Case Number: 2301558/16

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE MARTIN**
Members	**Ms Dengate** **Ms Murray**
BETWEEN:	**Paul Markham** **Claimant**
	and
	Asda Stores Ltd **Respondent**
ON:	**19 – 21 March 2018 and `11 June 2018**

APPEARANCES:

For the Claimant: **Mr Young – TU representative**

For the Respondent: **Ms Barrett - Counsel**

REASONS

1. Full reasons were given at the end of the hearing. These reasons are provided at the request of the Claimant in an email to the Tribunal on 11 July 2018.

2. By a claim presented to the Tribunal on 19 August 2016 the Claimant made claims of detriment for carrying out Trade union activities, namely health and safety inspections. The Respondent defended the claims on the basis that the Claimant had not given enough notice of his intention to carry out the inspection and it was unable to find cover for the Claimant's work to enable him to do the inspection.

The hearing

3. The Tribunal heard from the Claimant and on his behalf from Mr Paul Young, Trade Union Representative.

4. The Tribunal heard from the following witnesses for the Respondent: Mr Darren Coker, General Manager – Dartford Depot; Ms Lesley Watkins, Human Resources Business Manager; Mr Mark Lowe, former Operations Manager; Mr Chris Tilly, General Manager Bristol Depot; and Ms Jessica Hyne, Transport Department Manager.

5. The Tribunal had before it an agreed bundle of documents

The issues

6. The issues were agreed by the parties as follows:

7. Detriment on grounds related to Trade Union membership and or/activities/automatically unfair dismissal

a. Do the following acts constitute 'detriment' for the purposes of section 146 TULR(C)A 1992

i. Suspending the Claimant

ii. Initially denying the Claimant sick pay

iii. Withdrawing his sick pay at the end of May 2016

iv. Holding an investigation hearing into the incident on March 30 in his absence, in circumstances where he was unable to attend and

v. The nature of the questions provided to the occupation therapist at paragraph 52

vi. Deciding at an investigation hearing in the Claimant's absence to forward him for a disciplinary in relation to the incident on March 30

b. If so, were those acts, or deliberate failures to act, for the sole of main purpose of preventing or deterring him for being a member of a trade union or for taking part in trade union activities at an appropriate time or to penalise him for doing so?

8. Automatic unfair dismissal

a. Was the dismissal of the Claimant for the reason or principal reason that the Claimant was a member of an independent trade union or for the reason that as an independent trade union member, he had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time?

9. Automatic Unfair dismissal of a trade union representative

a. Was the dismissal of the Claimant as a result of being appointed a Health and Safety Representative who carried out the function of that role, as recognised by the employer and/or in accordance with arrangements established under or by virtue of any enactment?

10. Unfair dismissal

a. Was the Claimant dismissed contrary to s94(1) Employment Rights Act 1996?

b. Was the Claimants dismissal for the reason of gross misconduct fair and reasonable?

c. Did the Respondent carry out as much investigation into the Claimant's conduct as was reasonable in all the circumstances, followed a reasonable procedure and formed a belief that the Claimant was guilty of misconduct

d. Was the dismissal within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted?

e. Did the Respondent and the Claimant comply with the ACAS Code of Practice?

11. Remedy

a. If the Claimant was unfairly dismissed and / subject to a detriment:

i. What compensation, if any, should be awarded to the Claimant?

ii. Has the Claimant taken due steps to mitigate his losses and/or has he suffered loss or damage?

iii. Should any compensation awarded to the Claimant be increased or decreased I accordance with the ACAS Code of Practice?

iv. Should the Claimant be reinstated or re-engaged?

The law as relevant to the issues:

12. Section 146(1) Trade Union and Labour Relations (Consolidation) Act 1992 provides *'a worker has the right not to be subjected to any detriment as an individual by any act, or any7 deliberate failure to act by his employer if the act or failure take s place for the sole or main purpose of ….. (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so'.*

13. Section 152(1) Trade Union and Labour Relations (Consolidation) Act 1992

provides that a dismissal is automatically unfair if the principal reason for it is that the employee had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.

14. Section 152(4) Trade Union and Labour Relations (Consolidation) Act 1992 provides a dismissal is automatically unfair if the principal reason for it is that the employee *'was or proposed to become, a member of an independent trade union'.*

15. Section 98(4) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer.

16. Section 98 of the Employment Rights Act 1996 provides that on a complaint of unfair dismissal it shall be for the employer to show what the reason for dismissal was and that it was one of the reasons set out in subsection (2) of section 98.

17. The reason relating to the employee's conduct is one of those reasons. Section 98(4) provides that where the employer has shown what was the reason for the dismissal then: *'...the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.'*

18. In the case of a reason relating to the employee's conduct, it is necessary that the employer should have genuinely believed that the employee misconducted himself and have arrived at that belief on reasonable grounds after a fair investigation. The duty of the Tribunal where an employee has been dismissed because the employer suspects or believes that he or she has committed an act of misconduct is expressed by Arnold J., in the case of **British Home Stores Ltd v Burchell** [1978] IRLR 379, 380, as follows: *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question ... entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time ... First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief and thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate on the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."*

19. The burden of proof is neutral. The Tribunal must not substitute its own views.

20. It was held in the case of **Iceland Frozen Foods Ltd v Jones** [1982] IRLR 439 that: *'it is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.'*

21. The case of **J Sainsbury plc v Hitt** [2003] IRLR 23 held that when considering whether an employee has been unfairly dismissed for alleged misconduct, the 'band of reasonable responses' test applies as much to the question of whether the employer's investigation into the suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss the employee for a conduct reason.

22. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2004 provides guidance which the Tribunal must take into account when considering whether a dismissal is fair or unfair (Lock v Cardiff Railway Co Ltd [1998] IRLR 358).

The Tribunal's findings

23. The Tribunal has made the following findings of fact having heard the evidence and considered the documents it was taken to. These findings are confined to those matters which are relevant to the issues and necessary to explain the decision reached. All evidence was heard and considered even if not specifically referred to.

24. The Claimant was employed by the Respondent as an HGV driver. He delivered produce to the stores from the warehouse. He was originally employed at another depot where was was an elected GMB representative. Erith already had a shop steward and the Claimant was appointed as a health and safety representative. The issues in this case stem from a health and safety inspection the Claimant proposed to undertake on 30 March 2016.

25. When the Claimant started as a health and safety representative at Erith on 10 April 2015, he could use a rest day on overtime rates to do his health and safety checks. This stopped when Mr Coker became General Manager in March 2016. It was not normal practice for health and safety checks to be done on a rest day and at overtime rates. The Tribunal finds that the Claimant's attitude towards the Respondent changed from this point onwards. Another change made by Mr Coker was to remove the Claimant's paid release from work for trade union training. It was also not the norm that there was paid release for this purpose.

26. The Respondent had a dedicated H&S representative on site at Erith who did not undertake other duties. It was not just down to the Claimant to do the health and safety checks. The Respondent held meetings every four weeks to discuss health and safety issues. The Respondent and union representatives attended these meetings. The guiding principle in relation to health and safety issues

was that the Respondent and the union worked together, and the evidence was that this worked well.

27. The Claimant was entitled to carry out inspections provided gave reasonable notice to the Respondent and the time for the inspection was agreed by the Respondent. It was not the case that the Claimant could unilaterally decide when and where the inspection would take place.

28. In January 2016 the Claimant noted in the GMB work programme diary, a site inspection for 29 March 2016. It was marked by the Respondent as being *'not authorised'*.

29. On 23 March 2016 there was a scheduled health and safety meeting with the Respondent and the union attending – the Claimant refused to go saying that he had had no time to prepare for the meeting. The Tribunal notes that this was after the Claimant had been told he could not use a rest day on overtime rates to carry out his union duties.

30. On 25 March 2015 the Claimant sent an email to Mr Coker: "*just a reminder of the workplace inspection for 29 30 and 31 March"*. Mr Coker replied late on the same day to say that he knew nothing about the inspection and nor did the other managers and told the Claimant he had to postpone the inspection.

31. On 28 March 2018 the Claimant, without consulting the Respondent, put into the work diary a health and safety workplace inspection for 30th, 31st and 1st April. Mr Delfort (Shift Manager) wrote next to it '*not authorised'*. C re-entered these dates. Mr Spencer sent the Claimant a message saying: *'lets talk about it when next on site'* in response to the Claimant's request for information relating to the inspection.

32. On 30th March 2016, the Claimant arrived at work at 4 am; 3 hours before his shift started and purported to start a health and safety inspection. There is no doubt that it was not agreed. Mr Cocker had told him: *"it needs to be pp until we discuss"*. Mr Coker told the Claimant's line manager: "*Mark, please assume Paul will be back on driving duties"*.

33. The Claimant was asked to drive as scheduled at start of his shift. He refused saying he was going to carry on with the inspection which he had started to do. The Respondent tried to persuade him to drive with four managers each asking him to carry out his driving duties. This was a busy time, just before Easter, and the Respondent could not otherwise provide cover for the Claimant. Ms Hyne, Mark Launder, Mark Lowe (ops manager), and Mr Coker all spoke to the Claimant and tried to get him to undertake his contracted driving duties. Mr Coker was interrupted in a meeting at another site which he left to go to Erith to speak to the Claimant.

34. The Claimant refused to discuss postponing the inspection and became aggressive towards two of the managers. The Respondent spent substantial time speaking to the Claimant with Ms Hyne spending 45 minutes to try to persuade him. Ms Hyne was appointed to investigate his refusal to undertake

his driving duties. The Claimant refused to go to a meeting with her without union representation and Ms Hyne therefore tried to find a representative for him. However, the representatives refused to accompany him.

35. It was common ground that the Respondent gave the Claimant four opportunities to attend the investigation. The Claimant refused to attend the investigation meeting.

36. Ms Hyne prepared a note which included what the Claimant had said to her prior to the formal investigation meeting in her 45-minute discussion with him. She recommended that the Claimant should be referred for a disciplinary hearing for gross misconduct. Ms Hyne explained that the reason it was gross misconduct was that it involved four managers and that the Claimant's attitude warranted a charge of gross misconduct.

37. Mr Coker gave the Claimant the choice of going on his driving duty or being suspended. The Claimant refused to drive and was as a result suspended. The Claimant immediately went on sick leave and did not return to work.

38. While on sick leave the Claimant submitted several grievances against various managers all of which were dealt with by the Respondent. The Respondent delayed the disciplinary hearing until most of the grievances had been dealt with. This meant that the disciplinary hearing was held about eight months after the incident. The Claimant raised two grievance at the disciplinary hearing itself which resulted in the disciplinary hearing being adjourned and then adjourned again as grievances were outstanding.

39. Mr Coker initially believed that the Claimant was not genuinely unwell and was on sick leave because of the disciplinary issues. He took the view that if the Claimant felt well enough to undertake the health and safety inspection he well enough to attend the investigation meeting and he suspended the Claimant's pay. However, when medical evidence was given to the Respondent indicating a genuine illness, the Claimant's sick pay was reinstated.

40. The Respondent referred the Claimant to occupational health on two occasions. On the second occasion, the occupational health report said that the Claimant was fit to attend the investigation - but he did not do so. This resulted in his sick pay being suspended again.

41. The disciplinary hearing and two appeals were conducted by the Respondent. The Claimant was accompanied by a union representative to the disciplinary hearing and the two appeal hearings. The Tribunal is satisfied he had the opportunity to say what he wanted to say and that the investigatory process continued throughout the proceedings as matters were raised with the Respondent. For example, the Respondent adjourned the hearing to interview other witnesses. The Claimant was dismissed on 24 November 2016 and his appeals were not successful.

The Tribunal's conclusions

42. Having found the factual matrix as set out above the Tribunal has come to the following conclusions on the balance of probabilities.

S146 - Detriment on grounds relating to TU membership

43. There are two limbs to s146 – two limbs. The Tribunal finds that the Claimant was not prevented or deterred from doing a health and safety inspection. He was simply being told he could not do it at that time and the reasons were given to him - namely that the Respondent could not cover his driving duties as the notice given was insufficient.

44. The second limb is whether the Claimant was undertaking his union duties at an appropriate time. An appropriate time pursuant to s TUL(C)RA is a time wither outside the worker's working hours or within his or her working hours at which in accordance with arrangements agreed with or consent given by his or her employer, it is permissible for him or her to take part in the activities of a trade union. It is clear from the factual matrix above that there was no agreement or consent from the Respondent for the Claimant to undertake the inspection at the time he purported to so do and that therefore that time was an inappropriate time. There was no dispute about the time being within the Claimant's contracted hours and therefore the Claimant's carrying out of the inspection was not within the definition of 'appropriate time'. There was no evidence of any collective agreement which indicated that the time the Claimant purported to undertake the inspection was at an 'appropriate time'.Therefore, the ingredients for a detriment claim are not made out.

45. Even this fell within s146 and the inspection was at an appropriate time, the reasons for the Claimant's suspension and dismissal were not because of Trade Union activities. The Tribunal is satisfied that the Respondent was happy for an inspection to be done, just not then. The reason for dismissal was for failure to follow a reasonable management instruction, namely the refusal to drive as per his contract of employment. Therefore, the Claimant's claim of automatic unfair dismissal fails.

46. The Tribunal then looked at whether the Claimant's dismissal was fair or unfair pursuant to s94 Employment Right Act 1996.

47. The Tribunal finds that the reason for dismissal was conduct arising from the Claimant's refusal to follow a reasonable management instruction namely to undertake his contractual driving duties and the manner in which he interacted with management following that request.

48. The Tribunal considered the guidance in the Burchill case set out above. It first considered whether there had been a reasonable investigation. An investigation does not have to be perfect, the test is whether the investigation fell within the range of reasonable responses open to a reasonable employer.

49. The Tribunal find the investigation fell within the range of reasonable responses. The Respondent gave the Claimant numerous opportunities to

attend an investigation meeting which he refused. Ms Hyne, who had spent 45 minutes speaking to the Claimant wrote a report which included what the Claimant had told her in this conversation. The Respondent interviewed all concerned and this continued throughout the disciplinary process with the hearings being adjourned to enable this.

50. The Tribunal finds that the disciplinary process was fair. The disciplinary hearings were delayed enabling the Claimant's grievances to be dealt with. The Claimant made several grievances and ultimately it was reasonable to carry on with the disciplinary process even though not all the grievances had been finalised.

51. The Claimant was accompanied to all meetings by a regional representative, knew what the charges were and had the opportunity to put his arguments forward.

52. The Tribunal finds that there were reasonable grounds for the Respondent to conclude that the Claimant had committed an act of gross misconduct. It is not for the Tribunal to substitute its view for that of the Respondent but to consider whether the dismissal fell within the range of reasonable responses open to a reasonable employer. It is not necessary for there to have been previous warnings; gross misconduct can be a one-off act. The Claimant was dismissed for the way he behaved on that day namely his refusal to drive and his aggressive attitude.

53. The Tribunal finds that that there were no breaches of the ACAS code of practice.

54. In all the circumstances the Claimant's claims are dismissed.

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Employment Judge Martin
Date: 07 September 2018