EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Markham

Respondent: Asda Stores Limited

Heard at: London South Employment Tribunal, Croydon (by video)

On: 4-7 March 2024

Before: Employment Judge Abbott, Ms J Forecast and Ms C Edwards

Representation
Claimant: Mr P Young, Union representative
Respondent: Mr F Mortin, barrister, instructed by Addleshaw Goddard LLP

JUDGMENT having been sent to the parties on 11 March 2024 (reasons having been delivered orally on 7 March 2024) and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By its Judgment sent to the parties on 11 March 2024, the Tribunal unanimously found that the claimant was unfairly dismissed for a reason falling within the scope of section 100(1)(b) of the Employment Rights Act 1996 (**ERA**) and awarded compensation in the total sum of £5,656.70 net. Oral reasons for the judgment were delivered to the parties on 7 March 2024. By an email dated 20 March 2024, the claimant requested written reasons. These are those reasons.

Background

2. The claim came before the Tribunal on remittal from the Employment Appeal Tribunal (**EAT**) pursuant to an order of HHJ Katherine Tucker dated 1 December 2022.

3. The claim dates back to 2016, though amendments were made after it was

presented. By the time the claim came to a final hearing in March 2018 before EJ Martin and members, the complaints before the Tribunal were (1) detriment on grounds related to trade union membership and/or activities (2) automatic unfair dismissal for trade union activities (3) automatic unfair dismissal for performing the functions of a health and safety representative (4) 'ordinary' unfair dismissal.

4. An oral judgment was given when the final hearing was completed in June 2018 (the case having been adjourned, part-heard, due to illness of one of the witnesses) and all of the complaints were dismissed. Written reasons were subsequently provided. The claimant appealed to the EAT, and HHJ Stacey (as she then was) upheld the judgment on three of the four complaints, but remitted back to the same Tribunal for rehearing the complaint of automatic unfair dismissal for performing the functions of a health and safety representative, on the basis that the Tribunal had not properly analysed that claim, nor made the necessary findings of fact to enable it to do so. HHJ Stacey set out in paragraph 34 of her judgment the issues that the Tribunal needed to determine. This included making a finding as to the reason or principal reason for dismissal, as HHJ Stacey observed that the Tribunal had not made a clear finding in that regard.

5. At the suggestion of EJ Martin, the parties agreed to the judge determining the remitted issues alone and on the papers. By a written judgment dated 14 October 2020, EJ Martin dismissed the remaining complaint. However, that decision was also appealed by the claimant and was overturned by the EAT, for the reasons set out in the judgment of HHJ Katherine Tucker dated 1 December 2022.

6. The settled position before the Tribunal is that the factual findings that the original Tribunal (EJ Martin and members) made (*i.e.*, those in paragraphs 24-41 of the original reasons) are left intact by the judgment of HHJ Stacey, save for those in paragraphs 27-34 which HHJ Stacey expressly states (at paragraph 28 of her judgment) need to be revisited in light of the rights and entitlements of the claimant as a safety representative. The second Tribunal judgment (that of EJ Martin sitting alone) is to be treated as a nullity, having been overturned by HHJ Katherine Tucker.

<u>The issues</u>

7. The issues for this Tribunal to determine in respect of liability remain those set out in paragraph 34 of HHJ Stacey's judgment.

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

        i. carried out an inspection pursuant to Reg.5 of the 1977 Regulations within the 3 months prior to 30 March 2016?
        ii. given his employer or its representative reasonable notice of his intention to inspect the workplace on or about 30 March 2016?
        iii. And therefore, was the Claimant's proposal to conduct an inspection on 30 March 2016 made by virtue of the 1977

Regulations?

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

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

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

8. EJ Dyal set out in his Case Management Order of 6 October 2023 the remedy issues that required resolution in the event the claim succeeded. The Tribunal directed at the beginning of the hearing that we would deal with issues of blameworthy conduct / contribution (*i.e.*, issues c.i and c.ii below) at the same time as liability.

a. What basic award if any is the Claimant entitled to?

b. What compensatory award if any is the Claimant entitled?

c. In order to resolve those questions it may be necessary to decide:

i. Whether the basic/compensatory award should be reduced on account of blameworthy conduct;
ii. Whether a *Polkey* reduction should be made? (i.e., if the Claimant was unfairly dismissed, is there a chance he would have been dismissed in any event, if so what chance and when?)
iii. Has the Claimant taken reasonable steps to mitigate his loss and if not how does that affect remedy;

d. Did the Respondent breach of the ACAS code? If so was that an unreasonable breach and if so should there be an adjustment of any award?

(EJ Dyal originally included as issue e. the matter of whether the claimant was entitled to aggravated damages. Mr Mortin (who appeared for the respondent) argued at the outset of the hearing that aggravated damages were not available in a standalone s.100(1)(b) ERA claim and, in that light, the claimant (correctly in our judgement) did not pursue aggravated damages before us.)

<u>The law</u>

Liability

9. We adopt the summary of the relevant statutory provisions set out by HHJ Stacey in her judgment at paragraphs 9-14 (omitting paragraph 13 which is not relevant to the remitted issues).

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

10. Regulation 4A provides as follows:

"4A.—Employer's duty to consult and provide facilities and assistance

(1). Without prejudice to the generality of section 2(6) of the Health and Safety at Work etc. Act 1974, every employer shall consult safety representatives in good time with regard to-

(a). the introduction of any measure at the workplace which may substantially affect the health and safety of the employees the safety representatives concerned represent;

(b). his arrangements for appointing or, as the case may be, nominating persons in accordance with regulations 7(1) and 8(1)(b) of the Management of Health and Safety at Work Regulations 1999 or article 13(3)(b) of the Regulatory Reform (Fire Safety) Order 2005;

(c). any health and safety information he is required to provide to the employees the safety representatives concerned represent by or under the relevant statutory provisions [or the relevant nuclear provisions];

(d). the planning and organisation of any health and safety training he is required to provide to the employees the safety representatives concerned represent by or under the relevant statutory provisions [or the relevant nuclear provisions]; and

(e). the health and safety consequences for the employees the safety representatives concerned represent of the introduction (including the planning thereof) of new technologies into the workplace.

(2). Without prejudice to regulations 5 and 6 of these Regulations, every employer shall provide such facilities and assistance as safety representatives may reasonably require for the purpose of carrying out their functions under section 2(4) of the 1974 Act and under these Regulations.

…."

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

"(1). Safety representatives shall be entitled to inspect the workplace or a part of it if they have given the employer or his representative reasonable notice in writing of their intention to do so and have not inspected it, or that part of it, as the case may be, in the previous three months; and may carry out more frequent inspections by agreement with the employer.

(2). Where there has been a substantial change in the conditions of work (whether because of the introduction of new machinery or otherwise) or new information has been published by [...] the [relevant authority] relevant to the hazards of the workplace since the last inspection under this Regulation, the safety representatives after consultation with the employer shall be entitled to carry out a further inspection of the part of the workplace concerned notwithstanding that three

months have not elapsed since the last inspection.

……

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

….."

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

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

[…]

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

"100. Health and safety cases.

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

…

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

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

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

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

….."

10. It is common ground that the claimant was a "safety representative" for the purposes of the 1977 Regulations, and it is not suggested that the planned inspection at the end of March 2016 was a "more frequent inspection by agreement with the employer". Accordingly, the question of whether the claimant was entitled pursuant to Regulation 5(1) of the 1977 Regulations to inspect the workplace on 30 March 2016 comes down to two questions:

    a. Had he carried out an inspection of the workplace in the three months prior to 30 March 2016?

b. Had he given his employer or its representative reasonable notice of his intention to inspect the workplace on or about 30 March 2016?

11. Our attention was also drawn to the relevant Code of Practice, that being the Health and Safety Executive's "Consulting workers on health and safety", where the relevant provisions discussing Regulation 5 inspections are at paragraphs 50-56. The following points appear to the Tribunal to be particularly relevant:

    a. Paragraph 51 states that "Where possible, the employer and the health and safety representatives should plan a programme of formal inspections in advance, which will itself fulfil the conditions for providing notice. Variations in this planned programme should be subject to agreement."

    b. Paragraph 52 explains that, whilst there are advantages to inspections being jointly carried out by employer representatives and H&S representatives, "this should not prevent health and safety representatives from carrying out independent investigations".

    c. Paragraph 53 states that "The formal inspection may take various forms, and it will be for the appointed health and safety representatives to agree with their employer about this."

12. The claimant also directed us to paragraph 42, which is in the context of regulation 4, but pertinently notes that "Regulation 4(2) requires employers to allow health and safety representatives paid time as is necessary, during working hours, to perform their functions. In practice, this means they should carry out their functions (such as workplace inspections or attending health and safety committee meetings) as part of their normal job, and employers will need to take account of this in their workload."

13. Regarding the question of unfair dismissal, as already mentioned, it is common ground that the claimant was a representative of workers on matters of health and safety for the purposes of this provision and that he was dismissed, so the core question for the Tribunal is whether the reason (or the principal reason) for the dismissal was that he performed or proposed to perform a function as a safety representative by undertaking a workplace inspection on 30 March 2016.

14. Mr Mortin in his written closing submissions at paragraphs 9-16 drew our attention to various cases which set out uncontroversial general legal principles relation to establishing the reason (or principal reason) for dismissal and the burden of proof, which we adopt as correct.

> "9. As Cairns LJ said in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."
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> 10. Applying *Abernethy*, the employer will sometimes be able to establish that it has dismissed for a reason which is at least capable of being fair provided he can show that he genuinely believed that it was dismissing for that reason. The fact that the belief may be mistaken is irrelevant. The subjective belief of the employer at least

enables it to jump the hurdle of establishing a prima facie fair reason for the dismissal.

11. The ET will be aware that there are two stages in establishing whether a dismissal is fair. The first, and the only part relevant given the issues before it, requires an identification of whether there was a potentially fair reason to dismiss C. At this stage, the burden of proof is on the employer.

12. To discharge that burden, R does not, at this point, have to establish that the principal reason justified the dismissal, merely it was the reason R relied on and it was capable of justifying the dismissal.

13. Notwithstanding this, the employee will have to produce sufficient evidence to raise the question of whether the selection may have been for an automatically unfair reason. If the ET does not accept the employer's reason, then it is open to it to accept the reason put forward by the employee or decide that a different reason was the true reason for dismissal.

14. The leading case here is *Kuzel v Roche Products Ltd* [2008] IRLR 530, CA, particularly at [59]-[60] where the issue was considered in the context of protected disclosures (whistleblowing). In that case Mummery LJ cautioned that the statutory reversal of the burden of proof in discrimination cases is not to be read over into this context, which means that if the employer fails to prove the (non-prohibited) reason that it has relied on it is not the case that the ET must in law find for that prohibited reason. The key passages in his judgment read as follows (note these are emphasised below):

> "The ET 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 ET that the reason was what he asserted it was, **it is open to the ET 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 ET 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.**
>
> 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.**"

15. In determining the principal reason for the dismissal, the ET must not take account of events occurring subsequent to the conclusion of the dismissal process, or even of events which predated the dismissal if they were not known to the employer when it dismissed the employee (*W Devis & Sons Ltd v Atkins* [1977] AC 931). The opposite also rings true, namely that if the employer decides on reasonable grounds, and after a proper inquiry, that an employee has committed a particular act of misconduct, and it dismisses the employee for that reason, the dismissal will not be rendered unfair if it subsequently transpires the employee was innocent. It is not unlawful for the employer to be wrong, only to act unfairly.

16. A significant exception to the rule in *Devis* is that the employer should take

account of evidence which emerges in the course of an internal appeal pursuant to *West Midlands Co-operative Society Ltd v Tipton* [1986] 1 All ER 513. An appeal can remedy the defects in a disciplinary process. […]"

15. The Tribunal drew the parties' attention to the decision of the EAT (Mr Justice Choudhury, President) in *Sinclair v Trackwork Ltd* [2020] UKEAT 129/20/0112, a case that, based on our reading, we considered may be relevant to the present situation. Mr Mortin helpfully addressed us on this case in closing. *Sinclair* was a case under s.100(1)(a) ERA, but the rationale is equally applicable to s.100(1)(b) ERA cases. The key principles to be drawn from the decision are found at paragraph 13, in which the President provides the following summary:

    a. the scope of the protection afforded by s.100(1) [ERA] is broad;

    b. activities carried out pursuant to a designation under s.100(1)(a) will be protected and the manner in which such activities are undertaken will not readily provide grounds for removing that protection;

    c. however, conduct that is, for example, wholly unreasonable, malicious or irrelevant to the task in hand could mean that the employee loses the protection.

16. On the facts of the *Sinclair* case, there were conduct and attitude matters that might have constituted the kind of behaviour that could entitle an employer to properly treat those as the reason for dismissal, rather than the claimant's health and safety activities themselves. However, the fundamental difficulty for the respondent was that none of these reasons was found to constitute the reason, or part of the reason, for dismissal. The President found at paragraph 22.a of the decision that matters identified as being reasons for the dismissal were the direct result of the carrying out by the claimant of health and safety activities – it was the claimant diligently carrying out his duties that caused relations to sour. He went on to determine in further paragraphs that the matters relied upon as the (potentially fair) reason for dismissal was not properly separable from the carrying out of the protected activity itself, and therefore the conclusion that dismissal was other than for carrying out health and safety activities was not a permissible one in that case.

17. In this context, Mr Mortin directed us to another decision of the EAT (HHJ Burke QC and members) in *South West Trains v McDonnell* [2003] UKEAT 0052/03/0708. In that case, the claimant argued he had been dismissed for performing trade union activities. The Tribunal concluded that the claimant was seeking to talk to a colleague about RMT membership and an ongoing strike, but that his conduct in doing so (which was found to involve intimidation and harassment) was the true cause of the dismissal. We read this decision as one example of where the conduct is properly separable from the protected activities, and as being consistent with *Sinclair*.

Remedy

18. Where a complaint of unfair dismissal succeeds, s.118 ERA provides that the claimant is entitled to a basic award (calculated in accordance with sections

119-122 and 126) and a compensatory award (calculated in accordance with sections 123, 124, 124A and 126).

19. Section 120 ERA provides for a minimum amount of the basic award (before any reduction under section 122) in section 100(1)(b) cases. The minimum sum applicable to the claimant's case, given his date of dismissal, is £5,853.

20. Section 122(2) ERA provides that: "Where the tribunal considers that any conduct of the complainant 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 reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

21. Section 123 ERA provides, so far as relevant, as follows:

> "(1) Subject to the provisions of this section and sections 124, 124A and 126, 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.
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> (2) The loss referred to in subsection (1) shall be taken to include—
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> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
>
> (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
>
> […]
>
> (4) 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.
>
> […]
>
> (6) 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.
>
> […]"

22. Contributory fault can apply even where the unfairness is automatic (see *Graves v Arriva London South Ltd* [2015] UKEAT 0067/15/0307). The deduction for contributory fault under s.123(6) ERA can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss. In order to make a reduction for contributory fault, the ET must make findings of fact about the employee's conduct and that the conduct was culpable or blameworthy in some way. Only the employee's conduct is relevant to the inquiry about conduct. Once the ET is satisfied that there is culpable or blameworthy conduct then it is bound to consider making a reduction by such amount as it

considers to be just and equitable. See *Steen v ASP Packaging Ltd* [2014] ICR 56, EAT.

23. The misconduct need not be gross in character to warrant a reduction. The correct test is to consider if the conduct was culpable, blameworthy, foolish or similar which includes conduct that falls short of gross misconduct and need not necessarily amount to a breach of contract (per *Nelson v British Broadcasting Corporation (No. 2)* [1979] IRLR 346, [1980] ICR 110, CA).

24. When considering disciplinary, performance and grievance issues, employers must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures. Where an employer has unreasonably failed to follow the ACAS Code, a Tribunal may award an uplift to compensation of up to 25% if it is just and equitable to do so (per s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992).

The evidence before the Tribunal

25. We heard oral evidence from the claimant and from Mr Young (the claimant's Union representative) in support of the claimant's case, and from Miss Hyne (Transport Department Manager) and Mrs Watkins (HR Business Manager) for the respondent.

26. As a general observation, in weighting up the oral evidence, the Tribunal has had regard to the fact that the events in issue took place 7-8 years ago and (as the witnesses all fairly accepted) recollection after the passage of such time is difficult. This is a case in which the Tribunal found that the contemporaneous documentation was often the most reliable evidence of events, but the oral evidence did provide some assistance.

27. We also had before us witness statements dating from 2018 from Mr Tilly (General Manager of Bristol Depot), Mr Coker (General Manager of Dartford Dept) and Mr Lowe (former Operations Manager). By the end of the hearing, we had signed copies of Mr Tilly and Mr Coker's statements, but not of Mr Lowe's. None of these three individuals gave oral evidence before us, for good reason: given the passage of time since the events in dispute, all have now left the employment of the Respondent. However, all three did testify in the original Tribunal hearing before EJ Martin and members and were cross-examined on the contents of the very same witness statements. The claimant objected to those statements being relied upon at all. In the judgement of the Tribunal, in the circumstances of this case it was fair and just to consider those statements (including Mr Lowe's, notwithstanding we did not have a signed copy) on the basis that the claimant would be able to make submissions as to the weight we should put on those statements and whether any concessions were made by those witnesses in their oral evidence at the original hearing which may undermine their written evidence insofar as it is concerned with the (much narrower) issues now before us. We will indicate in our factual findings where we have relied upon such evidence; however, in broad terms, given this evidence was untested before us, we have approached it with a degree of caution and only afforded it weight where it is consistent with other, tested, evidence or with contemporaneous documents.

28. The role of the Tribunal is to consider all the evidence, and the documentary

materials we have been referred to, and form a view as to what is most likely to be the true position. It is important to say that, simply because we may not accept the evidence of a witness on a particular point, does not mean that we consider they are deliberately seeking to mislead, nor does it mean we must automatically not accept their evidence on other points. Ultimately, we must weigh up all the evidence on all different points and assess it on its merits.

The facts

29. The Tribunal made the following findings of fact. Where it has been necessary for us to resolve any conflict of evidence, we indicate how we have done so at the relevant point. We have only made findings of fact relevant to the issues that are before us. We have not referred to every document we have read and/or were taken to during the hearing, but we have considered all such documents. References to [x] are to pages in the hearing bundle.

30. The claimant was employed by the respondent, his employment commencing on 21 July 2008. His primary employment duties were as an HGV driver. At the time of the events in issue, he was based at the Erith XDC.

31. As part of his terms of employment, the claimant was subject to (among other things) the respondent's "Disciplinary Procedure (Distribution)". Aside from setting out the relevant processes, the document includes a non-exhaustive list of example misconduct / serious misconduct / gross misconduct behaviours. In that list, "deliberately refusing to comply with a reasonable management request" is identified as an act of serious misconduct, and "serious breach of trust or confidence resulting in a breakdown in working relationship" is identified as an act of gross misconduct.

32. On 10 April 2015, the claimant was appointed as a health and safety representative for Erith XDC by the local branch of the GMB union. From then until following a meeting on 22 March 2016 (which we address more fully below), the claimant used Tuesdays (which were for him a rest day from driving) to carry out his health and safety duties, and was paid overtime for this work. It was not normal practice at the respondent's other sites for health and safety representatives to use their rest days, and be paid overtime, for the fulfilment of such duties.

33. The GMB had a "National Recognition Agreement" with the respondent, and related guidance on the role of health and safety representatives. The claimant's role as a health and safety representative was subject to these. Responsibilities of such representatives were stated to include (among other things) "attending local meetings to represent the views and interests of members", "jointly undertaking site inspections highlighting health and safety issues" and "meeting legislative requirements". Further, under a heading "Values and Behaviour" it is stated that "The success of this Agreement will require colleagues at all levels within ASDA Distribution to work in a professional manner and in the spirit of partnership. […] Mutual respect for all individuals is fundamental to an effective working relationship."

34. It is important to note, however, that when acting as a safety officer, albeit appointed by a union, the duties of the officer are set out in the 1977 Regulations. Once appointed, the officer is independent of the union. We

therefore accept the claimant's oral evidence that he was primarily guided by what he referred to as the "Brown Book", which we understand to be the 1977 Regulations and associated guidance.

35. The manner in which health and safety activities, including workplace inspections, were planned as between the GMB and the respondent was through the agreement of a "annual planner" document. The 2016 planner for Erith XDC was in evidence at [179a]; we were not provided with planners for any other year for comparison. We had no direct evidence from anyone who was involved in agreeing the 2016 planner but, based primarily on the testimony of Miss Hyne and the claimant, we find that the planner would have been prepared by senior GMB officials for the site and approved by the respondent's senior managers for the site in around January 2016. Those aware of the planner, on the GMB side, included Graham Richards, who was the most senior GMB official on site and would have been involved in preparing it. The claimant was also plainly aware of it, though was not involved in preparing it. On the respondent side those aware would have included the General Manager at the time it was agreed, Val Morris Cook, and the health and safety area compliance manager, Steve Spencer. It is not credible that Mr Spencer would have been unaware of the annual health and safety planner given the nature of his role which, as described in Mr Lowe's witness statement was to be "responsible for everything encompassing health and safety". We accept the documentary evidence of Mr Coker and Mr Lowe that they were not aware of the 2016 planner, as it is apparent they became part of the management at Erith XDC after it was agreed. The other managers on site who subsequently interacted with the claimant at the time of the events at issue (Mr Daldorph, Mr Maunder and Miss Hyne) were not likely to be aware of the 2016 planner.

36. The 2016 planner provided for 3 site inspections during the year, the dates being listed as 29/03/2016, 30/08/2016 and 29/11/2016. There was no dispute that these site inspections were the periodic ones contemplated by Regulation 5(1) of the 1977 Regulations. Notably, each of the dates identified was a Tuesday, and all were scheduled at the end of calendar months. The gaps between inspection were either 3 or 5 months.

37. It was common ground that the most recent Regulation 5(1) inspection at Erith XDC had taken place in October 2015, *i.e.*, 5 months prior to the one scheduled for March 2016. That had been the first such inspection the claimant had undertaken since appointment to his representative role. It was common ground that the claimant had taken 4 days to complete that inspection. There was no evidence before us that suggested there was a view within the respondent that this length of inspection was problematic or out of the ordinary for this particular workplace, bearing in mind such inspections were conducted (if the 2016 planner is taken as representative) only 3 times per year. We also note, and accept, Miss Hyne's evidence (paragraph 9 of her statement) that the claimant told her he was entitled to carry out 3-day inspections three times per year. We find that, notwithstanding that the 2016 planner identifies only a single date for each of the site inspections, it would have been understood by the senior management of the respondent who approved the 2016 planner that the site inspections would have been multi-day events with a 3-4 day duration being well within contemplation.

38. On 5-6 January 2016, the claimant conducted an inspection of the lights in the Erith XDC, having received complaints from members that lights were not working. The respondent permitted the claimant to undertake this inspection. This inspection did not amount to an inspection of the entire workplace and was not a Regulation 5(1) inspection; rather it was an investigation of potential hazards and of complaints, further to the functions of a health and safety representative set out in regulation 4(1)(a) and (b) of the 1977 Regulations.

39. On 15 March 2016 (a Tuesday), the claimant inspected various parts of the workplace and prepared a PowerPoint presentation of his findings. We accept the claimant's evidence that this was, in essence, the claimant checking the status of issues that were either outstanding from previous health and safety audits or had been identified to him by members. This inspection did not amount to an inspection of the entire workplace and was not a Regulation 5(1) inspection.

40. On 22 March 2016 (a Tuesday), the claimant met with Mr Coker (who had very recently taken on the General Manager role for Erith XDC in addition to an existing General Manager role at Dartford depot) and Mr Lowe (who had recently become Transport Operations Manager) to discuss his health and safety role. The Tribunal considered that Mr Coker's email to the claimant, sent at 21:53 that day, was the most reliable evidence available of what was discussed. The key point for present purposes is that Mr Coker informed the claimant that he could no longer spend his Tuesdays (which were meant to be rest days) working solely on health and safety matters, though he would be able to undertake driving duties as overtime on those days. As was found by the original Tribunal at paragraph 25 of its reasons, the claimant's attitude towards the respondent changed from this point onwards.

41. Consistent with the 2016 planner, the monthly health and safety meeting for the site took place on 23 March 2016, commencing at 10:00am. For the first time since his appointment as a health and safety rep, the claimant did not attend this meeting. The circumstances were that the claimant had been rostered for a driving run from early in his shift, which was scheduled such that he would return in time to attend the meeting. However, the claimant did not leave the depot until 08:09 (having been scheduled to leave at 05:51) and arrived back at 09:53. We accept the claimant's evidence that, given the need to complete debriefing and rest after his driving he could not have made the start of the meeting. However, we find that he created that difficulty by departing late and, in any event, could reasonably have attended the meeting late. Moreover, we note that the disciplinary officer found that the claimant had prioritised covering for a colleague over attending this important meeting [449]. This conduct is an example of the change in attitude already mentioned.

42. On 25 March 2016 (Good Friday) at 05:40pm, the claimant emailed Mr Coker apologising for not attending the meeting. He additionally wrote the following: "Just a reminder workplace inspection next week: (put in d[ia]ry dates are 29th, 30th, 31st March)". The reference to "put in diary" we understand to mean that the claimant had written into the "transport diary" that he would be conducting the inspection on those dates. Miss Hyne provided helpful oral evidence regarding this diary, which we accept. In summary, drivers used the

diary to indicate shift swaps or other duties meaning they would not be available for driving, the entries would be approved on site (typically, but not always, by the driver taking the diary to a manager) and then forwarded to the team that plans the driving rotas. There was no set amount of notice required for an entry in the diary, save that the diary would be closed from 8pm on the day before to facilitate rota planning. We find the claimant did enter his inspection dates on 25 March 2016, but did not take the diary to a manager at that stage.

43. Later on 25 March 2016, at 22:32, Mr Coker responded to the claimant, copying Mr Spencer and Mr Lowe. It is worth quoting the substance of the email in full. It reads:

> "When you say "reminder" of workplace inspection I know nothing about it and neither does Steve Spencer, Mark Lowe or Andy Corbett
>
> This is something that should be agreed by all and managed by Steve
>
> This will need to be postponed until we discuss. Mark please assume Paul will be back on driving duties 29th, 30th and 31st.
>
> However Paul I notice the 29th is your rest day anyway and we discussed this last week? So unless Mark has agreed the overtime you won't be required. Mark can you have someone call Paul to discuss in case he isn't around til then to see this mail.
>
> Steve let's discuss next week
>
> Mark fyi"

44. We do not find it credible that Mr Coker had, in fact, established that each of Mr Spencer, Mr Lowe and Mr Corbett were unaware of the planned inspection. We have already found that, given his role, Mr Spencer must have been aware of the 2016 planner and therefore of the impending inspection. The line "Steve let's discuss next week" is also indicative of the fact that Mr Coker had not already been in contact with Mr Spencer about his knowledge. In any event, the email makes clear that Mr Coker's position is that (1) the inspection cannot proceed on the dates indicated by the claimant and (2) subject to contrary indication from Mr Lowe, the claimant was not approved to work overtime on 29 March. On the basis of the evidence before us, the claimant did not reply to this email.

45. On 27 March 2016, the claimant emailed Mr Spencer requesting a range of information said to be necessary for him to "carry out my functions". In this email, the claimant states that he will be doing a workplace inspection on 30th, 31st March and 1st April. It is therefore apparent that, in reaction to Mr Coker's email, the claimant did not plan to postpone the inspection to a date to be discussed, but rather shifted it back 1 day to account for the fact he would not be working on 29th March. When Mr Spencer responded on 29 March 2016, despite having been copied himself on Mr Coker's email of 25 March, he did not query the inspection dates but rather appears to accept that the inspection is going ahead, which is consistent with our finding that Mr Spencer was aware that this inspection had been planned for some time

within the 2016 planner. Nor did he query the length of the inspection (3 days) being indicated by the claimant.

46. On 28 March 2016, just after 07:00, the claimant took the transport diary to his immediate line manager, Mr Daldorph, for his inspection dates to be authorised. We accept the accuracy of Mr Daldorph's contemporaneous statement [184] as to what happened. Mr Daldorph refused to sign it off as he believed the claimant had conducted an inspection in the last few weeks, but said he would make further enquiries. Later in the day at around 17:00, Mr Daldorph informed the claimant he needed to see Mr Spencer the next day before he would sign anything off and had therefore cancelled the requests in the diary. Mr Daldorph did not then speak to Mr Spencer on 29 March 2016, which was a day on which the claimant did not work.

47. On 30 March 2016, the claimant arrived at the depot at 04:39 and began to undertake the workplace inspection. He did not report to the office for driving duties, to which he had been allocated for the day. This was brought to the attention of the Transport Department Manager, Mr Maunder. We accept the accuracy of Mr Maunder's contemporaneous statement [183] as to what then happened. In summary, he identified that the claimant had written an inspection into the transport diary but that was marked not approved by Mr Daldorph. He then went to look for the claimant and instead found Mr Richards, the senior GMB rep, who explained to Mr Maunder that the claimant would be carrying out the site inspection as communicated in January (*i.e.*, via the 2016 planner). Mr Maunder then found the claimant in the first aid room, told him he was planned to be undertaking driving duties that day, and that he was required to do so. The claimant informed Mr Maunder that he was undertaking health and safety duties and would not be driving today. Mr Maunder again asked the claimant to fulfil his driving duties, to which the claimant asked for a copy of the request in an email and printed. Mr Maunder duly did so, sending an email at 06:28 [182] which he then printed and handed to the claimant. The claimant continued to refuse to fulfil driving duties on the basis that he was carrying out duties as a health and safety representative. The claimant stated his request in the diary did not require authorisation, accused Mr Maunder of harassing him about his health and safety duties, stated that he did not understand the claimant's role, called him incompetent, and repeatedly directed him to go away with his vocal volume increasing. Regarding these last points, when Mr Maunder's account was put to the claimant in cross-examination, he responded "no comment" rather than denying the truth of Mr Maunder's account. He also drew attention to the fact that other managers (Mr Coker, Miss Hyne) had not suggested he had behaved in a similar manner to them. On balance, these answers undermined any argument on the part of the claimant that Mr Maunder's account was not accurate.

48. Mr Maunder reported what had happened to Mr Lowe. Mr Lowe asked another Transport Department Manager, Miss Hyne to speak to the claimant. We accept Miss Hyne's account of what happened. In summary, she spoke to the claimant for around 45 minutes, during which time the claimant explained that the inspection had been planned since January, Mr Coker could not stop him from doing it, and (despite several requests) he would not fulfil driving duties that day as he was conducting the inspection. Miss Hyne decided to open an investigation into the issue and invited the claimant to an

immediate investigation meeting. The claimant asked to be accompanied by a GMB rep. Mr Richards and another rep, Mr Ware, were both approached by Miss Hyne but declined to accompany the claimant. The claimant therefore refused to attend the meeting.

49. Meanwhile, Mr Lowe had arrived on site and spoke directly to the claimant. The Tribunal accepted the accuracy of Mr Lowe's contemporaneous statement [185] as to what then happened. We reject the account provided in Mr Lowe's witness statement for the Tribunal at paragraph 35, which we considered to be an unjustifiably embellished version and which, we are told, he did not stand by when cross-examined at the original hearing. Nevertheless, in summary, the claimant told Mr Lowe he would be continuing with the inspection and had no intention of driving. He also called Mr Lowe "an evil man that has it in for some drivers". Mr Lowe told the claimant that, if he would not drive, he would not be paid for the day.

50. In the meantime, Miss Hyne had continued her investigation meeting without the claimant. She gathered statements from Mr Daldorph, Mr Maunder and Mr Lowe and inspected the transport diary. She concluded, based on the evidence she had gathered, that the investigation should be forwarded for a disciplinary hearing for a serious breach of trust and confidence resulting in a breakdown in working relationship – a gross misconduct allegation.

51. Having been informed of the events taking place, Mr Coker arrived on site at around 10:45. The Tribunal accepted the accuracy of Mr Coker's contemporaneous record [193] as to what happened. We did not accept the claimant's account in his witness statement (paragraphs 23-25) because his allegation that Mr Coker was aggressive with the claimant did not feature in the grievance that the claimant brought against Mr Coker soon afterwards. In summary, we find that Mr Coker went with Mr Lowe to speak to the claimant. The claimant asked to speak with Mr Coker individually. The claimant stated that Mr Coker was trying to stop him from carrying out his duties. Mr Coker explained that he was happy for the inspection to take place, but the dates and timeframe needed to be agreed with the wider team. Mr Coker repeatedly asked the claimant to fulfil driving duties and the claimant refused. Mr Coker confirmed in his witness statement that the claimant was not aggressive with him during this encounter. As he was refusing to fulfil driving duties, Mr Coker decided he would suspend the claimant. The letter of suspension handed to the claimant shortly after 11:15 set out the reason for suspension as "you refused to carry out your contracted duties".

52. The details of what happened from this point up to the point of dismissal are of little relevance to the issues we have to decide. To take it briefly, the claimant went off sick immediately following his suspension. Miss Hyne decided to reopen the investigation to seek to give the claimant the opportunity to provide his version of events, but an investigation meeting was not scheduled until after the claimant had been deemed by Occupational Health as fit to attend. A meeting was scheduled on 31 May 2016 but the claimant did not attend, informing the respondent he was not well enough to participate. Another meeting was scheduled on 7 June 2016, the claimant again did not attend, asserting he was still too unwell. Miss Hyne proceeded in his absence, adjourned to take further evidence from Mr Coker [315a-315c], then concluded (as she had originally) that the investigation should be

forwarded for a disciplinary hearing for a serious breach of trust and confidence resulting in a breakdown in working relationship – a gross misconduct allegation.

53. Mr Agnew, an operations manager at another depot, was designated to hear the disciplinary. Progress of the disciplinary was considerably delayed due to the claimant raising a large number of grievances that needed to be dealt with first. Ultimately, meetings took place on 14 and 21 November 2016 at which the allegations were discussed.

54. What is important (it being HHJ Stacey's liability issue b)) is what facts were known to the disciplinary officer when he took the decision to dismiss. It is evident from the materials before the Tribunal, in particular Mr Agnew's adjournment notes [418-425], that Mr Agnew had sight of the various email exchanges between the claimant and Mr Coker between 22 and 25 March that we have already referenced, the transport diary entries, the 2016 planner, the statements of Mr Daldorph, Mr Maunder and Mr Lowe, Mr Coker's note of the events of 30 March prepared that evening, the notes of Miss Hyne's interview with Mr Coker, Miss Hyne's investigation report, notes of an interview with Mr Ware, and the claimant's account as provided in the meetings with Mr Agnew on 14 and 21 November 2016.

55. When it comes to considering the reason (or principal reason) for dismissal, it is important to note that we did not have the benefit of evidence from Mr Agnew. We did hear from Mrs Watkins, who was able to give evidence of discussions she had with Mr Agnew about his thought processes, which evidence was largely unchallenged. We also have Mr Agnew's adjournment notes and very detailed disciplinary outcome letter [446-453]. The Tribunal found that the dismissal letter provides a reliable picture of what reasons Mr Agnew had in mind for dismissal. We reject any suggestion that he had any ulterior motives, there being no evidence to support that. We also reject as not credible the idea that Mr Agnew was in some way influenced in his decision by Mr Coker.

56. The reasons for dismissal are, we find, encapsulated in the paragraph of the outcome letter bridging [452-453]. That paragraph reads as follows:

> "In summary I have worked through all the information and facts presented as part of this case to establish what happened to make an informed decision, from the detail above I ascertained that you did have a choice on how you behaved and acted through each situation detailed. The decisions you chose to take demonstrates you[r] complete lack of regard for every level of management within Depot therefore you have irreparably eroded the relationship with your employer through your actions prior to and on the 30th March 2016. In that you failed to follow the request process when urged to, you failed to carry out reasonable management requests prior to and on the 30th March 2016, this was illustrated above and your failure to attend your investigations on 31st May 2016 and 7th June 2016. Due to your actions is it clear you have seriously abused the trust and thereby the confidence the depot need in you as a colleague."

57. It is notable that the allegations of inappropriate behaviour towards Mr

Maunder and Mr Lowe do not feature in the reasons for dismissal.

58. Mr Agnew's decision was subject to two appeals. It was upheld at both appeal stages. The stage 1 appeal, determined by Mr Tilly, a General Manager at another depot concluded that [474]:

> "…it is my belief as was that of the disciplinary manager that you elected to choose not to take a delivery to a store that you were scheduled for, this was despite requests from numerous managers up to and including the general manager to do so. You had ample opportunity to postpone completion of the site inspection but elected not to do so. This is not only against the spirit of our national agreement but also our company policy in terms of failure to comply with a reasonable request. … if colleagues are permitted to refuse to act on management requests to do things within the business it undermines their ability to manage and run their sites effectively."

59. We accept that the outcome letter quoted above is a true reflection of Mr Tilly's reasons for dismissing the stage 1 appeal. Paragraph 28 of Mr Tilly's witness statement puts it in a consistent way. He states: "He was dismissed because he refused to co-operate with 4 different managers who had asked him to stand down from the inspection so it could be rearranged for a time more convenient for the business."

60. The stage 2 appeal, determined by Mr Dixon, Senior Director (Ethics & Compliance), included the following relevant conclusion [647]:

> "…it is my understanding that you elected to choose not to take a delivery to a store that you were scheduled for. This was despite requests from numerous (four) managers up to and including the General Manager Darren Coker. You had ample opportunity to postpone completion of the site inspection but elected not to do so. This is not only against the spirit of our national agreement but also against our company policy in terms of multiple failures to comply with a reasonable request. … your working relationship with the management team had become so untenable, this ultimately led to a serious lack of trust between employer and employee resulting in the breakdown of the working relationship. Furthermore, I agree that any refusal to act on management requests to carry out activities within the business will undermines their ability in managing to run any site effectively."

61. We accept that the outcome letter quoted above is a true reflection of Mr Dixon's reasons for dismissing the stage 2 appeal.

62. It is evident from these quotations from the outcome letters at each stage, and we find, that the principal reason for dismissal was the claimant's failure to comply with management requests to carry out driving duties rather than proceed with the workplace inspection. Whether those requests were reasonable ones is a matter we will come on to address later.

Submissions of the parties

63. Both parties provided us with detailed written submissions, for which we were

grateful. Mr Young and Mr Mortin also supplemented their written submissions orally. We have addressed the points raised in submissions as part of our discussion below so will not unduly lengthen these reasons by setting out the submissions here.

64. The claimant's written submissions included new evidence that we had not previously seen or heard, in particular concerning prior Tribunal hearings at which the non-attendance of Mr Agnew was discussed and a suggestion that Mr Coker's motivation for suspending the claimant was due to the cost of replacing fire extinguishers. It is not appropriate to raise entirely new matters which were not part of the evidence in closing submissions. We disregarded those points. Aside from those new points, we took account of the submissions when making our factual and legal findings.

Discussion: liability

65. We address the liability issues in turn.

Liability issue a.i.

66. The issue here is whether the claimant had carried out an inspection of the workplace within the 3 months prior to 30 March 2016.

67. We have found on the facts that:

    a. the last "regulation 5(1)" inspection had taken place in October 2015;

    b. the 5-6 January 2016 inspection of the depot lights did not amount to an inspection of the entire workplace and was not a Regulation 5(1) inspection; rather it was an investigation of potential hazards and of complaints, further to the functions of a health and safety representative set out in regulation 4(1)(a) and (b) of the 1977 Regulations; and

    c. the 15 March 2016 inspection of various parts of the workplace was, in essence, the claimant checking the status of issues that were either outstanding from previous health and safety audits or had been identified to him by members. It did not amount to an inspection of the entire workplace and was not a Regulation 5(1) inspection.

68. Accordingly, we find that the claimant had not carried out an inspection of the whole workplace within the 3 months prior to 30 March 2016, and therefore that this proviso in Regulation 5(1) was met.

Liability issue a.ii.

69. The issue here is whether the claimant had given his employer or its representative reasonable notice of his intention to inspect the workplace on or about 30 March 2016.

70. We have found on the facts that the 2016 planner had been agreed between senior GMB officials and senior site management of the respondent in January 2016. That planner included reference to a site inspection taking

place on 29 March 2016. Senior managers of the respondent, including Mr Spencer, were aware of this scheduling.

71. Does this amount to reasonable notice of the inspection? We accept that agreeing an annual plan in this manner is capable of amounting to reasonable notice – taking this approach is expressly endorsed in the HSE Guidance at Paragraph 51, which states that "Where possible, the employer and the health and safety representatives should plan a programme of formal inspections in advance, which will itself fulfil the conditions for providing notice." Accordingly, we find that reasonable notice had been given of a Regulation 5(1) inspection to take place on 29 March 2016.

72. A key point advanced by the respondent is that that 2016 planner provides only a single date (29 March 2016) for the site inspection, and therefore cannot be taken to have provided reasonable notice of a 3 or 4 day inspection, which is what the claimant intended to carry out. We reject that argument. Every site inspection in the 2016 planner was shown with a single date against it. However, it was common ground that the most recent full site inspection undertaken by the claimant in October 2015 had taken 4 days. As already stated, there was no evidence before us that suggested there was a view within the respondent that this length of inspection was problematic or out of the ordinary for this particular workplace, bearing in mind such inspections were conducted (if the 2016 planner is taken as representative) only 3 times per year. We find that, notwithstanding that the 2016 planner identifies only a single date for each of the site inspections, it would have been understood by the senior management of the respondent who approved the 2016 planner that the site inspections would have been multi-day events with a 3-4 day duration being well within contemplation. The proposed length of the inspection then crystallised when the claimant notified Mr Coker, and put entries in the transport diary, on 25 March 2016. However, we find that by that time, the reasonable notice had already been given by way of the agreement of the 2016 planner. It is not relevant that Mr Coker himself was unaware of the planned inspection – it had been agreed with (the then) senior on-site management of the respondent in January 2016. Moreover, there was nothing unreasonable about the claimant entering the dates in the transport diary only at this stage – as we have found already, there was no set amount of notice required for an entry in the diary, save that the diary would be closed from 8pm on the day before to facilitate rota planning. We had no evidence to indicate that the notice given made it impossible for the respondent to cover the driving schedule.

73. As it happened, the inspection did not begin on 29 March 2016 as had originally been planned, because of Mr Coker's directive that the claimant not work overtime on Tuesdays. However, the inspection would have been continuing on 30 March 2016 in any event, so we do not afford any significance to this point.

74. We therefore conclude that the claimant had given his employer or its representative reasonable notice of his intention to inspect the workplace on or about 30 March 2016.

Liability issue a.iii.

75. The answer to this issue follows from our determination of the first two sub-issues. We find that the claimant's proposal to conduct an inspection on 30 March 2016 was made by virtue of the 1977 Regulations.

Liability issue b.

76. This issue concerns the set of facts known to the respondent that caused them to dismiss the claimant. We have already addressed this as part of our factual findings and there is no need to repeat those findings.

Liability issue c.

77. This issue concerns whether the management instruction to the claimant to perform driving duties on 30 March 2016 was reasonable in light of the 1977 Regulations.

78. We find that the management instructions were not, for the following reasons. By virtue of Regulation 5(1) of the 1977 Regulations, as we have found, the claimant had the legal right to be undertaking a workplace inspection on 30 March 2016. Mr Coker's email of 25 March in which he insisted that an inspection needed to be "agreed by all and managed by Steve" and that it would therefore need to be postponed was unreasonable in that it had no regard to the provisions of the 1977 Regulations under which the claimant was operating. Whilst we can appreciate Mr Daldorph's reluctance to approve the claimant's diary entries pending further investigation of what was going on, he unreasonably failed to follow up on his discussion with the claimant. On 30 March 2016 itself, the claimant explained his legal right to undertake the inspection at that time to each of the managers who challenged him. The first manager, Mr Maunder, had even had it confirmed to him by the senior GMB official on site, Mr Richards, that the inspection had been planned since January 2016. All four of the managers unreasonably had no regard to the provisions of the 1977 Regulations under which the claimant was operating.

79. In short, reasonable notice having been given of the inspection (timing for which had, in fact, been agreed between the GMB and the respondent), the claimant should not have been scheduled to undertake driving duties on 30 March 2016, and it was unreasonable for him to be instructed to do so.

80. We have had due regard to the provisions of the National Recognition Agreement, which does give emphasis to the need for mutual working and co-operation. However, co-operation is a two-way street, and cannot entirely displace the legal framework to which the claimant was operating and to which the respondent's managers had no regard whatsoever.

Liability issue d.

81. This is the crux of the matter: was the reason (or principal reason) for the claimant's dismissal that he performed or proposed to perform a function as a safety representative by undertaking or seeking to undertake a workplace inspection on 30 March 2016?

82. We have found above that the principal reason for dismissal was the claimant's failure to comply with management requests to carry out driving duties rather than proceed with the workplace inspection. We have also found under liability issue c. that the management requests were unreasonable and, accordingly, the claimant was entitled to refuse those requests.

83. In the judgement of the Tribunal, this is a case that is closely analogous to *Sinclair*. The claimant was carrying out a protected activity, a workplace inspection pursuant to Regulation 5(1) of the 1977 Regulations. He was unreasonably requested by management on several occasions to cease carrying out the protected activity and instead carry out driving duties. He refused to do so, as he was entitled to do, and was suspended and ultimately dismissed as a consequence. Rather like in *Sinclair*, there was evidence of conduct that might have constituted the kind of behaviour that could entitle an employer to dismiss, specifically the claimant's behaviour towards Mr Maunder and Mr Lowe; however, as we have found, that particular behaviour did not in fact form part of the respondent's reasons for dismissal. We find that the reason for dismissal is not properly separable from the protected activity.

84. In a legal sense, then, the claimant was dismissed for the principal reason that he performed (or proposed to perform) functions as a health and safety representative. The claim under s.100(1)(b) therefore succeeds.

Discussion: remedy

85. As directed at the outset of the hearing, we addressed remedy issues c.i and c.ii alongside the liability issues.

Remedy issues c.i and c.ii: blameworthy conduct and contributory fault

86. The relevant legal provisions are sections 122(2) ERA (regarding the basic award) and 123(6) ERA (regarding the compensatory award), as set out above. The first relates to conduct of the claimant such that it would be just and equitable to reduce the basic award. The second relates to blameworthy conduct on the part of the claimant that contributed to his dismissal and is such that it would be just and equitable to reduce the compensatory award. The two sections overlap but are not the same.

87. We accept this is not a *Polkey* case (the 'ordinary' unfair dismissal case having been dismissed), but nevertheless, we do have to consider the extent to which the claimant contributed to his dismissal through his own conduct and actions.

88. We take account of the following particular examples of the claimant's conduct.

89. First, the claimant's inappropriate behaviour towards Mr Maunder and Mr Lowe. We have found as a fact (as did the original Tribunal) that this did occur. It is plainly blameworthy conduct. However, we have also found that it did not cause or contribute to the dismissal. Accordingly, it is a matter that can only be relevant to a reduction of the basic award. We do consider it just and equitable to reduce the basic award because of this conduct.

90. Second, the events of 23 March 2016, when the claimant failed to attend at least part of the scheduled health and safety meeting. We made factual findings that this was primarily due to the claimant's own conduct and is therefore blameworthy. We also accept that not attending the meeting did contribute to the dismissal, in the sense that had the claimant attended, it is very likely that the issue of the upcoming inspection would at least have been noted. We do consider it just and equitable to reduce the basic and compensatory awards because of this conduct, albeit this is of less weight than the other two examples.

91. Third, the claimant's reaction to being instructed not to proceed with his inspection, both prior to and on 30 March 2016. We have found that the requests were unreasonable. However, we do consider that the claimant's conduct in this respect was blameworthy. A reasonable reaction to Mr Coker's email of 25 March 2016 would have been to respond to explain the background, that the inspection had been planned since January 2016 as agreed with (the then) senior management and seek to work out a resolution consistent with the legislation and guidance, potentially by escalating with more senior GMB officials. The claimant was entitled to stand his ground, but simply ignoring Mr Coker's email (save for shifting the start date back 1 day) and proceeding regardless was blameworthy conduct that contributed to the problems that subsequently developed. Equally, on 30 March 2016, whilst the claimant was entitled to stand his ground about proceeding with the inspection, his manner in dealing with management on that day was blameworthy and did, we find, contribute materially to the dismissal. We do therefore consider that this conduct justifies a reduction of the basic award and did contribute to the dismissal in a manner that justifies a reduction of the compensatory award.

92. Drawing the strands together and taking an overall view, in the Tribunal's judgement, it is just and equitable to reduce the basic award by 50% on the basis of conduct prior to dismissal, and the compensatory award by one-third (33.3%) on the basis of contributory fault.

Other remedy issues

93. Having delivered oral reasons for the decisions on the issues set out above, the parties were able to largely agree the remedy issues. The respondent did not raise any argument on failure to mitigate (the claimant having obtained alternative employment on 5 December 2016, very soon after his dismissal on 21 November 2016, albeit at an initially lower rate of pay), the period for compensation was agreed (up to but not beyond 18 March 2018), as was the sum due for loss of statutory rights (£400).

94. The Tribunal was called upon to resolve three disputes.

    a. First, the claimant sought compensation for losses incurred from his date of suspension up to the date of dismissal. The respondent resisted this on two bases: (1) that compensation prior to dismissal is not available under section 123(1) ERA, and (2) that, in any event, the original claim included detriment claims that if successful would have compensated for those losses, but those claims were

dismissed. In the Tribunal's judgement, compensation for losses incurred from his date of suspension up to the date of dismissal is not available to the claimant. Fundamentally, s.123(1) ERA provides that the compensatory award must have regard to the "loss sustained by the complainant in consequence of the dismissal". Losses sustained prior to the dismissal cannot be said to be in consequence of the dismissal. We also consider that the respondent's second point, which is that these losses formed part of the original detriment claim that was dismissed, was also correct.

b. Second, the claimant argued that there should be an uplift to his compensation for breaches of the ACAS Code. The respondent resisted this on two bases: (1) that the original Tribunal already found that there were no breaches of the ACAS Code and that finding was not disturbed by the EAT, and (2) in any event, there were no findings in this Tribunal's judgment that were suggestive of breaches, let alone unreasonable breaches, of the ACAS Code. In the judgement of the Tribunal, both of the respondent's points were correct. The original Tribunal (which more closely examined the disciplinary process leading to dismissal for the purposes of the 'ordinary' unfair dismissal claim) did not find any breaches of the ACAS Code. Moreover, we found no breaches of the ACAS Code either. The claimant's criticism of the process was that it was a biased one, essentially because no one involved had proper regard to the 1977 Regulations. Lack of regard to the 1977 Regulations was a failing on the part of the respondent which has led to the claimant succeeding in his claim. However, that does not indicate bias, nor was it a failure of process which would justify an ACAS uplift.

c. Third, the claimant asserted that his gross salary at time of dismissal was £45,000 per year, but the respondent used an average based on the claimant's payslips to calculate the correct figure was £42,221.73 per year. The claimant was unable at the hearing to explain or evidence where the £45,000 figure came from, save that it was the figure used by the claimant's former solicitors as the basis for the schedule of loss. However, when the Tribunal drew Mr Young's attention to box 6.2 on the original ET1 which indicated a monthly gross pay of £3,500 (*i.e.*, £42,000 per year), he and the claimant conceded that it would be appropriate to adopt the respondent's figures.

95. The Tribunal having resolved those disputes, applying our findings the parties were agreed as to the appropriate figures as follows:

a. Basic award: the statutory minimum of £5,853.00 applied, subject to a 50% reduction under s.122(2) ERA, the final figure being £2,926.50 net.

b. Compensatory award: the sum of £4,090.80 (comprised of £2,540.60 in lost income, £1,150.20 in pension losses and £400.00 for loss of statutory rights), subject to a 33.3% reduction under s.123(6) ERA, the final figure being £2,727.20 net.

c. The total compensation therefore being the sum of the above figures: £5,656.70 net.

Conclusion

96. For the reasons set out above, the Tribunal found that the claimant was unfairly dismissed for a reason falling within the scope of section 100(1)(b) ERA, and shall be compensated by the respondent in the total sum of £5,656.70 net.

Employment Judge Abbott
Date: 27 March 2024

REASONS SENT TO THE PARTIES ON
12 April 2024
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FOR THE TRIBUNAL OFFICE