Appeal No. UKEAT/0239/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 March 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MID ESSEX HOSPITAL SERVICES NHS TRUST — APPELLANT

MR A SMITH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES ARNOLD (of Counsel) Instructed by: Capsticks Solicitors 1 St Georges Road Wimbledon London SW19 4DR
For the Respondent	MR SIMON PERHAR (of Counsel) Instructed by: Lyon Davidson Solicitors 43 Queen Square Bristol BS1 4QP

SUMMARY

UNFAIR DISMISSAL - Automatically unfair reasons

VICTIMISATION DISCRIMINATION - Protected disclosure

Unfair dismissal - automatically unfair reason for dismissal (protected disclosure) - section 103A ***Employment Rights Act 1996***

Detriment - protected disclosure- section 47B ***Employment Rights Act 1996***

The Claimant was employed by the Respondent as an Anaesthetics Nurse. He was also a steward for the Royal College of Nursing. The ET found that the Claimant was a campaigner and effective trade union representative and had been viewed as a nuisance and source of irritation by managers within the Respondent. It was against that background that the Claimant made the protected disclosures relied on in these proceedings. The ET was satisfied that the Claimant had discharged the initial (evidential) burden of showing his protected disclosures had materially influenced the Respondent's decision that he should be suspended and subjected to a disciplinary process and had been the reason or principal reason for his dismissal. The ET rejected the potentially fair reasons relied on by the Respondent - conduct or some other substantial reason, namely a breakdown in relations. The ET further found that the managers involved in the dismissal and appeal decisions had been aware both what a nuisance the Claimant had been and of his whistleblowing. Rejecting the suggestion that this was a case akin to **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500 EAT, the ET concluded that the reason for dismissal was the fact that the Claimant had made the protected disclosures relied on. It further found the reason for the Claimant's suspension was not made out and again concluded this had been because of his protected disclosures. The Respondent appealed against the ET's findings on the Claimant's whistleblowing complaints.

Held: *allowing the appeal in part*

Having found that the relevant decision takers in respect of the Claimant's dismissal and appeal had in mind *both* that he had been a nuisance in his campaigning and trade union activities *and* the fact of his having made protected disclosures, the ET needed to engage with the question which had been the real reason or principal reason for the dismissal? Although it had stated it had found that the reason for dismissal had been the Claimant's protected disclosures, there was nothing to demonstrate it had considered the alternative - that the decision takers' view of the Claimant as a nuisance was the principal reason. On the ET's findings, however, that had been left as a possibility, notwithstanding its rejection of the Respondent's positive case on the dismissal having been for a reason related to the Claimant's conduct or for some other substantial reason (**Kuzel v Roche Products Ltd** [2008] IRLR 530 CA applied). The appeal would therefore be allowed in this respect and the question of the reason or principal reason for dismissal remitted to the ET.

The ET had, however, been entitled to distinguish this case from that of **Panayiotou v CC Hampshire Police**; the issue in this case was not the manner in which the Claimant had made his protected disclosures but his entirely separate conduct that led the Respondent to view him as a "nuisance". The separate grounds of appeal on this point would be dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises questions arising from findings of detriment and dismissal for making protected disclosures in circumstances where the Employment Tribunal ("ET") had found that the employee concerned was generally seen as a nuisance by the managers involved in the relevant decisions; the Appellant contends the ET lost sight of those findings - and, thus, the potential alternative reason for the matters complained of - when it upheld the Claimant's complaints.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal against the Reserved Judgment of the ET sitting at Colchester (Employment Judge Warren sitting with members, Mr Quinn and Mrs Saund, over seven days in November 2016 with a further four days in Chambers), sent out on 9 February 2017. Representation before the ET was as it has been today.

The Background Facts and the ET's Decision and Reasoning Relevant to the Points Raised by the Appeal

3. The Claimant was employed by the Respondent as a Nurse for some 28 years; he started as a Recovery Nurse, but in 1999 had qualified in anaesthetics and took up a position as a Charge Nurse in Anaesthetics working in theatres. Throughout his employment he was also a Royal College of Nursing ("RCN") local steward and, as such, had been instrumental in certain campaigns - for example, regarding the non-payment of recruitment and retention payments to staff - and in representing RCN members in discipline and grievance proceedings. Those matters formed part of the relevant background to the Claimant's ET case, although his actual

complaint was not that he had suffered detriment or was dismissed because of his trade union activities but because of protected disclosures he made in December 2013 and April 2014.

4. Before the events with which the ET was concerned in these proceedings, the Claimant had an unblemished career, in that he had been a subject of no patient complaints, no disciplinary issues and no questions as to his clinical competence. That said, it was apparent to the ET that management had perceived the Claimant as having been a "*nuisance*". He was a campaigner and an effective trade union representative and his involvement in matters - specifically the cases of RCN members Mr Saunston and Ms Dando - had been an additional source of irritation for management. Moreover, the way in which the Claimant had pursued matters had been drawn to his attention at various times preceeding the events with which the ET was most directly concerned.

5. Turning to the matters at the heart of the claim before the ET, it was common ground that, on 16 December 2013 and then on 22 April 2014, the Claimant had made a number of protected disclosures. It was the Claimant's case that, by reason of these disclosures, he was subjected to disciplinary proceedings in July 2014, when he was suspended, and that these disclosures were also the real reason for his dismissal on 7 July 2015. For the Respondent, on the other hand, it was said the Claimant was guilty of gross misconduct justifying his summary dismissal, or, in the alternative, his dismissal was for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the Claimant held, namely a breakdown in the relationship between employer and employee.

6. The ET found that the Claimant had discharged what it described as the preliminary burden of proof, such as to suggest that the reason for his dismissal might not be conduct or

some other substantial reason as the Respondent had asserted. It considered, first, that the Claimant's case was supported by the timing. The Claimant had been absent from work due to ill health between May 2013 and January 2014. He had made his first series of disclosures on 1 December 2013; some of those disclosures related to medication and patient care issues but the Claimant also suggested that staff were being bullied and harassed by managers and not provided with adequate rest under the **Working Time Regulations**. Very shortly after the Claimant's return to work on 13 February 2014, he had confirmed that he wanted these disclosures treated as whistleblowing. Four days later he was sent an email stating he was required to meet with the Respondent's Head of Nursing, Ms Foster, and a representative of Human Resources, Ms Rogers. A little later, on or around 24 February, the Claimant heard from colleagues that they thought there was a witch hunt against him and he was told that Mr Watson, the Operating Department Practitioner, was gathering statements against him.

7. For completeness, I note that the Claimant's subsequent disclosures on 22 April 2014 concerned staff recruitment and retention payments, rest breaks and allegations of bullying and harassment and also stated that there was a lack of equipment and supplies in the Respondent's operating theatres.

8. Returning to the ET's reasoning, the ET also considered it relevant that the Respondent had taken the position that the Claimant was not entitled to have a trade union representative present with him at the meeting with Ms Foster, although the Respondent's Human Resources advisers and managers would have been aware this had been agreed as part of the Claimant's return to work programme. Yet, further, the ET took account of the fact that the Respondent - through its HR advisers and managers - had at all times ignored the possible link between the action being taken and the Claimant's whistleblowing.

9. More substantively, the ET considered the Respondent's disciplinary investigation and report were cursory and flawed. It made detailed findings in respect of each of the disciplinary allegations made against the Claimant, concluding the report provided no basis for suggesting he had made vexatious or malicious allegations (as was contended by the first charge). Although the ET accepted there was some independent evidential basis - the evidence of Ms Blunsten (the Respondent's Workforce Systems Manager) - for the second charge (that the Claimant had displayed disruptive behaviour in a unit meeting on 7 July 2014 - see below), it was concerned that the dismissing manager, Ms Hinton (the Respondent's Deputy Chief Nurse), appeared not to have reflected on evidence to the contrary supplied by the Claimant's witnesses (albeit the ET allowed that Mr Watson had advised the Claimant at the meeting that his questions were inappropriate but he had carried on in any event). As for the third charge - that the Claimant had continued to send confidential sensitive emails to his home or personal email address notwithstanding he had been told to stop doing so (although, the ET noted, he had not then been advised he might be disciplined or dismissed for gross misconduct if he continued) - the ET found there was no clarity as to what constituted sensitive and confidential information. The ET further found there were no reasonable grounds for the fourth charge relating to the quantity of emails sent to Trust officers, concluding that the instruction given in this regard was unclear and that the actual quantity of emails was not great. And as for the more general allegation of a breakdown in trust and confidence - the sixth charge - the ET found this was really in respect of the Claimant's relationship with three specific individuals - Mr Watson, Ms Foster and the Respondent's Head of Theatre and Anaesthetics, Ms Hine - who were all implicated in his whistleblowing allegations. The ET then summarised its findings on the disciplinary allegations as follows:

> **"272.1. Allegation 1, unfounded and vexatious allegations - no merit at all.**
>
> **272.2. Allegation 2, July 7 meeting - very minor.**
>
> **272.3. Allegation 3, sending emails home - no merit at all.**

272.4. Allegation 4, quantity of emails - no merit at all.

272.5. Allegation 5, failure to follow management instructions - falls down due to lack of merit in the previous allegations.

272.6. Allegation 6 - there may have been a breakdown in the relationship between Mr Smith and the three named managers, but that does not mean there has been a breakdown necessarily, of the relationship between Mr Smith and the Trust as a whole. There is no analysis of whether it may be possible to place him elsewhere and no analysis of where fault for that breakdown lies, in particular whether it might lie with Messrs Watson, Hine and Foster."

10. The ET also considered it relevant that the Respondent had failed to take account of the Claimant's health issues. It was apparent from the correspondence that he was unwell, and the ET had seen a psychiatric report that advised that the Claimant had been diagnosed with mild Asperger's Syndrome (albeit the Respondent did not have that advice at the time). The Respondent had appeared to ignore the advice it had received from Occupational Health or had put its own spin on that advice.

11. Yet further, the ET was concerned by the Respondent's failure to disclose an email from the Care Quality Commission ("the CQC") and a response from Ms Geddes (the Respondent's Chief Nurse); the failure to disclose those documents throughout the litigation process was, the ET considered, an indication of possible bad faith. The CQC had emailed the Respondent on 9 July 2014, asking for an update on the investigation relating to the Claimant in the light of "*numerous*" communications it had received from him. Ms Geddes had responded attaching a document drafted by the Respondent's HR Adviser, Ms Stephenson, which stated as follows:

"AS has had a history of disruptive behaviour. He has been involved as a union representative/colleague in previous grievance/disciplinary cases and continues to refer to these cases in his whistleblowing claims and his own grievance issues. Since early 2014 AS has sent large volumes (100 plus) of emails relating to his issues to a number of senior staff within the Trust despite being requested to send emails to one identified contact point only. In addition, despite being requested to not send emails containing sensitive information outside the Trust to his home email account, AS has continued to do this.

In April 2014 AS was warned that should he continue causing disruption he would be suspended from duty. A further incident of disruptive behaviour occurred this week on 7/7/14, following which he has been suspended. This matter will now be dealt with in accordance with the Trust disciplinary policy." (ET's Decision, paragraph 117)

Those documents were before the ET after the Claimant obtained them through a subject access request to the CQC; they had not been disclosed by the Respondent. Ms Geddes had said that she had forgotten about this exchange, but the ET found that was implausible.

12. In these circumstances, the ET looked to the Respondent to show that the reason for the Claimant's dismissal was as it had asserted; that is, as relating to the Claimant's conduct or for some other substantial reason, namely a breakdown in working relationships.

13. The ET considered its findings on the disciplinary charges pointed to the contrary. More than that, however, its assessment of the situation was that the Claimant had been a nuisance to the Respondent and to three particular managers (see the ET at paragraph 283); he was an effective trade union representative and his involvement in particular cases had been an additional source of irritation. Against that background, he had made his protected disclosures in December 2013 and "*suddenly, everything went wrong*" (see the ET at paragraph 284). The Respondent, however, steadfastly ignored the Claimant's attempts to link subsequent events with his whistleblowing, albeit the first disclosures had appeared to "*trigger things off*" and the second disclosures had appeared "*to add to the momentum*" (see the ET at paragraph 285). For its part, however, the ET considered that the allegations against the Claimant were "*either so weak or without merit, that we are unable to accept that the real reason for dismissal was the alleged misconduct and in our view, was more likely, the whistleblowing*" (paragraph 286). Moreover, Mr Watson, Ms Foster and Ms Hine (all implicated in the Claimant's disclosures):

> **"287. … were behind the events that led to the suspension and the investigation, (the allegations of canvassing witness statements by Mr Watson in the events of the 7 July meeting). No one considers if that might be why these allegations are made against Mr Smith and we have here, no evidence from them."**

14. Equally, the decision takers, Ms Hinton (who took the decision to dismiss) and Ms Geddes (who rejected the Claimant's appeal):

> **"288. … are aware of what a nuisance Mr Smith has been and of the whistleblowing. The weak nature of the case reveals a determination to get rid of him, which has nothing to do with his abilities and in circumstances where no reasonable employer would choose to dismiss him for the allegations which were brought against him."**

15. Although Ms Geddes had said, in her witness statement, that her first involvement in this matter was when she was asked to hear the Claimant's appeal against dismissal, the ET rejected that evidence, observing that not only had she been involved in the decision to suspend the Claimant but she had also responded to the CQC's enquiry regarding the investigation into him and, in her covering email, had volunteered to go through any of the content by telephone.

16. The ET further rejected the suggestion that the Claimant was dismissed for some other substantial reason because he had become unmanageable. Accepting that the Claimant was "*moderately difficulty to manage*", the ET rejected any suggestion that he was "*exceptionally so*", holding "*That does not make him unmanageable in the workplace*" (paragraph 290).

17. This was, the ET further found, not a case akin to **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500 EAT. In that case the ET had been entitled to draw a distinction between the making of the protected disclosure, the information provided, and reaction to the manner in which those complaints were raised. Noting that each case must turn on its own facts, the ET observed that the Claimant had been a campaigner in the past, carrying out his role as an RCN representative with the Respondent; he did not embark upon a campaign after receiving a particular outcome to his disclosures - indeed, he had not received an outcome to the investigation into his disclosures until October 2015 and he had been suspended in July 2014. The ET rejected the suggestion that the real reason for the Claimant's dismissal was the

manner of his making of complaints - the "*repeated emails to all and sundry*" - finding that was more "*a weak excuse amongst others, sought out to seek to justify dismissal*" (paragraph 291). The ET concluded:

> **"293. The reason for dismissal was, we conclude, on the balance of probability, that Mr Smith had made the protected disclosures relied upon. This is what was in the mind of Ms Geddes and Ms Hinton in their decision making. It was not the content of any one disclosure in particular, it was the collective of the disclosures, the fact that he had made them at all, that was in the mind of Ms Hinson and Ms Geddes. Mr Smith's claim for unfair dismissal succeeds."**

18. In the alternative, the ET would, in any event, have found the Claimant to have been unfairly dismissed for the purposes of section 98 of the **Employment Rights Act 1996**:

> **"294. For the avoidance of doubt, had we decided otherwise, we would nevertheless have found that Mr Smith was unfairly dismissed, for we would have found that there was no reasonable investigation and that the Respondent did not have reasonable grounds to believe that he was guilty of the misconduct for which he was charged. Insofar as there was misconduct on his part, the decision to dismiss lay outside the range of responses of a reasonable employer; it was not sufficiently serious as to warrant dismissal without warning, particularly when one bears in mind that Ms Hinton acknowledged in evidence that she had not taken into account Mr Smith's length of service and unblemished disciplinary record and further, the Respondent ignored the potential mitigation of Mr Smith's mental health."**

19. As for the detriment complaints, the ET found as follows:

> **"295. As for the detriment claim; the detriments relied upon are his suspension and the disciplinary process, they are indisputably detriments. They are deliberate acts. The person who made the decision to suspend was Mr Forden and we did not hear evidence from him. Ms Geddes endorsed the decision. She relied on a breakdown of team work and referred to a matter about which we had not heard evidence. None of the 5 factors she listed as taking into account in deciding whether to suspend, would appear to have any application to a decision to suspend based on Mr Smith's conduct at the unit meeting on 7 July 2014. Ms Geddes[']thoughts about Mr Smith are clear from her report to the CQC, we do not accept her abdication of responsibility for the content of that. From that response, it is clear that a decision had already been taken to take disciplinary action. For those reasons and also having regard to our analysis set out above, we find that the decision to suspend Mr Smith and to subject him to the disciplinary process, was because of the protected disclosures and with a view to finding a means to dismiss him."**

20. To unpack that reasoning somewhat further, the reference to the meeting of 7 July 2014 was to a regular roughly monthly theatre unit meeting at which some 150 to 200 people would have been in attendance. Ms Blunsten had attended to make a presentation on a new IT-based rota system and the Claimant had asked a number of questions relating to overtime and bank rates of pay. Ms Blunsten could not comment on those questions and that had been drawn to

A the Claimant's attention, but he had continued to ask his question nonetheless. In saying why she endorsed the decision to suspend the Claimant after this, Ms Geddes had suggested this was due to patient risk as teamwork had broken down. The ET did not accept that evidence.

B

21. Further, as the ET was satisfied that the Claimant had not been guilty of gross misconduct his breach of contract claim for unpaid notice was also upheld.

C

The Appeal and the Parties' Submissions

22. The Respondent was permitted to pursue this appeal on grounds 1-2 and 5-6 of its Notice of Appeal. By its first and second grounds of appeal, the Respondent challenges the D ET's finding as to the reason for the Claimant's dismissal: by ground 1, it contends the ET failed to properly apply the Court of Appeal's guidance in **Kuzel v Roche Products Ltd** [2008] IRLR 530; by ground 2, it objects that the ET failed to provide adequate reasons in this regard. By its fifth and sixth grounds of appeal, the Respondent's challenge goes wider, also going to E the ET's finding on detriment as well as the reason for dismissal: it contends (ground 5) that the ET erred in failing to adopt the approach laid down in cases such as **Panayiotou v Chief Constable of Hampshire Police**, which recognise that a factor which is related to the F disclosure may be separable from the actual act of disclosure; alternatively (ground 6), it argues that the ET had again provided inadequate reasons for its decision.

G 23. The Claimant resists the appeal, essentially relying on the reasoning of the ET.

The Respondent's Submissions

H 24. Acknowledging that the ET had referred to the Court of Appeal's guidance in **Kuzel v Roche Products Ltd**, it was the Respondent's case that it nevertheless failed to allow for the

possibility that the reason for dismissal might be other than that asserted by the employer, without being such as to render the dismissal automatically unfair. In this case there had been three possible reasons for the Claimant's dismissal: first, that postulated by the Claimant - his having made a protected disclosure; second, that asserted by the Respondent - the Claimant's gross misconduct, alternatively some other substantial reason; or, third, that it was because the Claimant was a nuisance, a reason that arose from the ET's own findings of fact (see paragraphs 283 and 288). Following **Kuzel**, having rejected the Respondent's reason - conduct or some other substantial reason - the ET still needed to ask whether the reason was not something other than the Claimant's whistleblowing; specifically, it needed to ask whether it was not the fact that the Claimant was seen to be a nuisance. Instead of engaging with this as a potential reason for the dismissal, the ET failed to return to the point and that amounted either to an error of approach (per **Kuzel**) or a failure to provide adequate reasons.

25. This point further informs the fifth and sixth grounds of appeal, by which the Respondent contended that the ET had failed to see that factors related to the disclosure might still be separable from it (see **Panayiotou v CC Hampshire Police**, also **Bolton School v Evans** [2006] IRLR 500 and **Martin v Devonshires Solicitors** [2011] ICR 352). Having found the Claimant was seen as a nuisance, the ET failed to consider his disruptive behaviour as a whole, over a prolonged period of time, as to which his protected disclosures were just one element. Correctly approaching its task, the ET ought properly to have regard to the entirety of the Claimant's behaviour and then determine (1) whether the protected disclosures were a material influence on the decision to suspend the Claimant and pursue disciplinary proceedings against him, and/or (2) whether the protected disclosures were the principal reason for his dismissal. Again, the ET's reasoning failed to demonstrate it had engaged with this exercise and this either amounted to an error of approach or a failure to provide adequate reasons.

The Claimant's Submissions

26. On grounds 1 and 2, and the reason for dismissal, the Claimant argued that the case was clearly made out: the real reason for his dismissal was because he had made protected disclosures. The ET had permissibly rejected the Respondent's case that the reason for dismissal was misconduct or some other substantial reason because the Claimant was unmanageable. No further alternative reason was seriously put forward. The Respondent's case before the ET was that the dismissal was fair for reasons of misconduct as advanced by the Respondent. At paragraph 290, the ET had then dealt with the only other point taken: some other substantial reason. There never was any further alternative case put by the Respondent that being a nuisance was a competing or principal reason for the Claimant' dismissal. In truth, the Respondent was attempting to have a second bite of the cherry before the EAT by changing the argument from the Claimant being unmanageable to being a nuisance; the two terms were really the same thing. Although **Kuzel** allowed that an at ET could find the dismissal had been for a reason not put forward at trial, the Respondent in this case was trying to circumvent the findings on whistleblowing by raising the specious point that the principal reason for dismissal was because the Claimant was a nuisance. The ET, however, was unequivocal in finding the principal reason for the dismissal was whistleblowing (see paragraph 293). Any reference to the Claimant being a nuisance was background and nothing more. Specifically, at paragraph 283, the ET had made findings about the past and the Claimant's trade union activities - the matters that made him a nuisance. That this was, however, merely background was apparent from the next paragraph when the ET turned to Claimant's protected disclosures - "*Against that background ...*": the ET finding that it was only when he made the protected disclosures that "*then suddenly, everything went wrong*" (see paragraph 284).

27. As for grounds 5 and 6, the Claimant contended that, again, the undisputed findings of the ET make clear that his protected disclosures were the principal reason for the dismissal and detriment. Specifically, the ET had been careful (see paragraph 289) to clarify it was not the Claimant's case that there was a wide-ranging conspiracy to remove the whistleblower (that had been the Respondent's suggestion, not the Claimant's, and the ET was alive to that). The Claimant's behaviour, whether disruptive or not, provided relevant background detail but nothing more, and the actions of the Respondent were not for these other separable reasons, but squarely because of the whistleblowing (see the ET at paragraphs 291 to 293). That was a permissible conclusion for the ET having heard all the evidence and the EAT should be slow to interfere with a first-instance Tribunal's determination of the reason in these circumstances; a matter that Parliament had expressly left to the ET (and see cases such as **Hollister v National Farmers' Union** [1979] ICR 542 CA and **ASLEF v Brady** [2006] IRLR 576 EAT). These were, moreover, conclusions reached given the ET's view as to the credibility of the parties and witnesses and (as the Supreme Court had underlined in **McGraddie v McGraddie and Anor** [2013] 1 WLR 2477) an Appellate Tribunal should not interfere in the trial Judge's conclusion on the primary facts in such a case.

The Relevant Legal Principles

28. In his claims before the ET, the Claimant had complained of unlawful detriment (contrary to section 47B of the **Employment Rights Act 1996** ("ERA")), of automatic unfair dismissal (section 103A) and of ordinary unfair dismissal (section 98).

29. A detriment for the purposes of section 47B can arise from any act or failure to act (see section 47B (1)); it is, moreover, a term that is broadly defined, covering anything that might

A cause the reasonable employee to take the view that she has been disadvantaged (see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 HL).

B 30. By virtue of section 48(2) **ERA**, where a Claimant has established that there has been a protected disclosure and she has suffered a detriment, it is for the employer to show that the detriment was not because of the disclosure; that is, that the disclosure did not materially influence - in the sense of being more than a trivial influence - the employer's treatment of the

C Claimant (see **Fecitt v NHS Manchester** [2012] ICR 372 CA).

31. The language used when determining causation in an unlawful detriment claim is

D different to that applicable in a dismissal claim (whether brought under section 103A or section 98 **ERA**): for the purposes of a claim of unfair dismissal, the ET will need to ask, what was the reason or principal reason for the dismissal? That said, whether dealing with a claim of

E detriment or of unfair dismissal, it will be the mental processes of the relevant decision taker that will be key: the ET will need to determine what materially influenced the decision taker (in the detriment case) or what facts or beliefs caused her to decide to dismiss (in the complaint of

F unfair dismissal - see per Cairns LJ in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 CA). Moreover, just as the employer bears the burden of showing the reason for detriment under section 47B **ERA**, in an unfair dismissal case (save where an employee has insufficient service to pursue a standard unfair dismissal claim (not this case)) the burden of proof of

G showing the reason for dismissal remains firmly on the employer. If the employer is unable to discharge that burden, the ET is bound to find the dismissal unfair (**Maund v Penwith District Council** [1984] ICR 143 CA); it is not enough for the employer to demonstrate that there were

H circumstances that might have provided it with a fair reason for the dismissal if it cannot prove that was in fact its reason at the time (see **ASLEF v Brady** [2006] IRLR 576 EAT).

32. To the extent an employee disputes the reason given by the employer, an evidential burden arises to cast some doubt upon the employer's reason. The employee does not thereby assume the legal burden (see **Maund** at pages 149A-C); she merely has to demonstrate some evidential basis for questioning the employer's reason, not to prove some other reason was in fact the real one. Thus, where (as here) the employee has sufficient service to pursue a complaint of unfair dismissal under section 98 **ERA** the only burden they will bear in terms of showing the reason for dismissal is an evidential one, the necessary stages being as explained by the Court of Appeal in **Kuzel v Roche Products Ltd** as follows: (1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason? (2) If so, has the employer proved the reason for dismissal? (3) If not, has the employer disproved the section 103A reason advanced by the Claimant? (4) If not, dismissal is for the section 103A reason.

33. Although the employer, therefore, retains a legal burden of proof throughout, failure to establish its asserted reason for the dismissal does not necessarily mean that the reason must be as the Claimant contends. As Mummery LJ further explained in **Kuzel**:

> **"59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."**

34. Moreover, when determining what materially influenced the employer in a detriment case or what was the real reason for a dismissal, it may be that a question arises as to whether it was the protected disclosure *or* the manner in which that disclosure was made that was really in issue - what is sometimes referred to as the "issue of separability" (see, in particular, the guidance given by the EAT, Lewis J presiding, in **Panayiotou** at paragraphs 49 to 54).

35. In approaching the questions raised by this appeal, I bear in mind the danger of the EAT stepping into the shoes of the first-instance ET, or of adopting an overly pernickety approach to an ET Judgment (see, for example, the warning given by the Court of Appeal in **Brent London Borough Council v Fuller** [2011] ICR 806, per Mummery LJ at paragraphs 28 to 30). That is particularly so where - as in the present case – the finding in question is one that has been left by Parliament to the ET, and involves an assessment of the primary findings of fact.

Discussion and Conclusions

36. Although the ET's conclusions as to whistleblowing detriment and dismissal are both challenged by this appeal, the focus has been on the ET's finding as to the reason for the Claimant's dismissal. Having heard all the evidence, the ET rejected the Respondent's case that the reason related to the Claimant's conduct/alternatively to some other substantial reason, namely a breakdown in the working relationship. Those were conclusions open to the ET on the evidence and the Respondent cannot, and does not, seek to go behind those findings. It is further apparent that the Respondent had failed to satisfy the ET that the reason for the dismissal was one that was capable of being fair for the purposes of section 98 **ERA**; it was, accordingly, an unfair dismissal. The Respondent objects, however, that this does not necessarily mean that it was unfair as having been for a prohibited reason under section 103A **ERA**; it did not automatically follow that the Claimant's protected disclosures were the reason or principal reason for his dismissal (see the third stage of the **Kuzel** guidance).

37. In this case, the ET was apparently mindful of the guidance given by the Court of Appeal in **Kuzel** and duly started by adopting a staged approach when determining whether the Claimant had been automatically unfairly dismissed. It being accepted that the Claimant had made a number of protected disclosures in two batches, the ET started with the question

whether the Claimant had satisfied the evidential burden he bore, such as to suggest that the reason for his dismissal might not be conduct or some other substantial reason (as the Respondent had asserted). The ET was clear that the Claimant had discharged this burden: (i) because of the coincidence of timing; (ii) because of the Respondent's position regarding the Claimant's entitlement to have a trade union representative at meetings with management; (iii) because the Respondent simply ignored the possibility of any link with the Claimant's protected disclosures; (iv) because his view that he was the subject of a witch-hunt was shared by his colleagues; (v) because the investigation and report were cursory and flawed; and (vi) because the Respondent had failed to disclose a CQC email and response from Ms Geddes which suggested the possibility of bad faith.

38. The ET then turned to the question whether the Respondent had made out its primary case that the Claimant had been dismissed for a reason relating to his conduct. It was satisfied it had not: going through each of the allegations relied on as together amounting to gross misconduct, the ET found these were so weak or without merit that it could not accept that misconduct was the real reason for the dismissal. This finding further affirmed the ET's view that the Claimant had shifted any evidential burden that he faced in terms of his positive case on the reason for dismissal.

39. The ET also addressed the alternative reason the Respondent had identified, that being some other substantial reason, namely the breakdown in working relationships. It accepted that the Claimant had been "*a nuisance to the Respondent and to the three managers in question*", those being the three managers implicated in his protected disclosures. This was true in terms of the Claimant being an effective trade union representative and his involvement in particular individual cases had been "*an additional source of irritation*". That was the background

against which the Claimant had made his protected disclosures and "*then suddenly, everything went wrong*".

40. At this point, the ET's staged approach breaks down a little; or, at least, it does not continue to expressly set out each of the questions that then follow in the **Kuzel** guidance. I accept, however, that this might not, of itself disclose an error of law; regard should be had to the substance of the ET's reasoning to see whether, nonetheless, it answered those questions.

41. Reiterating that it rejected the Respondent's case that the dismissal was related to the Claimant's conduct, the ET stated that the real reason was "*more likely, the whistleblowing*" (see ET, paragraph 286). It then investigated the strength of that case, specifically as compared to the conduct issues the Respondent had relied on (see paragraphs 287 to 288), finding that the relevant decision takers - Ms Hinton on the original decision to dismiss and Ms Geddes on the decision to confirm the dismissal on appeal - had both been "*aware of what a nuisance*" the Claimant had been "*of the whistleblowing*" (my emphasis).

42. The ET then returned to the 'some other substantial reason' case raised by the Respondent during the ET hearing, concluding that the Claimant was "*moderately difficult to manage, not exceptionally so. That does not make him unmanageable in the workplace*" (see paragraph 290). Rejecting the Respondent's suggestion that this was a case akin to **Panayiotou** (see paragraph 291), the ET again made a passing reference to the 'some other substantial reason' case - the suggested breakdown in the employment relationship - before concluding on the balance of probabilities that "*The reason for dismissal was … [the Claimant's] protected disclosures*" (see paragraph 293).

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43. The difficulty with that reasoning is that it does not fully address the third stage of the **Kuzel** guidance - the question whether the Respondent had disproved the section 103A reason advanced by the Claimant. It plainly had not done so on the two alternative potentially fair reasons it had relied on in terms of its positive case before the ET. That, however, did not mean the reason for the dismissal was necessarily the Claimant's protected disclosures. In many cases where the employer's positive case on reason has been rejected, it may be there is simply nothing else but the prohibited reason relied on by the Claimant. On the ET's findings in this case, however, that was not necessarily so in this instance. Here, there was another relevant part of the background: the Respondent's perception of the Claimant as an irritant or - as the ET expressly found - a nuisance. This may not have been the reason for the disciplinary investigation - at paragraph 284, the ET characterised this as the background; it was only when the Claimant made his disclosures that "*everything went wrong*" - but the ET had found it was one of the two matters in the minds of the decision takers at the dismissal and appeal stages (Ms Hinton and Ms Geddes), the other matter being the Claimant's whistleblowing (see paragraph 288).

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44. The question that then arose was which was the principal reason for the dismissal? Was it the Claimant's whistleblowing or was it really the opportunity to get rid of someone who was seen as a nuisance for reasons other than his whistleblowing? If the latter, the dismissal would still have been unfair but not for a prohibited reason (or, at least, not a prohibited reason that was before the ET). The difficulty is that there is no answer to that question. That may be, as the Claimant contends, because the ET was not really holding that there was a separate reason - nuisance - but simply saw this as all part of the overall finding about the Claimant as a whistleblower. There is an obvious attraction to that argument, not least as it is undesirable to overturn an ET decision reached after so many days of evidence and careful deliberation.

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Ultimately, however, I do not think that avoids the difficulty. The ET had itself drawn a distinction between the background - the nuisance factor - and the whistleblowing (see paragraphs 283 to 284). It found that the relevant decision takers were aware of both (paragraph 288). It needed then to demonstrate that it had considered which had been the real, or principal, reason for the dismissal; there is, however, no sign that it engaged with that question.

45. I do not think, however, that this was a failure to separate out the manner in which the Claimant acted from the making of disclosures, as in the **Panayiotou** sense. The ET was entitled to distinguish this case from that line of authority. The issue in this case was whether the Respondent had another - potentially equally unattractive (albeit the Claimant had not complained of having been dismissed for his trade union activities) - reason for the Claimant's dismissal such that the whistleblowing was not the principal reason.

46. As for the detriment case, I can see that there might be some question arising from the ET's reasoning provided directly under this head at paragraph 295 - again, there would seem to be a jump from the rejection of the Respondent's case to a conclusion that this was due to the Claimant's protected disclosures. Also, although less clear, I can see that there might be a question mark as to whether Ms Geddes' involvement in the suspension decision again raised a question as to whether this really reflected her view of the Claimant as a nuisance (and see, in this regard, her response to the CQC as set out above) rather than as a whistleblower. This was, however, put as an issue linked to the commencement of disciplinary proceedings and on that the ET was clear: those who had been implicated in the Claimant's disclosures were "*behind the events that led to the suspension and the investigation*" (see paragraph 287), a conclusion that is strongly corroborated by the ET's earlier findings on the disciplinary investigation and

charges. Applying the burden of proof set out in section 48 **ERA**, therefore, it seems to me that the ET reached an entirely permissible conclusion that the detriment the Claimant had suffered was due to his protected disclosures and that, furthermore, its reasoning in this regard was adequate when taken overall.

47. For those reasons I allow the appeal on grounds 1 and 2 but dismiss all remaining grounds. That being so, the ET's conclusion on the claim of automatic unfair dismissal under section 103A cannot stand and that case must be remitted.

48. For the Respondent it is said it the case should be remitted to a different ET. It argues that my findings make it clear the ET's approach was wholly flawed on the particular points that were subject to grounds 1 and 2 of the appeal, and the passage of time has been such that there is little to be gained by sending it back to the same ET. Whilst not putting the matter as high as bias or partiality (the Respondent did not need to go so far under the guidance laid down by the EAT in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763), there was a real risk that remission to the same ET would be seen as allowing it a second bite at the cherry. For the Claimant, it is said that the mater should be remitted to the same ET; that was the proportionate course. It had been very stressful and costly for the Claimant to undergo a seven-day hearing, and that he should not be forced to have to repeat that. The EAT should bear in mind he was a nurse and had limited resources.

49. I have of course had regard to the guidance laid down by the EAT in **Sinclair Roche & Temperley v Heard** and bear in mind the submissions that have been made to me. I appreciate the Respondent's concerns about remission to the same ET - there can be a perception that such a course simply allows the ET to make good previously flawed reasoning - but I do not think

there is any proper basis for such a concern in this case. Here, the question is whether the ET overlooked the third stage in **Kuzel**, failing to ask itself whether the 'nuisance' factor was the real or principal reason for the dismissal rather than the Claimant's protected disclosures. It may be that the real failure is one of adequacy of reasons (that possibility being acknowledged by ground 2 of the appeal), in which case, it would be right to permit the ET the opportunity to make good its explanation. If, however, there was an error in approach, then I would expect the ET to address that and to do so with a genuinely open mind, thus asking what was the real, or principal, reason for the dismissal. I have no reason for thinking that this ET would be in any way unable to do that or would act with other than complete professionalism. As for proportionality, this was a lengthy hearing and a different ET would face a real difficulty in coming to this matter afresh, having to reach conclusions on the basis of the primary findings of fact and assessments made by a different ET. On the other hand, I have no reason to think that this ET could not fairly quickly get back into this case (by reminding itself of its notes) and it has the benefit of understanding what it had in mind with its previous findings and therefore can address the defect identified by the appeal far more readily. As for the question whether the Judgment was wholly flawed, I do not consider that is a fair way of characterising my Judgment. Whilst I concluded there was one aspect of the reasoning in respect of which the ET lost its way, that is something that can be rectified, as I have described, and I am satisfied that the appropriate course is for this matter to be remitted to the same ET, to the extent that is still practicable. If it is not, then it will be a matter for the Regional Employment Judge to determine how the matter is to be dealt with.