possible to do so.

14. As a result of these concerns, and also as a result of a predicted reduction in income of £16m per year a proposal emerged from the Executive Team:

> *"Staff should be given a wider range of choices. One important option will be to retain recognised Unions but to end the current exclusive agreement whereby the two Unions are the only bodies who can represent staff."*

15. As a result notice was served on GMB and UNISON that the VRA would cease to apply as of the 3 March 2016. Two alternatives were put before the workforce namely:

    (i) "A further agreement similar to the first one or

    (ii) A different agreement which would continue to recognise the

> *two Unions as representing their members but would also allow for consultation and negotiation within non Union staff through a new staff representative body".*

16. An externally monitored ballot was organised and on a turn out of 40.9%, 55.5% of those who voted were in favour of the second option set out above. The respondent believed therefore that they had a clear mandate to proceed with setting up a different agreement.

17. The respondent announced its intention to set up an Employee Partnership Council (EPC). The first draft of the general principles of such agreement was sent to the Union on 8 January 2016 which proposed that nine members of the EPC would have voting power with three management members with no voting power.

18. Consequently, in January 2016, the draft Employee Partnership Council Recognition Agreement (EPCRA) went to all staff. The summary providing as follows:

> *"The EPC has been created to represent non Union and Union employees together with First Wessex management. The EPC's principal role is to allow First Wessex to engage in a constructive dialogue with its employees on matters affecting the workforce."*
>
> The relevant clauses provided that the EPC shall consist of twelve members in three categories with Union representatives, employee representatives and management representatives. UNISON was granted one representative and the GMB one representative and the employee representatives were to provide a declaration that they were not currently, nor had they been within the last six months, an active member of Unison or GMB.
>
> Therefore out of the twelve members nine would have voting powers comprising two trade Union representatives and seven employee representatives. Members of a trade Union who had been members within the previous six month were unable to stand as the employee representative and trade Union members could not propose or vote in relation to employee representatives.
>
> As a result of this proposal the GMB expressed concerns, especially about the proportionality of representation of the group. Adrian Baker of the GMB raised concerns with Ms McCorriston in April 2016. Her responses, for example, at page 238B and 238C make it clear that the respondent was willing to consider negotiating the terms of the proposed EPRCA.

19. As a result it is clear that the trade Union representatives would account for two out of nine of the EPC voting membership :22.2%; seven out of nine of the EPC shall be accounted for by employee representatives or 77.8%; and balance made up of management representatives.

20. Although not pleaded in the ET1 Mr Baker purported to make much of a

health and safety issue in late 2014 early 2015 which as he says in paragraph 9 of his statement:

> *"was truly the reason for subsequent de-recognition".*

21. No application to amend the claim had been made. This was a new reason advanced for the de – recognition. By asserting it in the way that he has in paragraph 9 he makes it clear that he believes that this was the reason for subsequent de-recognition. The evidence did not support Mr Baker's contention at all that health and safety issues had any relevance on the consequent events set out in these reasons. These bold, unpleaded, allegations are to be set in context with Mr Baker's performance in cross examination. During such cross examination he tried to give the impression that he was struggling to answer very simple and clearly expressed questions whereas he had no difficulty answering questions from his own Counsel. The Tribunal was not impressed with Mr Baker as a witness since the health and safety point had not previously been pleaded and yet he seem to place much emphasis upon it. His considerable reliance upon it in his own witness statement, on the facts of this case, results in the conclusion that he was desperately trying to manufacture evidence, and linkage to such evidence, to support his otherwise weak case.

22. On 24 April 2016 Mr Baker met with Carol Williams to discuss the allegedly contentious clauses. It was agreed that there would be the removal of the requirement for an employee representative not to have been a member of a trade Union in the previous six months. It was agreed that consideration would be given to reviewing clauses 6.7 – 6.9 and deleting clause 6.4. By this stage ballot papers had been sent to all employees on 7 April 2016 with a closing date for reply being 22 April 2016.

23. The outcome of that ballot has never been announced and the EPC has not been established. The reason that the outcome of the ballot has not been announced is that on 28 April the GMB sought the voluntary recognition of a bargaining unit for the trade operatives. The respondent notified the staff of this on 5 May 2016 and in July 2016 the voluntary recognition in relation to trade operatives was finalised.

24. That finalisation in July 2016 was after the present claim was brought and filed with the Employment Tribunal on 1 June 2016 initially brought by 131 employees (now 129). Since that time no steps have been taken in relation to setting up the EPC and the result of the ballot has still not been issued.

25. In paragraph 3 of the response to request for further and better particulars at page 72 of the bundle it is stated:

> *"The claimants repeat their contention that it is all the steps taken by the respondent in implementation of the EPCRA that have resulted in the contended for detriment."*

26. The claimants assert that EPC had been implemented since 1 March 2016. They assert that the appointment of management representatives and the terms of the EPC as far as who can stand as a candidate for an ER position and who can vote or not for ER candidates constitutes a detriment.

27. The detriments relied upon are set out in paragraph 27 of the respondent's closing submission. No issue was taken by the claimants that these did not accurately record the detriments relied upon namely:

    (i) "Does not allow any of the claimants to stand for an ER position or propose second or vote for any other employee to get appointed into an ER position (clauses 5.3.2, 5.3.3 and 6.9).

    (ii) Deprives the claimants from exercising any mandate over those governing the decision making process and/or from exercising the equivalent mandate as is available to employees who are not members of a Union.

    (iii) Provides an inducement to the claimants to surrender their Union membership in order to participate in EPC activities in a manner equivalent to non trade Union members."

28. It is alleged that the sole or main purpose of the above detriments was to prevent or deter them from being members of an independent trade Union and/or to penalise and from doing so.

29. Upon considering Section 148 TULRCA the Tribunal has had regard to the guidance in the case of **Serco Ltd v Dahou** which stated that there was:

    "A light burden on the employee to show only that there is an issue warranting investigation and capable of establishing the prohibited reason."

30. It follows from the above paragraph, under Section 148(1) TULRCA, that:

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

31. It is highlighted, by being underlined in paragraph 7 of the claimant's final submission, that:

    "For the avoidance of any doubt whilst the termination of the Voluntary Recognition Agreement forms the basis of the factual background that led to the implementation of the EPCRA the claimants' case in no way depends upon any form of comparison between the Voluntary Recognition Agreement and the EPCRA or of the arrangements provided for under those agreements."

32. In his closing submissions Mr Gilroy referred to the respondent's evidence as "aspirational evidence." He urged the Tribunal to "strip down" Section 146(1)(a) and that the Tribunal should determine that the mythical "Mr Bloggs," invented by Mr Gilroy, was being deterred from being a member of a trade Union and that this was the sole purpose of the exercise. He asserted that "what preceded the drafting of EPCRA version 2 was anti Union or anti GMB sentiment within the respondent". As earlier set out the Tribunal reject that there was such anti GMB sentiment and/or that any

dealings which the respondent had about the GMB were totally separated from the proposed implementation.

33. The claimants asserted that the agreement was implemented. In paragraph 21 of the claimants' skeleton argument it is stated:

> *"it is Cs' position that R's actions were carried out for the sole or main purpose of preventing or deterring Cs' from being or seeking to become members of an independent trade Union or penalising them for doing so."*

34. It was asserted by the claimants in closing that a number of the main issues raised by the respondent were no longer issues as they allegedly had no merit and the Tribunal did not need to resolve them. Whilst a clever advocacy technique the Tribunal disagree that the issues have been disposed of in this way.

35. In examining the definition of detriment both Counsel referred to the leading case of **Shamoon v Chief Constable of Royal Ulster Constabulary**. The House of Lords held:

> *"In order for a disadvantage to qualify as a detriment it must arise in the employment field in that the Court or Tribunal must find that by reason of the act or acts complained a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to detriment."*

36. In addition to **Shamoon** the claimant or also relied on the authority of CEG **Carlson v Post Office [1981] IRLR 158**.

37. In alleging detriment the respondent relies on various clauses in the draft EPCRA. It is exactly that "a draft." This document has not been implemented and it is clear from the evidence, particularly of Miss McCorriston that she was open to considering amendments. The Tribunal makes a finding of fact, having heard all the evidence, that none of the clauses relied upon are in force or implemented. Simply because a ballot took place in 2016 this does not result as a matter of a finding of fact that the new rules have "bitten." The results of that ballot have not been announced.

38. It appears now unlikely that there will be any further developments in the workplace as far as acting on the results of the ballot is concerned since the respondent is in discussion with another Company for a take over or merger. However, if it was ever to be taken further forward there is no reason why it would not be with further consultation with the Unions with further amendments. The Tribunal makes a clear finding of fact that the position as at the date of filing of the ET1 does not constitute a detriment. No implemented change had occurred.

39. The evidence supports the respondent's contention that the whole point of the EPC was to enable proportionate representation of the various groups of staff and allow the various groups of staff to chose who represents them. There is no evidence before the Tribunal suggesting that any of the

claimants had raised concerns about the voting powers or that they considered they had been disadvantaged since the Unions have made it clear that they would not wish non Union employees to vote for trade Union representatives. In effect what they are seeking is to put trade Union members in a better position.

40. As far as the voting mechanism was concerned each employee would be given a unique number so it would not be possible to tell from the unique number whether a person was a trade Union member or not. The Unions made it clear that they would choose representatives for themselves and Mrs Williams indicated that she would leave the choice of representatives to the Unions.

41. Although the claimants had made it clear that the case is not based on any comparison between the VRA and the EPCRA the facts would suggest that they were indeed asserting that they would have less control than they had previously enjoyed.

42. The Tribunal agree with the respondent's assertion that there is no detriment in allowing the different groups to have a voting power commensurate with the number of people they represent and it is not a detriment in the proposal that the trade Unions would have a voting power of 22% whereas the ER reps would have 78%.

43. If it is still a live issue for the Tribunal to determine the evidence does not support the claimants' allegation that the claimants were given an inducement to surrender their Union membership in order to participate in EPC activities. As is asserted by the respondent, in their submissions paragraph 49, even if all the trade Union members surrendered their membership and then voted in the same manner this would not change the outcome of the vote. As is stated in paragraph 62 of the respondent's submission:

> *"As a Union member an employee has the right to vote for a TU member to represent him on the EPC. As a non Union member he would have the right to vote for a non Union member to represent him on the EPC the two positions are exactly the same. An employee would not have anymore sway simply by relinquishing TU membership."*

44. In this case the Tribunal make a finding of fact that the complaint is a complaint that the bargaining power of the Union has diminished and the Tribunal rejects the claimants' assertion in paragraph 29 of the skeleton argument that:

> *"It is not the Union that is being restricted but the employees who are members of it."*

45. As was stated by Lord Justice Dillon in Palmer v Associated British Ports and Wilson v Associated Newspapers Ltd [1993] IRLR 336:

> *"It is not in dispute that the employees were entitled to de-recognize the Union as they did and that the de- recognition being aimed at the*

Union as a whole cannot be regarded as action against any employee as an individual for the purposes of Section 23."

46. Although this Tribunal hearing the case is not in any way bound by the observations of Employment Judge Reed at the Preliminary Hearing on 23 August 2016 as it happens, comments which he made in paragraphs 5 and 7 of the Case Management Summary, proved to be prophetically correct.

47. For all the reasons set out above the Tribunal find that there was no detriment.

48. In view of the fact that there was no detriment, it is not necessary to make a determination in relation to the issue of time limits.

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Employment Judge R Harper

Date 8th February 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

8th February 2017

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FOR THE TRIBUNAL OFFICE

The Schedule

Case no.	Claimant
1400835/2016	Mr N Anderson
1400836/2016	Mr T Andrew
1400837/2016	Mr J Bailey
1400838/2016	Mr C Bartlett
1400839/2016	Mr C Benson
1400840/2016	Mr D Bevis
1400841/2016	Ms J Billett
1400842/2016	Ms C Bingham
1400843/2016	Mr J Birch
1400844/2016	Mr M Blunden
1400845/2016	Mr E Boyd
1400846/2016	Mr M Boyes
1400847/2016	Mr K Boyns
1400848/2016	Ms E Bramwell
1400849/2016	Mr J Brown
1400850/2016	Mr P Brown
1400851/2016	Mr C Button
1400852/2016	Mr S Byrne
1400853/2016	Mr S Charlton
1400854/2016	Mr I Chowney
1400855/2016	Mr D Clark
1400856/2016	Mr M Cole
1400857/2016	Mr M Cole
1400858/2016	Mr G Coleman
1400859/2016	Mr D Collett
1400860/2016	Mr D Costello
1400861/2016	Mr M Cox
1400862/2016	Mr M Crossan
1400863/2016	Mr J Crowther
1400864/2016	Mr M Davis
1400865/2016	Mr D Feek
1400866/2016	Mr J Fell
1400867/2016	Ms L Ferreira
1400868/2016	Mr A Finch
1400869/2016	Mr D Fowles
1400870/2016	Mr G Freemantle
1400871/2016	Mr C Gale
1400872/2016	Ms WY Gayton
1400873/2016	Mr D Gilbert
1400874/2016	Mr R Giles
1400875/2016	Mr J Godleman
1400876/2016	Mr R Gomm
1400878/2016	Mr HP Gurung
1400879/2016	Mr K Harding
1400880/2016	Mr R Haskings
1400881/2016	Mr P Hayden
1400882/2016	Mr GA Hern
1400883/2016	Mr V Higgins
1400884/2016	Mr D Hooper
1400885/2016	Ms H Howard

1400887/2016	Mr R Howbrook
1400888/2016	Mr S Hunter
1400889/2016	Mr P Jackson
1400890/2016	Mr D Japes
1400891/2016	Mr R Jennings
1400892/2016	Mr G Kavanagh
1400893/2016	Mr S Kimber
1400894/2016	Mr J Kisko
1400895/2016	Mr JK Lake
1400896/2016	Ms W Lamont
1400897/2016	Mr B Lawes
1400898/2016	Mr S Lawes
1400899/2016	Mr A Leahy
1400900/2016	Mr B Letts
1400901/2016	Mr D Lewis
1400902/2016	Mr D Lovelock
1400903/2016	Mr P Lucas
1400904/2016	Mr J Lynch
1400905/2016	Mr J Lynch
1400906/2016	Mr R MacAulay
1400907/2016	Mr J Malyon
1400908/2016	Mr P Manktelow
1400909/2016	Mr G Marlow
1400910/2016	Mr R Martin
1400911/2016	Mr R Martin
1400912/2016	Mr A Michie
1400913/2016	Mr TJ Miles
1400914/2016	Ms A Miller
1400915/2016	Ms K Miller
1400916/2016	Mr S Miller
1400917/2016	Mr L Mills
1400918/2016	Mr P Mills
1400919/2016	Mr S Mitchell
1400920/2016	Mr M Muir
1400921/2016	Mr D Mullaney
1400922/2016	Mr H Nadeem
1400923/2016	Mr P Newell
1400924/2016	Mr K Norton
1400925/2016	Mr J O'Leary
1400926/2016	Mr NJ Osman
1400927/2016	Mr G Painter
1400928/2016	Mr D Parker
1400929/2016	Mr N Parker
1400930/2016	Mr K Partner
1400931/2016	Mr D Peak
1400932/2016	Mr S Peel
1400933/2016	Mr D Pike
1400934/2016	Mr S Povey
1400935/2016	Mr A Powles
1400936/2016	Mr A Reed
1400937/2016	Mr J Richards
1400938/2016	Mr D Rogers
1400939/2016	Mr S Roles

1400940/2016	Mr S Rose
1400941/2016	Mr J Schwodler
1400942/2016	Mr R Seoane
1400943/2016	Mr J Shields
1400944/2016	Mr J Small
1400945/2016	Mr K Smith
1400946/2016	Mr G Smithson
1400947/2016	Mr B Stone
1400948/2016	Mr G Street
1400949/2016	Mr J Third
1400950/2016	Ms R Tighe-Near
1400951/2016	Mr J Townsley
1400952/2016	Mr L Traves
1400953/2016	Mr P Trussler
1400954/2016	Mr RJ Tuxworth
1400955/2016	Ms E Upton
1400956/2016	Mr SR Vear
1400957/2016	Mr A Vidler
1400958/2016	Mr D Vincent
1400959/2016	Mr A Watkinson
1400960/2016	Mr D Weavis
1400961/2016	Mr R Weston
1400962/2016	Mr MG Wetherick
1400963/2016	Mr R Willans
1400964/2016	Mr M Woods
1400965/2016	Mr S Wright