

Determining the question of motivation in whistleblowing claims is not always as complicated as it seems

By [Grace Boorer](#)

3PB Barristers

University Hospital of North Tees & Hartlepool NHS Foundation Trust v Ms L Fairhall [2021] 6 WLUK 454

Background facts

1. Prior to her dismissal, the claimant was a senior employee with a continuous unblemished service record of 38 years.
2. In 2015, she became increasingly concerned about the workload of staff and, in particular, the increased pressure placed on district nurses. Between 21 December 2015 to 21 October 2016, she made 13 disclosures to various people outlining her concerns.
3. At first instance, the Tribunal concluded that all the disclosures were protected, noting that they alleged deficiencies in the standard of care provided by the NHS, which was a matter of public interest. The findings on the protected disclosures were not challenged on appeal.
4. Following one of the disclosures, the claimant indicated that she wished to instigate the whistleblowing policy. After returning from a brief period of leave, she was suspended by the Respondent.
5. Ultimately, following a long disciplinary process (which was heavily criticised by the Tribunal) the claimant was dismissed. The Tribunal did not accept that the reason for dismissal was conduct, as alleged by the Respondent, and instead concluded that the reason or principal reason for the dismissal was the protected disclosures made by the claimant. The Tribunal also upheld the detriment claims made by the claimant, which related to steps in the suspension and disciplinary process.

Grounds of appeal - dismissal

6. In respect of the dismissal, the Respondent's appeal was two-fold:
 - a. Firstly, the Respondent contended that the Tribunal had placed a positive evidential burden on the Respondent in the absence of an explanation for the dismissal.
 - b. Secondly, the Respondent contended that the Tribunal should only have focused on matters illuminated by the mental process of the decision makers and had erred in drawing inferences based on the conduct of numerous employees of the respondent in the lead up to the claimant's dismissal.

Decision of the EAT – dismissal

7. The EAT dismissed both limbs of the appeal, holding that the tribunal did not err "*in its hconsideration of the burden of proof nor in its assessment of the reasoning of the decision makers who decided to dismiss the claimant*" [43].
8. The EAT acknowledged that in a large organisation the route to dismissal may not be straightforward, and there may be a plan to remove the whistle blower which involves multiple people;

[36] The fact that the dismissal appears to be the culmination of a plan to get rid of the whistle blower may be circumstantial evidence to support the conclusion that the decision maker dismissed because of the protected disclosure; if there was an overall plan to get rid of the whistle blower, it is plausible that the decision maker was acting in accordance with that plan. Assessing factual scenarios of this nature is precisely what the employment tribunal is there to do.

9. The Tribunal distinguished this scenario, which was apparent in the instant case, with the situation in **Jhuti**¹. The 'Jhuti scenario' only applies where the decision maker "*is unaware of the machinations of those motivated by the prohibited reason*" [37], which was considered by His Honour Judge Tayler to be "*quite rare*". It is only in such circumstances where it is necessary for the Tribunal to attribute a reason to the decision maker that was not the reason operating in their mind. This was not the circumstances in the instant case, as the decision maker confirmed in evidence that they were aware of the Claimant's grievance, and the Tribunal specifically rejected their evidence that they were not

¹ Royal Mail Group Limited v Jhuti [2019] UKSC 55

influenced by the protected disclosures. Therefore, in this case, as in most circumstances, the Tribunal needed to look no further than the reasons given by the appointed decision maker².

10. The EAT went on to indicate that it is more likely in circumstances where there isn't a legitimate reason for dismissal for the 'wrongdoer' to distance themselves from the decision making. It would not be helpful in such circumstances to have '*excessively complex arguments about the difficulty in determining the precise mental processes of all those involved in the process (resulting) in a valid claim failing*' [41]. It is for the Tribunal to get a good sense of the reasons that operated in the mind of the dismissing officer in reaching its decision.
11. The EAT also reminded itself of the importance of the EAT not improperly interfering with the role of the tribunal, as was recently emphasised by Lord Justice Popplewell in **DPP Law Ltd v Greenberg [2021] EWCA Civ 672**.

Grounds of appeal – detriment

12. The Tribunal's decision in respect of the detriment claim was extremely brief and appeared as follows; "*The tribunal found that the decisions taken in each of the above matters was materially influenced in each case by the fact that the claimant had made protected disclosures*" [57].
13. The Respondent contended that the reasoning "*did not properly identify the person or persons responsible for each detriment short of dismissal, did not demonstrate that the correct legal test had been applied, and was so brief as not to be Meek compliant*" [58].

Decision of the EAT – dismissal

14. The EAT reminded itself of the decision **Meek v City of Birmingham District Council [1987] IRLR 250** at paragraph 8: "*It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a*

² Jhuti, para 60.

statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted”.

15. Following careful reading of the judgment, the EAT concluded that there was insufficient reasoning to show *“the tribunal’s analysis of the person or persons responsible for each detriment, and why it was decided that a material factor in the decision to subject the claimant to the detriment was her making protected disclosures”* [61]. The Tribunal should have analysed the individual steps, which resulted in the dismissal, as individual detriments.

Discussion

16. The case of **Fairhall** is a timely reminder that in most whistleblowing cases it is not necessary to complicate the question of motivation. It is rare for a decision maker to be unaware of the protected disclosure and, in the vast majority of cases, the Tribunal must simply analyse the reasons given by that decision maker. This remains the question even if multiple people are involved in a process culminating in the dismissal or there was a plan to get rid of a whistle blower, which did not just involve the decision maker.
17. However, if detriment claims are brought alongside an automatic dismissal claim pertaining to stages in a disciplinary process, it is important to remember that it is necessary for the Tribunal to carry out a separate analytical exercise in respect of the decision of each person said to be responsible for each detriment. This will likely be an onerous task on a Tribunal where different individuals have been involved in different steps of the process.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the [3PB clerking team](#).

9 August 2021



Grace Boorer

Barrister

3PB

Telephone: 01865 797700

grace.boorer@3pb.co.uk

3pb.co.uk