Appeal No. UKEAT/0287/18/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 15 August 2019

Before

HER HONOUR JUDGE STACEY

(SITTING ALONE)

MR PAUL STEVEN MARKHAM — APPELLANT

ASDA STORES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL YOUNG Trade Union Representative
For the Respondent	MS RACHEL BARRETT (of Counsel) Instructed by: Addleshaw Goddard LLP 3 Sovereign Square Sovereign Street Leeds LS1 4ER

SUMMARY

HEALTH & SAFETY

The Claimant had relied on a number of causes of action in his ET claim, including an allegation of an automatically unfair health and safety dismissal contrary to s.100(1)(b) **ERA 1996** for his having sought to undertake a workplace inspection in his capacity as a Safety Representative under the **Safety Representatives and Safety Committees Regulations 1977** (SI 1977/500).

Although the cause of action was identified in the list of issues in the ET's reasons for its Judgement, the ET appears not to have made findings of fact relevant to the issue, nor set out the applicable law, or addressed its mind so as to reach reliable conclusions on the point. Nor is the s.100(1)(b) claim identified in the ET's Judgment.

The ET dismissal of the Claimant's claim for dismissal on grounds of trade union membership/activities (s.152 **TULR(C)A 1992**) is not determinative of the s.100(1)(b) claim: it is a different cause of action and different findings of fact are required. It could not therefore be said that the ET's oversight would have made no difference to its decision.

The case is remitted back to the original tribunal to decide the s.100(1)(b) **ERA 1996** claim.

However, there was no error of law in the ET's failure to consider an allegation of breach of Reg 5 of the **1977 Regulations**, since this had not been argued, pleaded or identified as a free–standing complaint in the issues agreed between the parties. It amounted to the impermissible taking of a new point on appeal and it was too late to raise it now.

Nor was there an error in the Tribunal's failure to consider the rights and obligations under the **1977 Regulations** when considering if there had been a breach of s.146 and s.152 **TULR(C)A 1992**. The rights of the appellant as a safety rep under the **1977 Regulations** are independent from and separate to the right to protection from trade union victimisation. The cases will be fact sensitive and case specific – it cannot be said that any breach of Reg 5 of the **1977 Regulations** will necessarily also amount to trade union membership or activity victimisation. Safety Representatives are independent – both of their employer and the union, notwithstanding that it is the union's right to appoint safety representatives. On the facts of this case, the ET's failure to consider Reg 5 and the s.100(1)(b) **ERA 1996** claim did not undermine its findings and conclusions on the s.146 & 152 **TULR(C)A 1992** claims.

HER HONOUR JUDGE STACEY

1. This is an appeal against the judgment of the Employment Tribunal sitting at London South, before Employment Judge Martin, sitting with members Ms Dengate and Ms Murray, on 19 to 21 March 2018 and 11 June 2018. An oral judgment was given on the 11 June 2018 with written reasons sent to the parties on 14 September 2018. It concerns three issues. The first was whether the Tribunal failed to consider the Claimant's claim for automatically unfair dismissal contrary to s.100(1)(b) of the **Employment Rights Act 1996** ("the ERA") ("the health and safety dismissal claim") and if so whether it would have made a difference to the outcome of the case. The second was whether the Tribunal's failure to consider an alleged breach of Regulation 5 of the **Safety Representatives and Safety Committee Regulations 1977** ("the 1997 Regulations") which provides workplace inspection rights to safety representatives in certain circumstances amounted to a legal error. Thirdly, whether the Tribunal erred in law in dismissing the complaints under s.146 and s.152 of the **Trade Union and Labour Relations Consolidation Act 1992** ("TULR(C)A") ("the trade union detriment and dismissal claims") without first considering whether there had been a breach of Regulation 5 of the **1977 Regulations**, since it is the Claimant's contention that the **1977 Regulations** must be read into ss.146 and 152 **TULR(C)A**.

2. The Appellant in this Tribunal was the Claimant before the Employment Tribunal and the Respondent to the appeal was the Respondent. I shall continue to refer to the parties by reference to their status below.

3. The Claimant is an HGV driver and was employed by the Respondent, Asda, the well-known supermarket from 2007 until his dismissal on 21 November 2016. The GMB is an

A independent trade union registered with the certification officer whom the Respondent recognises for the purposes of collective bargaining, and as such is entitled to appoint safety reps under the **1977 Regulations** made by the Secretary of State provided by s.2(4) **Health and Safety at Work Act 1974**. The Claimant was appointed by GMB as a safety representative, on 10 April 2015 at the ASDA Erith XTC Depot, Belvedere, Kent, where he worked. As a recognised union, the GMB has the right to appoint safety representatives from amongst the employees employed by the Respondent. A union's choice of appointment is not restricted by the **1977 Regulations** to employees who are union members or lay officials, although in practice appointments to the position of safety rep are usually made from the ranks of the union's activist members. In general terms the function of an appointed safety rep, such as the Claimant in this case, is to represent the employees in consultations with the employer to promote and develop measures to ensure the health and safety at work of the employees (s.2(6) **Health and Safety at Work Act 1974**). By regulation 4 of the **1977 Regulations** s/he is also specifically tasked with such matters as investigating potential hazards and dangerous occurrences, investigating complaints by any employee whom s/he represents, to make representations about various matters, receive information and to undertake inspections of the workplace in accordance with Regulation 5. Paid time off is provided for to enable a safety representative to perform his or her functions.

4. The Claimant had sought to arrange an inspection pursuant to Reg 5 of the **1977 Regulations** on 30 March 2016. Whether he had complied with the necessary formalities and whether the proposed inspection fell within the ambit of Reg 5 was in dispute, but it was common ground the Respondent prevented him from undertaking it, and that 4 managers ordered him back to work to undertake deliveries in his HGV that day. The Claimant refused and was suspended. In proceedings issued before the Employment Tribunal on 19 August

2016, the Claimant identified his type of claim in box 8 of the ET1 form as a claim for detriment on grounds relating to trade union membership or activities contrary to s.146(1) of **TULR(C)A** ("the trade union detriment claim"). His detailed particulars of claim explain that as a safety rep appointed under the **1977 Regulations** he was entitled to inspect the workplace or part of it, subject to the procedural requirements set out in Reg. 5. The narrative of the particulars sets out the Claimant's perspective of events leading up to and including 30 March 2016 and the detriments he considered he had been subjected to because of seeking to conduct a workplace inspection. Leigh Day Solicitors, instructed by the GMB, were representing the Claimant at that time. The Respondent resisted the claim, asserting that the inspection had not been authorised, had not taken place at an appropriate time and the Claimant had not been subjected to a detriment (grounds of resistance).

5. Events moved on and on 21 November 2016 the Claimant was dismissed. On 31 January 2017 his claim was amended to include a complaint of automatically unfair dismissal contrary to s.152 of **TULR(C)A** ("the trade union dismissal claim") and also s.100(1)(b) the **ERA 1996** ("the health and safety dismissal claim"). The issues for determination at the Full Merits Hearing were subsequently agreed between the parties. Four causes of action were relied on: (1) the trade union detriment claim with six identified detriments relied on; (2) automatic unfair dismissal which although not citing the section number or statute was understood by everyone to be a claim under s.152 **TULR(C)A** ("the trade union dismissal claim"); (3) automatic unfair dismissal of a health and safety representative which, was understood by both parties to be a reference to s.100(1)(b) ("the safety rep dismissal claim") ; and (4) so called ordinary unfair dismissal under ss94-98 **ERA 1996** ("the ordinary unfair dismissal claim"). The agreed issues did not identify an allegation of breach of Regulation 5 of the **1977 Regulations.**

6. The chain of events giving rise to the proceedings were triggered by the Claimant's proposed health and safety inspection, at ASDA Erith XTC Depot, Belvedere, Kent, on 30 March 2016. In summary, the Claimant's case was that after having provided reasonable notice and complied with all the formalities, pursuant to Regulation 5, he was prevented from carrying out the inspection that he was entitled to undertake as part of his function as a safety rep. He was ordered to cease and instead to undertake his driving duties. When he refused, and continued to attempt to undertake his inspection, he was suspended and commenced Employment Tribunal proceedings. He was then subject to disciplinary proceedings for events on 30 March 2018 for which in November he was dismissed, when the proceedings were amended to include the dismissal claims.

7. The Respondent disputed the claim arguing that the Claimant's behaviour was a breach of the implied term of trust and confidence: it fell outside the definition of any protection available for trade union activities or membership, or safety rep activities, he had not been subjected to a detriment on any prohibited grounds and his dismissal was for a conduct reason and was not unfair in accordance with the principles of s.98.

8. The Employment Tribunal hearing took place over three days, from 19 to 21 March 2018, and owing to the illness of one of the witnesses, the case was adjourned, part-heard, for the completion of the evidence on 11 June 2018, when an oral Judgment was given. The written Judgment states only that "The judgment of the Tribunal is that the Claimant's claims are not successful and are dismissed" without identifying what claims have been considered. The Claimant, as per his entitlement, requested Written Reasons for the Decision and those were signed by the Employment Judge on 7 September and sent to the parties, seven days later, on 14 September 2018.

9. The **1977 Regulations** provide, in Regulation 4, that appointed safety representatives such as the Claimant, shall have, amongst other things, the following functions, "To carry out inspections in accordance with Regulations 5, 6, and 7 below"; with paid time off.

10. Regulation 4A provides as follows:

> ***"4A.—Employer's duty to consult and provide facilities and assistance***
>
> ***(1). Without prejudice to the generality of section 2(6) of the Health and Safety at Work etc. Act 1974, every employer shall consult safety representatives in good time with regard to-***
>
> > ***(a). the introduction of any measure at the workplace which may substantially affect the health and safety of the employees the safety representatives concerned represent;***
> >
> > ***(b). his arrangements for appointing or, as the case may be, nominating persons in accordance with regulations 7(1) and 8(1)(b) of the Management of Health and Safety at Work Regulations 1999 or article 13(3)(b) of the Regulatory Reform (Fire Safety) Order 2005;***
> >
> > ***(c). any health and safety information he is required to provide to the employees the safety representatives concerned represent by or under the relevant statutory provisions [or the relevant nuclear provisions];***
> >
> > ***(d). the planning and organisation of any health and safety training he is required to provide to the employees the safety representatives concerned represent by or under the relevant statutory provisions [or the relevant nuclear provisions]; and***
> >
> > ***(e). the health and safety consequences for the employees the safety representatives concerned represent of the introduction (including the planning thereof) of new technologies into the workplace.***
>
> ***(2). Without prejudice to regulations 5 and 6 of these Regulations, every employer shall provide such facilities and assistance as safety representatives may reasonably require for the purpose of carrying out their functions under section 2(4) of the 1974 Act and under these Regulations.***
>
> ***…."***

11. Regulation 5 concerning inspections of the work place provides as follows:

> ***"(1). Safety representatives shall be entitled to inspect the workplace or a part of it if they have given the employer or his representative reasonable notice in writing of their intention to do so and have not inspected it, or that part of it, as the case may be, in the previous three months; and may carry out more frequent inspections by agreement with the employer.***
>
> ***(2). Where there has been a substantial change in the conditions of work (whether because of the introduction of new machinery or otherwise) or new information has been published by [...] the [relevant authority] relevant to the hazards of the workplace since the last inspection under this Regulation, the safety representatives after consultation with the employer shall be entitled to carry out a further inspection of the part of the workplace concerned notwithstanding that three months have not elapsed since the last inspection.***
>
> ******

> ***(3). The employer shall provide such facilities and assistance as the safety representatives may reasonably require (including facilities for independent investigation by them and private discussion with the employees) for the purpose of carrying out an inspection under this Regulation, but nothing in this paragraph shall preclude the employer or his representative from being present in the workplace during the inspection.***
>
> **…..”**

Regulation 6 and 7 are not relevant for the purposes of this case.

12. Enforcement is by Regulation 11 which enables a safety representative to present a claim to an Employment Tribunal to assert that the employer has failed to permit to take time off in accordance with Regulation 4(2) or failed to pay him in accordance with the same regulation.

13. S. 146 **TULR(C)A 1992** 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 an independent trade union at an appropriate time, or penalising him for doing so, [...]**
> >
> > **(ba). preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or**
> >
> > **(c). compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.**
>
> **(2). In subsection [(1)] “an appropriate time” means —**
>
> **(a). a time outside the [worker’s][7] 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 [or (as the case may be) make use of trade union services];**
>
> **and for this purpose “working hours”, in relation to [a worker], means any time when, in accordance with his contract of employment [(or other contract personally to do work or perform services)], he is required to be at work.**
>
> **…..”**

14. S.100(1)(b) of the **ERA** provides:

> **“100. Health and safety cases.**

(1). An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

…

(b). being a representative of workers on matters of health and safety at work or member of a safety committee—

(i). in accordance with arrangements established under or by virtue of any enactment, or

(ii). by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee.

…..”

The Employment Tribunal’s Judgment

Regulation 5 of 1977 Regulations

15. The Tribunal appears to have decided that there was no free-standing Regulation 5 complaint before it. There is no reference to it in the Tribunal Decision and it appears not to have been raised by the Claimant in the course of the hearing other than in the closing submissions where the helpful notes, prepared by Ms Barrett from the hearing, record that the **1977 Regulations** are referred as a matter of relevance in considering the s.146 and 152 complaints but not as a free-standing complaint.

16. The ET1 form does not, in terms, rely on a breach of Regulation 5 as a free-standing complaint and the claim is not framed in terms of the enforcement provisions in Reg.11 and the available remedies of a declaration and compensation for the employer having failed to permit time off and for loss sustained by the employee. Nor did the Claimant or his representatives identify it as a free-standing complaint in the agreed list of issues, or raise it at the outset of the hearing. The Claimant’s attempt to conduct an inspection on 30 March 2016 are of course central to the factual matrix leading to his dismissal, and the alleged detriments, but it cannot fairly be said that the Tribunal has erred in law in failing to consider a complaint of breach of

the **1977 Regulations** when it has not been raised as a separate complaint for determination. The Tribunal can only decide the dispute brought before it and which has been pleaded (see for example **Chapman v Simon** [1994] IRLR 124 CA).

17. Given that the Claimant's attempted inspection on 30 March 2018 was so central to the facts of the case, ideally, the Tribunal would have clarified with the parties at the outset of the hearing that there was no Reg 5 case that had been pleaded and was therefore not before it as an issue and expressly addressed, as there was perhaps some small degree of ambiguity. However, the failure to do so does not amount to an error of law when it has not been cited in the ET1 as a free-standing issue. It is the role of the parties to make sure that the Tribunal correctly understands the claims on which it seeks a determination.

Interplay between 1977 Regulations and trade union victimisation.

18. The next ground I shall deal with is the assertion that it amounted to an error of law by the Tribunal not to have considered the **1977 Regulations** in considering the trade union detriment complaint, which it is common ground that the Tribunal did not do.

19. This is what the Tribunal said about the trade union detriment claim:

> **"S.146 – Detriment on grounds relating to TU membership**
>
> **43. There are two limbs to S.146–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 (sic) is a time wither (sic) 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 do so 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 to claim are not made out.

45. Even (sic) 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."

20. The Claimant's concern is that the Tribunal did not refer to the **1977 Regulations** when rejecting his trade union detriment complaint and its conclusion that he was not undertaking trade union activities "at an appropriate time". He contends that the Tribunal should first have analysed whether the Claimant's proposed safety inspection fell within the scope of Regulation 5. If they had done so, they would have concluded that he was acting within his rights in conducting the inspection on 30 March 2016, and that since he had been appointed by the union as a safety officer, it must follow that the Respondent was in breach of s.146 and had thereby subjected him to a detriment for his trade union activities.

21. I agree that the wording of the Tribunal's analysis of the trade union detriment complaint in paragraphs 43-45 appears to have confused trade union activities with safety officer duties, which is problematic. When acting as a safety officer, albeit appointed by a union, the duties of the officer are set out in the **1977 Regulations** to have regard to workplace safety. The interests of the union and the interests of health and safety may not always be aligned, and once appointed, the safety rep is independent. Safety rep rights and obligations are not necessarily synonymous with union membership and activities. They are separate functions and the role of an elected trade union rep is not the same as the role of a trade union appointed safety rep. It is important that the difference and distinctions are maintained. That is why they are separate rights and separate causes of action and legal protections given to each and which give rise to separate remedies.

22. There may be cases where an employer subjects a union member and/or activist who is also a safety rep (or vice versa) to a detriment that infringes both s.146 **TULR(C)A 1992** and the **1977 Regulations**, but it will not always be the case. Sometimes, in practice, the distinction between activities qua safety officer and qua trade union official will be hard to draw, where, for example, a union has a particular safety campaign that is taken up by a safety rep who may also be a union activist, but that was not the case here.

23. The difficulty for the Claimant is that on the facts of this case, the Tribunal's non-consideration of Reg 5 in the context of the trade union victimisation complaint does not have any effect on the outcome of that complaint. The Claimant's case was that he had been prevented from conducting a safety inspection pursuant to Reg 5 of the **1977 Regulations** as an appointed safety officer, which, he says, necessarily meant that s.146 has been infringed. That cannot be right: on the facts of this case, taking part in a safety inspection was not "taking part in the activities of an independent union". It appears to have been the Claimant's case at the Tribunal that the purpose of the Respondent's actions was to prevent or deter the Claimant from carrying out the inspection in his capacity as safety rep, not for any of the prohibited reasons identified in s.146(1). The Tribunal's error in paragraphs 43 and 44 is to assume (if that is what they have done) that the health and safety inspection was a trade union activity, which it was not. If anything, therefore they have disadvantaged the Respondent, not the Claimant, by suggesting that the first limb of s.146(1) has been met. The Claimant was not taking part in the activities of an independent trade union when he was seeking to undertake the safety inspection, he was taking part in the activities of a safety rep, so the appropriateness or otherwise of the timing was immaterial.

24. Although the Tribunal's approach was a little unclear, it did not disadvantage the Claimant in this regard and it made no difference to the outcome of the complaint of trade union victimisation.

The Tribunal's approach to the Health and safety dismissal complaint.

25. I deal lastly with the first of the Claimant's grounds of appeal which can be dealt with fairly briefly. S.100(1)(b), health and safety dismissal was clearly identified as an issue at all stages in the proceedings which the Tribunal was obliged to deal with and they have failed to consider it. The Claimant was given leave to amend the claim to include it as a cause of action, together with a trade union dismissal complaint, after he had been dismissed and it is in the agreed list of issues prepared by the parties in advance of the hearing. The Tribunal has correctly set out the issue in paragraph 9a of its reasons:

> **"9.…**
>
> > **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?"**

Which virtually mirrors the wording of s.100(1)(b) **ERA 1996**. But perplexingly the Tribunal have headed the paragraph:

> **"9. Automatic Unfair dismissal of a trade union representative"**

Whereas in the parties' agreed list of issues it is entitled:

> **"3. Automatic Unfair dismissal of a health and safety representative"**

26. So perhaps the error crept in at that stage. In any event, s.100(1)(b) is not set out anywhere in the Tribunal's summary of the applicable law, there is no mention of the section number or the substance and the issue is simply not addressed in the narrative or the

A conclusions. The Tribunal has simply failed to deal with it, as Ms Barrett was rather forced to concede during the course of the hearing today.

B 27. Ms Barrett's next submission was that notwithstanding the Tribunal's oversight, whether by luck or judgment, the Tribunal nonetheless made the necessary findings of fact to support the overall conclusion that all the Claimant's claims should be dismissed. I cannot agree with that submission. The Tribunal has failed to make the necessary findings of fact, has

C failed to consider Regulation 5 or analyse the issues and has not applied its mind to it. It is clear, from the Claimant's closing submissions, that s.100(10(b) was in fact the primary and probably his strongest point.

D

28. The Tribunal makes some findings at paragraph 27 – 34, but they will need to be re-visited in light of the rights and entitlements of the Claimant as a safety rep.

E

29. I am also troubled by the failure of the Tribunal to make a finding of fact about the reason for dismissal (see paragraph 41). Ms Barrett observed that the reason for dismissal is considered in the conclusions section of the Judgment. However, in order to draw conclusions,

F one needs facts from which to draw them from. There is a further difficulty in that the reasons change in each of the three paragraphs that they are mentioned. In paragraph 45, it is said that the reason for dismissal was the, "failure to follow a reasonable management instruction,

G namely the refusal to drive as per his contract of employment." By paragraph 47, that has become, "refusal to follow a reasonable management instruction, namely to undertake his contractual driving duties and the manner in which he interacted with management following

H that request." By paragraph 52, it states that the Claimant was dismissed, "for the way he behaved on that day, namely his refusal to drive and his aggressive attitude." Of course,

whether it was a *reasonable* management instruction for him to undertake his driving duties, hinges on his entitlement or otherwise to undertake the workplace inspection. Similarly, how his behaviour in consequence of that request can be viewed, is also coloured by his rights vis a vis the inspection. It will need to be revisited in light of the Reg 5 rights and obligations.

30. I am told today, but have not seen it, that the actual dismissal letter is very lengthy and relies on breach of the implied term of trust and confidence. The ET3 states that the dismissal was for a conduct reason and that "the actions of the Claimant resulted in a serious breach of trust and confidence resulting in the breakdown of the working relationship with the Respondent" so it is not entirely clear if they are relying on conduct, or some other substantial reason justifying dismissal.

31. There is no appeal from the ordinary unfair dismissal finding however and the difficulties with this aspect of the Tribunal's decision will be resolved by the remission of the health and safety dismissal aspect of the case back to the Tribunal. The starting point will be whether the proposed inspection by the Claimant comes within Reg 5 of the **1977 Regulations** and the Tribunal will need to hear the evidence again and make its findings on it. If the Tribunal finds that the reason (or if more than one the principal reason) for the Claimant's dismissal was for seeking to undertake a safety inspection in accordance with Regulation 5, and he had complied with the procedure set out in the **1977 Regulations** as informed by the HSE Code of Practice, then it follows that the Claimant will be found to have been unfairly dismissed contrary to s.100(1)(b) and the s.98 ruling will fall away. If the Tribunal finds that he does not fall within the protection of **ERA 1996** Regulation 5, or he does, but the s.100(1)(b) claim fails on causation, then the Tribunal's finding that the Claimant was not unfairly dismissed under ss.94-98 **ERA 1996** will be unaffected and still stand.

32. Ms Barrett submits that this Tribunal has to be mindful not to apply an over-rigorous approach and the judgment is for the benefit of the parties, who, having been at the hearing, do not come to the case as strangers. The judgment is to enable them to understand why they have won or lost and know the principal findings of facts. I accept that there is a generous ambit for Tribunals to operate within, and that they are under intense workload pressures, but the lack of s.100(1)(b) decision is a material oversight and cannot stand. The appeal must be allowed in relation to ground (a) and the case be remitted back to the Tribunal.

33. In considering the EAT guidance in **Sinclair Roche and Temperley and Ors v Heard and Anor** [2004] IRLR 763, it is appropriate to remit the matter back to the same tribunal. It is a professional Tribunal that will be well able to look at matters afresh with an open mind and consider the issues that it had not previously considered fairly and without preconception. It is proportionate for the matter to be remitted to the same tribunal to look at just one aspect of the case that it heard just one year ago, over several days.

34. In conclusion, ground (a) of the amended Grounds of Appeal relating to s.100(1)(b) of the **Employment Rights Act 1990** be allowed and the matter be remitted to the same Employment Tribunal for rehearing to the decide on the following questions:

a. Had the Claimant, who was a safety representative for the purposes of the **Safety Representatives and Safety Committees Regulations 1977** ('the 1977 Regulations'):

   i. carried out an inspection pursuant to Reg.5 of the **1977 Regulations** within the 3 months prior to 30 March 2016?

   ii. given his employer or its representative reasonable notice of his intention to inspect the workplace on or about 30 March 2018?

iii. And therefore, was the Claimant's proposal to conduct an inspection on 30 March 2016 made by virtue of the **1977 Regulations**?

b. What were the set of facts known to the Respondent which caused them to dismiss the Claimant?

c. Was the management instruction to the Claimant to perform driving duties on 30 March 2016 reasonable in light of the **1977 Regulations**?

d. Was the reason, or if more than one, the principal reason for the Claimant's dismissal that he performed or proposed to perform a function as a safety representative by undertaking, or seeking to undertake a workplace inspection on 30 March 2016?

35. All other Grounds of the Appeal are dismissed.