

# Protected disclosures: does *Kong* slam the door in the face of aggrieved claimants?

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By [Colin McDevitt](#)

3PB Barristers

This is a case which emphasises the rare nature of the *Jhuti* exception when considering an invented reason for an automatically unfair dismissal following the making of a protected disclosure. Does *Kong* slam the door in the face of aggrieved Claimants?

The Head of Legal at the Respondent company drafted a report in respect of which the Claimant made protected disclosures. The Head of Legal was somewhat put out and felt that the Claimant had impugned her integrity. The Claimant wrote an accusatory email which prompted the Head of Legal to go and discuss matters with the Claimant. The Head of Legal entered the Claimant's office without an appointment and without knocking. The Head of Legal was agitated from the outset of the encounter. A discussion followed which included the Claimant questioning the legal awareness of the Head of Legal. The Head of Legal was so upset that she had to leave the Claimant's office, slamming the door behind her. The Head of Legal then raised matters up the management chain, being upset with the Claimant's views and not being able to see how she could work with the Claimant. Mediation was refused. Senior managers took the view that the Claimant should be dismissed and so, after the Group Chief Auditor agreed, the Claimant was dismissed. The Head of Legal took no part in the decision to dismiss, but was this a *Jhuti*-type case?

We remind ourselves of the general principle that the reason for dismissal is the facts known to, or the beliefs held by, the person(s) who decided 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 the dismissal instead. The key features are that a person in the management hierarchy above the employee decided to bring about the dismissal because of the protected disclosures and manufactured an invented reason (such as performance issues) which the dismissing manager then adopted, being unaware that the invented reason was not genuine.

As might be expected given that protected disclosures had been made, the Claimant brought a claim of automatically unfair dismissal for having made the disclosures, pursuant to s.103A of the Employment Rights Act 1996. Her claim failed.

The Claimant appealed to the Employment Appeal Tribunal and HHJ Auerbach handed down the decision on September 10<sup>th</sup> 2021. The appeal, like the claim to the ET, failed.

The EAT stated that the ET had been correct to hold that the dismissal was for reasons held in the minds of the senior managers and the ET was correct to not impute to those managers the motivation of the Head of Legal. The *Jhuti* exception, the EAT held, did not apply in the circumstances. Whereas the Head of Legal's conduct towards the Claimant was materially influenced by the protected disclosures, the senior managers who took the decision to dismiss the Claimant had a different motivation - they were not motivated by the protected disclosures and, instead, they were motivated by the Claimant's conduct towards the Head of Legal which they considered was a personal attack on the abilities of the Head of Legal. The senior managers also considered that the Claimant's behaviour was reflective of a wider problem with the Claimant's interpersonal skills.

HHJ Auerbach described the application of the *Jhuti* exception as a "relatively rare occurrence" (para 72). He said that there are 3 essential features to the *Jhuti* exception:

- (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason;
- (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case; and
- (c) 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.

As a parting shot, HHJ Auerbach gave us an interesting insight into his views on whether the Head of Legal was above the Claimant in the hierarchy (para 78). He doubted whether the Head of Legal was within the chain of command as described in *Jhuti*. In *Jhuti*, the inventing manager was the Claimant's line manager who used his position to set Ms Jhuti up to fail. That was different to the present case where, although the Head of Legal was a part of senior management, there was a distinct reporting line from the Claimant to another manager. The Head of Legal had no responsibility for the Claimant and she was not a direct superior of the Claimant.

This case reminds us of the rare application of the *Jhuti* exception to the causation question of the reason for dismissal where there has been at least one protected disclosure. Claimants have several hurdles to overcome in order to bring themselves into the *Jhuti* exception and they ought to have in mind whether the influencer of the decision maker is actually a person who has responsibility for their line management. As ever, the causation question is central to the success or failure of such claims. *Kong* doesn't slam the door to such claims, but it emphasises that the door is barely ajar.

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**Colin McDevitt**

*Barrister*  
**3PB**

01962 868 884  
Colin.mcdevitt@3pb.co.uk  
3pb.co.uk