Neutral Citation Number: [2022] EWCA Civ 941

Case No: CA/202100/1961

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
His Honour Judge Auerbach
EA 2020/000357/000438 JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 July 2022

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))

LADY JUSTICE SIMLER
and
LADY JUSTICE ELISABETH LAING

- -

Between:

LING KONG	**Appellant**
- and -	
GULF INTERNATIONAL BANK (UK) LIMITED	**Respondent**
PROTECT (THE WHISTLEBLOWING CHARITY)	**Intervener**

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William Young and Courtney Step-Marsden (instructed by **Didlaw**) for the **Appellant**
Nicholas Siddall QC and Grahame Anderson (instructed by **Bird & Bird LLP**) for the **Respondent**
James Laddie QC and **Andrew Smith** (instructed by **BDBF LLP)** for the **Intervener**

Hearing date: 26 May 2022

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties or their representatives on 8 July by email and released to the National Archives. A copy of the judgment in final form as handed down should be available shortly thereafter but can otherwise be obtained on request by email to the judicial Office (press.enquiries@judiciary.uk).

Lady Justice Simler:

Introduction

1. The claimant, Ms Ling Kong, was employed by the respondent (referred to as "the Bank") in February 2010, initially as a Senior Business Auditor and from March 2016 as the Head of Financial Audit, responsible for carrying out risk-based audits of all business activities of the Bank. On 22 October 2018 she made a verbal protected disclosure to Jenny Harding, Head of Legal, to the effect that an industry-standard financial compliance template, designed for bank-to-bank lending, was not suitable for the use the Bank was making of it for non-bank-to-bank lending. She also sent Ms Harding an email dated 23 October repeating some of what she had said to Ms Harding the day before. Ms Harding was particularly upset by what happened on 22 and 23 October. She refused mediation when it was suggested and said that she could no longer work with the claimant. On 3 December 2018, the claimant was summarily dismissed by senior individuals at the Bank (Mr Mohammed and Ms Garrett-Cox, supported by the Head of Human Resources, Ms Yates).

2. The claimant made claims in the employment tribunal of ordinary unfair dismissal (section 98 Employment Rights Act 1996, the "ERA"), automatically unfair dismissal by reason of protected disclosures (section 103A ERA), detrimental treatment by reason of having made protected disclosures (section 47B ERA), and wrongful dismissal. She relied on ten protected disclosures. The case was heard by an employment tribunal sitting at London Central (EJ Stout and members, Ms Breslin and Mr McLaughlin) in January 2020 and a reserved judgment was sent to the parties on 2 March 2020. By that judgment, the tribunal held that the claimant was unfairly dismissed but rejected her protected disclosure detriment and dismissal claims, together with the wrongful dismissal claim. The tribunal found that Ms Harding, who was upset, both because of the protected disclosure about the template and because her competence was questioned, had subjected the claimant to a detriment materially influenced by the protected disclosure, but that that claim was time-barred. By contrast, the tribunal found that the principal reason for the claimant's dismissal was not the protected disclosure about the template, but that she had questioned Ms Harding's professional awareness or competence. The tribunal found that this was a separate reason related to her conduct and not her protected disclosures. It is this distinction drawn by the tribunal that is challenged on this appeal.

3. The claimant appealed to the Employment Appeal Tribunal ("the EAT"). The appeal was permitted to proceed on grounds limited to challenging the tribunal's rejection of the automatic unfair dismissal claim. In addition to challenging the tribunal's conclusion that her conduct was separable from the protected disclosures in that context (the "separability" ground), the tribunal's failure to impute Ms Harding's motivation for her detrimental treatment of the claimant to the Bank's dismissing officers was challenged by reference to the principle established in *Royal Mail Group Limited v Jhuti* [2019] UKSC 55, [2020] ICR 71. By a reserved judgment dated 10 September 2021 the appeal was dismissed on all grounds by HHJ Auerbach. The *Jhuti* ground is not pursued in this court and I shall not address it further.

4. Before us, the claimant was represented by Mr William Young on a pro bono basis (for which we are particularly grateful) and the Bank by Mr Nicholas Siddall QC and Mr Grahame Anderson. In addition to representation by the parties, we have had the benefit

of written and oral submissions from Mr James Laddie QC and Mr Andrew Smith on behalf of Protect (also on a pro bono basis), who intervened in this appeal with permission. Protect is a whistle-blowing charity providing advice to whistle-blowers and working with organisations on improving their "speak up" arrangements. It also campaigns for better legal protection of whistle-blowers.

The relevant statutory provisions

5. The Public Interest Disclosure Act 1998 inserted provisions into the ERA to protect individuals who make certain disclosures of information in the public interest, enabling them to bring claims for victimisation where they suffer retaliation in consequence, and are subjected to detrimental treatment or dismissal.

6. The protection for detrimental treatment is in section 47B ERA which provides:

> "**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 round 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 any 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) ...
>
> (1D) …
>
> (1E) …
>
> (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."

It is now well established that section 47B is infringed where the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the individual concerned: see *Fecitt and others v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 ("*Fecitt*") (Elias LJ at [45]).

7. As section 47B(2) makes clear, where the detriment of which an employee complains takes the form of dismissal, the protection is not accorded by section 47B but by the unfair dismissal provisions in Part X of the ERA. Section 103A provides:

> "**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."

It is for the employer to show the reason (or if more than one, the principal reason) for the dismissal: see section 98(1) ERA. For a dismissal to be automatically unfair under section 103A, the protected disclosure must be the reason or the principal reason for the dismissal.

The facts and tribunal findings relevant to this appeal

8. The facts are set out clearly and comprehensively by the tribunal at paragraphs 38 to 194. For the purposes of this appeal it is sufficient to summarise them, broadly as the EAT did, as follows.

9. Throughout her employment the claimant reported directly to Khalid Mohammed, the Group Chief Auditor, who was based in Bahrain. During the course of her employment she had a number of distinct concerns which formed the subject-matter of her disclosures. These are described in turn by the tribunal at paragraph 53. One of these was the Master Risk Participation Agreement template (or "MRPA") concern. A new product offered to investors through a particular fund, the "GTOP fund", launched in 2017 with non-bank corporate entities as counterparties, was governed by the MRPA. The claimant considered it had insufficient safeguards for the use the Bank was making of it with the GTOP fund.

10. The claimant first raised the MRPA concern in an email dated 26 September 2018 (referred to as PD3) addressed to several recipients and attaching the draft GTOP audit report, which disclosed numerous concerns. Her MRPA concern, as disclosed in PD3, was described by the tribunal at paragraph 53e. as follows:

> "In summary, the issue in relation to this was that the claimant considered that the 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 [Know Your Customer] and due diligence checks and monitoring on underlying borrowers. ..."

11. The tribunal dealt with PD4 at paragraph 53f. as follows:

> "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)."

12. In a section headed "The claimant's performance and conduct generally" the tribunal referred to the claimant's performance appraisals, which were "outstanding" or "exceeded expectations" every year. However, a number of colleagues described her approach as challenging, pernickety or inflexible; and lacking "softer, interpersonal" skills. These were found to be genuinely held views.

13. The tribunal described an incident in July 2018 which it referred to as the "José incident." In short, the claimant approached José Canepa, a colleague, to ask him about an audit concern the day after his departure from the Bank was announced, when he came into the office to collect his belongings. She did this 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, the Bank decided to take no action at the time.

14. In terms of the critical events leading to the claimant's dismissal, the tribunal found that on 26 September 2018 the claimant emailed to Ms Harding and a senior portfolio manager, Mr Henderson, certain material, highlighted in yellow, that she proposed to include in her draft GTOP audit report, relating to her 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.

15. The claimant then circulated the draft report to those concerned (PD3), omitting the passages referred to in that email exchange, but still setting out the MRPA concern and inviting management responses. The claimant chased for management responses in early October, and Ms Harding replied with a marked-up version, on behalf of herself and two others (Mr Henderson and another manager), containing many comments and extensive deletions as tracked changes, but without the formal management responses. The tribunal found that the reason for most of the deletions and comments was that 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."

16. On 22 October, the claimant told Mr Mohammed that management responses had not been received as required and that such comments as had been received included amendments and deletions to audit points, and other concerns.

17. The claimant also emailed Ms Harding on 22 October. She asked whether there was "any particular reason that no formal management responses from the legal dept" had been provided. She said she was "also a bit concerned to see a number of our audit observations had been amended, removed …" The tribunal continued (omitting page and other references):

> "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.)
>
> 141. Ms Harding's evidence was that the claimant immediately raised the issue in the email 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.
>
> 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.
>
> 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 … and 'the bank-to-bank issue' and that it was Ms Harding who left upset.
>
> 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 …, 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.
>
> 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.
>
> 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 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 said that Ms Harding told him that the claimant had questioned her integrity and professional ability. Ms Yates said that Ms Harding said that she felt her integrity and ability to do her job had been called into question by the Claimant."

18. Later in the afternoon of 22 October, the claimant emailed Mr Mohammed. She forwarded the email she had sent Ms Harding, saying that she had raised her concern with the Head of Legal in this "private email but she got agitated." Ms Harding emailed the claimant a copy of the report with management responses from her as Head of Legal, which did not include the substantial deletions she had previously made. The claimant considered this was a tacit acceptance by Ms Harding that she had overstepped the mark previously. Though Ms Harding denied this in evidence, the tribunal agreed, finding 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.

19. At some point that afternoon (still on 22 October) 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.

20. However, the next morning Ms Harding spoke to Ms Yates again. 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."

21. The tribunal continued (again omitting page and other references):

"155. The Claimant responded at 12.29, 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.
>
> One the other side, when you slammed the door and walked 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 workplace is very important. Happy to discuss it further tomorrow when we meet."

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.

…

158. Ms Harding responded to the Claimant's email at 12.29 ten minutes later: "*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 to think about whether or not to ask someone else to come along. Let's chat tomorrow*."

159. Ms Harding forwarded the email chain to Ms Yates.

> 160. Following receipt of the blind copy of the above email (12.29) 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 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. …"

22. Ms Harding and Ms Yates had further discussions about the incident. 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. Ms Harding did not think this would be helpful. Ms Harding spoke to Ms Garrett-Cox, the CEO, and forwarded to her the email exchanges with the claimant and asked for her thoughts on what to do next. Meanwhile, 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 and felt working together in future would be challenging.

23. For her part, the claimant thought matters were resolved following the meeting on 24 October with Ms Harding, and messaged Mr Mohammed to this effect. He understood this to mean that the claimant had apologised, when in fact she had not done so.

24. 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. They travelled to Bahrain to meet Mr Mohammed with "dismissal in mind". In preparation for that meeting, Ms Yates drafted an email dated 21 November 2018 containing a summary of the issues for Ms Garrett-Cox. It read:

> "Recent situation involving the Head of Legal which was brought to the attention of both HoHR and CEO. A formal grievance was considered.
>
> - 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). …"

It referred to nine "other situations/feedback provided over the past few years" and common themes emerging such as "little emotional intelligence when dealing with colleagues … dogmatic in her approach". It concluded that whilst her contribution to the audit function was perceived to be high, her "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 proportionate approach in her assessment of the risk …"

25. 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 ...
>
> 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."

26. 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", the first time such a rating had been made in respect of the UK business.

27. At a meeting on 3 December 2018 with Ms Garrett-Cox, Mr Mohammed (by 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. At the end of the meeting the claimant was given a termination letter. This referred to her conversation with Ms Harding on 22 October 2018, which "led to her strong view that you were questioning her integrity, followed with a subsequent email on the same day reinforcing this view." The letter said that the claimant's approach "was entirely unacceptable and fell well short of the standards of professional behaviour expected … as well as being contrary to the Bank's accepted principles of treating all colleagues with dignity and respect." This had prompted a wider review identifying other incidents and leading to the conclusion that stakeholders no longer wished to work with the claimant and trust and confidence had been lost.

28. When asked in the course of evidence who the stakeholders were, Ms Yates told the tribunal that they were Ms Harding, Mr Mohammed and Ms Garrett-Cox, but the tribunal found that this answer revealed the "lack of substance to this part of the Respondent's purported reasons for dismissal" since it was only Ms Harding who had lost confidence in, and would no longer work with, the claimant. Mr Mohammed

agreed that dismissal was appropriate "because of her conduct towards Ms Harding" and Ms Garrett-Cox concluded that her "conduct towards others" warranted dismissal.

29. The claimant appealed against her dismissal without success. The director who heard the appeal 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."

The tribunal's conclusions

30. The tribunal dealt with the detriment claims first, having given itself an extensive and correct self-direction as to the law. It found that Ms Harding's treatment of the claimant on 22/23 October 2018 was materially influenced by the protected disclosures, in particular PD2, PD3 and PD4. That treatment included going to the claimant's office without an appointment in an agitated state, becoming more agitated during the meeting, walking out and slamming the door, and her complaints to others that the claimant had questioned her professional integrity. The tribunal found 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. …"

31. At paragraph 215 the tribunal continued:

> "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 page 303b, Ms Harding had stated that it made her "*uncomfortable*" (see above paragraph 129).
>
> 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.
>
> 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. Nonetheless, the claim relating to this particular detriment failed because it was found to be out of time. The other detriment complaints failed on their merits.

33. The tribunal dealt next with the reason for dismissal, and again gave itself an uncontroversial self-direction on the law. The tribunal's conclusions on this part of the case (apart from those relating to the *Jhuti* point which are no longer relevant) are central to the appeal and I set them out in full as follows:

> "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 169). 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 decision-makers are (in our judgment), Mr Mohammed and Ms Garrett-Cox. Although we have found (see above paragraph 169) 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 page 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 section 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 (eg 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.
>
> 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."

34. The tribunal went on to deal with the overall fairness of the dismissal (finding it to have been "wholly unfair substantively as well as procedurally"), matters said to have a bearing on remedy for unfair dismissal, and the wrongful dismissal claim. The tribunal rejected the Bank's case that the claimant had caused or contributed to her dismissal. So far as the incident with Ms Harding on 22/23 October was concerned, the tribunal said it recognised that the claimant had "expressed herself robustly and inappropriately to Ms Harding (both orally and in her subsequent email)", but concluded that it would not be just and equitable to reduce compensation as a result of the part played by the claimant in this incident (paragraph 242 c.)

35. As already indicated, the claimant appealed to the EAT. In a careful, clearly reasoned judgment, HHJ Auerbach dismissed all grounds. He held that the tribunal directed itself properly on the issue of the separability of the reason for dismissal and the protected disclosures. The tribunal properly considered and applied the guidance on this issue set out in *Martin v Devonshires Solicitors* UKEAT/86/10*,* [2011] ICR 352 ("*Martin*"). It understood the issue and held the evidence up to the light: although the protected disclosure and the criticisms made of Ms Harding's competence were connected, the tribunal properly distinguished them. The tribunal did not forget the detriment finding

it had made. For the dismissal decision-makers, it was the impugning of Ms Harding's awareness and/or integrity which was the principal reason for dismissal, based on the email the claimant sent to Ms Harding on 23 October 2018, and not the protected disclosure. These managers thought 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*" (paragraph 90 of the EAT judgment). The tribunal's findings of fact and conclusions were supported by the evidence and there was no warrant for the EAT to interfere.

The appeal

36. Against that background I turn to the issues that arise on this appeal. There are two grounds of appeal: a narrow and a broader ground. The narrow ground is that the tribunal's findings on the separability of the claimant's conduct and her protected disclosures were inconsistent as between the detriment and dismissal claims and meant that a different legal test was applied to these two claims. Once the tribunal had found that the claimant's conduct in making the protected disclosures and in impugning Ms Harding's competence or integrity were inseparable for the purpose of the detriment claim, it followed that it should have concluded that the reason or principal reason for dismissal *was* the making of the protected disclosures. In failing to reach this conclusion, a different legal test for the separability of the protected disclosures from the conduct surrounding them, as between the claim for automatic unfair dismissal and the detriment claim was wrongly applied. The broader ground is that it was simply not open to the tribunal on these facts to distinguish between the claimant's conduct in making the protected disclosures, and the protected disclosures themselves, irrespective of the detriment finding, when deciding that the principal reason for dismissal was not the protected disclosures.

37. Developing the narrow ground, Mr Young submitted that although the two causes of action involve different tests (material influence for the detriment claim and sole or principal reason for the dismissal claim), in either case the question whether the conduct is separable from the protected disclosures is the same, no matter what degree of influence the conduct must have on the decision in question in order to meet the causation test. I agree with him thus far.

38. He submitted that the conduct relied on for the two claims was either identical or materially the same: Ms Harding objected to the claimant's conduct in the meeting on 22 October and to what she said in her e-mail of 23 October; that is the same conduct that was found to be the basis for the dismissal. Indeed, the tribunal found expressly that the nature and extent of Ms Harding's complaints to others about these events was a "material part of the reason why" she was ultimately dismissed. He submitted that the same facts accordingly formed the basis of both decisions and emphasised that the email of 23 October in substance repeated what was said at the meeting on 22 October and made the same protected disclosures. Moreover, the tribunal's assessment of that email of 23 October was that it was conciliatory in tone and that too suggests it did not add anything to the meeting of 22 October in terms of the reason for the adverse treatment. The fact that the decisions in question were made by different people is nothing to the point: to the extent that decisions were made because of the claimant's conduct in calling into question Ms Harding's professional competence/awareness, the tribunal had already found that that conduct was inseparable from the protected disclosures themselves.

39. Mr Young submitted that the question of separability is an objective question for the tribunal to answer, and the test is the same for both claims. Once answered in relation to the detriment claim, that decision applied to any other decisions taken because of the conduct in question. Although his submissions at one stage appeared to suggest that he was contending for a rule of law deeming the employer to have had a reason they did not have, Mr Young contended instead for an evidential rule that tribunals must look objectively at whether the conduct (or other separate) reason relied on by the employer is so closely connected to the protected disclosures as not to be properly separable from them. The tribunal's failure to adopt this approach in relation to the dismissal claim was an error of law.

40. Leaving aside the inseparability finding on the detriment claim, the broader ground of appeal is that it was not open to the tribunal, in light of the authorities and the facts found, to conclude that the claimant's conduct was separable from the making of the protected disclosures when deciding the reason for dismissal. Mr Young's primary submission was that, as a matter of law, it would be a failure to apply the relevant principles correctly if conduct that amounted to no more than "ordinary unreasonableness" could be separated or distinguished from the making of protected disclosures themselves. Alternatively, it is an error of law to conclude that conduct is properly separable without first conducting an analysis of whether the conduct was more than ordinarily unreasonable. On the tribunal's findings, the claimant's conduct (in raising her concerns reasonably on 22 October, in her "conciliatory" and "professional" email of 23 October, and in endeavouring to raise matters with Ms Harding in what she considered was a sensitive manner albeit a reasonable employer could conclude that it was not in fact sensitive) was nowhere near the kind of conduct found not to be protected in cases like *Martin* or *Bolton School v Evans* [2006] EWCA Civ 1653, [2007] ICR 641 ("*Bolton")*. It was closer to the kind of conduct that was found to be protected in *Bass Taverns Ltd v Burgess* [1995] IRLR 596, CA ("*Bass Taverns*"), although that dealt with a different statutory scheme.

41. In other words, the claimant was an exemplary whistle-blower bearing in mind the realities of the workplace. She raised reasonable concerns in a broadly reasonable manner (albeit perhaps untactfully) and with attempted sensitivity. At most, her conduct was ordinarily unreasonable. Moreover, the fact that Ms Harding was upset is not something that could properly be separated from the protected disclosures themselves. If it could be, any person who was the subject of, or directly affected by, protected disclosures could rely on being upset in response to justify retaliating against the whistle-blower. That would very substantially undermine the protection offered by the protected interest disclosure provisions of the ERA. Finally, Mr Young did not shy away from submitting that the overwhelming case necessary for a finding of perversity is made out in relation to the impugned finding.

42. Mr Laddie QC broadly adopted those submissions on behalf of Protect. He emphasised the protective purpose of the legislation expressed in its long title, and the observations of this court in *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73, [2020] ICR 1226, (Sir Patrick Elias at [1]) that, "*Too often the response of the employer has been to penalise the whistleblower by acts of victimisation rather than to investigate the concerns identified. The 1998 Act inserted a new [part] into the [ERA] designed to prevent this.*".

43. It was no part of Mr Laddie's submission that the separability principle is illegitimate or should be over-ruled. Rather, by reference to authorities dealing with other closely-related retaliation claims (for example, the trade union activities cases, *Bass Taverns* and *Morris v Metrolink Ratp Dev Ltd* [2018] EWCA Civ 1358, [2019] ICR 90 ("*Morris*"), and the health and safety case, *Sinclair v Trackwork Ltd* UKEAT/0129/20/OO, [2021] IRLR 557), he submitted that the separability principle is being construed and applied beyond its proper confines in whistle-blowing claims, and thus erroneously. The authorities all have something in common: an enquiry into the employer's reaction to something that the claimant has said or done. They are conceptually identical and accordingly, there ought to be consistency in approach to the separability principle, but no such consistency obtains. In the trade union and health and safety cases, the separate conduct relied on had to reach a threshold of seriousness before a finding of separability could be justified (serious misconduct in the trade union cases, or at least something more than ordinary unreasonable behaviour as identified in *Martin* at [22]). The same threshold should apply in whistleblowing cases and this appeal provides the opportunity to reintroduce coherence and consistency into the law.

44. He submitted that the present case provides a stark illustration of the separability principle being construed and applied beyond its proper confines. A false distinction was made by the tribunal when it determined the reason for dismissal; the claimant was dismissed because Ms Harding was upset at being criticised by her in a protected disclosure; it is commonplace that protected disclosures upset people – they typically involve criticism; if it was legitimate for the tribunal to say the claimant was not dismissed for making protected disclosures but because she criticised a colleague who was upset by that, and this is separable, then effective protection for whistle-blowing is seriously undermined.

45. Accordingly, Protect invited this court to endorse a structured approach to the separability question (while recognising that the guidance should be adopted as a useful toolkit and not a straitjacket). First, tribunals should consider what specific aspect of the claimant's conduct is relied on as the reason for adverse treatment. Secondly, they should decide whether the claimant engaged in that conduct; and, if so, was the conduct a feature of the claimant's making of the protected disclosure, or a corollary or consequence of it? Third, if so, did the conduct constitute wholly unreasonable behaviour or serious misconduct? Only if so, is the conduct likely to be properly separable from the making of the protected disclosure.

46. Finally, Mr Laddie submitted that an application by the tribunal in this case of the structured approach identified would have resulted in the automatic unfair dismissal claim being upheld in the claimant's case. This would have been the just and appropriate outcome on the facts.

Discussion and analysis

47. There is no doubt that the authorities to which we were referred, in the different contexts of alleged retaliation for trade union activities and protected disclosures, and victimisation, have a common feature: they concern an enquiry into the employer's reasons for reacting to something that the individual has said or done. In that sense, they are conceptually at least, materially the same. However, I do not accept Mr Laddie's submission that they reflect any lack of consistency in approach to the separability principle. To the contrary, a consistent approach emerges and each case

turned ultimately on its own particular facts. They are examples of applications of the separability principle. They do not identify indicia or set thresholds that constrain its application or scope.

48. I start with the early trade union activities cases dealing with the possibility of distinguishing between a dismissal for carrying out trade union activities and a dismissal for other conduct occurring in the context of or associated with such activities: *Lyon and another v St James Press Ltd* [1976] ICR 413 (EAT) ("*Lyon*") and *Bass Taverns*. In *Lyon* at 418, the EAT (Phillips J) said that:

> "the special protection afforded by paragraph 6(4) to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate."

The separate conduct relied on, in the context of a small company, was that without informing the manager of their activities, the two union members formed a trade union chapel and secretly solicited new members. The EAT (Phillips J) held that these acts were plainly done in the course of taking part in trade union activities and therefore protected. The EAT acknowledged that not every such act is protected and gave as an example, "*wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair*." In *Bass Taverns*, the separate conduct relied on by the employer (and accepted by the tribunal as such) for dismissing a shop steward was disparaging remarks he made about the company at an induction meeting used as a recruiting forum for the union, held with the consent of the company. Pill LJ quoted those passages cited above from *Lyon* and found that there was nothing in the tribunal's findings beyond "*the rhetoric and hyperbole which might be expected at a recruiting meeting for a trade union*" to justify the conclusion that the remarks (which were accepted as having gone over the top) were separate conduct that justified a conclusion that he was not taking part in trade union activities. He made clear that it might have been different had the remarks been "*malicious, untruthful or irrelevant to the task in hand*".

49. *Morris* also involved a claim for automatic unfair dismissal for taking part in trade union activities (section 152(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992). The employment tribunal had rejected the employer's contention that the fact Mr Morris stored and shared private, confidential information was conduct outside the scope of trade union activities and justified his summary dismissal, without expressly considering whether the conduct was fairly separable from the context in which it occurred. The EAT allowed an appeal from the decision. That decision was overturned by this court. Underhill LJ referred to the underlying principle in *Lyon* and *Bass Taverns* as follows:

> "19. …there will be cases where it is right to treat a dismissal for things done or said by an employee in the course of trade union activities as falling outside the terms of section 152(1), because the things in question can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred; and his reference to

> acts which are "wholly unreasonable, extraneous or malicious" seems to me to capture the flavour of the distinction. That precise phraseology should not be treated as definitive ... but the point which it encapsulates is that in such a case it can fairly be said that it is not the trade union activities themselves which are the (principal) reason for the dismissal but some feature of them which is genuinely separable. ...
>
> 20. However ... this distinction should not be allowed to undermine the important protection which the statute is intended to confer. An employee should not lose that protection simply because something which he or she does in the course of trade union activities could be said to be ill-judged or unreasonable ... *Bass Taverns* ... is a good illustration of this: the employee was held to fall within the scope of the section even though he had gone "over the top"."

50. *Martin* was a victimisation case. The claimant was an employee of a firm of solicitors. She was mentally unwell and made a series of false allegations of unlawful sex and disability discrimination against partners in the firm. She refused to accept that the allegations were untrue, and medical advice suggested that her highly disruptive behaviour was likely to continue. The firm dismissed her. In addressing her victimisation claim, the employment tribunal (EJ Auerbach) conducted a careful analysis of what it was about her conduct, including the making of her complaints, that led to the decision to dismiss. The tribunal found that the reason for dismissal had nothing to do with the fact that she made complaints of discrimination. Rather, it was because she was mentally ill and likely to behave in an unacceptably disruptive way in future as evidenced by her repeated, serious, false allegations, that she refused to accept were false. In other words, there were features (or consequences of the complaints) that were genuinely and properly separable from the making of the protected complaints themselves. On appeal to the EAT, Underhill J (President) referred to the analogous principle in the trade union activities cases. He upheld the distinction drawn by the tribunal in the following terms:

> "22. The question in any claim of victimisation is what was the 'reason' that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straight forward example is where the reason relied on is the *manner* of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing

> director at home at 3 am. ... it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context a protected complaint. …"

51. Underhill J sounded an important note of caution about the scope for abuse in a line of argument such as this:

> "22. … Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle".

52. The principle of separability recognised in *Martin* (in a victimisation context), was expressly approved by this court in *Page v Lord Chancellor* [2021] EWCA Civ 254, [2021] ICR 912 ("*Page*"). In *Page* Underhill LJ confirmed as correct the principle recognised in *Martin* at [22], and in the analogous trade union activities cases, stating at [56] that in a case where it applies, the making of a protected complaint "*is the context in which the reason for dismissal (or other detriment) arises, but it is not the reason itself*."

53. In *Fecitt*, a number of nurses employed at a walk-in centre in Wythenshawe, operated by the NHS Trust, made protected disclosures about a colleague of theirs, who, they alleged, was claiming to be more qualified than he actually was. Those disclosures were found to be correct. Nonetheless the colleague's employment continued, and the whistle-blowers, dissatisfied with this outcome, continued to press their concerns. Grievances and counter-grievances were pursued, and the NHS Trust ultimately concluded that the only feasible way of resolving the workplace conflict was to redeploy two of the whistle-blowers and remove the third. The tribunal criticised the management response to the situation but concluded, nonetheless, that the reason for moving the nurse claimants was not the making of the protected disclosures but the dysfunctional workplace situation that could not feasibly be resolved without moving the whistle-blowers. The EAT allowed an appeal against that conclusion but this court restored the tribunal's decision.

54. There was no challenge in this court to the proposition that, in an appropriate case, an employer can take action against a worker who makes a protected disclosure in what is regarded as an unreasonable or unacceptable manner, or who acts in an unacceptable way in relation to a protected disclosure; and in such cases it is legitimate for tribunals to find that although the reason for dismissal is related to the disclosure, it is not in fact because of the disclosure itself. However, it was argued that where whistle-blowers make proper disclosures in the public interest and do nothing untoward or improper, it would be unjust and contrary to the legislation's protective purpose to deny them protection. The dysfunctional situation and the making of the protected disclosures

were so inextricably inter-linked that it was not possible for the employer to take action to resolve the former without necessarily engaging the latter.

55. The argument was rejected by Elias LJ (with whom Davis and Mummery LJJ agreed):

> "51. … I entirely accept that, where the whistleblower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical - indeed sceptical - eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistle-blower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.
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> 52. The consequence of Ms Romney's submission, however, is that there could be no explanation which the employer could offer in these circumstances which would relieve him from liability. The need to resolve a difficult and dysfunctional situation could never provide a lawful explanation for imposing detrimental treatment on an innocent whistleblower. I do not think that can possibly be right. It cannot be the case that the employer is necessarily obliged to ensure that the whistleblowers are not adversely treated in such a situation. This would mean that the reason why the employer acted as he did must be deemed to be the protected disclosure even where the tribunal is wholly satisfied on the facts that it was not."

56. I would endorse and gratefully adopt the passages I have cited as correct statements of law. They recognise that there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the *real* reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in *Page*, the protected disclosure is the context for the impugned treatment, but it is not the reason itself.

57. Thus the "separability principle" is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for impugned treatment. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Were this exercise not permissible, the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the

making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct.

58. Likewise, what was said in *Martin*, about being slow to allow purported distinctions between a protected complaint and *ordinary* unreasonable behaviour, is also not a rule of law. There is no objective standard against which behaviour must be assessed to determine whether the separability principle applies in a particular case, nor any question of requiring behaviour to reach a particular threshold of seriousness before that behaviour or conduct can be distinguished as separable from the making of the protected disclosure itself. The phrases used in the authorities (in the context of trade union activities, victimisation and whistleblowing) capture the flavour of the distinction, but were not intended to be treated as defining, and do not define, those cases where separability would or would not apply. They cannot properly be read in this way. In the wide spectrum of human conduct that might be relied on by decision-makers, each end of the spectrum is easy to identify as Phillips J observed in *Lyon*: gross misconduct or conduct that is "wholly unreasonable, extraneous or malicious" at one end; and wholly innocent, blameless conduct at the other. Between those two ends of the spectrum difficult questions of fact arise, and the conduct and circumstances of the particular case will require close consideration. But the authorities provide no factual precedent or objective standard against which to assess the conduct relied on in a particular case.

59. The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.

60. All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will "*cry out"* for an explanation from the employer, as Elias LJ observed in *Fecitt*, and tribunals will need to examine such explanations with particular care.

61. The legislation confers a high level of protection on whistle-blowers for sound reasons, and the distinction should not be allowed to undermine that important protection or deprive individuals of protection merely because their behaviour is challenging, unwelcome or resisted by colleagues. As Mr Laddie emphasised, whistleblowing by its nature, frequently involves an individual raising concerns about wrongdoing committed by individuals, frequently colleagues, commonly working in the same workplace. It is a natural human response to be defensive and resist criticism. Not only is it likely that the subject or content of a protected disclosure will be unwelcome, the manner in which it is made, repeated or explained, may also be unwelcome, leaving individuals feeling it necessary to restate their concerns, and increasing the prospect of

being perceived as an irritant or thorn in the employer's side. Some things are necessarily inherent in the making of a protected disclosure and are unlikely to be properly viewed as distinct from it. The upset that a protected disclosure causes is one example because for all practical purposes it is a necessary part of blowing the whistle; inherent criticism is another. There are likely to be few cases where employers will be able to rely on upset or inherent criticism caused by whistleblowing as a separate and distinct reason for treatment from the protected disclosure itself, though I am reluctant to say that it could never occur. The way in which the protected disclosure is made is also, in general, part of the disclosure itself, unless there is a particular feature of the way it is made (for example, accompanying racist abuse) that makes it genuinely separable.

62. In these circumstances, I would dismiss the broad ground of appeal. Further, and save to the extent already set out, I do not consider that the guidance and structured approach Protect has invited this court to endorse is necessary. It takes matters no further.

63. As for the narrow ground of appeal advanced by Mr Young, the short answer to it is that there is no inconsistency in the tribunal's conclusions about separability as affecting the detriment claim on the one hand and the unfair dismissal claim on the other. This is because the decision-makers in the two claims were different, and Ms Harding's motivation could not be attributed to the other decision-makers, or dictate the outcome of the tribunal's assessment of the reason (or principal reason) for the different and separate decision made on 21 November 2018, by Mr Mohammed, Ms Garret-Cox and Ms Yates, to dismiss her. As discussed above, separability is not a rule of law or some sort of freestanding legal concept.

64. The critical question that had to be answered by the tribunal, in relation to each separate claim, was what was the reason in the mind of the relevant decision-maker for the impugned treatment. This is a question of fact. The tribunal had to assess the evidence to determine the facts or factors operating on the mind of each relevant decision-maker that led to the detrimental treatment in the detriment claim, and dismissal in the other. Where it arises, when considering separate actions or decisions taken by different decision-makers, it is not only defensible, but essential, to consider the question of separability discretely in each case. Indeed, the converse would have been an error on the part of the tribunal.

65. In relation to Ms Harding's conduct, a material part of the reason for it was her objection to the substance of the disclosures themselves, as opposed to the implicit criticism of her competence that they also entailed. That is why the detriment claim would have succeeded if in time. However, and notwithstanding that detriment finding, the tribunal recognised the need for careful scrutiny of "*what it was about the incident with Ms Harding that constituted the principal reason for dismissal*." It was plainly alive to the need to consider this issue particularly carefully because of its finding that the same incident involved Ms Harding herself subjecting the claimant to a detriment because she had made protected disclosures, and accordingly it considered "*what precisely it was about the incident*" that led to the decision to dismiss. From paragraph 222 onwards, the tribunal concluded that what motivated the trio of dismissal decision-makers was not the claimant's substantive views as contained in PD3 and/or PD4, or that she raised those concerns. It was rather, her lack of emotional intelligence and insensitivity in the way she conveyed to Ms Harding criticisms of Ms Harding personally, both in the meeting on 22 October and in the email of 23 October.

66. HHJ Auerbach explained at paragraph 89 of his judgment, that this was a consistent thread in the decision:

> "89.…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].

67. Together these findings led to the tribunal's conclusion at paragraph 226 that it was the fact that the claimant had questioned Ms Harding's awareness/integrity that was the principal reason for dismissal. While criticism of Ms Harding was implicit in the relevant protected disclosures given her role in advising on the use of the MRPA template, it was not necessary for that criticism to be spelt out. However, the claimant made explicit personal criticisms of Ms Harding in her email of 23 October. She did not need to do this to blow the whistle; she could have expressed herself differently, in a way that was sensitive to her senior colleague. To put it another way, it was not a necessary feature of making the protected disclosures for her to have made explicit criticisms of Ms Harding's competence or awareness. It was this separate feature of her conduct that was regarded as unacceptable on her part.

68. Moreover, although in the main the tribunal did not consider that the claimant had behaved unreasonably, it is clear that the trio believed she had done so, and the tribunal accepted that this belief was genuinely held. Mr Mohammed's view was significant: he was supportive of the claimant and had a high regard for her work, but he considered her email of 23 October to be unacceptable and could not defend her behaviour. It was "*contrary to everything he thought he had told the claimant previously about not allowing interactions to become personal.*" Furthermore, she did not apologise to Ms Harding as he had instructed, even though she recognised to some extent that she had made a mistake in her interactions with Ms Harding. What mattered is not what the tribunal itself thought of the claimant's conduct but what the decision-makers genuinely thought of it.

69. However, the combination of the finding that Ms Harding was motivated by the protected disclosures in subjecting the claimant to detrimental treatment and the tribunal's view of the claimant's behaviour as (broadly) reasonable and as not having

challenged Ms Harding's integrity, were grounds for the tribunal to be particularly circumspect in considering whether the conduct relied on by the Bank as justifying dismissal was the real reason for dismissal and could properly be separated from the disclosures. In my judgment, that is the approach adopted by the tribunal and what the tribunal did. It scrutinised the evidence with particular care to discern precisely the facts or factors that operated on the minds of the trio of decision-makers and constituted the genuine reason for dismissal.

70. Nor do I accept that a false distinction was made by the tribunal when it determined the reason for dismissal because, as Mr Laddie submitted, the claimant was dismissed because Ms Harding was upset at being criticised by her in a protected disclosure. First, the question of upset was one of the three points made for completeness after the tribunal had reached its conclusion at paragraph 226 that the principal reason for dismissal was the claimant's conduct. The tribunal correctly focussed on the claimant's conduct and did not put any focus on Ms Harding's upset. Secondly, the relevance of her upset was that it was evidence of the seriousness of this particular incident in contrast to earlier incidents of unacceptable interactions with colleagues that had not led to dismissal (see paragraph 228). Following the events of 22 and 23 October, the decision-makers concluded that the claimant's unacceptable style of interaction had manifested itself in an incident that was so serious in its impact on a senior colleague, and in the absence of any prospect of her changing her ways, she had to go. Thirdly, the tribunal's discussion about Ms Harding's upset was in the context of addressing the *Jhuti* principle, and whether Ms Harding's motivation for subjecting the claimant to detrimental treatment could be attributed to the Bank.

71. As for the submission that the wrong test was applied by the tribunal, for the reasons I have already given, I reject this argument. The tribunal made no error of applying different tests of separability. Rather, it properly considered the two different causes of action independently and recognised that its conclusion on separability in the detriment claim did not dictate the same outcome in the dismissal claim because the two claims involved wholly distinct (albeit related) factual enquiries.

72. Finally, and again for the reasons already given, the claimant's case on perversity falls far short of the overwhelming case required to be established for perversity to be made out: see *Yeboah v Crofton* [2002] EWCA Civ 794, [2004] ICR 257.

73. For all these reasons, I am satisfied that the tribunal fully understood the separability issue. It directed itself correctly on the relevant legal principles engaged. It scrutinised the Bank's evidence with care and an appropriate degree of scepticism in the circumstances of this case. The tribunal's reasons were fully and cogently set out; and its conclusions were not internally contradictory. Like HHJ Auerbach, I can see no proper basis for this court to interfere with its decision. I would therefore dismiss this appeal.

Elisabeth Laing LJ:

74. I agree with Simler LJ's comprehensive judgment. The key question in any case is the question posed by the relevant statutory language, which, in short, requires tribunals in each case to consider the evidence and to decide what the true reason for an employer's actions is. Focus on a 'separability principle', unless that principle is properly

understood, as explained by Simler LJ in paragraphs 56-58 of her judgment, may distract tribunals from that task.

Underhill LJ:

75. I agree that this appeal should be dismissed for the reasons given by Simler LJ. I do not see our decision as turning on any question of principle or as opening any general breach in whistle-blower protection. The employment tribunal reached the conclusion that the principal reason why the claimant was dismissed was what the decision-makers perceived as the seriously inappropriate way in which she had challenged Ms Harding's competence/integrity (which reinforced concerns that that they already had about a lack of emotional intelligence in dealing with colleagues) and was not the fact that she had made protected disclosures. Both as a matter of common sense and on the authorities that was a legitimate distinction in principle, and the tribunal considered with evident care how it applied in the present case. Its decision was unquestionably open to it on the evidence. The fact that the tribunal found that the claimant had not in fact behaved in a way which justified her dismissal does not mean that it was required to find that the dismissal decision was taken on the proscribed ground.