Case No: EA-2021-000268-VP (previously UKEATPA/0110/21/VP)

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
7 Fetter Lane, London, EC4A 1NL

Date: 11 November 2021

Before :

MR JUSTICE GRIFFITHS (sitting alone)

- -

Between :

(1) OXFORD SAÏD BUSINESS SCHOOL
(2) DR ANDREW WHITE **Appellants**

- and –

Dr ELAINE HESLOP **Respondent**

- -
- -

Schona Jolly QC and **Jennifer Danvers** (instructed by Bevan Brittan LLP) for the **Appellants (Respondents below)**
Jane Mulcahy QC and **Joel Kendall** (instructed by Royds Withy King LLP) for the **Respondents (Claimant below)**

Hearing date: 14 October 2021

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Judgment

SUMMARY

UNFAIR DISMISSAL, WHISTLEBLOWING, PROTECTED DISCLOSURES

The ET applied the correct legal test of causation in a claim for detriments suffered during employment on the grounds of protected disclosures and reached decisions on these points which were open to it on the evidence. The ET's decision, on the stricter test of causation applied to whether a dismissal was automatically unfair, was not inconsistent with those earlier decisions. The ET's decision on constructive dismissal was adequately and correctly reasoned, bearing in mind the issues and the facts in the case. **DPP Law v Greenberg** [2021] EWCA Civ 672 applied.

The Honourable Mr Justice Griffiths:

1. This is the appeal of the First and Second Respondents against a liability decision of Reading Employment Tribunal ("the Liability Decision") in favour of the Claimant. The Liability Decision found (amongst other matters) (a) that she had been subjected to a number of detriments "on the grounds of" protected disclosures, and (b) that she had been constructively and unfairly dismissed.

2. The Grounds of Appeal are:

    i) Ground 1, that the ET erred in its approach to whether the detriments were "done on the ground that" the Claimant had made protected disclosures, quoting section 47B of the **Employment Rights Act 1996** ("the Act"). This Ground has in argument been divided into three aspects (Appellants' skeleton argument, para 5):-

        a) The ET wrongly conflated the causative test with whether the acts or omissions were justified or reasonable.

        b) The ET failed to consider whether there was any link between the 'red flags' relied upon by the Claimant and the conscious or unconscious motivation of Dr White, justifying the drawing of inferences.

        c) The ET wrongly adopted a 'but for' test for causation in respect of some of the detriments.

    ii) Ground 2, that the ET failed to direct itself correctly or at all, when determining whether the Claimant had been constructively dismissed.

3. The appeal was rejected under rule 3(7), by HHJ Auerbach, but (after an oral hearing) has been allowed through to this full hearing by HHJ Shanks, under rule 3(10) of the **EAT Rules**.

Background facts

4. There is no challenge to the ET's findings of primary fact. The ET hearing lasted 10 days and included 8 days of evidence from witnesses. The ET consisted of an Employment Judge and two lay members. In those circumstances, a challenge to findings of primary fact would have been difficult. Ms Jolly QC for the Appellants made it clear that she was not appealing on the grounds of perversity, but, rather, on the grounds which I have set out, which she argued demonstrated errors of law. I may therefore summarise the background facts from the Liability Decision.

5. The Claimant, Dr Heslop, took her doctorate at the University of Oxford and then enjoyed a distinguished career before taking up appointment with the First Respondent (the Oxford Said Business School) as Director of Custom Programmes with effect from 1 January 2016. Something of the flavour of her career and of her reputation before her last working day on 6 September 2018 can be seen from a passage of her resignation letter dated 6 November 2018, which was shown to me, and which I do not understand to be disputed:-

> "…since graduating from the University of Oxford with a DPhil in 2003, having held the Mortimer May Senior Scholarship in Geography at Hertford College, I have had an exemplary employment record. During my time as an NHS Manager, Civil Servant, and Director within Deloitte I have been cited as a role model for my leadership, treatment of staff, and business

> contribution. I led the higher education consulting team at Deloitte and was invited by Professor Tufano [of the First Respondent] to sit on the International Advisory Board for the Said Business School in 2014. Prior to the actions of Dr White on the 6th September, I had successfully achieved the turnaround of the Custom Executive Education Business - increasing the client base from 39 to 64 clients, the contracted revenue by c.20%, and recognised revenue by 8% during the past financial year. I have increased the margin of Custom Executive Education activities by 7% since I started in post. These achievements demonstrate my capability in post, and the change I led and effected in Oxford's approach to Customised executive education was noted by externals including the Financial Conduct Authority, Shell, and the Education and Training Foundation. The night before my meeting with Dr White I was commended for my leadership in securing a major win with the Federal Government of Victoria (Australia), and separately for my leadership and guidance to the team in landing an opportunity with a Norwegian Law firm. During my tenure I have acted as an ambassador for Oxford and advocated the importance of education."

6. Dr Heslop's employer, the First Respondent, was Oxford Saïd Business School Limited ("OSBS"), which a company wholly owned by the University of Oxford. The University of Oxford was originally the Third Respondent but it had ceased to be a party in its own right by the time of the Liability Decision.

7. The Dean of OSBS was Professor Tufano, and Dr Andrew White was an Associate Dean who reported to him. Dr White was the Second Respondent.

8. Dr White was, therefore, senior to Dr Heslop at OSBS. She reported to him (Liability Decision para 36).

9. Dr Heslop herself had four direct reports (Nigel Spencer, Andrew James, Chantel Moore and Caroline Lomas) below whom were other teams, making a total of about "30 – 40 people" who "ultimately reported to the claimant" (Liability Decision para 32).

10. The Liability Decision pointed out, as an unusual feature (para 38), the fact that OSBS is "a management or leadership training academy" and a number of the witnesses "had professional expertise in matters of leadership and management, and strong and well-informed views on the right and wrong approach to such matters".

11. Dr Heslop's alleged protected disclosures were divided for the purposes of argument into four groups, described in the case as Groups 1-4. The ET decided that the Group 1 and Group 2 disclosures were not protected disclosures. The ET decided that there were, however, protected disclosures in Groups 3 and 4. There is no challenge to that part of the Liability Decision.

12. The first protected disclosure was, therefore, on 12 June 2018 when Dr Heslop said, in an email to Mr Harris (a director of OSBS) and to Dr White, that she was unsure how a certain proposal could "get past the procurement legislation". The ET found that the Claimant was making it clear that she was starting from the position that the actions contemplated by OSBS were unlawful (para 180). This protected disclosure was the only one upheld from Group 3. Dr White's response to the protected disclosure was

that, on further consideration, he did not proceed with the proposal, because he felt "deeply uncomfortable", and it "felt wrong to me" (para 76, quoting his evidence).

13. The rest of the protected disclosures accepted by the ET were in Group 4, and were made by Dr Heslop in conversations with Dr White on 9 August 2018, 13 or 14 August 2018 and in a written grievance on 31 October 2018 (para 188). These protected disclosures concerned what the Claimant reasonably believed to be breaches of OSBS's legal obligations to the Cabinet Office. The Cabinet Office was a major client which had so far spent some £16.5 million on a project or projects commissioned from OSBS (para 71).

14. Concentrating on the conversation on 9 August 2018, the Claimant's evidence (quoted in para 90 of the Liability Decision) was:

> "I was worried that we had a 'portfolio issue' which could mean that we were potentially in breach of a number of client contracts."
>
> "…the Cabinet Office had paid approximately £1 million in fees for the development of a bespoke program which appeared to have negligible developed IP…"
>
> "…the Cabinet Office would feel 'ripped off' and I had felt physically sick when I had seen the 'cut and paste job' when I had examined the programme materials."
>
> "I described to [Dr White] the work [my team] had done in comparing all of the written assets and presentation materials from the MMPM with the written materials for the first cohort

> and most recent cohort of the MPLA… [they had found] numerous examples of where the materials were identical - including the transposing of typos and use of legacy branding…"
>
> "…the fact that [the Cabinet Office] had spent so much on development fees [meant] they would have a reasonable expectation that tailored written materials did exist."
>
> "I warned [Dr White] that there were numerous emails over many years that showed that the Cabinet Office clearly thought that this was the case ..."

15. The ET found that Dr White's description of the meeting was "to much the same effect", although his own paraphrase was, if anything, in even starker terms, as follows (quoted in Liability Decision para 91):-

> "[The claimant] told me that she believed [the first respondent] had misled the Cabinet Office regarding the customised nature of the MPLA and she thought this was in breach of contract. She was concerned about the fees they had been charged and that in her view only minimal IP had been created. She referred to the 'gain share' which was the contractual arrangement with the Cabinet Office regarding developed IP. [She] said she was arranging an investigation ...
>
> [She] appeared to be suggesting that we were defrauding the client, which was clearly a pretty serious thing to be saying."

16. The ET noted that Dr White's personal reaction to this protected disclosure on 9 August 2018 was that "on further consideration, he felt the claimant's allegations were misconceived". However, "he acknowledged that the issues… needed to be resolved" (Liability Decision para 92).

17. Although the ET found that protected disclosures to like effect were repeated by Dr Heslop to Dr White in a second conversation on 13 or 14 August 2018, and again in her grievance dated 31 October 2018, these did not appear to add very much (Reasons, para 93 and para 187).

18. Directly following her phone call (and protected disclosure) to Dr White on 13 or 14 August 2018, the Claimant went on holiday, only returning to work on 6 September 2018.

19. At this point, the Claimant had been employed by OSBS for over two years, and Dr White had been her manager throughout (para 97), grading her highly on appraisal, and finding no substantial issues with her work or her relationships with colleagues (paras 97-100).

20. However, in her absence between 14 August and 6 September 2018 events unfolded as follows.

21. Unknown to the Claimant, her direct report Chantel Moore had, on the day of the Claimant's protected disclosure to Dr White on 9 August 2018, made general criticisms of the Claimant, saying the team were "very unhappy", the atmosphere in the office "was not good", she "did not trust the claimant", and the claimant "was not capable of being a leader" (para 104).

22. When the Claimant was on holiday, Chantel Moore spoke to Nicholas Blandford (a client director who did not report directly to the Claimant) and Andrew James (who did) about what she had said to Dr White. Mr Blandford then on 16 August 2018 approached Dr White himself and made his own criticisms of the Claimant (para 107), saying (for example) that she was "fundamentally unsuited to a role leading people". This was in response to a request from Dr White that Mr Blandford should tell him "more" about the "concerns" he understood there to be about "how things were going in the custom team."

23. None of the criticisms garnered by Dr White at this point, or subsequently, appear to have been accompanied by any specific examples. A subsequent decision by a certain Dr Glover in the Claimant's grievance proceedings concluded that there were, in fact, no "serious allegations", a conclusion with which the ET agreed (para 218). Dr Glover had the benefit of an investigation (not commissioned by Dr White) from Dee Masters of Counsel, in response to the Claimant's grievance in this respect, although both Ms Masters and Dr Glover reached their conclusions after the Claimant's resignation.

24. Although he had only spoken, at this point, to Chantel Moore and Nicholas Blandford, Dr White almost immediately, and in her absence on holiday, on 21 August 2018 sent the Claimant an invitation to a meeting to take place at 8 o'clock in the morning on her first day back, which would be 6 September 2018. "There was nothing in the meeting invitation to suggest the purpose of the meeting, other than it being headed "1:1" (Liability Decision para 109).

25. The ET decided (and there is no challenge to this finding, although Dr White denied most of it) that the purpose of the meeting at 8 o'clock in the morning on 6 September, which Dr White set up on 21 August 2018, was (a) to inform the Claimant of concerns

that had been raised about her, (b) to prevent her to returning to work (Liability Decision paras 211-212) and (c) "for the purpose of ending the claimant's employment" (para 196). Dr White had (the ET found, again contrary to the Respondents' case) "formed the concluded view that the claimant should be removed from her post" (Liability Decision para 212).

26. Meanwhile, in August, Dr White spoke to various people, although not all those who would have relevant things to say (para 193.c.), for the purpose (as the ET decided, now unchallenged, although Dr White denied it) of hearing "…the criticisms they had to make of the claimant. He was not setting out to conduct a dispassionate investigation into the positives and negatives of the claimant's behaviour" (Liability Decision para 193). This was labelled as "Detriment 1", and was accepted as such by the ET, although it is right to say that the ET noted that the criticisms themselves were genuine, and not fabricated, and that on the whole those who made the complaints had approached Dr White rather than the other way round (para 192).

27. Dr White also, having set up with the Claimant a meeting first thing in the morning on her first day back, "did not give the claimant any warning of the purpose of the meeting", and "had formed the concluded view that the claimant should be removed from her post without having followed any proper process" (Liability Decision para 212). These findings of fact by the ET are not challenged (although Dr White had denied having a concluded view). They were labelled as Detriments 8 and 9.

28. The rest of the detriments arise in the context of what happened on and after 6 September 2018 itself.

29. The Claimant came into that meeting "with no reason to suspect this meeting would be bad news for her, nor did she know anything of the complaints that had been made

against her" (Liability Decision para 123). On the contrary, she was "buoyant and looking forward to my return to work" on the back of two client wins she had just learned about (namely, OSBS winning work it had bid for with the State of Victoria in Australia, and work for a major law firm, Liability Decision para 122).

30. Dr White "got straight to the point", saying that "things were not working", "serious complaints had been made", and Dr Heslop "had lost the trust and confidence" of a "significant proportion" of her senior team (Liability Decision para 126). This "came as a complete shock to the claimant" (para 128). Dr White said words to the effect that he did not want her to continue as Director of Custom Programs (para 128).

31. Dr White "refused to tell her who had raised the concerns or what they were" (para 128). He stuck to this throughout the meeting, although the claimant pressed him to tell her (para 129).

32. The meeting was held by Dr White without fair process and contrary to OSBS's disciplinary policy. This was established by the ET as a detriment, labelled Detriment 2. "Dr White held the meeting on 6 September 2018 for the purpose of ending the claimant's employment, and did so outside any recognised form of disciplinary procedure" (para 196).

33. The ET also accepted that Dr White telling her that she had lost the trust and confidence of the senior team and/or of Dr White himself was a detriment, labelled Detriment 3 (paras 197-198).

34. The Claimant left the meeting shocked and upset (para 129).

35. Although Dr White and an HR director who was with him (Melanie Francis) apparently denied this, the ET found (and there is no challenge to the finding, which was supported

by the Claimant's notes of the meeting written up on the day) that the Respondents told her to stay away from work at the meeting on 6 September (para 203). This was accepted by the ET as "a detriment that continued through to her resignation" (para 203; the date of resignation was 6 November 2018). This finding is in contrast to Dr White's assertion, in his email of 7 September drafted with the assistance of Ms Francis who had been at the meeting with him, that "it was the claimant's decision to leave the office" (para 202). This detriment was labelled Detriment 4.

36. In fact, Dr White's whole account of the meeting, in that email, was not a true reflection of what had happened, but was (as Ms Francis herself accepted) "drawn up more on the basis of how they had originally intended the meeting to go rather than on how it had actually occurred" (Liability Decision para 135).

37. The Respondents (including Dr White) failed and refused to provide the Claimant with details of the alleged wrongdoing or performance issues, not only at the meeting of 6 September itself, but up to and beyond the date of her resignation on 6 November 2018. This was accepted as a detriment by the ET and labelled Detriment 5 (Liability Decision paras 204-205). The Claimant only found out details of the allegations against her when she got hold of Dr White's notes in response to a subject access request. The request was submitted on 21 September 2018, but the documents were not provided until after she had resigned on 6 November (Liability Decision para 144).

38. Similarly, the Respondents (including Dr White), both at the meeting on 6 September and continuously until after the Claimant's resignation on 6 November 2018, failed and refused even to identify the alleged complainants. This was accepted as a detriment by the ET and labelled Detriment 6 (paras 206-207).

39. Detriment 7 (an investigation into the allegations against the Claimant instigated by OSBS after Dr White had ceased to be involved) was not found to be on the grounds of protected disclosures, and so it did not form part of the submissions at the appeal hearing before me.

40. I have already dealt with Detriments 8 and 9, because they fell earlier in time, although they are later in the numerical order (see para 27 above).

41. The effect on the Claimant's mental health, at least for a time, and on her career, was immediate; and the consequences remain significant. Since the Liability Decision dated 29 December 2020, there has been a four-day hearing to consider remedy, which has resulted in a further decision ("the Remedy Decision") of the full ET of three members dated 6 August 2021. The Remedy Decision assesses the compensation payable by OSBS and Dr White jointly as nearly £1.5 million, mostly attributable to past and future loss of earnings, but also including an award for injury to feelings and a 10% ACAS uplift. I am told that the Respondents have lodged an appeal against the Remedy Decision.

The Liability Decision

42. The Liability Decision is a careful, detailed and well-structured document of 61 pages in single-spaced type. It is all on point (without excessive or inappropriate verbatim quotation, for example) and the quantity and quality of content is, therefore, commensurate with its length.

43. It takes the following form:-

    i) The customary introduction, including a summary of the final decision (pp 1-3).

ii) An agreed list of issues in multiple sub-paragraphs, numbering (excluding issues which fell away before the conclusion of the hearing) some 54 live issues, depending on how they are counted ("the List of Issues") (pp 4-7).

iii) An account of the hearing, including the names and roles of witnesses called (pp 7-9).

iv) Background facts, including a description of the parties and other protagonists in the case, and of their roles (pp 9-13).

v) A chronological account and initial examination of the alleged protected disclosures, including their division into Groups 1 – 4 (pp 14-26).

vi) A chronological account and initial examination of the alleged detriments, carrying the narrative up to the Claimant's resignation on 6 November 2018 (pp 26-38).

vii) Subsequent events, namely the report of Dee Masters of Counsel and the decision of Dr Glover on the Claimant's grievance dated 21 June 2019 (pp 38-39).

viii) The applicable law, including statute and caselaw (pp 39-41). No criticism is made of any of the ET's statements of the law, whether here or at any point in the Liability Decision. The law is always stated correctly.

ix) Discussion and conclusions on what disclosures were made, and whether they were protected disclosures (pp 42-45).

x) Discussion and conclusions on what detriments were suffered, but deferring the issue of causation (pp 45-48).

xi) Discussion and conclusions on the reasons for the detriments, including findings on which of them were "materially influenced" (that being the correct test in accordance with **Fecitt v NHS Manchester** [2011] EWCA Civ 1190 para 45) by the protected disclosures (pp 48-55). This is the section on which Ground 1 of the appeal most heavily focusses, although this section does have to be read in conjunction with the previous sections of the Liability Decision and some of the later sections too.

Within this section is a discussion of what were referred to as "red flags". The red flags formed part of the ET's reasoning in support of its conclusions that some (but not all) of the detriments were, applying what are unchallenged as the correct burdens of proof, and in the light of the evidence as a whole (not limited to the red flags), "materially influenced" by the protected disclosures. The ET notes, in para 217 of the Liability Decision, that the report of Dee Masters initially identified five red flags suggesting that Dr White's decision was influenced by the protected disclosures. It then notes that Counsel for the Claimant developed from the evidence at the ET hearing a final list of 21 red flags. The ET itself identified just 12 red flags which it found particularly significant, and set these out in the sub-paragraphs of para 217 of the Liability Decision (lettered a – l). These (that is, the 12 red flags which the ET itself decided were particularly significant and which it later referred to in its reasoning and decisions on causation) are what I will be referring to as "the Red Flags" (para 217 of the Liability Decision).

xii) A decision on the vicarious liability of OSBS for Dr White, which was not disputed (p 55).

xiii) Discussion and conclusions on whether the Claimant was constructively dismissed (pp 55-56). The ET decided that she was, and this section is the subject of Ground 2 of the appeal. It was accepted that, if she was constructively dismissed, the dismissal was unfair.

xiv) Discussion and conclusions on whether the Claimant's constructive dismissal was automatically unfair (pp 56-57). This depended on whether "the reason (or, if more than one, the principal reason) for the dismissal" was that she had made one or more protected disclosures (section 103A of the **Employment Rights Act 1996**).

This was rightly recognised by the ET as a different causation test from the one they had applied to the detriments short of dismissal under section 47B ("on the ground that"), which (as the ET also correctly stated) includes a protected disclosure which "materially influences (in the sense of being more than a trivial influence)" the employer's detrimental treatment of the whistleblower: **Fecitt v NHS Manchester** [2011] EWCA Civ 1190 para 45. The ET also correctly recognised (para 249) that the burden of proof provision in the Claimant's favour in section 48(2) of **the Act** applied only to detriments short of dismissal, not to her claim of automatic unfair dismissal (Liability Decision para 249; cf also paras 160-161).

The ET decided that the Claimant's dismissal was not automatically unfair, carefully explaining (at para 254):

> "We conclude that in this case, while the detriments were materially influenced by the protected disclosures, the claimant has not shown on the balance of

> probabilities that her protected disclosures were the principal reason for her dismissal. She faced a number of difficult allegations. Dr White overreacted to them. However, this does not imply or lead us to the conclusion that the whistleblowing disclosures were the principal reason for her dismissal. The principal reason for Dr White's decision that her employment had to end (and his subsequent actions) were the allegations that had been made against her. However, for the reasons we have set out above in relation to the separate statutory regime in relation to detriments, his actions were materially (that is, more than trivially) influenced by her protected disclosure(s)."

The Respondents under Ground 1 of their appeal attack these different outcomes and submit that there is "an inexplicable tension" between them (skeleton argument para 17), for reasons I will examine in due course.

xv) Discussion and decisions on remedy, including contributory fault (which was nil) and the ACAS uplift (pp 57-61). These were preliminary to the later hearing on remedies, which resulted in the Remedy Decision which I have already mentioned.

General principles

44. The Court of Appeal in **DPP Law v Greenberg** [2021] EWCA Civ 672 has recently emphasised how cautious the EAT (or any appellate body) will be when approaching a challenge to the detailed reasoning of a specialist Employment Tribunal, such as the

ones raised by the appeal in this case. Per Popplewell LJ (with whom Lewison and Lewis LJJ agreed) at paras 57-58, the correct approach is as follows (with my emphasis added):-

> "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"
>
> …
>
> (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] ICR 437 and in the recent decision in **Varndell v Kearney & Trecker Marwin Ltd** [1983] ICR 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."

45. Whilst, in the past, the reasoning and conclusions of Employment Tribunals, particularly in discrimination cases, have occasionally been overturned, and those authorities are frequently cited by appellants as a result, they must be regarded as exceptional. No-one need doubt the correctness of the decisions in **Law Society v Bahl** [2003] IRLR 640 (EAT), [2004] IRLR 799 (CA) or **Anya v Oxford University** [2001] ICR 847 CA, and I, certainly, do not. But the dicta of the Court of Appeal in **DPP Law v Greenberg** [2021] EWCA Civ 672, and the long line of authority quoted in support of them, demonstrate how important it is not to take such cases as a licence to nit-pick and hypercriticise the reasoning of other Employment Tribunals, so long as they state the law correctly, and demonstrate that they have embarked on a careful and conscientious examination of the evidence, in order to reach decisions on what are, for the most part, questions of fact.

46. They are difficult questions of fact, no doubt, as questions of motive and causation often are. They are made when it is rare for direct, compelling evidence to be available of why things happened as they did, by reference to allegations of unlawful discrimination

or whistleblowing. They are questions of fact, nevertheless, and appeals lie only on questions of law.

47. It is inappropriate as well as inconvenient for the EAT or the Court of Appeal to be asked to conduct a minute examination of ET decisions with a view to overturning findings of fact except in a relatively clear case. Even in a high-value case, or a case in which the reputational issues are acutely felt (both of which are not untypical of discrimination and whistleblowing claims), the winners should usually be left to retain the fruits of their victory without an expensive, time consuming and exhausting war of attrition in courts of appeal. An appellate court is not well placed to decide or even review questions of fact. It has not heard the evidence; which no written decision, however detailed, can ever fully convey.

48. The working assumption must be that an Employment Tribunal, which has made no clear error of law, has reached no impermissible conclusion of fact. This working assumption should not easily be displaced by hypercriticism of reasoning, or lack of reasoning, or of the way in which a decision is either structured or expressed. Any decision could usually have been expressed or structured differently, and perhaps a different court might have preferred a different structure or form of expression if it had had the task of writing the decision in the first place. It is, equally, always easy to say that an extra word or sentence would have improved a decision's resilience against an *ex post facto* attack following detailed scrutiny of it in preparation for an appeal. But that does not in itself mean that the original decision is wrong. The question is not whether the decision is ideal, or even excellent, but only whether it is good enough, with reasoning which is sufficient, and free of demonstrable error. If it passes that test, the facts (including inferences of fact, and findings of secondary fact) should remain

where the independent (and, in the case of Employment Tribunals, specialist) tribunal of fact has left them.

Ground 1(a): The ET wrongly conflated the causative test with whether the acts or omissions were justified or reasonable

49. Ground 1(a) is that the ET erred in its approach to whether the detriments were "done on the ground that" the Claimant had made protected disclosures (quoting section 47B of the **Employment Rights Act 1996,** "the Act") by wrongly conflating the causative test with whether the acts or omissions were justified or reasonable. It is argued that the Liability Decision shows strong disapproval of the conduct of Dr White and the OSBS, and that the ET in its Liability Decision impermissibly and irrationally moved from disapproval of Dr White's conduct to an inference that it was motivated by the protected disclosures.

50. There is no doubt that Dr White's conduct was reprehensible. That is clear from the ET findings, which I have set out (at paras 19 to 38 above). It did not follow from that that his conduct was motivated by the protected disclosures. In **Bahl v Law Society** [2004] IRLR 799 the Court of Appeal said (at para 101), after reviewing earlier authority:

> "It is correct, as Sedley LJ said [in **Anya v University of Oxford** [2001] IRLR 377] that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it… It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally unreasonably to everybody… proof of equally unreasonable treatment of all is merely one way

of avoiding an inference of unlawful discrimination. It is not the only way."

51. The Court of Appeal in **Bahl v Law Society** [2004] IRLR 799 (at para 69) endorsed as "a masterly analysis of the law" the judgement of Elias J in the EAT which was under appeal and, in particular, paras 77-128 of his judgment. In that passage, Elias J recognised that, whilst other evidence is required, "That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever" (para 99). Reasonable conduct is less likely to be improperly motivated (para 99), whereas unreasonable conduct requires more explanation (para 100); "The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility" (para 101 of the judgment of Elias J).

52. In **Bahl**, it did not appear from the ET decision precisely what it was that led the ET, in that case, to conclude that race or sex played any part in motivating the adverse treatment of Dr Bahl (para 127 of the Court of Appeal judgment), and the Court of Appeal found that there was no proper evidential basis for the ET's conclusion (para 134). It cited Pill LJ in **Governors of Warwick Park School v Hazlehurst** [2001] EWCA Civ 2056 at para 28 saying "In the absence of reasoning, there is a real danger that the inference has been wrongly drawn."

53. In the present case, the ET set out its reasoning very explicitly and clearly in paras 214-241 of the Liability Decision, and the reasoning appears to me both legitimate and sufficient. Indeed, it is too long and manifold for it to be convenient for me to set out in full. It is not the case that the reasons consisted solely or even mainly of the fact that Dr White's conduct was both unjustified and unreasonable. That it was unjustified and

unreasonable did not help him, but it was not the whole basis upon which the causation decision was made. I hesitate to paraphrase reasons which occupied 7 pages of the Liability Decision, but they included the following:-

i) Dr White decided to end Dr Heslop's employment, not only "without any discussion with the claimant" but "despite apparently having a high opinion of the claimant and her work" (para 216).

ii) Dr White's "conclusion that the claimant's employment must end" was "rapid" as well as one-sided (para 217); "Dr White's actions followed almost immediately after the claimant's protected disclosures (particularly the group 4 disclosures)" (para 216.e).

54. The ET set out the strangely inappropriate conduct of Dr White, not least in a number of the Red Flags in para 217, but when it said, in para 218, "Fundamentally it is very hard to understand why Dr White leapt to the conclusion that these allegations required the claimant's employment to be ended", this was in the context of the Liability Decision examining, and rejecting, the plausibility of his own explanations for what he did. This is particularly clear from its meticulous evaluation of the evidence in respect of each of the established detriments (Detriments 1-9, excluding 7) in turn.

55. Some of the evidence was helpful to Dr White, but it is a strength and not a weakness of the Liability Decision that those elements were recognised and referred to. It did not follow from the presence of some helpful evidence that the ET could not base its findings on the evidence as a whole, as it rightly did.

56. Great emphasis is placed in support of the appeal on the ET's finding that Dr White overreacted to the allegations brought to him by Chantel Moore and others, but Dr

White did not say that he overreacted, still less that this was the reason for him imposing the various Detriments. He put forward other explanations, and it was damaging to his case that they did not withstand the ET's scrutiny, for reasons which the ET gave. His evidence that he was garnering criticism in order to inform a later decision was inconsistent with him making up his mind immediately (para 225). The Respondent's submission that the conduct of the meeting of 6 September was intended to give the Claimant "an opportunity to avoid a formal process" (para 226) was inconsistent with the unchallenged finding that there was never going to be a formal or any process, Dr White having already decided that the Claimant would go (para 227). The Respondent's case that the Claimant was not allowed to resume her work because of a need to investigate (para 229) was inconsistent with Dr White's lack of any interest in an investigation, even extending to his refusal to tell Dr Heslop who was accusing her and what they were saying. The explanation that information could not be given because of concerns about confidentiality (para 232), was inconsistent with the lack of evidence of such concerns (para 234). The case that the meeting of 6 September was conducted as it was so that she could "take the easy way out" was inconsistent with the refusal to provide her with any basis for thinking that she would be well-advised to do so (para 233).

57. While *post hoc ergo propter hoc* ('After, therefore because of,') is a logical fallacy, the fact that an otherwise unexpected event follows rapidly on an event which might have caused it provides some evidence that it may have done so, which can be added to other available evidence. The ET decision has to be read as a whole and, read as a whole, the decision is not at all surprising, because it accords naturally with the primary facts. Between 9-14 August, Dr Heslop suggested, as Dr White put it, "that we were defrauding the client" (para 91), which, on further consideration, he felt to be

"misconceived" (para 92); a few days later he responded to the approaches from Chantel Moore and Mr Blandford (on and before 16 August) by diarising, on 21 August, the meeting at which Dr Heslop was to be told she had to go, as soon as she returned from holiday on 6 September, having listened in a biased fashion to everything bad he heard said about her.

58. It is objected that the ET makes no finding that Dr White was not a credible witness and it is submitted that this made more necessary a more lengthy, or at least more cogent, explanation by the ET of the inference that he was (contrary to his case) "materially influenced" by what the Claimant had said when inflicting the catalogue of detriments upon her thereafter. It is true that there is no free-standing evaluation of Dr White as a witness, but the Liability Decision did something better and more compelling than that. It weighed his evidence in the balance on individual disputes of fact, comparing it with other evidence about those issues when assessing whether it was credible or not. At multiple points, it was not (see, for example, paras 25-27 above). There is no challenge to any of those assessments and it followed from them that he could not by any means be said to have emerged as a credible witness. At some points, this lack of credibility was demonstrated by the Respondents' own evidence: it is a quite remarkable fact that Dr White's email of 7 September gave an account of the meeting of 6 September which was not a true account, although it was sent the day after (see para 35 above).

59. All of this to my mind refutes the criticism that the Liability Decision was based solely on disapproval, rather than a rational and evidence-based finding of secondary fact when deciding whether Dr White was "materially influenced" by the protected disclosures when imposing the detriments on Dr Heslop.

60. It is necessary also to add, as the ET did, the effect of section 48 of the **Employment Rights Act 1996**:

> "(2) On a complaint [of detriment on the ground of protected disclosure] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
>
> …
>
> (5) In this section… any reference to the employer includes… in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent."

61. Having set out these provisions (paras 160-161), the ET correctly cited the EAT judgment of Simler J in **Timis v Osipov** (affirmed by the Court of Appeal at [2019] ICR 655) which (as the Liability Decision summarised it at para 219)

> "…reminds us that it is for the claimant to show that the disclosures had a more than trivial influence on the detrimental treatment, but also that s48(2) requires the respondent to show the reasons for their action, and that if they do not do so inferences may be drawn against them".

62. The Respondents failed to discharge this burden, and this provided some support for the inference drawn against them, in addition to the other points identified in the Liability Decision.

63. The Appellants argue, under Ground 1(a), that "There is an inexplicable tension between the Tribunal's explanation for the s.103A claim [i.e. the dismissal, which was

held to be unfair, but not automatically unfair], and its conclusions on s.47B [i.e. the claim based on detriments other than dismissal] that 'the Respondents have not shown on the balance of probabilities the reason for the detriment' [para 225 of the Liability Decision]".

64. I see no tension, let alone contradiction, between the Liability Decision's reasoned conclusion that the protected disclosures more than materially influenced the imposition of the various detriments, and its subsequent conclusion that the protected disclosures were not "the reason or principal reason for the claimant's dismissal" (Liability Decision para 251, in the passage at paras 249-255 deciding that her dismissal was actually unfair but not automatically unfair).

65. The ET gave different answers to different questions and, in doing so, demonstrated how carefully and rationally it approached its task, analysing with a fine toothcomb and not simply applying a broad brush. It was aware that the different outcomes required explanation and provided it at paras 249-255 of the Liability Decision. On the automatic unfair dismissal question, section 48(2) of the **Employment Rights Act** did not apply (para 249); hence, the ET's rejection of Dr White's own explanations did not have consequences under section 48(2) when it came to the question of unfair dismissal (paras 250-251). When it came to automatically unfair dismissal, the burden lay on the Claimant on the balance of probabilities (para 251) and, moreover, it was the burden of showing, not only that the protected disclosures "materially influenced" the dismissal, which was enough to establish her detriment claims in accordance with **Fecitt v NHS Manchester** [2011] EWCA Civ 1190 para 45, but that it was "the principal reason" (Liability Decision para 252, quoting section 103A, "the reason (or, if more than one, the principal reason)").

66. The ET puts it very clearly in para 254 of the Liability Decision:

> "The principal reason for Dr White's decision that her employment had to end (and his subsequent actions) were the allegations that had been made against her. However, for the reasons we have set out above in relation to the separate statutory regime in relation to detriments, his actions were materially (that is, more than trivially) influenced by her protected disclosure(s)."

67. This was a conclusion, and a distinction, open to the ET on the evidence and on the primary facts found. There is no criticism of the ET's statements of the law. This is really an appeal against its findings of fact. It is not justified.

Ground 1(b): The Red Flags

68. Ground 1(b) is that the ET erred in its approach to whether the detriments were "done on the ground that" the Claimant had made protected disclosures by failing to consider whether there was any link between the 'red flags' relied upon by the Claimant and the conscious or unconscious motivation of Dr White, justifying the drawing of inferences.

69. The ET did not accept that all the 'red flags' relied upon by the Claimant were persuasive in her favour. Out of 21 red flags presented in argument, the Liability Decision found just 12 to be probative ("the ones that we find particularly significant") and these are the ones it set out at para 217 of the Liability Decision, as follows:-

> "a. The speed of Dr White's change of position set against his prior personal knowledge of the matters being brought to his attention.

b. The complaints from the claimant's colleagues did not justify a conclusion that there had been "a catastrophic breakdown of leadership in the custom team"…

c. Dr White having made the decision on 21 August 2018 that a meeting was necessary having only spoken to two of the claimant's colleagues.

d. Dr White failing to speak to all relevant colleagues (including all her direct reports) before forming his view of the claimant's performance.

e. Dr White's emphasis of negative as opposed to positive matters in his notes (for instance, the lack of any substantial record of discussions with Dr Spencer, who appears to have been broadly supportive of the claimant, and apparent failure to ask him to score his confidence in the claimant).

f. Dr White having mis-recorded what Ms Thomson said about the claimant.

g. Dr White failing to take into account that at the time the team was going through a difficult reorganisation.

h. Dr White failing to take account of any comments thus far on the "values feedback" that was in preparation at the time and would have given the fullest assessment of the claimant's actions along with a ready-made opportunity for him to take any areas of weakness up with the claimant.

> i. Dr White having formed his view (and communicated it to the claimant in the meeting) that she should leave, without having had any prior discussion or investigation with her.
>
> j. The subsequent failures to act properly in the events that followed the meeting on 6 September 2018.
>
> k. The identification of these problems, and Dr White having reached the conclusion that the claimant's employment should be ended very shortly after the Group 4 disclosures.
>
> l. The lack of documentation explaining Dr White's decision or internal discussions about the future of the claimant with the first respondent."

70. Taken together, these Red Flags did support the ET's conclusion that, while the principal reason for the Claimant's dismissal was the (insubstantial) allegations against her, the allegations did not wholly explain Dr White's conduct and it was permissible to infer that the very recent protected disclosures materially influenced him in acting as he did. At every point when reaching conclusions on causation of each of the Detriments, the ET included the Red Flags as part of its evaluation accordingly (para 225 on Detriment 1, para 227 on Detriments 2 and 3, para 230 on Detriment 4, para 234 on Detriments 5 and 6, and para 241 on Detriments 8 and 9). The ET in this way directly considered the bearing of the Red Flags, if any, on what Ground 1(a) calls "the conscious or unconscious motivation of Dr White" although the relevant question in law, and the question asked and answered by the ET, was whether Dr White did what he did "on the ground that" the Claimant had "made a protected disclosure" (quoting section 47B of **the Act**); that is, whether the protected disclosure "materially

influence[d] (in the sense of being more than a trivial influence)" his treatment of her (quoting **Fecitt**, as in para 162 of the Liability Decision). It is not, therefore, fair to say that the ET "failed to consider whether there was any link between the 'red flags' relied upon by the Claimant and the conscious or unconscious motivation of Dr White, justifying the drawing of inferences", as Ground 1(b) suggests.

71. Nor am I persuaded that the ET erred in law when evaluating the Red Flags as part of the evidence. Again, this is really an appeal against the ET's fact-finding, rather than an appeal on a point of law. But even as a submission about the value and weight of the evidence, it misses the mark. Red Flag a. was particularly striking: Dr White's change of mind about the Claimant hard on the heels of the protected disclosure, alleging a sort of fraud, which he thought was "misconceived". Red Flag k. also notes the close temporal connection between the disclosure and the detriment which, while it did not prove causation, was at least some evidence in support of it. But there was more. The biased reaction to the allegations was also suggestive (Red Flags b. – e.), as was its irrationality (Red Flags d., g. and h.) on the part of an intelligent, highly educated, and (see Liability Decision para 38) expert witness. Not only did Dr White not document what he was doing (Red Flag l.), he actually mis-documented what he was being told (Red Flag f.).

72. Consequently, I reject the attack on the Liability Decision based on the Red Flags. Moreover, the Liability Decision as a whole was not based solely on the Red Flags; it included consideration and rejection of the various explanations offered by Dr White himself, none of which is now challenged on appeal.

73. In this respect, it is important to remember that the Respondents' reliance in their appeal on Dr White's "over-reaction" to the complaints of Chantel Moore and Nicholas

Blandford, as a lawful (if unworthy) explanation for his detrimental conduct towards the Claimant, was not supported by the evidence, or by the decision of the ET. When the Liability Decision said (in para 222) that "Dr White plainly overreacted to the allegations he was presented with", this was characterising his conduct, rather than explaining it. Dr White did not say that he treated Dr Heslop as he did because he was over-reacting. He said that he had good reason to do it, and gave explanations which the ET rejected on the evidence. The Respondents' case was that the Claimant was the person prone to overreaction (Liability Decision para 257). When, at the remedy stage, the Respondents tried to capitalise on the ET's reference in para 222 to Dr White overreacting, the ET noted that it had not found that Dr White was "particularly sensitive to the allegations he was hearing, or prone to overreaction simply because of the nature of the allegations that were made" (Remedy Decision para 140). It said: "There is nothing to account for the first detriment other than the claimant's protected disclosures, nor is there anything to suggest that [Dr White] was (apart from any question of protected disclosures) particularly prone or inclined to coming to rash or hasty conclusions about employment matters" (Remedy Decision para 141). I do not therefore think that the ET in its Liability Decision was bound to spend any more time on, or give any greater weight to, the "overreaction" explanation now relied on by the Respondents than it actually did.

74. The reference in Ground 1(b) to Dr White's "conscious or unconscious motivation" was developed in argument before me by reference to the judgment of Mr Recorder Underhill QC (as he then was) in **London Borough of Harrow v Knight** [2003] IRLR 140, which stated (at para 15):

> "The authorities clearly establish that the question of the 'ground' on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which caused him to so act."

75. The Respondents argue that it followed that the ET was bound to decide and specify to what extent, if at all, Dr White's mental processes "on the grounds of" the protected acts were "conscious or unconscious", which they did not do. However, among the 54 live issues which the parties asked the ET to decide (set out in the List of Issues on pp 4-7 of the Liability Decision), the question of allocation between what was conscious or unconscious was not included. No doubt this was because the words of sections 47 and 48 of **the Act**, which were set out at paras 159-160 of the Liability Decision (and regularly referred to and applied thereafter), do not raise this distinction. Neither the List of Issues, nor the evidence and submissions in the case, suggested that this distinction was material to the way the case was being put on either side. Legal causes of action often have many elements, and each element may be broken down in a number of ways, but not every element is critical to the issues and the decisions of fact in every case. It would be a great impediment to the efficient process of justice if the parties and the fact-finding tribunal could not limit themselves to the live issues raised by the facts of the particular case, or if they could not rely on represented parties in an adversarial process to identify what those issues were. This observation is supported by **Scicluna v Zippy Stitch Ltd** [2018] EWCA Civ 1320 per Longmore LJ at paras 15-16, and per Underhill LJ at para 22.

76. Moreover, in **London Borough of Harrow v Knight** [2003] IRLR 140, the ET had unfortunately failed to direct itself by reference to the statutory words, posing, instead,

the imprecise question of whether the detriment "was related to the protected disclosures" (quoted in para 4 of **Harrow**). It had, therefore, failed to "set out separately the elements necessary to establish liability" including the critical words 'on the ground that' (per Recorder Underhill QC at para 5). It was this gap which required the EAT to conduct its own analysis of the fact-finding in order to see whether it was sufficient to pass the correct test, although that test had not been identified by the ET itself. It was in the process of that analysis, and on the particular facts of that case, that the EAT found that the lack of attention to what was conscious, or unconscious, meant that the reasoning fell short. This was only appropriate because (at para 17): "If we were satisfied that, despite using the wrong words, the tribunal had asked and answered the right question, and done so in Mr Knight's favour, its finding could stand. But we cannot be so satisfied."

77. In the present case, the ET clearly articulated the correct test, using the relevant statutory words. Applying the principles summarised in **DPP Law v Greenberg** [2021] EWCA Civ 672, and given the points I make in paras 45 and 48 above, I am not persuaded that the ET's failure to specify (unprompted by the parties or the List of Issues) to what extent Dr White was acting, not only "on the grounds" of the protected disclosures, but consciously as opposed to unconsciously so, was a significant omission undermining its decision or giving grounds to allow an appeal. The argument seems to depend heavily on an assumption that Dr White was accepted as a reliable witness when he denied that the protected disclosure materially influenced his course of conduct, and that assumption, as I have explained in para 58 above, is unwarranted.

Ground 1(c): The ET wrongly adopted a 'but for' test for causation in respect of some of the detriments

78. The causation test set by the statutory words – "on the grounds" – is stricter than a "but for" test: see **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 HL at para 29, and **London Borough of Harrow v Knight** [2003] IRLR 140 at para 16.

79. However, the ET stated the correct test at more than one point in the Liability Decision. It did so, indeed, repeatedly and constantly.

i) It used the statutory phrase "on the ground of protected disclosures" when stating its decision in para 3 and para 4.

ii) It stated the question of whether the Claimant was subjected to detriments "on the ground that" she had made a protected disclosure in the List of Issues in paras 5.1 - 5.3.

iii) It quoted the "on the ground that" test verbatim when setting out section 47B and section 48 of the **Employment Rights Act** in paras 159-160.

iv) It quoted the dictum of Simler J in para 115 **International Petroleum Limited v Osipov** (EAT), also verbatim, as follows (at para 163 of the Liability Decision): "…the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made."

v) It stated that it would be considering whether the detriments "were on the ground that the claimant had made protected disclosures" (in para 190).

vi) It directed itself by quoting (in para 162) from **Fecitt v NHS Manchester** [2011] EWCA Civ 1190 at para 45:

> "s47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

vii) It found that Dr White's action in relation to Detriment 1 was "materially influenced by the protected disclosures – in particular the group 4 disclosures" (para 225).

viii) It found that Dr White's actions in relation to Detriments 2 and 3 were also "materially influenced by the protected disclosures – in particular the group 4 disclosures" (para 227).

ix) It found that Dr White's action in relation to Detriment 4 (the Claimant's suspension from work) was also "materially influenced by the protected disclosures – in particular the group 4 disclosures" (para 230). This is the paragraph, however, in which it is said that they mistakenly applied a "but for" test, because of other wording in that paragraph, and I will return to that, below.

x) It found that Dr White's actions in relation to Detriments 5 and 6 (the Claimant not being informed of who was making allegations against her, or of what the allegations were), were "materially influenced by the protected disclosures – in particular the group 4 disclosures" (para 234). In doing so, however, it drew "a distinction between the elements of these detriments for which Dr White was responsible or had control and those which fell under the remit of others" (para 235). On the face of it, this demonstrated that a "but for" test was not being applied, but, rather, that the ET was strictly and correctly focussing on what "materially influenced" Dr White himself when deciding what he would and

would not do. In other words, they were applying the subjective test referred to in **Khan** at para 29.

xi) It found that causation in respect of the detriment constituted by the Dee Masters investigation (Detriment 7) was not proved (paras 236-237). This was because "Dr White did not have any responsibility for this" (para 237), although the investigation would no doubt not have taken place "but for" the actions of Dr White. This again confirms that the correct test was being applied: a subjective test by reference to why Dr White acted as he did, rather than a weaker causation test of consequences which would not have occurred "but for" the actions of Dr White.

xii) It found that Detriments 8 and 9 were "materially influenced by the protected disclosures – in particular the group 4 disclosures" (para 241). Again, this was both stating and applying the correct causation test.

xiii) The correct "material influence" test was, finally, repeatedly referred to when the ET was discussing and explaining its decision on automatic unfair dismissal and comparing the findings that it had made on causation of detriment in that respect under sections 47-48 with its decision on automatic unfair dismissal under section 103A (Liability Decision paras 250-251, and paras 253-254). For example, the ET says of Dr White (at para 254) that "his actions were materially (that is, more than trivially) influenced by her protected disclosure(s)".

80. Such an impeccable and reiterated statement of the correct test, rather than a "but for" test, immediately recalls the dictum of Popplewell LJ in **DPP Ltd v Greenberg** [2021] EWCA Civ 672 at para 58 that "…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".

81. The basis of Ground 1(c) is one passage, in para 230 of the Liability Decision, which says as follows:-

> "The difficulty for the respondents is that the points they rely on only arose as a result of the approach that Dr White was taking to the allegations he had received against the claimant. He should have dealt with those properly, but chose not to do so. Instead he embarked on a meeting which became very upsetting for the claimant. In arguing that the suspension was justified the respondents are relying on ill-effects which only arose because of Dr White's conviction that the claimant's employment should be ended. If he had handled things properly there may have been no need for the claimant to be suspended. In those circumstances we find that the respondents have not shown on the balance of probabilities the reason for this detriment. Bearing in mind the "red flags" we have identified above, we infer that it was materially influenced by the protected disclosures — in particular the group 4 disclosures."

82. Taken in isolation, this does give some support for a concern that a "but for" test is being applied, even though the phrase "but for" is not used. But it is always wrong to take one passage from an ET decision in isolation**: DPP Ltd v Greenberg** [2021] EWCA Civ 672 at para 57(1) and **Brent v Fuller** [2011] ICR 805 at 813. Even the

passage relied upon ends with the correct test: "…we infer that it was materially influenced by the protected disclosures".

83. Para 230 of the Liability Decision is a response to submissions on behalf of the Respondents summarised at para 229, as follows:-

> "While accepting that this occurred [i.e. Detriment 4, relating to the Claimant's suspension from work], Ms Danvers [Counsel for the Respondents] gives three reasons why the claimant could not go back to work on 6 September 2018 - those were that she was upset, had been made aware of concerns from her team who she would then have to interact with and that she needed some time and space to reflect on matters. In respect of matters from 7 September 2018 onwards, Ms Danvers says that ongoing suspension was justified pending a further meeting and in the light of the need to investigate the complaints she later made."

84. Para 230, which immediately follows this passage, is not making a "but for" point in order to set the test of causation, but rejecting the Respondents' own explanation and justification of the suspension. It was not justified because, in relying on the Claimant being "upset", and having to interact with a team who she had been told had anonymised and unspecified concerns about her, and on her needing "time and space to reflect on matters" (which she had not asked for), the Respondents were relying on Dr White's own prior mishandling of the situation. This did not provide an explanation independent of the detriments themselves, and in particular independent of the detriments prior to this one, which the ET had already decided were "materially influenced by", and therefore "on the grounds of", the Claimant's protected disclosures. The explanation

put forward was not convincing, and was not accepted. The passage is considering and rejecting the Respondents' case on causation, rather than applying a "but for" test to the Claimant's case on causation. When it came to deciding causation on Detriment 4, the ET's decision was on the correct test that Dr White was acting "on the grounds of", because "materially influenced" by, the protected disclosures. It also stated in para 230 that it reached the decision on the causation of Detriment 4, not on the basis of the prior discussion of the submissions of Counsel for the Respondents (except to the extent that it had rejected them), but on the basis of the Respondents' failure to show the reason for Detriment 4 on the balance of probabilities with an explanation of their own, and on the basis of the Red Flags.

85. The ET did not, therefore, wrongly apply a "but for" rather than a "material influence" test, even on Detriment 4 (the sole Detriment in respect of which this point is made). Ground 1(c) of the Respondents' appeal has not been made out.

The relevance of the Remedy Decision

86. The Appellants' skeleton argument relied on passages in the Remedy Decision in support of some of the arguments on Ground 1. The Remedy Decision was dated 6 August 2021 and sent to the parties on 7 September 2021. I have already mentioned that an appeal has now been lodged against the Remedy Decision, but that is not before me.

87. Four points are made.

88. First, the Respondents refer to para 134 of the ET's Remedy Decision where the ET says:

> "It is clear that if we are to find that there would have been detriments in any event we must do so on the basis of evidence. Recalling [Dr White] to say that he would have acted in the same way regardless of any protected disclosures would have an air of artificiality, particularly when it was always the second respondent's case that he had not been influenced by the protected disclosures, but in the absence of that the parties were left to argue the point by reference to the findings in our liability decision. That was not an easy task particularly as the findings in our liability decision were made by reference to the particular burdens of proof that applied to the different elements of the claim."

89. The appellants highlight the phrase "not an easy task" and say that if the Liability Decision had been written as it should have been, "the answer to whether he would have acted in the same way in any event would have been evident." This makes the mistake of suggesting that because a decision might have been reached or written differently, it ought not to have been reached or written as it in fact was. If the facts had been clearer, the task would, no doubt, have been easier. That does not mean that there was anything wrong with the fact-finding that was actually carried out.

90. Second, the Respondents rely on para 140 of the Remedy Decision, but I have already addressed this at para 73 above.

91. Third, the Respondents rely on para 141 of the Remedy Decision and complain that it is "a substantial rewriting of the liability conclusions". I am not persuaded that it is and, in any event, the appeal is against the Liability Decision, not the Remedy Decision, and

this sort of textual analysis by reference to a later set of Reasons does not seem to me to be profitable or legitimate.

92. Finally, the Respondents return to the "but for" point which I have already dealt with.

Ground 2: Misdirection on constructive dismissal

93. Ground 2 is that the ET failed to direct itself correctly or at all, when determining whether the Claimant had been constructively dismissed.

94. The Liability Decision deals with constructive dismissal at paras 244-248. There is no dispute that, if there was a constructive dismissal, it was unfair (para 248).

95. Five points are raised by the Notice of Appeal. The ET is said to have erred in law in that it:-

i) failed to identify what acts or omissions individually or cumulatively breached the implied term of trust and confidence;

ii) failed to identify the most recent act or omission which the Claimant said caused or triggered her resignation and/or to consider whether it did so and/or to consider whether the Claimant had affirmed the contract since that act or omission;

iii) took, insofar as affirmation was considered, the wrong approach by importing a concept of the initial breach being 'aggravated' by later breaches;

iv) failed to consider whether the most recent act or omission relied on amounted to the First Respondent acting (i) without reasonable and proper cause, and (ii) in a manner calculated or likely to destroy or seriously damage the relationship

of trust and confidence or, alternatively, failed to consider whether it was part of a course of conduct comprising several identified acts or omissions which cumulatively had that effect;

v) failed to consider or identify to which of the acts (or omissions) relied on by the Claimant (if any) she resigned in response.

96. It was clear from the List of Issues that the claim of repudiatory breach was based on a breach of the implied term of mutual trust and confidence, and it has been said that any breach of that term is a repudiation: **Morrow v Safeway Stores plc** [2002] IRLR 9.

97. It was obvious from the whole of the Liability Decision that the Detriments established by the Claimant were (in the words in which the mutual term of trust was formulated in the agreed List of Issues) "calculated or likely to destroy or seriously undermine the trust and confidence between the parties" (p 6 para 6). Moreover, the Liability Decision established that some of these were continuing breaches, right up until the point of resignation (see paras 26 to 40 above). Dr White decided to remove the Claimant from her post without following any proper process, and that view, and lack of process, continued to be the state of affairs at the date of her resignation. The ET singled this out in its findings of constructive dismissal at para 244 of the Liability Decision:

> "…the 6 September [meeting] contained a statement by Dr White that was tantamount to a dismissal… Matters did not get any better from there. The respondents persisted in not telling the claimant what the allegations against her were… No meaningful steps were taken to get the claimant back to work or to repair (if possible) the damage that had been done in the meeting on 6 September 2018"

98. The Liability Decision, both read as a whole, and in the summary at para 244, did identify the acts or omissions which breached the implied term of trust and confidence.

99. Given the serious and continuing nature of the breaches, and the failure to remedy them, the questions of what triggered the resignation and whether there had been affirmation waiving them before that resignation, were quite straightforward, and the treatment of these questions in paras 245-248 of the Liability Decision was clear and sufficient. These paragraphs explained the ET's decisions on these questions as follows:

> "245. The most that can be argued for the first respondent on this point (and it was argued by Ms Danvers) is that by not resigning immediately after the meeting of 6 September the claimant had waived any breach or had affirmed her contract of employment. Ms Danvers says that the claimant affirmed any breach of contract by saying that she wanted to return to work, by remaining employed for two months and by raising her grievance. She says that the claimant's resignation letter shows that any resignation was more about Dee Masters' investigation than the previous events. She says that if (as the claimant) suggests, she (the claimant) was seriously unwell at the time that may have affected her decision to resign, but did not change the underlying point that breaches of contract had to be viewed objectively. She says that what caused the claimant's resignation was the actions of a third party (Dee Masters) not the second respondent.

> 246. In response, Mr Kendall points out that the resignation letter refers to "*the appalling and unlawful conduct of* [the respondents]", that any breach during the 6 September meeting was aggravated by the respondents' subsequent actions, and reminds us of the claimant's ill health at the time of her resignation (brought on, she says, by the actions of the respondents).
>
> 247. We do not accept the respondents' arguments on waiver, affirmation or the reason for the claimant's resignation.
>
> 248. The claimant resigned within two months of the original breach of contract by the respondents. As Mr Kendall says, that initial breach was aggravated by the actions of the respondents thereafter, which themselves amounted to breaches of contract. The claimant was entitled to complain about this by raising her grievances, but raising the grievances did not amount to waiving the breach of contract or affirming her contract in these circumstances, nor to we accept that it was Dee Masters' decisions that amounted to the "final straw" leading to the claimant's resignation. As Mr Kendall points out. the substantial basis for the claimant's resignation is "*the appalling and unlawful conduct of* [the respondents]". This was the reason for the claimant's resignation. It was a constructive dismissal."

100. The Respondents argue that this passage fell short of the requirements suggested by **Kaur v Leeds Teaching Hospital NHS Trust** [2019] ICR 1 para 55. However, in that

passage Underhill LJ sets out five questions which "it is sufficient for a tribunal to ask itself" in what he calls "a normal case"; he is very far from saying that these five questions must now be a mantra which an ET fails to recite in any case at its peril. The five questions are:

> "(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in **Omilaju** [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) 8 breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)
>
> (5) Did the employee resign in response (or partly in response) to that breach?"

101. The Claimant's resignation letter said:

> "In view of the appalling and unlawful conduct of Dr White and OSBSL towards me, which has caused me considerable upset and mental distress, I believe I can no longer continue in my post.
>
> …
>
> I believe that I have been unlawfully expelled from the school and forced from my role…
>
> …I have no faith, for the reasons set out in the second grievance, in the "independent" investigation which is being conducted by Dee Masters…"

102. The ET upheld the first two of these allegations, which were plainly repudiatory. Dr White had decided in advance that she had to go, and had made that clear to her. He had done so without following any fair process or allowing her to know or to respond to the allegations against her. Those allegations were, in fact, lacking in substance. He had forced her to leave the workplace, and had wrongly claimed that this was her decision and not his. She had, indeed, been "unlawfully expelled from the school and forced from [her] role." So far as the Dee Masters investigation was concerned, the ET found that, at the date of her resignation, the Claimant had still not been told, in spite of requests, either who her accusers were or what they were saying. It did not cure the continuing, repudiatory breaches. But, in any event, the ET finding is very clear in para 248 of the Liability Decision that "the substantial basis for the claimant's resignation is "*the appalling and unlawful conduct of* [the respondents]". This was the reason for the claimant's resignation." The context of that was that Dee Masters was commissioned

by the University of Oxford (Liability Decision para 39), which was no longer an active Respondent, and the reference to Respondents was therefore to Dr White and OSBS (Liability Decision para 4), as opposed to the University and Dee Masters. The finding that the resignation was in response to continuing and unremedied repudiatory breaches by Dr White on behalf of OSBS, which one might think was a point already blindingly obvious from the fact-finding in the Liability Decision as a whole, is therefore confirmed by para 248.

103. In these circumstances, there is no substance in an appeal based on any greater examination of what caused the Claimant's resignation, or of the questions of waiver and affirmation, than the ET in fact carried out.

104. The objection taken on appeal to the use of the word "aggravated" in para 248, smacks of the appellate error of hypercriticism identified in the passage from **DPP Law v Greenberg** [2021] EWCA Civ 672 which I have quoted at para 44 above. "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" as Popplewell LJ says. Mummery LJ in **Brent v Fuller** [2011] ICR 806, 813 deprecates "…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".

105. I see no error in the phrase in question. It does not use "aggravated" in a legal sense, or as part of a legal test being applied to breach, affirmation or anything else. The sentence picked out of para 248 of the Liability Decision in this respect reads, in context:

> "The claimant resigned within two months of the original breach of contract by the respondents. As Mr Kendall says, that initial breach was aggravated by the actions of the respondents thereafter, which themselves amounted to breaches of contract. The claimant was entitled to complain about this by raising her grievances, but raising the grievances did not amount to waiving the breach of contract or affirming her contract in these circumstances…"

106. This is plain and simple English, as a commentary on the facts. There was a repudiatory breach on 6 September. Things did not get better after that; they got worse (as the ET found), they were, in other words "aggravated" by the actions of Dr White and the OSBS thereafter. Thus the right to resign and claim constructive dismissal continued. Raising grievances (which had not resulted in reversal of the breaches, and were not being handled by OSBS or Dr White) "did not amount to waiving the breach of contract or affirming her contract".

107. None of this is objectionable language or defective reasoning; none of it discloses an error of law.

Conclusion

108. The appeal is therefore dismissed.

