Appeal No. UKEAT/0129/20/OO (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 December 2020

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)
(SITTING ALONE)

MR C SINCLAIR — APPELLANT

TRACKWORK LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MS LOUISE MANKAU (of Counsel) Instructed by: RMT Legal Department By e-mail only: r.williams@rmt.org.uk
For the Respondent	MR SIMON LEE (Director) Trackwork Ltd 139 Sandall Lane Kirk Sandall Doncaster South Yorkshire DN3 1WZ

SUMMARY

Unfair Dismissal and Health Safety

The Claimant was employed as a Track Maintenance Supervisor. He was tasked to implement a new safety procedure. However, the Respondent had not told the Claimant's colleagues about the task and they raised concerns about what the Claimant was trying to do. The Respondent dismissed the Claimant for the "upset" and "friction" that his activities had caused. The Claimant claimed that his dismissal was automatically unfair under s.100(1)(a) of the **Employment Rights Act 1996** as the reason or principal reason for his dismissal was that, having been designated to carry out health and safety activities, he carried out such activities. The Employment Tribunal dismissed the claim, finding that although the Claimant had only been doing what he was instructed to do, the reason for dismissal was the fact that a loyal workforce had become demoralised by the way in which the Claimant's health and safety activities were being managed.

Held, allowing the appeal, that in circumstances where the Claimant's health and safety related activities did not exceed his mandate and were not found to be malicious, untruthful or irrelevant to the task in hand, the manner in which those activities were carried out was not properly separable from the carrying out of those activities itself. The Tribunal had erred in finding otherwise. The mischief which s.100(1)(a) seeks to guard against includes the fact that carrying out such activities will often be resisted, or regarded as unwelcome, by other colleagues. It would wholly undermine that protection if an employer could rely upon the upset caused by legitimate health and safety activity as being a reason for dismissal that was unrelated to the activity itself. A finding that the dismissal was for an automatically unfair reason would be substituted and the matter remitted to the Tribunal to consider remedy.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. I shall refer to the parties as the Claimant and the Respondent, as they were below. The Claimant appeals against the Judgment of Employment Judge Brain, sitting in the Sheffield Employment Tribunal ("the Tribunal"), dismissing his claim for automatic unfair dismissal. The Tribunal concluded that the principal reason for his dismissal was not the fact that he had carried out duties relating to health and safety at work. The Claimant contends that that conclusion amounts to an error of law and/or was perverse.

Background

2. The Claimant began his employment with the Respondent on 8 October 2018 as a Track Maintenance Supervisor. One of his duties in that capacity was to implement the Trackwork Safe System of Work procedure. That procedure was based on a system operated by Network Rail, which is referred to here as "NR019". The Tribunal found that the Respondent did not inform any of the other employees that the Claimant would be supervising or that the Claimant had a mandate to implement NR019.

3. The Claimant proceeded to implement the new system with, in the Tribunal's words, "all due diligence". The Respondent's Maintenance Manager, Mr Airey, gave evidence that he wished to see a "slow change", but the Tribunal found that this desire was never communicated to the Claimant. The new system represented a change from what the Respondent's employees had been accustomed to, and the Tribunal found that the Claimant's attempts to do what he was instructed to do created "friction". The Respondent's existing workforce became unhappy with what the Claimant was trying to do and they raised their concerns with management. The Tribunal summarised the position that the Claimant found himself in as follows:

> **"41. The Tribunal has a great deal of sympathy for the claimant. The claimant found himself the victim of poor management upon the part of the respondent. The claimant was given a brief to implement NR019. He set about doing that with all due diligence. Indeed, that he did so gave rise to one of the concerns related to Mr Airey about the claimant being "over concerned" regarding safe systems of work. Unbeknown it seems to the claimant the employees whom he was managing had not received the same brief. As far as the employees were concerned it was business as usual and therefore inevitably friction was created because the claimant was trying to implement a different system of work. Mr Airey's message evidenced in paragraph 10 of his witness statement (that he wished to see a slow change in the way in which the respondent operated) was not at any stage conveyed to the claimant. The employees whom the claimant was supervising therefore perceived the claimant as being overcautious and somewhat zealous in his approach."**

4. The Respondent decided to dismiss the Claimant on 11 December 2018 because of the upset and friction caused by the Claimant's attempts to implement NR019. The Claimant lodged proceedings with the Tribunal claiming that his dismissal was automatically unfair, in that the reason or, if there was more than one reason, the principal reason for his dismissal, was because:

(1) he was designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work and was dismissed for carrying out, or proposing to carry out, such activities; or

(2) he had made a protected disclosure to his employer.

5. The matter was heard by the Tribunal on 14 November 2019, and written reasons for its decision were given on 3 December 2019. The Tribunal concluded as follows:

> **"47. It was no part of the claimant's case that the respondent simply decided to dismiss him because the claimant was carrying out health and safety activities. The claimant's case is presented upon a somewhat more nuanced basis. This is that the respondent's employees were complaining to the respondent's management about the claimant's health and safety activities and that that is what prompted the respondent to dismiss the claimant. Mrs Mankau said that the relevant provision of the 1996 Act should be given a wide construction given that the mischief against which it is aimed is to prevent employers from thwarting employees carrying out activities protective of health and safety. Therefore, management being influenced by the fact that employees were unhappy about having a health and safety regime imposed upon them fell foursquare within the ambit of section 100(1)(a). An employer that dismisses an employee because the employee was the subject of embellished or exaggerated accounts of misconduct from fellow workers while carrying out health and**

safety duties effectively dismisses the employee for that very reason. In principle her submissions, in the Tribunal's judgment, have some force.

48. However, the Tribunal has to view matters in the context of the respondent operating in a health and safety critical environment. This is a respondent with an impeccable health and safety record. It has to adhere to exacting health and safety standards in order to operate. It has won awards (such as the Taylor Woodrow Subcontractor of the Year Award for 2018). The case also has to be seen in the context of Mr Airey specifically recruiting the claimant to take over from Mr Webb and Mr Airey encouraging the claimant to implement NR019. Further, when the claimant complained that he was meeting resistance from Mr Clarke, Mr Airey was supportive of the claimant.

49. Given that context, the Tribunal has to weigh in the balance the reason for the respondent's decision to dismiss the claimant. Was it because, as the claimant would have it, he was carrying out health and safety activities. Or alternatively was it because, as the respondent would have it, the claimant was not integrating within the workforce. By this, the respondent plainly meant that the claimant was creating friction with his (justifiable) approach to matters.

50. True it is but for the fact that the claimant had been recruited into the supervisor role and that he was carrying it out he would not have been dismissed. However, a "but for" analysis is not apt. The question for the Tribunal is what was the reason of a principal reason for the claimant's dismissal. Why did the employer act as it did?

51. In my judgment, it is against the probabilities that this particular employer would dismiss the claimant simply because he was carrying out his health and safety duties for the reasons given in paragraph 48 even if this did generate complaints from the other employees. In my judgment, the respondent decided to dismiss the claimant because of the upset that the respondent's approach to NR019 (through the agency of the claimant) was causing to the respondent's workforce. The respondent has mismanaged matters such that the claimant was diligently carrying out his duties which was subjectively seen by those whom he was managing as overzealous. Relations had soured and it was for this reason that the respondent decided to dismiss the claimant.

52. The respondent is asserting personality clash and upset on the part of its loyal workforce caused by its own mismanagement of the situation as the principal reason for dismissal. It was not the carrying out of health and safety duties that caused the respondent to dismiss the claimant but rather that a loyal workforce was becoming demoralised by the manner in which health and safety was being managed. The employees did not complain about being subject to health and safety management as such but rather by the way in which the respondent was going about matters. It was the claimant's methodology which generated the complaints and not that he was acting in his capacity as a supervisor to implement a health and safety regime in and of itself.

53. The Tribunal makes this finding with a heavy heart. It is tough on the claimant who was only doing what he had been set on to do by the respondent. ..."

6. The Tribunal also rejected, for the same reasons as above, the claim that the Claimant had been dismissed for having made protected disclosures.

The Legal Framework

7. Section 100(1) of the **Employment Rights Act 1996** ("the **1996 Act**") so far as relevant 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—**
>
> **(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,**
> **…**
> **(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."**

8. I was referred to the case of **Oudahar v Esporter Group Ltd** [2011] IRLR 730 in which the Employment Appeal Tribunal ("EAT"), HHJ Richardson presiding, considered s.100(1)(e) of the **1996 Act**. There it was held that the Tribunal should apply that sub-section in two stages:

> **"25. Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if the additional words inserted by virtue of Balfour Kilpatrick are relevant) did he take appropriate steps to communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.**
>
> **26. Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair."**

9. A similar approach can, in my judgment, be taken in relation to a s.100(1)(a): thus, the first stage is to determine whether the designated employee was asked to carry out activities in connection with preventing risks to health and safety and that he carried out, or proposed to carry out, such activities. If the Tribunal determines that the conditions of the first stage are

satisfied, then the second stage is to consider if the sole reason or, if more than one, the principal reason for dismissal, was that the employee carried out such activities, or proposed to carry out such activities.

10. The test under s.100(1), which is whether the reason or, if more than one, the principal reason for dismissal is the prohibited reason, is similar to that which applies under other parts of the **1996 Act**. My attention was drawn to the case of **Panayiotou v Chief Constable of Hampshire Police and Anor** [2014] IRLR 500 in which the EAT, Lewis J presiding, considered the whistleblowing provisions of s.103A of the 1996 Act. The test there is whether the reason (or, if more than one, the principal reason) for dismissal is that the employee made a protected disclosure. At paragraph 52, Lewis J held as follows, having reviewed the authorities:

> **"52. Those authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did."**

The judgment then continues at paragraph 54;

> **"54. The Employment Appeal Tribunal in Woodhouse suggested that, in such cases, it would only be exceptionally that the detriment or dismissal would not be found to be done by reason of the protected act. In my judgment, there is no additional requirement that the case be exceptional. In the context of protected disclosures, the question is whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, in fact, the reasons why the employer acted as he did. In considering that question a tribunal will bear in mind the importance of ensuring that the factors relied upon are genuinely separable and the observations in paragraph of 22 of the decision in Martin v Devonshire Solicitors [2007] ICR 352 that:**
> **"Of course such a line of argument is capable of abuse. Employees who bring complaints often do in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purposes to object to "ordinary" unreasonable behaviour as that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the**

distinction may be illegitimately made in some cases does not mean that it is wrong in principle.""

11. Whether the manner in which an activity is carried out for the purposes of s100(1)(a) of the **1996 Act**, can take one out of the protection afforded by that provision was considered by the EAT in the case of **Goodwin v Cabletel** [1998] ICR 112. In that case, in which HHJ Peter Clark considered the predecessor provisions contained in s.57A of the **Employment Protection Consolidation Act 1978** ("the **1978 Act**"), Mr Goodwin, to whom the task of ensuring compliance with health and safety requirements by sub-contractors was entrusted, took a hard line against a particular sub-contractor, whereas his employer favoured a more conciliatory approach. The employer removed the responsibility from Mr Goodwin and he resigned, claiming constructive dismissal. The Industrial Tribunal dismissed his claim for unfair dismissal finding that s.57A of the **1978 Act** did not apply to the way in which the employee carried out the protected activities. At 116F to 118A of the Judgment, HHJ Peter Clark said as follows:

"There is, as yet, little authority on the proper construction of s.57A, now s.100(1)(a) of the 1996 Act. Mr Sheldon has referred us to our judgment in Smith Industries v Rawlings [1996] IRLR 656, but we do not find that case helpful in deciding the instant appeal. However, we think that some assistance may be derived from the approach of the Court of Appeal in Bass Taverns Ltd v Burgess [1995] IRLR 596, a case concerned with the protection afforded by s.152 of the Trade Union and Labour Relations (Consolidation) Act 1992 where an employee is dismissed for taking part in trade union activities. Such a dismissal is, like a s.57A dismissal, automatically unfair.

The facts in that case were that Mr Burgess was a manager of licensed premises owned by Bass. He was also a "trainer manager", which involved giving presentations to trainee managers and practical training. Further, he was a trade union shop steward. At a presentation to trainee managers he went, by his own admission, "over the top". He said, in particular, that in matters of health and safety it was the union, not the company, which would fight for them, the company being primarily concerned with profits. Bass took exception to his remarks. It demoted him from the position of trainer in circumstances amounting to a constructive dismissal. He complained that his dismissal was automatically unfair under s.152. The Industrial Tribunal dismissed his complaint, finding that the reason for his dismissal was his conduct in abusing the privilege granted to him by the employers to use the meeting as a union recruitment forum. The appeal tribunal allowed his appeal, holding that his dismissal was on grounds of trade union activities. An appeal by Bass to the Court of Appeal failed. It was held that it was not a permissible option for the industrial tribunal to find that dismissal was other than for trade union

> **activities. The implied limitation on those activities contended for by the employer was unsustainable. However, Pill LJ said at paragraph 14:**
>
> **"I would add that in dealing with the facts of this case, I am very far from saying that the contents of a speech made at a trade union recruiting meeting, however malicious, untruthful or irrelevant to the task in hand they may be, come within the term 'trade union activities' in s.58 of the Act."**
> **Earlier in the course of his judgment, Pill LJ cited a passage from the judgment of Phillips J in Lyon v St James Press Ltd [1976] IRLR 215, where he said at paragraph 16:**
> **"The special protection afforded by para. 6(4)' of the 1975 Act**
> **'... to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of the trade union must not be obstructed by too easily finding acts done for the purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate.'**
> **Phillips J added at paragraph 20 in relation to acts claimed to come within the protection:**
> **'We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair.'"**
>
> **In our judgment a similar approach is appropriate when considering the health and safety activities protected by the former s.57A. The protection afforded to the way in which a designated employee carries out his health and safety activities must not be diluted by too easily findings acts done for that purpose to be a justification for dismissal; on the other hand not every act, however malicious or irrelevant to the task in hand, must necessarily be treated as a protected act in circumstances where dismissal would be justified on legitimate grounds."**

12. On the facts of **Goodwin**, the EAT held that, given the Industrial Tribunal's finding that Mr Goodwin had acted with integrity, it would have been a surprising finding if the Tribunal had concluded that his actions took him outside the scope of the protection afforded by s57A.

13. In my judgment, it is clear from that analysis that:

a. the scope of the protection afforded by s100(1) of the **1996 Act** 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.

14. Construing the scope of the protection broadly in this manner is consistent with the fact that these provisions were enacted to implement Directive 89/391/EEC on the introduction of measures to encourage improvements to health and safety of workers at work.

Grounds of Appeal and Submissions

15. There is a single ground of appeal, which is that the Tribunal erred in law in concluding that the reason, or principal reason, for the Claimant's dismissal was not that he carried out or proposed to carry out activities as a designated person under the meaning of s.100(1)(a) of the **1996 Act**. In particular, it is said that the Tribunal's conclusion was perverse, given the findings of fact at paragraphs 38, 41, 43 and 51 of the Judgment. These clearly show, submits Ms Mankau, on behalf of the Claimant, that there remained a clear and unbroken causal link between the Claimant's carrying out of health and safety activities and his dismissal.

16. Ms Mankau submits that the upsetting and souring of relationships between the Claimant and the Respondent's employees cannot be relied upon as taking the Claimant's activities outside the scope of the protection afforded by s 100(1)(a). To do so would, in her submissions, be contrary to the approach approved by the EAT in **Goodwin** and would amount to a dilution of the statutory protection. She further submits that the reasons relied upon by the Respondent in dismissing the Claimant (namely the fact that the Claimant's approach to health and safety issues had caused relationships to sour) is not something that is separable from the fact of the Claimant's carrying out of health and safety activities (see **Panayiotou**).

17. Mr Lee, who is the Director of the Respondent, represents the Respondent in this Appeal, as he did below. He emphasises the strong health and safety track record of the Respondent and submits that the Tribunal was correct to find that the health and safety activities were not the reason for the Claimant's dismissal. He highlights the various issues raised by staff, which are set out at paragraph 33 of the Tribunal's Judgment, where the Tribunal says as follows:

> **"33. In paragraph 7 of his witness statement Mr Airey lists a number of matters that were raised with him by members of his team about the claimant. These are as follows: "**
> **• The claimant's male bravado relating to gambling and pornography.**
> **• The claimant's attitude and behaviour on site which came across as aggressive.**
> **• The claimant's over enthusiasm to show a video of him beating up a man who was breaking into his house and detailed information relating to this.**
> **• Further discussions relating to the claimant's subsequent appearance on the television programme This Morning and a photograph he claimed was taken up the female presenter's skirt.**
> **• The claimant openly showing pictures of a female who he claimed to be his wife in pornographic situations and discussed wife swapping.**
> **• The claimant's "do as I say or else" attitude.**
> **• The claimant's over concern regarding safe systems of work and his lack of track knowledge. • A general unwillingness to listen and learn and a "know it all" attitude.**
> **• A rude disrespectful attitude to our trainers, they felt he was a risk to the business.**
> **• An argument and subsequent physical confrontation between the claimant, Phil Clarke and Mark Binney on site. This was a minor incident in the claimant's opinion and something far more serious in the opinion of Phil Clarke and Mark Binney"**

18. Mr Lee submits that those were the reasons for the Claimant's dismissal and that any friction between the Claimant and his co-workers was caused by that behaviour of the Claimant and it was this that led to his dismissal, not his health and safety activities.

Discussion

19. The conduct and attitude matters highlighted by Mr Lee might have constituted the kind of behaviour that could entitle an employer properly to treat those as the reason for dismissal

rather than the health and safety activities themselves. The difficulty for the Respondent is that the Tribunal systematically addressed most of the alleged behaviours and concluded that the allegations were either exaggerated, embellished or absurd. A further, more fundamental, difficulty for the Respondent is that none of these reasons was found to constitute the reason, or part of the reason, for dismissal. As the Tribunal noted, the letter of dismissal in this case, sent by Mr Purshouse, "expressly disavowed the incident of 21 November 2018 as being the reason for the dismissal". That incident is the one referred to in the final bullet point in paragraph 17 above.

20. The Tribunal's findings as to the reason for dismissal are expressly set out in paragraphs 51 and 52. There was a correct self-direction in law, in that the question for the Tribunal was identified as being what was the reason, or the principal reason, for the Claimant's dismissal; in other words, why did the employer act as it did? The Tribunal begins paragraph 51 by saying this:

> **"51. In my judgment, it is against the probabilities that this particular employer would dismiss the claimant simply because he was carrying out his health and safety duties for the reasons given in paragraph 48 even if this did generate complaints from the other employees."**

21. I pause there to note that, as the Tribunal expressly stated at paragraph 47 of its Judgment, it was no part of the Claimant's case that the Respondent decided to dismiss him simply because he was carrying out health and safety activities. The Tribunal continues:

> **"51. ... In my judgment, the respondent decided to dismiss the claimant because of the upset that the respondent's approach to NR019 (through the agency of the claimant) was causing to the respondent's workforce. The respondent has mismanaged matters such that the claimant was diligently carrying out his duties which was subjectively seen by those whom he was managing as overzealous. Relations had soured and it was for this reason that the respondent decided to dismiss the claimant.**
>
> **52. The respondent is asserting personality clash and upset on the part of its loyal workforce caused by its own mismanagement of the situation as the principal reason for dismissal. It was not the carrying out of health and safety duties that caused the respondent to dismiss the claimant but rather that a loyal**

> **workforce was becoming demoralised by the manner in which health and safety was being managed. The employees did not complain about being subject to health and safety management as such but rather by the way in which the respondent was going about matters. It was the claimant's methodology which generated the complaints and not that he was acting in his capacity as a supervisor to implement a health and safety regime in and of itself."**

22. In my judgment, that reasoning on the part of the Tribunal discloses a number of errors of law:

a. First, as a matter of causation, matters identified by the Tribunal as being reasons for the dismissal are the direct result of the carrying out by the Claimant of health and safety activities as a designated employee. It was the Claimant "diligently carrying out his duties" that had caused relations to sour; those relations had not soured for some other reason which might have intervened in the chain of causation between carrying out the health and safety activities and his dismissal;

b. Second, the souring of relations, or the over-zealous manner in which the Claimant carried out his duties, are not matters which can be said to be properly separable from the carrying-out of those activities on the facts of this case; the Claimant, as the Tribunal found, was merely doing what he was instructed to do. The Tribunal did not find that the Claimant had exceeded the terms of his mandate in implementing NR019. Rather, it was the Claimant's colleagues' perception of those activities as being over-zealous that caused the friction or the souring of relationships. However, the mischief which the protection afforded to employees by s100(1)(a) seeks to guard against includes the fact that carrying out such activities will often be resisted, or regarded as unwelcome, by other colleagues. It would wholly undermine that protection if an employer could rely upon the upset caused by legitimate health and safety activity as being a reason for dismissal that was unrelated to the activity itself. In my judgment, on the facts of this case, there was no proper distinction to be drawn between the co-workers' reaction to

the protected activity and the protected activity itself. The former is a direct consequence of the latter, and, more significantly, a predictable and likely consequence when a new safety system is sought to be introduced to an established workplace. The Tribunal makes it clear that it was the "manner" in which the health and safety was being managed, and the Claimant's "methodology" that formed the basis of the complaints against him. Such matters were not, on the facts found, properly separable from the activity in question;

c. Third, applying the approach applied in **Goodwin**, this is not a case in which it can be said that the Claimant carried out his activities as a designated employee in a malicious or extraneous way that was irrelevant to the task in hand so as to deprive him of the protection afforded by s.100(1)(a) of the **1996 Act**. Far from making any such finding about the Claimant's behaviour, the Tribunal expressly found that he was only doing what he had been asked to do. The various allegations by colleagues as to his behaviour were either rejected by the Tribunal or were not found to form any part of the reason for his dismissal;

d. Although the Tribunal's findings as to the reason for dismissal are ones of fact, and therefore not readily disturbed by the appeal tribunal, this is one of those cases in which the Tribunal can be said to have erred in law in reaching its conclusions as it relied upon a matter (namely the upset caused to the workforce) that was not properly separable from the carrying-out of the activity itself, and the conclusion that the dismissal was other than for the carrying out of health and safety activities was not a permissible option.

23. Mr Lee was at pains to point out that the Respondent had a good safety record and would not have dismissed the Claimant for anything to do with health and safety. However, the

mere fact of having a good track record in health and safety does not necessarily insulate an employer against a finding that a dismissal in a particular case was for reason connected to health and safety, although it could, in an appropriate case make such a conclusion less likely. Further and in any event, Mr Lee's submissions as to the real reason for dismissal, are not supported by the Tribunal's findings.

24. For these reasons, the Claimant's appeal is allowed.

Disposal

25. Ms Mankau submits that this is a case where all the necessary findings of fact are present for the EAT to be able to substitute a finding that the reason for dismissal was one that falls within s100(1)(a) of the **1996 Act**. I agree. The Tribunal expressly found at paragraph 45:

> **"45. It is not in dispute that the claimant was designated by the respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. Indeed, that was very much part of the claimant's remit. It is also not in dispute that the claimant was carrying out or proposing to carry out such activities upon 26 October 2018, 2 November 2018 and upon many occasions after 2 November 2018 until the date of his dismissal. The question for the Tribunal therefore is whether the claimant was dismissed or, if there was more than one reason for his dismissal, the principal reason for dismissal was because he was carrying out health and safety activities."**

On the basis of those findings, the first part of the analysis, as indicated by the decision in **Oudahar**, was made out and the Claimant did fall within s.100(1)(a) of the **1996 Act**.

26. As to the second part of the analysis and the reason for dismissal, the Tribunal found that was that it was the upset and friction caused by the Claimant's carrying-out of the health and safety activities that led to the dismissal. That upset and friction is not, as I have said, properly separable from the carrying out of the activity itself on the facts of this case; the

Claimant did not exceed his mandate and it was not found that he had acted unreasonably or maliciously in doing what he was instructed to do. Those activities, therefore, remain the cause of the dismissal. In these circumstances, I substitute a finding that the reason for dismissal was the carrying out of activities under s,100(1)(a) of the **1996 Act**.

27. The matter will be remitted to the Tribunal to consider remedy.

28. That concludes my judgment in this matter. It just remains for me to thank Ms Mankau and Mr Lee for their helpful submissions this morning.