Appeal No. UKEAT/0027/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 14 May 2014
Judgment handed down on 14 August 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

(SITTING ALONE)

SERCO LTD — APPELLANT

MR Z DAHOU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK SUTTON (One of Her Majesty's Counsel) Instructed by: Cater Leydon Millard Ltd 68 Milton Park Abingdon Oxfordshire OX14 4RX
For the Respondent	MS LOUISE CHUDLEIGH (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1N 3LW

SUMMARY

TRADE UNION ACTIVITIES – Detriment and dismissal

Employment Tribunal failed to consider Respondent's explanations for detrimental treatment/principal reason for dismissal on the causation issues in s.146 and 152 **Employment Rights Act 1996** in relation to participation in the activities of an independent trade union at an appropriate time; erred in its approach to the burden of proof; took too broad brush an approach to the trade union activities in question, failing to address whether they were at an "appropriate time"; and drew inferences without proper evidential basis to support them. Case remitted to differently constituted ET for fresh consideration.

MRS JUSTICE SIMLER DBE

Introduction

1. This is an appeal against the judgment and Reasons of an Employment Tribunal sitting at London Central comprised of Judge Glennie, Mrs Hills and Mr Javed, promulgated on 30 August 2013 ("the Reasons"). Mr Dahou was employed by Serco Limited for a little over two years and was dismissed for what Serco Limited said was gross misconduct. He said that this was an excuse or pretext and the real reason for his dismissal was his membership or participation in trade union activities. He relied on a series of alleged detriments (done for the same improper purpose) culminating in his suspension and the misconduct investigation leading to his dismissal. By its judgment, the Employment Tribunal upheld Mr Dahou's claim that he had been subjected to detrimental treatment relating to his suspension and misconduct investigation, and automatically unfairly dismissed, on grounds relating to his participation in trade union activities. It rejected other claims of detriment and there is no cross appeal in relation to these conclusions. The Tribunal made no findings in relation to ordinary unfair dismissal.

2. Serco Limited appeals against the findings of unlawful detriment and automatically unfair dismissal. Permission to appeal was granted by His Honour Judge Peter Clark on the basis that each of the 12 grounds of appeal raised reasonably arguable points of law. Serco Limited relies on a series of matters said to amount to errors of law in the Tribunal's approach to each of the principal conclusions such as to justify the setting aside of the Tribunal's findings and a substitution that there be no such findings or alternatively that the complaints be remitted to a freshly constituted Tribunal to be reheard. The appeal is resisted by Mr Dahou who contends that the decision was reached following an extensive analysis of the evidence

including live evidence from 23 witnesses. The case essentially turned upon the reason why various decisions were taken. These were questions of fact and this appeal attempts impermissibly to invite interference by the Employment Appeal Tribunal with findings of fact the Tribunal was entitled to make, and it does so by reference only to a selective account of the facts at issue.

3. The parties to this appeal are referred to below as the Claimant and the Respondent as they were before the Employment Tribunal. The Respondent was represented by Mark Sutton QC both before the Employment Tribunal and on this appeal; the Claimant by Louise Chudleigh. I have received clear and focussed submissions on both sides, both orally and in writing for which I have been grateful.

The Tribunal's findings of fact

4. The Tribunal set out the agreed issues at paragraph 4. The question whether the Claimant was taking part in the activities of an independent trade union, and if so, whether this was at an appropriate time was expressly identified as being in issue.

5. At paragraph 4.3 a list of actions or failures to act by the Respondent was identified at A to N relied on as detriments by the Claimant. The earliest act was in October 2011 and detrimental treatment by a number of managers in addition to Mr Caffrey and Mr Whitefoot was relied on in this regard.

6. The Tribunal set out its findings of fact at paragraph 30 to 134 inclusive. It made no general findings as to credibility. In relation to particular aspects of the evidence, it rejected the Claimant's case in favour of the Respondent's and vice versa. It expressly accepted Mr Caffrey

and Mr Whitefoot's evidence on a number of issues (see e.g. paragraphs 71 to 74). It expressly rejected the Claimant's evidence on some issues: e.g. paragraph 79.

7. A full and careful reading of the Employment Tribunal's Reasons and findings of fact is essential when considering this appeal. They are not repeated here but by way of summary, the essential facts found were as follows.

8. The Respondent is a large organisation engaged in public sector outsourcing. It held the contract for the London Barclays cycle hire scheme (known as "Boris Bikes" and referred to below as "LCHS"). The Claimant was employed by the Respondent as a team leader mechanic from 4 May 2010, working on the LCHS. The scheme operated from various depots in London. The Claimant worked mainly from the Penton Street depot managed by Mr Caffrey. The Respondent's Director of Industrial Relations and Employee Relations was John Whitefoot. The Contract Director for the LCHS was Mr Adamson.

9. The Respondent had a voluntary recognition agreement with a small union known as "Community", entered into on 30 March 2012. The National Union of Rail, Maritime and Transport Workers (referred to as the "RMT") was recruiting members among the LCHS workforce and wished to be recognised. In April 2012 the RMT contacted the Central Arbitration Committee about the lack of any formal response to their recognition request. In May 2012 they made a complaint to the TUC against Community in relation to the recognition agreement entered into by it with the Respondent. The RMT was also proposing to engage in strike action at the premises of the LCHS during the Olympic period (July to September 2012) and the Tribunal found that the strike threat was present by the end of May 2012 and that the Respondent was anxious to avoid strike action during the Olympics if possible.

10. So far as the Claimant was concerned, having commenced employment in May 2010, he joined the RMT in October 2010 and from then on he was active in trying to recruit other members among the LCHS workforce (paragraph 37). He was promoted to team leader nevertheless, on 26 September 2011.

11. One of his complaints to the Tribunal concerned his suspension from work in October 2011 by Mr Normanton, which the Tribunal found Mr Normanton had done because that is what HR told him he must do (paragraph 38).

12. There was a disciplinary investigation resulting in a disciplinary sanction but the Tribunal found that there was no reason to think that his union activities were a factor in the suspension or other actions at this time (see for example paragraphs 136 to 139). The Tribunal said at paragraph 136

> **"Although the Claimant had been active in the RMT for about a year when the suspension began, there was no evidence that his activities had caused any particular concern at this stage."**

13. On 30 May 2012, at a meeting with Mr Caffrey and Mr Whitefoot, the Claimant was challenged by Mr Caffrey about holding RMT meetings in company time (paragraph 73). Though not referred to in detail by the Tribunal, meeting notes showed that the Claimant challenged this; Mr Caffrey responded that the RMT was not recognised; and the Claimant said words to the effect that union members should be allowed to discuss such issues at any time without persecution and asked for clarity on what he was allowed to do in work time as a union representative. The Tribunal did not refer to this discussion but at paragraph 73 accepted the evidence of both Mr Caffrey and Mr Whitefoot that there had been

> **"Discussions about trade union activities in work time and that there was a genuine issue about this in their minds."**

14. The Tribunal found that the Claimant was invited to a meeting (by email of 6 June 2012) with Mr Caffrey and Mr Whitefoot to discuss the Respondent's policy and the statutory position in relation to trade union activities in work time and on company premises. The email subject was "the carrying out of union activities in work time".

15. The meeting took place on 8 June. The Claimant attended with Mr Reid accompanying him and producing a note of the meeting. The Tribunal made reference to that note as a broadly acceptable account of the meeting (and it is contained in the bundle on this appeal). The Tribunal found that the note of the meeting showed that there was a discussion about union activities during working hours but did not elaborate further. Although not recorded by the Tribunal it is clear (from the Claimant's document) that Mr Whitefoot explained repeatedly during the meeting that the RMT was not the recognised union and that this had implications for what the Claimant could do during work time. He agreed that the Claimant was an elected representative for the RMT within Barclays Bikes, but referred to the Claimant talking to members in the workplace and said that as he was not a recognised Trade Union representative that he should refrain from doing this in working hours and only talk to members during his breaks or after work because he had no recognised trade union facility time at Barclays Bikes. He spoke about the Claimant being on "thin ice" by talking to RMT members in the work place and that he needed "to be careful about what he did and how he did things relating to the union in the workplace". This was regarded by Mr Reid as a threat, but notably, the Claimant is not recorded as having denied speaking to members during work time in the workplace.

16. The note also showed and the Tribunal found that Mr Whitefoot had attempted to talk about threatened strikes at the LCHS during the Olympic period; and was keen to find out

anything useful in relation to potential strike action, and keen to promote Community to the Claimant (paragraph 74).

17. At paragraph 75, in relation to the meeting of 8 June, the Employment Tribunal stated that Mr Whitefoot agreed that he said words to the effect that "if you carry on with trade union activities as you are, you are heading for disciplinary proceedings and possibly dismissal; but that he would not do anything about this before September" (when the Olympics would have concluded). In context, this statement was plainly directed at the Claimant's participation in trade union activities during working hours which was not permitted by the Respondent.

18. Mr Whitefoot and the Claimant met again on 12 June 2012. Mr Whitefoot was hoping that the Claimant might be persuaded to join Community and arranged for him to meet representatives of Community at a public house after that meeting; the Claimant for his part was stringing Mr Whitefoot along in the hope of finding out on behalf of the RMT, what he could do about the CAC process and about Community, and duly attended the meeting.

19. On 27 June 2012 a meeting took place between the Claimant and Ms Butler, Industrial and Employee Relations Manager. The Tribunal found that her motive in approaching the Claimant was to find out what his problems were; but it also found it likely that she would have had in mind that this would be an opportunity to find out any useful information about employee relations issues at Penton Street given the difficulties about the pending strike action: paragraph 82. During the course of that meeting there was extensive discussion about the Claimant's grievances to date and he expressed the view that "they" would be happy for him to leave and Ms Butler asked what his position would be if offered a payoff. This question was returned to again in the meeting. The Tribunal also recorded the language used by Ms Butler

during that meeting. In particular when the Claimant referring to his own criminal record mentioned having a weapons charge, Ms Butler's response was "f…ing hell". She then said, "I'm sorry I shouldn't swear" (Paragraph 84).

20. On 4 July 2012 the Claimant returned to work at Penton Street after a period of absence resulting from work-related stress. The Tribunal made the following findings:

> **"On arrival he found that the key fob that would usually admit him to the workplace did not operate. Subsequently it appeared that this had been de-activated at the instruction of Mr Lee. He then had a conversation with Mr Caffrey about the matter. There was no dispute that the Claimant was angry about what had happened. Mr Caffrey's evidence was that the Claimant was shouting at him. In this, he was supported by Mr Meade who said…: "I heard Zak shouting and hollering. I could not see him from where I was sitting or hear exactly what was being said but he was clearly upset about something". The Tribunal was satisfied that the Claimant was angry and was shouting at Mr Caffrey. (paragraph 85)**

21. The Claimant's case was that in the course of this conversation Mr Caffrey, speaking under his breath, called him a "fucking idiot". Mr Caffrey denied saying this. Although it took this denial into account, the Tribunal concluded on balance of probabilities that Mr Caffrey did indeed say this to the Claimant (paragraph 86).

22. Immediately after the conversation the Claimant complained to Mr Adamson about Mr Caffrey calling him a "fucking idiot". Mr Adamson said he would do something about that, but did not take any action in respect of this allegation. He told the Tribunal that he did not give the conversation much thought after it ended and that it just went out of his mind. The Tribunal accepted this evidence as plausible (paragraph 88).

23. On or shortly before 5 July 2012 the RMT ballot papers in relation to the proposed strike action were issued to workers at Penton Street. On the same day, Mr Whitefoot and Ms Butler went to Penton Street to see the Claimant to ask him about whether the ballot papers had come out. The Tribunal found that the Claimant's evidence was that at lunchtime on 5 July he

suffered what he described as a nervous breakdown from which it took sometime to recover. The Tribunal made no finding as to whether this was true or not but found that "during that afternoon, Mr Caffrey and Mr Normanton saw the Claimant out on a bicycle, thus observing that he was not at work" (paragraph 89).

24. The Tribunal then dealt at paragraph 90 to 94 with events on 6 July 2012. First it dealt with the letter dated 6 July 2012, by which Mr Caffrey wrote to the Claimant reminding him of the earlier instructions given at the meeting on 8 June 2012 that he should "immediately cease the carrying out of trade union activities on behalf of an unrecognised trade union during work time and on company premises" (paragraph 90). The letter is summarised briefly by the Employment Tribunal. It states that on 20 June and 29 June, while certified off sick with work-related stress the Claimant had been found on the Respondent's premises conducting trade union activities. It goes on to state that:

> **"Whilst we have previously made it very clear to you that the company has no objection to you conducting such activities in your own time and outside of works premises, it was wholly inappropriate that you should do so, particularly but not exclusively during a period of sickness absence……**
>
> **Finally I would like to take this opportunity to remind you that… you attended a meeting with me as your line manager on 8 June 2012. The meeting was conducted in the presence of your RMT representative and Mr Whitefoot. At the meeting you were given a clear instruction that you should immediately cease the carrying out of trade union activities on behalf of an unrecognised union during work time and on company premises. You were also informed that any failure to follow this instruction may result in disciplinary proceedings being instigated against you…"**

25. In the afternoon of 6 July 2012 Mr Caffrey and Ms Butler approached the Claimant in the workplace to discuss three matters, including his whereabouts on the afternoon of 5 July 2012. The conversation was covertly recorded by the Claimant and his transcript of that conversation appeared in the tribunal bundle. At paragraphs 92 and 93 the Tribunal made the following findings:

"The Claimant became angry in the course of this conversation. …. (Mr Caffrey) asked how many bikes the Claimant had done today, to which the latter replied: "you want me to work hard then you treat me with respect".

The conversation then continued as follows

Mr Caffrey – "Zak I don't treat you any different to anyone else"

Claimant – "Yes you are. You swore at me the other day and you was in the wrong"

Mr Caffrey – "No I didn't"

Claimant – "Oh no you didn't, don't talk to me"

Mr Caffrey –"Zak!"

Claimant – "Don't talk to me, don't talk to me. You're a fucking liar as well"

Mr Caffrey- "did you hear that?"

Claimant – "Yeah I did swear at you because you swore at me and now you don't even want to admit it"

Ms Butler – "Zak"

Claimant – "You don't even want to admit it. Yeah you're not a man, you know what. You're not even a man. You would have been better off just to turn round and say"

Although there was some dispute about precisely who was where and facing in which direction in the course of these exchanges, it was common ground Ms Butler and the Claimant then continued to discuss matters at a little distance from Mr Caffrey. … Ms Butler is recorded as addressing the Claimant as "darling" and asking him to calm down. He replied that Mr Caffrey was antagonising him and that he knew that he came in (that is a reference to the Bank Holiday Monday). A little later on page 316 the Claimant asserted that Mr Caffrey was lying when he said that he didn't swear at him on the previous day. On page 317 Ms Butler said that the Claimant should stop losing his temper and an exchange ensued which concluded with the Claimant saying: "I didn't lose my temper Carol I told you. If I lost my temper he'd be on the floor and I'd walk away from the whole place. I don't lose my temper just because I'm aggressive in how I speak. Because I feel passionate about what I'm saying it doesn't mean I'm losing my temper. Walking away is not losing my temper.""

26. The Tribunal found that after this incident Ms Butler and Mr Caffrey telephoned Mr Whitefoot. Ms Butler's explanation for this was that she was aware that there had been trade union activity and that Mr Whitefoot was dealing with this and she did not want to upset anything that was being done. She said that the three of them discussed speaking to the police but that Mr Whitefoot had not influenced the decision to involve the police. The Tribunal recorded that she backtracked from this on being shown, in the course of evidence, a note suggesting that Mr Whitefoot said that he advised Mr Caffrey and Ms Butler to obtain police advice prior to a suspension meeting with the Claimant, as he was concerned about their health and safety.

27. The Tribunal found that by letter dated 9 July 2012 handed to the Claimant by Mr Caffrey, the Claimant was suspended from duty as a result of the incident on 6 July. Mr Caffrey and Ms Butler had arranged for police officers to be near at hand when the letter was given to him, although this police presence was, as the Tribunal found, unnecessary. The Tribunal did not set out the content of Mr Caffrey's letter. It did however set out the content of a letter from the RMT dated 9 July, sent on the Claimant's behalf stating that the suspension was based on a shameful, trumped up allegation. The Tribunal made no finding either way on this. Rather it recorded that Mr Adamson responded to the RMT letter that there would be an investigation into the Claimant's conduct and his counter complaints that this was treatment connected with his race or trade union activities (paragraph 96). Mr Cadger, HR Director, was appointed to conduct this investigation.

28. Mr Caffrey's suspension letter of 9 July describes the incident on 6 July and the Claimant's conduct as "perceived as aggressive, intimidating and totally unwarranted. You appeared to be sweating profusely and you were shaking. As a consequence of your apparent volatile behaviour and our genuine concern for your safety and welfare (especially given you have only recently returned from a period of absence for work related stress) and the safety and welfare of your co-workers I have taken the decision to suspend you with immediate effect. The period of suspension will be on full pay and is not punitive in nature". The Claimant remained suspended throughout the Olympic period.

29. The Tribunal found that there was an incident on 12 July involving RMT members seeking to recruit others outside the gate to Penton Street and the Claimant was present as well at some point. Further, on 19 July, the strike ballot result was made known and the vote was in favour of both industrial action and action short of a strike.

30. An investigation was undertaken by Mr Cadger into three specific matters relating to the Claimant's conduct, including the conduct on 6 July (paragraph 98). Mr Cadger told the Claimant that the counter allegations were also to be discussed at the meeting with him. The Claimant was interviewed on 30 July and this is dealt with at paragraphs 100 to 104. Mr Cadger interviewed Ms Butler and Mr Caffrey (paragraphs 105 and 106).

31. On 30 July the Claimant raised a grievance about Mr Adamson's failure to investigate his complaint that Mr Caffrey had sworn at him. A further grievance was raised against Mr Adamson in relation to a circular letter sent to employees at Penton Street referring to industrial relations concerns and stating that an employee (the Claimant) had recently been suspended on the basis of alleged very serious misconduct; no employee had been suspended for anything associated with their membership of the trade union; and any employee who took industrial action during the Olympic period would not be paid a £500 Olympic bonus. The Tribunal was satisfied that Mr Whitefoot had been closely involved with this circular letter (paragraph 108).

32. On 13 August 2012 Mr Cadger produced a report arising from the investigation, recommending (inter alia) that the allegations against the Claimant needed to be discussed at a disciplinary hearing (paragraph 109) but before this was done an internal review of any outstanding complaints and grievances raised by the Claimant should take place, specifically those related to race or trade union activities. At paragraph 112 the Tribunal found that Mr Cadger received four grievances from the Claimant in connection with his investigation.

33. On 25 August 2012 Mr Cadger wrote to the Claimant explaining that he had completed his report and sent it to Ms Mehmi, and that he would be contacted in due course. Subsequently, in response to contact from the Claimant's representative on 17 September, Ms

Mehmi explained that Sean Trotter had been asked to review the Claimant's outstanding complaints and grievances (paragraph 111). The Tribunal found that Sean Trotter produced a letter dated 31 October 2012 dealing only with a grievance dated 18 April concerning Mr Fleary.

34. At paragraph 113, the Tribunal found that a signed letter dated 14 November 2012 from Mr Anderson invited the Claimant to a disciplinary hearing "to address the single allegation that he called Mr Caffrey a 'fucking liar' on 6 July 2012. The letter said that this behaviour was considered to be so serious as to amount to gross misconduct". In fact the letter stated the following:

> **"The allegation you will be required to address is that at approximately 2:30pm on Friday, 6 July 2012 you were approached by Mick Caffrey… and Carol Butler… and asked about some work-related matters. Your response to questions was allegedly irrational and you began shouting and you called Mick Caffrey a fucking liar in front of other members of staff. Your behaviour was allegedly perceived as aggressive, intimidating and totally unwarranted. Please find enclosed copies of witness statements. This behaviour is considered so serious as to amount to a gross misconduct. If this allegation is proven against you, you may be liable to summary dismissal…"**

35. The Tribunal was critical about how the letter of 14 November 2012 came to be written. At paragraph 114 it referred to the first paragraph of the letter signed by Mr Anderson stating that he had recently been appointed to review documentation and believed after careful consideration that the Claimant should be required to attend a disciplinary hearing. The Tribunal found that Mr Anderson's oral evidence was that the letter was drafted by Ms Swann, from HR, and that he had not received or considered any documentation, but had just signed what was put in front of him. Further he said that Ms Swann must have decided that only one allegation should go forward. The Tribunal also found that Ms Swann told the appeal manager subsequently, that Mr Whitefoot had checked the disciplinary invitation letter signed by Mr Anderson. It should be noted that Mr Anderson was Contract Director, HM Prison & Young Offenders Institute, Ashfield, and not a member of the LCHS team or the Penton Street depot.

36. The Tribunal dealt with the disciplinary hearing at paragraphs 115 to 117. It recorded that the Claimant said he was not swearing at Mr Caffrey but rather using the swear word to emphasise what he was saying. In relation to the comment that he would have Mr Caffrey "on the floor" he said he was trying to express the fact that he was not angry. In relation to remorse he said "why would I show remorse if I don't mean it". During the hearing the Claimant became angry and raised his voice and subsequently apologised to Mr Anderson for doing so. He said that on 6 July he was being accused of fraud and that Mr Caffrey wanted to get rid of him. He apologised for his emotional behaviour in that meeting.

37. Following the disciplinary hearing conducted by Mr Anderson, the Tribunal held at paragraph 118 that by way of outcome letter, Mr Anderson "said that the allegation was proven and that the Claimant had failed to show any remorse or to demonstrate that he understood that his behaviour was not acceptable. He said that the matter amounted to gross misconduct and that he had decided to summarily dismiss the Claimant". In fact the letter dated 19 December 2012 contained a more detailed outcome than that reflected by the Tribunal's finding. It recorded that Mr Anderson found the Claimant had engaged in "aggressive and intimidating behaviour, coupled with foul and abusive language". He recorded the fact that the Claimant had admitted using the language complained of but denied that he had behaved in an intimidating or angry manner stating that he was simply frustrated. It went on to say

> **"You agreed however that the impact of your behaviour could have been intimidating. During the hearing itself you also became easily agitated and your representative had to try to calm you down. Overall based on the available evidence, I believed that you had behaved in the way alleged… in that you were angry, had used foul language and had behaved in a way that was aggressive and intimidating."**

Mr Anderson noted in the letter that the Claimant had failed to show remorse for his actions or demonstrate that he understood that his behaviour was unacceptable.

38. The Claimant was summarily dismissed. He was offered a right of appeal. Before an appeal hearing was convened he made an unsuccessful application for interim relief to the Employment Tribunal. In the course of that hearing it was recorded by the Employment Judge that the Claimant accepted that he had behaved "in a way that would be regarded as gross misconduct in line with the company code of conduct" (page 88 to 94). This was not referred to in the Reasons of the Tribunal, although it was relied on by the Respondent.

39. The Tribunal recorded that the HR manager, Ms Allum, described the appeal hearing as a review rather than a rehearing but made no findings on this question. The Tribunal found that during the course of that appeal hearing the Claimant's representative was recorded as saying: "the severity of the sentence is too strong – it should have been a final warning. It did not need to be a summary dismissal; it could have even been dismissal with notice". So far as that statement was concerned, the Tribunal found (at paragraph 122) that Mr Crossey (the representative) was not conceding that dismissal was appropriate. He was putting forward contentions in the alternative, stating that a final written warning would have been sufficient and then, if he had to retreat from that, and dismissal was inescapable, at least it should have been with notice.

40. The Tribunal found that Ms Smart, the appeal manager, undertook further investigation of the circumstances of 6 July including interviewing Messrs Whitefoot, Adamson, and Caffrey, Ms Butler and Ms Swann, and it recorded certain aspects of those interviews. Notably:

a) at paragraph 128: in relation to the circular letter sent by Mr Adamson on Mr Whitefoot's advice, that Mr Adamson said: "Advised by John Whitefoot that staff were very unsettled by activities that were ongoing with the RMT, there was a lot of misinformation at a time when we were going into the Olympics". And later: 'It was a

very volatile situation and a high risk time for the contract. JW (Mr Whitefoot) came in because of the focus from the RMT and the fact that we were part of their strategic plan.' However, Mr Adamson denied that the Claimant was suspended because of union matters and he said that this was about the RMT unsettling the wider workforce and contract."

b) At paragraph 131: that "Mr Caffrey had said 'ZD has behaved in an outrageous way on a number of occasions. We were turning a blind eye to some situations he was creating just to make sure we delivered during the Olympics. He was a difficult guy to manage. His behaviour became steadily worse' and then later "We just wanted to manage his behaviour through the Olympic period to protect service delivery" and: "We decided it was the right thing for the business given issues with industrial action threats and ZD's role in that. We tolerated more than we should have probably!"

41. From Mr Caffrey's interview by Ms Smart the Tribunal found at paragraph 132 that Mr Caffrey allowed Ms Butler to ask questions of the Claimant on 6 July about working on Bank Holiday Monday even though he knew the Claimant had been instructed to attend that day and did not say so at the time. Further, it found that Mr Caffrey's interview showed

> **"There was a clear link between the Claimant's activities and behaviour and the fears about getting through the Olympic period."**

42. Ultimately, the Tribunal found that Ms Smart rejected the appeal in a detailed outcome letter dated 7 March 2013 (paragraph 134); but which the Tribunal did not describe further. In fact the letter stated: "I find that swearing directly to a manager in what is perceived to be an aggressive and intimidating manner is gross misconduct. You have shown no remorse. I therefore conclude that the decision to dismiss without notice for gross misconduct was fair and

I do not deem it to be too harsh a penalty". The Tribunal made no findings about Ms Smart's role, the nature of the appeal hearing or whether the letter reflected her genuine views about the seriousness of the Claimant's conduct and the reasons for upholding the decision to dismiss.

The applicable legal principles

43. The Tribunal set out the applicable law at paragraphs 15 to 25 of the reasons. No criticism is made on this appeal of these paragraphs, save only in relation to the paragraph dealing with the burden of proof. Since the applicable legal principles are largely agreed, I deal with them briefly.

44. Section 146 **TULRCA 1992** deals with the right not to be subjected to any detriment and provides as follows:

> **"(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of –**
>
> **(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 any independent trade union at an appropriate time, or penalising him for doing so,…**
>
> **(2) In subsection (1) "an appropriate time" means –**
>
> **(a) a time outside the worker's working hours, or**
>
> **(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union ...**
>
> **(3) and for this purpose "working hours", in any time when, in accordance with his contract of employment he is required to be at work"**

45. Although the Claimant relied on s.146 (1)(a) and (b), the Tribunal made findings of unlawful treatment under s. 146(1)(b) only. There is no cross-appeal against that decision.

46. So far as concerns the proscribed purpose of preventing, deterring or penalising the "taking part in the activities of an independent union at an appropriate time, or for proposing to do so" (s.146 (1)(b)):

(a) An employer contravenes this sub-section only if the sole or main purpose of the employer in detrimentally treating the employee as he did, was to prevent, deter or penalise the employee on the proscribed basis. The focus is on employer's purpose; in other words the object the employer desires or seeks to achieve: **Dept of Transport v Gallacher** [1994] ICR 967 (CA).

(b) 'Activities' is not defined but the statute requires it to be 'activities of a union' and not merely the activities of a person who happens to be a trade unionist.

(c) It has been interpreted widely to include routine union activities carried out at an appropriate time e.g. participating in ballots, attending meetings, arranging or participating in gatherings, and planning for such action or activities. But the activities must take place "at an appropriate time". This is defined by s.146 (2) to mean either in the employee's own time or with the employer's consent, or agreement, during the employer's time. Own time includes meal breaks and times immediately before and after work (even if the employee is on the employer's premises at these times). Where an employer refuses consent for the employee to take part in activities of his union during working hours, no question can arise that activities carried out during working hours are at an appropriate time.

(d) Industrial action will rarely (if ever) take place at an appropriate time given the requirement of consent to activities during working time and so will rarely constitute an activity within this sub-section. On the other hand planning and organising industrial action may be done at an appropriate time, and if so, it will be protected: see **Britool v**

Roberts [1993] IRLR 481. This is a question of fact; but the statutory requirements must be fulfilled.

47. Section 148 makes specific provision with regard to the burden of proof:

> **"(1) 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."**

48. The Employment Tribunal referred to **Yewdall v SSWP** UKEAT/0071/05/TM in relation to the burden of proof. In that case, at paragraphs 23 and 24 the EAT said:

> **"We nevertheless find that, although clearly this is not necessarily a binding way for a tribunal to approach this statute, a very sensible way to do so would be to follow this structure which, in effect, follows the route of the Act as we see it to be:**
>
> **(i) have there been acts or deliberate failures to act by an employer? On this, of course, the employee has and retains the onus;**
>
> **(ii) have those acts or deliberate failures to act caused detriment to the employee?**
>
> **(iii) are those acts in time?**
>
> **(iv) in relation to those acts so proved which are in time, where detriment has been caused, the question of what the purpose is then arises. We are satisfied that Mr Russell was right to concede - and, in any event, this is our judgment - that there must be establishment by a Claimant at this stage of a *prima facie* case that the acts or deliberate failures to act which are found to be in time were committed with the purpose of preventing or deterring or penalising i.e. the illegitimate purpose prohibited by s146 (1) (b).**
>
> **This gives the same mechanism to sections 146 and 148 of TULR(C)A as is provided, for example, by section 63A of the Sex Discrimination Act 1975, where the onus of proof only passes to the employer after the establishment of a *prima facie* case of unfavourable treatment on discriminatory grounds by the employee which requires to be explained. Once it requires it to be explained, then the burden passes to the employer. Plainly that, in our judgment, is correct in this case. Otherwise the employer will have the burden of giving some explanation in a case where it is not clear what it is he has to explain. It must be clear, and we agree with Mr Russell's concession and with Mr Powell's submission, that there is a case made out at the *prima facie* stage that the acts complained of, with the resultant detriment, were on the case for the Claimant for the purpose of preventing or deterring or penalising in respect of trade union activities. Once that *prima facie* case is established, then the burden passes to the employer under s148."**

49. At paragraph 17 the Tribunal observed in relation to **Yewdall** that "the Employment Appeal Tribunal stated that the burden of proof operated in the same way as in the anti-discrimination legislation such as s.63A SDA. The burden of proof only passes to the employer

after the employee has established a prima facie or arguable case of unfavourable treatment on the prohibited grounds which requires to be explained".

50. The first sentence appears to overstate paragraph 24 of **Yewdall**. The mechanism may be similar, but that does not mean that it operates in the same way, and nor is this what the Employment Appeal Tribunal said. There are important differences, not least the absence of any mandatory requirement to draw inferences in s.148 (1) and the different statutory language. Moreover, in relation to the protected disclosure provisions (s.103A **ERA 1996**) which it is common ground operate in the same way as the trade union activities provisions, in **Kuzel v Roche Products Ltd** [2008] ICR 799, the Court of Appeal held at paragraph 48:

> **"There was a suggestion in argument before the Employment Appeal Tribunal, which was not pursued in this court that the burden of proof in protected disclosure cases should be the same as that applied in equivalent provisions governing discrimination cases. In those cases the burden of proving the reason for less favourable treatment of the Claimant shifts to the Respondent. Mr Linden argued for a "strictly limited" role for discrimination law in protected disclosure cases. The thinking behind the association of protected disclosure and discrimination is that both causes of action involve acts or omissions for a prohibited reason. Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts. As Mr Linden accepted there simply is no need to resort to the discrimination legislation in order to ascertain the operation of the burden of proof in unfair dismissal cases."**

51. Section s152 **TULRCA 1992** deals with automatic unfair dismissal on trade union grounds and provides as follows:

> **"(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it or, if more than one, the principal reason was 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,…**
>
> **(2) In subsection (1) an "appropriate time" means –**
>
> **(a) a time outside the employee's working hours, or**

(b) a time within his working hours at which, in accordance with arrangements agreed without consent given by his employer, it is permissible for him to take part in the activities of a trade union

(3) And for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work."

52. The burden of proving an admissible reason for dismissal is on the employer. At paragraph 20 the Tribunal referred to **Maund v Penwith District Council** in relation to the light burden on the employee to show only that there is an issue warranting investigation and capable of establishing the prohibited reason. Once this has been shown, the Tribunal stated that the onus was on the employer to prove which of the competing reasons was the principal reason for the dismissal. The Tribunal made no reference to **Kuzel**, (although it was relied on by the Respondent) where the CA held as follows on this question:

"55. … the burden of proof issue must be kept in proper perspective. As was observed in Maund, when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof …

57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the Employment Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

59. The Employment Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Employment Tribunal that the reason was what he asserted it was, it is open to the Employment Tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the Employment Tribunal *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

53. Accordingly, if a tribunal rejects the employer's purported reason for dismissal, it may conclude that this gives credence to the reason advanced by the employee, and it may find that the reason was the one asserted by the employee. However, it is not obliged to do so. The identification of the reason will depend on the findings of fact and inferences drawn from those facts. Depending on those findings, it remains open to it to conclude that the real reason was not one advanced by either side. To the extent that Ms Chudleigh suggested otherwise, I cannot accept her argument.

The Tribunal's reasons and conclusions in summary

54. The Tribunal reached its conclusions on the basis of the essential reasoning that follows. So far as the detriment claims are concerned:

(a) The only detriment in respect of which any arguable case had been raised by the Claimant was detriment item K (suspension on 6 July and the misconduct investigation that followed). There is no cross-appeal in relation to the dismissal of the remaining allegations not found to be detriments for these purposes.

(b) At paragraph 144, the Employment Tribunal found that although on the face of it there was misconduct to investigate as the Claimant had sworn at Mr Caffrey and acted aggressively towards him, the Claimant had raised an arguable case that at least the main purpose of suspending him was to remove him from the workforce at a time when strike action was contemplated to coincide with the Olympics.

(c) The Employment Tribunal then identified six factors that "called for an explanation". These were:

(144.1) the timing of the 6 July incident which was the day after the strike ballot opened;

(144.2) Mr Caffrey's statement that there was a need to manage the Claimant's behaviour during the Olympic period and his reference to the Claimant's role in the threatened strike;

(144.3) Mr Caffrey's failure to tell Ms Butler that there was an explanation for the Claimant working Bank Holiday Monday and allowing her instead to question him about this when he had previously been accused of fraudulent overtime claims;

(144.4) Mr Caffrey's denial of swearing when the Tribunal found he did so;

(144.5) Mr Whitefoot's involvement immediately after the incident given his role and the fact that this was "a relatively straightforward disciplinary issue about an employee swearing at a manager";

(144.6) The severity of the reaction to the incident given the apparent general tolerance of swearing (e.g. Mr Caffrey and Ms Butler).

(d) Having identified those factors, at paragraph 145 the Employment Tribunal stated that it "considered whether the Respondents had discharged the burden of proving that the treatment was not on the prohibited grounds and concluded that they had not". It stated that the six factors above were relevant but did not explain how or why.

(e) In addition to the six factors listed at paragraph 144, it identified three further matters relevant to this conclusion. These were:

(145.1) the way the complaint against the Claimant was dealt with was inconsistent with Mr Adamson's failure to deal with the Claimant's complaint against Mr Caffrey. The Tribunal stated that it might be said that the Claimant's behaviour was more serious overall than Mr Caffrey's but nevertheless concluded that there was inconsistency in approach without apparently reconciling this difference.

(145.2) the delay in the disciplinary process that spanned the Olympic period was unexplained: nothing happened between 25 August and 19 September. The Tribunal inferred that it was convenient for the Respondent to keep the Claimant away from the workplace during this time.

(145.3) no evidence was called from Mr Trotter to explain his failure to deal with all but one of the Claimant's grievances, or the time taken to do even that. The brevity of Mr Trotter's response meant that the delay in the disciplinary process could not be attributed to his consideration of the grievance or grievances.

(f) At paragraph 146 the Employment Tribunal held:

> **"The Tribunal did not consider that any point arose as to the timing of any union activities, to the extent that the Respondents were seeking to prevent or deter the Claimant from taking part in these. Although, as identified in paragraph 73 above, there had been some challenge about when the Claimant had been carrying out such activities, there was no evidence from which the Tribunal could conclude that he had in fact been doing so at an inappropriate time. Nor was there any evidence to suggest that, had he not been suspended, he would have been doing this at an inappropriate time."**

(g) At paragraph 147:

> **"The Tribunal concluded that the main purpose of suspending the Claimant and of carrying out the misconduct investigation was to prevent him from carrying out the activities of an independent trade union at an appropriate time. The Complaint of detriment under point K was therefore well founded."**

55. So far as the question of automatic unfair dismissal was concerned, the Tribunal's reasoning and conclusions were as follows:

(a) At paragraph 150 the Tribunal stated that it "concluded that, for substantially the same reasons as given in relation to item K, the Respondent had failed to prove the reason or principal reason for dismissal on which they relied. The Tribunal found that Mr Anderson's evidence about the letter of 14 November 2012 showed that he was not acting independently in the disciplinary process, and was following the directions of the

Respondent's HR department. In particular, it could be seen that again Mr Whitefoot was involved: he had approved the 14 November letter".

(b) At paragraph 151 the Tribunal stated that it took account of the points set out at paragraphs 144 and 145, and its finding that the Respondent had not discharged the burden of proof in relation to the detriment complaint. It went on to state:

> **"The decision to dismiss the Claimant followed directly from the suspension and decision to investigate the conduct allegations. In spite of the evidence from Mr Anderson and Mr Whitefoot, the Tribunal found it improbable that the latter had not influenced the decision to dismiss the Claimant. The only identifiable reason why Mr Whitefoot would do so was the Claimant's union activities. On 8 June Mr Whitefoot had predicted or threatened disciplinary proceedings that would be delayed until after the Olympics (paragraph 75 above). He was closely concerned with trade union issues and the risk of a strike in particular."**

(c) The Tribunal accordingly concluded that: "… The principal reason for the Claimant's dismissal was that he had taken part or proposed to take part in the activities of an independent trade union at an appropriate time and the dismissal was therefore automatically unfair."

(d) Contributory fault and Polkey were held not to apply because the Employment Tribunal had rejected the Respondent's stated reason for dismissal.

The grounds of appeal

56. The appeal against the Tribunal's findings is extensive. Ms Chudleigh has rightly reminded me of the observations in **Aslef v Brady** [2006] IRLR 576 at [55] (Elias P, as he then was) as to the importance of this Tribunal respecting the factual findings of an employment tribunal. The Employment Appeal Tribunal is not entitled to identify an error of law merely because it would have reached a different factual conclusion; nor should the reasons of a tribunal be subject to unrealistically detailed scrutiny. Tribunals are not required to make findings of fact on all matters of dispute; nor to recount all the evidence. It cannot therefore be assumed that the findings of fact reflect all the evidence, still less the nuances of expression

used by witnesses who gave evidence. An infelicity of expression and even a factual or legal error in a particular sentence will not render a tribunal's decision defective if the tribunal has essentially properly directed itself.

57. On that basis I turn to consider the grounds of appeal. Twelve grounds are advanced by the Respondent, said individually or cumulatively to vitiate the Tribunal's judgment. The first five grounds relate to the findings in relation to suspension and the disciplinary investigation; grounds six to 10 are directed at the finding of automatic unfair dismissal contrary to section 152(1); and the remaining grounds concern **Polkey** and contributory conduct.

Grounds 1 to 3

58. I take these grounds together because there is overlap in the Tribunal's reasoning in relation to the matters challenged in these grounds. Ground 1 challenges the Tribunal's approach to the burden of proof: in relation to the complaint that the Claimant's suspension and disciplinary investigation constituted a detriment contrary to s. 146(1)(b), in considering what the Respondent's main purpose was, the Tribunal misapplied the burden of proof provisions in failing to evaluate the Respondent's explanations for the treatment or to make relevant findings of fact. Ground 2 asserts an error of law in treating Mr Caffrey as an appropriate comparator for assessing whether the Claimant was treated inconsistently. Ground 3 challenges the reliance on by the Tribunal as a factor relevant to determining whether the Respondent discharged the burden of proof, the unexplained delay in the disciplinary process – the Respondent contends that this was not addressed in evidence because it was not identified as detrimental treatment.

59. Mr Sutton emphasises that the Tribunal made no finding in relation to the veracity of the accounts given that the Claimant acted in a threatening way on 6 July 2012 and that the reason

for the decision to suspend him was directly influenced by concerns in relation to staff safety as a consequence of the incident. Moreover, although when dealing with the letter of 9 July 2012 notifying the Claimant of his suspension, the Tribunal identified that the suspension was said to be on the grounds of "aggressive, intimidating and totally unwarranted" conduct and its implications for the safety of the Claimant and his co-workers, the Respondent argues that there was no evaluation of the incident on 6 July 2012 and whether Mr Caffrey's characterisation of it was accurately stated by him. Such an evaluation was Mr Sutton argued, manifestly necessary in order to decide whether or not the main purpose of the Respondent in suspending or investigating was the improper purpose.

60. Against that Ms Chudleigh points to paragraphs 144 to 147 and submits that a correct direction in law was given; the Tribunal approached the burden of proof correctly and expressly acknowledged at paragraph 144 that on the face of it there was misconduct to investigate. This was, she submitted, a case of pretext, and the Tribunal made adequate findings of fact and is not to be criticised for infelicities of expression or by applying a fine tooth comb to its reasoning.

61. The critical passages in the Reasons relating to these grounds are paragraphs 144 and 145. These have been summarised above. On the evidence and the Tribunal's findings, those directly involved in the suspension decision were Mr Caffrey, Ms Butler and Mr Whitefoot; whereas, the Tribunal found that Mr Cadger was appointed by Mr Adamson to investigate the allegations and counter-complaints, and it was on Mr Cadger's recommendation that disciplinary charges were issued. The critical question for the Tribunal was whether the main purpose these individuals had in doing what they did, was preventing or deterring the Claimant from taking part in trade union activities at an appropriate time. The Tribunal did not distinguish between these decision-makers as it should have done, since a consideration of their

thought processes to discern what object they sought to achieve was necessary. Particularly stark is the absence of any evidence to support or finding that Mr Cadger was influenced or affected by any improper purpose of the others, or of his own. Instead, the Tribunal dealt with these separate acts together and without any focus at all on Mr Cadger's role in the latter decision.

62. The Tribunal identified (at paragraph 144) two competing purposes of the suspension and investigation: the fact that there was misconduct by the Claimant to investigate, as the Respondent contended; and removing him from the workforce at a time when strike action was being contemplated to coincide with the Olympics, as the Claimant contended. If the Claimant raised an arguable case of an ulterior purpose, it was for the Respondent to prove the (main) proper purpose for which it acted. If the Tribunal was not satisfied by the Respondent's evidence that the main purpose was as it asserted, it did not follow that the Tribunal was bound (on any basis, whether as a matter of law or logic) to conclude that the purpose was that identified by the Claimant (**Kuzel**). The Respondent's main purpose would need to be determined by reference to the evidence, the findings of fact and the inferences that could properly be drawn from those facts.

63. Even if there was genuine misconduct by the Claimant, if the Respondent was acting opportunistically in relying on this misconduct (in circumstances where others would not have been similarly treated) it would be open to the Tribunal to conclude that despite the misconduct, the Respondent's true purpose in acting as it did was a different purpose. However, it would not be enough for the Tribunal to find that the relevant decision-makers merely welcomed the opportunity to suspend and investigate the Claimant for misconduct because he was associated with the Olympics strike; to succeed, the Tribunal had to find that their main purpose in doing

so was to prevent or deter him from these activities: see **The Co-operative Group Ltd v Baddeley** [2014] EWCA Civ 658 (Underhill LJ) at 43. Provided that the main purpose in acting as they did was the misconduct, the fact that they may have been pleased about this is insufficient.

64. At paragraph 17 of the Reasons, the Tribunal directed itself in relation to **Yewdall** as discussed above, and also that "the burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment on the prohibited grounds which requires to be explained". It followed this direction at paragraph 144, where it set out six factors calling for an explanation; and at paragraph 145, it concluded that the Respondent "failed to discharge the burden of proving that the treatment was not on the prohibited grounds." There was here a repeated failure to reflect the statutory language: it was for the Respondent to show the main purpose for which it acted; and in doing so, that this was not an improper purpose; not that the treatment was not on prohibited grounds. This is not a mere infelicity of language. Given its earlier legal direction, and the failure to adopt the correct statutory test, it is quite possible that the Tribunal treated the burden of proof as operating in exactly the same way as it would in a discrimination case so that it required the Respondent to show that the improper purpose (or prohibited grounds) played no part whatever in the Respondent's actions; and having failed to discharge the burden, drew a mandatory inference that 'the treatment was on the prohibited grounds'. Moreover, the Tribunal did not identify precisely what 'the prohibited grounds' were and there was therefore a danger that the burden placed on the Respondent was of giving an explanation in a situation where it is not clear what the Tribunal required the Respondent to explain. The Tribunal had not concluded that there was a prima facie or arguable case that the acts complained of, with the resulting detriment

were done for the purpose of preventing, deterring or penalising the Claimant's participation in trade union activities at an appropriate time.

65. In deciding that the Respondent failed to discharge the burden of proof, the Tribunal relied on the six factors that called for an explanation at paragraph 144 as being relevant, and on the three additional factors at paragraph 145. There is no explanation as to why or how these factors were relevant to the Tribunal's conclusion that the burden of proof had not been discharged. If these factors led the Tribunal to conclude that the misconduct was an excuse to suspend and investigate the Claimant in circumstances where any other employee would not have been treated in this way, the Tribunal should have said so. More importantly, having identified nine factors that called for an explanation, the Tribunal did not engage with the Respondent's explanations. Before concluding that the Respondent had not discharged the burden of proof, it was necessary for the Tribunal to address the Respondent's explanations as disclosed by its findings of fact, inferences drawn from those facts or identified in the undisputed evidence, as to the main purpose of the suspension and investigation, and decide whether it accepted them or not. To find that the decision makers acted with an improper purpose was a serious finding to make against the Respondent's managers, and tantamount to a finding of bad faith. If the Tribunal rejected the evidence as dishonest, unsatisfactory or unpersuasive or concluded that the misconduct was merely a pretext, and the main purpose was a different improper purpose, that rejection and finding should have been carefully and properly explained.

66. Had the Tribunal considered the explanations for the six factors identified (as listed at paragraph 54(c) above) which were available in light of its findings, it would have had to consider and make findings in relation to the following:

(i) As to the coincidence of timing, the Tribunal recorded that one of the reasons for Mr Caffrey speaking to the Claimant on 6 July was to find out his whereabouts on 5 July when he had seen the Claimant absent himself from work by leaving on his bicycle in the afternoon (paragraph 89 and 91). If accepted, this was a rational explanation for Mr Caffrey approaching the Claimant as his manager, and the fact of the strike ballot the day before may have been coincidence. If not accepted, and the Tribunal considered that the timing was sinister, this should have been explained, but was not. There are no findings to support a conclusion that Mr Caffrey and Ms Butler deliberately engineered the encounter on 6 July for an improper purpose.

(ii) The statements by Mr Caffrey were general: the Tribunal did not explain how the fact that he expressed these views led to the conclusion that Mr Caffrey's response to the misconduct on 6 July was not a genuine response for the purposes he identified.

(iii) As to Mr Caffrey's failure to tell Ms Butler that there was an explanation for the Claimant being at work on Bank Holiday Monday, and allowing her to question him: Mr Caffrey gave an explanation for this - he said the question was asked reasonably by her and it was not inappropriate for her to seek clarification on whether the Claimant was in and how long he was in for (paragraph 130). If this was rejected, the Tribunal should have said so, and explained how it was probative.

(iv) As to Mr Caffrey's denial of swearing, there are many reasons why he might have denied this: embarrassment, to avoid looking bad as a manager. Moreover, he could not have explained this at the hearing in advance of this finding having been made, since he denied it. The Tribunal did not explain how the mere fact that he was less than frank about swearing on the earlier occasion could justify, without more, rejecting his

explanation of his main purpose in suspending the Claimant following the incident on 6 July.

(v) As to Mr Whitefoot's involvement immediately afterwards, this was explained by Ms Butler as the Tribunal recorded at paragraph 94, in paragraph 25 of her statement: "After this altercation with Zak, Mick and I telephoned John Whitefoot….to explain what had happened. I was aware there had been trade union activity and that John Whitefoot had been dealing with this. I did not want to tread on anyone's toes by doing anything that may upset what had been happening with the trade unions". This explanation was not rejected by the Tribunal at paragraph 94, and provides a rational (perhaps even obvious) explanation for his involvement.

Moreover, as to the suggestion that this was a 'relatively straightforward disciplinary issue about an employee swearing at a manager', the Tribunal's findings in relation to Mr Caffrey, Ms Butler and Mr Whitefoot's evidence show that this was not their view. On their evidence the incident involved aggressive, intimidating behaviour towards a manager and there were concerns about the Claimant's health and safety and the safety of others as a result of volatile conduct on his part. There was no evaluation of this evidence.

(vi) As to the severity of the Respondent's reaction given the (apparent) tolerance of general swearing, this was (at least) capable of being explained by reference to the fact that the Respondent's evidence was that this was not a simple swearing case but involved more. The Tribunal made no attempt to assess the truth or otherwise of this evidence. The Tribunal's finding of a general tolerance of swearing was based on a different, less serious incident involving Mr Caffrey swearing under his breath; and Ms Butler, who swore but immediately recognised that she should not have sworn – but these earlier findings were not referred to by the Tribunal.

67. These were explanations that in the light of its findings could realistically be regarded as having explained the factors criticised by the Tribunal. Moreover, the Respondent's witnesses gave evidence about the reasons for and purpose for which they acted. There is nothing in the findings to indicate that the Tribunal did not regard these explanations as genuine; but it failed to consider or evaluate them. If the Tribunal was intending to reject these explanations, it needed to explain why, but failed to do so. If the Tribunal accepted that the misconduct genuinely merited suspension and investigation but was nevertheless being used as an excuse in this particular case, an even more careful consideration of the thought processes of the relevant decision-makers was necessary. The Tribunal was not entitled to ignore potentially relevant explanations; or to reject them without consideration and a proper evidential basis for doing so.

68. Turning to the additional factors identified at paragraph 145.1 to 145.3, the first concerns the asserted disparity in response to the Claimant's conduct on 6 July (identified at paragraph 145.1) as compared with Mr Adamson's response to the complaint about Mr Caffrey swearing. A number of points can be made about this. First, the Tribunal itself recognised that "it might be said that the Claimant's behaviour was more serious overall than Mr Caffrey's." This was obviously so on the face of the Respondent's evidence, and provided a possible answer to why the two incidents were treated so differently. Secondly, it is difficult to see how the fact that two different managers (Mr Adamson and Mr Caffrey) reacted differently to two different incidents was probative of anything in the circumstances. That a different employee would not have been suspended or investigated for the incident on 6 July might have been strong evidence that the misconduct was not the real purpose and was just a pretext, but the less similar the circumstances of the two cases are, the less relevant becomes the comparison, and the greater the need for explanation by the Tribunal if it is to be relied on.

69. As to the relevance of and reasoning in relation to the delay identified in the disciplinary process at paragraph 145.2, the Tribunal identified a delay after Mr Cadger completed his report on 25 August, and before Ms Mehmi responded to the Claimant's representative on 19 September. This may have been unfair and unreasonable; but there are no findings of fact about this delay sufficient to raise an evidential basis for an inference that Mr Whitefoot, Mr Caffrey, Ms Butler or Mr Cadger had anything to do with, still less caused, engineered or influenced this delay. The basis of the inference drawn by the Tribunal (that it was convenient for the Respondent to keep the Claimant away from the workplace during this time) is unexplained by the Tribunal – who had this thought in their minds, when and how was it acted on. Even if it was convenient to keep the Claimant out of the workplace, that did not mean that misconduct was not the main purpose the Respondent had in investigating his conduct.

70. At paragraph 145.3 the Tribunal relied on the failure to explain Mr Trotter's failure to deal with all the Claimant's grievances, or the time taken to deal with the single one he actually addressed. Again, this may have been unfair and unreasonable; but the Tribunal does not explain how or why it was relevant or supported the conclusion that the Claimant's misconduct was not the main purpose of his suspension and disciplinary investigation. As before, there are no findings that Mr Caffrey, Ms Butler, Mr Whitefoot or Mr Cadger had any involvement whatever in investigating these grievances.

71. Even if the Tribunal was not persuaded that the Respondent had discharged the burden of proving that its main purpose in acting (detrimentally) as it did was to address the misconduct of the Claimant in the incident on 6 July, it did not follow as a matter of law or logic, that the main purpose was an improper purpose under s. 146(1)(b). But this appears to have been the Tribunal's approach – perhaps because it considered that the mechanism was the

same as that applicable to the discrimination legislation. What was required was for the Tribunal to determine what the main purpose was of each relevant decision-maker, as a matter of fact, on the basis of evidence and permissible inferences. It was not enough that the Claimant was linked to the threatened strike; or that it was convenient to have him out of the way. It did not do this. For all these reasons, I am persuaded that the Tribunal erred in law in its approach to the burden of proof. It was not entitled to conclude that the burden of proof had not been discharged by the Respondent in this case, without first considering the explanations given by the Respondent as identified in its own findings of fact. Nor was it entitled to proceed from that conclusion without more, to a conclusion that the Respondent had an improper purpose.

Grounds 4 and 5

72. These grounds are closely related. The argument advanced in relation to ground 4 is that the Tribunal failed to make any finding as to what "activities" the Respondent was seeking to prevent the Claimant from carrying out by suspending him and instigating a disciplinary investigation.

73. At paragraph 144 the Tribunal found that the Claimant had raised an arguable case that the main purpose of suspending him was "to remove him from the workforce at a time when strike action was being contemplated to coincide with the Olympics"; at paragraph 145 this appears to be the "prohibited ground" it was considering; and at paragraph 147 it found that "the main purpose of suspending the Claimant and of carrying out the misconduct investigation was to prevent him from carrying out the activities of an independent trade union at an appropriate time".

74. Ms Chudleigh submits that this does not amount to a finding by the Tribunal that the purpose of the suspension was to prevent participation in the planned strike, which she agreed would be outside the scope of protection. Rather, relying on **Britool**, she submits that planning or being concerned with the organisation of industrial action constitutes trade union activities for these purposes.

75. The difficulty with this submission is that she is unable to point to any finding of fact by the Tribunal that the Claimant was taking part in trade union activities at an appropriate time by planning or organising the strike outside working hours, and that this is what the Respondent sought to prevent or penalise when it suspended him. In writing, the Claimant relied on the suggested finding at paragraph 151 that: "he was closely concerned with trade union activities and the risk of a strike in particular". However, in my judgment this refers to Mr Whitefoot and not the Claimant, as Ms Chudleigh accepted.

76. In the circumstances, it does appear that the Tribunal's failure to follow the statutory language, and the adoption of too broad-brush an approach, contributed to a failure by the Tribunal to make proper findings on this issue. This leads to consideration of ground 5 which challenges the Tribunal's approach to what *trade union activities at an appropriate time* the Claimant was taking part in that the Respondent sought to deter or prevent. Given that the RMT was not recognised in relation to the LCHS operation, no issue arose as to consent to the taking part in trade union activities during working hours. No consent had been given. The only 'appropriate' time at which such activities could be undertaken by the Claimant was outside working hours. The issue was raised squarely in the agreed list of issues that the Claimant's participation in trade union activities was not at an appropriate time and not therefore protected by the statutory provision relied on.

77. Having concluded that the Respondent failed to discharge the burden of proof at paragraph 145, at paragraph 146 the Tribunal stated that it "did not consider that any point arose as to the timing of any union activities to the extent that the respondents were seeking to prevent or deter the Claimant from taking part in these". This statement is criticised by the Respondent. The reason the Tribunal felt able to reach this conclusion was because it decided that there was no evidence from which the Tribunal could conclude that the Claimant had in fact been doing so at an inappropriate time; and nor was there any evidence to suggest that had he not been suspended, he would have been taking part in such activities at an inappropriate time. The Tribunal stated that it felt able to reach these conclusions despite its findings at paragraph 73. At paragraph 73 the Tribunal found that there was a genuine issue about the Claimant's trade union activities during work time in the minds of Mr Caffrey and Mr Whitefoot and that there had been earlier discussions with the Claimant about this. This was accordingly evidence of a genuine concern about the Claimant undertaking trade union activities at an inappropriate time.

78. There is considerable force in Mr Sutton's criticism of this paragraph. The evidence and findings demonstrate that the Respondent, specifically Mr Caffrey and Mr Whitefoot were concerned about the Claimant engaging in trade union activity at an inappropriate time. Mr Caffrey spoke to him about it on 30 May as the Tribunal found. Mr Whitefoot emailed Mr Caffrey, his line-manager, on 6 June about 'time for trade union activities' where a union is not recognised. The Claimant was invited to a meeting by email dated 6 June to discuss the Respondent's policy and the statutory position in relation to trade union activities in work time; and this was convened on 8 June to discuss the statutory position in relation to trade union activities at an appropriate time and led to the Claimant being warned that he was on thin ice by engaging in union activities during working hours. The Tribunal's findings at paragraphs 71 to

74 support this conclusion. Moreover the Tribunal found at paragraph 90 that on the morning of 6 July 2012:

> **"Mr Caffrey reiterated the instruction given on 8 June 2012 that the Claimant should 'immediately cease the carrying out of trade union activities on behalf of an unrecognised trade union during work time and on company premises'. He stated that disciplinary proceedings might be instigated for failure to follow that instruction."**

79. The fact that the Tribunal was not itself satisfied that the Claimant had been engaged in trade union activities at an inappropriate time was immaterial. The critical question was what was the decision maker's understanding and belief and the object he or they desired to achieve. There was substantial evidence available to the Tribunal as reflected at paragraphs 71 to 74 and 89 and 90 to demonstrate that Mr Caffrey and Mr Whitefoot thought the Claimant was taking part in such activities at an inappropriate time. The Tribunal's findings and the apparently uncontested evidence, suggest they were both genuinely concerned about this. They took action to address it. It was not open to the Tribunal to sidestep this issue on the basis of its own conclusions without engaging with the Respondent's evidence and explanations.

80. Ms Chudleigh accepts that the conclusion at paragraph 146 was a critical stage in the reasoning that led to the Tribunal's conclusion at paragraph 147. However, she submits that no point arose on the question of 'appropriate time' because the Claimant was not relying on a discrete event, but on the fact that he was an RMT activist known to be involved in the threat of strike action. It was this concern that led to his suspension and dismissal. I cannot accept that this adequately answers the point given that the statutory protection applies to activities at an appropriate time, and this could only have been outside working hours in this case given the RMT's lack of recognition. The Tribunal side-stepped the question whether such concerns as the Respondent had were based on illegitimate trade union activity. Ms Chudleigh submits that it is unfair to say that the Tribunal did not consider what purpose motivated the Respondent in

light of the conclusion at paragraph 147. But this is no answer to the criticism of paragraph 146. The conclusion at paragraph 147 was only possible as a consequence of the way the Tribunal approached the matter at paragraph 146. If that approach was in error of law, it vitiates the conclusion at paragraph 147.

81. Accordingly, I am persuaded that in determining whether the Respondent's main purpose in subjecting the Claimant to the impugned treatment was to prevent him from engaging in trade union activities at an appropriate time, the Tribunal adopted too broad brush an approach to the statutory question it was required to address. It substituted its view for the Respondent's and as a consequence, failed to consider the evidence and the findings already made as to what trade union activities and at what particular time the Respondent was seeking to deter or prevent by the conduct in suspending and investigating the Claimant. If the Respondent's main purpose, or object desired to be achieved, was to prevent or deter trade union activities at an inappropriate time, that would not satisfy the requirements of s. 146 (1)(b) TULRCA.

Dismissal: grounds 6-9

82. In light of my conclusions on grounds 1 to 5 above, and given the Tribunal's conclusion that for substantially the reasons given at paragraph 144 to 146 the Respondent had failed to prove the reason or principal reason for the dismissal on which it relied, the Tribunal's conclusion that the dismissal was automatically unfair cannot stand.

83. Given this conclusion, I deal briefly with the additional grounds raised by the Respondent on the finding of automatic unfair dismissal. Ground 7 challenges the Tribunal's failure to evaluate and make findings on Mr Anderson's evidence; ground 8 challenges as

insufficient the Tribunal's conclusion that Mr Whitefoot influenced the decision to dismiss; and ground 9 concerns the asserted failure by the Tribunal to determine what aspect of the Claimant's union activities caused Mr Whitefoot to influence Mr Anderson's decision to dismiss him, and in particular, were these activities at an appropriate or inappropriate time. Ms Chudleigh contends that these grounds seek impermissibly to interfere with findings of fact made by the Tribunal. She points in particular to the finding that Mr Anderson was not acting independently; that Mr Whitefoot influenced the decision to dismiss; and that the only reason he would do so was the Claimant's trade union activities. She relies strongly on the concluding words of paragraph 151 where the Tribunal recorded its conclusion that the principal reason for the dismissal was the inadmissible reason relied on so that the dismissal was automatically unfair.

84. It is trite law that the 'reason' for dismissal is the set of facts operating on the decision-maker's mind that cause him to dismiss. On the face of it, the decision-maker here was Mr Anderson (and possibly Ms Smart at the appeal stage). If the inadmissible reason of Mr Whitefoot (or anyone else's) for wanting the Claimant to be dismissed was to be attributed to Mr Anderson, the Tribunal would need to make proper findings about how he or they were involved, and what they did to manipulate the process. A finding that Mr Whitefoot deliberately engineered the Claimant's dismissal for an inadmissible reason is a serious finding of bad faith on his part. A finding that Mr Anderson colluded in that is equally serious. The basis for such serious findings should have been fully identified and carefully explained.

85. The Tribunal's reasoning and conclusions on this issue appear at paragraphs 150 and 151. At paragraph 150 the Tribunal found that Mr Anderson was not acting independently in the disciplinary process; and that Mr Whitefoot was involved, having approved the 14

November letter. The statement that Mr Whitefoot approved the letter inviting the Claimant to a hearing represents the full extent of the evidence and findings as to his involvement in the disciplinary process; there are no other findings about this, nor did Ms Chudleigh suggest that there was any other uncontested evidence of his involvement.

86. At paragraph 151 the Tribunal stated that it took into account the individual points at paragraphs 144 and 145 and its finding that the Respondent failed to discharge the burden of proof in relation to the detriment complaint. These statements (and their relevance to the issue being determined) are not explained. The individual points at paragraphs 144 and 145 have been addressed above. They apply with even more force to Mr Anderson's decision-making given his lack of involvement at any stage before the disciplinary hearing, and bearing in mind that he worked in an entirely different part of the Respondent organisation. The Tribunal did not evaluate Mr Anderson's evidence and the detailed reasons he gave for deciding to dismiss – the nearest the Tribunal got to evaluating his evidence was the statement "in spite of the evidence from Mr Anderson…" which rather suggests that it accepted the evidence he gave. So far as the reference to the burden of proof is concerned, it is difficult to see how this failure was relevant to the identification of the reason or principle reason in Mr Anderson's mind for dismissing the Claimant, in the absence of findings or evidence providing some link. Mr Anderson had not been involved in suspending or investigating the Claimant; or responsible for the delay in the investigation process between 25 August and 19 September; or for failing to investigate the Claimant's grievances.

87. Instead of the careful evaluation of the evidence required, the Tribunal stated that in spite of the evidence of both Mr Anderson and Mr Whitefoot, it was improbable that Mr Whitefoot had not influenced the decision to dismiss. There are a number of issues with this:

first, it is odd to reach a negative conclusion on so central an issue – this suggests an awareness that the Tribunal did not have sufficient evidence to support a positive conclusion on this issue. Secondly, in the absence of uncontested evidence or findings of fact capable of supporting this conclusion, the Tribunal was not entitled to draw an unsupported inference on this disputed question, still less where this was tantamount to a finding of bad faith. Apart from the finding that Mr Whitefoot approved the 14 November letter, (which is too slender a basis on its own, to support a conclusion that he therefore influenced Mr Anderson to dismiss the Claimant on a false basis) there is no finding that Mr Whitefoot communicated with Mr Anderson in person, by phone, email or otherwise at any time during the disciplinary process; nor any finding as to how he exercised the influence he did – did Mr Anderson knowingly go along with Mr Whitefoot, or was he unable to resist Mr Whitefoot's pressure? The Tribunal's statement that this conclusion was reached "in spite of the evidence" is an acknowledgment that this inference was drawn in spite of rather than because of the evidence. Thirdly, and in any event, it was not enough that Mr Whitefoot influenced the decision. The statutory requirement that the inadmissible reason is at least the principal reason is not satisfied by a finding that Mr Whitefoot influenced the decision.

88. The Tribunal went on to state that the only identifiable reason for Mr Whitefoot to influence the decision was the Claimant's trade union activities; and referred to the 8 June when Mr Whitefoot had predicted or threatened disciplinary proceedings that would be delayed until after the Olympics (paragraph 75), and that he (Mr Whitefoot) was closely concerned with trade union issues and the risk of a strike in particular. The difficulty with this reasoning is that Mr Whitefoot's involvement with the Claimant and his trade union activities, both on 8 June and at other times, could be fully explained by his concern that the Claimant's participation in trade union activities was during working hours which was not permitted because the RMT was not

recognised, and was therefore at an inappropriate time which the Respondent was fully entitled to object to and seek to prevent. The fact that Mr Whitefoot was closely concerned with trade union issues and the risk of a strike was a neutral point given his role as Director of Industrial and Employee Relations. The Tribunal failed to identify anything said or done by Mr Whitefoot to Mr Anderson, or anyone else, instructing them or directing them as to what he wanted to happen in relation to the Claimant and why.

Ground 10

89. Under this ground the Respondent contends that there was a further error in the Tribunal's conclusions on dismissal because it failed to consider whether the appeal to Ms Smart amounted to an intervening event such that the dismissal that ultimately followed was not solely or principally for the prohibited reason. The submission is based on a contention that the appeal process was in substance a re-hearing not a review: it involved substantive further investigations and re-interviewing of relevant personnel, a re-evaluation of the underlying evidence, and a fresh decision by the appeal manager. There was no finding that Mr Whitefoot exercised any influence whatever on this part of the process. The Respondent contends that the Tribunal was bound to consider (as it argued) whether the appeal expunged the earlier unlawful decision.

90. Ms Chudleigh submits that a finding of unfairness of the kind made by the Tribunal in this case was incapable of being remedied on appeal, even if contrary to Ms Allum's statement, the appeal was a re-hearing and not a review. She argues that disciplinary proceedings may never have been initiated at all but for the unfair purpose or inadmissible reason at the earlier stage. There is considerable force in this submission. However, the Tribunal made no findings

and reached no conclusions on this point, and given that the case will have to be reconsidered in light of the conclusions set out above, I prefer therefore to express no concluded view on it.

91. In the result accordingly, I have concluded that this appeal must be allowed on grounds 1 to 9 above. In those circumstances it is unnecessary to consider grounds 11 and 12 which raise specific complaints about the way the Tribunal dealt with contribution and **Polkey**. These points, and the issue of ordinary unfair dismissal which was not determined, will have to be reconsidered.

Conclusions

92. I have considered whether in the circumstances of this case justice requires that the matter should be remitted to a different and differently constituted tribunal, recognising the hardship that this will entail for the Claimant having to start again. Despite this undoubted hardship, I am satisfied that given the basis on which this appeal is allowed, and in light of the errors identified, which permeate the reasoning as a whole, that is the appropriate course to adopt.

93. For the reasons given above this appeal is accordingly allowed. In relation to the detriment claim at item K and the automatically and ordinary unfair dismissal claims, the case will be remitted to a differently constituted employment tribunal to be reheard.