Was it automatically unfair to dismiss an employee for upset and friction caused as a result of him carrying out health and safety duties?

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In Sinclair v Trackwork Ltd the Employment Appeal Tribunal (EAT) determined that it was unfair to dismiss an employee who caused friction in the workforce as a result of the way he undertook mandatory health and safety activities.

What does the law say?

S100(1)(a) of the Employment Rights Act (**ERA**) states that where the reason or principal reason for dismissal is that the employee was carrying out health and safety activities (having been designated to do so), such dismissal will be automatically unfair. This protection is similar to that offered to whistleblowers. If an employer dismisses an employee because he or she blew the whistle, then the dismissal will be automatically unfair.

In the case of Panayiotou v Kernaghan, the EAT considered whether the manner in which the employee pursued his whistleblowing complaints was genuinely separable from the protected disclosure itself. The EAT held that, in certain circumstances, it will be permissible to separate out factors or consequences following the making of a protected disclosure from the making of the protected disclosure itself.

What happened in this case?

Mr Sinclair was a track maintenance supervisor who was given a mandate to implement a new safety procedure. His colleagues were unhappy with his approach, considering him to be over-cautious and overzealous. However, they were unaware that he had been tasked with implementing the new procedure.

Given the soured relationship in the workforce, Trackwork Limited dismissed Mr Sinclair. The reasons given included that Mr Sinclair had created friction and upset by the manner in

which he had gone about implementing the new procedure.

Mr Sinclair brought a claim for unfair dismissal under s.100(1)(a) of ERA. The employment tribunal rejected his claim, holding that the dismissal was not because of the health and safety activities he was performing, but because of the manner in which he carried out the activities, which caused the upset. Mr Sinclair appealed to the EAT. He argued that the employment tribunal's conclusion was perverse given that there was "a clear and unbroken causal link between [his] carrying out of health and safety activities and his dismissal."

What was decided?

The EAT explored whether the health and safety activities were genuinely separable from the manner in which they were carried out. It concluded that this could be the case where the conduct was, for example, "wholly unreasonable, malicious or irrelevant to the task in hand".

However, the EAT held that Mr Sinclair had not exceeded his mandate and his actions were not unreasonable, malicious or irrelevant. Therefore, his manner of performing the activities could not be separated from the activities themselves.

The EAT held that the very mischief which section 100(1)(a) seeks to guard against is the fact that carrying out health and safety activities will often be unwelcomed and even resisted. Allowing an employer to distinguish the activities from the upset they caused, and relying on the latter to dismiss the employee, would undermine the protection.

Accordingly, the EAT substituted the tribunal's decision to one of automatically unfair dismissal.

What does this mean for employers?

As a result of the pandemic, employers have had to prioritise health and safety activities and deliver significant changes in the workplace. This case illustrates that the protection offered to employees performing health and safety activities is broad and there are very limited circumstances in which an employer can say that the manner in which such activities were carried out is distinguishable from the activities themselves.

Whilst this case relates to automatic unfair dismissal in respect of health and safety activities, the same principles can be read across to the more common case where an employee has blown the whistle on some unlawful practice. It is important to remember that the disruptive manner in which an employee pursues a whistleblowing complaint will not necessarily be distinguishable from the protected disclosure itself. This is a fine balance to strike and, of course, getting it wrong in a whistle blowing case can result in liability for an uncapped award of damages.

Sinclair v Trackwork Limited

If you would like to discuss any issues arising out of this decision please contact Blair Wassman (blairwassman@bdbf.co.uk), Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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