Appeal Nos. EA-2020-000357-JOJ (previously UKEAT/0054/21/JOJ)
EA-2020-000438-JOJ (previously UKEAT/0055/21/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 July 2021
Judgment handed down on 10 September 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS L KONG — APPELLANT

GULF INTERNATIONAL BANK (UK) LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR WILLIAM YOUNG (of Counsel) Advocate
For the Respondent	MR NICHOLAS SIDDALL (One of Her Majesty's Counsel) Instructed by: Bird & Bird LLP 12 New Fetter Lane London EC4A 1JP

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The claimant was employed by the respondent as Head of Financial Audit. A draft audit report prepared by her raised concerns that a legal agreement relating to a certain financial product did not provide sufficient protection against certain risks arising from the involvement of non-bank counterparties. It was not disputed that the claimant's communications of her concerns about this, and other aspects, amounted to protected disclosures.

The Head of Legal, who had been responsible for the agreement, disagreed with the claimant's view. She went to the claimant's office and a discussion took place, following which there were exchanges of emails. The Head of Legal considered that the claimant had impugned her integrity, and raised the matter with the Head of HR and others. She indicated that she was very upset, and could not see how she could continue working with the claimant. She declined mediation. The Head of HR and CEO became inclined to the view that the claimant should be dismissed. The Group Chief Auditor agreed to that course and the claimant was then dismissed.

The claimant complained of detrimental treatment and unfair dismissal for having made protected disclosures. One complaint of detrimental treatment – relating to the Head of Legal's conduct – would have succeeded, but was out of time. The complaint of unfair dismissal for having made protected disclosures failed. However, the claimant was found to have been ordinarily unfairly dismissed. The claimant appealed against the failure of the unfair dismissal protected disclosure complaint.

Held:

(1) The Tribunal had been correct to hold that the reason for dismissal in this case was the motivation for dismissing the claimant of the managers who took the decision to dismiss. The Tribunal was not wrong not to impute to the respondent the motivation of the Head of Legal, who had not participated in the decision to dismiss. The exception described in **Royal Mail Group Limited v Jhuti** [2020] ICR 71 did not apply to the facts of this case.

(2) The Tribunal had properly considered, and applied, the guidance in **Martin v Devonshires Solicitors** [2011] ICR 352 and other authorities when considering whether the principal reason for dismissal could properly be treated as separable and distinct from the making of the protected disclosures. It had properly concluded that, while the Head of Legal's own conduct towards the claimant was materially influenced by the protected disclosures (and therefore that the detriment claim relating to it would have succeeded had it been in time), the motivation of the managers who took the decision to dismiss the claimant was different. The Tribunal properly found that they were not motivated by the protected disclosures, but by the view that they took of the claimant's conduct towards the Head of Legal, when she and the claimant met, and in particular in a subsequent email. They considered that to be an unacceptable personal attack on the Head of Legal's abilities, and reflective (in their view) of a wider problem with the claimant's interpersonal skills. The Tribunal's findings of fact properly supported those conclusions, which were reached with care, and cogently reasoned.

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HIS HONOUR JUDGE AUERBACH

Introduction

1. I shall refer to the parties as they were in the Employment Tribunal, as claimant and respondent. The respondent is the UK branch of an international bank headquartered in Bahrain. The claimant was employed by the respondent from 2010 as an auditor. From March 2016 she was Head of Financial Audit. She was summarily dismissed on 3 December 2018.

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2. The claimant complained of unfair dismissal contrary to section 103A **Employment Rights Act 1996**, that is, that she was dismissed for the reason or principal reason that she had made one or more protected disclosures. She also complained of detrimental treatment on the ground of having made protected disclosures, contrary to section 47B. The respondent accepted that she had made protected disclosures and that the dismissal was procedurally unfair. But it contended that the reason for dismissal was related to her conduct, or the substantial fair reason of a breakdown in the working relationship, and was not the protected disclosures.

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3. In a reserved decision following a full hearing, the Tribunal (Employment Judge Stout, Ms T Breslin and Mr I McLaughlin) held that the claimant was unfairly dismissed contrary to sections 94 to 98 of the **1996 Act**; but the section 103A complaint did not succeed. One detriment claim would have succeeded had it been in time, but was dismissed because it was out of time. The claimant appeals against the dismissal of the section 103A complaint. There is also an appeal against the reconsideration decision, but it adds nothing of substance.

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The Facts and the Tribunal's Decision

4. The claimant's job was to carry out risk-based audits of all the respondent's business activities by reference to the regulatory requirements of the Financial Conduct Authority (FCA) and the respondent's Audit Manual. From 2015 she reported direct to the Group Chief Auditor,

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A Khalid Mohammed, who was based in Bahrain. In respect of the reporting line her role sat apart from UK senior management. That senior management included Alison Yates, Head of HR, and Jenny Harding, Head of Legal, both of whom reported to the CEO, Katharine Garrett-Cox.

B 5. On several occasions the claimant made protected disclosures within the meaning of section 47B of the **1996 Act**. At [53] the Tribunal described each of these in turn, numbering them PD1 – PD10. The description of these drew largely on the claim form. Reference was

C made to a particular product, referred to as the "New Product", offered to investors through a particular fund, the "GTOP fund", launched in 2017. The GTOP fund and the New Product were governed by a Master Risk Participation Agreement ("MRPA") with counterparties.

D 6. Reference was made to a number of distinct concerns which the claimant had, and which formed the subject-matter of her disclosures. One of these was the "MRPA concern". At [53e], in the course of setting out PD3, the Tribunal described this concern as follows:

> **"In summary, the issue in relation to this was that the Claimant considered that the**

E **industry-standard MRPA template was designed for bank-to-bank lending and not for use with non-bank institutions. She considered that it had insufficient safeguards in it for the use that the Respondent was making of it with the GTOP fund, in particular in relation to the legal effectiveness and enforceability of the securities on transaction level and the lack of provisions in the MRPA agreement to address the fact that the GTOP fund's counterparties were non-bank corporate entities and to require them to carry out appropriate KYC and due diligence checks and monitoring on underlying borrowers (ET1, paras 23-25)."**

F 7. PD3 was made in an email of 26 September 2018, attaching the draft GTOP audit report, which raised various concerns including the MRPA concern.

G 8. At [53(f)] the Tribunal then set out PD4 in the following way:

> **"PD4 - at a meeting between the Claimant and Jenny Harding on 22 October 2018 in which the Claimant reiterated concerns regarding the MRPA agreement, particularly the 'bank to bank' issue (i.e. the same issue as PD3)."**

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9. At [117]-[123] the Tribunal gave an account of an incident in July 2018 referred to as the "José incident." In summary, the claimant approached a colleague to ask him about an audit concern. She did so the day after his departure was announced, when he came into the office to collect his belongings, as she was concerned that it was her last chance to do so. Ms Yates intervened and told her that this was wholly inappropriate. Mr Mohammed was of the same view when he learned of the incident. However, it was decided to take no action at the time.

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10. On 26 September 2018 the claimant emailed Ms Harding and a senior portfolio manager, Mr Henderson, some particular material, highlighted in yellow, that she proposed to include in her draft GTOP audit report, in particular relating to the MRPA concern. Ms Harding replied that the material contained sweeping statements which were not substantiated. In further exchanges they disagreed about whether the MRPA should have been amended from the standard template, in view of the involvement of non-bank counterparties. The claimant left the material out of the draft "for now", but invited Ms Harding and Mr Henderson to review the material further and discuss it with her subordinate during her impending absence.

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11. The claimant then circulated the draft report generally to those concerned, omitting the passages referred to in that email exchange, but still setting out the MRPA concern and inviting management responses. That was PD 3. After the claimant chased for management responses in October, Ms Harding replied with a marked-up version, on behalf of herself, Mr Henderson and the Head of Risk, Mr Anthony, showing extensive deletions as tracked changes, and comments, but without management responses. The Tribunal found that the reason for the mark ups was because Ms Harding and, to a lesser extent, Mr Henderson "considered that the points that the Claimant had made in the draft audit report (i.e. her PD3) were wrong."

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12. The claimant then escalated to Mr Mohammed that management responses had not been received as required and that comments received had included amendments and deletions to audit points, and other concerns. The claimant also emailed Ms Harding, including asking whether there was "any particular reason" why there was no management response from the legal department and also saying that she was "a bit concerned" to see that a number of audit observations had been amended or removed, and as to other alterations. The Tribunal continued:

> **"140. The Claimant's email makes clear why, quite reasonably in our judgment, the Claimant was unhappy with management's responses to her draft audit report. This prompted Ms Harding to go to the Claimant's office. We find that she went because she felt the Claimant's email was accusatory (as it was, both with regard to the delay and in relation to the amendments and deletions to the audit findings). She entered without knocking. We find that she was agitated from the outset of this meeting. She picked up the draft GTOP report from the Claimant's desk and asked to discuss it. (Ms Harding in evidence was unclear about why she went to the Claimant's office, but we find it was the email we have quoted in full above as otherwise there is no explanation for why she went to the Claimant's office at that time and without the draft GTOP report in hand.)**
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> **141. Ms Harding's evidence was that the Claimant immediately raised the issue in the email (p 303b) about why Ms Harding did not realise that the MRPA was a bank-to-bank document. It was clear from the Claimant's evidence to Tribunal that this was still a very important point for her (it is her PD4) and that she considered that this was a point that Ms Harding ought to have known. We therefore accept that the Claimant raised this with Ms Harding and questioned her legal awareness about the matter that constituted her PD4.**
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> **142. However, Ms Harding's evidence went further. She said that three or four times the Claimant had said that she (Ms Harding) should not be in the role of Head of Legal "if [she] was asking questions like that" and was shocked that she was. She said that the Claimant said that she would escalate her concerns about her holding the title of Head of Legal to the CEO. Ms Harding said that this upset her so much she had to leave the room.**
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> **143. Ms Harding's account does not quite accord with that of the Claimant, although there is agreement as to the overall shape of the conversation, including that it was Ms Harding who went without an appointment to the Claimant's office, that the discussion focused immediately on the email at p 303b and 'the bank-to-bank issue' and that it was Ms Harding who left upset.**
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> **144. We do not, however, accept that the Claimant questioned whether Ms Harding should have been in the role of Head of Legal or threatened to escalate that issue to the CEO. The Claimant was concerned about Ms Harding's legal knowledge as is apparent from the email at p 303b, and she did question her legal awareness, but what she threatened to escalate to the CEO was the lack of management responses to the draft GTOP audit report. We so find because it is clear from the Claimant's emails around this time that that was the issue of chief concern to her and she had already asked Mr Mohammed about escalating it to the CEO. What upset Ms Harding and led to Ms Harding walking out, slamming the door, however, was what the Claimant said about her PD4 and her legal awareness of that issue.**
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> **145. For the avoidance of doubt, we find that the Claimant did not in this conversation question Ms Harding's professional integrity as she did not question her honesty or her principles. She questioned her legal awareness.**
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> **146. We add that a further reason for rejecting Ms Harding's account of the conversation is that the point on which she now places so much weight (the Claimant**

questioning whether she should be in the role of Head of Legal) does not appear to be something she said to anyone at the time, even though she spoke to a number of people about the incident immediately after the event. Mr Henderson's evidence (IH, para 35) was that after the meeting Ms Harding said that she was being accused of not doing her job properly and of not understanding issues raised in the fund audit. Mr Maskall (DM, para 27) said that Ms Harding told him that the Claimant had questioned her integrity and professional ability. Ms Yates (AY, para 51) said that Ms Harding said that she felt her integrity and ability to do her job had been called into question by the Claimant."

13. Shortly after this episode the claimant emailed Mr Mohammed reiterating her concern about the delay in management responses, copying to him her email to Ms Harding, saying that she had raised her concerns in this "private email but she got agitated." Ms Harding for her part emailed the claimant a copy of the report with management responses from her as Head of Legal, and which did not include the deletions she had previously made. The claimant considered this amounted to a tacit acceptance by Ms Harding that she had overstepped the mark previously. Though Ms Harding denied it in evidence, the Tribunal agreed. It added that she did perhaps think that what she had done earlier with the draft would not reflect well on her, which was why she reacted as she did in the conversation with the claimant.

14. At some point that afternoon Ms Harding telephoned Ms Yates and told her what had happened. Ms Yates' impression was that Ms Harding had reached "the end of her tether" with the claimant. Ms Harding also emailed the claimant and they agreed to meet for a chat. However, the next morning she spoke to Ms Yates again, and they discussed her options, including raising a grievance, though Ms Yates sought to dissuade her from that course. Ms Harding then emailed the claimant postponing their meeting and saying: "to be honest you have really upset me by calling into question my professional integrity in the way you did yesterday."

15. The Tribunal continued:

"155. The Claimant responded at 12.29 (p 376b), blind copying in Mr Mohammed. Her email is in our judgment conciliatory in tone and careful in the way that it explains why the Claimant had felt it important to raise the bank-to-bank issue only privately with Ms Harding so as to avoid causing her any embarrassment by including it in the draft audit report circulated more widely:

> **"I have no intention to hurt you in anyway and I have no concern on your professional integrity. Since all MRPA agreements are based on a template designed for Bank to bank, it is important to tailor legal provisions to add further protection to GIB since we are dealing with newly established, less capitalised, even previously dormant corporate entities. Therefore, I was a bit uncomfortable when the legal team questioned why it is 'bank to bank' since it is a reflection of legal awareness. If I had raised this 'bank to bank' issue in the audit report, the reader might have raised a question on the professional awareness (not integrity). Therefore, as I mentioned to you, I do not mind raising it privately with you and deal with it on offline basis to avoid any personal impact to you. On the other side, when you slammed the door and walk out with anger, honestly I did not feel comfortable as I did feel it was a type of intimidation to auditor. I would like to emphasize that all auditees have full rights to disagree, however we need formal responses as opposed crossing/removing/deleting our audit observations and reassigning the ownership to other departments. Lastly, I agree with you to discuss these issues again is a good approach since a peaceful professional relationship in the work place is very important. Happy to discuss it further tomorrow when we meet."**
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> **156. For the avoidance of doubt, we again find that in this email, the Claimant was, as she made explicitly clear, questioning Ms Harding's legal awareness and not her professional integrity."**

16. After addressing another aspect of events the Tribunal continued:

> **"158. Ms Harding responded to the Claimant's email at 12.29 ten minutes later (p 377): "I did not walk out with anger, I walked out like I did because I was upset and not surprisingly. You were in effect questioning my ability to do my job and you have done so again in your email below. Let's chat tomorrow and I'm going to have a think about whether or not to ask someone else to come along. Let's chat tomorrow."**
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> **159. Ms Harding forwarded the email chain to Ms Yates.**
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> **160. Following receipt of the blind copy of the above email (12.29, p 376b) from the Claimant, Mr Mohammed telephoned the Claimant and spoke to her for over an hour. He told her that the email was totally unacceptable. As he explained in his witness statement (paragraph 43) to the Claimant, contrary to everything he thought he had told the Claimant previously about not allowing interactions to become personal, "it called Ms Harding's competence into question, suggesting twice that she lacked legal or professional 'awareness'". He told the Claimant that he "could not defend this behaviour". He urged her to apologise to Ms Harding."**

17. Ms Harding and Ms Yates spoke again. Ms Harding did not want to raise a formal grievance, but did want to raise the matter with Mr Mohammed as the claimant's line manager. Ms Yates felt that doing nothing was no longer an option. She suggested mediation, which Ms Harding did not think would be helpful. Ms Harding then spoke to Ms Garrett-Cox, and forwarded to her the email exchanges with the claimant, and asked for her thoughts.

18. Ms Harding and the claimant met on 24 October. The Tribunal accepted Ms Harding's evidence that it was productive, but she felt that the damage to their professional relationship had been done. She thereafter sought to minimise direct interaction with the claimant. She shared her account of the incident at the management meeting in November 2018.

19. The Tribunal found that Ms Yates and Ms Garrett-Cox were "inclining to the view that the Claimant should be dismissed", something which had not been considered prior to the incident with Ms Harding. "With dismissal in mind" they travelled to Bahrain to meet Mr Mohammed. In preparation for that meeting, Ms Yates prepared "a summary of the issues" for Ms Garrett-Cox. Some extracts will give the flavour. It began:

> **"Recent situation involving the Head of Legal which was brought to the attention of both HoHR and CEO. A formal grievance was considered.**
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> **• In respect of the Trade finance audit – comment made whereby JH felt that her professional integrity was being questioned. Matter was discussed directly with the HoA but was not resolved satisfactorily (attached).**
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> **This follows other situations/feedback provided over the past few years."**

20. Nine bullet-pointed earlier incidents, including the José incident, were then listed. The document suggested there were common themes, including that the claimant had "little emotional intelligence when dealing with colleagues" and was "[d]ogmatic in her approach." It was suggested that the claimant's "ability to listen and build relationships with colleagues is limited. She is very forensic in her approach to the audits and often it is felt that she does not take a proportionate approach in her assessment of the risk …".

21. The Tribunal considered this to be a "conspicuously one-sided briefing" prepared with a view to engineering the claimant's dismissal.

22. The Tribunal continued:

> **"169. Mr Mohammed, Ms Yates and Ms Garrett-Cox met in Bahrain on 21 November 2018. Mr Mohammed gave evidence orally that in this meeting a collective decision**

was made that the Claimant should be dismissed. When questioned further, he indicated that it had been for him as the Claimant's line manager to make the initial decision, but we find that Mr Mohammed was placed in a position where it would have been difficult for him to have done otherwise. This is because we consider it would have been plain to him from the fact that Ms Garrett-Cox and Ms Yates had travelled to Bahrain especially, and from their approach (as reflected in Ms Yates' briefing email in advance of the meeting), that dismissal was the outcome they sought. We find that the dominant factor in his agreement to dismissal was that he considered the email to Ms Harding on which he had been blind copied to be unjustifiable and 'career limiting'. He also considered her actions regarding the previous incident with José Canepa to have been deeply inappropriate (see above paragraphs 118-123).

170. Following this meeting, Ms Garrett-Cox determined that the Claimant should be dismissed and she and Ms Yates presented this view to Mr Sykes as Chair of AROC for approval, which he gave."

23. The final audit report, signed by both the claimant and Mr Mohammed, was issued on 26 November 2018. It included the same matters as PD3 and PD4. It rated the internal control processes within its scope as generally unsatisfactory. It thereby embodied PD9.

24. At a meeting on 3 December 2018, with Ms Garrett-Cox, Mr Mohammed (via video link) and Ms Yates, the claimant was dismissed. Ms Garrett-Cox referred to the incident with Ms Harding, and said that the claimant's "behaviours, manner and approach had resulted in people not wanting to work with her. She also referred to the José incident." In further discussion she emphasised that this was not about the claimant's professional capability, and that all the issues she had raised regarding the GTOP Fund were included in the final report.

25. The claimant was given a termination letter which referred to her conversation with Ms Harding on 22 October 2018, which "led to her strong view that you were questioning her integrity", reinforced by the email that followed. The claimant's approach "was entirely unacceptable and fell well short of the standards of professional behaviour" expected and was contrary to the principles of treating colleagues with dignity and respect. This had prompted a wider review identifying other incidents and leading to the conclusion that key stakeholders no longer wished to work with the claimant and trust and confidence had been lost.

26. Ms Yates told the Tribunal that the "key stakeholders" were Mr Harding, Ms Mohammed and Ms Garrett-Cox, but the Tribunal found [180] that it was only Ms Harding who had lost confidence in, and would no longer work with, the claimant. Mr Mohammed, the Tribunal found, agreed that dismissal was appropriate "because of her conduct towards Ms Harding" and Ms Garrett-Cox, that her "conduct towards others" warranted dismissal.

27. The claimant unsuccessfully appealed against dismissal. The director who heard the appeal, Mr Withers, considered that the reasons set out in the dismissal letter warranted dismissal, and was satisfied that the claimant "had directly questioned Ms Harding's professional competence and that this was inappropriate." [191]

28. In relation to the detriment claims the Tribunal gave itself an extensive self-direction as to the law, citing, and discussing, numerous authorities. These included **Fecitt v NHS Manchester** [2012] ICR 372, **Panayiotou v Chief Constable Kernaghan** [2014] IRLR 500, **Martin v Devonshires** [2011] ICR 352 and **Royal Mail Limited v Jhuti** [2020] ICR 731. No criticism is made of this section of the decision on either side, as such.

29. The Tribunal went on to find, at [215], in a series of sub-paragraphs, that the claimed detriment (a), which was "Ms Harding's treatment of the claimant on 22/23 October 2018" was materially influenced by the protected disclosures. That behaviour included going to the claimant's office without an appointment in an agitated state, becoming more agitated during that encounter, walking out and slamming the door, and her complaints to others that the claimant had questioned her professional integrity. The Tribunal observed, that "[t]he nature and extent of Ms Harding's complaints to others about the Claimant was a material part of the reason why the Claimant was ultimately dismissed. We return to this point below."

30. The Tribunal continued that the foregoing was enough to raise a prima facie case that PD3 and PD4 "were a material part of Ms Harding's reasons for acting as she did" because they were at least a 'but for' cause of it. In the absence of an explanation the Tribunal could conclude that they were a material influence and the burden shifted.

31. The Tribunal continued, at [215](c) to (f):

> **"c. We have found that Ms Harding was unable to explain an important aspect of the meeting on 22 October in that she could not recall why she went to the Claimant's room (above paragraph 140). She also exaggerated and/or distorted her evidence about the conversation and we rejected her evidence in favour of the Claimant's (above paragraphs 141-146). We were not, therefore, satisfied as to Ms Harding's explanation of her reasons for treating the Claimant as she did.**
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> **d. We further draw the inference that PD3 and PD4 were a material part of her reasons for so acting. The origin of the whole incident is that Ms Harding disagreed with many of the protected disclosures that the Claimant made in PD3. She disagreed to the extent that she deleted many of them in a way that we have found she subsequently recognised overstepped the mark and her sensitivity about which was, we have found, part of the reason why she reacted as she did on 22 October (above paragraphs 137, 148, 149). Further, when the Claimant had originally set out the content of PD4 in her email at p 303b, Ms Harding had stated that it made her "uncomfortable" (see above paragraph 129).**
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> **e. Yet further, the 'professional awareness' point that the Claimant raised (PD4) was, we find, inseparable in this case from the protected disclosure itself. The making of PD4 by the Claimant in and of itself entailed implicit questioning of Ms Harding's legal awareness because she had overseen the putting in place of the MRPA which the Claimant (reasonably, the Respondent accepts) considered was a bank-to-bank document and thus meant that the Respondent was failing, or likely to fail, to comply with certain legal obligations. We acknowledge that it was not a necessary part of a protected disclosure in law to add to PD4 words such as 'it's a matter of legal awareness', but we find that in this case the Claimant did not raise her concerns about Ms Harding's legal awareness in an unreasonable way.**
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> **f. In any event, and perhaps more importantly, we find that Ms Harding's conduct towards the Claimant on 22 and 23 October 2018 was not simply because the Claimant questioned her legal awareness, but also a response to the substance of the protected disclosures that she had made, the content of which she disagreed with."**

32. However, other detriment complaints failed on their merits, and the complaint relating to this particular detriment was found to be out of time.

33. Turning to the reason for dismissal, the Tribunal gave itself a further legal direction, drawing in part on aspects of the law it had earlier set out, as follows:

> **"219. Under section 98(1) of the ERA 1996, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), eg (in this case) conduct or some other**

substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively what motivates them to do so. Facts and matters known to other employees of the employer, but not to the dismissing officer, may only be taken into account in the circumstances recently identified by the Supreme Court in Jhuti v Royal Mail Ltd (set out above at paragraphs 203-205).

220. In this case, the Claimant must raise a prima facie case that the sole or principal reason for her dismissal was that she had made protected disclosures (s 103A(1)). If she does, then it is for the Respondent to prove that the protected disclosures were not the sole or principal reason for the dismissal: see Dahou v Serco Ltd [2016] EWCA Civ 832, [2017] IRLR 81, the principles of which we have set out at paragraph 202 above."

34. Once again there is, rightly, no issue taken with that self-direction as such.

35. I should set out the Tribunal's conclusions in relation to the reason for dismissal in full.

"221. We find that the principal cause of the Claimant's dismissal was the incident with Ms Harding on 22/23 October 2018. We so find because, despite the various concerns expressed by the Respondent's witnesses about the Claimant over preceding months and years, there is nothing to suggest that dismissal had been contemplated prior to this incident, a point which Ms Yates confirmed in evidence (see above paragraph 161). It is also clearly the matter that was foremost in the minds of those who participated in the decision-making process. It was the first matter mentioned by Ms Yates in her briefing email which we found was written with a view to engineering the Claimant's dismissal (above paragraphs 166-168). It was the matter that was dominant in Mr Mohammed's rationale for agreeing to dismissal (above paragraph 0). And it was the first point mentioned by Ms Garrett-Cox in the dismissal meeting and in the termination letter (above paragraphs 175 and 178).

222. In some cases, our finding in the previous paragraph as to the principal cause for dismissal would be a sufficient finding also as to the reason for dismissal. In this case, however, since the Respondent relies on alternative potentially fair reasons for dismissal (conduct or some other substantial reason), and since the Claimant contends that the principal reason for dismissal was her protected disclosures, and because we have found that the incident with Ms Harding on 22/23 October 2018 involved Ms Harding subjecting the Claimant to a detriment for having made protected disclosures, we have considered very carefully what it was about the incident with Ms Harding that constituted the principal reason for dismissal. We have to decide what part or aspect of the Harding incident it was that constituted the principal reason for dismissal and whether that reason is to be categorised in law as being conduct, some other substantial reason or the Claimant's protected disclosures. In the light of our finding that the incident with Ms Harding was an unlawful detriment, we must also first consider how the principles in Jhuti (above paragraphs 203-204) apply to this situation.

223. The principles in Jhuti require that in most cases we should consider only the decision-maker's reasons for the dismissal. In this case, the relevant decisionmakers are (in our judgment), Mr Mohammed and Ms Garrett-Cox. Although we have found (see above paragraph 0) that Mr Mohammed perhaps did not have an entirely free rein in the matter, he regarded himself as a joint decision-maker and we consider that his part in the decision was of such magnitude as to count as a 'decision-maker' for the purposes of application of the Jhuti principles. However, in Jhuti the Supreme Court accepted (obiter) that the matters in the mind of a manager who participated in the dismissal process (such as an investigating manager) could also be attributed to the employer. In this case there was no formal investigation as no procedure was followed, but in our judgment Ms Yates fulfilled that investigating manager role (and, indeed, on our findings acted with a view to engineering the Claimant's dismissal).

Accordingly, we consider that we can take into account the matters in her mind as well in deciding what the employer's reason for dismissal was.

224. The position of Ms Harding, however, is different. There is no evidence that she participated in the decision-making process. However, we find that she does fall within the category identified in Jhuti as being a person "in the hierarchy of responsibility above the employee" whose reasons for acting may be taken into account if they invent a reason for dismissal on which the decision-maker subsequently acts. We base our finding that Ms Harding sat above the Claimant in the hierarchy on the fact that she was a member of the Senior UK Management Team (when the Claimant was not) and that she reported directly to the CEO (when the Claimant did not): see above paragraph 45.

225. We have next considered what precisely it was about the incident with Ms Harding that led Ms Yates, Ms Garrett-Cox and Mr Mohammed to decide to dismiss the Claimant. What Ms Yates and Ms Garrett-Cox said about that incident was that the Claimant had questioned Ms Harding's professional integrity, both orally in the meeting on 22 October 2018 and again in the email that the Claimant sent on 23 October 2018. This was, of course, how Ms Harding herself had categorised it, and Ms Yates and Ms Garrett-Cox explicitly accepted that categorisation, using the same terminology in the email at p 397 and the termination letter. The categorisation by Ms Harding of the Claimant's conduct as questioning her professional integrity was, we have found, wrong, since the Claimant was not questioning her professional integrity but her legal awareness (above paragraphs 141-146 and 154-155). However, the joint decision-maker, Mr Mohammed, recognised that distinction (see above paragraph 160), but still considered the email to have been "totally unacceptable". While we consider that there is an important distinction between questioning professional awareness and questioning integrity, we do not consider that it would have made any difference to Ms Yates or Ms Garrett-Cox's approach if Ms Harding had used the right terminology. Accordingly, although there was an element of 'invention' in Ms Harding's use of the word 'integrity', we do not consider that it is an invention of the sort that the Supreme Court had in mind in Jhuti. To attribute to the dismissal decision-makers here, Ms Harding's motivation, on the strength of an issue as to terminology such as this is not in our judgment the correct legal approach, applying the principles in Jhuti.

226. We accordingly find that the Respondent's principal reason for dismissal in this case was that the Claimant had questioned Ms Harding's professional awareness/integrity both orally in the meeting on 22 October 2018 and in the subsequent email of 23 October 2018. That, in our judgment, was a matter of conduct on the part of the Claimant and we accordingly find that the principal reason for the Claimant's dismissal was her conduct, which is a potentially fair reason under s 98(2).

227. However, there are three further points that we should deal with for completeness:-

228. First, in our judgment what led the Respondent to dismiss the Claimant for that reason on this occasion not just the fact that the Claimant had questioned Ms Harding's legal awareness. This is because it is apparent that similarly robust language/conduct on other occasions (e.g. Mr Sutton's accusing the Claimant of being 'deceitful' or as harassing him or Mr Sutton's shouting at the Claimant – above paragraphs 67 and 105) had not led to dismissal for either the Claimant or Mr Sutton. What was different on this occasion was the fact that Ms Harding had been apparently so upset by the incident, as reflected in her discussing the matter with so many colleagues (above paragraphs 146, 151, 153, 159, 161), raising it with the management team in a formal meeting (above paragraph 163), and her expressed difficulty in working further with the Claimant thereafter, including her refusal to mediate (above paragraphs 161-162). Ms Harding's actions in this regard were, we find (consistent with our finding in relation to Detriment a. above) motivated by the fact that the Claimant had made protected disclosures. However, again, we are unable to conclude that Ms Harding's degree of upset, or her raising of the incident with colleagues, were an 'invention' of the kind that the Supreme Court had in mind in Jhuti. This is because we accept that Ms Harding was genuinely upset by the Claimant. Accordingly, even though part of the reason for that was the fact that the Claimant had made protected disclosures, applying the principles in Jhuti, we cannot attribute Ms Harding's motivation to the Respondent.

> **229. Secondly, we should for the avoidance of doubt make clear that we do not find that Mr Mohammed, Ms Garrett-Cox or Ms Yates were motivated by the Claimant's protected disclosures when taking the decision to dismiss. None of them looked in any way at what had led up to the incident with Ms Harding or at the underlying issues that were of concern to the Claimant in her protected disclosures. Nor do we find, on the evidence we have heard, that we can draw any inference from the facts that the Claimant's role has not been replaced, that audits are now being undertaken by the Bahrain auditors who the Respondent's witnesses perceived (in general terms) as being more easy-going, or that the follow-up to the GTOP Audit has not yet taken place, that the reason for the Claimant's dismissal was that she had made protected disclosures or, more particularly, that she had driven the audit which had led to the first Generally Unsatisfactory rating for the Respondent's UK function. Although these matters could have indicated that an ulterior motive on the part of the Respondent in dismissing the Claimant was to stop her making further protected disclosures about GTOP, in our judgment this was not the motivation of the decision-makers from whom we have heard evidence.**
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> **230. Thirdly, we do not accept that the Respondent's principal reason for dismissal was that the Claimant's relationship with "key stakeholders" had broken down to the extent that they no longer wished to work with the Claimant as was asserted in the termination letter. This was not put forward by the Respondent's either in the termination letter or in their oral evidence at the hearing as the primary reason for dismissal and it was (at least in the way expressed in the termination letter) simply not true for the reasons we have set out above at paragraph 180."**

36. The Tribunal then went on to deal with the overall fairness of the dismissal, matters said to have a bearing on remedy for unfair dismissal, and the wrongful dismissal claim.

The Appeal

37. The original notice of appeal was presented by the claimant as a litigant in person. It contained 18 numbered grounds and was wide-ranging. At a rule 3(10) hearing Stacey J permitted only a much more limited challenge to proceed to a full appeal hearing.

38. At the start of the hearing before me, there was an issue as to the precise scope of the challenge which was now live. It was common ground that the challenge was confined to the decision to dismiss the section 103A complaint, that is, the Tribunal's conclusion that the protected disclosures were not the reason or principal reason for dismissal.

39. Mr Young submitted that the claimant had permission from Stacey J to advance what were, in substance, two grounds of appeal. I will call them the "separability" ground and the "attribution" ground. The gist of the "separability" ground is that the Tribunal erred by wrongly

purporting to distinguish the making of PD4, from the raising of Ms Harding's "legal awareness", when these things could not properly be separated, and the Tribunal had itself, in relation to the detriment complaint, found them to be inseparable. The gist of the "attribution" ground is that the Tribunal should have concluded that Ms Harding fed Ms Garrett-Cox and Mr Mohammed an invented reason for dismissing, being that she was upset because the claimant had impugned her integrity, and that Ms Harding's true reason, which was itself because of the making of PD4, should therefore have been treated as the respondent's reason for dismissal.

40. Mr Siddall contended that only the attribution ground was live before me, and that, to run the separability ground as well, the claimant required permission to amend, which he opposed. However, after hearing argument on this point at the start of the hearing, I ruled, for reasons I gave orally, that both grounds were live. In summary that was because it was clear to me, from her orders and reasons, that that was what Stacey J intended; and although the amended grounds might have been more clearly drafted by Mr Young's predecessor who became involved following the rule 3(10) hearing, they were sufficient to cover the territory.

Arguments

41. There were detailed skeleton and oral arguments on both sides. I have considered it all, and only summarise here what seem to me to have been the most significant points.

42. In relation to the separability ground, Mr Young relied in particular on three findings made in the course of the Tribunal's reasons. The first was the finding at [215(a)(iii)] that Ms Harding's treatment of the claimant on 22 and 23 October 2018 included telling a number of people in the office about the incident on 22 October and "wrongly saying that the Claimant had questioned her professional integrity. The nature and extent of Ms Harding's complaints to others about the Claimant was a material part of the reason why the Claimant was ultimately dismissed."

A The second was the Tribunal's finding, at [215(e)], that "the 'professional awareness' point that the Claimant raised (PD4) was, we find, inseparable in this case from the protected disclosure itself." The third was the finding, at [221], that "the principal cause of the Claimant's dismissal was the incident with Ms Harding on 22/23 October 2018."

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43. Earlier in the reasons the Tribunal had found at [160] that, in their long conversation following his receipt of a copy of the claimant's 23 October email to Ms Harding, Mr Mohammed had told the claimant that it was "totally unacceptable" and he "could not defend this behaviour", and he "urged her to apologise". The Tribunal had found at [169] that the dominant factor in his agreement to dismissal was that he regarded the email as unjustifiable and "career-limiting". At [226] the Tribunal concluded that the principal reason for dismissal was "that the Claimant had questioned Mr Harding's professional awareness/integrity" in both the 22 October meeting and the 23 October email, and that this was a matter of conduct.

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44. However, submitted Mr Young, that conclusion could not stand with the finding at [215(e)] that the "professional awareness point" was "inseparable" from the protected disclosure. In his skeleton Mr Young submitted that the whole point of the protected disclosure was that "Ms Harding had failed in her duty to ensure that the contracts she had overseen were legally fit for purpose" and he referenced [53(e)]. He submitted that "the very act of making such a disclosure necessarily involved calling into question Ms Harding's legal awareness."

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45. The Tribunal had correctly directed itself by reference to the relevant authorities: **Panayiotou** and **Martin**. It applied the relevant principles correctly in relation to the detriment complaint regarding Ms Harding's conduct; but it then failed to do so when it came to the section 103A complaint, as it failed to heed its own earlier finding of fact at [215(e)]. Had it done so, it would have been bound to conclude in light of that finding, that dismissing the claimant "because

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she had questioned Ms Harding's professional awareness/integrity" *was* dismissing her because she had made a protected disclosure, in particular PD4.

46. This was not a case where the difference in conclusions could be explained by the fact that, for a detriment claim to succeed, the disclosure need only be a materially contributing reason, whereas for an unfair dismissal claim to succeed it must be the sole or principal reason. Once the Tribunal had found that the claimant's conduct in making the protected disclosures, and in impugning Ms Harding's qualities, were inseparable, it followed that it should have concluded that the reason or principal reason for dismissal *was* the disclosures.

47. Alternatively, the Tribunal erred by failing to consider, at [226] whether these two things were properly separable, and, even absent the earlier finding at [215(e)], had it done so, it would have been bound to conclude that they were not. This case was a "world away" factually, from cases like **Martin** and **Bolton School v Evans** [2007] ICR 61. By contrast with what happened in those cases, the Tribunal found in the course of [235(b)] that the claimant had acted reasonably in raising PD3 and PD4. The EAT had said in **Martin** (at [22]) that an employer who objects to "ordinary" unreasonable behaviour in making a complaint should be treated as objecting to the complaint itself. So, more so here, where the claimant's conduct was found not to have been unreasonable at all.

48. Accordingly, concluded Mr Young, I should allow this appeal on the basis of the separability ground, even if I did not uphold the attribution ground.

49. As to the attribution ground, Mr Young noted that the Tribunal found, at [224], that Ms Harding was someone whose position in the hierarchy was such that her reasons could potentially be imputed to the respondent when deciding the reason for dismissal. However, it erred in concluding that she had not "invented" a reason for dismissing, in the **Jhuti** sense. In his skeleton

he submitted that there were two strands to this. The first was that she had invented the allegation that the claimant had impugned her integrity, as opposed to her legal awareness. However, in the course of oral submissions he abandoned that point. But he maintained the second strand, being that the Tribunal should have concluded that she invented the reason why she was upset, by giving the false impression that it was the claimant's imputation of her personal qualities, however described, rather than the actual disclosures.

50. Mr Young noted that the Tribunal found that Ms Harding told both Ms Yates, and then a number of other people in the office, that the claimant had called into question her integrity. It found that Ms Yates formed the impression that Ms Harding was "at the end of her tether". The claimant had not apologised, and Ms Yates and Ms Garrett-Cox travelled to Bahrain "[w]ith dismissal in mind." Ms Yates' email to Ms Garrett-Cox preparatory to the meeting with Mr Mohammed referred to "comment made whereby JH felt that her professional integrity was being questioned", which was discussed, but not resolved satisfactorily.

51. However, said Mr Young, that account was rejected by the Tribunal which found at [144] that "[w]hat upset Ms Harding was what the Claimant said about her PD4 and her legal awareness of that issue." It also found, at [137] and [149], that Ms Harding recognised that she had overstepped the mark by deleting parts of the draft audit report that contained the protected disclosures. He relied here, once again, on the Tribunal's finding in relation to the detriment claim against Ms Harding, which the Tribunal itself referred to at [228] when it said that she was "motivated by the fact that the claimant had made protected disclosures."

52. So, on the Tribunal's own findings, submitted Mr Young, Ms Harding had falsely "invented" that the reason she was upset by the claimant's behaviour was because the claimant had impugned her personally, not because of the protected disclosures. As he put it in his

skeleton, Ms Harding "manipulated the situation so as to hide the fact that she was upset because the Claimant had made a protected disclosure that called into question her professional awareness." Unlike in **Orr v Milton Keynes Council** [2011] ICR 704, the withheld information in this case was not merely about mitigating circumstances, but affected the reason for dismissal. The Tribunal should have regarded that as an invention that was within the scope of what the Supreme Court had in mind in **Jhuti**.

53. For the respondent Mr Siddall submitted that this appeal is an impermissible attempt to reopen a properly-reasoned finding of fact about the reason or principal reason for dismissal.

54. The general principle is that the reason for dismissal is the facts known to, or beliefs held by, the person or persons who took the decision to dismiss. **Jhuti** recognises a limited exception in certain cases where the facts or beliefs of another manager may be treated as the reason for dismissal instead. The key factual features in that case were that a person in the management hierarchy above the employee decided to bring about her dismissal because of her protected disclosures, and manufactured an invented reason, namely performance issues, which the dismissing manager then adopted, being unaware that it was not genuine.

55. The narrow and exceptional nature of the **Jhuti** exception was discussed in later cases such as **Simpson v Cantor Fitzgerald Europe** [2021] ICR 695 and **University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall** [2021] UKEAT 0150/20.

56. In the present case, at [225], the Tribunal observed that Ms Harding categorising the claimant's conduct as questioning her integrity was wrong, as the claimant was questioning her legal awareness. However it also found that Mr Mohammed recognised that distinction, but still considered the claimant's behaviour to be totally unacceptable; and this distinction would not have made any difference to the approach of either Ms Yates or Ms Garrett-Cox. To attribute

Ms Harding's motivation to the decision makers on the strength of this issue was therefore not a correct legal application of **Jhuti**. Ms Harding had not invented the fact that she was indeed upset, to the extent that she felt unable to continue working with the claimant.

57. Mr Siddall submitted that this reasoning was sound, and could not be properly disturbed. It was not the case that any invention of any sort by someone in the hierarchy above the employee could, or must, be attributed to the employer. The authorities commenting on **Jhuti** indicated that this was a highly-fact sensitive question, and one for the appreciation of the Tribunal. **Jhuti** was a case of positive invention. This case was not remotely like that. It was, at best for the claimant, a case where Ms Harding had not given a complete account of the background to what troubled her. The Tribunal had reached a properly-reasoned conclusion on this point, on the facts of this case, which could not be disturbed.

58. In any event the Tribunal had only found that Ms Harding was materially influenced by the protected disclosures, which was the proper test for liability for detriment. Even had it attributed her motivation to the respondent, it did not follow that it ought to have concluded that the protected disclosures were the sole or principal reason for the dismissal, which was the test for the purposes of section 103A.

59. The Tribunal had also plainly directed its collective mind to the "separability" issue. When considering the law, it specifically referred to the warning from the EAT, at [22] of its decision in **Martin**, about "being slow to recognise a distinction between the complaint and the way it is made save in clear cases". It then flagged up the issue in the last few lines of [222], and then, after addressing the **Jhuti** point, turned to consider it specifically at [225], leading to its conclusion as to the principal reason for dismissal at [226].

60. The Tribunal found there that it was the impugning of Ms Harding's awareness/integrity at the meeting on 22 October and then in the email of 23 October that was the principal reason for dismissal. It had foreshadowed that conclusion in an earlier section of its decision in which it had given thumbnail sketches of each of the respondent's witnesses and their general views of the claimant. Of Mr Mohammed, it had said, at [95]:

> **"In general terms, he was always very supportive of the Claimant, but ultimately (he frankly admitted in oral evidence) he agreed to dismiss the Claimant in the light of her email to Ms Harding of 23 October 2018."**

61. That email, observed Mr Siddall, did not itself contain any protected disclosure. In its account of the José incident, at [120], the Tribunal had described how both Ms Yates and Mr Mohammed, when he was told of it, took a critical view of the claimant's conduct on that occasion. At [169] it then found that the 23 October email was the "dominant factor" in Mr Mohammed agreeing to the dismissal, and it referred also there to his view of the José incident. These were both properly regarded as separate from the disclosures.

62. The Tribunal had properly made distinct findings about what were Ms Harding's reasons for her own treatment of the claimant on 22 and 23 October, that amounted to a detriment. The observation at [213] that this incident "ultimately" led to the dismissal, meant no more than that it was a "but for" cause. The same was true of the observation at [221] that it was the principal cause. The point here – at the start of the Tribunal's reasoning on this aspect – was that it was this incident that led to Ms Yates and Ms Garrett-Cox turning their minds for the first time to dismissal, whereas earlier incidents involving the claimant had not done so.

63. While the authorities urge circumspection on the issue, whether, in a given case, the reason or principal reason for dismissal was properly separable from the disclosure was a question of fact for the Tribunal. In **Martin** itself the EAT, at [23], whilst recognising that it was a line of

argument that may sometimes be abused, observed that Tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint. The present Tribunal had plainly taken care over the point, and the EAT could not, and should not, interfere with its conclusion.

Discussion and Conclusions

64. I start with the attribution ground, and, first, a brief review of some authorities. The starting point, recently reiterated by Underhill LJ in **Beatt v Croydon Health Services NHS Trust** [2017] ICR 1240 at [30], remains that, when considering a section 103A claim, as with any unfair dismissal claim, the "reason" for the dismissal "connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision."

65. However, in **The Co-Operative Group Limited v Baddeley** [2014] EWCA Civ 658 at [42] (and though the scenario did not fit the facts of the case) Underhill LJ was prepared to contemplate that the net might be cast wider where the facts known to, or beliefs held by, the actual decision-maker "have 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." In **Royal Mail v Jhuti** [2018] ICR 982 he essentially restated that formulation. In particular, he concluded that the earlier decision in **Orr** (above) precluded the exception being extended to the distinct factual scenario in that case.

66. In **Cadent Gas Limited v Singh** [2020] IRLR 86, a Mr Huckerby played a leading part in investigating an incident involving the employee. The EAT (Choudhury P and members) accepted, at [55], that, for the approach expounded by the Court of Appeal in **Jhuti** to be applicable, "some manipulation must be evident". They observed, at [56], that manipulation could take many forms. "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."

67. In **Jhuti** in the Supreme Court Lord Wilson JSC (with whom the other Justices agreed) endorsed Underhill LJ's formulation, but also developed the exception. However, he did so in a manner closely tailored to the particular facts of the case. He observed at [40] that at first sight the question raised by the appeal "seems to be of wide importance"; but he continued at [41]:

> **"On the other hand, as the company acknowledges, the facts of the present case are extreme:-**
>
> **(a) an employee on trial blows the whistle upon improper conduct on the part of her line manager's team;**
> **(b) her line manager responds by deciding to pretend that the employee's performance of her duties is inadequate and to secure a conclusion that she has failed her trial period; (c) over the next months he bullies and harasses her with targets, meetings and an improvement plan, by which he sets her up to fail;**
> **(d) he succeeds in creating, in emails and otherwise, a false picture of her inadequate performance;**
> **(e) the decision to dismiss the employee is made by an officer who, in her review of the evidence, fails to perceive the falsity of the picture which he has created; and**
> **(f) in particular the employee, in no condition to meet the decision-maker or otherwise to present her case clearly to her, fails to help her to understand the falsity of the picture.**
>
> **Instances of decisions to dismiss taken in good faith, not just for a wrong reason but for a reason which the employee's line manager has dishonestly constructed, will not be common."**

68. This paved the way for the ultimate ratio, at [60]:

> **"If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."**

69. Importantly, he added, at [61]: "There is no need to overrule the decision in the *Orr* case [2011] ICR 704; by our decision we attach only a narrow qualification to it."

70. In **Simpson v Cantor Fitzgerald Europe** [2021] ICR 695, **Jhuti** (which had at that point been decided by the Court of Appeal) was found by the EAT to have no application to the facts

at hand. The EAT's reasoning was later adopted by the Court of Appeal (by which point **Jhuti** had been decided the Supreme Court). Bean LJ, for the Court, observed (at [38]) that it did not make any difference whether the test was of "manipulation" of the person who decided to dismiss (*per* the Court of Appeal in **Jhuti**) or of the "construction of an invented reason to conceal a hidden reason" (*per* the Supreme Court). The alleged manipulators in the instant case had played no part in the disciplinary decision or any formal investigation. One of them had in fact for a long time pushed back against the possibility of Mr Simpson being dismissed.

71. In **University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall**, UKEAT/0150/20, 30 June 2021 the EAT (HHJ James Tayler) observed, at [36] – [37] that, in a case where there is an overall plan to remove a whistle-blower from a large organisation, a number of managers may be in the know, and the overall circumstantial evidence may be found to support the conclusion that the decision-maker was acting in accordance with that plan. By contrast, the situation in **Jhuti** "where the decision maker is unaware of the machinations of those motivated by the prohibited reason, is probably quite rare. It is only in such cases that it is necessary to attribute a reason to the decision maker that was not, in fact, the reason operating in his or her mind when the decision to dismiss was taken."

72. I note the following points. First, the general rule that the motivation that can be ascribed to the employer is only that of the decision-maker(s) continues to apply. Secondly, there is no warrant to extend the exceptions beyond the scenario described by Underhill LJ, which will itself be a relatively rare occurrence, and the surely highly unusual variation encountered in **Jhuti**. Thirdly, whether in the scenario contemplated by Underhill LJ, or in the variation described by Lord Wilson, two common features are that (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts

A and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their motivation to be attributed to the employer.

B 73. In the present case, the Tribunal found that Ms Yates drafted a one-sided briefing for the purposes of her and Ms Garrett-Cox's meeting with Ms Mohammed, and did so with a view to engineering the claimant's dismissal. However, Mr Young confirmed in oral submissions that
C he did not seek to rely upon that document as such, because he accepted that the Tribunal had found that Ms Yates, for her part, was not in any way motivated by the fact that the claimant had made protected disclosures. It was the motivation of Ms Harding on which he relied.

D 74. As for Ms Harding, the Tribunal considered that she "fell within the hierarchy of responsibility" above the claimant in the **Jhuti** sense. It also considered that she was wrong to categorise the claimant's conduct as questioning her professional integrity, as opposed to her professional awareness, and that this involved what it called an "element of 'invention'"; but it
E concluded that it would not be a correct application of **Jhuti** to attribute her motivation to the respondent "on the strength of an issue as to terminology."

F 75. In my view the Tribunal undoubtedly came to the right conclusion on this issue, and if anything, with respect, was over-generous to the claimant's case in its analysis. I say that for the following reasons. First, I agree with the Tribunal that criticising a professional person's knowledge or competence does not necessarily entail any criticism of their integrity. (For a recent
G illuminating discussion of the latter elusive but important concept see **Beckwith v Solicitors Regulation Authority** [2020] EWHC 3231 (Admin).) Secondly, however, I agree entirely with the Tribunal that, whether Ms Harding rightly or wrongly perceived the claimant to have
H questioned her integrity, as opposed to her know-how, does not remotely take us into the territory

of the sort of manipulation or invention that would be a necessary ingredient for **Jhuti** purposes. As I have noted, Mr Young abandoned the line of argument based on that particular distinction during oral submissions. He was right to do so.

76. But nor do I find that Mr Young's alternative argument, that the invention on the part of Ms Harding was that she was upset by the claimant having impugned her personally, as opposed to by the disclosures themselves, fares any better. The decision-makers were, as a group, aware of the general context of the draft audit report, and the material nature of the interactions with Ms Harding. They were by no means solely dependent on Ms Harding's oral account of the basic facts, as to what the claimant had said and done. The claimant herself put Mr Mohammed in the loop regarding her unfolding concerns about management responses to the draft audit report and the risk issues that it raised. The claimant herself (blind) copied in Mr Mohammed on her email exchanges with Ms Harding on 23 October. Ms Harding copied the email chain to Ms Yates. Mr Mohammed spoke to the claimant directly about the matter for an hour, and Ms Harding forwarded the email chain to Ms Garrett-Cox.

77. Having regard to all of that, I do not think the Tribunal was wrong not to find that the decision-makers had been materially misled about the material facts of what had occurred, by Ms Harding "inventing" the reason why she was upset.

78. In addition, I am bound to say that I think that the Tribunal was over-generous in regarding Ms Harding as in the hierarchy of responsibility above the claimant, in the sense meant in **Jhuti**. In **Jhuti** itself, the individual concerned was the line manager, who used his position to set Ms Jhuti up to fail. In the present case, while Ms Harding was part of the senior management team in the UK, as the Tribunal itself found, the claimant had, because of her role, a distinct reporting line to Mr Mohammed. There was no suggestion or finding that Ms Harding had "responsibility"

for the claimant, or that her dealings with Ms Harding over this matter were in the capacity of Ms Harding being a superior, as opposed to a person, who, because of her role, was a relevant manager from whom a response was required.

79. Finally, the Tribunal noted at [162] Ms Harding's evidence that she was not sure whether the claimant's conduct towards her warranted her dismissal. She had said that "there was a history there and it felt like she could not go on getting chance after chance to improve." But the Tribunal made no finding that Ms Harding was herself seeking to get the claimant dismissed. Ms Yates and Ms Garrett-Cox were the ones whose thoughts turned, at a certain point, to dismissal. It seems to me that, on the Tribunal's findings, Ms Harding's role was that she was simply someone who turned to HR for support or advice in relation to her perceived treatment by the claimant, and who was in the position, informally, of being a complainant or witness.

80. For all of these reasons, the Tribunal was not wrong not to have attributed Ms Harding's motivations to the respondent when determining the reason for dismissal. In my judgment, it would have erred if it had. This ground of appeal therefore fails.

81. I turn to the "separability" ground. I start by observing that the Tribunal was plainly alive to the issue. At [201] it cited both **Martin** and **Panayiotou**, (including the words of caution at [22] of **Martin**). Though that was in the context of the Tribunal's consideration of the detriment claims, the Tribunal plainly had the point in mind when it said, at [222], that it had "considered very carefully what it was about the incident with Ms Harding that constituted the principal reason for dismissal." Further, it continued that a particular reason why it needed to consider the matter very carefully was because of the finding that it had made that the same incident involved Ms Harding herself subjecting the claimant to a detriment because she had made protected disclosures. Then, when turning specifically to this issue, the Tribunal opened paragraph [225]

by stating that it had considered "what precisely it was about the incident" that led to the decision to dismiss. Then, at [229], the Tribunal stated in terms that it did not find that any of Mr Mohammed, Ms Garrett-Cox or Ms Yates were motivated by the disclosures.

82. This was a matter for the appreciation of the Tribunal, which heard and considered the evidence, and made the findings of fact. As the EAT also said in **Martin**, Tribunals can be trusted to apply this distinction. I add that the EAT will of course intervene, on this issue, as on any other, if the Tribunal in the given case has erred in law; but in a case, such as the present, where the Tribunal has clearly given itself a correct self-direction, and explicitly addressed itself to the point in such clear and careful language, its decision cannot be disturbed unless it is plainly perverse or fundamentally flawed. I turn, then, to review the Tribunal's reasoning.

83. I start with two general observations. First, the nature of the claimant's belief, in the form of the "MPRA concern", which meant that the protected disclosures were such, in law, was that the respondent was, or was at risk of being, in breach of regulatory requirements, because the MRPA agreement in place did not contain sufficient safeguards to address the implications of non-bank counterparties being involved. That was, in principle, it seems to me, potentially separable from the question of how that state of affairs had come about, who was responsible for it, and whether they were deserving of any form of criticism in that regard.

84. Secondly, the Tribunal found that Ms Harding disagreed with the claimant's view, that amounted to the MRPA concern, in and of itself. That this was the Tribunal's conclusion is apparent from: the Tribunal's view that an "important aspect" of the meeting on 22 October which required explaining, was why Ms Harding went to the claimant's room in the first place [215(c)]; that it drew the inference that PD3 and PD4 were a material part of her reasons for so acting,

observing that Ms Harding disagreed with the disclosures themselves to the point that she deleted them from the document that she was first sent [215(d)].

85. It is this which underpins its finding [215(e)] that the professional awareness point that the claimant raised was "inseparable" from PD4 itself. The Tribunal is not, I think, here saying that criticising Ms Harding's competence would be, or was, itself a protected disclosure; but rather that, as in fact Ms Harding was responsible for the document, criticising the document was an implicit criticism of Ms Harding as well; and the claimant herself, at the meeting on 22 October, and in the email of 23 October, herself stated that she did have an issue with Ms Harding's "awareness" (though not her integrity).

86. However, while the two issues were connected in this way, the Tribunal still properly distinguished them, recognising at [215(e)] that criticism of Ms Harding was not a necessary part of PD4, and stating at [215(f)] that "more importantly" Ms Harding's conduct was "not simply" because the claimant questioned her awareness, "but also a response to the substance of the protected disclosures that she had made, the content of which she disagreed with."

87. Standing back, what the Tribunal has concluded in relation to Ms Harding's conduct is that a material part of the reason for it (the correct test for a detriment claim) was her objection to the substance of the disclosures themselves, as opposed to the implicit criticism of her competence that, given her role in the matter, these also entailed. That is why that detriment complaint was found to be in principle meritorious (though it failed because it was out of time). It does not, in my view, follow from this, that anyone who took issue with how the claimant expressed herself on the subject of Ms Harding's competence at the 22 October meeting and in the 23 October email, should be treated as also taking issue with the disclosures themselves.

88. That the Tribunal was not of this view, and had not forgotten its detriment finding, is plain from [222] and following. The Tribunal was clear in this passage, and elsewhere, that what motivated the trio involved in the dismissal decision was not the claimant's substantive views that were the subject of the disclosures, or her having raised those concerns, as such, but the way in which she conveyed to Ms Harding her criticisms of Ms Harding personally.

89. That is a consistent thread in the decision. Mr Mohammed rated the claimant highly, but agreed to dismiss her in light of her email of 23 October 2018 [95]; it was the way in which that email called Ms Harding's competence into question, that Mr Mohammed told the claimant called for an apology [160]; it was after Ms Harding appeared to be at the end of her tether, was not willing to mediate, and wanted to raise the matter formally with Mr Mohammed, that Ms Yates considered that doing nothing was not an option [161]; it was then that Ms Yates and Ms Garrett-Cox were inclining towards dismissal [165]; Ms Yates' briefing note highlighted how the claimant's behaviour had affected Ms Harding, and a wider problem of lack of people skills [166]; the dominant factor in Mr Mohammed's support for dismissal, was his view of the effect of the email on Ms Harding, and he also considered her behaviour in the José incident to have been inappropriate [169]; he agreed to dismiss "because of her conduct towards Ms Harding" and Ms Garrett-Cox was of the view "that her conduct towards others warranted her dismissal" [180]. Mr Withers, who heard the appeal, was satisfied that the claimant had "directly questioned Ms Harding's professional competence and that this was inappropriate." [191].

90. All of these findings fed into the Tribunal's conclusion that it was the fact that the claimant had questioned Ms Harding's awareness/integrity in the meeting and in the email that was the principal reason for dismissal [226]; and that what was additionally significant about this episode was that Ms Harding was so upset that she refused mediation and indicated that she could no longer work with the claimant. In effect, it seems to me, what the Tribunal concluded was that it

was considered by these managers that the claimant's unacceptable style of interaction had now manifested itself in an incident that was so serious in its impact on a senior colleague, with no prospect of her changing her ways, that she had to go.

91. The Tribunal also not merely asserted at [229] its conclusion that none of the trio involved in the dismissal decision was motivated by the protected disclosures. It also explained, in that paragraph, that it had considered whether various features of the facts might point to an inference that they were so motivated, and why it had concluded that they did not. The conclusions of this paragraph are also, in my view, supported by the Tribunal's earlier finding at [171] that, prior to the claimant's dismissal the final GTOP report, including the material amounting to the claimant's disclosures, and the "Generally Unsatisfactory" rating of processes within its scope, was signed off by both Mr Mohammed and the claimant, and issued.

92. The fact that the Tribunal also found at [230] that it was not true to say that other "key stakeholders" could not work with the claimant, does not contradict, or undermine, the Tribunal's earlier findings about the essential reason for dismissal. Having read the whole decision, it appears to me that this point was made here as something of a marker, which became relevant to the later examination of the question of whether the dismissal was ordinarily unfair, and issues going to remedy, with which this appeal is not concerned.

93. For reasons I have already set out, I do not think that it follows from the Tribunal's findings about the detriment claim relating to Ms Harding's conduct, that it was bound to conclude that the trio being motivated by their view of the claimant's behaviour on 22 and 23 October amounted to them being motivated by the protected disclosures. Nor does the fact that the Tribunal for its part considered that the claimant had not questioned Ms Harding's integrity, and that the 23 October email was conciliatory in tone, mean that it was bound so to conclude.

These were reasons for the Tribunal to be particularly circumspect in considering whether the behaviour for which the respondent said it had dismissed could be properly separated from the disclosures. But this Tribunal was just that; and what mattered was what facts or beliefs influenced the trio, not what the Tribunal itself thought of the claimant's conduct.

94. In conclusion, the Tribunal understood the issue and it held the evidence up to the light. Its reasons were fully and cogently set out; and its conclusions were not internally contradictory. There is no warrant for me to interfere.

95. The second ground of appeal accordingly also fails.

Outcome

96. It was common ground before me that the reconsideration appeal adds no independent ground of challenge. The appeals against both the liability and reconsideration decisions are accordingly dismissed.