Neutral Citation Number: [2024] EAT 82

Case No: EA-2022-000318-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 24 May 2024

Before :

THE HONOURABLE MR JUSTICE KERR

- -

Between :

FIRST GREATER WESTERN LIMITED

Appellant
(First Respondent below)

- and –

AHMED MOSES MOUSSA

Respondent
(Claimant below)

- -
- -

Mr Ruaraidh Fitzpatrick (instructed by Kennedys Law LLP) appeared for the Appellant
Mr Martin Wynne Jones (instructed by Cameron Clarke Lawyers) appeared for the Respondent

Hearing date: 23 April 2024

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JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and will be released for publication on the National Archives caselaw website. The date and time for hand-down is 24 May 2024 at 10.30am. The version released for publication may be treated as authentic.

SUMMARY

Whistleblowing detriment; section 47B Employment Rights Act 1996

Victimisation; section 27 Equality Act 2010

Causation; treatment of the claimant.

The tribunal had not erred in finding that the first respondent employer (**FGW**) had inflicted detriments on the claimant in 2018 on the ground that he had made protected disclosures in 2012 and because he had done protected acts in 2013. The tribunal's decision was adequately reasoned and none of its findings of fact was perverse.

There was no procedural unfairness arising from the tribunal's findings that a particular employee, whom FGW chose not to call as a witness, had played a major part in influencing the third respondent decision maker, who was found not liable because he did not know about the protected disclosures and acts dating from 2012 and 2013.

The tribunal was entitled to find that FGW had, through that employee and one or more other unidentified employees within its management, perpetuated a culture of prejudice and ill will towards the claimant which encouraged the third respondent decision maker to treat the claimant unfairly in a disciplinary investigation in 2018, leading ultimately to a written warning in 2019.

The Honourable Mr Justice Kerr:

Introduction

1. I will refer to the respondent to this appeal as **the claimant** and to the appellant, the first respondent below, as **FGW**. The appeal is against a finding that FGW victimised the claimant for having done a protected act and subjected him to detriments for having made protected disclosures. The claims failed against the second and third respondents below, both managers and employees of FGW, respectively Mr Dean Haynes and Mr Billy White. There is no appeal against the decision to dismiss the claims against Messrs Haynes and White. They have taken no part in the appeal.

2. The decision appealed against was that of Employment Judge Alexandra Davidson, sitting (remotely) with Ms S. Campbell and Mr D. Clay at London Central Employment Tribunal. The decision was dated and sent to the parties on 14 February 2022, following a five day hearing from 24 January to 1 February 2022. In April 2023, Mr John Bowers KC, sitting as a deputy judge of the High Court, ordered that the appeal be set down for a full hearing on all the eight grounds, of which six (but not grounds 4 and 7) are now pursued.

3. In grounds 1, 2 and 3 FGW contends that the decision to impute liability to FGW was not open to the tribunal; that the necessary findings to enable it to do so are absent; and that the decision to do so in inadequately reasoned. In grounds 5 and 6, specific findings on particular factual issues are said to be perverse or contrary to the evidence. In ground 8, FGW asserts procedural unfairness by recasting the way in which the claimant's case should be understood, without notifying the parties or hearing evidence or submissions on the case as reinterpreted by the tribunal.

The Facts

4. Most of the relevant events took place in London, first at Ealing Broadway station (**Ealing**) and later, at Paddington station (**Paddington**). The tribunal found the following facts. Since May 2006, the claimant has been employed by FGW. In 2012, he was working at Ealing. A dispute arose when a new health and safety representative was appointed at Ealing, an appointment supported by a local union leader, Mr Pat Hayes. The claimant and others objected to the appointment, believing the correct process had not been followed.

5. The manager at Ealing was then Mr Haynes (the second respondent below, not to be confused with Mr Hayes). The claimant raised a grievance, asserting that Mr Hayes had threatened and abused him. Mr Haynes tried to conciliate, to prevent the matter from escalating. However, it did escalate

and in August 2012 the claimant brought a further grievance, with others. The ultimate outcome of the process was that the claimant and three others were dismissed in 2013 for acting in an intimidating manner towards Mr Hayes.

6. The claimant brought two tribunal claims in 2013, alleging unfair dismissal and discrimination on the grounds of race and religious belief. Mr Haynes was a respondent in those proceedings. In April 2014, the claims were settled on terms that included reinstatement of the claimant and a transfer to Paddington. In 2016, Mr Haynes too was transferred to Paddington, where he became the station manager. The claimant's job was as a gateline operative, which means the person supervising the passing of passengers through the ticket barriers to board trains.

7. Nothing untoward occurred until 27 February 2018, when the claimant was on duty with a colleague, Mr Patrick Larkin. A member of the public went past Mr Larkin without (it was later alleged) a ticket. The claimant helped to escort the man away from the ticket barriers. The police were called and arrested the man. It was later suggested the suspect was carrying a knife and drugs. Mr Larkin made a formal statement to police; the claimant did not. Both filled in an "assault report form"; someone referred to by the tribunal as "DC" helped the claimant to do this as the claimant was not confident using the English language.

8. The claimant's account and Mr Larkin's were, broadly speaking, that the suspect had pushed Mr Larkin aside, or pushed him in the chest. But after viewing available CCTV and perhaps considering other evidence, the station police commander, Ms Juliet Owens, contacted Mr Adam Field of FGW management to complain that it appeared the claimant and Mr Larkin had made false allegations of assault. She warned that they could be charged with an offence such as perverting the course of justice, but was content for FGW to deal with the matter.

9. Mr Field took advice from Ms Klaudia Czechowicz, who worked in FGW's human resources (**HR**) department. He then suspended Mr Larkin and the claimant pending an investigation. He had received no written evidence from the police; his decision to suspend was based on his verbal conversation with Ms Owens. There was also some "bodycam" footage of the incident or part of it, but FGW did not attempt to preserve it or use it in the investigation.

10. On 1 March 2018, the tribunal found, a co-worker called Natalie sent the claimant a message saying she had overheard "management" (the tribunal's word) talking about the incident in Mr Haynes' office. She advised him to protect his position, to check whether the CCTV had audio; and she advised him how to respond when giving his account. He replied that he had done no wrong and

"Don't worry It's gonna be fine thanks …".

11. In the suspension letter of 6 March 2018, the reason given was having provided a false statement about the incident on 27 February. The letter did not mention gross misconduct. Mr Field's evidence to the tribunal was that Ms Czechowicz had told him the matter was potentially a gross misconduct matter. Under the disciplinary rules, "[i]n gross misconduct cases, suspension pending investigation will be justified".

12. Mr Field obtained from Ms Owens a written statement (though unsigned and undated) from an officer called PCSO Jeff Dalling, saying the claimant and Mr Larkin had reported that "he" (which could be either of them) was "pushed". Both had signed an assault report form saying they did not want to take any action against the suspect. Mr Dalling's statement was mostly about what Mr Larkin, rather than the claimant, had reported to police. The suspect had been released. The tribunal found that Ms Owens had told Mr Field that the suspect had been carrying a knife for a legitimate purpose.

13. Ms Czechowicz advised Mr Haynes and Mr Field to appoint someone to carry out the investigation, suggesting two names, one of which was Mr White. Mr Haynes emailed Mr White: "[f]ancy doing the investigation for the gateline???" Mr White had not done such an investigation before and lacked experience. He was advised by Ms Czechowicz. Having read Mr Dalling's statement, he asked Ms Czechowicz if he could add a further allegation that the claimant had assaulted or physically restrained a member of the public, saying it was "quite clear" the claimant had done so.

14. Mr White asked Ms Czechowicz if he could include that conclusion in his "findings". She did not advise against this, but did advise Mr White to ask questions as they went through the CCTV. The tribunal later viewed that same CCTV and formed the view that it did not clearly show the claimant assaulting the suspect; the claimant shepherded him away from the scene and there appeared to the tribunal to be no physical restraint or assault. At least, it was far from clear that there was.

15. On 21 March 2018, Mr White interviewed the claimant, challenging the claimant's account. The next day, Mr Larkin retracted his formal statement to police and he was soon allowed to return to work. He gave some sort of apology for his part in the matter. He did not blame the claimant for the incident. Mr White spoke to Mr Larkin, the claimant and three other employees, from whom he did not obtain written statements. He did not interview Mr Field or the deputy station manager, a Mr Tom Law, who had given some kind of account to Mr Dalling, as referred to in the latter's statement.

16. The tribunal found the investigation was poorly conducted, unfair and unreliable. Mr White's conclusion was that the claimant should face three charges set out in a letter of 27 April 2018: laying

hands on a customer unnecessarily; putting himself at risk despite there being no evidence of a threat from the customer; and providing a false statement to "GWR" (i.e. FGW) stating that the customer had pushed the claimant's colleague when this was not supported by CCTV or other evidence. That charge letter did not mention gross misconduct, but the claimant remained suspended.

17. The station manager at the time was a Mr David Pinder. Mr Haynes was away a lot at this time, due to family matters. Ms Czechowicz asked Mr Pinder if he would conduct the disciplinary hearing. She told him she did not regard it as a gross misconduct matter, which meant that under the relevant disciplinary rules, he could deal with it. Under the disciplinary rules, suspension pending investigation was reserved for gross misconduct cases. Yet, the claimant remained suspended. No one told him he was not at risk of summary dismissal.

18. The claimant was then signed off work sick by his doctor and missed dates fixed for the disciplinary hearing due to anxiety and stress. On 12 July 2018, he attended an occupational health assessment appointment and expressed concerns to the doctor about his line manager, Mr Haynes, in connection with his continuing suspension and the context which, the claimant said, included the history of events at Ealing in 2012 and 2013. The doctor advised that these workplace concerns should be addressed and that the claimant should have a representative to help with communications.

19. The claimant complained to FGW's managing director, though solicitors, on 6 September 2018. The complaint was passed to Ms Czechowicz. She emailed colleagues on 12 September referring to that letter. The tribunal made several trenchant criticisms of that email. First, in it Ms Czechowicz said the solicitor's letter was from "potentially his friend who writes to us twice a year regarding various concerns Moses [the claimant] has". The tribunal found her language "trivialises the claimant's concerns and shows Ms Czechowicz found the correspondence unwelcome".

20. Next, in the same email Ms Czechowicz wrongly stated that Mr Larkin had been unable to write up the assault report form he had signed; in fact, it was in Mr Larkin's own hand; it was the claimant who had obtained help from another staff member to write up his form. Further, she mentioned that "management team called me", explaining that "Patrick can be easily led and that Moses is a confident individual who might have a strong influence on individuals such as Patrick".

21. The tribunal found the most likely explanation of that observation was that certain managers:

> **"fed back to [Ms] Czechowicz, in a way that was seriously prejudicial to the claimant. … this shows a received wisdom and collective memory relating to the claimant as being an agitator and a malign influence which we find dates back to the events of 2012 and 2013."**

22. Ms Czechowicz's email went on to state that "Moses has been adamant from the beginning that customer pushed Patrick and was aggressive towards him." The tribunal found that while the person referred to as "DC" had included this account in the form which was completed by DC, on the claimant's instructions, to assist the claimant, Ms Czechowicz omitted to mention in her email that the claimant had stated in his investigation interview that the wording on the form was incorrect.

23. Ms Czechowicz added that "Moses never changed his statement even upon seeing CCTV". The tribunal was unclear which "statement" Ms Czechowicz was referring to. If she meant the assault report form, the claimant had repudiated that as was clear from the notes of his investigation interview. Ms Czechowicz had added in the email: "Patrick retracted that report … he did not remember being pushed – rather told by Moses that he had been pushed". However, the tribunal noted that in his investigation interview, Mr Larkin had stated that (in the tribunal's words) he "told his supervisor that he thought he and the claimant had been pushed".

24. The tribunal went on to find that FGW responded to the claimant's solicitor's letter of 6 September 2018 with a cursory acknowledgement, not engaging with the substance of the points made in the letter. After a further occupational health assessment on 18 October 2018, the doctor who did the assessment wrote on 23 October to Ms Czechowicz saying the claimant had mental health problems arising from workplace issues and would probably not be fit to attend a meeting during the rest of 2018, or communicate directly about the matter; he would need a representative.

25. After a further solicitor's letter on 11 December 2018, the claimant submitted his claim to the tribunal. While it was proceeding towards trial, the disciplinary hearing eventually took place on 3 April 2019, conducted by a Mr Steven Hawker. The tribunal found that it shed light on prior events. The claimant was able to air his grievances before the disciplinary allegations were addressed. Mr Hawker dismissed the allegation of making a false statement and after viewing the CCTV, did not uphold the allegation of laying hands on a customer unnecessarily. He gave the claimant a first written warning for over-zealously putting himself at risk.

The Tribunal Proceedings

26. The claim was originally brought on five bases: arrears of pay and holiday pay; protected disclosure detriment (Employment Rights Act 1996 (**ERA 1996**), section 47B); discrimination on the ground of race (Equality Act 2010 (**the EqA 2010**), section 10); and on the ground of religion or belief (EqA 2010, section 11); and victimisation for having done protected acts (EqA 2010, section 27). The discrimination claims were not pursued, leaving the whistleblowing and victimisation

claims to be determined.

27. The pleaded grounds were long and wide-ranging. The history of the conflict in 2012 and the settled tribunal proceedings was set out. The claimant alleged that Mr Haynes remained hostile to the claimant as a result; that FGW persistently failed to address an issue he raised regarding arrears of pay; that FGW had imposed detriments including bullying and harassment by pursuing the "unfair and malicious" disciplinary proceedings in 2018; that the two tribunal claims in 2012 and 2013 were protected acts; and that numerous protected disclosures were made by the claimant.

28. The course of the 2018 disciplinary allegations was set out at some length. The alleged role of Mr Haynes was "a vendetta against him by … Dean Haynes". All three respondents chose to "load up more weight into the disciplinary case against him by adding the additional two allegations, so as to ensure his dismissal for gross misconduct". The "principal instigator" was Mr Haynes. The initial single allegation on 6 March 2018 was "done after careful planning by Dean Haynes and Klaudia Czechowicz in HR". They have "a close-knit working relationship".

29. The three respondents below denied liability, asserting in their grounds of resistance (so far as material now) that the disciplinary investigation had arisen as a result of an "altercation" on 27 February 2018 involving the claimant; that the disciplinary proceedings were carried out in good faith, without malice; that the investigation, suspension and disciplinary charges were reasonable; that the disciplinary hearing had not yet taken place because the claimant was off sick and had brought a formal grievance; that the treatment of the claimant was not causally linked to any protected act or protected disclosure; and that the disclosures were not protected anyway.

30. The tribunal identified the issues at the start of its reasons. The respondents accepted that bringing one of the two 2013 tribunal claims was a protected act. The second, they said, was not; the allegations in it were false and made in bad faith. The tribunal would have to decide that issue. The alleged protected and qualifying disclosures were: complaining in writing on 19 March 2012 about Mr Hayes' threatening and intimidating behaviour; reporting to Mr Haynes in July or August 2012 an alleged breach of confidentiality and victimisation by Mr Hayes; and raising a collective grievance on 17 August 2012, addressed to Mr Haynes, about the actions of Mr Hayes.

31. The tribunal then listed the nine alleged detriments: accusing the claimant of making a false statement about the 27 February 2018 incident; suspending him; Mr White conducting an inadequate and biased investigation in failing to interview three employee witnesses (Ms Selway, Mr Koroma and "Martin", the gateline supervisor); adding the two extra allegations at the end of the investigation;

deciding to convene a disciplinary hearing; failing to address the claimant's formal written complaint made on 6 September and 11 November 2018; failing to follow the recommendations of the occupational health doctor in July and October 2018; failing to liaise with the claimant's solicitor about the disciplinary process; and failing to pay certain overtime and other pay due.

32. The tribunal would also have to decide, as confirmed at the start of the decision, whether the treatment of the claimant was on the ground that he had done the protected acts relied on and/or because of the protected disclosures relied on. Finally, the tribunal recorded, it would have to decide other issues not now relevant: whether any of the claims were out of time; and if any succeeded, to what remedy the claimant would be entitled.

33. The tribunal had a hefty bundle of documents. The claimant, then represented by a senior paralegal, Mr Jagdeesh Singh, gave evidence and was cross-examined. He produced witness statements from Ms Selway and Mr Koroma, which the respondents below accepted without cross-examination. The respondents, represented then (as now) by Mr Fitzpatrick, called Mr Field, Mr Haynes, Mr White, Mr Hawker and a Mr Adeshiyan. A duty station manager, Ms Colmer, provided a statement but was unable to attend. The tribunal commented: "[w]e did not have a statement from Klaudia Czechowicz although she was a key individual in the case".

34. The tribunal heard the evidence and submissions over the five days. In its reserved decision and reasons, after setting out the issues (as just summarised) and its findings of fact (referred to above), the tribunal set out the relevant statutory provisions, not referring to any case law. They then proceeded to the determination of the issues, at paragraphs 60 to 78. They made the following determinations.

35. They decided they did not need to determine whether the second 2013 tribunal claim was a protected act under section 27 of the EqA 2010; they found no distinction between the two claims and the respondents conceded that the first claim was a protected act. It was sufficient for the claimant's victimisation claim that at least one of the two claims was a protected act.

36. Then, the tribunal found that the claimant had made two protected disclosures, for the purpose of the claim under section 47B of the ERA 1996: making his written complaint on 19 March 2012 about Mr Hayes' threatening and intimidating behaviour; and raising a collective grievance on 17 August 2012, addressed to Mr Haynes, about the actions of Mr Hayes. These two disclosures, the tribunal found, were protected disclosures; and they added:

> **"If we are wrong about this, our decision would be the same if the complaint related only to the protected acts (victimisation) as we consider that the background of the claimant's historic**

> **grievances and claims as a whole, including protected disclosures and protected acts, influenced the later events."**

37. The tribunal then found that FGW – not Mr Haynes or Mr White - had subjected the claimant to each of the nine detriments relied on by the claimant and listed by the tribunal earlier, at the start of the tribunal's reasons. They found that "the treatment amounts to a detriment in each case". They went on to consider the question of causation: "whether the treatment was done because of the protected act(s) and/or done on the ground that the claimant made the protected disclosures".

38. They rejected any causative link in the case of the ninth detriment consisting of withholding due payments. They dismissed the claim as against Mr White; while there were "shortcomings" in his investigation and many "stem from his apparent pre-judgment that the claimant had committed the misconduct", Mr White had not properly understood what happened, there were "significant flaws" in his treatment of the claimant but the tribunal found "no reason to conclude that these are directly due to the protected acts/protected disclosures, which pre-date [Mr White] by some time."

39. The tribunal stated (paragraph 69):

> **"The third respondent [Mr White] was overzealous in pursuing allegations against the respondent, which was facilitated by Klaudia Czechowicz, but we accept that he had no direct knowledge of the claimant's history. We therefore do not uphold the complaint against the third respondent."**

40. As for Mr Haynes, the tribunal commented that having been named as a respondent in the 2013 proceedings "was unlikely to endear the claimant to the second respondent [Mr Haynes]". They rejected the contention that Mr Haynes conducted a "vendetta" against the claimant. The latter had a "fixation" with Mr Haynes and saw his hand in every adverse decision of FGW towards him. While FGW's HR department should have excluded Mr Haynes from the disciplinary process altogether, he did not influence or control it. All he did was ask Mr White to carry out the investigation. The claim as against Mr Haynes was therefore also dismissed (paragraphs 70-71).

41. At paragraphs 72 to 77, the tribunal gave its reasons for upholding the claims for whistleblowing detriment and victimisation as against FGW, i.e. the decisions challenged in this appeal. It is easier to set these out in full than to attempt a paraphrase:

> **"72. In relation to the first respondent, we find that there is a 'collective memory' within the first respondent, which is prejudicial to the claimant and which has permeated the approach of HR (in particular Klaudia Czechowicz) and, in turn, those advised by HR, including the third respondent. This is illustrated by Klaudia Czechowicz's email of 12 September 2018. Taken as a whole we find this email demonises the claimant and is wholly sympathetic towards Patrick Larkin. The email shows us that there is a general negative view of the claimant within the management 'lore', which we find is connected with the history of the claimant's employment**

with the respondent, including the involvement of the claimant's legal representative. By sending that email to the Head of HR Business Partnering, she perpetuated the prejudicial view of the claimant within the organisation.

73. We find that this negative view had its origins in the events of 2012 and 2013. We reach this finding because there is evidence of a series of contentious events at that time, resulting in the dismissal and subsequent reinstatement of the claimant in a different station. We have not been shown any evidence of more recent problems with the claimant which would explain the negative assumptions about him and we therefore conclude that this view of the claimant dates back to the earlier period, when he was clearly a thorn in the side of the first and second respondents.

74. The detrimental treatment of the claimant is manifested in the following ways.

74.1. The stark difference between the treatment of the claimant and Patrick Larkin, particularly in relation to the way the suspension was dealt with. From our findings, it was Patrick Larkin who had done more than the claimant to trigger the original investigation, yet he was taken off suspension quickly. His Assault Report Form was not held against him on the grounds that he was dyslexic and had problems filling it in, even though it was clearly in his handwriting and it is not apparent to us what impact the dyslexia had. In contrast, the first respondent continued to rely on the claimant's Assault Report Form to support a disciplinary case against him, even though it was not completed by him, he said from the first time he was told what was in it that it was not accurate, and English is not his first language. No allowance at all appears to have been made for any communication issues arising from the language barrier or any possible misunderstanding on the part of Dorothy Colmer, who may have had in her mind what Patrick Larkin had said to her.

74.2. A distinction was drawn between Patrick Larkin and the claimant on the basis that Patrick Larkin withdrew his statement and showed remorse for having made it. Patrick Larkin made a formal statement to the police, which the claimant did not, so he had a statement which he was able to withdraw. On the claimant's understanding, he had not made a statement and was unable to withdraw something that did not exist. To the extent that the respondents rely on his Assault Report Form, he said that it was not accurate and did not reflect what was said.

74.3. The Whatsapp exchanges with Natalie show us that the claimant's situation was being discussed among management, also evidenced by Klaudia Czechowicz's comment in her email about receiving information from the 'management team' about the claimant influencing Patrick Larkin. The implication from Natalie's words of warning is that the conversation did not appear to be favourable for the claimant. (This exchange also shows us that the claimant was straight-dealing and was confident in his narrative regarding the incident.)

74.4. The suspension of the claimant, including the continuation of the suspension when there was no allegation of gross misconduct against him, which appears to be contrary to the provisions of the first respondent's disciplinary policy.

74.5. The investigation was handed to the third respondent to deal with. He was inexperienced and relied heavily on Klaudia Czechowicz, whose judgment and approach was clearly influenced by the negative view she had of the claimant.

74.6. The inept handling of the allegations against the claimant also, in our view, stem from the prejudiced view of the claimant among managers and HR. For example, the original allegation which led to the suspension was subsequently dropped but there was no suggesting of ending the suspension. Two additional allegations were added on 27 April 2018 at the conclusion of the formal investigation process. It is not clear whether

these were potentially grounds for suspension and, in any event, they should have been dealt with as separate matters. The first respondent ended up citing three allegations for the disciplinary hearing, none of them being the original allegation for which the claimant was suspended.

74.7. The lack of justification for the claimant's ongoing suspension was confirmed by Steven Hawker's response to the disciplinary allegations, two of which he did not pursue and the third of which resulted in a First Written Warning. We find that Steven Hawker came to the matter afresh with no knowledge of any background history with the claimant and saw clearly that the disciplinary allegations should not have been pursued in the way that they had been.

74.8. The first respondent did not deal with the letters sent on behalf of the claimant by his legal representative on 6 September 2018 and 11 November 2018. It is worth recording that the claimant's legal representative at this time (and at the hearing) was the same representative who represented him in 2012 and 2013. The first respondent, led by Klaudia Czechowicz, did not engage with the claimant or his representative in any meaningful way. The respondents relied on the provision in the Grievance Procedure which states

> ***'If you have a complaint about your dismissal or the taking of other relevant disciplinary action (other than warnings) by the Company under the Disciplinary Procedure, you should raise your complaint by way of appeal under the Disciplinary Procedure, rather than the Grievance Procedure.'***

The first respondent failed to realise that the claimant's complaint was not about dismissal or other relevant disciplinary action under the Disciplinary Procedure and therefore this clause did not apply. It was only when Steven Hawker met with the claimant that he was able to air his grievances.

75. The first respondent failed in part to follow the recommendations given in the Occupational Health reports of Dr Krishnan of 13 July and 18 October 2018. To the extent that the first respondent failed to engage with the claimant's legal representative, this is a failure to follow the Occupational Health physician's recommendation. For example, on 27 September 2018, Klaudia Czechowicz wrote to the claimant's legal representative, telling him that they were engaging with the claimant direct and would be in touch with him to arrange the disciplinary meeting. However, we do not agree with the claimant that there was a recommendation for the grievance to be resolved before the disciplinary hearing. The recommendation was for the workplace issues to be addressed before the claimant returned to work.

76. For the same reasons as we set out in relation to the failure to follow Occupational Health advice, we find that the first respondent partly failed to liaise with the Claimant's legal representative regarding the Claimant's complaints about the disciplinary process. There was acknowledgement of correspondence but no proper engagement with the issues being raised.

77. In conclusion, we find that the first respondent did subject the claimant to detriments on the grounds of the protected disclosures and protected acts. We do not suggest that there was a conspiracy among the protagonists but we find that the myriad examples of unfairness and less favourable treatment cannot simply be explained by a string of unfortunate errors. In our view, they show the existence of an underlying negative attitude towards the claimant shared and understood by management, including in particular Klaudia Czechowicz."

The Appeal Proceedings

42. At paragraph 3 of Mr Bowers KC's order (sealed on 23 May 2023) directing that the appeal should proceed to a full hearing, he made provision in the usual way for any issue as to what evidence was or was not called below should either be dealt with by agreement or, if that were not possible, by suggested questions for the employment judge or a request for her notes.

43. On 5 June 2023, FGW's solicitor, Ms Dorotea-Victoria Sikorska, made an affidavit arguing that the claimant had not based his case on any suggestion of "management lore". This is the basis of the eighth ground of appeal, asserting procedural unfairness. The tribunal used that phrase at paragraph 72, quoted above, with the word "lore" in inverted commas. Ms Sikorska pointed out that the phrase did not appear in the particulars of claim.

44. Rather, she said (quoting from the particulars of claim) his pleaded case was that the disciplinary proceedings had been "maliciously and vindictively instigated by … Dean Haynes", with "collaboration … by a colluding Deputy Manager … Billy White"; and that "the first allegation … was done after careful planning by Dean Haynes and Klaudia Czechowicz in HR"; and there was a "vendetta against him" by Mr Haynes. Nor did the evolution of the issues through the process of case management produce any suggestion of "management lore", which was not addressed in submissions.

45. Ms Sikorska complained that the respondents below would have prepared differently if they knew they had to meet a case based on a concept of "management lore" as an alternative route to establishing causation, should the claimant's conspiracy case be rejected. They would have drawn attention in witness statements to the size of FGW; where people sat in the business and relative seniority compared to Ms Czechowicz; and how persons at fault could be aware of the "management lore". They would have called Ms Czechowicz as a witness and addressed the point in submissions.

46. The employment judge was asked to comment on Ms Sikorska's affidavit and did so in a two page note dated 13 July 2023. She stated that the tribunal decided the claimant had received the detrimental treatment complained of; the tribunal needed to decide what the motivation was. The claimant had a "fixation" with Mr Haynes, as stated in the decision. The judge noted at paragraphs 4 and 5 of her note:

> **"4. … Most of the first respondent's actions were taken by Klauia Czechovvicz of their HR department. The first respondent chose not to call Klaudia Czechowicz or submit a witness statement on her behalf.**
>
> **5. We found that the claimant had been subjected to detriments mostly by Klaudia Czechowicz, either directly or indirectly. As she did not appear before us, we had to make findings on the basis of the documentary evidence before us. There were three matters in particular which we relied on in reaching our conclusion that she had adopted a received wisdom among managers (what we termed 'management lore') that there was a general prejudicial view of the claimant.**

> **I accept that 'management lore' was not a term advanced by the claimant but it was the explanation we found was the most likely to explain the first respondent's treatment of the claimant."**

47. The three matters supporting "the conclusion of there being a received wisdom regarding the claimant" were then set out: the evidence of the "overheard conversation between a group of managers"; Ms Czechowicz's disparaging remark in her email of 12 September 2018 addressed to HR colleagues and her dismissive approach to the claimant's solicitors; and in the same email, that she "exhibited an obvious negativity towards the claimant" suggesting that "other managers had this negative opinion about the claimant", for which the only explanation was the protected acts and disclosures of 2012 and 2013.

48. The judge explained that the tribunal "felt it was appropriate to find against [FGW], on the basis of Klaudia Czechowicz's conduct, while not having sufficient evidence to find against [Mr Haynes] and [Mr White]." She ended by saying at paragraph 9:

> **"The List of Issues asks whether the detriments were as a result of the protected acts or protected disclosures. We found that they were. Respectfully, it is a matter for the appeal tribunal to determine whether we were entitled to reach that conclusion on the basis of the claims as pleaded."**

49. FGW's solicitors sought to agree a written note of the proceedings. Sadly, the claimant's representative before the tribunal, Mr Singh, had died in 2022; making it impossible to reach agreement. In October 2023 Mr Andrew Burns KC, sitting as a deputy judge of the High Court, requested the employment judge to provide her notes corresponding to grounds 4-7 of the appeal and "any notes on whether the case about management lore relating to the Claimant was raised with [FGW] for it to adduce evidence or make submissions". It is not clear whether Mr Burns had seen the judge's note prepared in July 2023.

50. In response, on 27 November 2023, the judge produced six pages of typed notes of part of the cross-examination of the claimant, Mr Haynes, Mr White and Mr Hawker. These do not add very much to my knowledge of the course of proceedings below but they do confirm that the claimant in cross-examination said there was "evidence that Klaudia Czechowicz [w]as motivated by PID [public interest disclosures] and earlier complaints".

51. Mr Haynes in cross-examination denied any collusion with Ms Czechowicz; he was away quite a lot for family reasons at the relevant times. He relied on Mr White to do the investigating. Mr White, in cross-examination, confirmed that he went to Ms Czechowicz for advice about the investigation, not Mr Haynes his line manager. He would not have discussed the investigation or his

findings with Mr Haynes. Ms Czechowicz attended the meetings. He denied that she was "micromanaging"; she was just providing advice. He denied calling Ms Czechowicz about the claimant and did not know who else it could have been.

The Parties' Submissions

52. The claimant submitted, through Mr Fitzpatrick, in summary as follows. On ground 1, the tribunal had erred by adopting a "composite approach" to causation. The decision maker, Mr White, did not know about the 2012 and 2013 protected acts and protected disclosures. The tribunal should have applied the proposition of Choudhury P in *Malik v. Cenkos Securities plc* UKEAT/0100/17/RN, 17 January 2018, at [86], that a decision maker who did not have personal knowledge of the protected disclosure, could not be materially influenced by it to make the decision under challenge.

53. Choudhury P had been right to depart from the *obiter* observation of HHJ Eady QC (as she then was) in *Western Union Payment Services UK Ltd v. Anastasiou*, UKEAT/0135/13, at [74], that:

> **'…there may be cases where there is an organisational culture or chain of command such that the final actor may not have personal knowledge of the protected disclosure but where it nevertheless still materially influenced her treatment of the complainant… ."**

54. The decision in *Malik v. Cenkos Securities plc* had predated the Supreme Court's decision in *Royal Mail Group Ltd. v. Jhuti* [2020] ICR 731; Choudhury P had referred to the Court of Appeal's decision before the Supreme Court allowed the employee's appeal. But that did not vitiate the logic that a composite approach to causation remained impermissible; *Jhuti* is not authority that a generally composite approach is permissible in cases of whistleblowing detriment or victimisation.

55. For liability to be imputed to the employer, an employee more senior than the decision maker must provide the latter with tainted information and do so in a manner that manipulates and influences the decision maker. Only in rare cases will causation will be established in the manner found in *Jhuti*, where the employer is not permitted to hide behind the invented reason unwittingly adopted by the decision maker, the court or tribunal is required to penetrate through the invention and hold that the real reason for the dismissal is the hidden reason.

56. Alternatively, or in any event, on ground 2 Mr Fitzpatrick submitted that the tribunal's findings were perverse or insufficient to sustain an analysis along the lines articulated in *Jhuti*. Ms Czechowicz was said to have been the main perpetrator, procuring the infliction of the detriments directly or indirectly; yet only Mr Haynes was found to have knowledge of those detriments or protected acts. The tribunal did not make any finding that Ms Czechowicz was aware of them. She

was the mode of transmission of an ambience prejudicial to the claimant, but nothing more. She was not senior to the decision makers.

57. Similarly, in relation to the victimisation claim, the necessary building blocks for the tribunal's finding on causation were not present. The tribunal should have made clear findings about who knew what and when. It could not be said that the 2012 and 2013 tribunal proceedings and the related acts and disclosures were generally known to management. As in *Western Union Payment Services UK Ltd v. Anastasiou* (per HHJ Eady QC at [76]), we are left with "no understanding of how the ET felt able to draw the causal link between the disclosure and the detriments in this case".

58. The matters relied on in support of the tribunal's finding on causation in the judge's subsequent comments provided in July 2023, were inadequate to support the finding. They were, I am reminded, the overheard conversation between a group of managers; Ms Czechowicz's disparaging remark in her email of 12 September 2018 addressed to HR colleagues; her dismissive approach to the claimant's solicitors; and that in her email, she exhibited an obvious negativity towards the claimant, suggesting that other managers had this negative opinion about the claimant.

59. These deficiencies in the tribunal's reasoning also indicate that the decision was not adequately reasoned, which is itself a further and freestanding ground of appeal, namely ground 3. The finding that the claimant was prejudiced by "management lore" that he was a troublemaker was also procedurally unfair on FGW (as asserted in ground 8 of the appeal) because the claim had been brought on the basis of a vendetta and conspiracy against the claimant conducted and led by Mr Haynes, which the tribunal rejected as a "fixation" not borne out by the facts. The tribunal did not invite submissions or facilitate the calling of evidence to meet a different case based on "management lore", Mr Fitzpatrick submitted; echoing the complaint in Ms Sikorska's affidavit.

60. In oral argument, Mr Fitzpatrick accepted that the phrase "management lore" should be understood as shorthand for a generally negative workplace perception of the claimant as a result of the 2012 and 2013 matters; but he complained that the tribunal had not said that anyone who held this view of the claimant was aware of those same 2012 and 2013 matters and therefore it could not be said that anyone in management who held that generally negative view did so by reason of those matters. Even if those matters were the ultimate source of the negative view of the claimant, that did not show that a particular person, including Ms Czechowicz, was aware of them.

61. In grounds 5 and 6 of the appeal, Mr Fitzpatrick criticised specific factual findings, submitting they were perverse. First, he said there was no evidence to support the finding that Mr White's

investigation was inadequate and partial in that he failed to interview Ms Selway, Mr Koroma and "Martin", the gateline supervisor. These three employees, or at least two of them, had been present on the occasion of the incident on 27 February 2018. While Mr White had not spoken to Ms Selway or Mr Koroma about the incident, he had unsuccessfully tried to meet them both.

62. There was correspondence before the tribunal to that effect, but the meetings had not taken place. Mr Fitzpatrick submitted that his efforts to contact Ms Selway were extensive. He tried to speak to Mr Koroma but the latter did not respond to a written request, saying he did not receive the written request for an interview until much later. The claimant had alleged that "Martin" should have been interviewed but the tribunal had not given reasons for upholding that contention, although the issue was canvassed in evidence and submissions.

63. In ground 6, FGW submits simply that the tribunal was plain wrong to find that FGW had failed to address the complaints submitted by the claimant's legal representative on 6 September and 11 November 2018. These complaints were the claimant's grievances. The finding that FGW did not address those complaints was, Mr Fitzpatrick submitted, perverse because it was not disputed below that they were addressed by Mr Hawker on 3 April 2019, after the claim had been brought.

64. In defence of the tribunal's decision, Mr Wynne Jones for the claimant submitted that the tribunal had found that he did the relevant protected acts and made the relevant protected disclosures; that he suffered multiple detriments; that Mr Haynes and Mr White had not inflicted the detriments by reason of the protected acts or disclosures; that simple logic dictates that something must have caused the claimant to suffer those detriments; and that FGW cannot point to any other cause of those detriments than that FGW itself inflicted them because of the protected acts and disclosures.

65. There was no fault, he argued, to be found with the tribunal's conclusion that the claimant had an "unwarranted bad reputation among the management team" (paragraph 7 of the employment judge's comments made in July 2023). Mr Wynne Jones also relied on the next sentence of the judge's paragraph 7:

> **"The only way we could make sense of this, bearing in mind we did not hear from Klaudia Czechowicz, was that the respondent's management had a negative view of the claimant for reasons going back to the protected acts and protected disclosures."**

66. Mr Wynne Jones referred to the extensive pleaded case for the claimant below and submitted that it was not right to regard it as founded only on conspiracy or vendetta; it was more extensive than that. He pointed to the paragraphs asserting as part of the complaint factors cumulatively suggesting not only that the detriments were inflicted by the named individuals, Mr Haynes and Mr White, but

also by FGW itself; and that FGW's actions were done in consequence of the protected disclosures; and that Ms Czechowicz, in particular, was specifically identified as a contributor to that treatment.

67. The authorities do not, he submitted, preclude the tribunal's analysis that the infliction of the detriments was engineered by Ms Czechowicz who advised on the defective disciplinary proceedings, being motivated by a bias against the claimant in the context of his reputation as a bad lot, derived from the 2012 and 2013 protected acts and disclosures. It would be artificial and contrary to industrial common sense to disallow such an analysis. The facts pointed strongly to the tribunal's conclusion being the right one and one they were entitled, drawing the appropriate inferences, to reach.

68. Mr Wynne Jones submitted that there was no procedural irregularity. The phrase "management lore" is not a legal concept. It was simply descriptive of a "received wisdom" that there was a "general prejudicial view" of the claimant with its origin in the 2012 and 2013 protected acts and disclosures and this was the mostly likely explanation for the way he was treated (paragraph 5 of the judge's July 2023 comments). That explanation was found to be the most likely explanation, said Mr Wynne Jones, by way of careful analysis and adherence to the evidence.

69. He submitted that it was FGW's choice not to call Ms Czechowicz and that the pleaded case put FGW on notice that her involvement was significant. It was for FGW to weigh the risks of calling or not caller her, taking account of her involvement as stated in the pleaded case. It was obvious that she would have plenty of relevant evidence to give, including in cross-examination. Since FGW chose not to call her, it cannot be known what she would have said but the tribunal had evidence of her involvement including the documents with her "footprints" on them, as Mr Wynne Jones put it. While the decision maker was Mr White, he was guided by or controlled by Ms Czechowicz.

70. Mr Wynne Jones disputed that there was any procedural unfairness; management lore as an explanation was always a possible finding on the pleaded case. The factual findings were not perverse. The investigation of Mr White was rightly found to be defective. The efforts to interview eye witnesses to the incident were feeble; he did not try hard enough to obtain the best evidence and the tribunal was entitled so to find. It is true that the grievance complaints were eventually addressed, but they were initially dismissed and only addressed after the claim was brought.

71. Mr Wynne Jones also reminded me of the relevant burden of proof provisions, in particular that under section 48(2) of the ERA 1996 "it is for the employer to show the ground on which any act, or deliberate failure to act, was done". Section 136 of the EqA also enacts the differently structured burden of proof provisions which governed the victimisation claim, it was noted in the

course of oral argument. However, as Mr Fitzpatrick pointed out in his reply, the tribunal did not mention either of those provisions.

Reasoning and Conclusions

72. I propose to address the grounds of appeal in a different order from the order in which they were argued; starting with the perversity challenges to specific findings of fact (grounds 5 and 6); then dealing with the procedural unfairness point (ground 8); then the adequacy of the tribunal's reasons (ground 3); and finally whether the tribunal was entitled to find that the detriments suffered by the claimant were "on the ground that" he made the protected disclosures and "because" he did the protected acts (grounds 1 and 2).

The perversity challenges: grounds 5 and 6

73. The first perversity challenge relates to the pleaded contention of the claimant which became issue 7.3 in the list of issues. One of the nine detriments relied on by the claimant was that of Mr White "conducting an investigation which was inadequate and partial in that he failed to interview Aiesha Selway, Mustafa Koroma, and 'Martin the Gateline supervisor' about the incident of 27 February 2018".

74. This formulation of the issue by the tribunal reflected paragraphs 14(e) and 28 of the particulars of claim. The claimant's point was that these three employees were eye witnesses to the incident, yet were not interviewed. Ms Selway was wearing a "body cam" and the claimant's case was that the footage from it was relevant evidence which Mr White failed to view. It is common ground that there was evidence about this issue before the tribunal.

75. The claimant referred in his cross-examination to "Martin Graver", likely to be the gateline supervisor. The claimant complained that Mr White should have made more effort to interview these witnesses. Mr White wrote to Ms Selway and there some email exchanges between them but asked her to attend for interview at a time when she would not be working and would not be at Paddington. He wrote to Mr Koroma but the latter did not receive any letter until a year later.

76. Mr White was cross-examined. The note of his evidence records him saying "I looked at CCTV and other matters arose". He disagreed that he had made his mind up. The tribunal rejected that part of his evidence. The note also attributes to him the following:

> **"I didn't get evidence from Aiesha and Koroma. I tried but they didn't turn up for meetings. She offered a statement but never gave it. … Eventually she offered to meet me but it was too late. … I don't know why there was a delay. Maybe I was on annual leave or nights but I can't**

> **remember. I agree their evidence was relevant but I didn't manage to get their evidence. I invited them to meet but they didn't show…. I was on nights, hence the delay. … I have given them an opportunity to come to a meeting. I didn't get bodycam footage. By the time I was aware of it, the footage is overridden after 10 days … I don't believe their evidence would have changed anything."**

77. Ms Selway and Mr Koroma both produced written witness statements to the tribunal and the three respondents below did not require their attendance for cross-examination, as the tribunal recorded at paragraph 12 of its reasons. I have seen their statements, which confirm the correspondence from Mr White and that he never met them to ask them for their account of the incident. Both statements contain accounts of the incident stating that the claimant did nothing wrong.

78. At paragraph 25, the tribunal recorded that Ms Selway and Mr Koroma were among those who witnessed the incident on 27 February 2018. At paragraph 30 the tribunal expressed surprise that FGW's management did not preserve Ms Selway's body cam evidence, allowing it to be overwritten. The tribunal added that the body cam evidence "does not appear to have formed any part of the third respondent's [Mr White's] investigation". That finding is correct and not challenged.

79. At paragraph 63.3, the tribunal recorded its finding that the detriment cited in the list of issues at paragraph 7.3 was made out in that "[FGW] has subjected the claimant to the following detriment … [Mr White] conducted an investigation which was inadequate and partial in that he failed to interview Aiesha Selway, Mustafa Koroma, and 'Martin the Gateline supervisor' about the incident of 27 February 2018".

80. FGW does not submit that Mr White *did* interview those individuals; nor that they had no relevant evidence to give. The point was of major importance because Mr White sought to add an allegation of assault, to which Ms Czechowicz assented (reasons, paragraph 40); and Mr White viewed the CCTV and relied on it as making "quite clear" that, contrary to the tribunal's view, the claimant had committed an assault (paragraph 41). The tribunal there found that he had "pre-judged the outcome". At paragraph 44 the tribunal stated that Mr White "made contact with Aiesha Selway and Koroma but did not end up having a statement from either of them".

81. It is obvious that the tribunal considered that Mr White did not make enough effort to obtain relevant evidence from those witnesses and did not accept his explanation that it was they who were guilty of not assisting his enquiry. The parts of the account I have just mentioned formed part of a litany of criticisms of Mr White's investigation and the corrosive impact on it of Ms Czechowicz who guided him through it, to the detriment of the claimant. There was ample evidence to support the tribunal's finding to that effect and there is nothing in the perversity challenge to that finding.

82. In ground 6 of the appeal, it is said that the tribunal perversely found that FGW had failed to address the complaints submitted by the claimant's legal representative on 6 September and 11 November 2018. These complaints were the claimant's grievances. It is said that finding was perverse because the claimant's grievances were addressed by Mr Hawker on 3 April 2019, after the claim had been brought.

83. This detriment was listed in the tribunal's list of issues at paragraph 7.6 of its reasons: "the failure to address the Claimant's complaints submitted on 6 September 2018 and 11 November 2018". The detail of this complaint was pleaded at paragraphs 61-65 of the particulars of claim. It ties in with the further complaint that FGW avoided implementing the recommendation of the occupational health doctor that the claimant's workplace issues should be addressed. The gist of the claimant's case was that FGW were using his sickness absence as an excuse for not addressing his grievance.

84. It is obvious that the issue was raised at the start of the claim, before the grievances were, belatedly, addressed in April 2019, while the claim was developing towards trial. It is equally obvious that the complaint related to the period up to the bringing of the claim. It could not have related to events that had not yet happened. In oral evidence, the claimant complained of Mr Haynes pressurising him to attend a disciplinary hearing when unfit to do so, in 2018.

85. Mr Haynes, in cross-examination, denied knowledge of the two grievance complaints of September and November 2018. He was not included in the grievance process, he said. The judge's note of Mr Hawker's cross-examination includes: "… grievances intrinsically connected with disciplinary. Clear reason why grievances not progressed including C not being able to attend meetings. He was declared fit to attend in January 2019".

86. In its narrative, the tribunal referred to the complaint of 6 September 2018 and Ms Czechowicz's inappropriate response to it in her email of 12 September 2018 (reasons, paragraph 51). At paragraph 52, the tribunal referred to FGW's "cursory acknowledgment" of that letter; it "did not engage with the substance of the complaint". The claimant was at this point off sick as well as suspended. At paragraph 54, the tribunal referred to a further letter "repeating and amplifying the claimant's concerns". The date is given (correctly) as 11 December 2018, the day before the claim was presented. (Elsewhere, the tribunal erroneously identified the date as 11 November 2018.)

87. The tribunal went on to record that on 3 April 2019, when the disciplinary hearing took place, the meeting "dealt with both grievance and disciplinary matters" (paragraph 56). The tribunal's findings, therefore, when read in their proper context, are that the grievance complaints were not dealt

with at the time they were made but only months later. Not only are those findings not perverse, they were common ground below and in this appeal.

88. There is nothing remotely wrong with the tribunal's finding at paragraph 63.6 that FGW "failed to address the claimant's complaints submitted on 6 September 2018 and 11 November 2018". There is no merit in this ground of appeal. It is further explained at paragraph 74.8 that FGW "did not deal with the letters sent on behalf of the claimant by his legal representative on 6 September 2018 and 11 November 2018" (the latter date should be 11 December 2018). The tribunal went on to note that the representative was the same as in 2012 and 2013.

89. The tribunal went on to criticise Ms Czechowicz about this and to quote from the grievance procedure. The finding in the same paragraph was that FGW "failed to realise that the claimant's complaint was not about dismissal or other relevant disciplinary action under the Disciplinary Procedure and therefore this clause did not apply. It was only when Steven Hawker met with the claimant that he was able to air his grievances. Those findings are undisputed. There is no perversity and no merit in ground 6 of the appeal.

The procedural unfairness challenge: ground 8

90. I do not accept that the tribunal acted in a procedurally unfair manner in finding that "management lore" about the claimant - and Ms Czechowicz's encouragement and perpetuation of it - was the explanation for the treatment he received. Management lore is not a term of art, as Mr Wynne Jones rightly pointed out. The tribunal's reasoning fell within the four corners of the pleaded case, the factual matrix known to the parties and the list of issues that arose.

91. First, it was the essence of the claimant's pleaded case that the events of 2012 and 2013 were the root cause of the manner in which he was subsequently treated. Contrary to FGW's submission, his case was not limited to an allegation of conspiracy or a vendetta against him. The nine detriments he asserted were carefully extracted from a long and sometimes diffuse pleading. They were conscientiously formulated and listed by the tribunal at paragraph 7 of the reasons. They were wide ranging and included objective criticisms of the disciplinary process from which the tribunal would be invited to draw an inference of a causative link with the events of 2012 and 2013.

92. FGW was therefore aware that if the claimant could prove that they occurred and were detriments (the eighth issue) and that the treatment he received was "because" he did the protected acts and "on the ground that" he made the protected disclosures (the ninth issue), the claim would succeed. The tribunal did not depart from the list of issues, as in other appeals where procedural

unfairness has been alleged.

93. The respondents, correctly, did not ask the tribunal to include as an issue of fact whether Mr Haynes conducted a vendetta against the claimant or led a conspiracy to remove him from the organisation. The issues the tribunal has to decide should be, and were, firmly grounded in the requirements of the cause of action and the pleaded case. It is commonplace for a claim to succeed but without the tribunal agreeing with the claimant's beliefs about the losing party's motives. Malice is not part of the cause of action here, unlike in, say, the tort of malicious falsehood.

94. Secondly, as for the factual matrix, the respondents well knew that Ms Czechowicz played a pivotal role in the disciplinary process and effectively acted as Mr White's mentor in his first ever disciplinary investigation. It is wholly unrealistic to suppose that it would not have occurred to the respondents to call her as a witness because of the way the case was pleaded, for several reasons.

95. The first reason is the centrality of her role in the disciplinary process, the point I have just mentioned. The second is that the pleaded case at paragraph 24 of the particulars of claim accused her of a malign role in the disciplinary process. The third is that the claimant's criticisms of the disciplinary process can be traced directly to the advice she gave to Mr White, such as advice that he could add an allegation of assault to the charges. Fourthly, she penned the notorious email of 12 September 2018 which was a major document in the contentious correspondence.

96. It would therefore have been obvious to the respondents below and their solicitors that a decision would have to be made whether to call Ms Czechowicz as a witness. Mr Fitzpatrick suggested the tribunal may not have found that she knew of the 2012 and 2013 events. That is fanciful, with respect. The email of 12 September 2018 written by Ms Czechowicz referred to Mr Singh, the legal representative in 2013 as in 2018, as the claimant's "friend who writes to us twice a year regarding various concerns Moses [the claimant] has".

97. As experienced practitioners, the respondents' solicitors must have known that whether to call Ms Czechowicz was a judgment call. If she were cross-examined, that could go well or not so well. She would be asked why she wrote the documents she wrote and gave the advice she gave. On the other hand, if she were not called, the respondents would be exposed to the taunt that "Banquo's ghost" was missing from the feast and the tribunal would surely be invited to draw the usual adverse inference from her absence from the witness box and silence in the face of criticism.

98. The contention of Ms Sikorska in her affidavit that the respondents would have prepared differently and called Ms Czechowicz if the case had been differently pleaded is unconvincing. The

tribunal was right to say that it was the respondents' choice not to call her. The respondents have not waived privilege. The appeal tribunal is therefore not privy to whatever "risk assessment" exercise behind the cloak of privilege may have taken place in view of the criticisms of Ms Czechowicz and the role she played in the disciplinary process.

99. Finally, when the claimant was cross-examined, he reiterated and repeated strong criticisms of Ms Czechowicz's role in the treatment he received. The notes of his cross-examination include: "Klaudia Czechowicz email after receiving complaint. Klaudia Czechowicz need to deal with disciplinary first. … There is evidence that Klaudia Czechowicz [w]as motivated by PID [public interest disclosures] and earlier complaints. Klaudia Czechowicz refused to tell me which policy she relied on".

100. The claimant therefore made a clear allegation that Ms Czechowicz was aware of the earlier matters in 2012 and 2013 and that she was prejudiced against him because of them. It was an allegation in similar vein to the criticism arising from the words she wrote in her email of 12 September 2018. The respondents had an opportunity at that point to ask the tribunal's permission to call her as a witness to answer the claimant's allegations made in the witness box, supplementing those already made in the pleading. The respondents did not do so.

The "reasons" challenge: ground 3

101. The tribunal's reasons for finding that the causation for the whistleblowing and victimisation causes of action was established, is the subject of grounds 1 and 2 of the appeal, to which I am coming shortly. The third ground is said to be a freestanding "reasons" challenge, in which FGW asserts that the tribunal failed to give sufficient reasons for its decision regarding causation. I do not think this ground of appeal adds anything to the first and second grounds, which deal with the substance of the causation issues.

102. I do not think there is any lack of clarity or adequacy in the tribunal's reasoning independently of whether they applied the law on causation correctly or not. I remind myself that the appeal tribunal should not go through tribunal decisions with a fine tooth comb looking for errors; or, in Lord Hope's words in *Hewage v. Grampian Health Board* [2012] ICR 1054, at [26]:

> **"… one ought not to take too technical a view of the way an employment tribunal expresses itself, … a generous interpretation ought to be given to its reasoning and … it ought not to be subjected to an unduly technical analysis".**

103. Having read the decision several times, I find the tribunal's reasoning quite clear and well

expressed, especially when read in context, i.e. in conjunction with the pleaded case and an account of some of the evidence. The essence of the decision and reasoning is as follows, in my summary:

(a) The claimant was involved in a dispute at Ealing in 2012, involving a local union representative about whom he made three complaints in 2012. He was dismissed and brought two tribunal claims in 2013, settled by re-employment and, later, transfer to Paddington.

(b) He was blamed for an incident in February 2018 involving a train passenger. He was disciplined over that incident. He was poorly treated in numerous ways during the disciplinary process.

(c) The 2012 and 2013 matters had left the claimant with a bad reputation among management. There was evidence during the disciplinary process that he had that reputation and that it was influencing the disciplinary process.

(d) Two of the complaints against the union representative in 2012 were protected disclosures. At least one of the two claims brought in 2013 was a protected act. The treatment he received in 2018 following the incident in February 2018 consisted of a series of detriments.

(e) Mr White conducted the investigation under Ms Czechowicz's influence; the investigation was biased, defective and unfair, but Mr White's treatment of the claimant was not directly linked to the protected disclosures and acts, of which he did not have direct knowledge.

(f) Mr Haynes knew all about the protected acts and disclosures but, contrary to the claimant's perception, was not vindictive towards the claimant, was aware of the treatment of the claimant but did not take part in it.

(g) FGW's management had a collective memory prejudicial to the claimant, transmitted or translated through Ms Czechowicz into the disciplinary process, which permeated the approach of HR and Mr White who was guided by Mz Czechowicz.

(h) By this means the claimant was demonised, by contrast with Mr Larkin who was favoured. Ms Czechowicz was chiefly responsible for perpetuating the prejudicial view of and treatment of the claimant which had its origins in the protected acts and disclosures.

(i) The detriments alleged by the claimant occurred, they were detriments within the statutory meaning and were inflicted by FGW "on the ground that" he made the protected disclosures

and "because" he did the protected acts.

(j) The evidence supporting those findings was the evidence of bias against the claimant and subjection of the claimant to the detriments, coupled with the absence of any other explanation for doing so other than the protected disclosures and protected acts.

104. I do not see what is unclear about that reasoning, which I take from the written decision and reasons. I find no merit in the third ground of appeal. I hope the summary is a useful reference point for the main issue in the appeal, to which I now turn: whether the tribunal's conclusions on causation were sound in law and can stand.

The causation challenge: grounds 1 and 2

105. There is much case law about who caused, or did not cause, a dismissal, a detriment, an act of discrimination or an act of victimisation. The cases have not developed in an orderly and uniform progression. Universal guiding principles are not easy to find and it may be a mistake to search for them. There are many variables. The causes of action vary. The statutory wording varies. The class of potentially liable persons varies. The scope of vicarious liability varies. Available defences vary.

106. Most importantly, the facts vary. There is a danger of over-thinking the issue of causation in a particular case, discussing it by reference to hypotheticals in order to rule out imputation of knowledge from one person to another except in specified situations, real or hypothetical. It is better to develop the law by reference to the facts of real cases. Whether a detriment was inflicted "on the ground that" a claimant made a protected disclosure or "because" he did a protected act is, ultimately and always, a factual determination for the tribunal to make.

107. An appellate court should be wary of interfering with a properly reasoned finding as to what did or did not happen "because" of or "on the ground" of something. In the cases, there is discussion about scenarios such as separation of the investigation process from the disciplinary decision; reliance on tainted information; manipulation of a decision maker; an "Iago situation"; the true reason for treatment being masked by a hidden or invented reason; cases of collusion; and the influence of a management culture or chain of command.

108. I do not think I should decide this appeal by seeing if the facts of this case fit within the facts of (or a discussion of hypotheticals in) a past case. The principled approach is to consider, in the normal way, the terms of the statute, the nature of cause of action, the facts found by the tribunal and its reasoning and conclusion on the question of causation. If no flaw is discerned, it is likely that the

appellate tribunal will have no basis to interfere. At that stage, a cross check may be made to ascertain whether the tribunal's analysis of causation is at odds (and if so fatally) with any prior authority.

109. I am therefore suspicious of Mr Fitzpatrick's proposition (to quote from his skeleton argument) that there is a "general rule" that only the decision maker's motivation may be taken into account; and that there is a narrow exception where "liability may be imputed" provided there is "a hierarchical relationship between the provider of tainted information and the decision-maker"; and there must be a "Jhuti compliant finding" (referring to the Supreme Court's decision in *Royal Mail Group Ltd. v. Jhuti* [2020] ICR 731). Such reasoning risks elevating dogma over flexible fact finding.

110. *Jhuti* was a dismissal case. Ms Jhuti had already succeeded in her section 47B ERA 1996 claim, which was not before the Supreme Court. Lord Wilson JSC (with whom the other justices agreed) did not say there was any "general rule", though he did say (at [60]) that in searching for the reason for a dismissal "courts need generally look no further than at the reasons given by the appointed decision-maker". That is a statement of the obvious, not a principle of law.

111. The question before the Supreme Court was ([1]): "in a claim for unfair dismissal can the reason for the dismissal be other than that given to the employee by the decision-maker?" The answer (at [62]) was:

> **"yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."**

112. I take as my starting point the statutory provisions, first on whistleblowing. These have their origin in the Public Interest Disclosure Act 1998. By section 47B(1) of the ERA 1996, a worker has the right "not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure." Subsection (1) thus provides for direct liability of the employer *simpliciter*, in an ordinary or paradigm case.

113. Subsections (1A)-(1E) were added by provisions in the Enterprise and Regulatory Reform Act 2013. They create liability on the part of individual employees or agents, for whose act the employer may be vicariously liable; and they permit an employer's "reasonable steps" defence. Section 47B(2) excludes application of the section where the detriment in question amounts to dismissal. In dismissal cases, only the employer can be liable for unfair dismissal.

114. Thus, the cause of action for whistleblowing detriment short of dismissal includes provision for determining separately the liability of "the employer" and that of other individuals who may be

involved in inflicting the detriment. By section 48(2), on a complaint to a tribunal under (among other provisions) section 47B, it is for "the employer to show the ground on which any act, or deliberate failure to act, was done". That provision places no onus on any individual respondent to the claim, e.g. an individual manager, if that individual is not the employer.

115. While in a case of unfair dismissal on the ground of a protected disclosure, for the dismissal to be automatically unfair the disclosure must be the sole or principal reason for the dismissal (see section 103A of the ERA 1996), in cases of detriment under section 47B, the section "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" (per Elias LJ in *Fecitt v. NHS Manchester* [2012] ICR 372, at [45]).

116. Turning to victimisation, by section 27(1) of the EqA the cause of action is established if "A subjects B to a detriment because … B does a protected act". Section 109 regulates individual and vicarious liability for acts of discrimination, including victimisation, done in the course of "A"s employment and creates an employer's "reasonable steps" defence. Section 110 provides for joint liability of an employee or agent. Section 136 enacts the burden of proof provision, much discussed in case law. It applies to any respondent to a claim under the EqA, not just an employer.

117. The claims were brought against the employer, FGW, and two individuals, Mr Haynes and Mr White. That was in accordance with the statutory provisions. Under section 47B, claims may (since the 2013 amendments) be brought against the employer and certain individuals, with acts of employees usually treated as acts of the employer also. A claim may succeed as against the employer but not against the individuals, as happened in this case; or vice versa where the employer establishes the "reasonable steps" defence in subsection (1D)).

118. The tribunal made clear findings linking the 2012 protected disclosures and the 2013 protected acts with the treatment the claimant received in 2018. Those findings led to the conclusion that Mr Haynes and Mr White personally did not subject the claimant to the 2018 detriments because of the 2012 and 2013 matters: Mr Haynes, because he took no part in inflicting the detriments; Mr White, because while he took part in inflicting them and partook of the prejudice arising from the 2012 and 2013 matters, he did not have direct knowledge of those matters.

119. The tribunal's analysis was sophisticated and nuanced: the 2012 and 2013 protected disclosures and acts caused the 2018 detriments through the medium of the ill-will that FGW management, institutionally, bore the claimant. That was, the tribunal decided, a causative link

leading to the conclusion that FGW's management in a collective sense, *qua* body corporate and employer, inflicted the detriments "on the ground" of the protected disclosures and "because" of the protected acts; even though the two individual managers did not.

120. The "collective memory" prejudicial to the claimant (the tribunal's phrase in paragraph 72) was personified and perpetuated by Mr Czechowicz, who demonised the claimant and encouraged Mr White to treat him unfairly. There was no other explanation for the extraordinary way he was treated by comparison with Mr Larkin; nor for the message from Natalie the co-worker; nor for his suspension despite the incident not being viewed as gross misconduct; nor for Ms Czechowicz's disparagement of him and his representative Mr Singh (see paragraphs 74.1-8 and 75-77).

121. Subject to considering the impact of the case law, I would find that reasoning sound, open to the tribunal and not in any way flawed. The findings are clear. The reasoning is not difficult to understand, nor is it badly explained. I have provided my own summary above without difficulty when dismissing the "reasons" challenge in ground 3 of the appeal.

122. Turning to the cases, many factual scenarios, real and hypothetical, are discussed in them. The present case is not a collusion case, nor a joint decision maker case, nor a chain of command case, nor is it quite as bad as an "Iago" case. I do not find these labels helpful because every case is different. If a label for this case is needed, it is a combination of a manipulation case – Ms Czechowicz manipulating Mr White – an organisational culture case – the culture of hostility to the claimant because of the protected disclosures and acts – and with some tainted information from Ms Czechowicz about the propriety of suspension in a non-gross misconduct case.

123. If the matter were free from authority I would say that the tribunal was entitled to find that the 2012 protected disclosures and the 2013 protected acts materially influenced the claimant's treatment by FGW. It was not bound to find that they played no part in his treatment merely because Mr White considered he was dealing just with the February 2018 incident. The tribunal was entitled to dig deeper and decide there was more to the case than that incident, unmasking the real reason for the treatment, as Lord Wilson unmasked the real reason for the dismissal in *Jhuti*. The tribunal's decision is not, in my judgment, assailable unless barred by authority.

124. I bear in mind also Lord Reid's observation in *Post Office v. Crouch* [1974] ICR 378, at 399, that in an unfair dismissal case (and, by extension, a case such as this one), the statutory provisions "must be construed in a broad and reasonable way so that that legal technicalities shall not prevail against industrial realities and common sense"; and that the reason to which the provisions referred

might aptly be termed the "real" reason for it.

125. *Martin v. Devonshires Solicitors* [2011] ICR 352 was a claim for victimisation for having done protected acts by bringing grievances making allegations found to be false. The appeal tribunal (Underhill P as he then was, presiding) upheld the decision below that the manner and effects of the complaints were properly separable from the making of the complaints themselves.

126. This "separability principle" is now well established and was recently reaffirmed in *Kong v. Gulf International Bank (UK) Ltd* [2022] ICR 1513. It is "not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be" (per Simler LJ, as she then was, at [57]). It proceeds from the premise that causation is a factual determination and there is no rule that a protected disclosure must necessarily be the cause of events that occurred in its wake.

127. In *Orr v. Milton Keynes Council* [2011] ICR 704, the Court of Appeal (Sedley LJ dissenting) decided that only the knowledge of the dismissing officer could be taken into account in determining what the reason for the dismissal was. It could not include facts deliberately withheld from the decision maker by another manager. The Court of Appeal in *Royal Mail Group Ltd v. Jhuti* [2018] ICR 982 later felt bound by *Orr*, but the latter case has since been largely denuded of its authority (though not formally overruled), by Lord Wilson's comments on it in *Jhuti* at [47]-[52].

128. *Co-Operative Group Limited v Baddeley* [2014] EWCA Civ 658 (Underhill LJ, as he had by then become, giving the leading judgment) concerned a poorly reasoned tribunal decision in eccentric language which was too much for the court to accept, though it had passed muster (just) with the appeal tribunal under Keith J. The Court of Appeal set aside the decision and, with regret, ordered a re-hearing. The claims were (so far as material here) for detriment under section 47B, automatically unfair dismissal and ordinary unfair dismissal.

129. At [41] and following, Underhill LJ considered the "reason" for the claimant's summary dismissal (referring to Cairns LJ's seminal account in *Abernethy v. Mott, Hay & Anderson* [1974] ICR 323, not repeated here). At [42], he referred to a scenario where the facts known to the decision maker or beliefs held by him "have been manipulated by some other person … for short, an Iago situation." The law has since recognised that manipulation can, let us hope only in rare cases, be taken into account in determining the true reason for a dismissal or other detrimental treatment.

130. In *Western Union Payment Services UK Ltd v. Anastasiou*, UKEAT/0135/13/LA, 21 February 2014, a tribunal dismissed claims for whistleblowing automatically unfair dismissal and ordinary unfair dismissal but upheld a claim for whistleblowing detriment. The appeal tribunal (HHJ Eady

QC, as she then was, sitting with lay members), at [74]-[78] reversed the tribunal's decision that the claimant's protected disclosure had materially influenced the employer's treatment of him.

131. There was no evidential basis for that finding she pointed out; the tribunal had not found that the relevant decision makers had knowledge of the protected disclosure; nor was there evidential support for a suggestion that a report referring to the protected disclosure was generally known to senior management; there was no mention of the burden of proof provision in section 48(2) of the ERA 1996; and "[w]e are simply left with no understanding as to why the ET felt able to draw a causal link between the disclosure and the detriments in this case" ([76]).

132. HHJ Eady QC did recognise (at [74]) that:

> **"… hypothetically – there may be cases where there is an organisational culture or chain of command such that the final actor might not have personal knowledge of the protected disclosure but where it nevertheless still materially influenced her treatment of the complainant. In such cases, however, it would still be necessary for the ET to explain how it had arrived at the conclusion that this is what had happened."**

133. Here, the existence of an organisational culture was a large part of the tribunal's explanation for this claimant's treatment, combined with Ms Czechowicz's manipulative use of it in influencing Mr White's conduct of the disciplinary process. The difference from the *Western Union* case is that the tribunal's articulation of that explanation is full and properly reasoned, thus conforming to HHJ Eady's requirement that a tribunal must do so.

134. The last pre-*Jhuti* case I touch upon is *Reynolds v. CLFIS (UK) Ltd* [2015] ICR 1010. A tribunal had rejected a claim that the claimant had been dismissed by a decision of a senior manager for reasons related to her age rather than the quality of service she was providing. On appeal, Singh J (as he then was) held that the tribunal should have taken into account the mental processes of others who had significantly influenced the decision to terminate her employment.

135. The Court of Appeal (Underhill LJ giving the leading judgment) allowed the employer's appeal, holding that under the legislative scheme, the employer could only be liable for an act of discrimination done by an individual employee or agent. A discriminator could not discriminate on the basis that he was influenced by someone else's motivation. The case was not one of joint decision making; it was a "tainted information" case (see at [34]), where an act detrimental to the claimant is done by an employee who is innocent of any discriminatory motivation but is influenced by information or views coming from another employee whose motivation is discriminatory.

136. At [39], Underhill LJ explained how the "separate acts approach" – treating the second

person's discriminatory motivation as separate from that of the primary decision maker – conforms entirely to the scheme of the legislation (the Employment Equality (Age) Regulations 2006). At [46] he confirmed that "the correct approach in a tainted information case is to treat the conduct of the person supplying the information as a separate act from that of the person who acts on it". The supplier of the tainted information could, potentially, be separately liable for that discriminatory act.

137. However, at [47], Underhill LJ confirmed "for completeness" that the "Iago situation" scenario described in his earlier judgment in *Co-operative Group Ltd v Baddeley* at [42] was a different matter:

> **"… it was agreed before us that the difference in the statutory provisions as between the discrimination legislation and the unfair dismissal legislation meant that it was unsafe to read across from one type of case to the other."**

138. When the *Jhuti* case came before the Court of Appeal (on appeal from Mitting J), the main issue was whether manipulation by a manager influencing the decision to dismiss by a different manager could be taken into account in determining the "reason" for a dismissal. The claim was for whistleblowing detriment (section 47B ERA 1996) and whistleblowing dismissal (section 103A). Underhill LJ (Moylan and Jackson LJJ agreeing) decided that the manipulation could not be taken into account because the majority decision in *Orr* to that effect was binding and must be followed.

139. In the leading judgment at [26]-[27], Underhill LJ touched on the relationship between the whistleblowing provisions in the ERA 1996 and the causes of action for discrimination in the EqA. He pointed to both differences and similarities. The language of section 47B was closer to the EqA language than that of section 103A but "even so there is no precise correspondence, and caution is required in using authority on the one statute as a guide to the other".

140. At [32], he returned to *Reynolds v. CLFIS (UK) Ltd*, the age discrimination case which the employment tribunal had cited and Mitting J had discussed. At [37], he agreed with the parties and Mitting J that "it is unsafe to apply a direct read-across between the two statutory schemes". At [39], he returned, as Mitting J had, to *Co-operative Group Ltd v. Baddley* and in particular the passage in the *Co-operative Group* case (at [42]) where the villainous Iago had first made his entrance.

141. At [44], Underhill LJ recorded the submission of counsel for the employer that, while the *Reynolds* case had "no direct application, because the scheme of the [EqA] is different … [the] underlying conclusion had nevertheless been correct" because "we were bound … by the decision of this court in *Orr v. Milton Keynes Council*….". Underhill LJ went on to consider *Orr* and at [57] accepted the submission that the majority's decision in it was binding, though subject to "possible

qualifications" further discussed below, which were "marginal and not relevant to the present case".

142. Those qualifications were then discussed at [59]-[63]. I will not set out all the hypothetical cases there discussed. Underhill LJ referred to, among other things, a separation of functions in the disciplinary process; where a "manipulator" is a manager with some responsibility for the investigation but not the actual decision maker; or an extreme case where someone very senior such as a CEO "procures a worker's dismissal by deliberately manipulating … the evidence before the decision-taker".

143. The conclusion was that the court was bound by *Orr* to allow the employer's appeal in respect of the section 103A claim for whistleblower dismissal, but (see at [78]) that the employee could, in principle, recover compensation in respect of her dismissal via the route of compensation for her successful detriment claim under section 47B. Whether she could do in practice would have to be decided at a remedy hearing before the employment tribunal.

144. Before the Supreme Court gave judgment in *Jhuti*, Choudhury P heard the appeal in *Malik v. Cenkos Securities plc*, (UKEAT/0100/17/RN, UKEAT/0101/17/RN, judgment of 17 January 2018). The claimant appealed against the dismissal of his claims for whistleblowing detriments, constructive dismissal and victimisation on the grounds of race and religion. He had made protected disclosures and faced an "increasingly hostile environment" as a result. He could not make a case of express collusion and could not identify which individual managers knew of the protected disclosures.

145. The third ground of appeal included the contention that the tribunal had failed properly to apply the burden of proof provision in section 48(2) ERA 1996 and failed to consider whether the protected disclosures materially influenced the treatment of the Claimant; and in relation to dismissal, failed to consider whether the protected disclosures were the sole or principal reason for the dismissal (see at [35]). In particular, relying on the *Western Union* case (cited above) (see *Malik* at [74(iii)]), the tribunal failed to consider whether there was a "chain of command" such that any decisions made were materially influenced by protected disclosures.

146. Choudhury P dealt with the "chain of command" point at [85]-[91], quoting the passage in *Western Union* (also quoted above) where HHJ Eady QC had, *obiter*, used the expression "chain of command". It was not clear, he commented at [86] "how a decision maker who did not have personal knowledge of the protected disclosure could be said to have been materially influenced by it to make the decision under challenge". That would have to be "as a result of importing the knowledge and motivation of another to that decision-maker".

147. Choudhury P regarded that as "not permissible in considering why the decision-maker acted as he or she did", citing in support the Court of Appeal's reasoning in *Reynolds*, in the context of age discrimination. The conclusion was, at [87], that a claimant seeking to rely on the motivation of a person other than the decision maker must rely on the "separate acts" approach. At [89], he rejected the submission that *Reynolds* was distinguishable because the age discrimination legislation was different; the relevant provisions in section 47B are "very similar … in relation to vicarious liability".

148. Choudhury P also rejected any analysis based on a "chain of command" on the facts. The case was not properly articulated and had not been pursued in that way before the tribunal below. And there would still, in accordance with the reasoning in *Reynolds*, have to be a separate act of whistleblowing discrimination by one or more individuals; no such separate acts were pleaded. There was no properly articulated case, either based on individual separate acts, or a chain of command, or collusion between particular individuals.

149. The *Jhuti* case in the Court of Appeal did not assist the claimant either, because (see at [93]), it was a dismissal case and not one relying on detriment. In dismissal cases, one can, he recognised, "attribute the motivation of someone other then the dismissing officer to the employer … in some circumstances"; because liability for the dismissal lies only with the employer and "the injustice which concerned the Court of Appeal in **CLFIS** does not arise".

150. Indeed, in *Cadent Gas Ltd. v. Singh*, UKEAT/0024/19/BA, 8 October 2019, the appeal tribunal (Choudhury P sitting with lay members) dismissed an employer's appeal where the tribunal had found a dismissal automatically unfair by reason of trade union activities and the dismissing officers had been unwittingly and decisively influenced by a manager involved in the investigation, a Mr Huckerby, not called as a witness below, who was motivated by the claimant's union activities. The case fell within one of the manipulator scenarios discussed by Underhill LJ in *Jhuti*.

151. Choudhury P distinguished the reasoning in *Orr* and *Jhuti* (in the Court of Appeal), referring to (amongst other passages) the observations of Underhill LJ at [62] about a manipulator who is not the decision maker but is a manager with some responsibility for the investigation. Mr Huckerby was such a person, the tribunal had effectively found; it had been entitled to do so. Choudhury P commented at [56]:

> **"… manipulation can take many forms and is not confined to those apparent from direct communication between Mr Huckerby and Mr Wilson. If a manager is as heavily involved in directing the investigation as Mr Huckerby clearly was and plays the kind of role that he did in steering the investigation towards a disciplinary hearing and dismissal, there is a much stronger**

case for attribution … .”

152. The next case is ***Jhuti*** in the Supreme Court, already mentioned. The judgment was delivered on 27 November 2019. The court reversed the Court of Appeal’s decision, freeing the law from the straitjacket of the *Orr* decision, though without formally overruling it. At [53], Lord Wilson endorsed the correctness of Underhill LJ’s suggestion that in what he had called an “Iago situation”, it could be “appropriate for a tribunal to attribute to the employer knowledge held otherwise than by the decision-maker”; referring to “the knowledge of a manager who, alongside the decision-maker, had had some responsibility for the conduct of the disciplinary enquiry”.

153. Lord Wilson noted that on the facts of ***Jhuti***, the “manipulator”, a Mr Widmer, had no such responsibility; he was above Ms Jhuti in the hierarchy but was not responsible for any part of the disciplinary investigation that led to her dismissal. He noted further (in the discussion at [55] and following) that the employer relied on the vicarious liability provisions available under section 47B in detriment claims as a reason for *not* permitting attribution to the decision maker of the knowledge of another in dismissal claims, where only the employer can be liable. He rejected that argument and answered the question asked of the court at [62], as I have quoted above.

154. The last case I need to mention is Bourne J’s decision in *William v. Lewisham and Greenwich NHS Trust* [2024] EAT 58. The judgment was handed down on 24 April 2024, the day after the oral hearing in this appeal. The parties made brief written observations on the case, at my invitation. I am grateful for those observations and take them into account. Bourne J followed Choudhury P’s decision in *Malik* that in a section 47B ERA 1996 detriment case, the reasoning in *Reynolds* must be applied and it is therefore not permissible to attribute to the decision maker knowledge and motivation of another person who influenced the decision maker.

155. Bourne J also held that the decision in *Malik* should not be regarded as inconsistent with the Supreme Court’s subsequent decision reversing the Court of Appeal’s decision in *Jhuti*. At [82], Bourne J decided that he should follow *Malik* because it was not obvious that the Supreme Court’s subsequent decision had shown *Malik* to be obviously wrong. As Lord Wilson in *Jhuti* had “made clear in his judgment at [46], the decision …. turned on the meaning and purpose of section 103A [of the ERA 1996]”.

156. I do not think those authorities bar the tribunal’s analysis in the present case, nor that they invalidate its reasoning and conclusions. Before the 2013 amendments to section 47B ERA 1996, only an employer could be liable for whistleblowing detriment and the basis of liability had to be

direct, not vicarious, liability. In *Fecitt* (see at [21]), the claimants complained:

> **"not only of the positive acts taken by the employer, namely the redeployment of Mrs Fecitt and Mrs Woodcock and the removal of shifts from Mrs Hughes, but also of the failure by the employer to take proper steps to prevent victimisation by colleagues. They also alleged that, quite separately from the question whether the employer was personally liable for its actions, the employer was in any event vicariously liable for the acts of victimisation perpetrated by fellow workers in the course of their employment."**

157. The Court of Appeal held that the employer could not be vicariously liable for the acts of employees unless the latter had done an actionable wrong to which the strict liability doctrine of vicarious liability could attach. At the time, that was not possible because an employee could not be personally liable for victimising a whistleblower: see Elias LJ's judgment at [33]. But the Court of Appeal clearly allowed that the employer could be *directly* liable for victimising a whistleblower under section 47B(1). To decide otherwise would have made no sense, for there was at the time no other way of establishing liability under the section.

158. After the 2013 amendments to section 47B, it still remained possible for an employer to be directly liable under section 47B(1), without vicarious liability. The words of section 47B(1) were not amended. The amendments made the acts of individual employees actionable, enabling vicarious liability for those acts, subject to the "reasonable steps" defence. The amendments did not abolish direct liability of the employer under section 47B(1).

159. As Choudhury P observed in *Malik* at [86] it is difficult to see how a person can be influenced by something he or she does not know about; it would have to be by attribution to that person of another's knowledge which, he thought, was barred by the reasoning and decision in *Reynolds*. The individual responsible for influencing the unwitting decision maker should be claimed against and made liable instead, to avoid injustice to the innocent influenced person.

160. However, the tribunal's analysis of causation in the present case is different. The innocent influenced person *was* proceeded against, but not made personally liable. The malign influence on him was exerted not by one individual only but by FGW itself, i.e. by a management culture which "permeated the approach of HR (in particular Klaudia Czechowicz) and, in turn, those advised by HR, including the third respondent [Mr White]" (paragraph 73). It is similar to the scenario envisaged by HHJ Eady QC in *Western Union*.

161. It does not matter, in my judgment, that Ms Czechowicz *might* have been found personally liable had she been made a respondent; nor that Mr White might not have been made a respondent. Mr White could be exonerated whether or not he was sued. Ms Czechowicz's contribution was

important but she was not the only individual who passed on the "management lore" prejudicial to the claimant. She received feedback from at least one other unidentified source within management. She transmitted the received wisdom about the claimant to Mr White but she did not invent it; she had heard about it and discussed it with others as well as perpetuating it.

162. It was legitimate, in my judgment, to attribute the influence on Mr White to the employer itself, FGW. The case was, therefore, one of direct liability, not vicarious liability. There is no injustice here to an innocent decision maker as in a *Reynolds* type case. I do not think the "separate acts" analysis should be applied in a case such as this. The tribunal's findings on causation were findings of fact which were open to it and properly reasoned. It is on that basis that I find the first and second grounds of the appeal must fail.

163. In addition, I have doubts about whether Underhill LJ would, if he had had the issue in mind, have intended to excluded section 47B detriment cases from the purview of his remarks about Iago and about manipulation cases, when he made those remarks in *Baddeley*, *Reynolds* and *Jhuti*. I also have doubts about whether Choudhury P in *Malik* had in mind a "collective memory" case such as this, which is far removed from the facts of *Malik*.

164. I do not find particularly persuasive the proposition that the *Reynolds* reasoning should apply to whistleblowing detriment cases short of dismissal under section 47B but not to whistleblowing dismissal cases under section 103A. While (as has been pointed out) the former could be considered a form of discrimination, dismissal can also be a form of discrimination and both causes of action have in common the need for causation (albeit different tests of causation) based on the making of a protected disclosure.

165. Furthermore, as noted above, there must be such a thing as direct employer liability under section 47B(1) without vicarious liability. Until the 2013 amendments, it was the only form of section 47B liability. I do not accept that the amendments abolished and wholly replaced that form of liability without altering the words of subsection (1). It therefore appears to me that, unlike in age discrimination, a cause of action under section 47B(1) can in principle exist without an identified individual being motivated by a relevant protected disclosure.

166. However, I do not need to say any more about those matters since I do not base on them my decision to uphold the tribunal's reasoning and conclusion. For the reasons I have given, I find the tribunal's decision on causation in the case of FGW sound and not flawed by any error of law or approach. The first and second grounds of challenge in this appeal do not succeed.

Conclusion

167. For all those reasons, I dismiss the appeal. I am grateful to counsel for their cogent and concise submissions and also to the judge for the helpful responses to the request for comment and her notes of evidence.