Appeal No UKEAT/0008/19/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 20 August 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR WLADYSLAW PAZUR — APPELLANT

LEXINGTON CATERING SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD O'KEEFFE (Representative) Southwark Law Centre Hanover Park House 14-16 Hanover Park Peckham London SE15 5HG
For the Respondent	MR MATTHEW SELLWOOD (of Counsel) Instructed by: Astons Solicitors 14b Basset Court Loake Close Grange Park Northampton NN4 5EZ

SUMMARY

Working Time Regulation 1998 *– detriment -* *Section 45A* ***Employment Rights Act 1996***

Unfair Dismissal *– automatically unfair reason for dismissal – Section 101A* ***Employment Rights Act 1996***

The Claimant, who worked as a Kitchen Porter, had been denied his right to a rest break (contrary to Regulation 10 **WTR** and his contractual entitlement) when assigned to work for client L. When he subsequently refused to return to client L, he was first threatened with dismissal and then dismissed by the Respondent. The Claimant brought ET proceedings (relevantly) contending the threat of dismissal had amounted to an unlawful detriment, contrary to Section 45A **ERA**, and that he was then dismissed for a automatically unfair reason for the purposes of Section 101A **ERA**. He also complained that he had been wrongfully dismissed. The ET accepted that the Claimant had previously left client L's premises because he refused to comply with a requirement that was in breach of the **WTR**. Proceeding on the basis that requiring the Claimant to return to client L amounted to the imposition of, or proposal to impose, a requirement in contravention of the **WTR**, the ET was not satisfied that the Claimant had provided sufficient evidence to establish his refusal to return to L was a refusal for the purposes of Sections 45A or 101A **ERA** and accordingly dismissed both of those claims. In considering the Claimant's complaint of wrongful dismissal, however, the ET found that his reason for refusing to return to client L was due to his concern about the Head Chef (who had tried to make him stay longer on the previous shift) and because of the working arrangements in breach of the **WTR**. In the circumstances the ET upheld the wrongful dismissal claim, finding the Respondent had no proper basis for summarily dismissing the Claimant.

The Claimant appealed against the ET's rejection of his detriment and dismissal claims.

Held: allowing the appeal

The ET had not erred in seeking to determine the Claimant's reason for declining to return to client L; the protection afforded by Sections 45A and 101A **ERA** required that there was some

explicit refusal (or proposal to refuse) to accept a requirement in contravention of the **WTR**. The dismissal of those claims because the Claimant had failed to establish the reason for his refusal was, however, inconsistent with the ET's subsequent finding (in relation to the wrongful dismissal claim) that the reason was (at least in part) related to a requirement to work in contravention of the **WTR**. Moreover, given the ET had found that the Respondent's conduct and decision to dismiss were materially influenced by the Claimant's refusal to return to client L, it ought to have upheld the Section 45A detriment complaint. As for the Section 101A claim, the question was whether that refusal was the reason, or principal reason, for the dismissal. That was a question that would need to be remitted of the ET for reconsideration.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises questions relating to claims of unfair dismissal and detriment in respect of the **Working Time Regulations 1998** ("the WTR"), brought under Sections 45A and 101A **Employment Rights Act 1996** ("the ERA").

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is a Full Hearing of the Claimant's appeal against a Judgment of the London Central Employment Tribunal (Employment Judge Walker, sitting alone on 25 July and 26 September 2018; "the ET"), sent out to the parties on 27 September 2018. Representation before the ET was at has been today.

3. By its Judgment, the ET dismissed claims pursued by the Claimant of detriment and automatic unfair dismissal, both on health and safety grounds and in respect of the **WTR**; this appeal is only concerned with the latter. The ET upheld the Claimant's further claim of breach of contract; there is no cross appeal against that ruling.

The Relevant Factual Background and the ET's Decision and Reasoning

4. The Claimant worked for the Respondent as a Kitchen Porter. He would be assigned by the Respondent, as part of a support team of Porters and Chefs, to a variety of different locations each week. The Claimant's claims centred on certain occasions, when he refused to attend particular bookings: first, at the site of a client referred to as Client B; second, at the site of Client L.

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5. The Claimant had refused to return to Client B's site because of the working conditions there, which he relied on as bringing him within the protection against detriment or dismissal on health and safety grounds. The ET accepted that the Claimant's refusal to attend this client's premises was based on the poor working conditions he had previously experienced there but found this fell short of what was required to establish a case of health and safety detriment or dismissal. There is, as I have said, no appeal against that finding.

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6. The Claimant had been assigned to work for Client L on 23 November 2017, to work a shift of eight hours from 2pm to 10:30pm. He refused to say the beyond 10pm, however, because he had not been allowed a rest break. Pursuant to Regulation 12 of the **WTR** - given that the Claimant's daily working time was more than six hours - he had been entitled to a rest break for an uninterrupted period of not less than 20 minutes; moreover, under his contract with the Respondent, he was entitled to a rest break of 30 minutes. The ET was satisfied that the Claimant had left his shift at Client L on 23 November 2017 because he had not been given the rest break to which he was entitled, either under the **WTR** or as a matter of contract.

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7. On the night in question, the Claimant had complained to his then line manager, Gintare, who was also on site, about not being given a break. On 26 November the Claimant emailed the Respondent's Human Resources Manager complaining about Client L's site. He referred to a lack of supplies, such as washing liquids and plasters in the first aid box but also complained:

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> **"…to make things worse - during my entire eight hour shift, I did not get any break or meal. At the end of my shift, one of the Head chefs wanted me to stay longer, when I refused he informed my line manager who was attending the event and when she came, she tried to make me stay longer. This is unacceptable."**

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Although it seems there had been an intention on the Respondent's part to make further enquiries into the Claimant's complaints, this came to nothing, given what took place in early December.

8. On Monday 4 December 2017, the Claimant's new line manager, Vakare, asked him to return to work at Client L on the Tuesday, Wednesday, and Friday of that week. The Claimant called Vakare to say that he had recently complained about Client L not giving him any breaks or meals and trying to force him to stay longer; she said she would call him back. Vakare then texted the Respondent's support team Operation Manager, Mr Bouteldja explaining that the Claimant was refusing to go to Client L. She said (see the ET at paragraph 24):

> **"I asked him nicely just to go there for tomorrow and then Wednesday I will replace him with someone else. He said to me that if he go there tomorrow and head chef will not be nice with him, he will send an email straight away…what should I do? Replace him or keep it?"**

9. Mr Bouteldja then texted the Claimant in the following terms (see the ET at paragraph 26):

> **"Hi Wlad, this is Alain, you have a choice, you either go [Client L] for tomorrow or you have no job on support team."**

In his ET claim, the Claimant complained that this was a detriment, contrary to Section 45A of the **ERA**.

10. The Claimant responded to Mr Bouteldja that he would rather have no job than return to Client L. Mr Bouteldja replied, "*Your P45 will be sent to you good luck."*

11. It seems to have later occurred to Mr Bouteldja that this might not have been the most temperate response and it was the Respondent's case that, on the following day (5 December), he sent a letter, inviting the Claimant to an investigation meeting for 7 December but the

Claimant failed to attend. The Claimant also did not attend a disciplinary hearing, which was said to have been organised for 9am on 8 December; albeit, as he was seemingly only invited to attend that meeting by letter of the same date - assuming it was ever sent out (something the ET doubted) - he would not have received notice of the hearing in time to attend in any event. A further letter, dated 9 December, purported to dismiss the Claimant for gross misconduct (a decision apparently taken by Mr Bouteldja), referring to a disciplinary hearing held on 7 December. Again, the ET questioned whether this had ever been sent; certainly, it was never received by the Claimant.

12. Subsequently, by email of 11 January 2018, the Claimant wrote to the Respondent saying that he had never received a dismissal letter and raising a number of matters, including a complaint about the fact that he had been given no break. He also referred to the fact that he felt he had been dismissed because he had reported many irregularities and he mentioned frequent cases of "mobbing", by which he meant he had been forced back to work when he was on his break.

13. When questioned during the ET hearing about his reasons for not wanting to return to Client L's site, the ET recorded that (see paragraph 34):

> **"He referred to two occasions when the head chefs at Client L had been unpleasant towards him, the second occasion being the events on 23 November."**

14. The ET found that the Claimant had in fact been dismissed on 4 December 2017, when Mr Bouteldja sent the text message about his P45 (see paragraph 60). It found that the "*subsequent effort to clean up the position*" was "*patently a sham*" (paragraph 61). As for the reason for the Claimant's dismissal, "*It was quite simply because the Claimant had refused to*

attend client sites as instructed twice, being his refusal to go to Client B and Client L's sites" (see the ET at paragraph 62).

15. For the purposes of the Claimant's breach of contract claim, the ET considered whether there was any proper basis for the Claimant's summary dismissal. It noted that there were "*no circumstances where the Claimant refused to attend work without there being a background problem which the Claimant had raised with the Respondent*" (see paragraph 64). In relation to Client L, the ET observed that the Claimant's refusal was because "*he had been refused his break and there was a breakdown in the relationship between the Claimant and the chef*" (paragraph 65).

16. As for the Respondent's position, the ET found that Mr Bouteldja was not interested in what had actually happened at Client L's site on 23 November: he had carried out no proper investigation as to whether the Claimant had or had not been denied his rest break and "*his main concern was that it caused him and his team problems when the Claimant refused to go to the site they had decided upon*" (see the ET at paragraph 65). In the circumstances, the ET concluded (see paragraph 66):

> **"On the previous occasion when the Claimant refused to go to client B, he was called in for a discussion but no disciplinary action took place. The second time, he was simply dismissed. It was clear that Mr Bouteldja was frustrated by the Claimant's behaviour and that in sending his instruction that the Claimant would receive his P45, it was because he was frustrated by those refusals."**

17. As for the Claimant's complaints of detriment and automatic unfair dismissal on working time grounds, the ET accepted that he had not been allowed the rest break he was entitled to and that had "*led to a dispute between him and the chef*" (paragraph 52). The ET also accepted that the Claimant had left work on 23 November because he refused to forego that break (paragraph 54). It did not consider it clear, however, that the Claimant's refusal to return

to Client L's site was "*because he expected the Respondent would continue to apply any such imposition on him; that is to work without taking the rest to which he was entitled under the* ***WTR***" (see paragraph 56). In this regard, the ET noted that the Claimant had not explained his reasons in his witness statement. Although he had given some evidence about this when questioned at the ET hearing, the Claimant's account had been mixed, although "*it was clear that he talked about the chef being unpleasant to him and he feared some unspecified bad treatment from him*" (also paragraph 56). Accepting that the Claimant had been dismissed because he had refused to attend for work at Client L, the ET identified the relevant question as being whether or not the Claimant's refusal related to the working time provisions. In this regard, it concluded (see paragraph 58) there was simply:

> **"insufficient evidence from the Claimant about why he was refusing to go back to client L to conclude this was because he expected the chef to refuse him his breaks again…this was not explained in his witness statement and his oral evidence was unclear but referred to the chef being unpleasant to him."**

On that basis the ET dismissed the Claimant's claims of working time detriment and dismissal.

The Relevant Legal Framework

18. The claimant was pursuing claims of detriment and dismissal due to a proposed contravention of the **WTR**.

19. Specifically, by Section 45A **ERA**, it is provided that:

> **"45A. Working time cases.**
>
> **(1). A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker-**
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> **(a).refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,**
>
> **(b).refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,**
>
> **(c).failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations,**
>
> **(d). being—**

(i). a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or

(ii). a candidate in an election in which any person elected will, on being elected, be such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate,

(e). brought proceedings against the employer to enforce a right conferred on him by those Regulations, or

(f). alleged that the employer had infringed such a right.

(2). It is immaterial for the purposes of subsection (1)(e) or (f)—

(a). whether or not the worker has the right, or

(b). whether or not the right has been infringed, but, for those provisions to apply, the claim to the right and that it has been infringed must be made in good faith.

(3). It is sufficient for subsection (1)(f) to apply that the worker, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) This section does not apply where a worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X."

20. Claims of unlawful detriment under Part V of the **ERA** - which includes Section 45A - can be enforced by complaint to an ET under Section 48. By Section 48(2), it is provided that on such a complaint, "*It is for the employer to show the ground on which any act or deliberate failure to act was done*."

21. The right not to be unfairly dismissed, as provided by Section 94 **ERA**, is generally limited to those who have the required two years qualifying service (see Section 108 **ERA**). That requirement does not, however, apply to those who can establish that they have been dismissed for a prohibited reason. Relevantly, under Section 101A it is provided:

"101A Working time 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 the employee-

(a). refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

(b). refused (or proposed to refuse) to forgo a right conferred on him by those Regulations…"

22. Where, as here, the Claimant does not have sufficient continuity of service to otherwise bring a claim of unfair dismissal, the burden is on him to demonstrate that the relevant matter is the reason, or principal reason, for the dismissal (see **Maund v Penwith District Council** [1984] ICR 143 CA); absent such an automatically unfair reason, the ET would not have jurisdiction to determine the complaint.

23. When considering a claim of detriment or dismissal in this context, the ET is concerned with the ground, or reason, for the employer's action or decision. In both cases this must be (relevantly) that the worker has refused, or proposed to refuse, to comply with a requirement that the employer imposed (or proposed to do so) in contravention of the **WTR** (here, to forego the rest breaks as provided by Regulation 12 **WTR**). Under Section 45A **ERA**, the requirement is only that this is the ground for the employer's action; that is, that it materially influenced - in the sense of being more than a trivial influence - the employer's action (see **Fecitt v NHS Manchester** [2012] ICR 372 CA). In a case where the complaint is of automatically unfair dismissal, under Section 101A **ERA**, the test is somewhat higher: this must be the reason, or principal reason, for the decision to dismiss.

24. In considering whether the ground, or reason, for the employer's action or decision was a relevant refusal, or proposal to refuse, on the part of the Claimant, the EAT (Langstaff P presiding) has held that the refusal must be explicit, see **Ajayi & Anor v Aitch Care Homes (London) Ltd** UKEAT/0464/11 at paragraphs 17 to 22. In that case, the Claimants had been dismissed after being found asleep whilst supposedly working on the night shift. The EAT (as had the ET before it) rejected the argument that this could amount to a refusal to forego rest breaks under the **WTR**, holding that the refusal required under the statute had to be something

more than non-compliance with an instruction: there had to be some communication of the Claimant's refusal - a refusal, or proposal to refuse, that was thus made explicit.

25. In reaching that conclusion, the EAT in **Ajayi** does not seem to have been referred to the earlier decision of a different division of the EAT (Lady Smith presiding) in **McLean v Rainbow Homeloans Ltd** [2007] IRLR 14. In that case, the ET had found that the Claimant's claim must fail because his reason for refusing to work in breach of the **WTR** was not actually because he was refusing to work in contravention of those rights but because he did not want to work weekends. Lady Smith concluded that revealed an error of approach, reasoning:

> **"17. It is plain from the term of s. 101A that the issue that ought to have been addressed was one of whether or not the claimant was asserting that he had been dismissed because he had refused to comply with a requirement which the respondents proposed to impose which, as a matter of fact, amounted to a requirement that would have contravened** WTR**. It is not necessary, for the purposes of s. 101A that the dismissal in question occurs because the employee has positively asserted any right under the regulations (although he would, separately, have had good grounds for claiming disapplication of the one year requirement had he done so, given the terms of ss. 104 and 108(3)(g)). All that is required is that employee has refused to accede to a requirement that would have breached the regulations and that the dismissal is because of that refusal. The fact that the requirement would have breached the regulations does not, however, have to be the reason for the employee having declined to comply."**

26. In considering the approach that should be taken to Section 45A **ERA** in **Gale & Ors v Mid & West Wales Fire Service** UKEAT/0365/14, it appears that I was referred to neither **Mclean** nor **Ajayi**. Although the approach I suggested did not adopt the reasoning of either of those cases, on analysis I am not sure there is any real difference between the tests applied.

27. In **Gale**, the Claimants argued that - even if they had not expressly raised their concern with the employer's proposals as being in contravention of (in that case) Regulation 10 **WTR**:

> **"…the fact that they had signified their unwillingness to agree to work to a system that would require them to forgo their Regulation 10 rights was sufficient for section 45A(1)(b) purposes, whether or not they actually specifically made an allegation to this effect."**

28. In rejecting that argument, I explained my approach as follows:

> **"65. Should the ET have proceeded on the basis that the Respondent was, by implication, aware that the Claimants were objecting to the removal of rest break rights in general terms albeit that no specific point had been raised?…**
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> **66. That said, the protection afforded under section 45A(1) has to relate to something: something on the part of the worker has to have materially influenced the employer. Where the protection arises prospectively, there must be something that signifies that the worker proposes to refuse to forgo a right conferred by the WTR."**

29. Allowing that Sections 45A and 101A **ERA** are intended to provide a protection against a form of victimisation - although not in precisely the same way as provided under the **Equality Act 2010** – there has to be something that signifies that the Claimant was refusing, or proposing to refuse, to comply with a requirement that would contravene the **WTR**. That said, neither Section 45A(1)(a) nor 101A(1)(a) require that the Claimant must have signified that refusal by a specific means (contrast, for example, the requirement at Section 45A(1)(c) or (e)) and I do not consider it would be consistent with the protective purpose of the legislation for the employee to be required to state precisely which provision of the **WTR** was in issue, or even to have positively asserted a right under the **WTR** (see **McLean**). The refusal has to relate to the imposition of, or proposal to impose, a requirement that would contravene the **WTR**; the worker is not required to identify the particular contravention. On the other hand, as the EAT held in **Ajayi**, there has to have been an explicit communication of the Claimant's refusal, or proposal to refuse, to comply with the employer's requirement. If it was sufficient that the worker, as a matter of fact, did not comply with the requirement that the employer had imposed, or proposed to impose, in contravention of the **WTR**, there would have been no need for Parliament to include the requirement that the worker had done so.

The Grounds of Appeal and the Parties' Submissions

30. By his first ground of appeal, the Claimant complains that the ET failed to make a crucial finding of fact as to whether the requirement that he attend Client L was a requirement imposed, or proposed to be imposed, by the Respondent in contravention of the **WTR**. For the

A Respondent it is observed that the ET proceeded on the assumption that Sections 45A and 101A **ERA** were engaged in this case; the issue raised by the Claimant could not have prejudiced his position and, given that the Respondent had taken no point in this regard, was academic at this stage.

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31. By ground two, the Claimant submits that the ET misdirected itself in holding that his reason for refusing to comply with the relevant requirement was determinative of whether Sections 45A(1) or 101A(1) **ERA** were engaged (relying on reasoning of the EAT in **McLean v Rainbow Homeloans Ltd** in this regard). The Claimant urges that the protection against detriment must be seen as a form of protection against victimisation akin to that provided by Section 27 **Equality Act 2010**. He contends that in **Gale** the real focus was on the reason in the employer's mind, not on the worker's subjective intent.

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32. The Respondent disagrees with this analysis, arguing that the ET's approach in the present case was consistent with the relevant case law (see **Gale** at paragraph 66 and **Ajayi** at paragraphs 17 to 22). It submits that more weight should be given to the EAT's Judgment in **Ajayi** because there the point was fully argued, when that was not the case in **McLean** (where the Claimant was not in attendance). On the basis of the relevant case law, the Respondent submits that, not only must the Claimant have made his refusal, or proposal to refuse, explicit, there must, furthermore, be something signifying a refusal to forego **WTR** rights.

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33. In any event, by ground three, the Claimant complains that the ET *had* found that his reason for not returning to Client L was because he had been refused a break (see paragraph 65 of the ET's Judgment). For the Respondent it is objected that that finding related to the ET's consideration of the Claimant's breach of contract claim, at which stage the focus was on what

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was in the mind of the employer rather than, as would be relevant to the Sections 45A and 101A claims, on the reasoning of the Claimant. In any event, the finding in question related to what had motivated the Claimant in the past (on the previous shift at Client L), not to his subsequent reason for refusing to return to Client L.

34. In a further alternative, by his fourth ground of appeal, the Claimant contends that it would have been perverse for the ET to find other than that his reason for refusing to return to Client L was the refusal of his right to a rest break. For its part, the Respondent observes that a perversity challenge faces a high threshold (see **Yeboah v Crofton** [2002] IRLR 634 CA); it contends that, given the ET's findings as to the gaps in the Claimant's evidence, and given his statement to his line manager that he believed "*the head chef won't be nice with him*" (see the ET at paragraph 24), it had not been perverse for the ET to conclude that the requisite reason had not been established.

35. Finally, by the fifth ground of appeal, the Claimant contends that, in determining Mr Bouteldja's reason for threatening him with dismissal (the detriment of which the Claimant complained), the ET had: (i) failed to apply the reverse burden of proof under Section 48(2) **ERA**; or (ii) failed to apply the correct test, which required only that the prohibited reason be a material factor in the relevant decision. The Respondent objects that this was not a point taken before the ET but, in any event, submits that the application of Section 48(2) would make no difference given: (i) it was incumbent on the Claimant to raise a *prima facie* case; (ii) the Respondent had provided a reason for the text that was other than the prohibitive reason; and (iii) even if the ET had rejected the Respondent's case on reason, it was not bound to find that the detriment was for the prohibited reason (see **Dahou v Serco Ltd** [2016] EWCA Civ 832 at paragraph 40).

36. During the course of the oral hearing, both parties acknowledged my decision on the appeal, in relation to the claims under Sections 45A and 101A, would need to into account the ET's findings at to the Respondent's reason for dismissing the Claimant at paragraphs 62 and 66 of the Judgment – it being necessary to read the ET's reasoning holistically. More specifically, for the Respondent, it was conceded that these findings would be sufficient to establish that the Claimant's refusal - if a relevant refusal (see above) - had materially influenced Mr Bouteldja for the purposes of Section 45A **ERA**. It was not, however, accepted that this necessarily meant that his refusal to work at Client L was the reason or principal reason for the dismissal for Section 101A **ERA** purposes.

Conclusions

37. Relevantly for present purposes, there were two complaints before the ET. The first was a complaint of unlawful detriment; this related to Mr Bouteldja's text, threatening the Claimant that if he did not return to Client L he would lose his job. The second was of automatic unfair dismissal, the dismissal of the Claimant having taken place almost immediately after the detrimental act alleged in respect of Mr Bouteldja's text, threatening that he would be dismissed.

38. In relation to both claims, the ET first needed to find whether the Claimant had refused, or proposed to refuse, to comply with a requirement which the Respondent had imposed, or proposed to impose, in contravention of the **WTR**. Here, the relevant requirement was that the Claimant should forego his rest breaks. On that basis, the claims could be more straightforwardly have been put under Section 45A(1)(b) and Section 101A(1)(b), but it is not suggested that this undermines the Claimant's claims in any respect. In any event, although the ET did not expressly state that it had found that the requirement made, or proposed, by the

Respondent was in contravention of the **WTR**, it is accepted that this much is implicit from its reasoning.

39. The real issue between the parties on this appeal has been whether the ET then erred in concluding that the Claimant had not made good the other precondition for protection under Sections 45A or 101A; that is, that he had refused, or proposed to refuse, to comply with that requirement.

40. For the ET this became the crucial question. It had accepted that the Claimant had left his shift at Client L on 23 November because he was denied his rest break. When it considered why Mr Bouteldja had threatened that the Claimant would lose his job (the detrimental act), however, the ET found this was not in response to the Claimant having left his shift on 23 November, but was due to his subsequent refusal to attend for work at that site (see the ET at paragraph 57). In determining what was in Mr Bouteldja's mind, when deciding that the Claimant should be dismissed, the ET thus found that he took the decision he did because the Claimant had refused to attend clients' sites – including Client L's site - as instructed. So, the issue was not why the Claimant had left his shift at Client L, but why he was refusing to return. If that was because to return would mean complying with the requirements that he forego a rest break under the **WTR**, then the Claimant would fall under the protection of Sections 45A and 101A. If, however, it was for some other reason, he would not.

41. The Claimant says that the ET's approach in this regard adds a gloss on the statute and he contends that the ET was wrong to focus on his subjective reasoning: the question, throughout, should have been what was the ground, or reason, for the Respondent's action or decision. That argument is met, however, with the difficulty that the ET found that it was the

A Claimant's refusal to return to Client L's site that led to the detrimental act, and then to his dismissal. On its face, that is not straightforwardly a finding that this was because the Claimant had refused, or proposed to refuse, to comply with a requirement that would contravene the **WTR**; a further step would then be required. Specifically, the ET had to determine what the Claimant was doing when he said he would not work for Client L. Was he communicating a relevant refusal or proposal to refuse? On this crucial issue, the ET found there was "*insufficient evidence from the Claimant about why he was refusing to go back to Client L*." It was for that reason that it dismissed his claims. The real question that arises on this appeal is whether that was a permissible finding by the ET.

D 42. The assessment of evidence must be a matter for the ET. It, after all, has the benefit of hearing the evidence, duly tested under cross-examination. That said, in the present case, there was plainly evidence before this ET that might be thought to have strongly suggested that the Claimant's refusal was due to the **WTR** issue - a refusal to agree to working arrangements that did not respect his right to a rest break. That, after all, was why the ET found that the Claimant had previously left his shift at Client L, refusing to stay until 10.30pm as he had been requested. That, furthermore, was what the Claimant complained about in his email to the Respondent on 11 January 2018; specifically, the Claimant explained to the ET that when he used the term "mobbing", that referred to his being dragged back to work, away from his break (see the ET at paragraph 34).

G 43. The Respondent points out, however, that the evidence was not all one way. Before the ET, the Claimant had also "*referred to the chef being unpleasant to him*" (see the ET at paragraph 58); it submits that this provides some evidential basis for a finding that the Claimant's refusal was for a reason other than those which would afford him protection of

A Sections 45A and 101A. That is true but the difficulty with that submission is that the explanation provided can be seen as one and the same as the **WTR** issue. First, because when the Claimant made his complaint to Human Resources (on 26 November), he explained that one of the Head Chefs at Client L had called his line manager when he refused to stay until 10.30pm because he had not been given his rest break (see the ET at paragraph 20). Furthermore, when the Claimant was questioned about his reasons for not wanting to return to Client L's site, although he referred to two occasions when Head Chefs at Client L had been unpleasant to him, the last of those occasions had been on 23 November, when the unpleasantness seems to have solely related to his refusal to forego his rest break entitlement (see paragraph 38).

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44. The Respondent points out that all this related to the past; the ET was concerned with the Claimant's prospective refusal. That may be so, but the ET then went on to make findings as to the Claimant's reasons for subsequently refusing to return to Client L. Having stated that, "*the Respondent knew why he was refusing and there was, on each occasion, a reason*", the ET was clear: "*There were no circumstances where the Claimant refused to attend work without there being a background problem which the Claimant had raised with the Respondent*." In the case of Client L, at least part of the "*background problem*" was the refusal to respect the Claimant's rest break entitlement. Indeed, the ET's finding was explicit in this regard: "*When the Claimant then refused to return to client L, it was because he had been refused his break, and there was a breakdown in the relationship between the Claimant and the chef*."

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45. The Respondent says that this finding is not relevant to the ET's earlier consideration of the Claimant's case of **WTR** detriment or dismissal. First, it appears under a different part of the ET's Judgment, expressly under the heading "Breach of Contract." Second, and more

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substantively, at this stage of its reasoning, the ET's focus was on the Respondent's reason for dismissal - whether it was entitled to summarily dismiss the Claimant - rather than on the Claimant's reason for refusing to return to work at Client L.

46. I do not find either objection persuasive. First, because the basis for a judicial decision will generally be undermined if one part of the reasoning is inconsistent with another. Second, because, when determining whether the Respondent had a contractual right to summarily dismiss the Claimant, the ET was not solely concerned with the Respondent's subjective reasoning; it was also applying an objective test: had the claimant acted in repudiatory breach of contract? And that brings me to the third point, which is that the ET was plainly not limiting itself to what was in the Respondent's mind when deciding that the Claimant ought to be dismissed. Expressing itself in entirely objective terms, it stated its finding to be that the Claimant refused to return to Client L "*…because he had been refused his break, and there was a breakdown in the relationship between the Claimant and the chef*." On that basis, it was inconsistent for the ET to find there was insufficient evidence as to why the Claimant was refusing to return to Client L when it then went on to find that there *was* sufficient evidence to determine his reasons. The most the Respondent can really suggest is that the ET's findings are capable of suggesting two reasons for the Claimant's refusal (albeit, even then, the breakdown in the relationship with the Head Chef could be seen as referable to the rest break issue) but, even if one allows for the possibility that, by refusing to return to Client L, the Claimant was communicating *both* that he was concerned about the Head Chef and that he was not prepared to work in contravention of the **WTR**, he had done sufficient for the purposes of Sections 45A and 101A purposes. For those reasons, I would therefore allow this appeal.

47. The question then arises as to whether - adopting, as I have, the ET's findings of fact in relation to the breach of contract claim - there is only one answer in this case; that is, that the Claimant was subjected to detriment and/or dismissed for the relevant prohibited ground or reason? At this stage, the focus is on the Respondent's ground, or reason, for the detrimental act and dismissal.

48. In my view, the answer, once again, is largely to be found in the ET's conclusions on the breach of contract claim. It is apparent that (at paragraphs 62 and 66) the ET went on to make findings as to what was in the mind of Mr Bouteldja when he decided that the Claimant should be dismissed: "*It was quite simply because the Claimant had refused to attend client sites as instructed twice, being his refusal to go to client B and client L's sites*."

49. Although the ET's findings in respect of the breach of contract claim could be said to only relate to the reason for dismissal, it is plain that the same findings must also apply to the threat relied on as the detrimental act. The detriment claim, after all, relates to the threat of dismissal, which was only moments before the dismissal itself; there is no suggestion there was any different reason for the refusal to return to Client L on the Claimant's part or any different motivation in Mr Bouteldja's mind at the relevant time. Asking then, whether the Claimant's refusal to return to Client L - which was the communication of a refusal to comply with a requirement in contravention of the **WTR** - and asking whether that materially influenced the threat made to the Claimant by Mr Bouteldja, I am satisfied that there can only be one answer; it plainly did. That, in my judgement, is therefore determinative of the Section 45A detriment claim.

50. The question for Section 101A purposes is, however, different. In this respect, the issue is whether the Claimant's refusal (or proposal to refuse) was the reason, or principal reason, for the dismissal. That is something more than a "material influence" and, in this regard, the Respondent says I cannot read the ET's reasoning as going so far. There is, moreover, also the possibility that it was that aspect of the Claimant's refusal to return to Client L that related to his relationship with the Head Chef - which might be wider than the prohibited reason - that weighed with Mr Bouteldja. Yet further, given that the ET also found that the dismissal was because of both refusals - the Claimant's refusal to go back to Client B as well as his refusal to return to Client L – the Respondent says it cannot be said that the latter must have been the sole or principal reason for the Claimant's dismissal.

51. I have not found this point easy. I am not overly impressed by the possibility of there being a twofold reason for dismissing the Claimant for his refusal to return to Client L: Mr Bouteldja was not concerned with whether the Claimant had fallen out with the Head Chef, it was the simple refusal to work for that client to which he objected. That, in turn can be seen as the simple refusal to comply with the Respondent's requirement that he work for Client L, which was - for the reasons already explained above - a reason that related to the **WTR** issue. As for the refusal in relation to Client B, it seems to me that the ET's finding at paragraph 66 might well suggest that, ultimately, it was the refusal in relation to Client L that was determinative. I accept, however, that the ET has not expressly stated that to be the case and, given the possibility that there might be more than one answer on this point (and following the guidance provided by the Court of Appeal in **Jafri v Lincoln College** [2014] ICR 920), ultimately, I consider I have to remit this point.

52. For the reasons I have provided, I therefore allow the appeal and, in respect of the detriment claim, I set aside the ET's Judgment and substitute my finding that this claim is upheld. On the question of the claim of automatic unfair dismissal, however, I am remitting this matter to the ET, to determine whether the Claimant's refusal, or proposal to refuse, was the reason or principal reason for the dismissal. In this regard, having heard from the parties on the issue of disposal, and having had due regard to the guidance in **Sinclair Roche and Temperley v Heard & Fellows** [2004] IRLR 763 EAT, it is clear to me that the appropriate course is to remit to the same ET, if that remains reasonably practicable. In particular, I bear in mind that this is a relatively short point and most of the ET's findings remain undisturbed (indeed, the ET's findings of fact in relation to the breach of contract claim, have informed my decision on the detriment and dismissal claims); the hearing took place just under a year ago and I cannot imagine that, using her notes and having regard to hear earlier findings, the Employment Judge would be unable to recollect the evidence that had previously been given. There is, further, no reason to doubt the professionalism of this Employment Judge and this is not a case where it has been suggested that the Judgment was wholly flawed or that there was any question of bias or procedural impropriety. As for the future conduct of this matter, the ET will be best placed to decide how to proceed with the remitted hearing in accordance with the overriding objective.