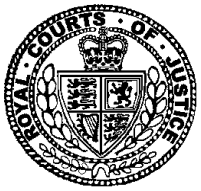

Neutral Citation Number: [2016] EWCA Civ 832
Case No: A2/2014/2899

IN THE COURT OF APPEAL (QUEEN'S BENCH DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 26 April 2016

Before:

LORD JUSTICE LAWS

LORD JUSTICE LONGMORE

LORD JUSTICE RICHARDS

Between:

DAHOU

Appellant

and

SERCO LTD

Respondent

DAR Transcript of
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Official Shorthand Writers to the Court

Miss L Chudleigh (instructed by Thompsons Solicitors) appeared on behalf of the **Appellant**

Mr Mark Sutton (instructed by Carter Leydon Millard) appeared on behalf of the **Respondent**

Judgment

(As Approved by the Court)

LORD JUSTICE LAWS:

1. This is an appeal with permission granted by Lewison LJ on 17 December 2014 against the decision of the Employment Appeal Tribunal ("the EAT")(Simler J) handed down on 14 August 2014. The EAT allowed the appeal of the employer, the respondent in this court, against the judgment of the Employment Tribunal sent to the parties on 30 August 2013.

2. The Employment Tribunal upheld two allegations advanced by the employee, the appellant in this court: (1) detriment for a reason relating to Trade Union membership activities or services contrary to section 146(1) of the Trade Union & Labour Relations (Consolidation) Act 1992; and (2) automatically unfair dismissal on the footing that the principal reason for the dismissal was the appellant's Trade Union activities: section 152 of the 1992 Act.

3. The appellant was employed by the respondent as a mechanical technician on 4 May 2010 at the London Cycle Hire Scheme ("LCHS"): the Boris bikes. He was promoted on 26 September 2010 to the post of team leader. He was also the local representative of The National Union of Rail, Maritime and Transport Workers ("the RMT") for the 75 or so RMT members in the workforce. The respondent did not recognise the RMT at the LCHS; they were only prepared to recognise another union called Community. They entered into a voluntary recognition agreement with Community on 30 March 2012.

4. On 6 July 2012 the appellant was suspended from work on account of alleged concerns about his behaviour. A misconduct investigation followed. He was

dismissed on 19 December 2012 for what the respondent said was gross misconduct. As the EAT stated at paragraph 1 of Simler's J judgment, the appellant "said that this was an excuse or pretext and the real reason for his dismissal was his membership or participation in Trade Union activities. He relied on a series of alleged detriments, done for the same improper purpose, culminating in his suspension and a misconduct investigation leading to his dismissal". Simler J continued:

> "By its judgment, the Employment Tribunal upheld Mr Dahou's claim that he had been subjected to detrimental treatment relating to his suspension and misconduct investigation, and automatically unfairly dismissed, on grounds relating to his participation in trade union activities. It rejected other claims of detriment and there is no cross appeal in relation to these conclusions. The Tribunal made no findings in relation to ordinary unfair dismissal."

5. The context in which the relevant events took place was the threat of a strike by the RMT at the LCHS during the Olympic Games in London between July and September 2012. On 5 July 2012 the RMT issued ballot papers for a strike to employees at LCHS' premises at Penton St in Islington. It is convenient before going further into the facts to set out the material statutory provisions. Section 146 of the Trade Union & Labour Relations (Consolidation) Act 1992 has this:

> "A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
> …
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so …
>
> (2) In subsection (1) "an appropriate time" means —
>
> (a) a time outside the worker's working hours, or
>
> (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his

> employer, it is permissible for him to take part in the activities of a trade union …
> and for this purpose "working hours", in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services)], he is required to be at work."

6. Section 148(1) of the 1992 Act:

> "(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.
>
> …
>
> 152 (1)
>
> For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee –
>
> . . .
>
> (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time . . ."

Subsection (2) then replicates the definition of "appropriate time" to be found in section 146.

7. I turn to the facts. There was a great deal of evidence in the case. What follows is essentially a bare outline. Some other factual matters will surface when I come to confront the conclusions of the tribunals.

8. On 30 May 2012 at a meeting with Mr Caffrey, the appellant's manager, and Mr Whitefoot, a director of the respondent company, Mr Caffrey challenged the appellant about holding RMT meetings in company time. The appellant in effect responded

that Union members should be allowed to discuss such issues at any time "without persecution". After this, Mr Caffrey invited the appellant to another meeting on 8 June 2012. Mr Whitefoot made it clear that he should not talk to MT members in the workplace during working hours. Mr Whitefoot indicated that otherwise the appellant would be "heading for disciplinary proceedings and possibly dismissed" (see paragraph 75 of the Employment Tribunal's findings). There is no finding by the Employment Tribunal that the appellant was taking part in Trade Union activities at an appropriate time (see EAT, paragraph 75) or that he was admonished by the respondent for doing so.

9. At a meeting on 27 June 2012 between the appellant and Ms Butler, the respondent's industrial and employee relations manager, the appellant mentioned his criminal record, including a weapons charge. Ms Butler said "fucking hell" and then apologised for swearing.

10. On 4 July 2013 the appellant returned to work at Penton St after a period of absence occasioned by work-related stress, but he could not get in: his key fob had been deactivated. He was angry and shouted at Mr Caffrey. Under his breath Mr Caffrey called him a "fucking idiot".

11. The next day, 5 July 2012, the day of the RMT strike ballot, the appellant was absent from work in the afternoon. On 6 July 2012 Mr Caffrey wrote to the appellant. The letter recorded that on 20 June and 29 June, while he was certified off sick, the appellant had in fact been found in the workplace conducting Trade Union activities. The letter referred to the earlier meeting of 8 June 2012. It included this:

> "At the meeting you were given a clear instruction that you should immediately cease the carrying out of trade union

> activities on behalf of an unrecognised union during work time and on company premises. You were also informed that any failure to follow this instruction may result in disciplinary proceedings being instigated against you."

12. The same afternoon, 6 July 2012, Mr Caffrey and Ms Butler approached the appellant in the workplace to discuss his absence from work the previous afternoon as well as other matters. There was such concern as to his possible reaction that it seems two police officers were brought in on standby (paragraph 105 of the Employment Tribunal).

13. The appellant was suspended on 6 July 2012. As I have said, a letter explaining why was sent on 9 July 2012; it came from Mr Caffrey. It said this:

> "At approximately 2:30pm on Friday, 6 July 2012, you were approached by myself and Carol Butler, HR business partner, and asked questions about a claim for payment you had submitted earlier that day for Bank Holidays worked in April / May 2012, an application for unpaid leave for 13 July 2012, your failure to provide job cards for the previous few days and your absence from work for a period of two-and-a-half hours the previous day. These were perfectly reasonable questions, to which you responded in a totally irrational manner. You began shouting and you called me a 'fucking liar' in front of and within earshot of your colleagues and other members of staff. Your behaviour was perceived as aggressive, intimidating and totally unwarranted. You appeared to be sweating profusely and you were shaking. As a consequence of your apparent volatile behaviour and our genuine concern for your safety and welfare (especially given you have only recently returned from a period of absence for work related stress) and the safety and welfare of your co-workers I have taken the decision to suspend you with immediate effect. The period of suspension will be on full pay and is not punitive in nature. We would ask that you do not attempt to enter any circa of premises during this time. We will write to you in due and in any event before close of business on Friday 13 July 2012 to advise you on the next course of action."

14. In fact, the appellant had covertly recorded the exchanges on 6 July. The Employment Tribunal found (paragraph 92) that the meeting included this:

> "Claimant – 'You swore at me the other day and you was in the wrong.'
>
> Mr Caffrey – 'No I didn't.'
>
> Claimant – "Oh no you didn't, don't talk to me"
>
> Mr Caffrey –'Zak!'
>
> Claimant – 'Don't talk to me, don't talk to me. You're a fucking liar as well'
>
> Mr Caffrey- "did you hear that?"
>
> Claimant – 'Yeah I did swear at you because you swore at me and now you don't even want to admit it'
>
> Ms Butler – 'Zak'
>
> Claimant – 'You don't even want to admit it. Yeah you're not a man, you know what. You're not even a man'."

I may break off there.

15. On 9 July 2012 the RMT sent a letter responding to the appellant's suspension on the same day, asserting that the suspension was based on shameful, trumped-up allegations. After this Mr David Cadger was appointed to investigate matters concerning the appellant's conduct, including his behaviour on 6 July. He produced a report on 13 August 2012 concluding that the decision to suspend on 6 July 2012 had been correct and recommending that the allegations against the appellant should be discussed at a disciplinary hearing (Employment Tribunal, paragraph 109).

16. Mr Anderson, who came from a different branch of the respondent's operations, was appointed to conduct the hearing. He wrote to the appellant on 14 November 2012

with notice of the hearing. He set out the allegation that the appellant would have to face as follows:

> "The allegation you will be required to address is that at approximately 2:30pm on Friday, 6 July 2012 you were approached by Mick Caffrey… and Carol Butler… and asked about some work-related matters. Your response to questions was allegedly irrational and you began shouting and you called Mick Caffrey a 'fucking liar' in front of other members of staff. Your behaviour was allegedly perceived as aggressive, intimidating and totally unwarranted. Please find enclosed copies of witness statements. This behaviour is considered so serious as to amount to a gross misconduct. If this allegation is proven against you, you may be liable to summary dismissal i.e. dismissal without notice or payment in lieu of notice."

17. This allegation is reiterated in the record of the disciplinary hearing which took place on 12 December 2012. The Employment Tribunal characterised the accusation at the disciplinary hearing as "single allegation" of calling Mr Caffrey a "fucking liar" (paragraph 113). That was not accurate. The appellant was – and this is of some importance – said to have behaved in an aggressive and intimidating manner.

18. At the disciplinary hearing, at which the appellant became angry and raised his voice and subsequently apologised to Mr Anderson for doing so, Mr Anderson communicated his decision, and confirmed it after the hearing by letter of 19 December 2012 in these terms:

> "In the hearing you admitted from the outset that you had used the language complained of and had called your manager a 'fucking liar,' but despite this you denied that you were intimidating or angry, stating that you were simply frustrated. You agree, however, that the impact on your behaviour could have been intimidating. During the hearing itself you also became easily agitated and your representative had to try to calm you down. Overall based on the available evidence, I believed that you had behaved in the way alleged on 6 July

> 2012 in that you were angry, had used foul language and had behaved in a way that was aggressive and intimidating.
>
> At the hearing I advised you that my decision was that the allegation levelled against you was proven but that I wanted to take the time to consider the sanction that should be imposed and the mitigation that you provided. In particular, this related to ongoing issues within your personal life, your relationship with Mr Caffrey, your length of service and previous conduct. I have considered all of the matters that you raise, but note that, despite these points and your acceptance that you had spoken to your manager in the way alleged, you fail to show any remorse for your actions or demonstrate that you understood your behaviour was not acceptable. On the contrary, when you were represented it was suggested you were remorseful. You interjected and said this was not in fact the case; you did not regret what you had said and you felt that your behaviour was justified. This was a serious incident for which you were wholly responsible: aggressive and intimidating behaviour coupled with foul and abuse language and calling your manager a 'fucking liar' in an area and within earshot where another manager and employees were present is wholly unacceptable behaviour and in my judgment amounts to gross misconduct. I have also consulted the Serco disciplinary policy. Therefore my decision is to summarily dismiss you with effect from Friday, 21 December 2012 without notice or pay in lieu of notice."

19. So the appellant was summarily dismissed. The appellant, who has accepted that "he had behaved in a way that would be regarded as gross misconduct in line with the company code of conduct" (Employment Tribunal, paragraph 11), exercised his right of internal appeal. The appeal hearing took place on 18 January 2013. It was submitted by the appellant's representative that the sanction of summary dismissal was too harsh and a final written warning of dismissal with notice would have sufficed.

20. Ms Smart, the appeal manager, issued her decision letter on 7 March 2013. She had undertaken some further investigation into the circumstances of the meeting on 6 July 2012. In her decision letter she said this:

> "I find that swearing directly to a manager in what is perceived to be an aggressive and intimidating manner is gross misconduct. You have shown no remorse. I therefore conclude that the decision to dismiss without notice for gross misconduct was fair and I do not deem it to be too harsh a penalty."

21. There was no finding by the Employment Tribunal that this was in any way an unreasonable conclusion or that it was in any way tainted by the appellant's involvement with the RMT.

22. I turn to the Employment Tribunal's conclusions. As I have said, the tribunal upheld the appellant's claims of detriment made under section 146(1) of the 1992 Act and automatically unfair dismissal under section 152. The Employment Tribunal's judgment runs to 154 paragraphs and contains a great deal of factual detail. The EAT provides a crisp and, so far as I can see, accurate summary of the Employment Tribunal's essential reasoning at paragraphs 54 to 55 of Simler's J judgment:

> "54. The Tribunal reached its conclusions on the basis of the essential reasoning that follows. So far as the detriment claims are concerned:
>
> (a) The only detriment in respect of which any arguable case had been raised by the Claimant was detriment item K (suspension on 6 July and the misconduct investigation that followed). There is no cross-appeal in relation to the dismissal of the remaining allegations not found to be detriments for these purposes.
>
> (b) At paragraph 144, the Employment Tribunal found that although on the face of it there was misconduct to investigate as the Claimant had sworn at Mr Caffrey and acted aggressively towards him, the Claimant had raised an arguable case that at least the main purpose of suspending him was to remove him from the workforce at a time when strike action was contemplated to coincide with the Olympics.
>
> (c) The Employment Tribunal then identified six factors that 'called for an explanation'. These were:

(144.1) the timing of the 6 July incident which was the day after the strike ballot opened;

(144.2) Mr Caffrey's statement that there was a need to manage the Claimant's behaviour during the Olympic period and his reference to the Claimant's role in the threatened strike;

(144.3) Mr Caffrey's failure to tell Ms Butler that there was an explanation for the Claimant working Bank Holiday Monday and allowing her instead to question him about this when he had previously been accused of fraudulent overtime claims;

(144.4) Mr Caffrey's denial of swearing when the Tribunal found he did so;

(144.5) Mr Whitefoot's involvement immediately after the incident given his role and the fact that this was "a relatively straightforward disciplinary issue about an employee swearing at a manager";

(144.6) The severity of the reaction to the incident given the apparent general tolerance of swearing (e.g. Mr Caffrey and Ms Butler).

(d) Having identified those factors, at paragraph 145 the Employment Tribunal stated that it "considered whether the Respondents had discharged the burden of proving that the treatment was not on the prohibited grounds and concluded that they had not". It stated that the six factors above were relevant but did not explain how or why.

(e) In addition to the six factors listed at paragraph 144, it identified three further matters relevant to this conclusion. These were:

(145.1) the way the complaint against the Claimant was dealt with was inconsistent with Mr Adamson's failure to deal with the Claimant's complaint against Mr Caffrey. The Tribunal stated that it might be said that the Claimant's behaviour was more serious overall than Mr Caffrey's but nevertheless concluded that there was inconsistency in approach without apparently reconciling this difference.

(145.2) the delay in the disciplinary process that spanned the Olympic period was unexplained: nothing happened between 25 August and 19 September. The Tribunal inferred that it was convenient for the Respondent to keep the Claimant away from the workplace during this time.

(145.3) no evidence was called from Mr Trotter to explain his failure to deal with all but one of the Claimant's grievances, or the time taken to do even that. The brevity of Mr Trotter's response meant that the delay in the disciplinary process could not be attributed to his consideration of the grievance or grievances.

(f) At paragraph 146 the Employment Tribunal held:

> 'The Tribunal did not consider that any point arose as to the timing of any union activities, to the extent that the Respondents were seeking to prevent or deter the Claimant from taking part in these. Although, as identified in paragraph 73 above, there had been some challenge about when the Claimant had been carrying out such activities, there was no evidence from which the Tribunal could conclude that he had in fact been doing so at an inappropriate time. Nor was there any evidence to suggest that, had he not been suspended, he would have been doing this at an inappropriate time.'

(g) At paragraph 147:

> 'The Tribunal concluded that the main purpose of suspending the Claimant and of carrying out the misconduct investigation was to prevent him from carrying out the activities of an independent trade union at an appropriate time. The Complaint of detriment under point K was therefore well founded.'

55. So far as the question of automatic unfair dismissal was concerned, the Tribunal's reasoning and conclusions were as follows:

(a) At paragraph 150 the Tribunal stated that it 'concluded that, for substantially the same reasons as given in relation to item K, the Respondent had failed to prove the reason or principal reason for dismissal on which they relied. The Tribunal found that Mr Anderson's evidence about the letter of 14 November 2012 showed that he was not acting independently in the disciplinary process, and was following the directions of the Respondent's HR department. In particular, it could be seen that again Mr Whitefoot was involved: he had approved the 14 November letter'.

(b) At paragraph 151 the Tribunal stated that it took account of the points set out at paragraphs 144 and 145, and its finding that the Respondent had not discharged the burden of proof in relation to the detriment complaint. It went on to state:

> ‘The decision to dismiss the Claimant followed directly from the suspension and decision to investigate the conduct allegations. In spite of the evidence from Mr Anderson and Mr Whitefoot, the Tribunal found it improbable that the latter had not influenced the decision to dismiss the Claimant. The only identifiable reason why Mr Whitefoot would do so was the Claimant’s union activities. On 8 June Mr Whitefoot had predicted or threatened disciplinary proceedings that would be delayed until after the Olympics (paragraph 75 above). He was closely concerned with trade union issues and the risk of a strike in particular.’
>
> (c) The Tribunal accordingly concluded that: ‘… The principal reason for the Claimant’s dismissal was that he had taken part or proposed to take part in the activities of an independent trade union at an appropriate time and the dismissal was therefore automatically unfair.’
>
> (d) Contributory fault and Polkey were held not to apply because the Employment Tribunal had rejected the Respondent’s stated reason for dismissal.”

23. There were 12 grounds of appeal to the EAT. Simler J allowed the appeal on grounds 1 to 9, expressed no concluded view on 10 and found it unnecessary to deal with 11 and 12. These latter two concern contributory fault and the question whether any compensatory award should be reduced on account of the possibility that the appellant might have been dismissed in any event (Polkey 1988 AC 344).

24. There is a respondent’s notice before us seeking permission to raise these matters and inviting the court to disapprove the statement of the Employment Tribunal at paragraph 152, where it is said that: “Contributory fault and Polkey do not arise because the Tribunal has rejected the respondent’s stated reason for dismissal.” I shall return briefly to that in due course.

25. Both the Employment Tribunal and the EAT made reference to the EAT decision in Yewdall UKEAT/0071/05/TM. In relation to section 146 of the 1992 Act the EAT in that case said this:

> "We nevertheless find that, although clearly this is not necessarily a binding way for a tribunal to approach this statute, a very sensible way to do so would be to follow this structure which, in effect, follows the route of the Act as we see it to be:
>
> (i) have there been acts or deliberate failures to act by an employer? On this, of course, the employee has and retains the onus;
>
> (ii) have those acts or deliberate failures to act caused detriment to the employee?
>
> (iii) are those acts in time?
>
> (iv) in relation to those acts so proved which are in time, where detriment has been caused, the question of what the purpose is then arises. We are satisfied that Mr Russell was right to concede - and, in any event, this is our judgment - that there must be establishment by a Claimant at this stage of a prima facie case that the acts or deliberate failures to act which are found to be in time were committed with the purpose of preventing or deterring or penalising i.e. the illegitimate purpose prohibited by s146 (1) (b).
>
> This gives the same mechanism to sections 146 and 148 of TULR(C)A as is provided, for example, by section 63A of the Sex Discrimination Act 1975, where the onus of proof only passes to the employer after the establishment of a prima facie case of unfavourable treatment on discriminatory grounds by the employee which requires to be explained. Once it requires it to be explained, then the burden passes to the employer. Plainly that, in our judgment, is correct in this case. Otherwise the employer will have the burden of giving some explanation in a case where it is not clear what it is he has to explain. It must be clear, and we agree with Mr Russell's concession and with Mr Powell's submission, that there is a case made out at the prima facie stage that the acts complained of, with the resultant detriment, were on the case for the Claimant for the purpose of preventing or deterring or penalising in respect of trade union activities. Once that prima facie case is established, then the burden passes to the employer under s148."

26. In relation to dismissal, the EAT, but not the Employment Tribunal, cited Kuzel [2008] ICR 799, in which Mummery LJ stated at paragraphs 57 to 60:

> "57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.
>
> 58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the Employment Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
>
> 59. The Employment Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Employment Tribunal that the reason was what he asserted it was, it is open to the Employment Tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the Employment Tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.
>
> 60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

27. Despite the multiplicity of grounds of appeal to the EAT, it appears to me that the principal engine of the EAT's decision was Simler's J conclusions on ground 1. This is framed by reference to the detriment complaint under section 146(1). As I will show, Simler J concluded that its correctness (along with other grounds) was fatal also to the Employment Tribunal's finding of automatically unfair dismissal. Ground 1 was to the effect that the Employment Tribunal had misapplied the law relating to burden of proof (section 148) and so "failed to evaluate the genuineness of the material witness's explanation for the treatment complained of, and in particular that the appellant was suspended because his aggressive and threatening conduct raised concerns about staff safety".

28. Ground 6 was that "Employment Tribunal further erred in law by adopting the erroneous analysis identified in the above grounds in support of its finding that the appellant had been automatically unfairly dismissed". As will appear, it seems to me that the issue here is not so much a question of the misapplication of the law relating to burden of proof but rather one relating to the Employment Tribunal's duty to deal with the case presented before it by, in this case, the employer.

29. It is plain that both the purpose of an employer's act or omission (sections 146 and 148) and the reason for dismissal of an employee (section 152) consist in the factors operating on the mind of the relevant decision-maker: see, for example, Baddeley [2014] EWCA Civ 658, per Underhill LJ at paragraphs 41 and 42. Both under section 146 (see Yewdall) and section 152 (see Kuzel), it is for the employee to raise a *prima facie* case. In the dismissal case it is perhaps more accurate to say that it is for the employee to show "only that there is an issue warranting investigation and capable of

establishing the prohibited reason": Simler J (paragraph 52) referring to Maund [1984] ICR 143.

30. If the *prima facie* case is made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore to prove what were the factors operating on the mind of the decision-maker. It follows, of course, that in such a case a critical element in the task of the Employment Tribunal consists in their reasoned assessment of the matters, certainly the central matters, advanced by the employer in proof of those factors.

31. In my judgment that was the approach which Simler J followed. She noted at paragraph 49 that at paragraph 17 the Employment Tribunal had observed in relation to Yewdall that "the EAT stated that the burden of proof" (section 146) operated in the same way as in the anti-discrimination legislation, such as section 63A of the Sex Discrimination Act 1975. The burden of proof only passes to the employer after the employee has established a *prima facie* or arguable case of unfavourable treatment which requires to be explained.

32. Simler J proceeded to observe at paragraph 50:

> "The first sentence appears to overstate paragraph 24 of Yewdall. The mechanism may be similar, but that does not mean that it operates in the same way, and nor is this what the Employment Appeal Tribunal said."

33. Simler J then proceeded to state in detail what were the matters about which the Employment Tribunal should have made findings, setting out the points by reference to the six factors which the Employment Tribunal had said called for an explanation and which she had enumerated, as I have shown, at paragraph 54(c). I should cite paragraphs 66 to 67 of her judgment in full:

“66. Had the Tribunal considered the explanations for the six factors identified (as listed at paragraph 54(c) above) which were available in light of its findings, it would have had to consider and make findings in relation to the following:

(i) As to the coincidence of timing, the Tribunal recorded that one of the reasons for Mr Caffrey speaking to the Claimant on 6 July was to find out his whereabouts on 5 July when he had seen the Claimant absent himself from work by leaving on his bicycle in the afternoon (paragraph 89 and 91). If accepted, this was a rational explanation for Mr Caffrey approaching the Claimant as his manager, and the fact of the strike ballot the day before may have been coincidence. If not accepted, and the Tribunal considered that the timing was sinister, this should have been explained, but was not. There are no findings to support a conclusion that Mr Caffrey and Ms Butler deliberately engineered the encounter on 6 July for an improper purpose.

(ii) The statements by Mr Caffrey were general: the Tribunal did not explain how the fact that he expressed these views led to the conclusion that Mr Caffrey's response to the misconduct on 6 July was not a genuine response for the purposes he identified.

(iii) As to Mr Caffrey's failure to tell Ms Butler that there was an explanation for the Claimant being at work on Bank Holiday Monday, and allowing her to question him: Mr Caffrey gave an explanation for this - he said the question was asked reasonably by her and it was not inappropriate for her to seek clarification on whether the Claimant was in and how long he was in for (paragraph 130). If this was rejected, the Tribunal should have said so, and explained how it was probative.

(iv) As to Mr Caffrey's denial of swearing, there are many reasons why he might have denied this: embarrassment, to avoid looking bad as a manager. Moreover, he could not have explained this at the hearing in advance of this finding having been made, since he denied it. The Tribunal did not explain how the mere fact that he was less than frank about swearing on the earlier occasion could justify, without more, rejecting his explanation of his main purpose in suspending the Claimant following the incident on 6 July.

(v) As to Mr Whitefoot's involvement immediately afterwards, this was explained by Ms Butler as the Tribunal recorded at paragraph 94, in paragraph 25 of her statement: "After this altercation with Zak, Mick and I telephoned John Whitefoot….to explain what had happened. I was aware there

had been trade union activity and that John Whitefoot had been dealing with this. I did not want to tread on anyone's toes by doing anything that may upset what had been happening with the trade unions". This explanation was not rejected by the Tribunal at paragraph 94, and provides a rational (perhaps even obvious) explanation for his involvement.

Moreover, as to the suggestion that this was a 'relatively straightforward disciplinary issue about an employee swearing at a manager', the Tribunal's findings in relation to Mr Caffrey, Ms Butler and Mr Whitefoot's evidence show that this was not their view. On their evidence the incident involved aggressive, intimidating behaviour towards a manager and there were concerns about the Claimant's health and safety and the safety of others as a result of volatile conduct on his part. There was no evaluation of this evidence.

(vi) As to the severity of the Respondent's reaction given the (apparent) tolerance of general swearing, this was (at least) capable of being explained by reference to the fact that the Respondent's evidence was that this was not a simple swearing case but involved more. The Tribunal made no attempt to assess the truth or otherwise of this evidence. The Tribunal's finding of a general tolerance of swearing was based on a different, less serious incident involving Mr Caffrey swearing under his breath; and Ms Butler, who swore but immediately recognised that she should not have sworn – but these earlier findings were not referred to by the Tribunal.

67. These were explanations that in the light of its findings could realistically be regarded as having explained the factors criticised by the Tribunal. Moreover, the Respondent's witnesses gave evidence about the reasons for and purpose for which they acted. There is nothing in the findings to indicate that the Tribunal did not regard these explanations as genuine; but it failed to consider or evaluate them. If the Tribunal was intending to reject these explanations, it needed to explain why, but failed to do so. If the Tribunal accepted that the misconduct genuinely merited suspension and investigation but was nevertheless being used as an excuse in this particular case, an even more careful consideration of the thought processes of the relevant decision-makers was necessary. The Tribunal was not entitled to ignore potentially relevant explanations; or to reject them without consideration and a proper evidential basis for doing so."

34. At paragraphs 68 to 70 Simler J addressed the additional factors identified at paragraph 1.5.1 to 1.5.3 of the Employment Tribunal decision. She had set these out

at paragraph 54E, and again she pointed out the absence of necessary findings. She said this at paragraph 71:

> "What was required was for the Tribunal to determine what the main purpose was of each relevant decision-maker, as a matter of fact, on the basis of evidence and permissible inferences. It was not enough that the Claimant was linked to the threatened strike; or that it was convenient to have him out of the way. It did not do this. For all these reasons, I am persuaded that the Tribunal erred in law in its approach to the burden of proof. It was not entitled to conclude that the burden of proof had not been discharged by the Respondent in this case, without first considering the explanations given by the Respondent as identified in its own findings of fact. Nor was it entitled to proceed from that conclusion without more, to a conclusion that the Respondent had an improper purpose."

35. The reference to burden of proof is perhaps infelicitous, but the central point that the tribunal should have "first consider[ed] the explanations given by the Respondent" is at the heart of the case. Then at paragraph 82 Simler J said this:

> "In light of my conclusions on grounds 1 to 5 above, and given the Tribunal's conclusion that for substantially the reasons given at paragraph 144 to 146 the Respondent had failed to prove the reason or principal reason for the dismissal on which it relied, the Tribunal's conclusion that the dismissal was automatically unfair cannot stand."

36. I will deal a little later with the overall question of whether Simler J was right to hold in the particular circumstances here that the Employment Tribunal did not grapple with the respondent's case. First, there are a number of other grounds on which Ms Chudleigh for the appellant assaults the EAT decision. A central one, very much linked to the question whether Simler J was right at paragraph 71 and 82, is this: it is said that the EAT applied an overzealous approach and dissected the Employment Tribunal decision as if with a fine toothcomb. Reference is made to the well-known

judgment of Elias J, as he then was, in Aslef v Brady [2006] IRLR 576 at paragraph 555. But the criticism is misplaced; Simler's J conclusion is that the Employment Tribunal failed to fulfil a critical part of its task, that is, to enter into a reasoned adjudication on the employer's case. In the nature of things, in this particular instance that task, if properly executed, must have involved a descent into considerable detail. This was a case about details; not all cases are. Here, the Employment Tribunal was bound to grapple with the essentials of the employer's case consisting, as those essentials did, in the details. They were so obliged in particular because the appellant's case involved the conclusion that the respondent had concocted a false basis for the appellant's suspension and dismissal and maintained that false story before the Employment Tribunal.

37. Mr Sutton for the employers drew our attention to the observations of Underhill LJ in the Baddeley cases at paragraphs 58 and 60. They seem to me to be in point. With great respect, perhaps I need not set them out. Next it is said by Ms Chudleigh that Simler J erroneously equate the burden of proof requirement in the detriment case with that in the dismissal case. I need not take time with this. Both involved the establishment of a *prima facie* case, or at least the articulation of issues requiring explanation, and then the need for the employer to prove his purpose or reason for acting. Simler J correctly proceeded accordingly.

38. Next, in paragraph 70 of Ms Chudleigh's written argument it is said that Simler J trespassed upon the Employment Tribunal's fact-finding territory which, in her judgment, the Employment Tribunal should have considered. I have read paragraphs 66 and 67 of the EAT judgment. There the judge was not finding facts, as Ms

Chudleigh at length acknowledged; she was highlighting areas of the case where, in her view, the Employment Tribunal should have found that facts.

39. Next, the appellant says that Simler J was wrong to hold, at paragraph 71, that, even if the respondent had no proved what was its main purpose (see section 48), still it did not follow that the main purpose was an improper one, and section 148 "requires a finding of unlawful treatment if the employer fails to show the purpose for which she acted" (paragraph 72 of Ms Chudleigh's written argument).

40. As regards dismissal cases, this court has held (Kuzel, paragraph 59) that an employer's failure to show what the reason for the dismissal was does not entail the conclusion that the reason was as asserted by the employee. As a proposition of logic, this applies no less to detriment cases. Simler J did not hold that it would never follow from a respondent's failure to show his reasons that the employee's case was right. Usually no doubt it will; but this is a barren point in the circumstances of this case, which is really about the Employment Tribunal's treatment of the respondent's case on the merits.

41. Then Ms Chudleigh complains that the EAT misunderstood Mr Cadger's role (paragraph 61) where Simler J said:

> "Particularly stark is the absence of any evidence to support a finding that Mr Cadger was influenced or affected by any improper purpose of the others, or of his own. Instead, the Tribunal dealt with these separate acts together and without any focus at all on Mr Cadger's role in the latter decision."

42. The appellant says that whether or not Mr Cadger was affected by an improper purpose was not itself relevant to the allegation of detriment. It is of course right that Mr Cadger was appointed to investigate the appellant's conduct after the suspension,

and he was not in any event a decision-maker, but his state of mind when he produced a near contemporaneous report to the effect that the decision to suspend was justified and recommending a disciplinary hearing was in my judgment plainly relevant to an assessment overall of the decision-maker's decision to suspend, and certainly to the reasons for dismissal.

43. Then Ms Chudleigh has a rather more general complaint that the EAT should have acknowledged that the Employment Tribunal was entitled to proceed as it did in relying on the factors and the additional factors which it enumerated and which were, as I have shown, summarised by Simler J. But this argument so stated does not refute the proposition that the Employment Tribunal should have engaged with the respondent's explanations.

44. Then Ms Chudleigh submits that the EAT erred in holding (paragraph 81) that the Employment Tribunal took too "broad brush" an approach to the question whether the detriment and dismissal took place in order to prevent or deter the appellant from taking part in Trade Union activities at "an appropriate time". At paragraphs 146 to 147 the Employment Tribunal had said this:

> "146. The Tribunal did not consider that any point arose as to the timing of any union activities, to the extent that the respondents were seeking to prevent or deter the claimant from taking part in these. Although, as identified in paragraph 73 above, there had been some challenge about when the claimant had been carrying out such activities, there was no evidence from which the Tribunal could conclude that he had in fact been doing so at an inappropriate time. Nor was there any evidence to suggest that, had he not been suspended, he would have been doing this at an inappropriate time.
>
> 147. The Tribunal concluded that the main purpose of suspending the claimant and of carrying out the misconduct investigation was to prevent him carrying out the activities of an independent trade union at an appropriate time. The complaint of detriment under point K was therefore well founded."

45. At paragraph 80 Simler J stated:

> "Ms Chudleigh accepts that the conclusion at paragraph 146 was a critical stage in the reasoning that led to the Tribunal's conclusion at paragraph 147. However, she submits that no point arose on the question of 'appropriate time' because the Claimant was not relying on a discrete event, but on the fact that he was an RMT activist known to be involved in the threat of strike action. It was this concern that led to his suspension and dismissal. I cannot accept that this adequately answers the point given that the statutory protection applies to activities at an appropriate time, and this could only have been outside working hours in this case given the RMT's lack of recognition. The Tribunal side-stepped the question whether such concerns as the Respondent had were based on illegitimate trade union activity. Ms Chudleigh submits that it is unfair to say that the Tribunal did not consider what purpose motivated the Respondent in light of the conclusion at paragraph 147. But this is no answer to the criticism of paragraph 146. The conclusion at paragraph 147 was only possible as a consequence of the way the Tribunal approached the matter at paragraph 146. If that approach was in error of law, it vitiates the conclusion at paragraph 147."

46. I consider this conclusion was open to Simler J and is not displaced by such further reasoning as is to be found at paragraph 151 of the Employment Tribunal. Mr Sutton submits that the critical issue under section 146 is the employer's appreciation of the employee's activities. That is right. The letter from Mr Caffrey to the appellant on 6 July 2012, to which I have referred already, shows on the face of it the importance of the timing of Trade Union activities, at any rate in his mind.

47. More generally and critically, Simler J was, in my judgment, right to conclude that the Employment Tribunal had not grappled with the respondent's case because they did not confront the matters she set out at paragraphs 66 to 70. This is so notwithstanding Ms Chudleigh's emphasis on various factual points this morning: factual points that are in the background of the case but which nevertheless, submits Ms Chudleigh,

strengthen the appellant's position. They include for example Mr Whitehouse's concerns about industrial relations, Mr Caffrey's conduct relating to the appellant's claim to be paid for working on Good Friday, and bad behaviour by other employees which was leniently dealt with in contrast the treatment of the appellant: there was, she points out, a general tolerance of swearing in the respondent company.

48. Ms Chudleigh also relies in relation to dismissal on a finding at paragraph 151 of the Employment Tribunal determination to the effect that Mr Whitefoot did probably influence Mr Anderson, the dismissing officer. But this does not, by a wide margin, displace the overall correctness of Simler's J decision. Mr Sutton, for his part, placed specific emphasis on the Employment Tribunal's failure to address the way in which Mr Caffrey and Ms Butler reacted to the episode on 6 July. Were they telling the truth in saying they were intimidated? Was the decision to mount an investigation genuine?

49. I consider that on the appeal to the Employment Appeal Tribunal Simler J reached the right result for the right reasons. I would specifically recall and emphasise what I have said already as to the need in this particular case for some descent into the detail by the Employment Tribunal if they were properly to execute their task of providing a reasoned assessment of the matters advanced by the employer.

50. There are two further outstanding questions. The first concerns relief. At paragraph 92 Simler J decided that the matter should be remitted to a differently constituted tribunal. She said:

> "I have considered whether in the circumstances of this case justice requires that the matter should be remitted to a different and differently constituted tribunal, recognising the hardship that this will entail for the Claimant having to start again.

> Despite this undoubted hardship, I am satisfied that given the basis on which this appeal is allowed, and in light of the errors identified, which permeate the reasoning as a whole, that is the appropriate course to adopt."

51. The appellant says that the witnesses, having been cross-examined once, have had something in the nature of a dress rehearsal. To some extent, of course, that cuts both ways. The appellant refers to the judgment of Burton J in Sinclair Roche & Temperley v Heard [2004] IRLR 763 at paragraphs 45 to 46 which, with respect, I will not set out. I do not mean to diminish the importance of this issue when I say that I will content myself with repeating this passage from Mr Sutton's skeleton argument with which I agree:

> "4.2(3) The impact of remission to a differently constituted panel, including the hardship faced by the claimant, was apparent to the learned judge and was weighed in the exercise of her discretion, but the interests of justice were clearly the paramount consideration. The Tribunal's approach having been criticised on a number of grounds which permeated its reasoning as a whole, it would clearly be unfair to expect the Tribunal to reconsider the complaints with fresh eyes, unaffected by their own earlier determinations. To use Burton J's expression, a 'rethink' would be impractical. A reconsideration before the same Tribunal would not, from Serco's perspective, meet the requirements of a fair hearing.
>
> 4.2(6) Simler's J decision on this issue is essentially a matter of case management discretion. Absent any error in principle, it is respectfully submitted that the challenge to the decision on disposal should be considered in the light of the guidance in CPR Part 52.11.14. The decision on remission plainly fell in the scope of the learned judge's discretion and there are no persuasive grounds for disturbing the same."

52. Lastly, there is the respondent's notice, to which I have referred in passing. It is submitted there that the order of the EAT should be varied so as to provide that, if on remission the Employment Tribunal upholds the automatically unfair dismissal claim,

it should proceed to determine issues of contributory fault and the reduction of compensation following the Polkey case.

53. In a supplementary skeleton argument Mr Sutton cites much authority and submits at paragraph 17 "that the Employment Tribunal erred in refusing to determine whether any remedy ought to be reduced to reflect contributory conduct or in the light of the Polkey principle". The reference is to section 152 of the Employment Tribunal decision, which I have already set out. The order made by the EAT is sound as to contributory fault and Polkey.

54. At paragraph 91 Simler J stated:

> "In the result accordingly, I have concluded that this appeal must be allowed on grounds 1 to 9 above. In those circumstances it is unnecessary to consider grounds 11 and 12 which raise specific complaints about the way the Tribunal dealt with contribution and Polkey. These points, and the issue of ordinary unfair dismissal which was not determined, will have to be reconsidered."

55. It seems plain to me therefore that all points of contributory fault and Polkey will have to be considered insofar as they are raised by the Employment Tribunal on remission. The Employment Tribunal will obviously not be bound by what the earlier tribunal has said at paragraph 152.

56. I note that the appellant contends in Ms Chudleigh's written argument at paragraph 98 that the species of Polkey argument articulated in the respondent's notice is new. Polkey is not pleaded in the respondent's defence before the Employment Tribunal and this argument was not advanced in submissions before the Employment Tribunal.

All this will be for consideration on remission, as will any further pleading which is sought to be put in by either party.

57. For all the reasons I have given then I would dismiss the appeal but I would decline permission to advance the respondent's notice.

LORD JUSTICE LONGMORE:

58. I agree with the judgment which my Lord has delivered and the reasons which he has given.

LORD JUSTICE RICHARDS:

59. I also agree.

Order: Application refused