Appeal No. UKEAT/0024/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 October 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MR D BLEIMAN

MRS C BAELZ

CADENT GAS LIMITED — APPELLANT

MR PRITPALL SINGH — RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	Mr Andrew Burns (One of Her Majesty's Counsel) Ms Kate Balmer (of Counsel) Instructed by: Addleshaw Goddard LLP One St Peter's Square Manchester M2 3DE
For the Respondent	Mr Deshpal Panesar (of Counsel) Instructed by: Simpsons Solicitors St Nicholas House Old Church Yard Chapel Street Liverpool L2 8TX

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SUMMARY

AUTOMATICALLY UNFAIR DISMISSAL

The Claimant, an active trade union member, was a gas engineer. He was required to respond to priority gas leaks without delay. On 19 June 2017, he was called out to a gas leak at 1.13am. The Claimant had not rested properly or eaten for some time but accepted the job. Instead of going directly to the leak, he stopped for some food without telling Dispatch. He arrived at the premises 1 minute outside the hour stipulated in the service level agreement (SLA). The failure to meet the SLA was noticed by Mr Huckerby, a manager with whom the Claimant had had difficulties in the past relating to his union activities. Mr Huckerby played a leading role in the investigation. In the course of internal emails, Mr Huckerby referred to the Claimant's trade union status which he wanted to keep "on the radar". The Tribunal found these references to be unexplained as were various other steps taken by Mr Huckerby, including his own involvement which was not the norm for a manager of his seniority. Mr Huckerby was also found to have given incorrect information to HR and to the dismissing officer in the course of the investigation. The disciplinary hearing was conducted by Mr Wilson, who had not had any prior involvement. He decided to dismiss the Claimant for gross misconduct.

The Claimant claimed, amongst other matters, that the reason or principal reason for his dismissal was because of his trade union activities contrary to s.152 of the **Trade Union and Labour Relations (Consolidation) Act 1992**. The Tribunal upheld that complaint. In doing so it had concluded that Mr Wilson and Mr Dennis (the manager hearing the appeal) were not motivated by prejudice against the Claimant for his trade union activities and cited a case (**Dundon v GPT**) that was not mentioned in the course of the hearing. The Respondent appealed on the grounds that having found that Mr Wilson and Mr Dennis were not motivated by prejudice against the Claimant for his trade union activities that was the end of the case, and

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that there was no scope for attributing Mr Huckerby's trade union animus to the Respondent in these circumstances.

Held, dismissing the appeal, that the Tribunal's finding that Mr Wilson and Mr Dennis were not motivated by prejudice did not preclude a finding that trade union activities played a part in their reasoning. The reference to **Dundon** was not incorrect and it had not played such a central role in the Tribunal's judgment that there was any material injustice caused by not giving the parties an opportunity to comment on it.

In any event, the Tribunal's analysis was such that it fell into one of the manipulator scenarios posited by Underhill LJ in **Royal Mail v Jhuti** [2018] ICR 982**.** In particular, Mr Huckerby was a manager deputed by the employer to carry out the task of investigating the misconduct. His leading role in the investigation was such that it was appropriate, in the circumstances of this case to attribute his motivation to the employer, even though that motivation might not be shared by Mr Wilson or the appeal officer, Mr Dennis.

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THE HONOURABLE MR JUSTICE CHOUDHURY

1. We refer to the parties as they were below. This is an appeal brought by the Respondent against the decision of the Leicester Employment Tribunal upholding the Claimant's claim that the reason or principal reason for his dismissal was that he had engaged in trade union activities. The appeal concerns the vexed issue of when the motivation of a manager, who is not the dismissing officer, may be attributed to the employer.

Background

2. The Respondent manages the national gas emergency service. Its gas emergency response policy, EM72, states that employees must travel to emergency callouts without delay, or, if delayed, they must contact the Dispatch call centre ("Dispatch") to enable the use of alternative resources to be considered. The Respondent's policies state that a breach of EM72 may amount to gross misconduct.

3. The Claimant commenced employment with the Respondent in January 1988. At the time of his dismissal on 14 September 2017, he was a Lead First Response Engineer whose role was to deal with public gas leaks. Until the incident that led to his dismissal, the Claimant had an unblemished career and disciplinary record.

4. The Claimant was the health and safety representative and shop steward for the GMB trade union and had held these positions since 2012. He was an active trade union official. He regularly raised issues of concern with management. Although the Claimant was a representative of the GMB at regional level, he would often raise matters which, in the Respondent's view, were more appropriate to the national level.

5. The Claimant had raised a number of grievances prior to the events that led to his dismissal. These related to, amongst other things, the unfair allocation of work by Dispatch to the Claimant. The Claimant had complained that he was receiving more calls than other engineers and was being discriminated against as he was challenging Dispatch in his role as a union representative. These complaints led to management in Dispatch apologising to the Claimant on a number of occasions for not following processes and for unfairly allocating work. The Tribunal did not see any of the formal outcomes of these grievances. However, it concluded that in light of the numerous apologies made by different staff within Dispatch, the Respondent accepted some culpability that Dispatch was not following the agreed procedures and that the Claimant was being unfairly allocated work.

6. The Claimant continued to raise a number of grievances throughout 2016 and 2017. In March 2016, the Claimant's grievance that he was being prevented from carrying out trade union activities by a Mr Stephen Pain on several occasions and from inspecting some shelving in his capacity as a health and safety representative was upheld. However, the Claimant continued to be prevented from accessing the shelving area. Other grievances and complaints were raised in June, December, October and November 2016. Three of these grievances involved complaints about Mr Andrew Huckerby, Network Manager. It was the Claimant's case that Mr Huckerby bore an animus against the Claimant due to his trade union activities. The Tribunal had no evidence as to the outcome of some of these grievances. It is clear that the Respondent found the number of challenges from the Claimant "difficult to manage", and noted that a senior HR manager had even asked a colleague of the Claimant, Mr Whitaker, how they could stop the Claimant putting in so many challenges.

7. In the period leading up to the incident which resulted in the Claimant's dismissal, the Claimant had been on duty for substantial periods. On Saturday, 17 June 2017, the Claimant was required to work on a particularly complex and physically demanding job during one of the

hottest days of the year. The Claimant spent longer than anticipated in finishing the work. By the time he finished the job at 8.44pm that evening, he had not eaten since 8.00am that morning. The Claimant spoke to Dispatch on his way back to the depot. There was a discussion about relieving the Claimant from further duties under the Respondent's Fatigue Risk Assessment policy. However, it appears that this was not properly done or recorded by Dispatch at the time. As a result, the Claimant was not stood down from further duties as he ought to have been. As the Claimant was about to leave the depot, he was contacted again by Dispatch. During the ensuing conversation, the Claimant made it very clear that he was extremely tired, and, in a further conversation later that evening, explained that he had hardly had any food all day.

8. The Claimant eventually got home at 10.29pm. There was a further call with Dispatch at this point after which the Claimant went to bed.

9. At 12:58am on 18 June 2017, an uncontrolled gas escape was reported at premises in Bolton Road in Leicester. This was classed as a Priority escape in accordance with EM72. Dispatch contacted another engineer at 1:05 am. However, that engineer stood himself down in accordance with the Respondent's risk assessment procedure. A few minutes later, at 1.13am, the Claimant was woken up by a call from James from Dispatch. The Claimant was given to believe that he was the only engineer left to take the callout. Telephone conversations with Dispatch are recorded. The Tribunal heard a recording of this call (amongst others) and noted that part of the exchange was as follows:

> **"78 …The Claimant stated:**
>
> **"Well I am tired, but if he doesn't want to do it I will have to do it won't I?"**
>
> **To which James replied:**
>
> **"Yeah. OK that's alright then Paul [which is how the Claimant was addressed]. So, it's been in a little while. It's probably been about 20 minutes, but it's not too far."**

10. Although very tired, the Claimant accepted the job, because he believed he had no real choice but to do so. It appears that James did not understand the risk assessment procedure or how to properly assess who should have been called out. It was subsequently accepted by the Respondent that, given the particular circumstances of that evening (including the fact that there was no explanation as to why the Claimant was called out over and above another engineer, who had not yet worked the maximum permitted number of hours before he would have to be risk assessed down), the Claimant should never have been called out. The Tribunal found as a fact that by the time the Claimant had spoken to Dispatch earlier that evening, the Claimant should have been stood down in accordance with the Respondent's own fatigue risk assessment procedure.

11. The Claimant changed and left home at 1:25am to travel to the escape. The Claimant felt he needed something to eat and drink as he had not eaten for so long and thought the job could take a while. He travelled 1 mile in the opposite direction to visit McDonald's, which the Claimant believed would still be open at that time of night. Upon finding that that branch of McDonald's was closed he drove back towards the escape and stopped at Kentucky Fried Chicken to collect some food. The visit to KFC lasted around 13 minutes.

12. The Claimant arrived at the escape at 1:59am, which was just one minute outside the service level agreement ("SLA") standard requirement of one hour. The property could not be accessed so the Claimant risk assessed himself down at 2.22am and went home.

13. During an informal debrief with his line manager, Mr Rob Baxter, and a Mr Martin Jones, the Claimant was led to believe that nothing further would come of the incident.

14. Mr Huckerby received a daily lost jobs report which noted that the Bolton Road job had resulted in the SLA target being missed. He decided to look into it further. It should be noted that any findings as to Mr Huckerby's actions were not based on any direct evidence from him

as he was not called as a witness. The Tribunal considered this to be a "*surprising*" omission given that it was being alleged that Mr Huckerby "*drove the investigation towards a dismissal*".

15. Mr Huckerby wrote to HR on 20 June 2017 stating that there was potentially a disciplinary action against the Claimant. Mr Huckerby told Mr Dennis, Head of Contract, Planning and Assurance, that he had engaged HR in relation to this matter "*as the Claimant was a TU rep he wanted to get a radar as this could be an issue*". This reference was unexplained. There are further references in the internal documentation to the Claimant's status as a health and safety rep, which the Tribunal regarded as being unexplained. The Tribunal heard no evidence from the Respondent as to why the Claimant's union representative status could be an issue and why Mr Huckerby felt this needed to be highlighted to HR. When HR asked why the SLA had been missed, Mr Huckerby replied and advised HR that the job had failed regulatory standards. He omitted to mention that there had been a 20-minute delay by Dispatch in allocating the call to the Claimant which must have contributed to the lost job. In a further email to HR, Mr Huckerby highlighted that the Claimant had stated that he had been unable to gain access to the building and mentioned that another engineer visited at 5.00am and did manage to gain access. The Tribunal considered that Mr Huckerby was thereby implying to HR that the Claimant may have deliberately recorded the job as "*no access*" because he was suspicious that the Claimant had not been truthful about the matter. This was supported by Mr Huckerby's actions in subsequently ordering data retrieval from the Claimant's Bascom-Turner machine, which is the gas detection equipment used by engineers.

16. HR's response was to recommend that this matter be treated as gross misconduct and that an investigation officer be appointed. Mr Huckerby nominated Mr Chris Brown as the investigating officer. However, Mr Huckerby continued to play a part. Although HR prepared terms of reference for the investigation, these were changed by Mr Huckerby. The amended terms of reference referred to the Claimant being a "*trained health and safety rep*". The

Tribunal noted, once again, that there was no explanation or evidence as to why the reference to the Claimant's status as a health and safety rep was relevant or was included by Mr Huckerby in the amended terms of reference.

17. The Respondent's disciplinary procedures required an assessment of whether there was a need to suspend an employee subject to disciplinary action. The Tribunal describes this assessment as follows:

> **"96. A disciplinary suspension risk assessment checklist was completed. Counsel for the respondent confirmed this had been completed by Martin Jones. Under a column titled "Consideration" the following question is posed:**
>
> > ***"Is there a risk the employee's presence at work will make it difficult to investigate the allegation e.g. employee may seek to destroy evidence or attempt to influence / intimidate witnesses."***
>
> **97. The question had been marked with an "N" to signify No but in the comments box the following statement had been made *"Potential to try and influence peers as a TU Rep"*. No explanation was provided by the respondent's witness when they were asked about this in cross examination. Mr Wilson was asked if the claimant had ever sought to destroy evidence or intimidate witnesses and his reply was he did not know. It was suggested that this demonstrated the trade union animus. We had no explanation as to why the claimant's status as a trade union representative might mean his suspension risk assessment would be assessed in this way. "**

18. The Claimant was not informed that he was being investigated until the end of a meeting between the Respondent and trade union representatives held on 10 July 2017. It was Mr Huckerby who gave the Claimant this information, stating that a fact find about the events on 18 June 2017 had concluded and would lead to a gross misconduct case. This was notwithstanding the fact that the investigatory report was yet to be produced and no recommendations had been made as to what, if any, disciplinary action was to be taken.

19. At the investigatory meeting on 25 July 2017, the Claimant accepted that he had gone to the job via KFC, but relied, in mitigation, upon the fact that he had not eaten and was very tired. He also informed the investigator, Mr Brown, that he was a diabetic (although the Tribunal did not in the event find that the Claimant was suffering from this condition). The Claimant said that he was aware that other engineers involved in similar incidents had not been investigated in

the same way, and queried whether the investigation was linked to his role as a trade union representative. Mr Huckerby continued to be involved in the investigation even at this stage, requesting further information from Dispatch and informing Mr Brown (incorrectly) that the Claimant had taken a 20-minute break at 9:30pm on the night of the incident.

20. An investigation report was produced on 4 August 2017. This described the Claimant's failure to comply with a proper instruction as gross misconduct. No specific recommendations were made as to next steps.

21. The decision was soon taken to proceed to a disciplinary hearing although it was wholly unclear who made that decision. Another manager, Mr Peter Wilson, was put in charge of the disciplinary hearing. Mr Wilson wrote to the Claimant on 9 August 2017 to invite him to attend a disciplinary hearing to answer a charge of gross misconduct.

22. The Claimant raised a grievance that he was being investigated on the grounds of his safety representative role and/or ethnic background. Mr Wilson was not aware of the grievance at the time of the first disciplinary hearing but did become aware of it by the time of the reconvened hearing on 14 September 2017.

23. Mr Wilson made some enquiries about the other engineers identified by the Claimant and also took into account some information provided to him by HR as to other engineers said to have been involved in similar incidents.

24. Mr Wilson decided that the Claimant had been guilty of gross misconduct, that the Respondent had dismissed engineers involved in similar incidents in the past, and that dismissal was the appropriate sanction in the Claimant's case. A letter to that effect was sent to the Claimant on 21 September 2017. Mr Wilson referred in the dismissal letter to the Claimant as being a health and safety representative and stated, "*You above all people should have been aware of the seriousness of your actions*".

25. The Claimant lodged an appeal against his dismissal. Before that appeal was heard, the Claimant lodged a complaint with the Tribunal and applied for interim relief. The hearing to determine interim relief was held on 3 October 2017. Employment Judge Evans dismissed the application, concluding that it was not likely that, on the determination of the Claimant's claim of unfair dismissal, the Tribunal would find that the Claimant was unfairly dismissed on the grounds of his trade union activities contrary to section 152 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("the 1992 Act").

26. The Claimant's appeal was heard by Mr Dennis. One of the grounds of appeal was that Mr Huckerby and Mr Wilson were friends and had colluded in his dismissal. The Tribunal accepted that there was no evidence to support that allegation and that it was rightly rejected by Mr Dennis. The Claimant's appeal was dismissed on 1 December 2017.

The Tribunal's judgment

27. The Claimant brought claims for unfair dismissal, automatic unfair dismissal on the grounds of trade union membership or activities, wrongful dismissal and disability discrimination. The claim of disability discrimination did not succeed as the Tribunal did not find that the Claimant was a disabled person within the meaning of s.6 of the **Equality Act 2010**. The Claimant's remaining claims succeeded.

28. In a detailed judgment, the Tribunal expressed surprise at the fact that the Respondent had decided not to call Mr Huckerby, given that it had been a key plank of the Claimant's case that Mr Huckerby had an alleged animus towards the trade union, and had played a principal role in the investigation.

29. As to the reason for dismissal, the Tribunal accepted that the failure to comply with EM72 was a serious matter entitling the Respondent to undertake an investigation. The Claimant relied upon a number of matters in support of his claim that the reason or principal

reason for his dismissal was his trade union activities. The first of these was that the Claimant was being held to a higher standard when assessing misconduct by reason of his trade union status. This was based on the reference in the dismissal letter to the fact that the Claimant "*above all people*" should have been aware of the seriousness of his actions. The Tribunal concluded as follows:

> **"162 …The reference to "you above all people" clearly denotes the claimant was being placed at a higher standard. We did not find Mr Wilson's explanation for this statement to be satisfactory (see paragraph 129) as the Claimant had not claimed to be unaware of the rules and procedures and had accepted he had breached EM72. We find that the claimant was held to a higher account due to his status of health and safety representative. This was referenced on a number of occasions and there has not been a satisfactory explanation as to why.**

30. The Claimant also relied upon the inconsistency of treatment in that other engineers had been treated less severely for similar conduct and that this was because of his trade union status.

31. The Tribunal noted that whilst the Respondent was entitled to investigate the matter, the Claimant's conduct appeared to have been dealt with much more seriously and by more senior management initially than in other cases. Having noted that Mr Huckerby was not involved in the investigation of failures to comply with EM72 by other engineers, the Tribunal stated as follows:

> **"166. This was in contrast to the level of involvement Mr Huckerby had with the claimant's investigation. Mr Huckerby initiated the investigation. We accept that there were valid grounds to commence such an investigation having regard to Mr Huckerby seeing a report about a lost SLA with an explanation that the claimant had stopped for food. Martin Jones may have drafted the initial fact find but Mr Huckerby then went much further than initiation and took on a leading role on the investigation. He highlighted that the claimant was a trade union representative to the HR team. He did not merely instigate the investigation he drove the investigation. He amended the terms of reference that had been drafted by HR and drafted the privacy impact assessment and later widened the request and then obtained data from the claimant's vehicle tracker and gas monitoring device. He emailed a reply to HR in response to an email they had sent to Martin Jones, advising that SLA targets had been lost but omitted to mention that 20 minutes had been lost by Dispatch in failing to allocate the call quickly. This was not a balanced response to HR setting out all the relevant factors as to why the SLA was missed. In failing to mention this fact, it seemed that the claimant was wholly to blame for missing the SLA. This led directly to HR advising the case was one of gross misconduct. Mr Huckerby**

was also having discussions with Chris Brown and Dispatch management and was active in gathering documentation for the investigation.

167. Having compared the approach the respondent took in the David Shead case we concluded that the claimant has raised a prima facie case. We therefore considered the respondent's explanation. We did not hear from Mr Huckerby as a witness. The respondent dealt with this in evidence from both Mr Wilson and Mr Dennis who both told the Tribunal it was entirely appropriate that as the Network Manager Mr Huckerby would instigate the investigation as he was responsible for missing SLA's. Whilst this may have explained the instigation of the investigation it did not explain the extent of Mr Huckerby's involvement in the investigation itself as has been outlined above. The respondent submitted that the initial fact find looked into actions of others including Javed Rahim. The respondent pointed to Javed Rahim's different conduct in that he had stood himself down and therefore his conduct differed from the claimant who accepted the job. This did not take into account that by the time the claimant was presented with the job he knew there was no other engineer that could have taken the job having being advised that Javed Rahim had stood himself down as had David Shead. We also found that rather than the claimant being requested and having a choice to accept the job he had no choice but to take the job. We reject the contention that James answered a rhetorical question by the claimant (see paragraph 78)."

32. The Tribunal dealt with some of the comparators in paragraph 169 as follows:

"169. Mr Shead, who was not a trade union representative, had failed to proceed directly to a P1 gas escape. He was given a written warning. Ms Cameron, who was also not a trade union representative committed far more serious transgression than the claimant and was given a final written warning despite already being on a final written warning. She was dismissed on notice for an accumulation of warnings. The claimant also admitted to failing to proceed directly to a P1 gas escape and was summarily dismissed for gross misconduct. These are facts from which we conclude are capable of establishing the dismissal was on prohibited grounds as the difference in treatment was stark. We rejected Mr Wilson's explanation that a final written warning was as serious as being dismissed for gross misconduct. A summary dismissal is the most serious of sanctions open to an employer. The difference on the effect on an individual between receiving a final written warning and summary dismissal is retaining a job and salary and having no job and salary, not even notice pay.

170. The respondent submitted that the claimant's case was not inconsistent with other dismissals within the respondent. This was not, in light of both the evidence available in the bundle and the evidence that unfolded at the hearing a sustainable position. In relation to Mr Jones he had deliberately stayed at home to make tea and toast delaying 35 minutes. We reject that this can be described as analogous to the events involving the claimant on 17/18 June 2017.

171. The respondent's case in respect of Mr Shead was that it differed from that of the claimant in that he had expressed remorse and was apologetic and acknowledged it would never happen again. Mr Wilson's evidence was that he was informed of this by HR. If we accept that Mr Wilson believed this information from HR to be correct can it be said that as he genuinely yet mistakenly believed the cases to be different he cannot have been motivated by the claimant's trade union status. In our view this is more relevant to the band of reasonable responses but there are a number of inconsistences with this. The claimant apologised for missing the SLA on the night of 18 June and openly advised he stopped for food but this was overlooked by Mr Wilson and not taken into account."

33. The final three factors considered by Tribunal in determining the reason for dismissal were "Motivation", "Trade Union Animus" and "Conflicting Reasons put forward for dismissal". It is necessary to set out these aspects of the Tribunal's judgment more fully:

> **"Motivation**
>
> **172. We do not conclude that Mr Wilson or Mr Dennis were motivated by prejudice against the Claimant for his trade union activities or that Mr Wilson was in conspiracy with Mr Huckerby to dismiss the Claimant for a falsehood but motivation is not necessary (Gundton v GPT) [This is intended to be a reference to Dundon v GPT Ltd [1995] IRLR 403]. We also reject the Claimant's contention that he was dismissed as the Respondent was about to enter into pay talks and his influence was one of the Respondents motivating factors. There was no evidence to support this.**
>
> **173. Nonetheless, Mr Wilson presided over a wholly inadequate investigation. Other members of staff had culpability. 3 Dispatch team members failed to mark the Gantt with crucial information. No action was taken against anyone other than the Claimant. The Respondent's explanation once the Claimant had accepted the job he was obliged to proceed without delay, ignored everything else that had happened to that point and this is not a reasonable position to have taken.**
>
> **Trade Union Animus**
>
> **174. The Claimant's evidence established sufficient grounds to show that there was a history of conflict between him and Mr Huckerby. We reached this conclusion taking into account the history of grievances, the disagreement regarding the stress survey and the ACAS early conciliation.**
>
> **175. We have already concluded that the Respondent has not provided an adequate explanation as to why Mr Huckerby was so involved in the investigation into the Claimant's conduct. Although Mr Huckerby did not make the decision to dismiss the Claimant the active role he took in driving the investigation, which is different to the approach taken for Mr Shead, had the end result that the Claimant faced a charge of gross misconduct whereas Mr Shead was dealt with locally and received a written warning.**
>
> **176. The Respondent disputed there was any evidence to show that Mr Huckerby had a particular issue with the Claimant. Mr Huckerby was not called as a witness to refute any of this evidence…**
>
> **177. In addition, the Respondent's explanations for the unfavourable treatment of the Claimant in comparison to Mr Shead and Ms Cameron is unsatisfactory and does not explain why the other members of staff in Dispatch faced no sanctions or any investigation despite one member of staff being heard on the recording saying he did not understand the callout procedures.**
>
> **178…**
>
> **179. It was not only the animus between the Claimant and Mr Huckerby that we found raised a prima facie case. What was also persuasive that the reason for the dismissal was trade union activities was the chain of events involving Dispatch on [the] night of 18 June 2017. We have found and Mr Wilson conceded that the Claimant should never have been called out to the job in question. The history of animosity and disputes between the Claimant and**

<u>Dispatch was never even considered to be of relevance by Mr Wilson or Mr Dennis</u>. No one from Dispatch was ever interviewed or held to account for the failings that night.

180. We found that the correlation made by Mr Jones on the disciplinary suspicion checklist to be concerning (see paragraph 97 above). In response to a question as to whether there was a risk the employee's presence at work will make it difficult to investigate the allegation e.g. employee may seek to destroy evidence or attempt to influence / intimidate witnesses a correlation was made with the claimant's status as a union representative. Mr Jones commented "Potential to try and influence peers as a TU Rep". This was a telling observation and in the absence of an explanation it is reasonable to infer that there was a prejudicial view of the claimant due to his trade union status / activities.

Conflicting reasons put forward for dismissal

181. We have considered the submission that the claimant did not know himself the reason for his dismissal having cited race, socialist views or trade union beliefs at various states of the investigation and disciplinary. The claimant did express views that his treatment may have been connected to his race on a number of occasions. We have balanced this with the claimant's position taken at the investigation, where he immediately raised his trade union activities as being the reason for his difference in treatment, his emails to HR prior to the disciplinary hearing, his formal grievance (which was never dealt with) and focus of his challenges at the disciplinary hearing and appeal and his claim to the employment tribunal. Taking all of this into account we conclude that the claimant was consistent in his reliance on the prohibited reason of his trade union activities. The claimant's defence of his actions throughout have been based on his belief he was being treated differently due to his trade union activities and status as a union representative.

182. Lastly we turn to the respondent's submission that the trade union were less than full throttle in their assertion the dismissal was due to trade union activities where the correspondence from the union stated that it "conceivably may have had an influence". We agree that an influence would not be sufficient to show the reason or principle reason for dismissal and could be taken as a watered down expression of support. It is the function of the Tribunal to arrive at a judgment based on the evidence before us and other opinions, even from the supporting trade union are not of relevance when reaching that judgment.

183. It follows that taking all of the above into account, on balance we find the principle (sic) reason for the claimant's dismissal was his trade union activities and shall be regarded as unfair." (Emphasis added.)

34. The Tribunal next dealt with the s.98 "ordinary" unfair dismissal claim. It found that the investigation conducted by Mr Wilson was "*wholly inadequate*" and that Mr Wilson's reliance upon the comparators to justify the Claimant's sanction was "*flawed*." He had simply accepted a verbal account of events from HR about the other cases without investigating the matter properly. The Tribunal regarded that as unreasonable, stating that if an employer is going to

point to other cases in support of its decision to dismiss an employee, "*they should be certain of the facts*".

35. The Tribunal concluded that the dismissal was not within the band of reasonable responses. This was a situation where the Claimant should never have been in the position of being called out that evening. The Tribunal concluded as follows:

> **"195. The most forceful reason for our finding decision to dismiss was outside the band reasonable responses is the Respondent's previous decisions in other cases. The most analogous case was that of David Shead and he received a written warning. The Respondent acted with far more lenience towards Ms Cameron who committed worse transgressions yet she received a final written warning, and was dismissed owing to the fact she was already on a final written warning. The Respondent's own band of reasonable responses was clear from these cases and they stepped outside of it when deciding to summarily dismiss the claimant."**

The Tribunal declined to make any **Polkey** reduction, but did reduce the award by 20% for contributory fault.

Legal framework

36. Section 152 of **the 1992 Act** provides:

> **"152 Dismissal of employee on grounds related to union membership or activities**
> **(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,…**
> **…"**

37. The "reason or principal reason" test in that provision is the same as that provided for in Sections 98, 100, 104 and 103A of the **Employment Rights Act 1996** ("the 1996 Act"). Thus, when determining the "reason" for dismissal, all such unfair dismissal provisions should be interpreted consistently with ordinary unfair dismissal legislation: see **Royal Mail**

Group Ltd v Jhuti [2018] ICR 982 ("Jhuti") at [58]. We return to the Court of Appeal's analysis in **Jhuti** below.

Grounds of Appeal

38. The Respondent only appeals against the Tribunal's decision that the reason for dismissal was trade union activities. Mr Burns QC, who appears for the Respondent (leading Ms Balmer), informed us that the appeal is on a point of principle, as all outstanding compensation issues had been resolved with the Claimant. The Respondent relies upon four grounds of appeal:

a. **Ground 1** – The Tribunal erred in that, having expressly found that neither Mr Wilson nor Mr Dennis were "*motivated by prejudice against the Claimant for his trade union activities*" and that Mr Wilson was not in conspiracy with Mr Huckerby to dismiss the Claimant for falsehood, it ought to have concluded that trade union activities were not the reason for dismissal. In deciding otherwise, the Tribunal misapplied the law and incorrectly relied upon the decision in **Dundon v GPT** [1995] IRLR 403 ("**Dundon"**);

b. **Ground 2** - The Tribunal committed a material injustice in relying upon **Dundon** without giving the parties an opportunity to comment upon it;

c. **Ground 3** - The Tribunal erred in placing reliance upon the history of matters with Mr Huckerby and Mr Jones, when neither of those individuals were the decision-makers in relation to the Claimant's dismissal. The Tribunal thereby failed to ensure that it considered "*only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss*" as required by the

decisions of the Court of Appeal in **Jhuti** and **Orr v Milton Keynes Council** [2011] ICR 704 ("Orr");

d. **Ground 4** – The Tribunal reached a perverse conclusion in holding that the Claimant had been treated materially differently to Mr Robert Jones and or erred in law in concluding that any difference in treatment from comparators supported the inference that the reason for dismissal was trade union activities.

39. Mr Burns dealt with Grounds 1 and 3 together in oral submissions. We deal with those grounds first.

Grounds 1 and 3 – Motivation and the failure to consider only the mental processes of the decision-makers

Submissions

40. Mr Burns submits that once the Tribunal had concluded that the Respondent's relevant decision-makers were not motivated by prejudice against the Claimant, that was the end of the Claimant's case on this issue. It is said that the Tribunal erroneously relied upon the decision in **Dundon** as entitling it to disregard its finding as to motivation. In **Dundon**, the situation was entirely different in that the reason for selecting an employee for redundancy was connected to the amount of time spent by that employee on trade union activities. It was not necessary in those circumstances for the employee to establish that there was some prejudice or predisposition against trade union activities; it was enough that the reason for dismissal was because of those activities. Mr Burns further submits that the Tribunal's decision is contrary to the principles established by the Court of Appeal in **Orr** and **Jhuti**, whereby the Tribunal is "*obliged to consider only the mental processes of the person or persons was or where*

authorised to, and did, take decision to dismiss"; see **Jhuti** at [57]. In the present case, submits Mr Burns, there was no warrant for departing from that principle, and in particular, no warrant for attributing any animus on the part of Mr Huckerby and/or Mr Jones to the deputed decision-makers, Mr Wilson and Mr Dennis.

41. Mr Panesar submits that there was no error on the Tribunal's part. He says that the Tribunal's findings clearly demonstrate that Mr Huckerby, with whom the Claimant did have a difficult history because of his trade union activities, was "knee-deep" in the investigation and played a leading role in driving it forward. As such, the Tribunal was entitled to attribute Mr Huckerby's motivation to the employer notwithstanding the fact that such motivation was not shared by Mr Wilson or Mr Dennis. The present case therefore falls squarely within one of the exceptions to the general rule that only the motivation of the decision-maker is relevant, as described by Underhill LJ in **Jhuti**.

Discussion

42. It is necessary in our view to examine precisely what the Tribunal concluded by way of motivation insofar as it related to Mr Wilson and Mr Dennis. At paragraph 24, the Tribunal directed itself as follows:

> **"24. Reason or principal reason**
>
> **The reason or principal reason test is one of causation. The union grounds must be the sole or predominant reason. The motive or purpose in dismissing is not the issue. It does not have to be shown that the employer was motivated by malice or prejudice Dundon v GPT LTD [1995] IRLR 403."**

43. The Respondent accepts that that self-direction is correct. It does not matter that the employer has no predisposition, or harbours no prejudice, against those engaged in trade union activities; what matters is whether the reason, or if more than one, the principal reason, for the dismissal is that the employee was engaged in trade union activities. There is, as has often been

stated, a distinction between the 'reason why' the employer acts as it does and its purpose or motive in doing so. (We prefer the term "purpose", rather than "motive", only because the latter is apt to confuse given that the 'reason why' an employer acts is often referred to as its "motivation").

44. Bearing that self-direction in mind, we then turn to consider what the Tribunal actually concluded at paragraph 172:

> **"172. We do not conclude that Mr Wilson or Mr Dennis were <u>motivated by prejudice</u> against the Claimant for its trade union activities or that Mr Wilson was in conspiracy with Mr Huckerby to dismiss the Claimant for a falsehood but motivation is not necessary [Dundon]…" (Emphasis added)**

45. It is apparent from the underlined words that the Tribunal was correctly referring back to its previous self-direction that it is not necessary for it to be shown that there was prejudice based on trade union activities. The Tribunal was not, in our judgment, thereby indicating that it was unnecessary to consider whether trade union activities formed part of the motivation or the reason why the employer acted as it did. That much is clear from the Tribunal's various references to the correct approach: see the immediately preceding paragraph [171] in which the Tribunal asks whether Mr Wilson was "*motivated by the Claimant's trade union status*". Mr Burns submits that such a benevolent interpretation is unwarranted because the Tribunal clearly states in [172] that "*motivation is not necessary*" and proceeds to cite **Dundon**. However, in our view, having regard to the first part of the sentence in which those words appear, and where the Tribunal clearly refers to Mr Wilson and Mr Dennis not being "*motivated by prejudice*", it is clear that what the Tribunal meant to say was that "[*<u>such</u>*] *motivation*", i.e. prejudice, was not necessary. The reference to **Dundon** was, in that context, entirely correct. The Tribunal was not in this paragraph stating that Mr Wilson and Mr Dennis were not motivated by the Claimant's trade union activities or that such motivation was irrelevant; instead, it was saying that they were not motivated by prejudice against the Claimant for such activities. Once that is

appreciated, then it becomes clear in our view that there was no error of law in this paragraph at all.

46. That analysis is supported by the fact that the Tribunal did in fact conclude that the Claimant's trade union activities were a factor operating on Mr Wilson's mind in holding the Claimant to a higher standard than others. At paragraph 162, the Tribunal states:

> **"162. Further, in the conclusions reached by Mr Wilson in the dismissal letter he referred to the Claimant as being a health and safety representative and then stating "you above all people should have been aware of the seriousness of your actions". The reference to "knew above all people" clearly denotes the Claimant was being placed at a higher standard. We did not find Mr Wilson's explanation for this statement to be satisfactory (see paragraph 129) as the Claimant had not claimed to be unaware of the rules and procedures and had accepted he had breached EM72. We find that the Claimant was held to a higher account due to his status of health and safety representative. This was referenced on a number of occasions and there has not been a satisfactory explanation as to why."**

47. Furthermore, at paragraph 173, the Tribunal refers to the fact that Mr Wilson presided over a wholly inadequate investigation, and at paragraph 179, stated that:

> **"179. It was not only the animus between the claimant and Mr Huckerby that we found raised a prima facie case. What was also persuasive that the reason for the dismissal was trade union activities was the chain of events involving Dispatch on night of 18 June 2017. We have found and Mr Wilson conceded that the claimant should never have been called out to the job in question. The history of animosity and disputes between the claimant and Dispatch was never even considered to be of relevance by Mr Wilson or Mr Dennis. No-one from Dispatch was ever interviewed or held to account for the failings that night."**

48. These paragraphs demonstrate, in our judgment, that far from the Tribunal concluding that trade union activities played no part in the motivation of Mr Wilson, it considered that several of his decisions were either such that those activities played a part in his decision and/or that the explanation for the Claimant's treatment, in circumstances where those not involved in trade union activities were treated differently, was not properly explained.

49. The Tribunal had found that the Claimant had established a *prima facie* case that his treatment was because of his trade union activities: see e.g. [167], [179]. The burden to establish the reason for the dismissal then shifted to the employer: see **Serco Ltd v Dahou** [2017] IRLR 81 at [30]. It was the Respondent's case that the reason for the investigation and the dismissal was the Claimant's act of gross misconduct in failing to attend to the escape without delay. However, as the Tribunal repeatedly noted, the Respondent failed to produce evidence, in particular from Mr Huckerby, to explain certain of the Claimant's treatment throughout the investigatory and disciplinary process and provided unsatisfactory explanations for other matters. Furthermore, as set out above, Mr Wilson himself was found to have held the Claimant to a higher standard because of his trade union activities and he presided over a wholly inadequate investigation. In these circumstances, it was open to the Tribunal to conclude that the burden of showing the reason had not been discharged. Unlike a discrimination case, there is no requirement then to treat the impugned reason as being the reason for treatment. However, it was open to the Tribunal to draw that inference.

50. However, if we are wrong about that, and the Tribunal did in fact conclude in paragraph 172 that the Claimant's trade union activities (as opposed to prejudice in respect of such activities) played no part in the motivation of Mr Wilson and Mr Dennis, the question arises as to whether the motivation of others may properly be attributed to the employer notwithstanding the fact that the impugned motivation was not in fact shared by the actual decision makers.

51. In **Jhuti**, the Court of Appeal analysed the circumstances in which the motivation of a person not directly involved in the decision to dismiss may nevertheless be attributed to the employer. In that case, the employee, Ms Jhuti, had made whistleblowing disclosures to her line manager, Mr Widmer. Mr Widmer put Ms Jhuti under great pressure to withdraw her allegations and thereafter subjected her to what she believed to be undue criticism of her work

and harsh and unreasonable treatment. Ms Jhuti was eventually signed off work by her GP and she did not return to work. The employer had to decide what to do about her continued employment and assigned a Ms Vickers to investigate. Ms Vickers had had no previous involvement in the matter and came to the conclusion that Ms Jhuti should be dismissed for unsatisfactory performance. The employment tribunal found that, although Ms Vickers had acted on the basis of partial and misleading information as to performance provided by Mr Widmer, who was motivated by the disclosures Ms Jhuti had made, those disclosures played no part in Ms Vickers' reasoning and her claim of whistleblowing dismissal contrary to s.103A of **the 1996 Act** was dismissed. The Court of Appeal upheld the Tribunal's decision. In doing so, it considered **Orr**, a decision of the Court of Appeal concerning the dismissal of an employee for behaviour that had arisen out of an altercation with his line manager. The line manager was said to have acted unreasonably and made racist comments. However, evidence of such conduct was not available to the dismissing officer. The question was whether the line manager's knowledge of the true circumstances could be attributed to the employer, notwithstanding the fact that the dismissing officer was unaware of it. Underhill LJ in **Jhuti** considered that the essential ratio of the decision in **Orr** was as follows:

> **"The answer to the question "Whose knowledge or state of mind was for this purpose was intended to count as the knowledge or state of mind of the employer?" will be "The person who was deputed to carry out the employer's functions under section 98."**

52. The employer in **Jhuti** relied upon **Orr** in support of its submission that as it was illegitimate for the purposes of applying the test under s.98 of **the 1996 Act** to consider the mental processes of anyone other than the decision maker, the same should apply to s.103A where the identical language of "*reason (or, if more than one, the principal reason)*" is used. Underhill J concluded as follows:

"57. I therefore accept Mr Gorton's submission that for the purpose of determining "the reason for the dismissal" under section 98(1) of the 1996 Act the Tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss. (That may be subject to the possible qualifications discussed at paras 62 and 63 below; but they are marginal and not relevant to the present case.)

58. Mr Paxi-Cato submitted that even if that conclusion were correct as regards section 98 it should not apply to the language of section 103A , in order not to restrict the scope of the protection offered to whistleblowers. I cannot accept that. Section 103A falls under Part X of the 1996 Act and it *1003 must be interpreted consistently with the other provisions governing liability for unfair dismissal. All of those provisions, using identical language, require a determination of "the reason … for the dismissal", albeit that in the various cases of "automatic" unfair dismissal that determination is dispositive of liability, whereas in section 98 it is only the first stage of the inquiry. There is no justification for taking a different approach to identifying the reason for the dismissal in the one case than in the other. As Mummery LJ observed at para 48 of his judgment in *Kuzel v Roche Products Ltd [2008] ICR 799*: "the protected disclosure provisions must be construed and applied in the overall context of unfair dismissal law in Part X of the 1996 Act into which section 103A was inserted."

59. I turn to consider the reasoning of Mitting J as set out at paras 37–42 above: [2016] ICR 1043. He took as his starting point the observation which he quoted from my judgment in *Co-operative Group Ltd v Baddeley [2014] EWCA Civ 658* about cases of "manipulation". We are on no view bound by what I said in that passage, which not only was obiter but was (for that reason) not based on any detailed analysis. Nevertheless it reflects an obvious concern at the prospect of an employer escaping liability for unfair dismissal in a case of the kind identified. The correct analysis of a "manipulation" case seems to me require some care. It is best to take it in stages, by reference to the status of the manipulator.

60. I take first the case where a colleague with no relevant managerial responsibility for the victim procures his or her dismissal by presenting false evidence by which the decision-taker is innocently (and reasonably) misled. In such a case the dismissal is plainly not unfair within the meaning of the 1996 Act, whether by way of the manipulator's motivation being attributed to the employer for the purpose of section 98(1) (or sections 98B–104G), or by his knowledge being used to impugn the reasonableness of the decision to dismiss under section 98(4) . The employee has no doubt suffered an injustice at the hands of the Iago figure and may have other remedies (as the Claimant may in the present case—see below); but *the employer* has not acted unfairly.

61. I take next the position where the manipulator is the victim's line manager but does not himself have responsibility for the dismissal. If the matter were free from authority I could see the force of the argument for attributing the manipulator's motivation to the employer, because it has delegated authority to him or her to manage the employee in question. However, that is precisely the argument that appealed to Sedley LJ in *Orr v Milton Keynes Council [2011] ICR 704* and which the majority rejected, for cogent reasons: see paras 49–50 above. It is accordingly not open to us to accept it.

62. Neither of those situations is covered by what I said in the *Baddeley* case, which referred specifically to the situation where the manipulator is "a manager with some responsibility for the investigation", albeit ex hypothesi not the actual decision-taker. That phrase was chosen, I think, to refer generally to the possible role of Mr Berne, and it was imprecise because no findings had been made about what that role was. But it does in fact have a possible

application in cases where someone other than the ultimate decision-taker has a formal role in the decision-making process. For example, in the more elaborate forms of disciplinary procedure manager A is sometimes given responsibility for investigating allegations of misconduct which are then presented to manager B as the factual basis (albeit, typically, challengeable at a hearing) for a disciplinary decision. This is a refinement of a kind which did not fall for consideration in the *Orr* case; and there would in my view be in such a case a strong case for attributing to the employer both the motivation and the knowledge of A even if they are not shared by B. I do not see anything in that view inconsistent with the ratio in the *Orr* case: in such a case the conduct of the investigation is part of the deputed "functions under section 98". But although in the present case Mr Widmer supplied documents to the HR department which it in turn passed to Ms Vickers, and responded to her query about the TMI complaint, that does not make him an investigator.

63. There was, finally, some discussion before us of the case where someone at or near the top of the management hierarchy—say, to take the most extreme case, the CEO—procures a worker's dismissal by deliberately manipulating, for a proscribed reason, the evidence before the decision-taker. Such a case falls outside Moore-Bick LJ's formulation quoted at para 47(4) above, because the CEO, despite his or her seniority, would not have formal responsibility for making the dismissal decision. [7] But the facts in the *Orr* case did not raise this issue, and it rather sticks in the throat that even in a case of this particular kind the manipulator's motivation should not be attributed to the employer for the purpose of section 98(1) . There may well be an argument for distinguishing the case of a manager in such a senior position from those considered in the preceding paragraphs; but the issue does not arise on the facts before us and I prefer not to express a definitive view.

64. If I am right so far Mitting J's reasoning cannot be sustained. Even if Mr Widmer's conduct, as summarised at para 35 of his judgment (para 41 above), constituted a deliberate attempt to procure the Claimant's dismissal because she had made a protected disclosure (though that may in fact be going rather further than the employment Tribunal's findings allow), that motivation could not be attributed to Royal Mail as the employer since it was not shared by Ms Vickers, who was the person deputed to take the dismissal decision.

65. It may at first sight seem wrong that Royal Mail should not be liable for unfair dismissal in circumstances such as the Tribunal found here. But there is an important point of principle involved. The statutory right not to be unfairly dismissed depends on there being unfairness (as defined) *on the part of the employer* ; and unfair or even unlawful conduct on the part of individual colleagues or managers is immaterial unless it can properly be attributed to the employer. A principle has to be identified as to how to draw the line between those whose conduct can and cannot be so attributed. That has been done, in the *Orr* case, on a careful and fully reasoned basis, and we must abide by that decision.

66. It does not, however, follow that in a case of this kind the dismissed employee is necessarily unable to recover compensation for the losses caused by the dismissal. Whether there is another route to such compensation, based on the unlawful conduct which led to the dismissal, is the subject of the issues considered under the following heading.

53. It is clear from that analysis that it is not in every case that the mental processes of the decision-maker will be key. That may well be the general position consistent with the analysis

in **Orr**. However, there are situations, such as those described in paragraph 62 of **Jhuti,** where the motivation and knowledge of a person who is not the decision-maker may be attributed to the employer even where that motivation and knowledge is not shared by the decision-maker. Mr Panesar's submission is that the circumstances of the present case fall squarely within those postulated in paragraph 62 of **Jhuti**. That is because Mr Huckerby was not only an investigator, and therefore a person carrying out deputed functions of the employer in relation to that investigation, he played a leading part in that investigation. We agree with that submission. The Tribunal's findings reveal, as Mr Panesar sought to demonstrate, a compelling picture of a senior manager, who has a poor history with the Claimant by reason of his trade union activities, taking a leading and directing role in the investigation in circumstances where other employees who were not engaged in trade union activities and who had committed similar acts of misconduct were dealt with by local management and not investigated in the same way. Moreover, that role contributed to an imbalanced picture being presented to HR and which resulted in a charge of gross misconduct being laid; a situation that had not arisen for other engineers who were not engaged in trade union activities. Thus, we note that, amongst other matters:

a. There were disputes and disagreements between Mr Huckerby and the Claimant relating to trade union activities: paragraphs 53(d) and (e);

b. Mr Huckerby gave inaccurate information about the Claimant to Mr Wilson, who in turn relied upon that information: paragraph 65.

c. The investigation was instigated by Mr Huckerby: paragraphs 89 and 166. Whilst the Tribunal accepted that the matter was one that the Respondent was justified in investigating, it was given no explanation as to why Mr Huckerby took a leading

role in it rather than a local manager as had been the case with other similar incidents (where the accused employee was not engaged in trade union activities);

d. There were several express references in internal communications to the Claimant's trade union status in the course of the investigation: see paragraphs 90 and 91. The Tribunal did not receive any satisfactory explanation for this;

e. Mr Huckerby, in explaining to HR why the job had missed the SLA target, did not mention that there had also been a 20-minute delay in Dispatch allocating the call to the Claimant: paragraph 92. He also presented information about the Claimant's activities in a manner that might imply that the Claimant had deliberately misrecorded the job as "no access";

f. Mr Huckerby informed the Claimant about the disciplinary investigation on 10 July 2017 and told him that this would lead to a gross misconduct case. This was, however, almost a month before the investigatory report was completed on 4 August 2017. That report did not make any recommendation as to whether disciplinary proceedings should ensue: see paragraphs 98 and 101, It was unclear who made the decision to commence disciplinary proceedings;

g. Mr Wilson stated that Mr Huckerby was the "responsible manager" for the investigation: paragraph 102;

h. Mr Wilson did not ask Mr Huckerby about the Claimant's allegations regarding trade union discrimination even though the Claimant had raised that as an issue: paragraph 108. Mr Dennis also failed to put this point to Mr Huckerby in the course of his appeal investigation;

i. The Tribunal considered it surprising that the Respondent had not called Mr Huckerby to give evidence. Whilst that was a matter for the Respondent, the Tribunal observed that "*many of the questions posed by the Claimant's treatment in particular Mr Huckerby's role in the investigation were not dealt with by the Respondent's evidence and Mr Huckerby could have cast light and given evidence on his actions and conduct and enabled the Tribunal to evaluate the explanations*"; paragraphs 88 and 143;

j. The Tribunal summarised Mr Huckerby's involvement in paragraph 166 of the Judgment, which is set out in paragraph 31 above. The Tribunal considered the extent of this involvement to be unexplained: paragraph 167.

k. There was clearly an "*animus*" between the Claimant and Mr Huckerby which raised a *prima facie* case that the reason for his dismissal was his trade union activities: paragraph 179;

l. The Tribunal also had in mind the role of the other deputed investigator, Mr Brown, and noted that his observation that the Claimant had the "*potential to try and influence peers as a TU Rep*" was telling. In the absence of an explanation, the Tribunal inferred that there was a prejudicial view of the Claimant due to his trade union activities: paragraph 180.

54. It seems to us that this case is a good example of one where the motivation of the manager(s) deputed to conduct the investigation can be attributed to the employer, even if the eventual dismissing officers did not share that motivation.

55. Mr Burns submits that there are at least two reasons why the Tribunal's decision cannot be upheld even if it should be considered as one potentially falling within the scope of

paragraph 62 of **Jhuti**. The first is that there was no evidence of Mr Wilson (or Mr Dennis) actually being manipulated by Mr Huckerby to dismiss the Claimant. We accept that some manipulation must be evident. To hold otherwise would be to attribute an impugned motivation to the employer where the deputed manager had not conducted himself in any way that could be described as unfair. We can envisage situations where a manager does little more than instigate the investigation leaving the course and outcome of the investigation entirely to others. That would be unlikely to give rise to attribution.

56. However, manipulation can take many forms and is not confined to those apparent from direct communication between Mr Huckerby and Mr Wilson. If a manager is as heavily involved in directing the investigation as Mr Huckerby clearly was and plays the kind of role that he did in steering the investigation towards a disciplinary hearing and dismissal, there is a much stronger case for attribution. Furthermore, the findings of fact here do suggest that there was "manipulation" in the sense of withholding details, making unnecessary (and unexplained) references to TU status and treating the Claimant differently from the way others were treated. All of these matters led the Claimant to be subject to a disciplinary hearing in circumstances where, had it not been for the trade union animus, there would not have been an investigation of this sort. This Appeal Tribunal, which includes members with experience as representatives of employers and workers (as did the Tribunal), considers that it is appropriate that an employer should be liable for unfair dismissal for a proscribed reason in these circumstances. If it were not then there would potentially be scope for abuse. A manager with an unlawful motivation could take every step in the investigation to ensure that dismissal was the likely outcome. However, in order to avoid liability attaching to the employer, the final decision could then be passed to another (innocent) manager.

57. The difficult question is where to draw the line between that where attribution is appropriate and that where it is not. The decision in **Orr** establishes a line based on whether or not the person is carrying out the employer's deputed function for the purposes of the investigation in question. That line may result in harsh outcomes for the victims of unlawfully motivated manipulation in some cases - the decisions in **Orr** and **Jhuti** themselves are examples - but it is a workable line (binding on this Appeal Tribunal) that avoids the situation whereby the motivation of any employee is attributable to the employer, regardless of whether that employee has any formal and significant role in the process.

58. It is worth also noting that the present case is not one where the Respondent could say that Mr Wilson's motivation was free from the taint of trade union activities. As set out above, the Tribunal expressly found that, whilst Mr Wilson may not have been motivated by prejudice, trade union factors nevertheless played a part in his reasoning, and did so to the extent that those factors were the reason, or principal reason, for the dismissal.

59. Mr Burns also says that this **Jhuti**-based analysis cannot save the Tribunal's decision for the simple reason that there was no self-direction based on that case and this Appeal Tribunal cannot say that there was unequivocally only one answer to that analysis such that the matter need not be remitted. We do not accept that submission. If it is implicit in the Tribunal's conclusions that it has correctly applied the law, then the failure to mention the case in which the correct approach is set out is not fatal to upholding the decision, as the following passage in the well-known decision in **Meek v Birmingham City Council** makes clear:

> **"Lastly, in Martin v. Glynwed Distribution Ltd. [1983] I.C.R. 511 at page 520F, my Lord said:**
>
> **"The duty of an industrial Tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to the parties to give some explanation of them, but it is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the industrial Tribunal addressed its mind and why it**

> **reached the conclusions which it did, but the way in which it does so is entirely a matter for the industrial Tribunal." (Emphasis added)**

60. **Jhuti** may not have been cited, but the Tribunal asked itself the correct question, i.e. "What is the employer's reason (or, if more than one, the principal reason) for the dismissal". Having determined that there was a *prima facie* case (as to which determination there is no challenge) it was for the Respondent to establish the reason. It patently failed to discharge that burden. Having regard to all of its findings of facts, including those relating to Mr Huckerby's prominent role in the investigation, the Tribunal was entitled to infer that that reason was the Claimant's trade union activities.

61. For these reasons, it is our judgment that Grounds 1 and 3 of the appeal fail.

Ground 2 – Failure to give parties the opportunity to comment on Dundon

62. The relevant principles are not in dispute. They are set out in the judgment of the Court of Appeal in **Stanley Cole (Wainfleet) Ltd v Sheridan** [2003] ICR 1449, per Ward LJ:

> **"31. .... In my judgment … the authority must be shown to be central to the decision and not peripheral to it. It must play an influential part in shaping the judgment. If it is of little or no importance and serves only to underline, amplify or give greater emphasis to a point that was explicitly or implicitly addressed in the course of the hearing, then no complaint can be made. If the point of the authority was so clear that a party could not make any useful comment in explanation, then it matters not that the authority was not mentioned.**
>
> **32. Thus it seems to me, the authority must alter or affect the way the issues have been addressed to a significant extent so that it truly can be said by a fair-minded observer that the case was decided in a way which could not have been anticipated by a party fixed with such knowledge of the law and procedure as it would be reasonable to attribute to him in all the circumstances.**
>
> **33. There is, however, an important caveat. This is not intended to be an all-encompassing test. It is, in my judgment, impossible to lay down a rigid rule as to where the boundaries of procedural irregularity lie, or when the principles of natural justice are to apply, or what makes a hearing unfair. Everything depends on the subject matter and the facts and circumstances of each case."**

63. In our judgment, the **Dundon** case was not, in the circumstances of this case, central to the Tribunal's reasoning. It was cited to establish a principle that was not in dispute, namely that it does not have to be shown that the employer was motivated by malice or prejudice. **Dundon** cannot be said to have played a pivotal role in how the judgment developed because the Tribunal did not base its findings on prejudice or malice. The Respondent's submission that the reference to **Dundon** led the Tribunal astray is not accepted for reasons already set out. As such, whilst it would have been preferable if the parties had been given an opportunity to comment on **Dundon** before reliance was placed upon it, this is not a case where any material injustice resulted.

64. Accordingly, Ground 2 of the Respondent's appeal also fails.

Ground 4 – Was the Tribunal's approach to the comparators perverse

65. Mr Burns' submission here centred on the comparator Mr Robert Jones, whose circumstances are addressed in, amongst others, paragraph 170 of the Judgment. It is submitted that the Tribunal reached a perverse conclusion in holding that the Claimant had been treated materially differently to Mr Jones and/or erred in law in concluding that any difference in treatment supported an inference that the reason for dismissal was trade union activities.

66. Mr Jones was dismissed a few days before the Claimant. He had also been called to a P1 gas escape. However, instead of attending to it without delay, Mr Jones "*deliberately stayed at home to make tea and toast delaying 35 minutes*." The Tribunal rejected that as being analogous to the Claimant's situation. Whilst the two situations did involve delay caused by a decision to consume food, there are significant differences:

a. There was as Mr Panesar put it, a "*sea of context*" leading to the Claimant's call out, which does not appear to have been similar to Mr Jones. The Claimant "*should never have been called out*": para 82;

b. The Claimant conscientiously agreed to attend when another engineer should have been called out instead;

c. The Claimant left for the job within 12 minutes of the call ending. Bearing in mind that he had just been woken up, that was a remarkably quicker response than that of Mr Jones who waited 35 minutes before leaving.

d. The Claimant's food delay was 13 minutes, not 35.

67. It appears to us that there is more than ample material here for the Tribunal legitimately to reach the conclusion that the two situations were not truly analogous. At any rate, it was far from perverse for the Tribunal to so conclude.

68. The Respondent's Skeleton argument relied upon some further issues under this Ground. These were not pursued orally and we do not lengthen this judgment by considering them in any detail. Suffice it to say that in each case we find that the Respondent's points fall far short of crossing the high threshold of a perversity claim.

Conclusion

69. For all of these reasons, this appeal fails and is dismissed.

70. We thank both Counsel for their expert and helpful submissions.