EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr L E Veintimilla Briceno	**OCS Group UK Limited**
Heard at: London Central	**On**: 25 – 27 January 2022 In chambers: 28 January 2022

Before: Employment Judge Lewis
Mr P Alleyne
Mr S Godecharle

Representation

For the Claimant: Mr S Bennett, UVW

For the Respondent: Ms R Kight, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that

1. The claim under section 145A TULRCA 1992 is upheld. The claimant was made an offer to transfer sites for a higher rate of pay, the sole or main purpose of which was to induce him not to take part at an appropriate time in the activities of an independent trade union.

2. A remedy hearing will be held on **22 February 2022** at 10 am.

3. The claim under section 145B TULRCA 1992 is not upheld.

4. The claim for an unauthorised deduction from wages is not upheld.

5. The claim for trade union detriment under section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 is dismissed on withdrawal.

SUMMARY

The claimant was employed by OCS as a cleaner on its MOJ contract at Petty France. He was an active and high profile member of his trade union, United Voices of the World. OCS opposed UVW's application for recognition at Petty France. At a crunch time in the recognition process, and when ballot arrangements were being discussed, OCS offered the claimant (and a colleague who was also active in the Union) a swift transfer to another MOJ contract at Old Admiralty Building where they would get paid the London Living Wage, which was a higher rate of pay. OCS said the claimant (and his colleague) were made the offer without general advertisement because they had previously expressed a desire to move to locations with higher rates of pay and because they already had SC security clearance. The tribunal decided that the sole or main reason for the offer was to induce the claimant not to take part in trade union activities, ie not to vote in the ballot, not to attend the access meetings and not to influence his colleagues to vote in favour of recognition.

REASONS

Claims and issues

1. The claimant brought claims for unauthorised deductions from wages, trade union inducements under s145A and s145B of the Trade Union and Labour Relations (Consolidation) Act 1992, and unlawful detriment under s146 of the Trade Union and Labour Relations (Consolidation) Act 1992.

2. The issues were agreed at the start of the hearing as follows:

<u>Unauthorised deduction from wages – s13 Employment Rights Act 1996</u>

2.1. What was the claimant's contractual rate of pay? Was it £9 or £9.14/hour or was there a binding contractual agreement with effect from 1 November 2019 to increase it to the London Living Wage, which at the date of the agreement relied upon was £10.55/hour and increasing to £10.85/hour with effect from 11 November 2020? The claimant relies on a signed contract to t his effect dated 10 October 2019.

2.2. How much is owed to the claimant, if anything?

<u>Unlawful inducements – section 145A TULRCA 1992</u>

2.3. Was the claimant made an offer to transfer sites for a higher rate of pay for the sole or main purpose of inducing him:

2.3.1. not to be or seek to become a member of an independent trade union

2.3.2. not to take part, at an appropriate time, in the activities of an independent trade union
2.3.3. not to make use, at an appropriate time of trade union activities?

Unlawful inducements – section 145B TULRCA 1992

2.4. Was an offer made to the claimant to transfer from the Petty France site to a different site, leaving the proposed bargaining unit, in exchange for an increase in pay to the London Living Wage?

2.5. Would acceptance of that offer, together with other workers' acceptance of offers which the respondent also made to them, have the prohibited result, ie that the terms and conditions of employment of OCS workers at the Petty France site would not be determined by collective agreement negotiated by or on behalf of the Union

2.6. Was the respondent's sole or main purpose in making the offers to achieve that result?

Unlawful detriment – section 146 TULRCA 1992

2.7. Was the claimant subjected to the detriment of delay to his start date at the new site at a higher rate of pay?

2.8. If so, was the detriment for the sole or main purpose of:
2.8.1. Preventing or deterring the claimant from being or seeking to become a member of an independent trade union, or penalising him for doing so; or
2.8.2. Preventing or deterring the claimant from taking part in the activities of an independent trade union, at an appropriate time, or penalising him from doing so, or
2.8.3. Preventing or deterring the claimant from making use of trade union services, at an appropriate time, or penalising him for doing so?

Procedure

3. The tribunal heard from the claimant and, for the respondent, from Mr Melo, Ms MacDuff, Ms Lumley, and briefly, from Mr Latilo and Mr Pearce. There was an agreed trial bundle, which was divided into three electronic bundles. This made things difficult. The hard copy numbers did not match the electronic numbers, and the references in witness statements to document numbers were only those of the hard copies.

4. There was also a witness statement bundle. Mr Melo's witness statement was in Portuguese and had been translated. A short supplementary bundle was provided early on day 1 containing photos of the claimant in certain past trade union activities. There was also a chronology and Ms Kight provide written closing submissions.

5. The respondent provided the claimant with a hard copy of the bundle at the start of day 2. During day 1, if it was necessary to refer to a document in the electronic bundle, this was shown on shared screen and the relevant part was read out.

6. The claimant's first language is English, although he understands some English and Portuguese. A Spanish interpreter attended to help the claimant (Mr J Alatsas on day 1 and Mr P Schunemann on the remaining days). As requested by the claimant, the interpreter interpreted when the claimant was giving evidence, but the remaining time was simply available in case the claimant did not understand anything.

7. A Portuguese interpreter (Ms M Jefferies) attended to assist Mr Melo. Mr Melo only asked for her assistance on one or two points when he was giving evidence. He said he did not need her to remain after that. She was therefore not required to attend after the end of day 2.

8. The claimant withdrew the unlawful detriment claim at the start of day 3 in the light of the evidence which had been given on days 1 and 2. He agreed to it being dismissed on withdrawal.

Fact findings

9. The respondent 'OCS' is an outsourcing company which provides facilities management and property services for private and public sector clients. OCS has provided cleaning, security, catering and porterage services to the MOJ since January 2018, including at the Petty France premises.

10. The claimant started his employment on 10 November 2014 with Amey. He was transferred under TUPE to the employment of OCS on 23 January 2018. The claimant was employed as a cleaner at Petty France. OCS employs about 83 staff members altogether at the Petty France building including about 29 staff members in the cleaning team. The claimant's supervisor from the outset was Mr Melo, the Soft Services Supervisor.

11. At the time of the transfer from Amey, Ms MacDuff was the Building Manager. She was responsible for managing all the services at Petty France for OCS. She was also the main point of contact with the client (MOJ). Ms MacDuff reported to the regional manager for Westminster, Mr Gilmour.

12. The claimant 's hourly pay was £6.47 when he started. It gradually increased until it was £9 in 2019 and £9.14 from April 2020.

<u>Union activities</u>

13. The claimant joined the United Voices of the World trade union ('the Union') in 2017, and he became active very quickly. He was a high profile member of the Union. In December 2017, with the Union's support, he launched a campaign for cleaners at the MOJ to be paid the London Living

Wage ('LLW'). He helped promote a strike which took place in August 2018. This received publicity. A photo of striking cleaners (including the claimant) was featured in an article on the BBC News website.

14. OCS accepts that the claimant was a member of the Union at all material times, took part in its activities and made use of its services.

15. Ms MacDuff was aware from before 2019 that the claimant and his colleague Carlos were trade union members and had been involved in strikes. She knew they were passionate about pay and workers' rights, and had taken part in the strike. In the tribunal, she would not concede that they were the two most prominent members of the Union at Petty France, but she was unable to give the names of anyone else who she knew was a Union member. Ms MacDuff said she believed Mr Gilmour would also have been aware that the claimant and Carlos were members of the Union.

16. The Union applied for formal recognition in respect of workers at Petty France in June 2019, having failed to secure voluntary recognition. OCS opposed the recognition application. The sequence of events is set out later in this decision, as the claimant says that his treatment in respect of a proposed transfer was essentially to get him out of the way and prevent him influencing the recognition ballot.

Old Admiralty Building ('OAB')

17. As a preliminary observation, we should say that we faced difficulties in establishing certain facts because of a lack of transparency in the respondent's evidence. Mr Melo and Ms MacDuff were vague in their evidence and Mr Gilmour, a key figure, did not give evidence at all. This was accompanied by a lack of documentation in the trial bundle concerning the date OCS signed the contract with the client for OAB; when it was to start work; and what was anticipated in terms of the state of building works. There was a lack of documentation regarding activity in the lead-in period; and emails and SMIs, which we told must exist, evidencing when relevant activities should come on stream and subsequent delays were not shown to us. A SMI (Service Management Instruction) is a document from the client informing OCS that a building is coming on line and it is necessary to mobilise.

18. The most we were shown was a list of SMIs with notification and start dates ('the SMI list'). We did not see the SMIs themselves. We do not know what they said. We did not see any contextualising emails. Not only did we not hear from Mr Gilmour, we did not hear anyone else from senior management or HR who might have known what he knew. Mr Bennett was forced to put key questions about what Mr Gilmour knew to witnesses who had no first-hand knowledge about it.

19. It appears that in around October 2018, OCS was awarded a new contract to provide facility services to Old Admiralty Building ('OAB'), another of the MOJ's properties. We were not shown any confirmatory document of this, but

we will accept the oral evidence, as it is probable that the contract would have been awarded in advance of its start date. We do not know what the projected start date was. The building was derelict and major refurbishment works were underway.

20. OAB was managed by the Government Property Agency ('GPA') which is a sub-contractor to MOJ Estates, which managed Petty France. The Union is not recognised at OAB.

21. Ms Lumley was recruited by OCS in October 2019 and started in December 2019 as Building Manager for OAB. The building was still in a derelict state when she started. She was initially based elsewhere. Prior to her recruitment, Mr Gilmour was in charge of mobilising the contract and having meetings with the client.

22. The first the claimant knew of any possible transfer to OAB was when he was approached by Mr Melo in late September 2019. Mr Melo made a similar approach to Carlos at the same time.

23. Mr Melo was asked by Mr Gilmour in late September 2019 for two cleaners who would be able to work at the OAB from 1 November 2019. Because of the need to find people quickly, the cleaners should have SC security clearance. Mr Gilmour said that the pay at that site would be at the level of the London Living Wage.

24. We were not shown any contemporaneous document indicating why 1 November 2019 was to be the start date or why that had become clear suddenly in October 2019. However, we did see a list of all SMIs for Phase 1. The first on the list was an SMI dated 25 October 2019, with a start date of 16 November 2019.

25. Mr Melo spoke to Ms MacDuff, before approaching the claimant and Carlos.

26. Mr Melo says he was not told by anyone who to select. We do not accept this evidence. Mr Melo's evidence, as we have already stated, was very vague and he answered many questions by saying he could not remember. He said he could not remember the date of the conversation with Mr Gilmour or the specifics of the conversation and he had taken no notes. Further, he did not mention that he had spoken to Ms MacDuff before approaching the claimant and Carlos, yet she says that he did.

27. Mr Melo only approached the claimant and Carlos. He says he could not advertise on the usual internal programme because as a new building, OAB, was yet on the system. He accepted he could have put a notice on the notice board.

28. Mr Melo says the reason he only approached the claimant and Carlos was that they had previously asked him on several occasions to move to another site at a higher rate of pay. He says he was just trying to help.

29. The claimant accepts that he was always expressing his feeling that he should be paid at a higher rate, ie the LLW, and that in the past, he had asked to move to a site paying the LLW. However, he did not believe that Mr Melo would have offered him this opportunity for that reason because in general, Mr Melo had not offered him opportunities to move to a porter position, which would be expected given his seniority. We will come back to our finding on the motives of the offer to the claimant in our conclusions.

30. After the claimant and Carlos had accepted the offer, Mr Melo told them not to mention it to anyone else because there were only two vacancies and others might be jealous.

31. Much is made in the respondent's witness statements (including Mr Melo's) about the fact that cleaners at OAB would need SC security clearance and that, since this could take many months to obtain, another strong reason for selecting the claimant and Carlos was that they already had such clearance. In his oral evidence, Mr Melo placed very little weight on that reason.

32. A large number of Petty France cleaners, as well as the claimant and Carlos, had SC security clearance. Mr Melo, who was Security Team Lead at some point, estimates that very approximately 50% of the Petty France cleaners at the time had that clearance, which would mean 15 or 16 people. Ms MacDuff said she thought that very unlikely and that the maximum was likely to be 10. She could not back that up with any firm statistics. While we would not hold Mr Melo to 50%, we think his estimate was likely to be more accurate. He was the hands on supervisor with day-to-day control over their work. He understands the picture on security clearance because either then or at some point since, he became Security Clearance Lead (another date which he was unable to remember, even approximately). In any event clearly the claimant and Carlos were not the only two.

33. Mr Melo was aware that the claimant and Carlos were both active Union members and that the issue of pay was a particular issue.

34. On 10 October 2019, Mr Melo submitted to the HR Service Centre an electronic form entitled 'Formstack Submission For: Managers Change Request Form'. This noted OAB as 'Contract Name' and for 'Type of change being made' it noted 'contract change, basic pay, working times'. The hourly rate was noted as 10.55. Total contracted hours were noted as 40. At the bottom it said, 'I have read, understood and agree to the variation of my terms and conditions of employment as contained in this form'. It was signed by the claimant. Underneath, it was signed by Mr Melo as his line manager.

35. On 30 October 2019, Mr Melo emailed the HR Service Centre to 'cancel the request below' because OAB was not going to be ready on 1 November 2019 and they did not yet have the correct date. He said the claimant would meanwhile stay at Petty France.

36. This was the first of several delays to the start date at short notice from the client caused by difficulties with the refurbishment. We were not given any more precise details other than the list of SMIs.

37. Shortly before 1 November 2019, not having heard anything about his move since signing the document, the claimant asked Mr Melo what was happening. Mr Melo said there had been a delay. He did not yet know the new date, but it would probably be December.

38. The claimant approached Mr Melo again in December. Mr Melo said he had heard nothing more, and he would let him know when he had news. There was a similar conversation in January 2020, when Mr Melo indicated the move would probably take place in February 2020.

39. In January 2020, Ms Lumley met the claimant and Carlos regarding the proposed move. The claimant understood this just to be an informal introduction on a move which he was expecting to go ahead.

40. Delays continued and the claimant continued to ask Mr Melo when the move was happening. In March 2020, the pandemic hit the country. The claimant contracted Covid-19 and was very ill. He was off work with Covid-19 and then with stress. He returned to work on 2 June 2020.

41. On 28 May 2020, Ms Lumley emailed Ms MacDuff and Mr Melo as follows:

> '..Some time back it seems like ages ago we had a talk about two staff members that may be interested in join me at OAB. Can you please let me know if this is still on the cards if so then will it be temp, temp to permanent? As much as building my own crew sounds tantalising and I have a pick of the bunch I am also a firm believer of using who we have especially if they are good (not so much the bad eggs, please don't pass over any bad eggs!)
> Talk some more when I know where you and Roz stand with your teams.'

42. Mr Melo replied later that day, 'Yes these two guys are good and they are very excited for the change. Please could you tell me the date they will be starting with you?'

43. On 19 June 2020, the claimant received the following letter dated 17 June 2020, which had been posted to him from Ms MacDuff:

> 'I write further to your application to transfer to the Old Admiralty Building (OAB). I am pleased to confirm that you have been successful with your application. Your transfer date will be the 23rd June 2020. You will report to Ms Lumley…'

44. Although the letter stated 'application', Ms MacDuff said she was using a standard template, which was then checked by HR.

45. Around this time, the claimant became aware that his colleagues had been invited by OCS to an access meeting to be held at 10 am on 22 June 2020 as part of the recognition process. He thought it was strange that he had not received an invitation. The claimant mentioned this to his Union who took the matter up (see below).

46. The claimant went ahead and attended the meeting anyway. A few hours later, the claimant was called to the office with Mr Melo and Ms MacDuff. They told him his move had been delayed again until 16 July 2020. They said that as the move was not happening, they needed to give him a letter inviting him to one of three access meetings. (The first such meeting was the one that had just taken place.)

47. The reason the transfer did not go ahead on 23 June 2020 as planned was because of further delays with the building. The list of SMIs shows an SMI Update of 12 May 2020 giving the start date of 23 June 2020, followed by an email/SMI Update of 16 June 2020 giving a start date of 16 July 2020.

48. Ms MacDuff confirmed to the claimant in a letter on 25 June 2020 that the planned transfer due to take place on 23 June had been postponed. She said she could not yet confirm the new date of transfer, but she would do so on client notification. Meanwhile the claimant would continue to work at Petty France. The claimant was distressed that, having been told at the meeting that the new date was16 July, the confirmation email said no date could yet be confirmed. The claimant began to wonder whether the move would ever happen. He decided to cease chasing for projected dates as he was constantly let down, and the constant expectations and disappointments were impacting his mental health.

49. On 3 September 2020, the claimant submitted a formal grievance regarding a number of matters, including those which were the subject of these proceedings and the delayed move to OAB. The grievance also said that the claimant was owed a shortfall in wages since 1 November 2019.

50. At the time of the grievance hearing on 22 September 2020, the claimant still had not been given any new date for the move.

51. The grievance outcome letter was dated 22 October 2020. The grievance officer was Mr Latilo. He said that the claimant's move would take place on 21 April 2021, and meanwhile there was a temporary cleaner role available at OAB which the claimant could take up until he was made permanent in April. The claimant was told that if the client removed the temporary role at any point, the claimant would return to Petty France and would revert to his Petty France terms and conditions. Meanwhile his post at Petty France would not be replaced by a permanent employee. The claimant was asked to state whether he wanted the interim post by Monday 26 October 2020.

52. The claimant rejected the interim role. After what had happened, he was anxious that if he gave up his permanent post at Petty France, he might find himself with no job at all.

53. The claimant appealed against the grievance outcome. His appeal was rejected by letter dated 27 May 2021.

54. Meanwhile, on 14 April 2021, the claimant's wife telephoned Mr Mason, who had taken over Ms MacDuff's role as Area Facilities Manager, and asked for the move to take place to OAB as soon as possible. Mr Mason had not been informed that the claimant was to move there and said he would look into it. In about May 2021, a colleague of the claimant's at Petty France was moved to a full-time cleaning position at OAB. On 26 May 2021, Mr Mason confirmed that he had looked into the matter and the claimant would be able to transfer with effect from 1 June 2021. The claimant did finally move over on 1 June 2021.

55. The claimant believes that OCS lost all interest in facilitating his move once the recognition ballot was concluded on 28 July 2020 (see below).

Union recognition

56. Going back, the sequence of events regarding the application for recognition was as follows.

57. In about August 2018, OCS refused the Union's request for voluntary recognition of cleaners and security guards working on the MOJ Petty France contract. On 7 June 2019, the Union made a statutory recognition request to the Central Arbitration Committee ('CAC'). OCS submitted its response on 17 June 2019. On 12 July 2019, the CAC accepted the Union's application. The parties then entered a period of negotiation. No agreement was reached between the Union and OCS as to the appropriate bargaining unit, so a hearing was held on 27 August 2019, which decided that the appropriate bargaining unit was all workers other than management and administrative staff employed by OCS and working on the MOJ contract at Petty France.

58. On 10 September 2019, OCS agreed to the CAC's proposal that they proceed with a membership check to clarify the number of workers within the bargaining unit and how many of those were members of the Union. On 23 September 2019, the Union wrote to the CAC complaining that the workplace had been artificially stacked with non-union members and that undue pressure had been placed on members in a meeting on 17 September 2019 and in subsequent one-to-ones. Also on 23 September 2019, OCS wrote to the CAC saying that as only 36 out of 74 workers in the bargaining unit were Union members, the CAC must hold a secret ballot.

59. On 10 October 2019, the CAC wrote to the parties giving its decision that there should be a postal ballot. OCS wrote to the CAC on 17 October 2019, requesting a reconsideration of the decision to have a secret ballot. It said it was concerned that workers were being pressured to support the Union by being presented with documents to sign which they did not understand. OCS

attached a statement from an employee complaining that cleaners had been approached by 'Carlos' and asked to 'just sign'.

60. Senior management, including Mr Gilmour, would have known about the Union's application for recognition from the outset. Mr Melo and Ms MacDuff were vague about the exact date when they became aware. They suggested they became aware of it around the time of the ballot and presentations, but said they were not aware of it in Autumn 2019. We have doubts about this. We did not have much confidence in Mr Melo's evidence because it was extremely vague. He consistently said he could not remember matters which were so long ago. We were not confident around Ms MacDuff's evidence around these matters either. For example, she tried to say that she would not have known that the claimant and Carlos were two of the Union's most prominent members at Petty France, yet she conceded she had known them by name and was unable to identify any other Union members who she knew by name in 2019. In September / October 2019, discussions had reached the stage of bargaining units, membership checks, and ballots. Matters were heated. It would be surprising if at that point the Building Manager and local supervisor had no idea about what was going on. We find that on the balance of probabilities, Ms MacDuff and Mr Melo became aware at least in September 2019 that a recognition ballot was being planned.

61. We do not have information regarding what happened over the next 8 months, although it is possible the outbreak of the pandemic slowed matters down.

62. On 17 June 2020, the CAC emailed the Union to say that it had that day been advised by OCS that two employees in the bargaining unit were leaving OCS on 23 June 2020 and therefore needed to be removed from the list provided to them. The Union wrote to the CAC on 18 June 2020, complaining about unfair practices by OCS in respect of the bargaining unit. It complained specifically that OCS had decided to move at least two Union members who worked at Petty France to a different site at a critical point during the statutory recognition process. The two individuals were the claimant and Carlos. The Union said they had each been offered a transfer to OAB, which had better terms and conditions, when the vote was originally supposed to take place. The vote did not take place then and they were not transferred. They then received letters on 17 June 2020 stating their application to transfer to a different site was successful and giving a transfer date of 23 June 2020. The first access meeting had been planned for 22 June 2020.

63. OCS submitted a response to the complaint on 25 June 2020. It stated that an opportunity for two cleaners at OAB was made available in September 2019. The submission included the following from the timeline:

- 'As the rate of pay is higher, a decision was taken to offer this opportunity in the first instance to all existing OCS staff currently employed on the MOJ contract at Petty France prior to seeking external resources.

- Carlos and [the claimant] both expressed an interest. Their appointments were verbally confirmed in October 2019 and paperwork prepared to confirm these positions in October 2019 confirming a start date 1st November 2019. However this process was put on hold as a start date was delayed due to ongoing refurbishment work.'

OCS stated that after various postponements, the new date was now 16 July 2020. It said it had then required the two staff members to be reinstated on the staffing list.

64. We note at this point that it was not true that the opportunity had been offered to all existing staff. It had only been offered to the claimant and Carlos, as explained elsewhere in this decision.

65. By letter dated 22 June 2020, the CAC informed the Union that it would take no further action in regard to the complaint as it had been resolved by the reinstatement of the two workers to the list of workers within the bargaining unit.

66. The ballot was eventually held. The results certified on 28 July 2020 showed that 82 employees were entitled to vote. 51 votes were cast of whom 34 said yes, they wanted recognition. This meant that 41.46% of those eligible to vote and 62.20% of those who actually voted were in favour of recognition. The required threshold was 40% and 60% respectively.

67. Despite what the OCS's witnesses tried to assert, this was obviously a very fine margin. Had the claimant and Carlos remained outside the bargaining unit at the time of the vote, all else remaining the same, the vote would have been 32 out of 80 ie 40% of those eligible to vote. Had the claimant and Carlos been replaced, and we were told it would have been necessary to replace them, it is possible that new recruits would have felt it was too early to vote or that they would have voted against recognition, in which case the recognition application would have failed the ballot.

Law

68. Under s13(3) of the Employment Rights Act 1996, where the total amount of wages paid on any occasion by the employer to a worker is less than the total amount of the wages properly payable to the worker on that occasion, the amount of the deficiency shall be treated as a deduction from the worker's wages. 'Properly payable' means there must be a legal entitlement to the wages.

69. Section145A of the Trade Union and Labour Relations (Consolidation) Act 1992 states, so far as is relevant:

(1) A worker has the right not to have an offer made to him by his employer for the sole or main purpose of inducing the worker—

(*a*) not to be or seek to become a member of an independent trade union,

(*b*) not to take part, at an appropriate time, in the activities of an independent trade union,
(*c*) not to make use, at an appropriate time, of trade union services, or …

(4) In subsections (1) and (2)—
(*a*) 'trade union services' means services made available to the worker by an independent trade union by virtue of his membership of the union, and
(*b*) references to a worker's 'making use' of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

70. TULR(C)A 1992 s145B(4) states that having terms of employment determined by collective agreement shall not be regarded for the purposes of section 145A … as making use of a trade union service.

71. TULR(C)A 1992 s145B states, in so far as is relevant:
(1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if—
(*a*) acceptance of the offer, together with other workers' acceptance of offers which the employer also makes to them, would have the prohibited result, and
(*b*) the employer's sole or main purpose in making the offers is to achieve that result.
(2) The prohibited result is that the workers' terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.
(3) It is immaterial for the purposes of subsection (1) whether the offers are made to the workers simultaneously.

72. Ms Kight submitted that s145B could not apply in this case because offers need to be made to at least two other workers in addition to the claimant because s145B(1) refers to 'workers' in the plural and to 'them'. She said this is logical because s145B is aimed at a collective issue. Mr Bennett said this was to take too literal an approach to the wording of the section and that the drafting could be intended to include the singular as well as the plural position. We were caught somewhat by surprise by this argument, which was raised for the first time before us at the end of the respondent's closing submissions. Nevertheless, we note that the commentary in the IDS Handbook, which Ms Kight referred us to, albeit not as a definitive authority, and in Harvey, agree with Ms Kight's position. There does not appear to be any case law on this point. Looking at the drafting, we agree that the clear plural wording does envisage more than one other person in addition to the claimant. Although it is a little surprising that the section should encompass offers to as few as three people, but not to two, we do not think we can go behind that wording. There may be arguments under the European Convention of Human Rights that this is insufficient protection of an individual's right to have their terms and

conditions negotiated by a trade union. However, no such argument was put to us in this case, and we have no idea whether it would succeed.

Conclusions

Unauthorised deductions from wages

73. The claim is for the difference between what the claimant did get paid from 1 November 2019 and what he would have been paid under the London Living Wage. The claimant argues there was a contractual agreement on 10 October 2019 to pay him the LLW with effect from 1 November 2019.

74. The first question is whether there was such a contractual agreement between Mr Melo on behalf of OCS, and the claimant on 10 October 2019. The claimant argues that the Formtrack submission was evidence of and amounted to a contractual agreement. The respondent argues that it was simply a change request form.

75. We find that it was a contractual agreement. The form itself sets out the terms and conditions including a start date. It is signed by both the claimant and Mr Melo, the claimant's line manager. Where the claimant is required to sign, it states 'I have read, understood and agree to the variation of my terms and conditions of employment as contained in this form'. It does not state anywhere that this is subject to ratification. The claimant was not told it was subject to approval. Further, Ms MacDuff gave evidence that no other documents are usually issued to an employee on change of contract terms. We find that Mr Melo made an offer to the claimant of transfer to OAB on 1 November 2019 where he would be paid the LLW. The claimant accepted that offer by signing the form.

76. We then considered whether there were independent contractual agreements for a transfer to OAB and for a pay rise, or whether the pay rise was essentially contingent on the transfer. We believe the position was the latter. Although the document does not explicitly say this, it is a natural reading of it. The 'contract name' refers to the client contract, and is recorded as 'Old Admiralty Building'. The document refers to 'moving from one contract to another' which we interpret as meaning, moving from the Petty France contract to the OAB contract. It would not make sense if it was referring to moving to a different contract of employment because by definition, the form was concerned with changes to the contract of employment. Within that context, the list of type of change being made as 'Contract change, basic pay, working times' is naturally read as contract change (ie Petty France to OAB) entailing change of pay and working times (ie the pay and working times which apply at OAB). This interpretation is not surprising. Both the claimant and Mr Melo understood that the change in pay was the result of the change in client contract / location. The LLW was paid on the OAB contract. It was not paid on the Petty France contract. Indeed, when the claimant subsequently kept chasing up on the agreement, he was asking when he would move. He was not asking in the first instance when he would get his pay rise.

77. Mr Melo unilaterally cancelled the agreement to transfer to the OAB contract on 1 November 2019. The claimant did not agree to that cancellation. The result was that the claimant lost pay. He would be entitled to make a claim for breach of contract for damages. However, as he is still an employee, he cannot make such a claim in the employment tribunal. He can only claim for an unauthorised deduction from wages. But he cannot succeed in his claim for unauthorised deduction from wages because the LLW never became due until he moved. He worked at Petty France and was therefore only entitled to be paid at the Petty France rate. His claim for an unauthorised deduction from wages therefore fails.

Unlawful inducements – sections 145A TULRCA 1992

78. There is no dispute that an offer was made to the claimant to transfer to OAB on 1 November 2019, where he would receive a higher rate of pay ie the London Living Wage. The dispute concerns what was the sole or main purpose o the offer.

79. The claimant says the purpose of the offer was to remove him from the site so that he would not be able to vote on the forthcoming ballot for trade union recognition and/or would not be able to attend the access meetings and /or would not be able to persuade his colleagues to vote for recognition in the ballot. OCS denies this and says the sole purpose was to swiftly find suitable cleaners for the new site and that he was chosen because he already had SC clearance and because he had previously expressed a desire to move to a location with higher pay.

Section 145A(1)(a): inducement not to be a member of an independent trade union

80. We do not find the purpose of the offer was to stop the claimant being a trade union member. Although UVW was not recognised at OAB, moving to OAB would not prevent him being an active trade unionist. However, it would stop him being on the spot to vote and influence the vote at Petty France. This falls under the category of 'trade union activities', which we address below.

Section 145A(1)(c): inducement not to make use of trade union services

81. We do not find the purpose was to make use, at an appropriate time of trade union services. Section 145B(4) says that 'services' does not include having terms of employment decided by a collective agreement. These were the services referred to in this case. The claimant did not identify any other type of union service that the offer was designed to stop him making use of.

Section 145A(1)(b): inducement not to take part if trade union activities

82. We find that OCS made the offer to transfer on more pay for the sole or main purpose of inducing the claimant not to take part, at an appropriate time, in the activities of an independent trade union. Voting in a recognition ballot,

attending the access meetings and seeking to persuade colleagues to vote for recognition would each constitute trade union activities. Indeed, OCS did not put forward any argument that they did not. The argument was simply that this was not its purpose.

83. We noted that on the one hand, the offer to the claimant and subsequent conduct did indeed coincide with what was happening at OAB and outside the control of OCS. On the other hand, the timing also coincided very precisely with events in the Union recognition process. We therefore examined the timing and surrounding circumstances very carefully.

84. There are a number of matters which point towards our conclusion. OCS was vehemently opposed to recognition. There were allegations and counter-allegations in the process before the CAC. This is of course nowhere near enough evidence on its own, but it provides context.

85. We note also that a very similar offer was made at the same time to Carlos. The claimant and Carlos were the two most vocal and active members of the Union based at Petty France. They were the only two whom Ms MacDuff could name. They had appeared in national news coverage when there was a strike a few years earlier.

86. Usually vacancies would be advertised on the internal system. If that had not been set up yet because it was a new building, Mr Melo accepted he could have sent round and email of advertise the vacancies on a staff notice board. Instead he made direct approach to two individuals and told them to keep the offers secret so that other staff would not find out.

87. One of the two explanations given was that OAB needed staff who already had SC level security clearance so that they could quickly be transferred. A great deal was made of this in the respondent's witness statements. But Mr Melo put very little emphasis on this in his oral evidence. Under questioning, he estimated that perhaps 50% of the cleaners would have had SC clearance. While this was a very rough estimate, that would still mean a large number of cleaners additional to the claimant and Carlos. Ms MacDuff sought to persuade us it was unlikely to be so many and she would imagine it would be a maximum of 10%. She had no real ground for this other than saying the requirement to give personal family details made it unlikely it would cover many more. We found her attempt – without evidence – to provide a percentage so much less than Mr Melo unconvincing. Mr Melo was the one who has experience as Security Team Lead. We find the putting forward so strongly of a reason which does not stand up to examination to be another matter from which we might draw an inference.

88. The main reason put forward to us for the initial selection of the claimant and Carlos was that they had made requests in the past to move somewhere where the LLW was paid. However, it does not strike us as likely that Mr Melo would have offered them the move and told them to keep it secret, just to be nice to them. It is not consistent with the way the claimant was treated after the initial offer, whereby he was kept continually in the dark, had to chase for

updates himself, and ultimately had to push for the move to happen at all. We further lack confidence in the reason because of the vagueness of Mr Melo's evidence. Mr Melo constantly said that he could not remember. He could not recall whether there were any written communications from Mr Gilmour about security requirements for the cleaners. He could not recall whether there were any documents at all about his reasons for choosing the claimant and Carlos. He could not remember whether Mr Gilmour had given him the start date of 1 November. He could not remember why it was necessary for people to start quickly.

89. Both reasons given by OCS are also inconsistent with the explanation given by OCS to the CAC in response to the complaint on 25 June 2020, ie that a decision was taken to offer this opportunity in the first instance to all existing OCS staff currently employed on the MOJ contract at Petty France prior to seeking external resources, and the claimant and Carlos both expressed an interest.

90. We were also struck by the dates and a series of coincidences. Mr Gilmour was aware of the Union recognition process and on the balance of probabilities, we have found that Mr Melo and Ms MacDuff were aware of it in the Autumn of 2019. All three of them were aware that the claimant (and Carlos) were high profile members of the Union.

91. The claimant and Carlos were asked in late September / early October 2019 if they would like to move to OAB, where they would be paid the LLW. The start date would be 1 November 2019. The change form was signed on 10 October 2019. On 10 September 2019, the CAC had suggested proceeding with a membership check of number of workers and union members in the bargaining unit. On 23 September 2019, the Union wrote to the CAC complaining that the workplace had been artificially stacked with non-union members and that undue pressure had been placed on members in a meeting on 17 September 2019. Also on 23 September 2019, OCS said there should be a secret ballot. On 10 October 2019, the CAC notified the parties there would be a postal ballot, and on 17 October 2020, OCS wrote to the CAC expressing concern that workers were being pressured to support the Union by being presented with documents to sign which they did not understand. OCS attached a statement from an employee complaining that cleaners had been approached by 'Carlos' and asked to 'just sign'. The offers to the claimant and Carlos therefore took place at the precise time when the CAC was pushing steps in the recognition process and arranging a membership check. It happened at the same time that members were allegedly being put under pressure by the employer. And shortly before OCS showed concern that workers were being pressurised to support the union.

92. We considered whether this was nevertheless a coincidence of timing. However, we were not convinced as to why OCS sought to move any cleaners at that particular time and so quickly. The first SMI was not until 25 October 2019 and it gave a start date of 16 November 2019. Why was OCS requiring the claimant to sign documents with a start date of 1 November 2019 before a SMI had even been received? Why was it such a hurry at that

point? And when the SMI did come through with a date of 16 November 2019, why was the claimant not immediately told of the postponement? We were not shown any contemporaneous documentary evidence as to why the 1 November 2019 date was chosen. We did not hear from Mr Gilmour and Mr Melo said he could not remember hat he was told.

93. The Union process appears to have been in abeyance from then till June 2020. Ms MacDuff sent the claimant a letter on 17 June 2020 confirming he had been 'successful' with his 'application' and that his transfer date would be 23 June 2020. We note there was an SMI issued on 12 May 2020, giving a 23 June 2020 start date. OCS notified the CAC on 17 June 2020 that two employees in the bargaining unit were leaving OCS on 23 June and therefore needed to be removed from the list provided to them. OCS then issued letters to employees in the bargaining unit inviting them to a choice of three access meetings, the first of which was 22 June 2020. The claimant was not provided with an invitation. The Union complained to CAC on 18 June 2020 about unfair practices. The claimant attended the access meeting on 22 June 2020 anyway, and was told afterwards by Mr Melo and Ms MacDuff that the move had been delayed again until 16 July 2020, so they needed to give him the invitation letter to the access meetings.

94. Again we find the coincidence of dates striking. Although objectively 23 June 2020 was a start date given by an SMI, there had been no such formal letters regarding the transfer at any of the earlier dates. Moreover, the claimant was given only 6 days' notice, despite the fact that the SMI was issued on 12 May 2020. We note that OCS were assiduous to inform CAC immediately that the claimant and Carlos were no longer in the bargaining unit. We also note that the 23 June 2020 start date was postponed by an email/SMI Update of 16 June 2020 giving a start date of 16 July 2020. Even if we give the benefit of the doubt and say that had not immediately filtered through to those issuing the invitations to access meetings, we would have expected the postponement to have been known before 22 June 2020.

95. The final point we note in relation to dates is that after the successful ballot on 28 July 2020 and the end of the process, OCS showed no real urgency to put through the claimant's move. Indeed, it only happened after the claimant lodged a grievance and pushed the matter.

96. The documentation shows that the issue of pressure by the Union on members to vote in favour of the ballot was very much in OCS's mind. OCS also knew that the claimant and Carlos had been key figures in the strike a few years earlier. OCS is bound to have seen them as two figures who might influence colleagues to vote in favour of recognition.

97. Finally, we note the overall lack of transparency in terms of documents disclosed and witness evidence, much of which was extremely vague. We did not hear from Mr Gilmour or from anyone who knew first hand what he had in mind. Mr Melo said he could not remember much about what Mr Gilmour told him. Mr Melo did not mention a conversation with Ms MacDuff which Ms MacDuff said took place before Mr Melo approached the claimant and Carlos.

Unlawful inducements – sections 145B TULRCA 1992

98. As already stated, it is accepted that an offer made to the claimant to transfer from the Petty France site to a different site where he would earn a higher wage, ie the London Living Wage.

99. Section 145B requires offers also to be made to other workers (plural) which they accept. A similar offer was made to Carlos (one other worker), but we were not told of offers to anyone else. Therefore the claim under section 145B cannot succeed and it is not upheld.

Employment Judge Lewis
31st Jan 2022

Judgment and Reasons sent to the parties on:

31/01/2022.

For the Tribunal Office