Neutral Citation Number: [2025] EAT 136

Case Nos: EA-2023-SCO-000055-DT
EA-2023-SCO-000058-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 6 October 2025

Before:

THE HON. LORD FAIRLEY, PRESIDENT

- -

Between :

MS ANN HENDERSON

Appellant

- and -

GCRM LIMITED AND OTHERS

Respondents

- -
- -

Mr Will Young and **Mr Stephen Butler**, of Counsel, for the **Appellant**
Mr David Hay K.C. and **Mr Christopher Milsom**, of Counsel, for the **Respondents**

Hearing dates: 05 August and 18 September 2025

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JUDGMENT

SUMMARY

Whistleblowing; Employment Rights Act, 1996, sections 47B and 103A; composite approach to liability.

The claimant was employed by the first respondent as an embryologist. She was dismissed in February 2022 for the stated reason of conduct. She brought complaints *inter alia* against the first respondent under section 103A of the **Employment Rights Act 1996** ("**ERA**") for automatically unfair dismissal and against the first and third respondents for the detriment of dismissal under sections 47B(1A) and (1B). The complaint under section 103A did not succeed, but the complaints under sections 47B(1A) and (1B) were upheld against the third and first respondents. The claimant and the first and third respondents each appealed.

In her appeal, the claimant contended that the Employment Tribunal had erred in its consideration of her section 103A complaint by not properly considering the necessary questions arsing from **Royal Mail Limited v. Jhuti** [2018] ICR 982 – in particular as to whether or not the second respondent had manipulated the third respondent in the disciplinary process or created a false pretext for dismissal which the third respondent had been induced to adopt.

In the respondents' appeal it was submitted that the Tribunal had erred in concluding that that, in combination, **Timis v. Osipov** [2019] ICR 655 and **Jhuti** were capable of leading to a conclusion that an innocent dismissing manager (the third respondent) could be found personally liable to a claimant in a dismissal detriment complaint under section 47B(1A) such as to make the employer also liable under section 47B(1B).

Held:

In the claimant's appeal:

Once **Jhuti** had been raised by the claimant as a live issue, it was necessary for the Tribunal to make clear findings about whether or not the second respondent had improperly manipulated the third respondent through his involvement in the disciplinary process or created a false pretext for dismissal which he induced the third respondent to adopt in order to hide a proscribed reason. The Tribunal had erred in failing to engage with those issues. The claimant's appeal was therefore allowed and the section 103A complaint was remitted to the same Tribunal for it to consider those questions.

In the respondents' appeal:

The Tribunal had erred in applying **Jhuti** to the complaints made under sub-sections 47B(1A) and (1B) and in finding the first and third respondentsliable for those complaints.

Such an approach to liability was unacceptable in principle in a section 47B(1A) complaint as it cannot have been the intention of Parliament to impose unlimited liability upon innocent individuals who have not personally been motivated by a proscribed reason. The purposive approach to the legislation in both **Timis** and **Jhuti** reflected, in each case, the need to provide the claimant with an effective remedy. There is no need to extend the *ratio* of **Jhuti** into complaints under section 47B(1A), and very good reason not to do so.

Paragraph 3 of the Tribunal's judgment was, therefore, set aside, and a decision substituted dismissing the complaints against the third and first respondents under sections 47B(1A) and (1B).

Observed:

There is no reason in principle why **Jhuti** could not, in appropriate circumstances, apply to a direct claim against an employer for non-dismissal detriment in terms of section 47B(1).

The Honourable Lord Fairley, President:

Introduction

1. These two related appeals concern sections 47B and 103A of the **Employment Rights Act, 1996** ("**ERA**"). Those sections provide remedies for employees who have been subjected to detriment for making protected disclosures. Complaints made under them are commonly referred to as "whistle-blowing claims".

2. The claimant was employed by the first respondent as an embryologist. She was dismissed in February 2022 for the stated reason of conduct. She brought complaints under sections 47B and 103A, the detail of which I will return to below. Before doing so, however, it is helpful to consider the terms of those provisions in detail and to examine how they have been interpreted.

The statutory provisions

3. Statutory protections for whistle-blowers were first introduced to the **ERA** by the **Public Interest Disclosure Act, 1998**. Amendments were made in 1999 and again in 2013. The full legislative history is summarised by Underhill LJ in **Timis v. Osipov** [2019] ICR 655. The current provisions are in the following terms:

> **47B Protected disclosures.**
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority,
>
> on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

> (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
>
> (a) from doing that thing, or
>
> (b) from doing anything of that description.
>
> (1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
>
> (a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
>
> (b) it is reasonable for the worker or agent to rely on the statement.
>
> But this does not prevent the employer from being liable by reason of subsection (1B).
>
> (2) This section does not apply where—
>
> (a) the worker is an employee, and
>
> (b) the detriment in question amounts to dismissal (within the meaning of Part X).
>
> (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.
>
> …
>
> **103A Protected disclosure.**
>
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

4. Subsections 47B(1A) to (1E) were added by the **Enterprise and Regulatory Reform Act, 2013** with effect from 25 June 2013 following the decision of the Court of Appeal in **NHS Manchester v. Fecitt** [2012] ICR 372. Two cases which have considered the scope and application of sections 47B and 103A are of particular significance in the present appeals.

5. In **Timis**, the Court of Appeal concluded that whilst only an employer can be liable for an automatically unfair dismissal under section 103A, a worker or agent of the employer may be personally liable in a claim under section 47B(1A) for the detriment of dismissal on the ground that the claimant had made a protected disclosure. If such liability is established, the employer will also be liable by virtue of section 47B(1B), unless it is able to establish the statutory defence in section 47B(1D).

6. In **Royal Mail Limited v. Jhuti** [2018] ICR 982, the Supreme Court held that, in certain limited circumstances, the principal reason for a dismissal in a complaint under section 103A

may be found to be the making of a protected disclosure, even though that was not in the mind of the dismissing officer of the employer at the time of the decision to dismiss. In broad terms, this will be the case where a manager senior to the dismissed employee deliberately manipulated evidence or hid the real reason for dismissal – the making of a protected disclosure – behind a fictitious one, such that an innocent dismissing officer, acting in good faith, adopted the manipulated or fictitious reason. In such a case, a tribunal should look past the reason relied upon by the innocent manager to identify the real principal reason for the dismissal. I will refer to such cases – as parties did in submissions – as involving a situation of "tainted information".

7. The issue raised in the claimant's appeal is whether the Employment Tribunal properly and fully considered the potential applicability of **Jhuti** to her section 103A complaint. The issue in the respondent's appeal is whether the Tribunal erred in concluding that, in combination, **Timis** and **Jhuti** have the effect that an "innocent" dismissing manager may be found personally liable to a claimant in a dismissal detriment complaint under section 47B(1A) so that, in a tainted information case, the employer of the innocent manager may also be made liable under section 47B(1B).

The complaints to the Employment Tribunal

8. Following her dismissal, the claimant brought a complaint of "ordinary" unfair dismissal in terms of section 94 **ERA**. In addition, she brought complaints based upon some of the whistleblowing provisions in sections 47B and 103A the **ERA**. Those complaints were:

a) against her employer (the first respondent) under section 103A for automatically unfair dismissal;
b) against her line manager (the second respondent) and the manager who dismissed her (the third respondent) under section 47B(1A) for the detriment of dismissal; and
c) against the first respondent under section 47B(1B) on the basis that it was treated as having subjected her to the detriment of dismissal through the actions of the second and / or third respondent.

9. In each of the detriment complaints against the second and third respondents under section 47B(1A) (and, by extension, against the first respondent under section 47B(1B)) the claimant relied only upon the pleaded detriment of dismissal. An application by the claimant

to widen the scope of the detriments relied upon in the section 47B complaint was refused in December 2022. That decision was not appealed. The significance of that for the purpose of this appeal is that there were no complaints before the Employment Tribunal that the claimant had been subjected to pre-dismissal detriment by any respondent.

10. The claimant did not seek to advance a complaint of dismissal detriment against the first respondent under section 47B(1). Having regard to the terms of section 47B(2), such a claim would not have been competent.

The Tribunal's findings of fact

11. Over a period of almost two years between 30 August 2019 and 20 August 2021, the claimant had made a number of disclosures about staffing issues to managers of the first respondent.

12. The second respondent was the claimant's line manager. In or about August 2021, the second respondent appointed an investigating officer, Ms Young, to investigate allegations about the claimant's conduct.

13. On 26 August 2021, a meeting took place between the claimant, the second respondent and Ms Young. During that meeting, an attempt was made – apparently initiated by the second respondent – to negotiate a termination of the claimant's employment. At the end of the meeting the claimant was asked to leave the premises. This was, in effect, a suspension.

14. No agreement was ultimately reached regarding termination of the claimant's employment. On 6 October 2021, the second respondent sent a letter to the claimant regarding the conduct allegations that were to be investigated by Ms Young. The second respondent advised the claimant that she was to remain suspended on full pay in the meantime.

15. Ms Young interviewed the second respondent and another employee, Ms Zujovic, about the conduct allegations and produced a report. The report led to a disciplinary process being commenced. The second respondent advised the claimant that a disciplinary hearing would be held on 20 December 2021 by Teams call. The intention was that the disciplinary hearing would be conducted by the second respondent. When the date of the hearing had to be changed to 28

January 2022, however, responsibility for the conduct of it was passed to the third respondent. The third respondent was senior to the second respondent and was employed by a different company in the group of which the first respondent was a part. She had joined the group of which the first respondent was a part on 4 January 2022 and was not aware of the history of the claimant's disclosures.

16. The disciplinary hearing commenced on 28 January 2022, and was adjourned, first to 31 January, and thereafter to 3 February, when the claimant was dismissed. The decision to dismiss was taken solely by the third respondent. The reasons for dismissal were then confirmed in a letter dated 11 February 2022.

17. The reasons given by the third respondent for the dismissal all related to the claimant's conduct, and not to any protected disclosure made by her. The third respondent was genuine in her belief that the claimant was guilty of some form of misconduct (whether labelled as such or as gross negligence). That was her reason for dismissing. In dismissing the claimant, the third respondent was acting as the first respondent's worker and/or its agent and with its authority under section 47(1A) **ERA**.

18. The Tribunal found, however, that the second respondent had been a "key influence" (ET § 217) upon the third respondent. It set out the basis for that conclusion in ET § 203 to 206:

> 203. …it was clear to the tribunal that [the third respondent] was extensively informed and guided in the process by Ms Young from HR and [the second respondent] as the claimant's manager in particular. They had involvement with the claimant going back months if not years in relation to the subject matter of her protected disclosures. It was [the second respondent] who decided to commence a disciplinary process after the claimant declined to leave under a negotiated settlement, and Ms Young who carried out the investigation on his instructions and into issues that he identified. [The second respondent] initially planned to hold the disciplinary hearing, only handing the matter over to [the third respondent] when its postponement meant that he would no longer be available. By her own admission [the third respondent] had little or no knowledge of the disciplinary allegations brought against the claimant (decided upon by [the second respondent] with assistance by Ms Young) in terms of why they were deemed serious examples of potential misconduct, the details of what happened or even the context around them. [The third respondent] had never been to the Glasgow lab and nor did she speak to anyone in Glasgow other than [the second respondent]. She relied on both individuals for information and guidance, both in terms of the way they shaped the investigation process and the more direct information they gave her when she requested it. She spoke to [the second respondent] during an adjournment of the claimant's disciplinary hearing.

> 204. …Given the heavy reliance [the third respondent] placed on the materials prepared by Ms Young and [the second respondent], the various decisions they took earlier in the process, and the further guidance they both provided, it is open to the tribunal to find that the motivations of [the second respondent] and Ms Young had a material influence ultimately on [the third respondent's] decision. The tribunal does not go so far as to share the claimant's view that [the second respondent] ordered [the third respondent] to dismiss the claimant, as he would have had no authority to do so and the tribunal accepted that [the third respondent] would have wished to make what she saw as her own decision. The tribunal did however conclude that those two individuals influenced the otherwise unaware [third respondent] to a significant degree. As they were so heavily motivated towards disciplinary action by the claimant's protected disclosures themselves, that filtered through into the decision [the third respondent] took.
>
> 205. It is a requirement of the above finding that Ms Young and [the second respondent] were themselves motivated to initiate and then to conduct a disciplinary investigation against the claimant, and to interact with [the third respondent] in a way which were driven by the claimant making protected disclosures. This is the tribunal's conclusion on the evidence…To address [the disclosures] would involve time and money. It would impact negatively on patient numbers and therefore income of the clinic. The first respondent and particularly [the second respondent] did not want to do that and reached the view that it would be better to have the claimant leave her role. When she would not agree to do so by negotiation they took the formal route.

The tribunal's decision and reasons

19. The complaint of ordinary (section 94 **ERA**) unfair dismissal against the first respondent succeeded on its merits. The first respondent does not challenge that decision. In summary, the Tribunal concluded that whilst the belief of the third respondent that the claimant was guilty of gross misconduct / negligence was genuinely held, it was not held on reasonable grounds or after reasonable inquiry in terms of the second and third limbs of **British Home Stores Ltd v. Burchell** [1980] ICR 303. The Tribunal also concluded that the decision to dismiss was not within the band of reasonable responses.

20. In relation to the whistleblowing complaints, the Tribunal found that the claimant had indeed made protected disclosures and that, having regard to its findings of fact at ET § 203 to 205, these had a "material influence" upon her dismissal:

> 206. The tribunal therefore concluded that the making of the claimant's protected disclosures had a material influence on her dismissal. She was subjected to the detriment of dismissal by [the third respondent] acting in the capacity of agent of her employer.

The second respondent:

> "…also held the view that the claimant's part in the dismissal matters involved misconduct on her part, although at the same time he also considered her to be a problematic colleague

> in repeatedly raising complaints and requests, some [of] which were protected disclosures, and which were inconsistent with his own views, priorities and constraints."
> (ET § 217)

21. When it considered the section 103A complaint, however, the Tribunal was not persuaded that the protected disclosures were the "principal reason" for the dismissal:

> 208. Although the tribunal found, as above, that the claimant making her protected disclosures had a material influence on her dismissal, it did not find that they were the sole or principal reason for the dismissal, as they would have had to be in order to result in an automatically unfair dismissal under section 103A. They contributed to a lesser degree than that.

The making of the protected disclosures:

> "…was part of the overall picture but they were not the sole or principal reason for the claimant's dismissal. (ET § 213)

The complaint against the first respondent under section 103A was accordingly dismissed.

22. In response to a reconsideration application, the Tribunal elaborated upon its decision about the section 103A complaint in further reasons dated 10 July 2023:

> 33. The tribunal were aware that they were legally permitted to make a finding that the disclosures were the sole or principal reason for the dismissal under section 103A if they found the evidence supported that conclusion. In doing so they could apply the principle confirmed in **Royal Mail v. Jhuti** to the effect that [the second respondent] and/ or Ms Young's influence on the fact that a disciplinary procedure was activated and the course it then took could be taken into account if it influenced sufficiently the decision which [the third respondent] reached. So, for example, if they withheld important evidence which went in the claimant's favour, or distorted and exaggerated evidence which pointed against her, because she had made protected disclosures, and [the third respondent] then relied on that to reach the decision that dismissal was justified when she would not have so concluded otherwise, the knowledge and motivations of [the second respondent] or Ms Young could be considered as relevant to the question of causation.
>
> 34. However, the tribunal found that the making of protected disclosures did not occupy that level of prominence in the overall set of reasons in the mind of [the third respondent]. Even when recognising that the protected disclosures were a factor leading to her decision, and a material one, they were not the main one. That was the evidence gathered during the disciplinary investigation. [The third respondent] found it to be sufficient in quantity and gravity to justify dismissal. The tribunal found that there were flaws in the process by which she arrived at that decision, but that is a separate matter from the question of what were her reasons."

23. In the complaint made directly against the second respondent, the tribunal concluded (ET § 207) that as he had not personally taken the decision to dismiss the claimant, he could not be liable under section 47B(1A) for the only pleaded detriment of dismissal.

24. In the complaint of detriment against the first and third respondents, the tribunal combined what it took to be the *ratios* of the decisions in **Timis** and **Jhuti**, to conclude that (a) the second respondent had informed and guided the third respondent in the process leading to the dismissal and had a material influence upon the decision; (b) the second respondent's actions in that regard had been, at least in part, on the ground that the claimant had made protected disclosures; and (c) the thought processes and motives of the second respondent could, therefore, be imputed to the third respondent on the basis of **Jhuti**.

25. The Tribunal's initial decision was that only the first respondent was liable (under section 47B(1B)) for the detriment of dismissal on the ground of the protected disclosures. It did not find the third respondent liable under section 47B(1A). Following a reconsideration application, however, the Tribunal revised its Judgment to find the third respondent personally liable for the dismissal detriment claim. It noted that the logic of its conclusion as to the liability of the first respondent under section 47B(1B) was that the third respondent must also be personally liable under section 47B(1A) for the detriment of dismissal. Without such primary liability under section 47B(1A), secondary liability could not attach to the first respondent at all under section 47B(1B).

Submissions in the claimant's appeal

Claimant

26. The Tribunal failed, when considering the section 103A complaint, to carry out a proper analysis of what was the true reason for the dismissal (ground 1). In particular, the Tribunal failed to ask itself (as it should have done per **Jhuti**) whether the third respondent had "adopted" a reason for dismissal provided by the second respondent. Had it asked that question and answered it in the affirmative, it would then have had to go on to consider whether the adopted reason was invented by the second respondent and whether the reason for such invention was the making of one or more protected disclosures. Whilst the Tribunal's thought processes at ET § 208, including its reference to the disclosures having "contributed" to the dismissal, were unclear, it seemed ultimately to have asked none of the relevant **Jhuti** questions.

27. Had the Tribunal correctly addressed the **Jhuti** questions, and had it applied those questions to the facts as it found them to be, the only possible conclusion would have been that

the principal reason for the dismissal was that the claimant had made protected disclosures (ground 2).

28. In relation to the section 47B(1A) complaint against the second respondent, if grounds 1 and 2 were accepted, the second respondent's involvement could be seen to have caused the claimant's dismissal, even if the second respondent was not formally the decision-maker. The pleaded detriment of "dismissal" should be construed widely so as to mean "caused the claimant to be dismissed" (ground 3).

Respondents

29. The causal significance of the disclosures was an issue of fact for the Tribunal to evaluate. It had concluded twice – once in its original reasons and again in the reconsideration decision – that the protected disclosures were not the principal reason for the dismissal. That was an evaluation of fact with which an appellate court ought not to interfere (**Lambeth London Borough Council v. Agoreyo** [2019] ICR 1572 at [61] to [68]). The claimant's position in grounds 1 and 2 was undermined by the Tribunal's conclusions at ET § 217 about the belief of the second respondent in the existence of misconduct.

30. In relation to ground 3, **Jhuti** had no role to play in section 47B detriment complaints for the reasons more fully set out in the respondents' appeal.

Submissions in the respondents' appeal

Respondents

31. The tribunal erred in considering that **Jhuti** was capable of being applied to a claim under section 47B(1A). In so doing, it failed to recognise the distinction between parts V and X of the **ERA**. **Jhuti** had concerned the latter but not the former. The Tribunal's decision was also inconsistent with decisions of the Employment Appeal Tribunal and Court of Appeal, including **Reynolds v. CLFIS (UK) Limited** [2015] ICR 1010; **Malik v. Cenkos Securities Plc** UKEAT/0100/17; and **William v. Lewisham & Greenwich NHS** [2024] ICR 1065. On the basis of the facts found by the Tribunal, the only proper course was dismissal of the section 47B claims against the third respondent. Without individual liability under section 47B(1A), it inevitably followed that the first respondent could not be liable under section 47B(1B).

Claimant

32. The causation test under section 47B is whether the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower (**NHS Manchester v. Fecitt and ors**) at para. 45). The principle that liability may arise where one employee has influenced the decision of another has long been recognised in relation to such complaints (**Ahmed v. City of Bradford Metropolitan District Council** UKEAT/0145/14; **Western Union Payment Services UK Limited v. Anastasiou** UKEAT/0135/13); and **First Greater Western v. Moussa** [2024] IRLR 697). The Tribunal was, therefore, correct to apply **Jhuti** to the section 47B claims made in this case.

Analysis and decisions

The claimant's appeal

33. **Jhuti** concerned the liability of a corporate employer under section 103A. The need to discern a state of mind, such as the reason for taking action, on the part of an inanimate person such as a company was recognised as presenting difficulties of attribution (paragraph [42]). Lord Wilson JSC, who delivered the judgment of the court, considered that the key question in **Jhuti** was:

> "which human being is to be taken to have the state of mind which falls to be attributed to the company?" (paragraph [42]).

34. The court approved the suggestion made by Underhill LJ in **The Co-Operative Group Limited v. Baddeley** [2014] EWCA Civ 658 that such attribution might occur where facts known to, or beliefs held by the actual decision-maker had:

> "been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation…at least where he was a manager with some responsibility for the investigation..."

35. In **Jhuti**, the court considered a particular variant of the **Baddeley** scenario: if a person senior in the hierarchy of responsibility to the employee determines that the employee should be dismissed for the making of a protected disclosure but deliberately and dishonestly hides the real reason for dismissal behind a fictitious one. In such a situation, the tribunal should look past the fictitious reason and attribute the real principal reason to the employer, even where the fictitious reason was adopted in good faith by an innocent decision-maker on the company's

behalf (paragraphs [46], [60] and [62]). The court in **Jhuti** recognised that cases of a decision being taken in good faith not just for a wrong reason but for a reason which the employee's line manager had dishonestly constructed will be rare (paragraph 41). The same can be said of the **Baddeley** scenario (see **Kong v Gulf International Bank (UK) Limited** EA-2020-000357-JOJ per HHJ Auerbach).

36. The scope of **Jhuti** was considered by Bourne J in William at paragraph [29]:

> "…since Parliament in enacting section 103A had clearly intended that a dismissal should be unfair where the making of a protected disclosure was the real reason for it, where a person superior to the claimant in the hierarchy of the organisation determined that they should be dismissed for one reason but hid it behind an invented reason, and the decision-maker adopted the invented reason, a court (or tribunal) should penetrate through the invention and identify the hidden reason as the real one."

37. In each scenario – whether **Baddeley** "manipulation" or **Jhuti** "construction of an invented reason to conceal a hidden reason" – a key feature is the deliberate presentation of a false or distorted factual picture to the innocent dismissing manager by the manager who is motivated by the making of the protected disclosure. For there to be attribution of an improper reason to an innocent decision maker there must, therefore, be an element of dishonesty on the part of a manager involving concealment of the true reason behind a manipulated or invented one.

38. The claimant relied upon **Jhuti** as a basis for her section 103A complaint. Her primary position was that the second respondent had instructed the third respondent to dismiss her. The Tribunal rejected that suggestion. Given the reliance upon **Jhuti**, however, the Tribunal also required to consider whether the second respondent manipulated evidence or persuaded the third respondent to adopt a fictitious reason for dismissal, thereby concealing the fact that the real reason was the making of one or more protected disclosures.

39. The Tribunal made a number of general observations about the role of the second respondent. He was described as a "key influence" who "shaped the investigation" and "extensively informed and guided the process". The third respondent "relied heavily upon information provided by" the second respondent and Ms Young and was "guided and influenced" by them. The second respondent had "a material influence" upon the claimant's dismissal. That influence "filtered through into the decision [the third respondent] took". At no

point, however, did the Tribunal engage with the issue of whether there was manipulation of the evidence or the creation of a false reason. Paragraph 33 of its reconsideration reasons suggests that the Tribunal was aware of that test, but its conclusion at paragraph 34 of the reconsideration reasons that:

> "… the making of protected disclosures did not occupy that level of prominence in the overall set of reasons in the mind of [the third respondent]. Even when recognising that the protected disclosures were a factor leading to her decision, and a material one, they were not the main one."

left the critical questions unanswered. The conclusion that the protected disclosures were a material causal factor leading to the third respondent's decision hints at the possibility of manipulation or creation of a false reason, but does not unequivocally resolve that issue. Similarly, the Tribunal's reasons for its conclusion that the dismissal was unfair under section 94 in circumstances where only the second respondent and Ms Zujovic provided information for Ms Young's report hints at the possibility of manipulation but does not directly address it.

40. Another equally possible interpretation of the Tribunal's reasons at ET § 203 to 205 and 217 is that the influence of the second respondent was limited to his initiation and guidance of a disciplinary process about matters he genuinely believed amounted to misconduct. In particular, at ET § 217, the Tribunal found that the second respondent:

> "…held the view that the claimant's part in the dismissal matters involved misconduct on her part."

If that was the extent of his influence, and in the absence of tainted information, **Jhuti** could not be engaged. To conclude otherwise would erroneously conflate the different issues of the second respondent's motive for instituting a disciplinary process on the one hand with the reason for the dismissal on the other.

41. I agree with the submissions for the claimant that, once **Jhuti** had been raised as a live issue, it was incumbent upon the Tribunal to make clear findings about whether or not the second respondent had improperly manipulated the third respondent through his involvement in the disciplinary process or created a false pretext for dismissal which he induced the third respondent to adopt in order to hide a proscribed reason. It was also incumbent upon the Tribunal, if it reached that view, to explain precisely what the manipulation or invention

consisted of, and clearly to identify what part it ultimately played in the third respondent's decision to dismiss. I agree with the claimant that the Tribunal did not engage with those issues.

42. I do not agree, however, with the suggestion made in the second ground of appeal that, had the Tribunal asked itself the correct questions, it would inevitably have concluded that **Jhuti** applied and that the principal reason for the dismissal was the making of protected disclosures. As I have already noted, the Tribunal made no express finding that the second respondent manipulated evidence or created fictitious allegations of misconduct. Its reasons are, at times, arguably inconsistent with such a conclusion. It is not, therefore, inevitable that if the Tribunal had addressed the correct questions, it would necessarily have come to a different conclusion on the section 103A complaint. If, having considered the correct questions, the Tribunal had rejected any suggestion of manipulation or creation of a fictitious reason by the second respondent, **Jhuti** could not be engaged at all, whatever may have been the second respondent's motives for instigating the disciplinary process. Even with such factors present, the Tribunal would still then have needed to consider the effect that they had upon the third respondent's decision.

43. In relation to the third ground, I do not accept that the term "dismissed" should be taken to include action that caused or contributed to dismissal by a different manager. Such an approach would blur the line between pre-dismissal detriment and the detriment of dismissal itself. The claimant pleaded her case on the basis that the detriment imposed upon her by the second respondent was dismissal. The Tribunal rejected her contention that the second respondent instructed the third respondent to dismiss her. The claimant could have pleaded a different case of pre-dismissal detriment against the second respondent, but she did not do so. The Tribunal made a legitimate finding of fact that the only person who dismissed the claimant was the third respondent. Having reached that conclusion, the Tribunal was correct to find that the complaint of dismissal detriment against the second respondent could not succeed under section 47B(1A).

The respondent's appeal

44. **Jhuti** was concerned only with section 103A. The question in this appeal is, therefore, whether the *ratio* of **Jhuti** ought also to be applied to complaints under section 47B(1A).

45. In common with **Jhuti**, the cases of **Ahmed**, **Anastasiou** and **Moussa** all concerned the attribution of a state of mind to a worker's "employer". When **Ahmed** and **Anastasiou** were decided, the 2013 amendments to section 47B had not been enacted. At that time, the only route to liability for protected disclosure detriment was under section 47B(1) against the worker's "employer". As is clear from Kerr J's analysis of the particular cause of action in **Moussa**, it too was a claim made directly against the employer in terms of section 47B(1). I do not, therefore, accept the submissions made on behalf of the claimant that these cases are of assistance in determining the approach to be taken to attribution in a tainted information complaint made under sub-sections 47B(1A) and (1B).

46. The legislation under consideration in **Reynolds** was **The Employment Equality (Age) Regulations, 2006**. Regulation 26 dealt with the concept of "aiding" unlawful acts:

> 26. Aiding unlawful acts
>
> (1) A person who knowingly aids another person to do an act made unlawful by these Regulations shall be treated for the purpose of these Regulations as himself doing an unlawful act of the like description.
>
> (2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under regulation 25 (or would be so liable but for regulation 25(3)) shall be deemed to aid the doing of the act by the employer or principal . . ."
>
> (3) A person does not under this regulation knowingly aid another to do an unlawful act if—
>
> > (a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of these Regulations, the act which he aids would not be unlawful; and
> >
> > (b) it is reasonable for him to rely on the statement.
>
> (4) A person who knowingly or recklessly makes a statement such as is referred to in paragraph (3)(a) which in a material respect is false or misleading commits an offence, and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

47. Underhill LJ concluded (at paragraph 36) that a "composite approach" to liability – combining the act of one employee with the motive of another – was unacceptable in principle:

> "I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise, very unfair consequences would follow. I can see the attraction, even if it is rather rough and ready, of putting X's act and Y's motivation together for the purposes of rendering [the employer] liable: after all, he is the

> employer of both. But…[i]t would be quite unjust for X to be liable to [the claimant] where he personally was innocent of any discriminatory motivation."

48. In **Malik**, Choudhury P concluded (at paragraph [89]) that the reasoning behind the decision in **Reynolds** should apply equally to whistleblowing detriment claims brought under section 47B(1A) and (1B):

> "The provisions of section 47B(1A), (1B), (1C) and (1D) are indeed very similar to the provisions considered in **CLFIS** in relation to vicarious liability. Under section 47B, another worker can be liable for subjecting a claimant to a detriment on the ground that the claimant has made a protected disclosure. By virtue of section 47B(1B) the acts of that worker are treated as also done by the employer, irrespective of whether it was done with the employer's knowledge or approval. However, the employer can rely upon the reasonable steps defence to avoid liability. It was the fact that the decision-maker could be personally liable (as well as the employer being vicariously so) that led to the Court of Appeal in **CLFIS** concluding that it would be unjust to attribute the discriminatory motivation of another to that decision-maker. I agree… that the similar scheme of vicarious liability under section 47B means that a similar approach should be taken in cases of detriment on the grounds of protected disclosure; that is to say the knowledge and motivation of another should not be attributed to the innocent decision-maker."

49. At paragraph [82] of **William**, Bourne J rejected a submission that **Malik** was implicitly overtaken by **Jhuti**:

> "The… question is whether **Jhuti** now shows [**Malik**] to have been manifestly wrong. In my judgment it does not. As Lord Wilson JSC made clear in his judgment at para. 46, the decision in **Jhuti** turned on the meaning and purpose of section 103A. Lord Wilson JSC compared that unfair dismissal regime with the detriment regime under section 47B at paras 54—58 and went on, at para 60, to set out the court's decision as to 'the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X'. That decision does not purport to change, and does not logically change, the interpretation of section 47B..."

50. The parties to this appeal were agreed that the defence provided in section 47B(1E) applies only in very limited circumstances where a party has been misled as to the legal consequences of their actions, but does not apply to a tainted information case involving the invention or manipulation of facts so as to deceive an innocent actor. In that latter scenario, a claim could still be brought under section 47B(1A) against the party who invented or manipulated evidence, as well as against the employer under section 47B(1B). There is also no obvious reason in principle why **Jhuti** could not, in appropriate circumstances, apply to a direct claim against an employer for non-dismissal detriment in terms of section 47B(1).

51. I see no reason, however, to depart from the conclusions reached in each of **Reynolds**, **Malik** and **William** that a "composite approach" to liability is unacceptable in principle in a

section 47B(1A) complaint because it cannot have been the intention of Parliament to impose unlimited liability upon innocent individuals who have not personally been motivated by a proscribed reason. The purposive approach to the legislation in both **Timis** and **Jhuti** reflected, in each case, the need to provide the claimant with an effective remedy. That purposive approach provides whistle-blowers with a full and effective range of causes of action and remedies for protected disclosure detriment without liability ever having to be imposed upon a wholly innocent party. There is no need to extend the *ratio* of **Jhuti** into complaints under section 47B(1A), and very good reason not to do so.

52. In these circumstances, I agree with the submissions made on behalf of the first and third respondents that the Tribunal erred in law by applying **Jhuti** to the complaints made under sub-sections 47B(1A) and (1B). It follows that it erred in finding the first and third respondents responsible liable for those complaints.

Disposal

Claimant's appeal

53. In terms of ground 1 of the claimant's appeal, I will set aside paragraph 2 of the Tribunal's judgment and remit the complaint under section 103A **ERA** to the same Tribunal for it to consider and apply all elements of **Jhuti**.

54. Grounds 2 and 3 are each refused.

Respondent's appeal

55. In the respondents' appeal, I will set aside paragraph 3 of the Tribunal's Judgement of 10 July 2023 (as amended following reconsideration). As no other conclusion is possible on the facts found by the Tribunal, I will substitute a decision dismissing the complaints under section 47B(1A) against the third respondent and under section 47B(1B) against the first respondent.