Appeal No. UKEAT/0150/20/VP

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 March 2021
Judgment handed down on
30 June 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

UNIVERSITY HOSPITAL OF NORTH TEES & HARTLEPOOL NHS FOUNDATION TRUST
APPELLANT

MS L FAIRHALL RESPONDENT

Transcript of Proceedings
JUDGMENT

APPEARANCES

For the Appellant	DAVID READE (One of Her Majesty's Counsel) Instructed by: Hempsons The Exchange, Station Parade, Harrogate, HG1 1DY
For the Respondent	MATTHEW RUDD (Of Counsel) Instructed by: Thrive Law, 15 Queen Square, Leeds, LS2 8AJ

SUMMARY

TOPIC NUMBER: 32A WHISTLEBLOWING, PROTECTED DISCLOSURES

The claimant made a number of protected disclosures, after which she informed the respondent that she intended to invoke the formal whistle blowing policy. The claimant was then suspended, subject to disciplinary investigation (during which she raised a grievance that was rejected), dismissed and her appeal against dismissal rejected. The tribunal considered that the claimant's treatment was not only grossly unfair, but was the culmination of a process, involving numerous people, designed to get rid of her because she had made protected disclosures. The tribunal found that the claimant had been dismissed for the reason, or principle reason, that she had made protected disclosures. This was not a **Jhuti** type case in which an innocent decision maker was manipulated by others into dismissing the claimant, but a case in which, on a proper reading of the tribunal's judgment, it was found as fact that the reason, or principle reason, of the disciplinary hearing panel for dismissing the claimant was her making protected disclosures. The Tribunal properly considered the reasoning process of the chair of the panel, the only witness called by the respondent to explain the reasoning process of the panel. The appeal against the protected disclosure dismissal claim was rejected. While it was clear that the tribunal concluded that the dismissal was the end of a process aimed at achieving the dismissal of the claimant, the individual claims of pre-dismissal detriment were not considered in sufficient detail to be **Meek** compliant because there was insufficient analysis of who were the relevant decision makers in respect of each specific detriment and why it was concluded they had acted on the grounds of the claimant having made protected disclosures. The pre-dismissal claims were remitted to the tribunal for further consideration, if necessary.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgment of the employment tribunal, Employment Judge Johnson sitting with lay members, after a hearing held from 19-23 August; 6-11 and 16 September 2019 at the Teesside Justice Hearing Centre. The judgment was sent to the parties on 8 January 2020. The claimant succeeded in claims of unfair dismissal (including that her dismissal was for the reason, or principal reason, of having made protected disclosures), wrongful dismissal and detriment done on the grounds of having made protected disclosures.

2. The Tribunal described the claimant's employment history and her role with the respondent at the time of her dismissal:

> **8. The claimant began her employment with the NHS in 1979. From 2008 she was employed as a clinical care co-ordinator for the Stockton region for the District Nursing Service. On 13th June 2013 she was transferred to Hartlepool where she operated from the Masefield and Hartfields premises. The claimant was responsible for the management and provision of high quality patient care in the community and had operational leadership and management of the district nursing team, which included approximately 50 employees. That role included allocating nursing staff, monitoring absences, fielding and relaying nurses concerns and mobilising the workforce to ensure the effective and efficient operation of services in the locality. The claimant also had responsibilities for risk management and identifying safeguarding concerns, in addition to her usual nursing responsibilities. At the time of her dismissal, the claimant had 38 years continuous service with the national health service during which she had a clean and unblemished employment record. [emphasis added]**

3. The Tribunal noted that the claimant received a positive assessment in the summer of 2015, shortly before her problems began:

> **In July 2015 the Care Quality Commission (CQC) undertook a visit and inspection, following which the claimant was personally commended for the manner in which she conducted her team and for the quality of care and leadership skills she demonstrated. The claimant also received positive feedback from the Nursing and Midwifery Council (NMC), in which particular mention was made of the claimant's work and the positivity and enthusiasm of the claimant's team under her management.**

4. The Tribunal described the claimant's developing concerns about the workload of her staff in 2015 that resulted in her making 13 disclosures between 21 December 2015 and 21 October 2016:

> **10. At around this time, the claimant considered that her team of district nurses had become subjected to an increasing workload as a result of a change in policy by the local authority. That change in policy required the respondent to monitor those patients who had been prescribed medicines, so as to ensure that the correct medicines were being taken at the correct time. This task became known as "meds prompts". It was accepted that this caused a considerable increase in the workload of each individual district nurse. The claimant also required her district nurses to ensure that each patient was properly treated in accordance with their individual care plan and that any problems of potential problems were properly recorded on the NHS "Datix" system.**
>
> **11. As a result of this increased workload, considerable pressure was placed upon those district nurses undertaking this work. Incidents of absences due to stress and anxiety began to increase. That in turn put additional pressure upon those district nurses who remained at work. In addition, there were further difficulties with the respondent's IT system, which increased those levels of stress.**
>
> **12. The respondent operates a "risk assessment register", which all employees are encouraged to utilise. The system is designed to enable those employees who have genuine concerns to record those concerns insofar as they amount to a risk of any kind. The risk register is examined by the senior management team (SMT) whose duty it is to implement those steps necessary to ensure that such risks are minimised or removed. The claimant began to express concerns about a number of matters which she believed were impacting upon her team of nursing staff and thus upon the quality of care being provided to patients. The claimant began to raise those concerns with her managers, either verbally or in writing, or by making entries on the risk assessment register. It is the claimant's case that between 21st December 2015 and 21st October 2016, she reported 13 matters in terms which she alleges amounted to qualifying and protected disclosures … [emphasis added]**

5. The Tribunal concluded that all the claimant's disclosures were protected. In its analysis, having considered each disclosure in turn, the Tribunal concluded:

> **115. The tribunal found in each of the above disclosures, the claimant had a genuinely held and reasonable belief at the time of making the disclosures, that they were true and that the disclosures were made in the public interest. Alleged deficiencies in standard of care provided by the National Health Service must always be a matter of public interest. The tribunal found that the claimant was at the forefront of a team of nursing staff which was operating under considerable pressure and suffering from a lack of resources to meet the demands of the volume of work imposed upon them. The tribunal found that each of the above amounted to a qualifying and protected disclosure.**

6. There is no challenge to the finding of the Tribunal that all of the disclosures were protected disclosures.

7. One of the disclosures related to the death of a patient. The Tribunal held that following the disclosures and the death of the patient the claimant informed Julie Parks (described by the employment tribunal as Care Group Director and in the respondent's skeleton argument as Associate Director of Community Services) that she wished to instigate the respondent's whistle blowing policy, after which she had a brief period of leave, and then, on her return, was suspended:

> **116. Following those disclosures and shortly after the patient`s death, the claimant made it clear to Julie Parks in the meeting on 21st October 2019 that she wished to instigate the respondent's formal whistleblowing procedure. The claimant requested a meeting with Julie Parks as a matter of urgency. The claimant then took a short period of annual leave between the 26th and 31st of October and upon her return to work on 31st October was informed that she was being suspended.**

8. In its detailed findings of fact, the Tribunal described in excruciating detail the manifest failings and fundamental unfairness of the respondent in dealing with the claimant's suspension, the investigation into her conduct, her grievance, her eventual dismissal and the rejection of her appeal. The tribunal considered the treatment of the claimant did not accord with the respondent's policies or fair practice, save in respect of the investigation into monies found in the claimant's locker that had been donated by patients and had not been dealt with by the claimant in accordance with the respondent's policy for donations at the date of her suspension. It was never put to the claimant that there was any suggestion of dishonesty. The tribunal was particularly critical of the contention by the respondent at the hearing that there was an issue as to the claimant's honesty that formed a component of the reason for her dismissal.

9. It is not surprising that the respondent has not sought to challenge the findings of the Tribunal that the dismissal was unfair and wrongful. The appeal is against the Tribunal's determination that the dismissal was for the reason, or principal reason, that the claimant had made protected disclosures; and that her treatment in the lead up to her dismissal involved her being subject to detriments done on the grounds that she had made protected disclosures. The central ground of appeal is that the Tribunal misdirected itself as to, and/or misapplied, the burden of proof.

10. The Tribunal reached the following conclusions as to the suspension of the claimant:

> **117. The tribunal found that the respondent's suspension of the claimant was unjustified and unreasonable in all the circumstances of the case. The suspension letter … refers to "an investigation to take place following allegations of potential gross misconduct relating to concerns regarding your leadership and also concerns in relation to inappropriate and unprofessional behaviour including bullying and harassment". The tribunal found that at the time of the suspension there had been no such "allegations" which could justify suspension at that stage. … No specific "allegations" were made... No evidence was given as to why it was necessary to suspend the claimant to enable any such investigation to be carried out. Julie Parks insisted that the decision to suspend the claimant was taken by Julie Lane at a meeting between Ms Lane, Steve Pett and Ms Parks. Ms Parks insisted that the decision to suspend could only be taken by Ms Lane in her capacity as the director of nursing. No explanation was given by the respondent as to why Ms Lane was not called to give evidence about the respondent's reasons for suspending the claimant in those circumstances.**

11. The Tribunal concluded that the claimant had been suspended for an excessively long period, and held that:

> **118. No meaningful or adequate explanation was given to the tribunal by the respondent as to why the claimant's suspension lasted from 31st October 2016 until she was dismissed on 17th April 2018. The tribunal found that to be an inordinate and unreasonable length of time for an employee of the claimant's seniority and length of service to be suspended. During that time the claimant was never provided with any specific details of the allegations against her, despite raising a formal grievance, which included the need for and the length of her suspension.**

12. The Tribunal was highly critical of the investigation:

> **119. The tribunal found the respondent's investigation into the claimant's alleged misconduct to be inadequate and unreasonable in all the circumstances of the case. No explanation was given for the unreasonable**

delay in interviewing the relevant witnesses, particularly those who are said to have expressed concerns about the claimant'' behaviour. No explanation was given as to what was to be the remit of the investigation or of any instructions given to the investigating officer. No explanation was given as to why the investigating officer was not called to give evidence to the tribunal. The allegations of misconduct for which the respondent says it dismissed the claimant were never specifically put to the claimant, so that she was never given a fair opportunity to prepare her case or to respond to them. The respondent's witnesses referred to little more than "themes" or "perceptions" by the staff, none of which contained a level of detail which would have enabled the claimant to respond. Many of the questions put to the staff contained what are commonly called "closed questions" which the tribunal found to be indicative of a requirement from the questioner that the interviewee would actively seek to identify any matters which may be detrimental to the claimant. When the investigation was completed and the report produced, it should have been sent to the claimant in accordance with the respondent's policy. No explanation was given by the respondent as to why the report was not sent to the claimant until October. The tribunal found that no reasonable employer in all the circumstances of this case, would have conducted the investigation in this manner.

13. The Tribunal held of the disciplinary hearing and outcome:

120. The tribunal found that the disciplinary hearing itself was unfair and unreasonable from the outset, in that it did not set out with any precision the allegations of misconduct which the claimant was expected to answer. The tribunal found it unreasonable for the respondent to say in these proceedings that the claimant could and should have been able to discover the nature of the allegations by reading the investigation report. Bearing in mind the size of the respondent's administrative resources and in particular its dedicated HR resources, that was an unreasonable approach to adopt. The tribunal notes that, under cross examination, Ms Grieves conceded that there were a number of flaws and defects in the disciplinary hearing. Despite those concessions, Ms Grieves insisted that the disciplinary hearing had been fair and that those flaws did not adversely affect the fairness of the outcome. The tribunal found Ms Grieves to be an unpersuasive and unreliable witness. In assessing credibility, the tribunal took particular note of her sudden introduction of a finding by the disciplinary panel that the claimant had been dishonest in her handling of the charitable monies. Equally alarming was Ms Grieves evidence that it was this finding of dishonesty which led to the claimant being dismissed, as she would not have been dismissed solely in respect of the allegation relating to her professional behaviour. It was put to Ms Grieves in cross examination by Mr Rudd that this revelation was no more than an attempt by her to "beef-up" the respondent's case, which she could now see to have been seriously eroded by the answers given in cross examination by earlier witnesses. Ms Grieves denied that she was so doing. In the absence of any meaningful explanation as to why there had never been any allegation of dishonesty made against the claimant and why that finding was not recorded anywhere in the dismissal letter, the tribunal found that Ms Grieves was indeed trying to "beef-up" the respondent's case. The tribunal found that Ms Grieves was being less than candid with the tribunal.

121. The tribunal found that the decision of the disciplinary panel to dismiss the claimant for gross misconduct was not supported by the evidence before the panel. The reasoning behind the decision was systematically dismantled by Mr Rudd in his cross examination of Ms Grieves. [emphasis added]

14. The appeal process was also considered to be similarly unfair:

> **122. The tribunal found that the appeal process conducted by Lynne Taylor was similarly flawed. The tribunal found that no reasonable appeal officer could possibly have fairly and reasonably addressed all of the claimant's grounds of appeal in the time taken to hear the appeal and particularly for the panel to undertake its deliberations. The defects in the investigation report were put to Ms Taylor who, albeit reluctantly, accepted that a number of the claimant's grounds of appeal should have been upheld. Ms Taylor said in her evidence that she could recall Ms Grieves saying at the appeal hearing that the dismissing panel had taken into account the claimant's "dishonesty" in coming to its decision to dismiss the claimant. Again, no mention is made of that in the minutes of the appeal hearing or in the letter dismissing the appeal. The tribunal found that the appeal process and the appeal hearing had not been conducted in a fair or reasonable manner.**

15. This led the Tribunal to its consideration of the reason advanced by the respondent for the dismissal, and its fairness:

> **123. In terms of the unfair dismissal claim, the tribunal was not satisfied that the respondent had established that its reason or its principal reason for dismissing the claimant was a reason related to her conduct. Those responsible for the claimant's dismissal and the dismissal of her appeal did not "genuinely believe" that the claimant had committed any acts of misconduct which are now alleged. There could be no such genuine belief because there were no reasonable grounds for that belief. There could be no reasonable grounds because there had not been a reasonable investigation. The respondent's decision to dismiss the claimant fell outside the range of reasonable responses open to an employer in all the circumstances of this case. This was an employee of thirty-eight years unblemished service who was suspended from her role in circumstances where that suspension was unjustified and unreasonable. The investigation which followed that suspension was inadequate and unreasonable. The investigation did not produce any qualitative evidence which could have led a reasonable employer to decide to dismiss the claimant in those circumstances, for reasons related to her conduct. The procedure followed by the respondent was unreasonable and unfair. For those reasons the claimant's complaint of unfair dismissal is well-founded and succeeds. [emphasis added]**

16. I have set out these findings in some detail because, while they specifically relate to the claim of unfair dismissal, they included treatment that was said to constitute detriments done on grounds of the claimant having made protected disclosures and involved consideration of whether the respondent had made out the reason it advanced for the claimant's dismissal, which it clearly did not. While unfairness of itself, even if as gross as that found by the Tribunal, could not establish that the reason for the claimant's treatment was the making of protected disclosures;

unexplained, or inadequately explained, unfair treatment could be relevant to drawing inferences as to the reason for the treatment.

17. In its findings of fact, the Tribunal determined that there had been fundamental failings in the manner in which the Claimant's grievance had been dealt with at paragraph 68:

> **The tribunal found Ms Dean to be a generally unreliable witness, whose evidence under cross examination differed considerably from what she had put in the grievance outcome letter and her witness statement. The tribunal found the investigation into the claimant's to have been unreasonably superficial in all the circumstances of the case. Ms Dean had accepted what she was told by the respondent's witnesses without properly testing that evidence against the evidence of the claimant.**

18. After a detailed critiques of the grievance appeal, the tribunal concluded:

> **72. The tribunal found Michelle Taylor to be an unreliable and unpersuasive witness. The tribunal found that she had failed to deal with the claimant's grievance appeal in a reasonable manner and had displayed inappropriate elements of prejudgment.**

19. All in all, it is hard to see how the findings could have been much more critical of the respondent. The respondent was found to have treated the claimant in a grossly unfair manner starting shortly after she had indicated her intention to invoke the respondent's whistle blowing policy, and culminating in her dismissal. It is important to read the judgment of the employment tribunal as a whole to identify the facts it had found before going on to consider the claims to which this appeal relates.

20. The Tribunal, in addition to finding that the claimant had been unfairly and wrongfully dismissed, found that the dismissal was automatically unfair being for the reason, or principal reason, that the claimant had made protected disclosures, and that the claimant had been subject to detriment done on the ground that she had made protected disclosures. The specific acts of alleged detrimental treatment were in the period between the claimant having made her protected disclosures, and indicating that she wished to invoke the whistle blowing procedure, and her

dismissal. They are, to an extent, stages in the process leading up to the decision to dismiss. The dismissal claim was the fundamental claim and the one from which the majority of the claimant's losses are likely to flow. I will start by considering that claim.

Dismissal

The Tribunals direction as to the law

21. The Tribunal set out section 103A Employment Rights Act 1996:

> **Section 103A Protected disclosure**
>
> **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 made a protected disclosure.**

22. The Tribunal further directed itself as to the relevant law at paragraph 106:

> **106. Automatically unfair dismissal for making protected disclosures**
>
> **The wording of section 103A of the Employment Rights Act 1996 follows the wording of section 98 in that the whistleblowing must have been a reason or principal reason for dismissal. In *Kuzel v Roache Products Limited* [2008 EWCA-CIV-380] the Court of Appeal said that if the employer fails to establish its alternative reason for the dismissal, it will often by the case that the employment tribunal will find the claimant's automatically unfair reason (for example whistleblowing) established, but that is not a rule of law – it may still be the case that the tribunal finds another reason established on the facts, which can still defeat the claimant's claim. In *El-Megrisi v Azad University* [UKEAT/0448/08] the employment tribunal held that, where an employee alleged that she has been dismissed because she made multiple public interest disclosures, section 103A does not require the tribunal to consider each such disclosure separately and in isolation, as their cumulative impact can constitute the principal reason for the dismissal. This is so even where some of the disclosures have taken place more than three months before the claimant's dismissal. Where the tribunal finds that the disclosures operated cumulatively, the question must be whether that cumulative impact was the principal reason for the dismissal. [emphasis added]**

The Tribunal's analysis

23. The tribunal reached its conclusions in paragraphs of the judgment that included some further analysis of the law:

> **125. The tribunal has found that the respondent has failed to establish a fair reason for dismissing the claimant. The claimant asserts that the real reason**

why she was dismissed, was because she had made protected disclosures. The wording of section 103A adopts the usual unfair dismissal formula that the whistleblowing must have been the reason or principal reason for the dismissal. The difficulty for any claimant in such circumstances is that he or she must establish that the whistleblowing impacted upon the mind or decision-making process of the dismissing officer to such an extent that the tribunal is satisfied that the whistleblowing was the principal behind the dismissal. The reason or principal reason therefore means the employers' reason in an unfair dismissal claim. However, possible complications may arise if the dismissing officer was genuinely unaware that any protected disclosures had been made or the dismissing manager has been manipulated and/or misled by a fellow manager, who is the one who really objected to the disclosure and then engineered a false (nondisclosure) case against the employee so as to engineer a dismissal. It is the latter situation which has formed the subject matter of considerable judicial discussion in *Orr v Milton Keynes Council* [2011 EWCA-CIV-62], *Co-operative Group Limited v Baddeley* [2014 EWCA-CIV-658] and *Royal Mail Group Limited v Jhuti* [2016 IRLR854] and later in the Court of Appeal in [2017 EWCACIV-1632]. In *Jhuti*, the employment tribunal dismissed the claimant's complaint of automatic unfair dismissal under section 103A, finding that the decision-maker was unaware that Ms Jhuti had made a protected disclosure, having been given incomplete and misleading information by another manager. Thus, the protected disclosure formed no part of the decision-maker's motivation and was not the reason for the dismissal. The Employment Appeal Tribunal overturned that decision, holding that there was "no reason why the reason held by the manipulator of an ignorant and innocent decision-maker could not be attributed to the employer any more than the unfairness of his or her motivation." However, the Employment Appeal Tribunal decision was then overturned on further appeal by the Court of Appeal. The Court of Appeal referred to *Orr v Milton Keynes Council*, where the Court of Appeal had held that the focus must be on the knowledge or state of mind of the person who actually took the decision to dismiss. As was said by Underhill LJ in *Jhuti*, the essential ratio in Orr was as follows;

"The answer to the question "whose knowledge or state of mind was for this purpose intended to count as the knowledge or state of mind of the employer?" will be " The person who was deputed to carry out the employer`s function under S.98"

126. In the claimant's case before this tribunal, Ms Fairhall had made a number of protected disclosures to a number of different people within the respondent's hierarchy. That hierarchy included Julie Lane (Director of Nursing), Julie Parks (Associate Director of Community Services) and Steve Pett (General Manager). It was those three senior managers who met immediately after the claimant expressed her intention to invoke the formal whistleblowing policy, and decided that the claimant should be suspended. From the date of that decision, the respondent's substantial HR resources were engaged in the administration of the suspension, investigation, disciplinary process and appeal process. Those same HR resources were also engaged in the administration of the claimant's grievance, the grievance hearing and the grievance appeal. The claimant made it known to Mary Grieves and Lynn Taylor that she believed the reason why she was suspended, investigated, disciplined and dismissed, was because she had made those protected disclosures. Ms Grieves and Ms Taylor both confirmed under cross examination that they were aware that the claimant had raised a grievance, but both denied that they were aware of the exact contents of the grievance. Both denied that their respective decisions to dismiss the claimant and dismiss her appeal against dismissal, were in any way influenced by the fact that she had made those protected disclosures. The tribunal did not accept their evidence in that regard. The original decision to suspend the claimant and to

instigate a formal investigation was taken by the most senior member of the hierarchy, Julie Lane. The tribunal found it likely that thereafter, the task of investigating the claimant, instigating disciplinary proceedings and ultimately dismissing her, were influenced by that hierarchy to such an extent that it was appropriate to attribute their motivation to those carrying out the process which led to the dismissal. The respondent has failed to produce any evidence to explain the claimant`s treatment and provided unsatisfactory explanations for other matters.

127. In Kuzel v Roache Products Limited, Mummary LJ said that if the employer fails to establish its alternative reason, it will often be the case that the employment tribunal will find the claimant's automatically unfair reason, such as whistleblowing, to be established. However, that is not a rule of law – it may be still be the case that there is in fact another reason established on the facts of the case which could still defeat the claimant's claim. In Mrs Fairhall's case, the tribunal has found that the respondent has failed to establish that it was reasonable to suspend the claimant in October 2016, to dismiss her in April 2018 and to dismiss her appeal in June 2018. The respondent has failed to establish that the claimant committed any act of misconduct which could justify dismissal. As Ms Souter said in her closing submissions, the approach advocated in *Kuzel v Roache* is as follows:-

(i) 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? Has she raised some doubt as to that reason by advancing the section 103A reason?

(ii) If so, has the employer proved his reason for dismissal?

(iii) If not, has the employer disproved the section 103A reason advanced by the claimant?

(iv) If not, dismissal is for the section 103A reason.

In answer to those questions, the tribunal found:-

(i) The claimant has shown that there is a real issue as to whether the reason put forward by the respondent is a real issue as to whether the reason put forward by the respondent was not the true reason. The tribunal has found that the misconduct was indeed not the true reason.

(ii) The tribunal found that the respondent has not proved its "misconduct" reason for dismissing the claimant.

(iii) The respondent has not disproved the section 103A reason advanced by the claimant.

(iv) Accordingly, the tribunal is satisfied that the principle reason for the claimant's dismissal was a section 103A reason, namely that she had made protected disclosures.

128. In coming to that conclusion, the tribunal particularly takes into account the close proximity in time between the last of the claimant's disclosures and the declared intention to formerly engage the respondent's whistleblowing policy, and the decision to suspend the claimant. The tribunal also takes into account the unreasonable nature of the investigation, the delay in undertaking the investigation and the length of the suspension. The tribunal particularly takes into account lack of credible evidence from the respondent's witnesses who gave evidence to the employment tribunal. The tribunal found that Ms Grieves in particular was disingenuous in attempting to "beef-up" the respondent's case by stating that the dismissing panel had in

> **fact found the claimant to have been dishonest with regard to the charitable monies and that it was this "dishonesty" which led to her dismissal. Lynn Taylor's evidence was little better, when she stated under cross examination that she did recall Ms Grieves mentioning at the appeal hearing that they considered the claimant to have been dishonest, yet there was no mention of such dishonesty anywhere in the notes of the hearing, the outcome letter, anywhere in Ms Taylor's witness statement or indeed in any part of the respondent's pleaded case. Ms Souter drew the tribunal's attention to the decision of the court of appeal in *Maund v Penwith District Council* [1984IRLR24] where it was said that if the employer appears to show a reason for dismissal, then the burden passes to the employee to show that there is a real issue as to whether that was the true reason. The employee cannot do this by merely asserting an argument that it was not the true reason – an evidential burden rests upon him or her to produce some evidence that casts doubt upon the employer's reason. The graver the allegation, the heavier will be the burden. Once this evidential burden is discharged, however the onus remains on the employer to prove the reason for the dismissal.**
>
> **129. In all the circumstances of the present case, the tribunal considered it reasonable to infer from all of the surrounding facts, that the claimant had discharged the burden of proving that the principal reason for her dismissal was because she had made protected disclosures. [emphasis added]**

The appeal in respect of the claimant's dismissal

24. The Respondent contends in Ground 1 of the Notice of Appeal that the "Tribunal misdirected itself and misapplied the burden of proof". The Respondent criticises the Tribunal for answering questions its counsel had posed as those necessary to answer in determining the public interest dismissal claim, because it is asserted that the questions were taken out of context. The Respondent contends that:

> **12.2. The attribution of liability to an employer has to rest on the examination of the mental processes of individuals. Thus Lord *Wilson in Royal Mail Group Ltd v Jhuti* [2019] UKSC 55. at paragraph 60, directed the Tribunal, in considering the reason for the dismissal first to the mind of the decision maker. …**
>
> **(a) Automatically Unfair Dismissal**
>
> **12.3. At paragraph l 06 of the Judgment the Tribunal had correctly directed itself that the effect of the decision in *Kuzel v Roche Products Limited* [2008] EWCA Civ 380 [2008] ICR 799 was that if the employer failed to show a fair reason for the dismissal it did not follow that the Tribunal must find the dismissal to be automatically unfair, per Lord Justice Mummery at paragraph 60. Lord Justice Mummery had rejected drawing of a parallel with discrimination legislation, para 48.**
>
> **12.4. Despite that direction the erroneous approach of the Tribunal is to fill the void of a rejected explanation or the absence of an explanation with the conclusion that it must decide that the reason, whether for the purpose of**

> **dismissal or detriment, was that the Claimant had made protected disclosures.**
>
> **12.5. That error of approach is evident in relation to dismissal at paragraph 127. It is acknowledged that the Tribunal quote from the Trust's legal submissions at paragraph 46 although fully considered those submissions had correctly referred to *Kuzel* at paragraph 48 of the submissions, and made clear that Claimant's would not succeed by default in the absence of an employer proving a fair reason or indeed any reason for the dismissal.**
>
> **12.6. <u>The Tribunal's erroneous approach is however to place positive evidential burden on the Trust to prove that the making of the protected disclosures was not the reason or the principal reason for the dismissal</u>. [<u>emphasis added</u>]**

25. The core of this ground of appeal is the contention that the claimant, having established a sufficient evidential basis to assert that she was dismissed for making protected disclosures, and the respondent having failed to establish its purported reason for dismissal, neither of which are findings that are challenged, the Tribunal placed a "positive evidential burden on the Trust to prove that the making of the protected disclosures was not the reason or the principal reason for the dismissal".

26. At ground 2 the Respondent contends that the Tribunal erred in its approach in drawing an inference that the reason for the claimant's dismissal was her making of protected disclosures because the Tribunal relied on the conduct of numerous employees of the respondent in the lead up to the claimant's dismissal, whereas it should have only considered matters that illuminated the mental processes of the decision makers.

Further consideration of the law

Burden Proof

27. The key decision on the approach to be adopted in determining public interest dismissal claims remains the decision of Lord Justice Mummery in **Kuzel *v* Roche Products Ltd** [2008] ICR 799. This is an authority that is so well known that consideration is often limited to what

many treat as a gobbet, at paragraph 59, in which Mummery LJ summarises his conclusion as to the burden of proof in such claims. There is much in the more detailed analysis that rewards close reading. Mummery LJ starts his discussion and conclusions with an important warning against getting too obsessed with the burden of proof:

> **46 The summary of the submissions shows how worked up lawyers can get about something like the burden of proof. In some situations, such as being charged with a criminal offence, there is plenty to get worked up about. It is very important indeed. In many areas of civil law, however, the burden of proof is not a big thing. Discrimination law is an exception, because discrimination is so difficult to prove. In the case of unfair dismissal, however, there has never been any real problem for the tribunals in practice. The danger is that in cases like this something so complicated will emerge that the sound exercise of common sense by tribunals will be inhibited. [emphasis added]**

28. Not, perhaps, the most auspicious start for an appeal, such as this, dependant on establishing that a meticulous and carefully reasoned judgement of the employment tribunal foundered on the unexposed rocks of the burden of proof. The appeal requires the respondent to establish that the "sound exercise of common sense" of this Tribunal cannot be relied upon.

29. Mummery LJ continued with a few preliminary observations:

> **48 First, the protected disclosure provisions must be construed and applied in the overall context of unfair dismissal law in Part X of the 1996 Act into which section 103Awas inserted. Part X includes sections 94 to 134. There was a suggestion in argument before the appeal tribunal, which was not pursued in this court, that the burden of proof in protected disclosure cases should be the same as that applied in equivalent provisions governing discrimination cases. In those cases the burden of proving the reason for less favourable treatment of the claimant shifts to the respondent. Mr Linden argued for a "strictly limited" role for discrimination law in protected disclosure cases. The thinking behind the association of protected disclosure and discrimination is that both causes of action involve acts or omissions for a prohibited reason. Unfair dismissal and discrimination on specific prohibited grounds are, however, different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs a risk of complicating rather than clarifying the legal concepts. As Mr Linden accepted there simply is no need to resort to the discrimination legislation in order to ascertain the operation of the burden of proof in unfair dismissal cases. [emphasis added]**

30. Mummery LJ considered that analogy with the burden of proof in discrimination claims is not of assistance in considering protected disclosure claims.

31. Mummery LJ made the following general points about the burden of proof in unfair dismissal claims:

> **49 Secondly, it is not profitable to discuss burden of proof issues in generalities. It must be related to particular issues, in this case to the different aspects of an unfair dismissal claim. On some issues the 1996 Act is completely silent on the burden of proof. In the absence of specific statutory provision the general rules apply. The general rules are that a person bringing a claim must prove it and a person asserting a fact must produce some evidence for it. Thus the burden was on Dr Kuzel to prove that she was unfairly dismissed. It was for her to produce some evidence for the facts she alleged. But it does not follow that the burden of proof was on her in respect of every element of the unfair dismissal claim.**
>
> **50 An unfair dismissal claim has a number of aspects any or all of which may be disputed. In this case the dispute is about the reason for dismissal and where the burden of proof lies. The burden may differ according to the nature of the disputed issue. On the specific issue of dismissal, for example, the claimant employee must prove that he was dismissed. This will not usually be a difficult burden to discharge. The production of a letter of dismissal usually proves the point. There are, however, cases in which there is disputed evidence about whether the employee resigned or whether he was constructively dismissed.**
>
> **51 Similarly there may be an issue as to the claimant's status affecting his right not to be unfairly dismissed. It is for the claimant to produce evidence to show that he was an employee of the respondent. This is not normally difficult. In most cases there will be a written contract, written particulars or some other document relating to pay arrangements and so on. In some cases oral evidence will be needed to prove the terms and conditions on which the claimant did work for the respondent.**
>
> **52 Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, presuppose that, in order to establish unfair dismissal, it is necessary for the tribunal to identify only one reason or one principal reason for the dismissal.**
>
> **53 Fourthly, the reason or principal reason for a dismissal is a question of fact for the tribunal. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
>
> **54 Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.**
>
> **55 Sixthly, the burden of proof issue must be kept in proper perspective. As was observed in Maund v Penwith District Council [1984] ICR 143, when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof. [emphasis added]**

32. It is in this context that Mummery LJ went on to consider the specific provisions dealing with dismissal for making protected disclosures:

> **56 I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.**
>
> **57 I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
>
> **58 Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
>
> **59 The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
>
> **60 As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason. [emphasis added]**

Reasons and decision makers

33. Most people are employed by an employer that is a legal person, such as a company, rather than by a natural person. In this case the claimant was employed by a NHS Foundation

Trust. Dismissal involves the termination of the contract between the employer and the employee. The decision to terminate the employment contract, to dismiss the employee, must be taken by a natural person, or persons; the decision maker or makers. In many cases there will be no difficulty in identifying the decision maker or makers. Just as Mummery LJ warned against an excessive fixation on the burden of proof, it is important not to get tied up in knots about reasoning processes if it is clear who took the decision to dismiss and why they did so.

34. The paradigm is a hearing at which one person, acting independently, takes the decision to dismiss, so there is only that person's reasoning process to be considered. A disciplinary hearing may be before a panel, in which case it may be necessary to consider the reasoning process of the panel, although often only the chair of the panel gives evidence, the employer presumably accepting the reasoning process of the chair properly evidences that of the panel.

35. There may be circumstances in which people other than the decision maker are involved in the decision making process. Such other people might advise, or even be instrumental in persuading the decision maker to take the decision. If a person charged with taking a decision whether to dismiss (the dismissing officer) decides to dismiss at the behest of another person who wishes the employee to be dismissed for a prohibited reason, in circumstances in which the dismissing officer knows what he or she is doing, including being asked to dismiss for the prohibited reason, there is no conceptual difficulty in finding that the prohibited reason was adopted by the dismissing officer. For example, if a manager tells the dismissing officer that an employee should be dismissed because he or she has made protected disclosures, and the dismissing officer does what he or she been told, the making of the protected disclosures will be the reason why the dismissing officer decided to dismiss, in the sense of being the reason operating in his or her mind, notwithstanding that it may have been put there by someone else.

There may be a number of people behind the scenes who have input as advisers or superiors who make it known to the decision maker that they want an employee to be dismissed because of the protected disclosures she or he has made; if the decision maker goes along with the plan the involvement of the instigators does not prevent a tribunal drawing a clear inference that, whatever its precise origin and development, the reason for dismissal operating in the mind of the decision maker was of a prohibited kind.

36. The very existence of the protection for those who make public interest disclosures shows a recognition of the possibility that managers in an organisation may decide that they want to be rid of a whistle blower. In such circumstances, particularly in a large organisation, the route to the eventual dismissal of the whistle blower may be tortuous and involve a number of people who, to a lesser or greater extent, are in the know about the plan to get the whistle blower out of the door. Such a scenario may involve multiple examples of unexplained unfair treatment. The facts may look much like those found by the Tribunal in this case. As far as the dismissal is concerned, in most such cases the decision maker would be going along with an overall plan to remove the whistle blower. In considering the decision to dismiss, the tribunal only has to determine the reasoning process of the decision maker because that person, as others may have done in taking the decisions leading to the dismissal, acted as he or she did because the employee made protected disclosures. The twists and turns in the journey matter relatively little because it is the destination that counts; the eventual reasoning process of the person who took the decision to dismiss. The fact that the dismissal appears to be the culmination of a plan to get rid of the whistle blower may be circumstantial evidence to support the conclusion that the decision maker dismissed because of the protected disclosure; if there was an overall plan to get rid of the whistle blower, it is plausible that the decision maker was acting in accordance with that plan. Assessing factual scenarios of this nature is precisely what the employment tribunal is there to do.

37. The situation in **Royal Mail Group Ltd v Jhuti** [2020] ICR 731, where the decision maker is unaware of the machinations of those motivated by the prohibited reason, is probably quite rare. It is only in such cases that it is necessary to attribute a reason to the decision maker that was not, in fact, the reason operating in his or her mind when the decision to dismiss was taken. Lord Wilson held at paragraph 60:

> **In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X, courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.**

38. Thus, it is only in cases where the decision maker is acting in good faith, but has been manipulated by another, that it is necessary to rely on the attribution of the reason of the manipulator to the decision maker.

39. It is important to note that this case was decided before **Jhuti** reached the Supreme Court, so the Tribunal decided the claim on the basis that it was <u>not</u> possible to attribute the reason of a manipulator to an innocent decision maker.

40. Despite the **Jhuti** situation being unusual, the case is relied upon in pretty much every appeal where there is any issue about decision makers. The arguments about decisions and decision maker have become ever more Baroque; often unnecessarily so.

41. The paradigm of the single decision maker who dismisses for a clearly expressed reason will often apply where the employer has a legitimate reason for dismissal. If an employer really has determined to rid themselves of a whistle blower the process may be complex and involve people who are keen to appear not to have been involved in the decision making; someone who wishes to ensure an employee is dismissed because of their whistle blowing is likely to try to keep to the shadows. Wrongdoers often wish to distance themselves from their decisions. It would be troubling if in such cases excessively complex arguments about the difficulty in determining the precise mental processes of all those involved in the process resulted in a valid claim failing. Fortunately, we can rely on the good sense of the members of employment tribunals to see through such ruses and get to grips with the reason that operated, however it got there, on the mind of the dismissing officer.

The Role of the EAT

42. Mummery LJ's reference to the common sense of the employment tribunals is a reminder of the importance of the EAT not improperly interfering with its exercise. This was recently emphasised by Lord Justice Popplewell in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 who reiterated the importance of the well known authorities that considered the role of the EAT:

> **57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:**
>
> **(1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:**
>
> > **"The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid".**

This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd* (The "PACE") [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.

(2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be Meek compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In Meek, Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v. Brain* [1981] I.C.R. 542 at 551:

> **"Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."**

(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in RSPB v Croucher [1984] ICR 604 at 609-610:

> **"We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in Retarded Children's Aid Society Ltd. v. Day [1978] I.C.R. 437 and in the recent decision in Varndell v. Kearney & Trecker Marwin Ltd [1983] I.C.R. 683."**

58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them,

and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.

Determination of the appeal against the employment tribunal's dismissal decision

43. I do not consider that the employment tribunal erred in its consideration of the burden of proof, or in its assessment of the reasoning of the decision makers who decided to dismiss the claimant.

44. There are a number of points to note from the analysis of the Tribunal at paragraphs 125 to 129:

(1) The Tribunal recognised that if the claimant established a sufficient evidential basis to support the allegation that the reason, or principal reason, for her dismissal was the making of protected disclosures, and the respondent failed to establish its purported reason for dismissal, it remained open to the employment tribunal to decide that there was some other untainted reason for the dismissal;

(2) The Tribunal recognised that it had to consider the thought process of the person(s) who made the decision to dismiss;

(3) The Tribunal decided the matter on the basis of the law before **Jhuti** reached the Supreme Court. The Tribunal having considered the decision of the Court of Appeal directed itself on the basis that it must consider the reasoning of "the person who was deputed to carry out the employer's function under S.98";

(4) The Tribunal expressly rejected the evidence of Ms Grieves that the decision to dismiss was not in any way influenced by the fact that the claimant had made protected disclosures;

(5) The Tribunal held that Ms Grieves was disingenuous in attempting to "beef-up" the respondent's case by stating that the dismissing panel had found the claimant to have been dishonest with regard to the charitable donations, and that it was this "dishonesty" which led to her dismissal;

(6) The Tribunal considered that the appropriate inference to draw from all the surrounding evidence was that *"the claimant had discharged the burden of proving that the principal reason for her dismissal was because she had made protected disclosures"*. That finding, taken by itself, suggested that the Tribunal, if anything, was placing too high a burden on the claimant;

(7) The specific questions that the Tribunal asked itself and answered at paragraph 127 were posed to it by Ms Souter, Counsel for the Respondent, as being the correct questions to answer in this type of case.

45. The Tribunal fully appreciated that it had to determine the reason the disciplinary panel decided to dismiss the claimant. Only the chair of the panel, Ms Grieves, was called to give evidence. Mr Reade, in his skeleton argument, focused on the large number of people involved in the processes that resulted in the dismissal of the claimant (together with the rejection of her appeal and the grievance process) with the suggestion that the Tribunal had to get to grips with the reasoning processes of all of them.

46. To the extent it might be suggested that the Tribunal was required to consider the thought processes of all those on the disciplinary panel, that was not a point run before the employment

tribunal and, in any event, as the respondent chose only to call the chair of the panel, the Tribunal was entitled to assume that her reasoning was the result of the panel's deliberation, and that her evidence reflected the reasoning process of the whole panel.

47. The Tribunal described how the process commenced with the decision of three managers to suspend the claimant shortly after she said that she wished to invoke the whistle blowing policy, and that thereafter the respondent's human resources were focused on the process leading to the claimant's dismissal. The Tribunal referred to the management and human resources as the "hierarchy". The Tribunal "found it likely that thereafter, the task of investigating the claimant, instigating disciplinary proceedings and ultimately dismissing her, were influenced by that hierarchy to such an extent that it was appropriate to attribute their motivation to those carrying out the process which led to the dismissal". Mr Reade contended that the Tribunal considered there was a **Jhuti** situation. I consider that, reading the judgment as a whole, it is clear that the Tribunal concluded that the suspension of the claimant was the commencement of a process that occurred because she had made protected disclosures and culminated in her dismissal, not because Ms Grieves was innocently duped into dismissing, but because Ms Grieves, and her panel, knowingly dismissed the claimant because she had made protected disclosures.

48. The Tribunal concluded that the claimant had established the necessary evidential basis to suggest that Ms Grieves, and her panel, could have dismissed her for making the protected disclosures. That decision has not been challenged. The Tribunal rejected the purported potentially fair reason the respondent gave for dismissing the claimant. That decision has not been challenged. The Tribunal appreciated that those determinations did not necessarily mean that the claimant would win, because it was open to it to conclude from all the evidence that there was some other reason for dismissal, other than the claimant's making of protected disclosures.

It is clear that the Tribunal did not consider there was any evidence to suggest that Ms Grieves, and her panel, had some unexpressed other reason for dismissing the claimant. The Tribunal found that Ms Grieves was not a truthful witness and rejected her evidence. In circumstances in which a *prima facie* basis for asserting that the claimant was dismissed for making protected disclosures was made out, the Tribunal rejected the reason for dismissal asserted by the Respondent and the Tribunal did not consider an alternative reason for dismissal was established on the evidence, that was sufficient for it to conclude that the dismissal was because the claimant had made protected disclosures. The Tribunal did not need to go any further. Nonetheless, the Tribunal did not stop at that point. It examined all the surrounding evidence with care and concluded that the proper inference to draw was that Ms Grieves dismissed the claimant because she had made protected disclosures. The factual finding of the Tribunal that the dismissal was the culmination of a process designed to rid the respondent of the claimant was a matter that the Tribunal was entitled to take into account in drawing the inference that Ms Grieves had decided to dismiss because of the protected disclosures.

49. It is particularly rich for the respondent to criticise the Tribunal for having answered the questions the Counsel it had instructed at the employment tribunal posed. While the tribunal answered those questions, which might have been thought to suggest that if the respondent's reason for dismissal was rejected, it must go on to find that the dismissal was for the reason that the claimant had made protected disclosures, it is clear that the tribunal did not approach the case on that basis, and kept well in mind the possibility that it could find an alternative reason for dismissal.

50. The Tribunal made clear findings of fact, identified the relevant law, applied the law properly to the facts it found to reach an unimpeachable decision that the claimant was dismissed

for the reason, or principal reason, that she had made protected disclosures. That was the core issue in the case.

Detriments

51. The Tribunal identified the following detriments at paragraph 131:

> **(i) the suspension**
>
> **(ii) the length of the suspension**
>
> **(iii) the delay in the investigation process**
>
> **(iv) the manner in which the investigation was conducted**
>
> **(v) the failure to provide the claimant with specific details of any allegations**
>
> **(vi) the unreasonable manner in which the grievance (and appeal) were conducted**
>
> **(vii) the unreasonable manner in which the disciplinary hearing (and appeal) were conducted**

52. I doubt that the unreasonable manner in which the disciplinary hearing was dealt with is properly severable from the dismissal itself, however that has not been raised as a ground of appeal by the respondent.

The Tribunals direction as to the law

53. The Tribunal set out section 47 Employment Rights Act 1996

> **Section 47 Protected Disclosures**
>
> **(1) A worker has the right not be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.**

54. The Tribunal directed itself as to the proper approach to be adopted in determining whether a detriment was done on grounds of the claimant having made protected disclosures:

> **112. The statute requires the imposition of the detriment to be "on the ground that" worker has made a protected disclosure. Plus it is necessary to undertake an analysis of the mental processes (conscious or subconscious) which caused the decision maker to act in that way. It is now accepted that the same principles apply to whistleblowing detriment claims as in discrimination claims – it is necessary to look at the mental processes of the particular decision maker who is said to have subjected the claimant to the detriment [*Malik v Cenkos Securities PLC* – UKEAT/0100/17]. "On the ground that" means "materially influenced the decision", in the sense of being more than a trivial influence [*Fecitt v NHS Manchester* – 2012 ICR372].**
>
> **113. Once the claimant has established the protected disclosure and that she has been subjected to any detriment, under section 48 (2) "it is for the employer to show the ground on which any act, or any deliberate failure to act, was done." This statutory provision means that the tribunal may uphold the claim if the employer is unable to show the ground on which the act was done [*Kuzel v Roache Products Limited* above]. This means that the employer must show that the detrimental treatment was "in no sense whatsoever" on the ground of a protected disclosure. Effectively, where an employer has a variety of motives for its actions, it is sufficient that one of the motives was a response to a protected disclosure.**

The appeal on the Tribunals direction as to law

55. The respondent contends that the employment tribunal erred in analysing the law on the basis that the respondent must establish that each detriment was "in no sense whatsoever done" on the ground that the claimant had made protected disclosures. The respondent accepts that the phrase "in no sense whatsoever" came from the submissions of its own Counsel, but contends that the Tribunal failed to appreciate that it was not used in relation to the burden of proof, but to express the fact that the protected disclosure need only be a material factor in the detrimental treatment.

56. I do not consider that is a fair reading of the Tribunal's analysis of the law. The Tribunal clearly set out that it had to consider the decision making process of the person (or persons) who decided upon the detrimental treatment. The Tribunal specifically referred to the approach adopted in **Kuzel** and noted that "the tribunal **may** uphold the claim if the employer is unable to show the ground on which the act done" [emphasis added]. That clearly shows that the Tribunal,

as with the dismissal decision, considered it was possible that even if it did not accept the respondent's reason for the detrimental treatment, to conclude that there was some other reason than the making of the protected disclosures. The Tribunal used the phrase "in no sense whatsoever" in the way that the respondent's Counsel had, to indicate that the protected disclosure only had to be a material factor in the decision to subject the claimant to the detrimental treatment for the claim to be made out. I do not consider the appeal in respect of the tribunal's direction as to the law in respect of detriments done on grounds of having made protected disclosures is made out.

The Tribunal's analysis of the detriment claim

57. The Tribunals analysis of the detriment claims was very brief:

> **131. Detriment is established if a reasonable worker would or might take the view that the treatment accorded to him of her had in all the circumstances been to their detriment or put them to a disadvantage. The tribunal found that the following treatment administered to the claimant by the respondent was done on the ground that she had made protected disclosures:-**
>
> **(i) the suspension**
>
> **(ii) the length of the suspension**
>
> **(iii) the delay in the investigation process**
>
> **(iv) the manner in which the investigation was conducted**
>
> **(v) the failure to provide the claimant with specific details of any allegations**
>
> **(vi) the unreasonable manner in which the grievance (and appeal) were conducted**
>
> **(vii) the unreasonable manner in which the disciplinary hearing (and appeal) were conducted**
>
> **132. The tribunal found that the decisions taken in each of the above matters was materially influenced in each case by the fact that the claimant had made protected disclosures.**

The appeal in respect of the reasoning on protected disclosure detriment

58. The Respondent contends that the reasoning did not properly identify the person or persons responsible for each detriment short of dismissal, did not demonstrate that the correct legal test had been applied, and was so brief as not to be Meek compliant.

Meek

59. In **Meek v City of Birmingham District Council** [1987] IRLR 250 Lord Justice Bingham held at paragraph 8:

> **It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted.**

60. It often seems that no grounds of appeal are complete without the final ubiquitous perversity and **Meek** grounds, however that does not mean that there is never anything in them, although they should be saved for those cases where the ground is properly arguable.

Determination of the detriment appeal

61. The Tribunal clearly considered that after the claimant had made her protected disclosures, and notified the respondent that she intended to instigate a whistle blowing complaint, a process commenced that resulted in her dismissal. There are a number of detailed findings of fact about this process, particularly the unexplained unfairness of much of the claimant's treatment. However, when analysed as pre-dismissal detriments the reasoning was

extremely brief, with no separate analysis of each detriment. Reluctantly, having regard to the very careful and detailed findings of fact the Tribunal made overall, I conclude that there is not sufficient in the reasoning, which is essentially limited to paragraph 132, to show the tribunal's analysis of the person or persons responsible for each detriment, and why it was decided that a material factor in the decision to subject the claimant to the detriment was her making protected disclosures. It may well be that the Tribunal considered that because it had found in the claimant's favour in respect of her main claim, that she had been dismissed for making protected disclosures, the detriment claims were subsidiary. That is probably correct; but if individual steps in the process resulting in the dismissal were to be held to be individual detriments they required separate analysis. In the circumstances, I uphold the appeal on the basis that the employment tribunal gave insufficient reasons for upholding the protected disclosure detriment claims.

Disposal

62. Having had regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 I consider that the protected disclosure detriment claims should be remitted to the same employment tribunal:

(1) The Tribunal determined the main claim without error;

(2) I do not consider that the employment tribunal misdirected itself as to the law in respect of protected disclosure detriments – the error was insufficiency of reasons;

(3) It is proportionate to do so as it should not be necessary to hear further evidence – if there was insufficient evidence in respect of some of the more minor detriments the claimant will need to consider whether it proportionate pursue those allegations;

(4) There is no reason to doubt the professionalism of the Tribunal.

63. The claimant may wish to consider whether to pursue the more minor detriments, or indeed, any of the detriments, having succeeded in the dismissal claim. If the major, or all, of detriment claims are pursued it may be possible for them to be dealt with at a combine hearing together with remedy. That will be a matter of case management for the employment tribunal.