EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Markham**

Respondent: **Asda Stores Ltd**

RESERVED JUDGMENT ON REMITTED CASE

The judgment of the Tribunal is that the original judgment and reasons promulgated on 7 September 2018 stand.

REASONS

1. This judgment relates to a judgment of the Employment Appeal Tribunal which remitted this case to the Tribunal in relation to the Claimant's claim of automatically unfair dismissal only. The parties agreed that written submissions would be appropriate as there was no further evidence to give. The parties also agreed that the remitted case could be heard by Employment Judge Martin sitting alone.

2. Judge Martin apologises to the parties for the delay in dealing with this which is due to the very large workload in the London South Employment Tribunal which has been exacerbated by the Covid-19 pandemic.

3. This judgment is to be read in conjunction with the original judgment which sets out the Tribunal's findings of fact. No additional evidence was given and the findings of fact in that judgment have not been altered. The Tribunal had before it in addition to the judgment of the EAT and the original papers for the original hearing, the parties submissions which were read in full even if not all parts are specifically referred to below.

4. HHJ Stacey set out a list of issues to be considered on remission:

    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 regulation 5 of the 1977 Regulations within the 3 months prior to 30.03.16?

ii. given his employer or its representative reasonable notice of his intention to inspect the workplace on or about 30.03.16?

iii. and therefore, was Clamant's proposal to conduct an inspection on 30.03.16 made by virtue of the 1977 Regulations?

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

c. Was the management instruction to Claimant to perform driving duties on 30.03.16 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 a workplace inspection on 30.03.16?

The relevant law

5. Regulation 5(1) of the 1997 Regulations provides as follows:

> 5.— Inspections of the workplace
>
> (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.

6. The relevant Code of Practice is the HSE's 'Consulting workers on health and safety'. The applicable provisions are at paragraphs 50-56:

> 50. The Regulations deal with the frequency of formal inspection by the appointed health and safety representatives. In some circumstances, where a high-risk activity or rapidly changing circumstances are confined to a particular area of a workplace or sector of an employee's activities, it may be appropriate for more frequent inspections of that area or sector to be agreed.
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> 51. The Regulations require appointed health and safety representatives to give reasonable written notice to the employer of their intention to conduct a formal inspection of the workplace. Where possible, the employer and the health and safety representatives should plan a programme of formal inspections in advance, which will itself fulfil the conditions for providing notice. Variations in this planned programme should be subject to agreement.
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> 52. HSE sees advantages in formal inspections being jointly carried out by the employer representatives and health and safety representatives, but this should not prevent health and safety representatives from carrying out independent investigations or private discussion with employees. The health and safety representatives ought to co-ordinate their work to avoid unnecessary duplication. There should also be co-ordination of inspections for large businesses responsible for managing multiple sites.

53. The formal inspection may take various forms, and it will be for the appointed health and safety representatives to agree with their employer about this. The following types of inspection, or a combination of any or all of them over a period of time, may be appropriate to fulfil this function:

a) safety tours – general inspections of the workplace;
b) safety sampling – systematic sampling of particular dangerous activities, processes or areas;
c) safety surveys – general inspections of the particular dangerous activities, processes or areas.

54. The numbers of health and safety representatives taking part in any one formal inspection should be agreed between the appointed health and safety representatives and their employer, depending on their particular circumstances and the nature of the inspection. It will often be appropriate for the safety officer or specialist advisers to be available to give technical advice on health and safety matters that may arise during the inspection.

55. At large workplaces, it may be not be practical to conduct a formal inspection of the entire workplace at a single session, or for the complete inspection to be carried out by the same group of health and safety representatives. In these circumstances, arrangements may be agreed between the employer (or their representative) and the appointed health and safety representatives for the inspection to be carried out by breaking it up into manageable units (eg on a departmental basis). It may also be appropriate, as part of the planned programme, for different groups of health and safety representatives to carry out inspections in different parts of the workplace either simultaneously or at different times but in a way that ensures complete coverage before the next round of formal inspections is due.

56. There may be special circumstances in which appointed health and safety representatives and their employer want to agree a different frequency of inspections for different parts of the same workplace (eg where there are areas or activities of especially high risk)

5. Section 100 of the Employment Rights Act 1996 ('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…

6. As submitted by the Respondent, there is an evidential burden on the Claimant to show there is a real issue as to whether or not the Respondent's stated reason for dismissal is true. It is for the employee to

raise a prima face case. However, as with 'ordinary' unfair dismissal, the legal burden remains with R to establish the reason for dismissal. (Serco Ltd v Dahou [2016] EWCA Civ 832; [2017] IRLR 81 §29-30, also citing the earlier case of Maund v Penwith District Council [1984] IRLR 24, CA.)

7. The Respondent referred to the following case law:

    a. **Serco Ltd v Dahou [2016] EWCA Civ 832; [2017] IRLR 81** §29-30, also citing the earlier case of Maund v Penwith District Council [1984] IRLR 24, CA.) which held that there is an evidential burden on C to show there is a real issue as to whether or not the Respondent's stated reason for dismissal is true. It is for the employee to raise a prima face case. However, as with 'ordinary' unfair dismissal, the legal burden remains with R to establish the reason for dismissal.

    b. **Bass Taverns Ltd v Burgess [1995] IRLR 596, CA** at §9, citing **Lyon v St James Press Ltd [1976] IRLR 215** per Phillips J at §16 and 20 which held that: "The special protection afforded… to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of the trade union must not be obstructed by too easily finding acts done for the purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate… We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair.

    c. **Abernethy v Mott, Hay and Anderson [1974] ICR** 323, 330B-C, NIRC held that the 'reason' for a dismissal is "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

8. The first issue requires the Tribunal to determine what constitutes a health and safety inspection. The Respondent submits that there is no statutory definition within the 1977 Regulations and that the definition is in the HSE Code of practice which gives examples at paragraph 53 which are set out above.

9. The Claimant made the following submission:
    a. "No site inspection is shown in the GMB annual planner [165A] in the three months prior to 30th March 2016.

    b. The GMB annual planner is the agreed notification process for all trade union activities at the Erith XDC depot ('XDC').

    c. At no time prior to, or during the site inspection on 30th March 2016, did R object to it on the grounds that a site inspection had already been carried out within the previous three months.

d. The date of the previous regulation 5 site inspection was October 2015. During cross examination C gave evidence stating, 'The lighting inspection carried out in January was not a regulation 5 site inspection, it was carried out under regulation 4 (a) and (b) of the 1977 regulations following concerns brought to C attention by GMB members he represents, This included the update on 15th March 2016.

e. This fact was reiterated by Paul Young ('PY') giving evidence".

10. The Respondent submitted as follows:

a. There is no definition in the 1977 Regulations of what will constitute an 'inspection'. The HSE Code of Practice gives a variety of examples at paragraph 53, including "safety tours – general inspections of the workplace".

b. On 15.03.16, C spent the day conducting a review of the depot, surveying all areas (inside and outside), taking photographs and noting any health and safety issues. C confirmed in oral evidence that he was able to walk around the premises, check whether there were any outstanding issues, and report them to his managers. The resulting report entitled 'Health and Safety Update Asda XDC Erith 15/3/2016' was sent to management. Emails sent by General Manager Darren Coker ('DC') to C on 18.03.16 and 22.03.16 show that the issues flagged in C's inspection report were discussed and acted upon.

c. It is difficult to see how this could be anything other than an "inspection". Chris Tilly ('CT'), General Manager of the Bristol depot, gave evidence that the quarterly health and safety inspections carried out by his health and safety reps also take one day, and his is the largest depot site in the country. The disciplinary manager, Mark Agnew ('MA') noted that given C had spent every Tuesday in March on health and safety business for at least 40 cumulative hours, his Shift Manager believed that the workplace inspection had already been completed".

11. The Tribunal notes that there is no statutory definition of an inspection, and notes that the guidance refers to what an inspection may comprise. The Tribunal's finding is that the form of the inspection is not defined as paragraph 53 of the guidance provides *"The formal inspection may take various forms, and it will be for the appointed health and safety representative to agree with their employer about this".* The paragraph goes on to give examples including, "*safety tours – general inspections of the workplace*". However, given the use of the words "formal inspection" the Tribunal interprets this as something over and above the general day to day inspections that health and safety representatives may do.

12. The Respondent refers to the Claimant "conducting a review of the depot, surveying all areas (inside and outside), taking photographs and noting any health and safety issues". Although the Tribunal accepts that the Claimant put his findings into a document which was sent to management and acted on by management, the Tribunal does not find that the inspection had the necessary formality to mean that it was conducted pursuant to regulation 5 of the 1977 Regulations. This means that the Claimant's proposal to conduct an inspection on 30 March 2016 was pursuant to regulation 5 of the 1997 Regulations.

13. However, even if the Tribunal is incorrect about this, the Tribunal's finding was that the Respondent had no objection to a health and safety inspection being carried out by the Claimant. Its objection was the timing of the inspection. In considering this the Tribunal referred to its judgment. In the judgment it is stated that the Respondent did not object to the Claimant carrying out an inspection per se, but it wanted it done on another day as the Claimant could not be released from his driving duties at that time as it was

Easter and very busy.[1]

14. The remitted issues do not mention the issue of whether the Respondent had agreed to an inspection on the 30 March 2016. The Tribunal's judgment was that agreement had not been given and that the Claimant notwithstanding this unilaterally started to conduct the inspection.[2] The Tribunal's clear finding was that agreement had not been reached to conduct an inspection on that day. This feeds into the requirement to give reasonable notice of intention to conduct an investigation. One reason for giving reasonable notice is to enable the employer to try to find cover for the representative's normal work duties. The HSE Code of Practice paragraph 51 as set out above clearly envisages reasonable notice to include agreement between the employer and the union including agreement for any variation to planned dates. The judgment clearly sets out the factual matrix as found, and this clearly shows that there was no agreement for the inspection to be undertaken on 30 March 2016. The variation in the date for the inspection were made close to the inspection dates, and the Respondent's management promptly told the Claimant that the date had not been agreed.

15. The Tribunal refers to its judgment which sets out the set of facts known to the Respondent which caused it to dismiss the Claimant[3]. There is no need to repeat them here. There was no further evidence produced for the purpose of the remitted judgment and therefore there is no reason to re-evaluate the factual findings already made. The submissions made by the Respondent reflect the findings made by the Tribunal and the Tribunal accept them as being accurate in relation to the evidence given at the hearing.

16. The Tribunal accepts the submission made by the Respondent that the Claimant did not comply with the requirements of regulation 5. The Tribunal find that he did not give adequate notice and did not seek agreement of the Respondent as the Code of Practice indicates he should. Even if it had, the Claimant was not dismissed because he proposed to undertake an inspection but for his behaviour towards management which is set out in the judgment. The Tribunal's finding is that it was a reasonable management instruction to drive on 30 March 2016.

17. The Judgment sets out the reason for dismissal. The reason was not that the Claimant performed or proposed to perform a function as a safety representative by undertaking a workplace inspection on 30.03.16. The Claimant was dismissed for the way he behaved on that day namely his refusal to drive and his aggressive attitude.

Employment Judge Martin

Date: 14 October 2020

[1] Judgment paragraphs 43 and 44
[2] Judgment paragraphs 27-32
[3] Judgment paragraphs 25-41