EMPLOYMENT TRIBUNALS

Claimant: Mr D Usunov

Respondent: ABM Technical Solutions Limited

Heard at: London Central
On: 23 and 24 March 2022 and in chambers (remotely by CVP) 25 March 2022

Before:
Employment Judge Heath
Ms C Ihnatowicz
Mr D Carter

Representation
Claimant: In person
Respondent: Mr A O'Neill (Solicitor)

RESERVED JUDGMENT

The claimant's claims of automatic unfair dismissal and ordinary unfair dismissal are not well-founded and are dismissed.

REASONS

Introduction

1. The claimant claims that he was automatically unfairly dismissed for trade union membership and/or activities contrary to section 152 Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA"). He also claims "ordinary" unfair dismissal under section 98 Employment Rights Act 1996 ("ERA"). Claims of race discrimination, disability discrimination and for a redundancy payment have been struck out because they had no reasonable prospects of success at a preliminary hearing.

2. The respondent does not accept the claimant has continuity of service from his previous employer by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), and thus does not have the two

years' service necessary to bring an unfair dismissal claim. It was agreed between the parties and the tribunal to hear the ordinary unfair dismissal claim, together with the TULRCA claim, on the assumption that the claimant had the qualifying service, and then to determine the continuity issue if he would otherwise succeed in his unfair dismissal claim.

The issues

3. A draft List of Issues have been prepared by the respondent prior to the hearing based on issues which have been discussed at a previous case management hearing. The claimant had not agreed these with Mr O'Neill prior to the hearing (despite case management orders directing this), but he agreed at the hearing that these with the issues the tribunal had to decide. The List of Issues are annexed to this decision.

Procedure

4. A Bulgarian interpreter was provided for the claimant for this hearing. He indicated at the outset that he wanted to conduct the hearing in English, but to seek help from the interpreter as and when he needs it from time to time. This is, in fact, how he did use the interpreter during the hearing.

5. The ordinary unfair dismissal requires the claimant to have had two years' service before the tribunal can accept jurisdiction. There is no such requirement for an automatic unfair dismissal claim under section 152of TULRCA. The respondent proposed that the tribunal assumed, for the purposes of the hearing, that the claimant had two years service. Mr O'Neill proposed that the tribunal adjudicate on the unfair dismissal claim on this basis. If the tribunal was satisfied on the evidence that the dismissal was unfair under section 98 ERA, the tribunal could come back to consider the TUPE question. This was explained to the claimant, who agreed with this approach. Accordingly, the tribunal considered that this was an appropriate approach in the circumstances.

6. There have been some difficulties in case preparation. The claimant did not comply with case management orders in respect of production of his witness statement. Amended case management orders were made, which he did not comply with, and a further order was made for the production of sequential witness statements, which he did not comply with. On 14 March 2022 Employment Judge Brown ordered that "*Unless the claimant sends his witness statement to the respondent, copied to the tribunal, by 15 March 2022, he will not be permitted to give evidence on liability to the tribunal, save that he can rely on the contents of his claim forms and the List of Issues as his evidence in the case*".

7. On 15 March 2022 at 10.48pm the claimant sent ½ page email to the tribunal, in which he made some observations about procedure and also factual assertions in relation to the case. The tribunal treated this, together with the claim for and the List of Issues as the claimant's evidence in the case.

8. At the start of the hearing, the claimant indicated that he wanted to refer to some documents in his possession. These documents had not been disclosed to the respondent, had not been referred to at case management discussions and the claimant had not brought copies to the hearing. The respondent objected to these being considered by the tribunal. Additionally,

the claimant at the start of the hearing said that he wanted to play audio recordings of his disciplinary hearing and the appeal hearing. He had not disclosed these, or even mentioned them to the respondent prior to the hearing, and had not provided transcripts. He said these recordings were each about an hour long. The tribunal asked why the claimant was asking for these recordings to be played, and he responded "*Everything that came up is recorded*". The respondent objected to these.

9. The tribunal decided that further documents, which had not been disclosed prior to the hearing in accordance with case management orders, were not to be used at the hearing. The tribunal also decided that clandestine recordings, never before referred to let alone disclosed, to be played at the hearing. The claimant had been left in no doubt during the case management of this case at previous hearings about the need for proper and orderly advance disclosure of evidence. "Dumping" a large amount of evidence on the respondent at the start of the hearing risked prejudicing the respondent. The only way to ensure the respondent could have remained on an equal footing, would be to adjourn the case to allow it to read and listen to the evidence, for Mr O'Neill to take instructions and take a view on how to deal with the evidence. This evidence should have been disclosed prior to witness statements to give the witnesses an opportunity to comment on the evidence. It would not be fair or just to allow what was little more than an ambush. Allowing further time for the respondent to consider the evidence would just waste time and delay matters further. The evidence would not be allowed in.

10. During the evidence of Mr Shore, recordings of radio comms that had been played during the claimant's disciplinary hearing were played.

11. The first two days of the hearing were conducted in person. The third day was also due to be conducted in person. By this stage the tribunal had heard both evidence and submissions. Unfortunately the judge had, during the course of the second day, developed symptoms he feared might be of COVID. The tribunal sought the views of the parties, and decided to deliberate the following day in chambers by CVP. The decision would be reserved.

12. The tribunal was provided with a 444 page bundle, evidence from the claimant as set out above, and witness statements on behalf of the respondent from:

    a. Mr Peter Shore, Contract Manager;

    b. Ms Sophie Buckingham, HR Adviser;

    c. Mr Paul Douglas, Contract Manager.

13. Mr O'Neill and the claimant gave oral closing submissions.

The Facts

14. The respondent is a company which provides various services to different sectors. It employs around 5000 people providing facilities services, and around 350 people providing technical services. The respondent provided technical services to the managers of a building known as Broadgate, for its customer Broadgate Estates.

15. The claimant is a Bulgarian born British citizen who is an electrician. For reasons we have outlined above, we have not heard detailed evidence or made findings in respect of any potential transfer of the claimant's employment to the respondent, but the claimant worked for five years for companies also providing technical services at Broadgate.

16. The claimant commenced employment as an electrician with the respondent on 29 March 2019. Although we have not heard evidence on this, it would appear that his previous employment terminated on the administration of the company employing him. The claimant was one of the 350 members of staff employed by the respondent providing technical services.

17. On 13 July 2019 the claimant emailed the HR Department of the respondent, copied to Mr O'Donnell, a Regional Officer of the claimant's trade union, Unite, expressing dissatisfaction about his pay. He said that he felt he had been "*manipulated by some of the people who are in management staff of previous companies we have been worked before we have transferred to [the respondent*]". He also complained that some less qualified members of staff had been able to progress through the company and become more highly remunerated. He provided a copy of his City and Guilds certificate and qualification.

18. In around October 2019 Mr Shore was transferred to the Broadgate site as Contract Manager for the site. He became the claimant's line manager.

19. On 10 December 2019, a Mr Warrington, the Technical Services Manager of Broadgate Estates (the respondent's client) emailed Mr Shore with the subject heading"*[EXTERNAL] REF: 1BG – ABM site Engineer's – To Be Removed Off Site IMMEDIATELY!" Mr Warrington referred to the "current/ongoing situation regarding"* the claimant. He referred to the fact that in addition to various observations he had collated since January 2019 and previous discussions and emails, he had *"just heard a seriously concerning conversation over the radio comms*" between a supervisor, Barrie Arnold, and the claimant. The email included the following: -

- "*Dimo was asked to safely isolate and open up a particular DB within the SW Plant room. The instructions were to 'Safely Isolate' and open up the Distribution Board (One of the DBs that was affected from yesterday's CHW leak) to allow this to dry out.*

- *Dimo responded over the radio that he had switched it on, putting power back onto a DB that still contained visible signs of water. Barrie asked twice to confirm and then instructed Dimo to switch it off*."

20. Mr Warrington said that he hoped Mr Shore would agree that this was a " *'Major Breach of Health and Safety' endangering not only himself but potentially others as well*". He requested that the claimant be removed from site with immediate effect.

21. A customer instruction to remove a member of the respondent's staff from site is not a common occurrence. At the time Mr Shore saw the email, the claimant was not on site. Mr Shore met with the claimant, together with

Ms Fox, Lead Contract Support, who took notes, at 10:21 AM on 11 December 2019. What happened at this meeting was recorded in a template Investigation Form.

22. The reason for the investigation was given as "*Suspension and third-party removal from site due to breach of Health & Safety on 10 December 2019*".

23. The claimant was told he was suspended with immediate effect following the third-party request for removal from site. He was told that he would be invited to an investigation where he would have an opportunity to put his case forward.

24. He was asked for some work items and was told he was suspended on full pay. The claimant was also told that he could have a representative attend any further investigation meeting. The claimant was told not to return to site. The claimant responded that there were "*plenty of liars are located here*". He wanted to speak to the client, but was asked not to.

25. Mr Shore was tasked with investigating this issue. On 12 December 2019 he interviewed Mr Arnold, the Supervisor. The details of this interview were set out in a Statement Form.

26. Mr Arnold said that on 10 December 2019 he had showed the claimant a water damaged distribution board on the level 2 south-west plant room. He told the claimant that the board was damaged, showed him the isolation point next to the board, and explained that the board needed to be isolated, and its cover removed so that it could dry out. Mr Arnold said that there was a further meeting between him and the claimant where he issued the claimant a padlock to lock out (i.e. ensure that the installation could not be switched on again).

27. Mr Arnold said that at approximately 3 pm he had radioed the claimant to say "*The area we looked at can you now isolate so we can dry out the board. Any problems to seek assistance from [Mr Arnold*]". The claimant replied that he had switched the board on, the lights were on and there were no problems. Mr Arnold asked the claimant to repeat this. The claimant confirmed the board was on, lights were on, things were live and there were no problems.

28. Mr Arnold said that he immediately told the claimant to switch the board off and that he was en route. He asked why the claimant had switched the board on, and the claimant replied that Mr Arnold had told him to. Mr Arnold denied this and told the claimant to turn the power off and that he was on his way up.

29. Mr Arnold said that while he was en route to see the area, he could see the claimant leaving the building, going outside and leaving the area unattended.

30. Mr Arnold said that when he arrived at the location he found the main board had been switched off. He felt that powering up the main board with the water damage had presented an immediate risk to the claimant's well-being. He was concerned that the claimant had done the opposite of what he had requested.

31. Mr Arnold took photographs on his mobile phone of the main board, the lighting board and the general area, which he provided to Mr Shore.

32. Later on 12 December 2019, Mr Shore interviewed Mr Lawman, Shift Leader. Mr Lawman said that he had overheard the radio conversation whilst he was at lunch. He indicated that he overheard Mr Arnold instructing the claimant not to switch on the board. Mr Lawman said, from the sound of things, the claimant had switched on the board rather than locked it off and tagged it, and had then left the area of concern.

33. On 18 December 2019, Mr Shore sent the claimant a letter confirming his suspension and invited him to a Third Party Removal Request Meeting on 23 December 2019. The purpose of the meeting was to discuss the request to remove the claimant from site and "*the impact this has on your ongoing employment. I must advise you that in the event that no suitable alternative employment can be found it may result in your dismissal from the company*". The letter went on to say that there were copies of available positions within the company, and that consideration would be given at the hearing to whether any of these were suitable to get the claimant back into work.

34. Mr Shore told us, and we accept, that he had used a template letter for a Third Party Removal Request Meeting, filling in additional detail.

35. On 23 December 2019 Mr Shore interviewed the claimant with a notetaker present. Minutes of the meeting appear in a Statement Form. By this time, Mr Shore had listened to a recording of the radio conversation between Mr Arnold and the claimant on 10 December 2019.

36. The purpose of the meeting was explained to the claimant, and he was told that it was his opportunity to explain the situation and give his side of the story.

37. The claimant said that he was removed because "*the site sees him as a "Tron" and were trying to take him off site using lies*". (The claimant confirmed in his oral evidence to the tribunal that "Tron" was a Bulgarian word meaning something limiting the vision of someone else, or obstructing them from doing something).

38. The claimant set out his account of what occurred that day. He had been informed that there were no lights at level 2. He said he had tried to find Mr Arnold a number of times to find out what to do, and saw him around 10 when Mr Arnold had arrived for work. He said he did not see Mr Arnold again until 4 PM.

39. The claimant said that Mr Arnold had given him no instructions. He then said that he had seen Mr Arnold on a few occasions during the day, but that no instructions had been given face-to-face or by radio.

40. The claimant said he had received radio instructions at 3:15 PM to go to level 2 to investigate. The claimant quoted Mr Arnold as saying "*Dimo you have more time you can go to investigate what is the problem*".

41. The claimant said whenever he went to the second floor the lights were off and the main MCCB breaker was off. The claimant said he told Mr Arnold there was no fault and there was no water and that he switched the lights on.

He said the problem was that the breaker was off. He confirmed that there was no water.

42. The claimant said that Mr Arnold had given him a padlock because he might need it, and had told him to find a fault.

43. The claimant confirmed again the lights were always off, the boards were off, there was no water, and that he had switched the board on. He said that he had been given no instructions, but simply asked to investigate what the problem was.

44. The claimant said that Mr Arnold "*had lied plenty of times and not just this once*". He confirmed he had received "*absolutely no instructions*". He said that there were no instructions to take covers off and dry the board and that he was "*100% sure*" of this.

45. The claimant confirmed that Mr Arnold had asked him to switch the board off once it had been switched on. However, he denied getting any instructions on the radio.The claimant said that Mr Arnold was trying to find ways to make him look bad and that people were lying about him to try and "*make him dirty*".

46. On 30 December 2019 the claimant emailed the respondent's HR Department attaching a copy of the Statement Form Mr Shore had prepared for the claimant's investigation interview. The claimant had signed each page of the form indicating he had read and fully understood the statement. He had, however, written some of his own observations in handwriting on the form. At no point in the interview had the claimant mentioned anything about his membership of a trade union or any activities connected with his trade union. He did not make any handwritten comments about these issues either.

47. On 2 January 2020, Mr Shore emailed the three statements he had taken during the course of his investigation to Ms Buckingham, a human resources adviser. He indicated that he considered there was a case for removal from site and dismissal from the respondent "*on H&S gross misconduct*".

48. On 10 January 2020 the claimant was sent a letter inviting him to a "Disciplinary Hearing – Gross Misconduct". The purpose of the hearing was to consider an allegation of gross misconduct expressed as follows:

> *"Failure to carry out instructions as given by supervisor on making a safe Distribution Board and not following Lock Out Tag Out (LOTO) on 10 December 2019.*
>
> *Serious breach of ABM policy, operating procedure and workplace rules whereby you switch to the board on when there was significant water damage on 10 December 2019 which is a risk to yourself and others".*

49. The general wording of these two charges was lifted straight from the respondent's disciplinary procedure as examples of gross misconduct, with specific details added. The disciplinary procedure was not in the bundle, but we accept this evidence.

50. The letter of 10 January 2020:

a. Attached the disciplinary policy and explained the claimant would be given the opportunity to explain his case and answer the allegations. He was told he could ask questions, dispute the evidence, provide his own evidence or otherwise argue his case. He was told that he could also put forward mitigating factors, and that due consideration would be given to any factors he raised.

b. Indicated that Mr Peakall, Account Director, would conduct the hearing assisted by Ms Buckingham, HR adviser. The claimant was given the right to be accompanied at the disciplinary meeting by a work colleague or a trade union official of his choice. The various outcomes open to the meeting were explained to the claimant, including dismissal without notice. He was told his suspension with full pay would continue.

c. Provided the claimant with the evidence, namely, Mr Arnold's statement, Mr Lawman's statement, the email from Mr Warrington, photographs of the wet distribution boards and switches. He was also told that the recordings of the radio traffic would be heard at the hearing.

51. The claimant received this letter and arranged representation by his trade union representative.

52. The disciplinary hearing took place on 15 January 2020, chaired by Mr Peakall, who was assisted by Ms Buckingham who took notes. The claimant attended accompanied by a trade union representative Mr Olugun.

53. During the hearing: -

a. The disciplinary allegations the claimant faced were read to him, which were said to constitute gross misconduct, with a possible outcome of dismissal.

b. Evidence from the statements was read out to him, and he was given the opportunity to put forward his account. He was specifically asked to confirm whether any instructions had been given by Mr Arnold face-to-face or by radio. His response was "*None, I went and checked the basement, no fault*".

c. The recordings of the radio comms were played at the disciplinary hearing. In the recordings Mr Arnold could clearly be heard to ask the claimant on one occasion "*Can you dry out that panel onto the second floor please?*" He further says that he needed it "*stripped down to dry out*". Around eight minutes later the claimant asks Mr Arnold to call him back and says "*the power is on on the south-west*". Mr Arnold says "*How is that happened?*". The claimant says "*the main breaker*". Mr Arnold asks "*Have you reinstated power to that second floor board?*" The claimant replies "*Yes, the lighting board is on, everything is on with power*". Mr Arnold instructs the claimant to switch it back off again and again said "*Switch it off, the board is full of water*". The claimant said "*You asked me to turn it on"* and Mr Arnold replies *"No Dimo, I asked you to strip the board so it could dry*". The claimant replied that the

power was off. Mr Arnold said that he was on his way up and told the claimed not to touch anything.

d. During the hearing the claimant denied that there was any leaking in the second floor room or that the electrical board was wet. He denied that he had been told to dry the board or given instructions. He said that Mr Arnold had lied all the time. He then denied turning on the breaker, and again said that there was "*no water at all*" in the second floor room.

e. The claimant was shown photographs of wet distribution boards and switches from the second-floor room. His trade union representative said "*the pictures were taken at another time, they are not an accurate representation*". The claimant went on to say *"they were taken in February 2019*".

f. The claimant went on to complain that he had been pushed "*to do the dirty jobs I have no training for*".

g. The claimant's trade union representative put forward that the may have been an issue with the claimant's "*level in English*". The claimant, however, said "*I understand what they are talking about*". He was asked specifically whether he understood the instructions and he responded "*of course, yes*". He was specifically asked whether he understood the instruction to dry out the electrical board and he responded "*the board was not wet".* He later said *"I understood all of the instructions, I have been working for 5 years in the company*" and said that he could communicate well. He complained about being underpaid and not being taken seriously.

h. At no point in the disciplinary hearing did the claimant or his trade union representative say anything about either his membership of a trade union, or any trade union activities.

54. On 29 January 2020, Mr Peakall wrote to the claimant with the outcome of the disciplinary hearing. The outcome was dismissal without notice for gross misconduct. The reason given was:

> *"Failure to carry out instructions as given by supervisor on making a safe Distribution Board and not following Lock Out Tag Out (LOTO) on 10 December 2019.*
>
> *Serious breach of ABM policy, operating procedure and workplace rules whereby you switch to the board on when there was significant water damage on 10 December 2019 which is a risk to yourself and others".*

55. Mr Peakall noted the claimant's assertion that he had not received any instructions regarding the distribution board, but referred to radio recordings that clearly demonstrated Mr Arnold had asked the claimant to dry out the board. He referred to the fact that the claimant had made clear that he had understood instructions.

56. Mr Peakall wrote that he had asked the claimant why he had switched on the board when there was significant water damage, and noted that the claimant had denied switching on the board, but admitted to turning on the

MCC board which feeds the light board. He noted that the claimant said that it was dry, despite the photographic evidence showing the board as being wet.

57. Mr Peakall set out that "*the risk that was taken by switching on a wet distribution board is extremely irresponsible and it could have caused serious harm to yourself as well as anyone else working on the other ends of the board*". He said he considered this misconduct was so serious that it warranted dismissal without notice and without giving any warnings.

58. Mr Peakall offered the claimant a right of appeal, and set out that dismissal was effective immediately without notice or payment in lieu of notice. The claimant was told he would be paid for accrued but untaken holiday, and was asked to return company property.

59. For reasons which were not entirely clear, the claimant claims he did not receive his dismissal letter until 21 February 2020. On 25 February 2020 the claimant appealed his dismissal by way of letter to Ms Buckingham, an HR adviser. He claimed to be the victim of "*an organised lie*" and said that photographs were forged in that someone had sprayed water before taking a photograph. He said that the photographs of the burnt distribution board were not from the second floor South West plant room. He said the radio comms recording was "*manipulated*" and that *"everything is fabricated*". He further stated "*I also want to tell you that in your company which is entrusted to you, you are surrounded by as many liars as you can't imagine, and who you owe to believe. But you will understand it consequences of the time. I believe there is someone to take care of all that you have caused me. Sooner or later everyone pays for their Sins*". He said that the points he raised during the dismissal meeting were ignored and the decision to dismiss him was unfair. He wished to be reinstated into his role.

60. In his grounds of appeal, the claimant did not refer to his trade union membership or any trade union activity.

61. The claimant's appeal against dismissal was heard on 1 April 2020. It was a remote meeting which the claimant attended by telephone and the appeal chair, Mr Paul Douglas, and the notetaker, Ms Buckingham, attended by video. The claimant was represented by Mr O'Donnell, the trade union Regional Officer.

    a. Mr Douglas began the meeting by asking the claimants to clarify his grounds of appeal. The claimant referred to a conversation he overheard and said "*they are absolute liars*".

    b. The claimant, essentially, said that the radio comms recording played at the disciplinary hearing did not reflect what had been said over the radio. He said he was "*sure it has been manipulated, not what I heard on the radio. I remember exactly what he told me*". He claimed that Mr Arnold had spoken to someone and said "*everything is dry*".

    c. The claimant asserted that the photographs used at the disciplinary hearing had been taken on the fifth-floor, and not the second-floor room that he had attended.

d. The claimant's trade union representative put forward that the claimant believed people at work dislike him and have made false allegations against him in order to get him dismissed and he believed that he had been "set up".

e. There was some discussion about what had been interpreted as threats in the claimant's grounds of appeal.

f. Neither the claimant nor the trade union regional officer made any reference to the claimant's trade union membership or to any trade union activities.

62. At the meeting Mr Douglas indicated that he did not uphold the claimant's appeal.

63. On 8 April 2020 Mr Douglas wrote to the claimant setting out a written outcome to the appeal. He set out what he understood the basis of the claimant's appeal to be, namely that the radio recordings had been tampered with, that photographs relied on at the disciplinary hearing were not of the plant room in question, and that he had been set up by colleagues in order to be dismissed. He further set out that he had had regard to radio recordings, and all of the written evidence used before the disciplinary hearing.

64. Mr Douglas set out his conclusions that he did not accept that it was possible to manipulate the recordings as suggested by the claimant. He also confirmed that the photos had been taken in the correct second-floor plant room. Finally in respect of the allegation of being targeted by colleagues, Mr Douglas set out that he had confirmed that there had been no complaints of bullying put forward by the claimant on file. He indicated that he did not uphold the appeal

65. Subsequent to the dismissal, and for the purposes of these proceedings, a photograph was taken of Mr Arnold's mobile phone displaying various photographs used during the course of disciplinary hearings. The after-the-event photographs show the disciplinary hearing photographs on the screen of Mr Arnold's phone together with digital information displayed. The digital information makes clear that the disciplinary hearing photographs were all taken on 10 December 2019. We find as a fact that they were taken on this date.

66. As set out above, we were played recordings of radio comms of the afternoon of 10 December 2019. No evidence, beyond bald assertion, was put forward that these recordings were in manipulated or falsified in any way. We find is a fact that they are genuine recordings setting out the radio comms between Mr Arnold and the claimant on that day.

67. Finally, in terms of our fact finding, we were told that the switches on the distribution board in the second floor room are of a sort that are not easily lockable. We were told that Mr Arnold, after he attended the second-floor room on 10 February 2019 went to a room in the basement of the building and "locked out" and tagged the electrical feed to the second floor room board. This was evidenced in a photograph on page 213 of the bundle. We were told that this was the appropriate way to "Lock Out Tag Out". This evidence was not challenged, and we accept it.

The law

Automatic unfair dismissal

68. Section 152 TULRCA provides, relevantly: -

> *(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*

Unfair dismissal

69. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant's dismissal, and that this is a potentially fair reason under section 98(2) ERA 1996. In this context (and indeed for the section 152 TULRCA claim), a reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*" (***Abernethy v Mott, Hay & Anderson*** **[1974] ICR 323**).

70. Potentially fair reasons include a reason relating to conduct (section 98(2)(b)) and "*Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*" (section 98(1)(b) "SOSR").

71. The approach to fairness of dismissal is governed by section 98(4) ERA, which provides: -

> *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> > *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> >
> > *(b) shall be determined in accordance with equity and the substantial merits of the case.*

72. Where the reason for the dismissal is said to be misconduct, the approach to fairness is the test in ***British Home Stores v Burchell*** **[1980] ICR 303** namely:

a. Did the respondent have a genuine belief in the claimant's misconduct?

b. Was such a belief based on reasonable grounds?

c. Following a reasonable investigation?

d. And following a reasonable procedure?

e. Was dismissal within the range of reasonable responses open to a reasonable employer?

73. This approach is suitable to an SOSR dismissal where it is alleged that trust and confidence broke down (***Perkin v St George's Healthcare NHS Trust*** **[2006] ICR 617**).

74. In considering a dismissal that is disciplinary in nature, the tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code of Practice").

Conclusions

Section 152 TULRCA claim

75. Our conclusions on this issue obviously have substantial overlap with one element of the ordinary unfair dismissal claim. For both claims it is necessary to examine what the reason for dismissal was. For this claim to succeed we must conclude that the reason, or principal reason, for dismissal related either to membership of an independent trade union or activities of an independent trade union at an appropriate time.

76. The List of Issues, which we allowed the claimant to rely on as evidence in his case, refer at paragraph 1b) to an overheard conversation the claimant says was about him, which concerned some sort of unlawful activity about wages and tax. It also refers at paragraph 3a) to the claimant's assertion that he communicated with his trade union who communicated with the building manager, to the annoyance of the latter.

77. The claimant did not expand upon this in either statement form, orally at the hearing or by putting a case to the respondent's witnesses. It is right to say paragraph 1b) and 3a) of the List of Issues represent the high watermark of the claimant's case under section 152 TULRCA.

78. It is right to say that the claimant, who was represented by a trade union representative and a Regional Officer in the workplace disciplinary proceedings, did not assert anything whatsoever about trade union membership or trade union activities during the course of the disciplinary or appeal process. Sometimes it is the case that employees are circumspect about making strong allegations against the employer when involved in internal disciplinary processes, but then do not hold back when they come to the tribunal. This approach is, in many ways, understandable when workers do not want to jeopardise their working relationship. The situation here is different. The claimant's whole case in the internal process was that his employers had set him up, told lies about him and fabricated evidence. It is therefore difficult to understand why, if the claimant felt he was being disciplined, and subsequently dismissed, for trade union membership and /or activities, that he or his representatives did not mention it. The claimant could point to no post-employment revelation or disclosure which caused him to raise the allegation only at a later stage.

79. On the other hand, the respondent's dismissing officer and appeal officer heard recordings of specific and straightforward instructions being

given to the claimant to deal with wet electrical installations. They saw photographs of electrical boards and switches clearly wet with visible water. They heard the claimant's explanation that he had not been given any instructions, that the radio comms were manipulated, that photographs had been taken of the wrong room or at a different point in time, and that the disciplinary process against him was engineered by liars who were setting him up for dismissal. We did not hear from Mr Peakall, who no longer works for the respondent, but we saw minutes of the hearing he chaired, his dismissal letter and we heard from Ms Buckingham who attended the disciplinary hearing. We had no difficulty accepting that the reasoning set out in his dismissal letter accurately represented the evidence that he would have given.

80. The explanation which overwhelmingly best fits the available facts is that the respondent dismissed the claimant because it believed on the evidence that he had committed an act of gross misconduct by failing to carry out instructions given by a supervisor to make safe an electrical installation, and by switching on an electrical board damaged by water when it was unsafe to do so.

81. We conclude on the evidence that the dismissal had nothing whatsoever to do with the claimant's trade union membership or any trade union activities. This claim is not well founded, and we dismiss it.

Ordinary unfair dismissal

82. We proceeded to consider this claim on the basis that the claimant had two years qualifying service.

83. Again, we consider what was the reason for dismissal. As we have concluded in respect of the section 152 TULRCA claim, we find that the reason for dismissal related to conduct, or in the alternative some other substantial reason, namely the breakdown in trust and confidence between employer and employee.

84. Both of these reasons are potentially fair under section 98(2) ERA.

85. We turned then to fairness under section 98(4) and consider whether the respondent acted reasonably in all the circumstances in treating the reason given is sufficient reason for dismissal.

86. We considered first whether respondent had a genuine belief in the claimant's misconduct, and whether such belief was based on reasonable grounds. These are two elements of the *Burchell* test, but it is convenient to take them together.

87. As set out above, the dismissing and appeal officers both had the benefit of audio recordings which allowed them to hear the instructions the claimant's supervisor gave to him. They had the benefit of photographic evidence of what was asserted to be the venue where the misconduct took place and they had an investigation report that included written material and statements from the respondent's client, the claimant's supervisor and his shift leader. All of these had either been involved or overheard the radio comms. Mr Arnold, the supervisor, and additionally taken the photographs. A cogent case was made out by this evidence that the claimant had not

followed his supervisor's instruction and had switched on soaking wet electrical equipment.

88. Against that, the claimant put forward the case that he was set up by liars who fabricated audio and photographic evidence against him. His case was built on assertion alone, without the benefit of any supporting evidence whatsoever.

89. Faced with these competing narratives, the tribunal considers that there were reasonable grounds on which the employer could reasonably conclude that the claimant was guilty of the misconduct alleged against him. There is nothing put before us to suggest that their belief was not genuinely held. In many ways, the more reasonable the grounds are to entertain the belief, the easier it is to accept that the belief is genuine.

90. The tribunal turned to the question of a fair investigation following a fair procedure. Again, these are two elements of the *Burchell* test, which it is convenient to take together.

91. The tribunal had regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures, which set out key principles for handling disciplinary issues in the workplace.

92. The Code recognises by its use of language ("in some cases", "where practicable", "it would normally be appropriate" "wherever possible") that it is not setting out rigid tramlines for how every disciplinary case should be run.

93. The first step is for the employer to establish the facts of the case, if necessary, by having someone not involved in decision-making investigate the case. The second stage is to give the employee sufficient notice of the disciplinary issue that he or she is facing and its potential consequences. Any written evidence relied on should be provided at this stage. Next, a meeting to discuss the problem should be held without unreasonable delay, and the employee should be given the opportunity to be accompanied should they wish. After the meeting it is for the employer to decide on appropriate action and then to provide an opportunity to appeal to an impartial person not previously involved with the case.

94. We have to assess whether the investigation fell within the bounds of reasonable responses open to the reasonable employer. We are not to substitute the steps we might have taken as an investigating employer. In all the circumstances, we conclude that the disciplinary procedure adopted by the respondent fell well within the band of reasonable responses open to a reasonable employer.

95. Mr Shore was tasked with investigating the allegations. He took statements from relevant witnesses (or in the case of Mr Warrington, used his email). He met the claimant and conducted an investigation meeting at which evidence was put to him, and he himself was given the opportunity to put his version of events forward. A disciplinary meeting was held before Mr Peakall, who was independent of Mr Shore's investigation. In advance of this, the misconduct allegations were clearly spelled out in an invitation letter, written and photographic evidence was provided, and the claimant was told that recordings of radio comms would be played. At the disciplinary meeting the allegations were put to the claimant, and he was given the opportunity to

challenge the evidence and put forward his own account. The potential consequences of the allegations being proven was made clear to the claimant. He was accompanied by a trade union representative who was permitted to address the hearing. Mr Peakall found the allegation proven and dismissed the claimant for gross misconduct. The claimant was given a right of appeal which he exercised.

96. For the most part, this whole process took place within a reasonable timescale. The disciplinary decision letter was unaccountably delayed, but assessing the matter in the round, we find that this did not cause unfairness or injustice.

97. Mr Douglas gave his view to us that the allegation "*Failure to carry out instructions as given by supervisor on making a safe Distribution Board and not following Lock Out Tag Out (LOTO) on 10 December 2019*" was not worded as well as it could have been. He told us that the distribution board in the second floor room was not amenable to locking, but that the appropriate way of making the installation safe was to do as Mr Arnold had done by locking and tagging the feed in the basement. We agree that the charge could have been better worded, but, again, in the round we do not find any unfairness or injustice. The respondent reasonably took the view that the claimant, although he had switched off the electrical board, had left the scene. He had made no attempt to ensure that no electricity could flow to the board by locking it out at its feed in the basement, or in the alternative asked for advice or assistance on making the board safe. Anyone subsequently could have switched the board on at considerable risk to life and limb.

98. We conclude, that despite the delay the claimant experienced in receiving the dismissal letter, and the imperfect wording of the first allegation, that the investigation and the procedure as a whole were within the band of reasonable responses of a reasonable employer.

99. We turn finally to the issue of whether the dismissal was in the range of reasonable responses open to the employer. We have regard to the fact that Mr Arnold, had instructed the claimant to dry out the electrical board and given him a lock to lock out and tag out the system (i.e. isolate it so it could not be switched on). We note that failure to follow instructions is an example of gross misconduct as is failure to follow the respondent's policy, operating procedures and rules.

100. We also have regard to the fact that the claimant is an experienced tradesman. However, the danger of switching on a soaking wet electrical installation would be apparent to anyone. Mr Peakall found that the claimant's actions were "*extremely irresponsible and it could have caused serious harm to yourself as well as anyone else working on the other ends of the board*". In his evidence to the tribunal, Mr Douglas (who himself has an electrical inspection certificate) said the claimant's actions on the day in question "*risked loss of life*" and that he "*had put his own and others' lives at risk*". In Mr Douglas's view, it really was that serious.

101. The way the claimant approached the disciplinary (by accusing management of falsifying evidence and of lying) did not leave any scope for examining extenuating circumstances or mitigation. The claimant did not change his approach at the tribunal.

102. We remind ourselves, again, that we are not to substitute our own opinion for that of the employer. We consider that the respondent reasonably believed the claimant had been responsible for a life-threatening act in turning on a wet electrical board. This was compounded by his leaving the scene and failing to ensure that the installation was properly isolated by locking it out and tagging it in the basement. We consider that the respondent's decision to treat this as sufficient reason to dismiss summarily falls well within the range of reasonable responses open to an employer in all the circumstances.

103. Accordingly, we find that the respondent did not unfairly dismiss the claimant, and his claim is not upheld and is dismissed.

104. In the light of our findings we do not need to make conclusions in respect of the other issues. The TUPE question is now academic, and the question of remedy does not arise.

Employment Judge **Heath**

13 April 2022_____

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13/04/2022.....

FOR EMPLOYMENT TRIBUNALS

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL CASE NO. 2202637/2020 BETWEEN

Dimo Uzunov Claimant

and

ABM Technical Solutions Limited Respondent

DRAFT LIST OF ISSUES

1. Was the Claimant dismissed because of Trade Union membership and activities contrary s152 TULRCA 1992 ("**the TU claim**") which states (inter alia)?

a. "(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, …

b. The Claimant says in his ET1: "*my managers were informed that I am registered with*

Unite the Union and they looking for was to eliminate me until one day on 11.12. 2019 I was suspended from my position with lies and fraud. Two three days before I was suspended I attended on their conversation at our Building office between one lady from Engineering Management Office and my Technical Manager Peter Shore and my supervisor Barrie Arnold and the shift leader Marthin .....She told them "Guys we must to start paying you right because you see what he do". It was about me so I comunicate with Unite the Union. It was a matter of paying them more money but hiding the Tax, and in order not to change their wages they decided to eleminate me [sic]*."*

c. The Claimant further stated in an email of 10 December 2020 to the Tribunal in support of his claim: "*I was cast out as the last criminal because I was registered with Unite the Union and I corresponded with them about my situation in the*

company ABM Technical Solutions. My managers hear about it and decided to fire me because I hindered them in the tricks they did."

2. Was the Claimant dismissed because of his membership of his trade union?

3. What were the activities which the Claimant undertook?

a. The Claimant asserts he communicated with his trade union who communicated with the building manager and that this occurred regularly and the building manager was annoyed.

b. Do the activities constitute trade union activities?

c. Was the Claimant dismissed because of these activities?

4. If the Claimant was not dismissed in respect of the TU Claim, did he have more than two years

continuous service at the date of dismissal in order to claim 'ordinary' unfair dismissal?

a. The Claimant asserts his employment was continuous with his former service with George

Birchall Service Limited ("GBS") pursuant to the Transfer of Undertakings (Protection of Employment) Regulations TUPE 2006.

b. Was there a relevant transfer under TUPE between GBS and the Respondent? If so, what

sort of transfer was this? The Claimant does not specify this.

c. Assuming this is most likely to be a service provision change ("SPC"), what type of SPC was this?

d. If this was an SPC, was the Claimant part of an organised grouping of employees whose principal purpose was carrying out activities. What were the activities and how was the Claimant organized?

e. Was the Claimant assigned to any such group?

f. Did the Claimant in fact transfer under TUPE?

g. Did the Claimant object to transfer under TUPE?

h. Does Regulation 8(7) TUPE apply to the transfer so as to limit the effects of TUPE in the Claimant's case.

5. If the Claimant had sufficient qualifying service as a result of a relevant transfer under TUPE transfer, was there a potentially fair reason in section 98(1) and (2) ERA 1996 to dismiss? a. The Respondent says this was conduct or in the alternative SOSR.

6. Was this capable of justifying the dismissal?

7. Has the Respondent proved that this was in fact the reason for dismissal? The Respondent says that the Claimant was dismissed for a serious breach of conduct, inter alia:

a. Failed to carry out instructions as given by supervisor on making a safe Distribution Board and not following Lock Out Tag Out (LOTO) on 10 December 2019.

b. Switched the board on when there was significant water damage on 10 December 2019 which was a risk to the Claimant and others.

8. If not, was there any other reason capable of justifying the dismissal within section 98?

9. Did the Respondent act reasonably in all the circumstances in treating that reason as sufficient

section 98(4) ERA 1996.

a. "*depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

b. *shall be determined in accordance with equity and the substantial merits of the case*."

10. This is a neutral burden.

11. The Tribunal must not substitute its view. The Tribunal's role is "*to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair*'.' (*Iceland Frozen Foods v Jones [1982] IRLR 439*)

12. The Claimant did not initially provide any information as to why he says his dismissal

was unfair other than as set out above in connection with the TU Claim. At the Open Preliminary Hearing on 22 October 2021 the Claimant stated (as recounted by EJ Brown in her Judgment) the following ("**the Unfair Dismissal Factors**"):

a. The decision to dismiss was predetermined – the Respondent had already decided to dismiss the Claimant and used the electricity allegations as a pretext for doing so;

b. The evidence on which the Respondent relied in dismissing the claimant was fabricated or

manipulated: the audiotapes were edited and water was sprayed onto the relevant area before photographs were taken;

c. The Respondent did not have reasonable evidence on which to dismiss the Claimant because the photographs of the relevant area on which it relied were of the wrong place; the Claimant was working on the second floor but the photographs were of the fifth floor;

d. The Respondent had not provided the claimant with any training in 5 years the Respondent failed to send the Claimant on an inspection and testing course; and

e. The Respondent did not provide the claimant with tools

f. The Claimant had only one day's notice of the investigatory meeting.

13. Was the dismissal fair?

14. If not, what compensation should be awarded: **Basic Award**

a. is there conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so (ERA 1996 s 122(2)).

15. If not, what compensation should be awarded: **Compensatory Award**

a. "…*the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".(section 123(1) ERA 1996)

b. "*In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland* " (section 123(4) ERA 1996)

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it* ***shall*** *reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*" (section 123(6) ERA 1996).

Specific issues on compensation:

a) The award must be what is just and equitable in all the circumstances (*W Devis & Sons Ltd v Atkins [1977] IRLR 314, [1977] ICR 662*)

b. Should there be a reduction for *Polkey?* Would the position have been any different if the Unfair Dismissal Factors had not occurred.

c) Has the Claimant contributed to his dismissal? The Respondent says the Claimant wholly to blame for his dismissal.

i. has there been conduct which was culpable or blameworthy in some way?

ii. if so, did it contribute to the dismissal?

iii. If so to what extent?,

iv. in deciding whether to reduce compensation it is only the employee's conduct which can be taken into account; the conduct of the employer, and the treatment of other employees, is irrelevant (*Parker Foundry Ltd v Slack [1992] IRLR 11*)

d. Has the Claimant failed to mitigate his loss? If the Claimant has failed to mitigate, to what extent?