Neutral Citation Number: [2024] EAT 51

Case No: EA-2022-000743-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 April 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

GARY LEWIS	**Appellant**
- and -	
DOW SILICONES UK LIMITED	**Respondent**

- -
- -

JOEL KENDALL (instructed through Advocate) for the **Appellant**
CHRISTOPHER HOWELLS (instructed by Capital Law Limited) for the **Respondent**

Hearing date: 5 March 2024

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JUDGMENT

SUMMARY

TRANSFER OF UNDERTAKINGS

The Employment Tribunal erred in law in finding that the claimant had been fairly dismissed. The only possible outcome based on the respondent's pleaded case and the evidence was that the sole or principal reason for the claimant's dismissals was the transfer of an undertaking and so the dismissal was automatically unfair. The matter was remitted to a new Employment Tribunal to determine remedy.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal. I shall refer to companies other than the respondent by their trading names as the relevant company name is not always apparent from the pleadings or judgments.

2. The claimant commenced work for Npower as an operations technician at the Combined Heat and Power Plant ("CHPP") in Barry, South Wales, on 14 June 1999.

3. On 1 March 2013, the respondent purchased the CHPP and outsourced operations and maintenance to COFELY. The claimant's employment transferred pursuant to the provisions of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("**TUPE 2006**"). COFELY changed its name to Engie. On 1 March 2017, the respondent insourced operations and maintenance. That amounted to a service provision change for the purposes of **TUPE 2006**.

4. The respondent sought to introduce changes that, so far as is relevant to this appeal, involved changes to standby/call out arrangements and responsibility for issuing Safe Work Permits. The claimant contended that these changes would involve a substantial change in working conditions to his material detriment for the purposes of regulation 4(9) **TUPE 2006**. He resigned and contended that he was constructively dismissed by operation of regulation 4(9) **TUPE 2006** and/or section 95(1)(c) **Employment Rights Act 1996** ("**ERA**") and that the dismissal was automatically unfair because the sole or principal reason for the dismissal was the transfer of the undertaking for the purpose of regulation 7(1) **TUPE 2006**, or was unfair for the purposes of section 98 **ERA**.

The first Employment Tribunal Judgment

5. The claim was heard by Employment Judge Harfield, sitting with members, on 25 and 26 September 2019. By a judgment sent to the parties on 24 December 2019, the claim was dismissed. The Employment Tribunal held that the claimant was not dismissed because the employer was entitled to introduce the changes and they did not constitute a substantial change in working conditions to his material detriment. He was not constructively dismissed for the purposes of section 98 **ERA**.

The first Appeal

6. The claimant appealed. The appeal was upheld by HHJ Shanks on 10 December 2020:

> 14. The Tribunal dealt with the new standby/call-out arrangements at paragraphs 69 to 76 of the judgment. In short, they found that they did not involve a substantial change to Mr Lewis's working conditions to his material detriment because (a) Dow had a contractual right to introduce the new system and Mr Lewis "owed" the hours and (b) Mr Lewis already worked additional hours for Engie by way of cover. It does not seem to me that either of these points support the Tribunal's finding. The fact that an employer is contractually entitled to introduce a change in working conditions does not mean it is not a change. And the fact that Mr Lewis may have provided many hours of cover by way of wholly voluntary overtime when asked under the previous arrangements cannot mean that effectively having to provide cover when rostered and called upon does not represent a change which is of its nature substantial (even ignoring any financial consequences which Mr Howells for Dow said were not raised as such below). Plainly Mr Lewis considered the change detrimental to him and I cannot see any basis for saying that his position is not reasonable; as he pointed out to the Tribunal, the new system, involving compulsory standby arrangements, clearly had the potential to impact on his domestic plans and arrangements.
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> 15. I am therefore of the view that the Tribunal's finding was based on false reasoning and I consider that there was really only one finding open to them in all the circumstances, namely that this was a substantial change to Mr Lewis's material detriment. Their finding to the contrary on this point was accordingly perverse.
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> 16. I have reached a similar conclusion in relation to the new Safe Work Permit arrangements which the Tribunal dealt with at paras 77 to 82 of the judgment. In this case the Tribunal found against Mr Lewis because: (a) under his employment contract it was open to Dow to extend his responsibilities to cover the Safe Work Permit; (b) that it was not a substantial extension because he could do it with appropriate training which had already been put in place. As before (a) is irrelevant. As to (b), it seems to me that the fact that a change is within the capabilities of the employee after a course of training cannot be determinative and, given the nature of the new responsibilities and the training involved it must have amounted to "a substantial change". Again, it was plainly one that Mr Lewis regarded as detrimental and, again, given the nature of change and the need to undergo training, I do not see how that position can be regarded as unreasonable.
> Conclusion and disposal
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> 17. For those reasons I allow the appeal to the extent that I consider that the Tribunal's findings in relation to regulation 4(9) were perverse. I therefore substitute a decision that by reason of the changes to his working conditions in relation to standby/call-out duties and safety Mr Lewis was entitled to treat his contract of employment as terminated

> and is to be treated as having been dismissed by Dow. His complaint of unfair dismissal based on regulation 4(9) is accordingly remitted to the Tribunal to determine.

The second Employment Tribunal judgment

7. The remitted hearing was heard by Employment Judge R Brace on 14 and 15 June 2022. The Employment Tribunal reached the following conclusions:

> 59. The EAT having found that Regulation 4(9) TUPE applied and that the relevant transfer involved or would involve a substantial change in working conditions to the material detriment of the Claimant and that the Claimant should be treated as having been dismissed by the Respondent, I must consider whether Regulation 7 TUPE applies such that the dismissal was unfair.
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> Regulation 7(1) TUPE
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> 60.I considered whether this was a case, whereby the 'sole or principal reason' for the dismissal was the transfer itself under regulation 7(1) TUPE.
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> 61.Whilst Mr Howells, counsel for the Respondent, submitted that the test under regulation 7(1) TUPE, was more stringent than the test pre-2014 amendment, referring to matters as 'incidental' to the transfer and not falling within regulation 7(1), I considered the CA decision in *Hare Wines Ltd v Kaur*, the only case progressing as far as the Court of Appeal since the 2014 amendment to TUPE, and approached the question of what was the sole or principal reason for dismissal in the circumstances, as a question of causation.
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> 62.I was persuaded that the Respondent had satisfied me that the transfer was neither the sole or principal reason for the dismissal for the following reasons:
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> > (a) Whilst the timing of the dismissal was in very close proximity to the transfer itself, and did remind myself that this was an important consideration, I did not find the timing of the changes was determinative in this case. **Rather, whilst the transfer was not wholly irrelevant in that the new employer, the Respondent sought to address existing problems that Engie had not, I was persuaded that the principal reason for the changes to the working conditions** (resulting in the termination of the Claimant's employment,) **was that the Respondent had a need to resolve an ongoing situation as soon as possible, to ensure the constant running of the plant and to ensure the safety of workers at, and those in close proximity to, the CHP plant**;
> >
> > (b) **I was also not persuaded that the reason for the**

changes to working conditions was to harmonise terms and conditions, a matter which had been referenced by the Claimant in his evidence and by his Counsel in submissions. Rather, whilst this was one of the effects of the change in respect of overtime management, **I did not conclude that the fact that the overtime aligned with the Respondent's system and/or the safety rules may have aligned with the Respondent's system of management, was the purpose or reason, or even the principal reason, for the change of working conditions**;

(c) I concluded that the real reason or cause for the changes to the Claimant's working conditions, and in turn for the termination of the Claimant's employment, was the need to:

(i) **resolve problems in covering shifts at the CHP plant, albeit problems which had been ongoing for some time at Engie prior to the transfer but had not been addressed by Engie at point of transfer**;

(ii) in turn, impose a rigid primary cover system which would then encompass a system of compulsory overtime, to replace the ad hoc cover whereby employees could choose to agree to cover or refuse to cover those shifts; and

(iii) **ultimately ensure safety and continuous operation at the CHP plant**.

Regulation 7(2)

63. The Respondent had also satisfied me that the reason for the change in working conditions, and in turn the dismissal of the Claimant, fell within regulation 7(2) TUPE.

64. In reaching this conclusion, I first considered whether there was an 'economic, technical or organisational reason' for the dismissal under Reg 4(9) TUPE, before considering whether that reason 'entailed changes in the workforce'.

65. The definition of 'organisational' reason covered situations where a transferee decides to re-organise job functions in order to carry on the business and I accepted the Respondent's arguments that there were organisational reasons for the changes in relation to:

(a) The Engie voluntary system of cover and overtime - **I concluded that this Engie system was essentially no longer 'fit for purpose' or acceptable, prior to and as at the date of transfer.** That it was in that position prevailed for the reasons put forward by the Respondent, which I found to be accepted by the Claimant, namely that cover, and in turn the overtime system at Engie, had broken down in the last 6 months of the contract because of shortage of

goodwill from the Engie operatives to provide that cover on an overtime basis, and because the new engineer operations manager lacked training to provide the cover; and

(b) **The introduction of the Safe Work Permit - I accepted the submissions by the Respondent that having two sets of safety rules operating in the same workplace was unacceptable as a result of the inherent problems and risk to safety and needed to change as a result**.

66. I then considered whether these organisational reason entailed 'changes to the workforce' within the Respondent and concluded that they did on the following basis:

(a) The description 'changes to the workforce', did not have to necessitate changes in numbers, as had been submitted by the Claimant's representative (although a change in the numbers of the workforce overall would have met this test,) but that a change in the functions could also amount to 'changes in the workforce' (*Berriman v Delabole Slate Ltd and Nationwide Building Society v Benn*);

(b) When considering whether there had been changes in the functions of the members of the workforce as an entity, it was agreed by the Claimant, and I concluded, that the 'workforce' in this case was the body of transferring employees only and not the Respondent's workforce as a whole;

(c) I concluded that the introduction of a system of compulsory overtime, the Respondent's Primary Cover System, was a change in the function of the employees; that **the function of the employee changed, from one whose function was to cover set shifts only, to one whose function it was to cover set shifts and work overtime on a compulsory basis to ensure that the operation of the CHP plant was safe and continuous**;

(d) Whilst the Claimant had not been given an entirely new job to do, the functions of the Operations Technicians had substantially changed in that with the changes to the Safety Work Permits, the Claimant was to become responsible for some of the functions that had previously been carried out by the site engineers. I did not consider this a minor job role change, neither did the Claimant, as he had confirmed on cross-examination. The transfer of functions would have required the Claimant to acquire additional training and skills. This was more than a minor change in my view (*Miles v Insitu Cleaning Co Ltd*);

67. In light of regulation 7(3A) TUPE, I accepted the Respondent's

arguments that there were organisational reason entailing changes in the Respondent's workforce for the purposes of regulation 7(2) TUPE.

68.In accordance with regulation 7(3) TUPE, there being no argument that this was a redundancy situation, I concluded that the dismissal of the Claimant under regulation 4(9) TUPE, was to be regarded as having been for a potentially fair reason, namely 'some other substantial reason of a kind justifying dismissal'.

Section 98 Employment Rights Act 1996

69. I then turned to the final question of whether the Respondent acted reasonably in dismissing the Claimant for that reason. Again I concluded that it had.

70. In relation to both the introduction of the standby/overtime/primary cover system and safe work permit/transfer of duties, **I was satisfied that there were substantial reasons for introducing the changes to the Claimant's working conditions that led to the regulation 4(9) TUPE termination of employment, for the reasons set out in the Reserved Judgment** and repeated in §62 of these written reasons; essentially that **the Respondent was entitled to apply a different safe system of working.** I did not consider that the Respondent had to show that the reorganisation, or rearrangement of working patterns was essential, but was satisfied that the Respondent management had demonstrated that they thought they had sound good business reasons for the changes and that the changes had not been imposed for arbitrary reasons.

71. In relation to the manner of the implementation of the change, I concluded that the Respondent had acted reasonably in that **the Claimant had been informed and consulted about the changes to the system of working, both in terms of the primary cover and safe work permits**:

> (a) at the consultation meetings, in particular on 10 January 2018, when explaining the primary cover system, the Claimant confirmed that he would not pick up his phone (§22 and 23 Reserved Judgment); and
>
> (b) at and following the consultation meeting 19 February 2018, when the Claimant was informed that his role and job function would require participation in the Respondent shift and annualized hours system which would include call out and standby (§36-39 Reserved Judgment);

72. He had received training on the Safe Work Permit on 21 and 22 February 2022 (§40 Reserved Judgment) .

73. These discussions and the training had taken place before the Respondent sought to impose any change on the Claimant.

> 74. The Claimant resigned on the evening of 5 March 2018 (§47 Reserved Judgment) before the changes could be brought into effect, by way of agreement, imposition or by way of dismissal and re-engagement although I did further conclude that, taking into account the findings made regarding the Claimant's clear resistance to those changes, that agreement would have been unlikely in the event that the Claimant had not resigned.
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> 75. I did not consider that the manner in which the Claimant was escorted from the site once he had resigned, or the correspondence between the parties that followed, to be relevant considerations when determining whether the Respondent had acted reasonably, a matter which the Claimant had relied on, as these events had followed the resignation and in turn, termination of his employment.
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> 76. Given that the Claimant was clearly indicating that he was not going to agree to the changes, the Respondent's conduct as at the point of the Claimant's resignation, in seeking to agree to put those changes in place was reasonable in all the circumstances of the case.
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> 77. When reaching that conclusion I took into account not, just the reasonableness of the employer in seeking to introduce those changes which was to seek agreement through consultation and discussion, but also the reasonableness of the Claimant in rejecting them, which included (a) refusal by the Claimant from the outset to pick up the phone when rostered on primary cover (§22 Reserved Judgment).
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> 78. What might have happened if the Claimant had not resigned on 5 March 2018 was far from clear to me, but I concluded that in the circumstances, in the context of the consultation that had taken place, the fact that all other transferring employees had agreed to the new systems (both standby and Safety Work Permits (§46 Reserved Judgment)) whilst the changes were to the Claimant's detriment, I did not consider that the employer had acted unreasonably in the circumstances.
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> 79. On that basis, the claim for unfair dismissal is not well-founded and is dismissed. [emphasis added]

The second appeal

8. The claimant appealed on the following grounds:

> 1. The Employment Appeal Tribunal determined in appeal no. UKEAT/0155/20/LA (V) that the transfer involved a substantial change in working conditions to the material detriment of the Claimant such that he was to be treated as having been dismissed. In light of such determination the Employment Tribunal ("ET") should have scrutinised very closely any reason advanced by the Respondent to the effect that the transfer was neither the reason nor principal reason for the change in working conditions. In failing to do so, the ET erred in law

> 2. The ET erred in law in permitting the Respondent to advance a case that had not been argued at the original hearing; namely that the reason or principal reason for change in working conditions was safety. For the avoidance of doubt the scope of the remission from the EAT did not permit the Respondent to advance a new reason for dismissal
>
> 3. Further or alternatively, there was no evidence to support the ET's conclusion that the principal reason for the changes to working conditions was safety. Yet further or alternatively, such a conclusion was perverse
>
> 4. The ET erred in law in concluding that the reason for the change in working conditions was an ETO reason within the meaning of regulation 7(2) of TUPE
>
> 5. If, contrary to the above, the ET was permitted to find that the reason for dismissal was safety, then the ET made an error of law in not finding the dismissal unfair for the purposes of s.98 of the Employment Rights Act 1996

The law

9. Regulation 4(9) and (11) of **TUPE** 2006 provides:

> (9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.
>
> (11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

10. Regulation 7 **TUPE 2006** provides:

> 7 - Dismissal of employee because of relevant transfer
>
> (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.
>
> (2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

> (3) Where paragraph (2) applies—
>
> (a) paragraph (1) does not apply;
>
> (b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
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> > (i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
> >
> > (ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

11. In **Kuzel v Roche Products Ltd** [2008] EWCA Civ 380 [2008] I.C.R. 799 Mummery LJ gave guidance about how to analyse a claim of automatic unfair dismissal:

> 47. A few preliminary observations may clarify, even simplify some aspects of the case.
>
> 48. First, 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. Part X includes sections 94 to 134 . There was a suggestion in argument before the appeal tribunal, which was not pursued in this court, that the burden of proof in protected disclosure cases should be the same as that applied in equivalent provisions governing discrimination cases. In those cases the burden of proving the reason for less favourable treatment of the claimant shifts to the respondent. Mr Linden argued for a "strictly limited" role for discrimination law in protected disclosure cases. The thinking behind the association of protected disclosure and discrimination is that both causes of action involve acts or omissions for a prohibited reason. Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts. As Mr Linden accepted there simply is no need to resort to the discrimination legislation in order to ascertain the operation of the burden of proof in unfair dismissal cases.
>
> 49. Secondly, it is not profitable to discuss burden of proof issues in generalities. It must be related to particular issues, in this case to the different aspects of an unfair dismissal claim. On some issues the 1996 Act is completely silent on the burden of proof. In the absence of specific statutory provision the general rules apply. The general rules are that a person bringing a claim must prove it and a person asserting a fact must produce some evidence for it. Thus the burden was on Dr Kuzel to prove that she was unfairly dismissed. It was for her to produce some evidence for the facts she alleged. But it does not follow that the burden of proof was on her in respect of every element of the unfair dismissal claim.

50. An unfair dismissal claim has a number of aspects any or all of which may be disputed. In this case the dispute is about the reason for dismissal and where the burden of proof lies. The burden may differ according to the nature of the disputed issue. On the specific issue of dismissal, for example, the claimant employee must prove that he was dismissed. This will not usually be a difficult burden to discharge. The production of a letter of dismissal usually proves the point. There are, however, cases in which there is disputed evidence about whether the employee resigned or whether he was constructively dismissed.

51. Similarly there may be an issue as to the claimant's status affecting his right not to be unfairly dismissed. It is for the claimant to produce evidence to show that he was an employee of the respondent. This is not normally difficult. In most cases there will be a written contract, written *810 particulars or some other document relating to pay arrangements and so on. In some cases oral evidence will be needed to prove the terms and conditions on which the claimant did work for the respondent.

52. Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, presuppose that, in order to establish unfair dismissal, it is necessary for the tribunal to identify only one reason or one principal reason for the dismissal.

53. Fourthly, the reason or principal reason for a dismissal is a question of fact for the tribunal. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

54. Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.

55. Sixthly, the burden of proof issue must be kept in proper perspective. As was observed in *Maund v Penwith District Council* [1984] ICR 143, when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof.

56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.

57**. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce**

> **some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason.** It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
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> 58**. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence**.
>
> 59. **The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
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> 60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.
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> 61. I emphatically reject Roche's contention that the legal burden was on Dr Kuzel to prove that protected disclosure was the reason for her dismissal. The general language of section 98(1) is applicable to all of the kinds of unfair dismissal in the 1996 Act ("for the purposes of this Part"), including the subsequently inserted provisions. Section 98(1) is inconsistent with Mr Bowers's submission, as is the specific provision placing the burden of proof on the employer in case of detriment to the employee by reason of a protected disclosure. It is probable that no similar provision was made in the case of dismissal because it was considered, correctly in my view, that the situation in the case of dismissal was already covered by the general terms of section 98(1) and was blindingly obvious as a matter of general principle. **An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was.** [emphasis added]

Analysis

12. I consider it is clear from an overall reading of the Judgment that the Employment Tribunal

concluded that there were pre-existing problems with standby/call out arrangements and that it was the need to address these pre-existing problems and to have a single system for Safe Work Permits that was the sole or principal reason for seeking to change the claimant's working conditions to his material detriment. The Employment Tribunal concluded that the fundamental reason was ensuring the safety of those at the CHPP and those living near to the site. Accordingly, the transfer of the undertaking was not the sole or principal reason for the dismissal of the claimant. That reasoning also underpinned, and was fundamental to, the conclusion that there was an ETO reason for the dismissal.

13. The fundamental question in this appeal is whether this finding was open to the Employment Tribunal on the basis of the pleadings, the case run in the first Employment Tribunal hearing, the remission from the Employment Appeal Tribunal and the evidence at the second Employment Tribunal hearing, having regard to the extent to which it was open to the Employment Tribunal to make new findings of fact.

14. The respondent pleaded its defence in the ET3 response:

> 19 … During its consultation meetings with the Claimant the Respondent explained to the Claimant that for organisational and operational reasons the Claimant would be required to participate in the Respondent's Annualised Hours System together with the call out and stand by requirements contained within this. …
>
> During the consultation process the Claimant continually pointed out that the differences between the organisational and operations structures applying at Engie and at the Respondent meant that there would be changes to his job role and functions for the operational reasons that had been explained to him. The Respondent denies that it threatened to dismiss the Claimant if he refused to agree to a new contract. The Respondent simply pointed out that it was impossible for it to alter its operational processes and structures to accommodate one person when it had 300 other employees all operating the plant on the Annualised Hours System together with the call out and stand by requirements contained within this.
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> 21. In the event that the Claimant asserts that he should be treated as having been constructively dismissed and/or dismissed for the purposes of regulation 4(9) TUPE on the basis that there was a change to his job role and/or functions to his material detriment the Respondent will contend that:
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> 21.1. It is denied that any changes to the Claimant's working conditions were to the material detriment of the Claimant. Furthermore, in relation to any purported dismissal (which is denied) the Respondent will contend

> that it had a fair reason for any such dismissal namely some other substantial reason under section 98(l)(b) of the Employment Rights Act 1996 (ERA) and regulation 7(3)(b)(ii) TUPE).
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> 21.2. Any such dismissal was for an economic, technical or organisational (ETO) reason(regulation 7(2) TUPE) entailing changes in the workforce in respect of the Claimant's job role and/or functions due to the differences between the transferor's and transferee's operational structures.
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> 21.3. The ETO reason was an organisational reason as set out above namely the changes that were required following the TUPE transfer in respect of moving to annualised hours, changes in shift rotas and being available for both stand by and call out duties.
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> 21.4. The Respondent followed a fair procedure in dismissing the Claimant in accordance with section 98 (4) ERA, namely that the Respondent carried out extensive collective and individual consultation with the Claimant on 14 December 2017, 10 January, 19 February and 5 March 2018.

15. Numerous appeals to the Employment Appeal Tribunal have succeeded on the basis that the Employment Tribunal's determination of the claim was not founded on a complaint pleaded by the claimant, even having regard to the lesser degree of formality that may be expected of a litigant in person, in comparison to a represented party. It is hard to avoid the cliche: what's sauce for the goose is sauce for the gander. A respondent, particularly when represented, can be expected to draft the response clearly so that the claimant knows the basis of the defence before finalising and giving evidence.

16. I do not consider that on a fair and reasonably generous reading of the response it can be said that the sole or principal reason for the changes in working conditions to the material detriment of the claimant was "a need to resolve an ongoing situation as soon as possible, to ensure the constant running of the plant and to ensure the safety of workers at, and those in close proximity to, the CHP plant". That simply was not the respondent's pleaded case. That is sufficient for the appeal to succeed as it was incumbent on the respondent to adequately plead what it contended was the sole or principal reason for the claimant's dismissal.

17. Furthermore, there was no basis for this determination in the findings of fact of the first Employment Tribunal that remained binding on remission. Nor do I consider that the finding is based on the respondent's evidence at the second Employment Tribunal hearing. It is not set out in the

witness statements or documents to which I was referred. Even if the reason for dismissal accepted by the second Employment Tribunal was founded on the documentary and witness evidence it would still have required an application to amend, which probably would have been doomed to failure because of the terms of the remission from the EAT.

18. Both parties referred me to an email sent by Ryan Howell, Senior Human Resources Manager, to the claimant that was said to set out the respondent's reason for insisting on changes in respect of standby/call out arrangements and Safe Work Permits sent to the claimant on 8 March 2018:

> In relation to your role, we have made it clear to you during the consultation process that **for organisational and operational reasons you would be required to fully participate in the Dow Annualised Hours System, together with the call out and stand by requirements contained within this** and that your **contract of employment with Engie permitted changes to be made on this basis. During the consultation process you repeatedly pointed out and we acknowledged that the differences between the organisational and operations structures applying at Engie and at Dow meant that there would be some changes to your job role and functions following the TUPE transfer** for the organisational and operational reasons that we explained to you. **Clearly we are unable to change our work and operations processes and organisational structure for one person when we have 500 others all operating the plant on another structure and procedures.** [emphasis added]

19. I cannot accept the respondent's invitation to read the reference to the respondent being "unable to change our work and operations processes and organisational structure for one person" as referring to the need to have commonality of terms for safety reasons. If that was the reasoning of Mr Howell he would have said so.

20. So, where did the safety issue come from? It came from the cross-examination of the claimant who all along had raised health and safety concerns. The Employment Tribunal relied on his cross-examination:

> 28. The Claimant had given evidence in the original hearing on the cover system that had operated and findings of fact had been made at §14 Reserved Judgment. In this hearing on cross-examination, the Claimant agreed that those findings were accurate and again agreed that:
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> (a) overtime at Engie had been voluntary;
> (b) that cover, and in turn the overtime system at Engie, had broken down in the last 6 months of the contract because of shortage of goodwill from the Engie

operatives and because the new engineer operations manager lacked training to provide the cover.

29. He also confirmed that if Engie could not cover a shift, then the CHP plant which operated 24 hours a day/7 days a week, would need to shut down, and that, as at the date of the TUPE transfer, he held the view that the Engie system of cover, to ensure that the CHP plant operated safely, was unacceptable.

Safe Work Permit

30. The original tribunal had dealt with the Safe Work Permit at §77 to 82 of its Reserved Judgment.

31. The Respondent wished to change the system of operation, changing the operatives responsibilities in relation to safety:

(a) From the position at Engie, which had failed, where engineers (not Operations Technicians) issued Work Control Documents to confirm that it was safe for work to be carried out on a piece of equipment; to

(b) A system at the Respondent, where 'Safe Work permits' would be issued by the transferring Operations Technicians.

32. This new system required training over a period of 6 months and gave those transferring employees, including the Claimant new responsibilities, responsibilities that the Claimant had no wish to take on.

33. Given the nature of the new responsibilities and the training involved, it was a substantial change (§16 EAT Judgment).

34. The Claimant agreed on cross-examination, and I further found that:

(a) if an accident had arisen at the CHP Plant that could have 'catastrophic consequences', not just for those at the site but also those living in the wider community; and

(b) that the November 2017, Engie Audit Report had identified that having three sets of safety rules in operation was of concern.

35. The Claimant also gave evidence at this hearing that:

(a) the CHP Plant, a heat and power plant was, by reason of the transfer, being integrated into a chemical site i.e. the Respondent's operation, with two different ways of working;

(b) He was opposed to integration of the systems and believed that the Engie system of operation was safer than that proposed by the Respondent, in that it was a higher level of employee, an engineer, who had responsibility for issuing the permits and that he did not believe that he was the type of person that could carry out the responsibilities of signing off the Safe Work Permit; and

(c) That it would be a 'good idea' for the Respondent's safety rules to be applied across all of its operations to inter-connect people

21. The problem with relying on what the claimant said in response to cross-examination is that it was not evidence of the respondent's reason for dismissal but about what the claimant thought about health and safety issues after the event. It was for the respondent to establish what its reason was for dismissing the claimant. That required consideration of the reasons in the minds of those that insisted on the substantial change in working conditions to the material detriment of the claimant. That could not be established by ascertaining what the claimant thought about health and safety issues after the event.

22. HHJ Shanks held that regulation 4(9) **TUPE 2006** applied, which requires that the transfer "involves" the substantial change in working conditions to the material detriment of the claimant. It does not necessarily follow from the fact that the transfer "involves" the substantial change in working conditions to the material detriment of employees, that the sole or principal reason for the dismissal must have been the transfer of the undertaking, or that there could not be an ETO reason for dismissal. The scheme of **TUPE 2006** clearly allows that possibility. However, on the analysis required by **Kuzel v Roche**, where the transfer of the undertaking involves a change in working conditions to the material detriment of the claimant and the transfer is the occasion for the change in working conditions it is hard to see how it could be held that the claimant has not at least set up a sufficient basis for a claim that the transfer was the reason or principal reason for the change in working conditions to the material detriment of the claimant. It was for the respondent to establish the reason for dismissal. As Mummery LJ pithily put it in **Kuzel v Roche** "An employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was."

23. If a respondent does not prove a reason that was not the transfer of the undertaking it is open to an Employment Tribunal to decide that the sole or principal reason for the dismissal is one that was not advanced by either party, but the Employment Tribunal must have evidence in order to do so. That evidence must be about the sole or principal reason the respondent had in mind when it required the change in working conditions to the material detriment of the claimant.

24. I have concluded that the appeal must be allowed because the reason relating to health and

safety that the Employment Tribunal found was the sole or principal reason for the imposition of the terms to the material detriment of the claimant was not pleaded or evidenced by the respondent and there was no other evidence that could support health and safety having been the underlying reason for the imposition of the change to terms of employment in the mind of the respondent at the time. The respondent accepted that if there was no proper basis for the Employment Tribunal finding that safety was the reason for the dismissal that determination would also be fatal to the respondent having established an ETO reason for the dismissal. Finally, even if the respondent could have relied on an ETO reason for the dismissal it would have been unfair as there was no consultation about any health and safety reasons for the dismissal.

25. I have concluded that there is only one possible outcome. The respondent did not establish, and there was no proper basis for the Employment Tribunal finding, a sole or principal reason for dismissal other than the transfer of the undertaking, nor was there an ETO reason for dismissal. The appeal is allowed on all of the revised grounds and a decision is substituted that the claimant was unfairly dismissed because the sole or principal reason for dismissal was the transfer and the ETO defence was not made out. The matter is remitted to another Employment Tribunal to determine remedy. I can see no saving to be made by remission to the same Employment Tribunal. It is better that the decision be taken by a new Employment Tribunal coming fresh to the matter.