Neutral Citation Number: [2017] EWCA Civ 1632

Case No: A2/2016/2952

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE MITTING

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2017

Before:

LORD JUSTICE JACKSON
LORD JUSTICE UNDERHILL
and
LORD JUSTICE MOYLAN

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Between:

ROYAL MAIL LTD	**Appellant**
- and -	
KAMALJEET JHUTI	**Respondent**

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Mr Simon Gorton QC and **Mr Jack Mitchell** (instructed by **Weightmans**) for the **Appellant**
Mr Simao Paxi-Cato and **Mr Matthew Jackson** (instructed by **Net Solicitors**) for the **Respondent**

Hearing date: 29 June 2017
Written Submissions: 21 and 25 July 2017

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Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. This is an appeal by Royal Mail Group Ltd. against a decision of the Employment Appeal Tribunal (Mitting J sitting alone) in a whistleblower case. The Claimant, Ms Kamaljeel Jhuti, brought proceedings in the Employment Tribunal both for unlawful detriment contrary to section 47B of the Employment Rights Act 1996 and for "automatic" unfair dismissal contrary to section 103A. She succeeded on the former claim but lost on the latter because, although her line manager had on the proscribed grounds treated her as having a poor performance record, the different manager who took the decision to dismiss her was unaware of that motivation and had made the decision in good faith on the basis of what she (reasonably) understood to be inadequate performance. Mitting J allowed the Claimant's cross-appeal on the basis that the line manager's unlawful motivation should be treated as the reason for the dismissal. The issue thus raised is of some general importance and Mitting J himself gave permission to appeal.

2. Royal Mail has been represented before us by Mr Simon Gorton QC and Mr Jack Mitchell. Mr Gorton also appeared in the EAT but not in the ET, where Royal Mail was represented by Mr Steve Peacock of Weightmans. The Claimant has been represented throughout by Mr Simao Paxi-Cato of counsel: in this Court he leads Mr Matthew Jackson.

THE FACTS

3. The facts that are relevant for the purpose of this appeal can be stated fairly shortly.

4. The Claimant was recruited as a media specialist in the MarketReach unit of Royal Mail's Sales Division. The role of MarketReach is to promote the use of mail by businesses engaged in marketing. The Claimant was initially on a trial period of six months.

5. Shortly after she started her employment the Claimant observed what she believed were irregularities in the way that colleagues were offering customers what were described as "tailor-made incentives" ("TMIs"). It is not necessary for the purpose of this appeal to understand the details of the irregularities in question. At the risk of some over-simplification, the essential point is that sales staff were entitled to offer discounts to new clients, or to existing clients in order to encourage them to try new products, but that it would be a breach of OFCOM guidance for such incentives to be given in respect of ongoing business. The Claimant reported her concern that such breaches might be occurring to her immediate manager, Mr Mike Widmer, in particular in two e-mails dated 8 and 12 November 2013.

6. On 13 November 2013 Mr Widmer had a long meeting with the Claimant in response to her e-mails. Her account of the meeting and his were very different, but the ET preferred her evidence. In short, it found that Mr Widmer put her under great pressure to withdraw her allegations, with a clear

if veiled threat that if she did not do so her employment would not continue beyond the end of her probation. He sought to characterise her allegation as being that colleagues had been offering TMIs to clients' procurement departments rather than to their marketing departments – which would not necessarily be wrong, depending how the choices as to new business were made in that particular company – but that was, the ET found, a deliberate mischaracterisation of her complaint, which was about the unequivocal wrongdoing of TMIs being offered in respect of existing business. The Claimant was extremely surprised and shaken by Mr Widmer's hostile response to her complaint and was concerned for her job. She asked him what she should do. He said that she should write to him withdrawing her allegations and saying that she had misunderstood the rules governing the use of TMIs. She agreed to do so, and that evening sent him an e-mail in appropriate terms apologising for "having got her wires crossed". He subsequently told her that she needed to get further training in the use of TMIs.

7. Over the following months the Claimant became increasingly unhappy about her relationship with Mr Widmer. He was critical of her performance, and imposed targets and requirements for improvement, in a way which she believed was harsh and unreasonable and which she attributed to his reaction to her earlier allegations about the misuse of TMIs. In February 2014 she complained to the HR department, mentioning in e-mails that she had drawn attention to the misuse of TMIs. An arrangement was made for her to be managed directly by Mr Widmer's superior, a Mr Reed. He extended her probationary period by a further month and had a meeting with her on March 3 2014. She was dissatisfied with his response at that meeting. On 10 March she raised a grievance about her treatment by Mr Widmer. On 12 March her GP signed her off work suffering from work-related stress. She never returned to work.

8. In due course the decision was taken that the Claimant's future within Royal Mail needed to be resolved. The responsibility was given to Pauline Vickers, the Head of Sales Operations, who had had no previous involvement with her management. She was sent by the HR department a file of the e-mails passing between the Claimant and Mr Widmer, though this did not include her e-mails of November 2013 making the TMI allegations. On 11 July 2014 she wrote to the Claimant to tell her that the termination of her employment was being considered and invited her response either at a meeting or in correspondence.

9. The Claimant did not attend the proposed meeting because she was too unwell. She did however send Ms Vickers a series of e-mails between 11 and 14 July 2014. These were voluminous and incoherent, reflecting her poor mental state. However in the course of them she referred to the allegations which she had previously made about misuse of TMIs. Ms Vickers was concerned about this and asked Mr Widmer to comment. He sent her an e-mail describing how he had dealt with the Claimant's original concerns and how she had, he said, accepted that they were based on a misunderstanding. He supplied a copy of her e-mail of 13 November 2013 retracting her

allegations, though not of her earlier e-mails. Ms Vickers accepted his account.

10. On 21 July 2014 Ms Vickers wrote to the Claimant giving her three months' notice of dismissal. The letter was accompanied by a four-page summary of the circumstances leading up to her decision. These made it clear that the reason for the termination was squarely her unsatisfactory performance. The summary concluded:

> "Taking all the evidence into account, in my capacity as decision making manager, I am required to make an assessment as to whether I feel it's likely that, upon KJ's return to work, she would be able to meet the standards required in the role of Media Sales Specialist. Given that over the period of 28 November–3 March KJ did not meet this standard, despite being issued with a specific five point improvement plan my view is that it's unlikely that she would achieve the standards expected in the role. On this basis, my decision is that her employment should be terminated."

The summary did refer to the allegations about the misuse of TMIs. As to this, Ms Vickers said:

> "I reviewed the emails relating to KJ's concerns about the TMI process and requested further clarity from Mike. I have confirmed with Mick that KJ did raise the issue of TMIs being used inappropriately; this was discussed during a 1 to 1 and detailed in Mike's email dated 14 November 2013. Mike's recollection is that this was resolved and her concerns were based on a misunderstanding of the process. This recollection is supported by KH's email of the 13 November, in which she clearly states "*Also, thank you for the clarification; I am so sorry I got my wires crossed re TMI's to procurement. I didn't realise sometimes this can happen and hence team members would take this route.*" Mike suggested KJ completed further training with Phil Walkington and in his email of the 14 Nov states, "*it is vital you understand TMI's, including what you can and cannot do, what you can and cannot say to a customer, where they are appropriate and the process involved in applying for one*". In Mike's feedback email of the 28 November, Mike indicates that KJ had not followed up any of the training recommended on 14 Nov, including the TMI session. It would appear from this evidence that KJ raised an issue on TMI's based on her limited understanding of the process, this concern was appropriately handled, the misunderstanding was accepted by KJ and additional training was offered to enable KJ to fully understand the process. I have therefore discounted this as an issue relating in my considerations of KJ meeting the required standard of performance."

11. The Claimant appealed. Her appeal was dismissed by an appeals officer, Ms Madden, on 28 August 2014. She said in her reasons that she had spoken to Mr Widmer and she accepted his account of the meeting of 13 November 2013.

THE BACKGROUND LAW

12. The provisions granting protection to whistleblowers were introduced by the Public Interest Disclosure Act 1998 by way of amendments to the 1996 Act. Part IVA contains the definition of "protected disclosure". No issue on that arises in this appeal. The operative provisions affording protection to workers who have made a protected disclosure deal separately with cases of dismissal and other "detriment". I take detriment first.

DETRIMENT

13. Section 47B (1), which was inserted into Part V of the 1996 Act ("Protection from Suffering Detriment in Employment"), provides that:

> "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure".

14. In *NHS Manchester v Fecitt* [2011] EWCA Civ 1190, [2012] ICR 372, this Court held that a claim could not be brought against an employer under sub-section (1) on the basis only that it was vicariously liable for the acts of individual employees, because it did not impose any liability on the individual wrongdoer. In response to that decision, the Enterprise and Regulatory Reform Act 2013 added new sub-sections (1A)-(1E) to section 47B. Sub-section (1A) reads:

> "A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done-
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority,
>
> on the ground that W has made a protected disclosure."

Sub-section (1B) provides for vicarious liability, as follows:

> "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."

Sub-section (1D) gives employers a "reasonable steps" defence to a vicarious liability claim.

15. Section 48 (1A) gives the employment tribunal jurisdiction to determine a complaint of a breach of section 47B.

16. Section 49 (1) provides that if a breach of section 47B is established the tribunal –

> "(a) shall make a declaration to that effect, and
>
> (b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates."

Sub-section (2) reads:

> "… [T]he amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—
>
> (a) the infringement to which the complaint relates, and
>
> (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right."

DISMISSAL

17. Section 103A, which was inserted by the 1998 Act into Part X of the 1996 Act ("Unfair Dismissal"), reads:

> "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."

18. Absent provision to the contrary, dismissal for making a protected disclosure would also be unlawful under section 47B (1), since it is plainly a detriment to which the worker is subjected by his employer. However, section 47B (2) provides that:

> "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)."

19. The provisions of Part X which give the employment tribunal jurisdiction to entertain claims for unfair dismissal and provide for remedies – see sections 111-132 – apply to claims under section 103A as they do to other claims of unfair dismissal, subject to certain particular qualifications which I need not itemise here.

20. The draftsman's decision to treat whistleblower dismissal as a different kind of animal than whistleblower detriment gives rise to one anomaly already identified in the case-law. This is that for the purpose of section 103A the proscribed motivation must be the only, or at least the principal, reason for the dismissal, whereas the phrase "on the ground that" in section 47B comprises any case where it is a significant part of that motivation: that this was anomalous was acknowledged by Elias LJ in *Fecitt* – see para. 44 (p. 384 C-D). Another anomaly, following the changes effected by the 2013 Act, is that a worker can be individually liable for whistleblower detriment whereas under section 103A, as for unfair dismissal generally, only the employer can be liable. Other anomalies may await exploration.

"ORDINARY" UNFAIR DISMISSAL

21. In the present case there is no claim for "ordinary" unfair dismissal, because the Claimant had insufficient length of service. However, for reasons which will appear, I need to set out the terms of section 98, which prescribes the test of fairness in such cases, and to identify the essential nature of how it works.

22. I need not set out the entirety of section 98, but the material parts for our purposes read:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if ... —
>
> (a)-(d) ... [various "admissible" reasons are identified]
>
> (3) ...
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

> (b) shall be determined in accordance with equity and the substantial merits of the case.
>
> (5)-(6) ..."

23. Section 98 thus requires a two-stage enquiry. First, by sub-section (1) (glossed in sub-sections (2)–(3)), the employer must show that the reason, or principal reason, for the dismissal is of an admissible kind. Second, by sub-section (4), the tribunal must decide whether it was reasonable of the employer to dismiss the employee for that reason.

24. It is well established that the first stage of the exercise required by section 98 involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. The classic formulation is that of Cairns LJ in *Abernethy v Mott Hay and Anderson* [1974] ICR 323, approved by the House of Lords in *W Devis & Sons Ltd v Atkins* [1977] ICR 662. Cairns LJ said, at p. 330 B-C:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."

In *Beatt v Croydon Health Services NHS Trust* [2017] EWCA Civ 401, [2017] IRLR 748, I said, at para. 30 (p. 752):

> "As I observed in *Hazel v Manchester College* [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it is sometimes put, what 'motivates' them to do so (see also *The Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658, at para. 41)."

I will refer to the mental processes that cause the employer – or, more accurately, the person(s) responsible for the dismissal decision – to dismiss the claimant as their "motivation".

25. The second stage of the inquiry is essentially objective because it depends on the reasonableness of the decision. Nevertheless it also, albeit in a different way, requires some examination of the mental processes of the decision-maker and in particular of what he or she (reasonably) knew or believed: this is trite law, emerging from a long line of cases most recently reviewed in the decision of this Court in *Orr v Milton Keynes* which I consider below (see paras. 45-51). It will be noted that the effect of section 103A – which is part of a group of sections in Part X (sections 98B–104G) which proscribe dismissal for various specified reasons – is to render this second stage unnecessary: if the proscribed motivation is found the dismissal is automatically unfair.

RELATIONSHIP WITH DISCRIMINATION CONTRARY TO THE EQUALITY ACT 2010

26. It is worth adding something about how section 47B and section 103A (with their various ancillary provisions) relate to the provisions proscribing discrimination in the Equality Act 2010. In one sense they too are concerned with discrimination, and the phrase "whistleblower discrimination" is very commonly used. That is not inapt since the underlying concept is the same. But it is important to appreciate that the two statutory schemes are not identical, and there are likewise some significant differences in terminology. Thus, while it no doubt makes sense to interpret identical language (where it occurs) in the same way, it is not safe always to read across from one scheme to the other. In *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] ICR 799, which involved a claim of whistleblower dismissal, Mummery LJ said, at para. 48 (p. 809 D-E):

> "Unfair dismissal and discrimination on specific prohibited grounds are ... different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs the risk of complicating rather than clarifying the legal concepts."

That case was concerned specifically with section 103A, and the structure and language of section 47B is closer to that of the Equality Act, particularly since the changes introduced by the 2013 Act. But even so there is no precise correspondence, and caution is required in using authority on the one statute as a guide to the other.

27. One particular difference between the two schemes which it is important to bear in mind in this case is that whereas the whistleblower provisions of the 1996 Act provide separately for dismissal and "detriment", as explained above, the 2010 Act makes no such distinction: although discrimination by dismissal is specifically identified in section 39 (2) (the principal provision prohibiting discrimination in employment), it is simply one of a list of proscribed discriminatory acts alongside "subjecting [the employee] to any other detriments" (see heads (c) and (d)). The separate provision for dismissal and detriment, which has the consequences noted at para. 20 above, is a peculiarity of the whistleblower provisions.

THE DECISION OF THE EMPLOYMENT TRIBUNAL

28. The Claimant's claims were heard, as regards liability only, by a tribunal sitting at London Central chaired by Employment Judge Baty in September 2015. The Judgment and Reasons were sent to the parties on 11 November 2015. They are exemplarily full and clear.

29. The Tribunal had to determine a large number of factual and legal issues, but for present purposes its decision can be sufficiently summarised as follows:

(1) Protected disclosures. The Claimant's various allegations to Mr Widmer, Ms Vickers and others about the abuse of TMIs were held to constitute protected disclosures.

(2) Detriment. The Claimant suffered four specific detriments on the ground that she had made those disclosures. Two of these concerned her treatment by Mr Widmer. They were, as summarised at para. 2 of the Agreed List of Issues:

> "(e) Being bullied, harassed and intimidated by Mike Widmer, who imposed mandatory weekly one-to-one meetings and targets solely on the Claimant
>
> (f) Being served with a document entitled 'Performance Plan Objectives' by Mike Widmer and informed that it was a condition of her passing her probation to complete this and provide all her key contacts from her previous employments in the travel sector."

The other two concerned offers made to the Claimant by Ms Rock to terminate her employment by consent: I need not give the details.

(3) Time limit. The Tribunal rejected a contention by Royal Mail that the detriment claim was out of time.

(4) Dismissal. The protected disclosures were not the reason for the Claimant's dismissal, because they did not affect the mental processes of Ms Vickers (or Ms Madden); and accordingly the claim under section 103A failed. However that did not necessarily prevent the Claimant from recovering for the loss caused by the dismissal, on the basis that that loss was a consequence of the unlawful detriments: I return to this below.

30. The relevant part of the Tribunal's reasoning for the purpose of this appeal is at paras. 342-346. I think it is worth quoting these in full, subject to omitting a few immaterial details:

> "342. Ms Vickers was the person responsible for whether or not to dismiss the claimant, which she ultimately did by notice given to her on 21 July 2014. Ms Vickers made her decision based on the information that was in front of her. The background to this is that, as we have found, Mr Widmer had, because of the claimant's protected disclosures of 8 and 12 November 2013, embarked on a course of bullying and harassment against the claimant. The first thing he achieved in this was, by threatening the claimant in relation to her job, to get the claimant to write an email stating that she had got her wires crossed in relation to the TMI issue. The email which Mr Widmer got the claimant to write on 13 November 2013 is crucial because, when one looks at the documents alone, it looks like a retraction of the allegation on the surface and

enables Mr Widmer to say in future, as he does, that he thought that issue had been dealt with or, as he did in one email to the claimant, to feign ignorance of that she meant when she referred to '*the issue she had raised*'. On top of that, he then put together a series of performance-related emails which followed the various weekly meetings which he had set up after that. Superficially, on the surface, without seeing the context which we have been able to at this hearing and to hear from the claimant, they look like a managed performance monitoring series of meetings. When one reads that chain of emails on their own, we can see how someone would come to the conclusion that this was a bona fide performance procedure.

343. Furthermore, Ms Vickers did not have the advantage of seeing the full picture when she was making her decision. Firstly, although she was aware of the bullying and harassment complaint by the claimant, HR had directed that this should be dealt with separately … so she did not know fuller details of the claimant's complaint against Mr Widmer. Furthermore, whilst she had been provided with the 'retraction' email of 13 November 2013 and Mr Widmer's 'performance' emails, she had not been provided with copies of the disclosures made on 8 or 12 November 2013, or subsequent documents such as the 6 February 2014 email to Ms Heath [these were other e-mails referring to the misuse of TMIs]. In addition, crucially, she did not get to hear from the claimant herself as the claimant was too ill to attend any meeting to explain all this. What she did have were the claimant's emails of 11 to 14 July 2014. Firstly, given their style, it is not surprising that she found them irrational to some extent. However, she nonetheless picked up on the two lines in particular about '*the business of cheating the public of the business value*' and '*how staff also cheat the business by millions of pounds*'. She went to Mr Widmer to investigate. Mr Widmer replied by email explaining, disingenuously, that this was an issue which had been raised but that the claimant had told him that she had got her wires crossed. He went on to cross-refer to his subsequent instruction that the claimant should get more training from Mr Walkington regarding TMIs, which also ties in with one of his contemporaneous emails. In his reply, he focuses, as he has sought to do at this tribunal, on the claimant's initial email of 8 November 2013 concerning TMIs in connection with procurement, as if the misunderstanding was simply about the person at the client with whom the TMI was agreed (whether they were in procurement or marketing) rather than what the TMI was in respect of. …

344. As noted, his explanation fits in with the contemporaneous 'retraction' email of 13 November 2013. Ms

> Vickers accepted his explanation which, given that it tied in with contemporaneous emails, was not unreasonable of her.
>
> 345. Given the information that was before her, it was not only not surprising but was in fact inevitable that Ms Vickers would choose to dismiss the claimant and would choose to do so for the reasons she sets out in her letter of 21 July 2014 at paragraph 3, essentially on the grounds of performance. We find that, in terms of her own reasoning, the fact that the claimant had made protected disclosures was not part of her reasoning and that she genuinely believed that the claimant was a poor performer. In this context, we note that she had not even seen any of the written disclosures which we have found to be protected disclosures (the emails of 8 and 12 November 2013). Following the case of *CLFIS (UK) v Reynolds*, Ms Vickers must herself have been motivated by the protected disclosures and, notwithstanding that the evidence before her was hugely tainted as a result of Mr Widmer and others, there is no basis on which her decision can be said to be based on the disclosure on the basis of someone else's motivation. Therefore, the principal reason for the decision was not the making of the protected disclosures and the complaint of automatically unfair dismissal under section 103A of the Employment Rights Act 1996 fails.
>
> 346. <u>However, given Mr Widmer's actions, including the treatment which he meted out to the claimant as a result of her protected disclosures, the email trail that he prepared in this context, and his other actions as set out in these reasons above, it was inevitable that Ms Vickers would, as she did, dismiss the claimant</u>."

(The underlining of para. 346 is in the original.)

31. Those findings are explicit. Ms Vickers both genuinely and reasonably believed that the Claimant should be dismissed for poor performance; but she did so on the basis of partial and misleading information most of which derived directly or indirectly from Mr Widmer, who was motivated by the protected disclosures that she had made.

32. I need to explain the Tribunal's reference in para. 345 to *CLFIS (UK) Ltd v Reynolds*. That is a decision of this Court ([2015] EWCA Civ 439, [2015] ICR 1010), in which I gave the leading judgment. It concerned a claim of age discrimination under the 2010 Act and arose out of the termination of the claimant's contract as a worker (to which I will refer as a dismissal, though she was not employed under a contract of service). The employment tribunal held that the person making the decision had done so wholly because of concerns about her performance; but on the appeal to this Court it was argued that the reports on which those concerns were based might have been motivated (at least in part) by her age. So far as relevant for our purposes, the decision established two things:

(1) Even if the motivation of the report-maker(s) was tainted that would not impugn the dismissal decision, because the only relevant question was what had motivated the decision-taker.

(2) However, that approach did not necessarily mean that in such a case a claimant could not recover compensation for the dismissal, since he or she could in principle rely on the making of the unfavourable report as an act of unlawful discrimination in its own right, for which the employer was liable. As I put it at para. 39 (5) (p. 1026 G-H):

> "The losses caused to [the claimant] by her dismissal could be claimed for as part of the compensation for [that] discriminatory act, since they would have been caused or contributed to by that act and would not (at least normally) be too remote."

33. Although it was for point (1) that the ET specifically referred to *CLFIS v Reynolds*, it clearly also had point (2) in mind. The evident purpose of the finding in para. 346 – that is, that the Claimant's dismissal was the inevitable consequence of Mr Widmer's treatment of her – is to lay the factual foundation for an award of compensation for the losses caused by the Claimant's dismissal on the basis that the dismissal was itself a consequence of the detriments which it had found: for want of a neater shorthand, I will refer to this as "compensation for dismissal consequent on detriment". That that was the ET's intention was explicitly confirmed at a case management hearing on 24 November 2015 at which directions were given for a remedy hearing.[1] The Claimant had served a schedule of loss claiming "career-loss earnings", i.e. including loss immediately attributable to her dismissal. Mr Peacock objected, on the basis that the dismissal of her claim under section 103A precluded any such claim. As recorded in his summary of the hearing, the Employment Judge rejected that objection. He says:

> "I directed [Mr Peacock's] attention to the provisions of the judgment regarding the causal link between the detriments and the dismissal, contained in the section at paragraphs 342-346, and in particular the underlined paragraph (at 346)."

THE APPEAL TO THE EAT

34. Royal Mail appealed to the EAT on two grounds. The first, described as the principal ground, challenged the ET's finding that the detriment claims were in time. Its secondary ground was headed "para. 346 of the Reasons" and referred also to what EJ Baty said at the case management hearing. Para. 13 of the grounds reads:

> "C's claims only succeeded under s. 47B and not under s. 103A. A finding that there has been a breach of s. 47B cannot give rise to a claim in respect of any losses that flow from

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1 The hearing has not proceeded, pending the outcome of the appeal to the EAT and now the present appeal.

> dismissal in any event: see s. 47B(2) as those matters fall within s. 103A and that claim was dismissed."

35. In her Respondent's Answer the Claimant cross-appealed against the dismissal of her claim under section 103A.

36. With the agreement of counsel, Mitting J heard argument on the cross-appeal first. He allowed it, and it was apparently agreed that in those circumstances the issues raised by Royal Mail's appeal "fell away"[2] and he did not decide them. His reasoning on the cross-appeal can be summarised as follows.

37. He started, at para. 29 of his judgment, by holding that the ET had been wrong to treat the issue as decided by *CLFIS v Reynolds*, because the statutory schemes as regards discrimination and whistleblower dismissal were different. He referred in this regard to the observation by Mummery LJ in *Kuzel* which I have quoted at para. 26 above. It is convenient to say here that it was common ground before us (and I agree) that Mitting J was right about this: this is a good example of a situation where it is unsafe to apply a direct read-across between the two statutory schemes. The starting-point for the analysis must, as Mitting J said at para. 30, be the language of section 103A itself.

38. As to that, Mitting J points out at para. 30 of his judgment that the correct approach to establishing "the reason (or, if more than one, the principal reason) for [a] dismissal" in the context of a claim of unfair dismissal was very well settled. He quotes what Cairns LJ said in *Abernethy* which I have set out at para. 24 above. He also quotes, at para. 31, Mummery LJ's reference in *Kuzel* to "a set of facts operating on the mind of the employer when dismissing the employee" (para. 54 (p. 810)).

39. Mitting J goes on to observe, at para. 32, that in the great majority of cases the only relevant mind will be that of the person who takes the decision to dismiss – or, where the decision is taken jointly, the minds of the persons taking it. But, he says, "there is no binding statement in the authorities that the mind of that person or those persons must in all circumstances be equated with that of the employer". He then refers to a judgment of mine in *Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658. The facts in that case had not been properly found by the ET, but one possible reading was that a senior manager, Mr Berne, who resented the fact that the claimant had made a protected disclosure, had set in motion disciplinary proceedings against him in which false or partial evidence was presented which the decision-taking managers (a Mr Atkinson and, on appeal, a Mr Logue) had innocently accepted. At para. 42 of my judgment I said:

> "It was accepted before us, and appears to have been accepted by the ET, that the relevant decision-makers – that is, the persons with whose motivation we are concerned – are Mr Atkinson and Mr Logue. In principle, therefore, it is immaterial what Mr Berne may have thought or wanted *except* to the extent that that operated on their minds. There was some

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[2] I am not sure that that was strictly correct, but there is no need to explore the point.

> discussion before us of whether that approach was applicable in all cases or whether there might not be circumstances where the actual decision-maker acts for an admissible reason but the decision is unfair because (to use Cairns LJ's language) the facts known to him or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation – for short, an Iago situation. Mr Carr [counsel for the employer] accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct."

I went on to say that that had not, however, been the basis of the ET's reasoning.

40. Mitting J rejected a submission by Mr Gorton that my observations in *Baddeley* were relevant only to the issue of reasonableness (i.e. under section 98 (4)) and not to the question of the reason for the dismissal. He says, at para. 34:

> "I can see no reason of principle why any such clear distinction should be drawn. A man can manipulate what a person believes as to his reason just as well as he manipulates what a person believes as to the fairness of decisions which flow from having that reason. I, therefore, reject Mr Gorton's submission on that issue. I am satisfied that, as a matter of law, a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them."

41. Having reached that conclusion, Mitting J proceeds, at para. 35, to consider "whether on the facts found by the Employment Tribunal the same principle can apply in more nuanced circumstances such as those which exist here". He concludes that it does. His reasons read as follows:

> "First, Mr Widmer was the Claimant's line manager responsible for induction and supervision and for allocating duties to her and, in due course, for reporting upon her performance. Secondly, she made protected disclosures to him, disclosures which he realised were serious and of significance to him, to those in positions senior to him and to the Respondents generally. Thirdly, she was deliberately subjected to detriments by him from the moment that she made the disclosure until he ceased to be her line manager. Fourthly, his temporary replacement, Mr Reed, displayed no difference in approach from that adopted by Mr Widmer. Fifthly, Mr Widmer was setting up a paper trail which set her to fail. Sixthly, he succeeded. Seventhly, he lied to Ms Vickers about the disclosures made by the Claimant by explaining

> disingenuously that this was an issue which had been raised but that the Claimant had told him that she had got her wires crossed and by giving her email to him of 13 November 2013 to Ms Vickers, but not the earlier emails of 8 and 12 November 2013. Eighthly, Ms Vickers was deprived of information for unexplained reasons by Human Resources who did not give her copies of the emails of 6 February and 25 and 26 February 2014 and by the decision to separate the grievance from performance issues."

42. Mitting J concludes, at para. 36:

> "In those circumstances, it is not only the mind of Ms Vickers which needs to be examined to discern the Respondents' reasons for dismissal. The reason and motivation of Mr Widmer must also be taken into account. Once it was, as the Employment Tribunal found, it was inevitable that dismissal would occur and it did occur on the Tribunal's findings by reason of the fact that the Claimant had made prohibited disclosures principally to Mr Widmer."

THE APPEAL TO THIS COURT

43. Formally the only issue before us was Royal Mail's challenge to Mitting J's decision on the cross-appeal about the unfair dismissal claim. But it seemed to us that it was unsatisfactory to consider that issue without considering also the point raised by para. 346 of the ET's Reasons and challenged in the second ground of appeal to the EAT. The parties readily consented to our deciding that question, and indeed much of the ground had already been traversed in a late-served supplementary skeleton argument from Mr Gorton and Mr Mitchell[3] and a response to it from Mr Paxi-Cato.

(1) THE SECTION 103A ISSUE

44. Mr Gorton's oral submissions did not precisely follow the format of Royal Mail's pleaded grounds and I need not reproduce those grounds here. The foundation of his case as developed before us was that it was settled law that in any case of unfair dismissal the only relevant consideration was what had motivated the person or persons taking the decision to dismiss. He accepted, as I have said, that *CLFIS v Reynolds* had no direct application, because the scheme of the 2010 Act is different, and that the ET had been wrong to treat it as determinative; but he submitted that its underlying conclusion had nevertheless been correct. He submitted that we were bound in that regard by the decision of this Court in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704, to which neither the ET nor the EAT had been referred. I need to consider that decision in some detail.

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[3] Purely for convenience, and without any disrespect to Mr Mitchell, I will refer to the skeleton argument hereafter simply as Mr Gorton's.

45. The facts in *Orr* are not straightforward, but at the cost of some oversimplification they can be summarised as follows. The claimant employee was dismissed for behaving in an offensive and insubordinate manner towards his team leader, a Mr Madden. The dismissal decision was taken by a more senior manager, a Mr Cove, following a disciplinary hearing in which Mr Madden gave evidence of the conduct in question: the claimant did not attend or give his account. It was subsequently established (or at least arguably so) that the conduct in question had been in response to unreasonable conduct on the part of Mr Madden and to a racist comment made by him; but that had not come out in the evidence available to the decision-taker. It can be seen that the essentials of the factual situation are similar to those of the present case.

46. The claimant brought proceedings for unfair dismissal and racial discrimination. The tribunal allowed the discrimination claim, but it found the dismissal to be fair, on the basis that Mr Cove reached a reasonable decision on the basis of the information available to him. That decision was upheld by the EAT. It was also upheld in this Court but only by a majority (Moore-Bick and Aikens LJJ, Sedley LJ dissenting).

47. The leading judgment for the majority is that of Moore-Bick LJ. His reasoning as regards the present issue can be summarised as follows:

    (1) The issue to be decided was "who is to be regarded as the employer for the purpose of section 98 of the 1996 Act ?": see para. 51 (p. 719E). More specifically (see para. 54 (p. 720 B-C)), was it necessary to focus only on Mr Cove, who took the actual decision to dismiss, or was it necessary, as the claimant contended, to treat "the employer" as having also the fuller knowledge enjoyed by Mr Madden ?

    (2) The correct approach to a question of that kind was set out by Lord Hoffmann, delivering the opinion of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, namely "whose act (or knowledge, or state of mind) was *for this purpose* intended [by the legislation in question] to count as the act etc of the company ?". The passage is quoted by Moore-Bick LJ at para. 56 of his judgment (p. 721 C).

    (3) At para. 57 Moore-Bick LJ formulates that approach as it applies to the issue before the Court. He says that it is well-established by authority that the exercise required by section 98 (4) depends on what the employer reasonably believes, on the basis of what it reasonably knows, about the relevant matters[4], and he continues (p. 721E):

    > "Since belief involves a state of mind, it is necessary, as Lord Hoffmann said, to determine whose state of mind

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4 The authorities in question, beginning with *British Home Stores Ltd v Burchell* [1980] ICR 303 (note), had been reviewed at length at paras. 38-50 of his judgment (pp. 714-9).

> was *for this purpose* intended to count as the state of mind of the employing company or organisation."

(4) At para. 58 he says that Parliament must have appreciated that in the case of an organisation of any size the power of dismissal would be exercised not at the top of the organisation but by a duly authorised and appropriately skilled person at a lower level. He says (p. 721G) that it follows that:

> "The answer to the question 'Whose knowledge or state of mind was *for this purpose* intended to count as the knowledge or state of mind of the employer?' will be 'The person who was deputed to carry out the employer's functions under section 98'."

That represents the essential *ratio* of *Orr*.

(5) The person deputed to carry out the functions in question was Mr Cove. Moore-Bick LJ says, at para. 59 (pp. 721-2):

> "[T]o impute to Mr. Cove knowledge of Mr. Madden's behaviour that he could not reasonably have acquired through the appropriate disciplinary procedure in order to enable Mr. Orr to treat as unreasonable and therefore unfair a decision that was in all respects reasonable would be to impose on the Council as the employer a more onerous duty than that for which section 98 provides."

He goes on to address the contrary conclusion of Sedley LJ, but I will come back to that presently.

48. Aikens LJ delivered a substantial judgment agreeing that the appeal should be dismissed. Although Sedley LJ suggests that Aikens LJ's reasons are not identical to those of Moore-Bick LJ, I can detect no difference as regards the issue with which we are concerned. They can be summarised as follows:

(1) At para. 78 he summarises under eight heads the established principles about the interpretation and application of section 98 of the 1996 Act. I need not set these out in full, but I should note that, although most are concerned with the approach to sub-section (4), i.e. the second stage of the enquiry required by the section, the first two are directed to the first stage. They are:

> "(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.
>
> (2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the 'real reason' for dismissing the employee was one of those set out in the statute or was of a kind that

> justified the dismissal of the employee holding the position he did."

(As regards the first of those propositions, Aikens LJ gives a footnote reference to *Abernethy* and its approval by the House of Lords in *Devis v Atkins*. As regards the second, he gives references to *West Midlands Co-Operative Society Ltd v Tipton* [1986] ICR 192, *per* Lord Bridge at p. 210C, and, again, *Devis v Atkins*, *per* Lord Dilhorne at pp. 676-8 and Lord Simon at pp. 682-3.)

(2) At para. 83 he summarises the claimant's case, namely that the council was to be taken to have known the facts which were known to Mr Madden but not to Mr Cove. He continues, at para. 84 (p. 728 C-E):

> "As I understood it, [counsel for the claimant] had two arguments. First, he submitted that if the facts known to Mr Madden are to be attributed to the council, as employer, then its 'real reason' for dismissing Mr Orr for his conduct ... cannot be characterised as 'dismissal for gross misconduct'. That is because, in the light of that knowledge, the 'set of facts' or 'set of beliefs' that were *known to the [corporate] employer at the time* could not amount to 'gross misconduct'. Secondly, if that knowledge is attributed to the council, he submits it must follow that the decision to dismiss Mr Orr for 'gross misconduct' in relation to his behaviour ... was not reasonable within section 98(4)(a) and so was unfair."

It should be noted that Aikens LJ thus understood himself to be addressing not only an argument based on reasonableness under sub-section (4) but also an argument based on the employer's "real reason" for dismissal, i.e. under sub-section (1).

(3) At para. 85 he identifies the issues to which those arguments give rise. For present purposes I need only refer to the first, namely "by what rules does a tribunal or court decide which natural person's acts or knowledge or state of mind are to be attributed to a corporate employer for the purposes of section 98 of the ERA ?" (p.728F).

(4) As regards that first issue, at para. 86 he adopts the reasoning and conclusion of Moore-Bick LJ (p. 729 A-B).

49. Sedley LJ's approach is stated at para. 19 of his judgment, as follows (p. 711 A-C):

> "I would hold that a person to whom a corporate employer deputes a decision about dismissal not only decides but inquires on behalf of the employer. In so doing, he or she has to be taken to know not only those things which he or she ought to know but any other relevant facts the employer actually knows. Among such facts, it seems to me, are facts known to persons

> who in some realistic and identifiable way represent the employer in its relations with the employee concerned. If, as would seem inescapable, relevant things known to a chief executive must be taken to be known to both the corporation and its decision-maker, the same is likely to be the case as the chain of responsibility descends. It is equally likely not to be the case when one reaches the level of fellow employees or those in more senior but unrelated posts. The elements mentioned in s.98 (4)(a) – the size and administrative resources of the employer's undertaking - may well have a bearing here. All of this appears to me to be doing no more than putting practical flesh on the doctrinal bones laid out by Lord Hoffmann in the *Meridian* case [1995] 2 AC 500. The principle is that where neither express authority nor vicarious liability affords an answer, attribution of the personal to the corporate depends on what one can call institutional intent."

He amplifies his reasoning at paras. 27-29 (pp. 712-3). His essential point is that, since Mr Madden was authorised by the council to manage the claimant, "anything he knew about [the claimant's] performance of his duties was in law known to the council" and that "so, logically was anything he knew about his own management of [the claimant]": see para. 28 (p. 712F). It is irrelevant that those things were not known to Mr Cove: what matters is that they were known (in law) to the council: para. 29 (p. 712 G).

50. Moore-Bick LJ responded to that reasoning at para. 60 of his judgment as follows (p. 722 B-F):

> "Sedley L.J. suggests that the person deputed to carry out the investigation on behalf of the employer must be taken to know any relevant facts which the employer actually knows, which include not only matters known to the chief executive but also any relevant facts known to any person within the organisation who in some way represents the employer in its relations with the employee. However, in my view it would be contrary to the language of the statute to hold that the employer had acted unreasonably and unfairly if in fact he had done all that could reasonably be expected of him and had made a decision that was reasonable in all the circumstances. That is why it is important to identify whose state of mind is intended to count as that of the employer for this purpose. To impute to that person knowledge held by others is to reverse the principles of attribution formulated in the *Meridian* case and to place the whole exercise on an artificial footing. The obligation to carry out a reasonable investigation as the basis of providing satisfactory grounds for thinking that there has been conduct justifying dismissal necessarily directs attention to the quality of the investigation and the resulting state of mind of the person who represents the employer for that purpose. If the investigation was as thorough as could reasonably have been

> expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained. Moreover, the principle cannot logically be restricted to a person in the position of Mr. Madden; if sound, it must apply to all employees above a certain level of seniority, though in principle it should apply to any employee who is in possession of information that relates to the organisation's affairs and which it is material for his superiors to know. To impute Mr. Madden's knowledge to Mr. Cove, therefore, is tantamount to treating Mr. Cove as having acquired all the relevant information in the organisation's possession. That is not what section 98(4) or the authorities require."

51. I should mention for completeness that there was in *Orr* a good deal of discussion about the relevance and effect in a case of this kind of the terms of section 98 (4) (b). Both Moore-Bick LJ and Aikens LJ held that they did not advance the argument: see paras. 62-64 (p. 723) and paras. 91-99 (pp. 730-1) of their respective judgments. Sedley LJ agreed, albeit with some reluctance: see paras. 30-31 of his judgment (p. 713).

52. Mr Gorton's straightforward submission was that *Orr* constituted binding authority that in applying the test in section 98 of the 1996 Act it was illegitimate to consider the mental processes of anyone save the decision-taker(s); and that, since the relevant language was identical, the same applied to section 103A.

53. Mr Paxi-Cato's initial contention was that we ought not to follow *Orr* because the reasoning of the majority was based on *Meridian* and *Meridian* had now been the subject of further consideration by the Supreme Court in *Bilta (UK) Ltd v Nazir* [2015] UKSC 23, [2016] AC 1. That submission is, with all respect, plainly wrong. The proposition which the majority derived from *Meridian* was simply that the question of whose state of mind should be attributed to a corporate body depended on the purpose for which the question is relevant: see para. 47 (2) and (3) above. That proposition is not questioned in *Bilta:* indeed the relevant passage from the opinion of Lord Hoffman is cited with approval in the judgment of Lord Sumption – see para. 67 (p. 27 E-F).

54. Mr Paxi-Cato also submitted that *Orr* was impossible to reconcile with the reasoning of the EAT in *Hilton International Hotels (UK) Ltd v Protopapa* [1990] IRLR 316, in which it was held that conduct by a manager towards an employee could found a claim of constructive dismissal under section 95 (1) (c) of the 1996 Act even if the manager in question had no authority to effect a dismissal. I do not see any such inconsistency: the two issues are wholly distinct. But even if there were more in the point than I believe there is, it could not justify us in departing from an authoritative decision of this Court.

55. Mr Paxi-Cato's remaining submissions proceeded on the basis that *Orr* was binding on us as far as it went. On this alternative his primary case was that the Court in that case was concerned with what knowledge or belief was to be attributed to the employer for the purpose of section 98 (4) (that is, in assessing the reasonableness of the dismissal) and not for the purpose of section 98 (1) (that is, in determining what was the employer's reason for the dismissal). The only issue in *Orr* concerned section 98 (4), and although the discussion in the judgments of both Moore-Bick LJ and Aikens LJ sometimes refers simply to the requirements of "section 98", whenever a particular sub-section is identified the reference is always to sub-section (4).

56. As to that, I accept that the Court in *Orr* was not concerned as such with the issue of whose "reason" counts as the employer's for the purpose of section 98 (1). Nevertheless in my view its reasoning as regards section 98 (4) must apply equally to both sub-sections. The two stages of the process required by section 98 are inextricably linked. The question formulated by sub-section (4) is whether the employer acted reasonably in treating the reason shown by it under sub-section (1) (that being the "it" referred to under (a)) as a sufficient reason for dismissing the employee. What that reason was will be established by reference to the mental processes of the particular person (or persons) responsible for the decision. It would be incoherent and unworkable if, in deciding – as the reasonableness question requires – what beliefs were (reasonably) held or facts (reasonably) known by the employer, it were permissible to look at the mental processes of a different person. Thus when Moore-Bick LJ formulated the question as being who is to be regarded as the employer "for the purposes of section 98" (rather than "for the purposes of section 98 (4)") – see para. 47 (4) above – he may have been making an assumption that the answer is necessarily the same as regards both stages of the enquiry required by the section; but that assumption was natural and in my belief correct. It is also noteworthy that Aikens LJ understood that one way that the claimant's case was being put engaged sub-section (1) rather than sub-section (4) – see para. (48 (2) above – but he adopted Moore-Bick LJ's reasoning as decisive of both.

57. I therefore accept Mr Gorton's submission that for the purpose of determining "the reason for the dismissal" under section 98 (1) of the 1996 Act the tribunal is obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss. (That may be subject to the possible qualifications discussed at paras. 62 and 63 below; but they are marginal and not relevant to the present case.)

58. Mr Paxi-Cato submitted that even if that conclusion were correct as regards section 98 it should not apply to the language of 103A, in order not to restrict the scope of the protection offered to whistleblowers. I cannot accept that. Section 103A falls under Part X of the 1996 Act and it must be interpreted consistently with the other provisions governing liability for unfair dismissal. All of those provisions, using identical language, require a determination of "the reason ... for the dismissal", albeit that in the various cases of "automatic" unfair dismissal that determination is dispositive of liability whereas in section 98 it is only the first stage of the enquiry. There is no

justification for taking a different approach to identifying the reason for the dismissal in the one case than in the other. As Mummery LJ observed at para. 48 of his judgment in *Kuzel* (p. 809 B-C):

> "… the protected disclosure provisions must be construed and applied in the overall context of unfair dismissal law in Part X of the 1996 Act into which section 103A was inserted".

59. I turn to consider the reasoning of Mitting J as set out at paras. 37-42 above. He took as his starting-point the observation which he quoted from my judgment in *Baddeley* about cases of "manipulation". We are on no view bound by what I said in that passage, which not only was *obiter* but was (for that reason) not based on any detailed analysis. Nevertheless it reflects an obvious concern at the prospect of an employer escaping liability for unfair dismissal in a case of the kind identified. The correct analysis of a "manipulation" case seems to me require some care. It is best to take it in stages, by reference to the status of the manipulator.

60. I take first the case where a colleague with no relevant managerial responsibility for the victim procures his or her dismissal by presenting false evidence by which the decision-taker is innocently (and reasonably) misled. In such a case the dismissal is plainly not unfair within the meaning of the 1996 Act, whether by way of the manipulator's motivation being attributed to the employer for the purpose of section 98 (1) (or sections 98B-104G), or by his knowledge being used to impugn the reasonableness of the decision to dismiss under section 98 (4). The employee has no doubt suffered an injustice at the hands of the Iago figure and may have other remedies (as the Claimant may in the present case – see below); but *the employer* has not acted unfairly.

61. I take next the position where the manipulator is the victim's line manager but does not himself have responsibility for the dismissal. If the matter were free from authority I could see the force of the argument for attributing the manipulator's motivation to the employer, because it has delegated authority to him or her to manage the employee in question. However, that is precisely the argument that appealed to Sedley LJ in *Orr* and which the majority rejected, for cogent reasons: see paras. 49-50 above. It is accordingly not open to us to accept it.

62. Neither of those situations is covered by what I said in *Baddeley*, which referred specifically to the situation where the manipulator is "a manager with some responsibility for the investigation", albeit *ex hypothesi* not the actual decision-taker. That phrase was chosen, I think, to refer generally to the possible role of Mr Berne, and it was imprecise because no findings had been made about what that role was. But it does in fact have a possible application in cases where someone other than the ultimate decision-taker has a formal role in the decision-making process. For example, in the more elaborate forms of disciplinary procedure manager A is sometimes given responsibility for investigating allegations of misconduct which are then presented to manager B as the factual basis (albeit, typically, challengeable at a hearing) for a disciplinary decision. This is a refinement of a kind which did not fall for consideration in *Orr*; and there would in my view be in such a case a strong

case for attributing to the employer both the motivation and the knowledge of A even if they are not shared by B. I do not see anything in that view inconsistent with the *ratio* in *Orr*: in such a case the conduct of the investigation is part of the deputed "functions under section 98". But although in the present case Mr Widmer supplied documents to the HR department which it in turn passed to Ms Vickers, and responded to her query about the TMI complaint, that does not make him an investigator.

63. There was, finally, some discussion before us of the case where someone at or near the top of the management hierarchy – say, to take the most extreme case, the CEO – procures a worker's dismissal by deliberately manipulating, for a proscribed reason, the evidence before the decision-taker. Such a case falls outside Moore-Bick LJ's formulation quoted at para. 47 (4) above, because the CEO, despite his or her seniority, would not have formal responsibility for making the dismissal decision[5]. But the facts in *Orr* did not raise this issue, and it rather sticks in the throat that even in a case of this particular kind the manipulator's motivation should not be attributed to the employer for the purpose of section of 98 (1). There may well be an argument for distinguishing the case of a manager in such a senior position from those considered in the preceding paragraphs; but the issue does not arise on the facts before us and I prefer not to express a definitive view.

64. If I am right so far Mitting J's reasoning cannot be sustained. Even if Mr Widmer's conduct, as summarised at para. 35 of his judgment (para. 41 above), constituted a deliberate attempt to procure the Claimant's dismissal because she had made a protected disclosure (though that may in fact be going rather further than the ET's findings allow), that motivation could not be attributed to Royal Mail as the employer since it was not shared by Ms Vickers, who was the person deputed to take the dismissal decision.

65. It may at first sight seem wrong that Royal Mail should not be liable for unfair dismissal in circumstances such as the ET found here. But there is an important point of principle involved. The statutory right not to be unfairly dismissed depends on there being unfairness (as defined) *on the part of the employer*; and unfair or even unlawful conduct on the part of individual colleagues or managers is immaterial unless it can properly be attributed to the employer. A principle has to be identified as to how to draw the line between those whose conduct can and cannot be so attributed. That has been done, in *Orr*, on a careful and fully reasoned basis, and we must abide by that decision.

66. It does not, however, follow that in a case of this kind the dismissed employee is necessarily unable to recover compensation for the losses caused by the dismissal. Whether there is another route to such compensation, based on the unlawful conduct which led to the dismissal, is the subject of the issues considered under the following heading.

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5 It would of course be different if the ostensible decision-taker were more or less directly told by the CEO what to decide. His or her involvement would in such a case be a sham and the CEO would be the real decision-maker. In a true "manipulation" case the decision-maker makes a genuine decision but on tainted information (and, in this case, tainted from the top).

(2) "THE PARA. 346 ISSUE"

67. As noted at para. 36 above, Mitting J's decision on the section 103A claim meant that he did not have to reach a decision on Royal Mail's grounds of appeal, and, as he acknowledged, he did not hear argument on them. Nevertheless, in his judgment he expressed the view that the ET's apparent belief that the Claimant should in principle be able to claim "career-long" losses as a consequence of the unlawful detriments – see para. 33 above – was wrong. As he put it at para. 28:

> "Section 47B (2) expressly excludes the detriment of dismissal and so of necessity to [*sic*] the financial and other consequences of dismissal from consideration whatever the causative link."

68. The terms of Royal Mail's relevant ground of appeal to the EAT (see para. 34 above) suggest that its position would have been that Mitting J's view on the point was right, albeit obiter. But in his supplementary skeleton argument and his oral submissions Mr Gorton disavowed reliance on para. 28 of Mitting J's judgment and said that the point that he was making was more subtle and less wide-ranging. I will follow the order in which the points are made in the supplementary skeleton argument.

69. At paras. 10-16, read with paras. 20-24, Mr Gorton accepts that there was indeed a route by which the Claimant might be entitled to compensation for dismissal consequent on detriment notwithstanding section 47B (2). However he contends that no such case had been advanced on her behalf in the ET and that it was too late for it to be advanced now. He described the route as follows:

> "It would have been that, on the ground of C having made protected disclosure(s), Mr Widmer manipulated Ms Vickers by providing a false and misleading impression of C's performance, leading to Ms Vickers reaching a negative view of C so that she dismissed. That would have been a claim against Mr Widmer, pursuant to 47B (1A), which if proven, would then have attached liability vicariously to R under s 47B (1B), subject to any reasonable steps defence under section 47B (1D)."[6]

(That could be read as meaning that it would have been necessary for the Claimant to bring proceedings against Mr Widmer personally under section 47B (1A). It is clear from what he says elsewhere that that is not what Mr Gorton meant, but for the avoidance of doubt I should make it clear that, if his point is otherwise good, it would not depend on Mr Widmer being named as a respondent. All that would matter is that Royal Mail's liability arose, vicariously, under section 47B (1B). It is perfectly open to a claimant to advance a claim against an employer under sub-section (1B) without

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6 I have silently corrected a couple of slips in the punctuation.

proceeding against the worker who actually did the deed: indeed that is probably the more usual course.)

70. As I read it, and in the light of the arguments in the following paragraphs of the skeleton, there are three elements in that formulation which Mr Gorton says should have been pleaded but were not. I take them in turn.

71. First, it seems to be being said that it is necessary that the claim be advanced under sub-section (1B) of section 47B (via sub-section (1A)) rather than under sub-section (1). I do not see why that matters for these purposes. What matters, if this route is to be pursued, is that the detriment complained of be the act of Mr Widmer which leads to the dismissal, rather than the act of dismissal itself. Whether Royal Mail is liable for that act because it is to be treated as its own act under section 47B (1) or because it is "vicariously" liable for Mr Widmer's act under section 47B (1B) would appear to be immaterial.[7] The Claimant did indeed clearly plead acts of detriment done by Mr Widmer, which the Tribunal found to be proved (see para. 29 (2) above).

72. However, even if it was necessary in law that the claim be made under sub-section (1B), I would not accept that that route was not open to the Claimant on her pleadings. The particulars of claim attached to the ET1 alleged that the relevant acts complained of were done by Mr Widmer, who was an employee of Royal Mail, and it was plainly implicit that he was acting in the course of his employment. They went on to aver that Royal Mail was liable under section 47B but did not identify the sub-section(s) relied on; and since nobody appears to have sought particularisation the Agreed List of Issues was similarly unspecific.[8] In those circumstances the Claimant was entitled to rely on both sub-section (1) and sub-section (1B), which do not appear to be mutually exclusive, since she had averred, expressly or by implication, the facts necessary to either. It was up to Royal Mail, if it chose, to seek further particulars with a view to being able to plead either that Mr Widmer's acts were not to be attributed to it for the purpose of sub-section (1) or that it had a "reasonable steps" defence (i.e. under sub-section (1D)) to the claim under sub-section (1B).

73. Secondly, it is said that it would have been necessary for the Claimant to complain specifically of Mr Widmer's *communication* of his tainted views to Ms Vickers, whereas the only acts pleaded and found consisted of how he treated the Claimant: see para. 29 (2) above. I agree that the Claimant could have identified that communication as a specific detriment, but I do not regard

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7 It is not necessary in this judgment to consider the circumstances in which a company may be liable under sub-section (1) without the need to resort to sub-section (1B). It seems that the distinction will only be relevant in practice if the employer wants to advance a reasonable steps defence under sub-section (1D).

8 I ought for completeness to note that the ET in its summary of the applicable law at para. 273 of the Reasons quoted sub-section (1) and not sub-sections (1A) or (1B); but the point is not treated as contentious and there is nothing to suggest that this reflects the Claimant having belatedly nailed her colours to the mast. There is nothing material in the parties' written closing submissions.

the failure to do so as fatal to her case. It is still open to her to argue at the remedy stage that her eventual dismissal was a (not too remote) consequence of the detriments actually found.

74. Thirdly, it is said that the Claimant never pleaded her case as one of "manipulation". That is true as far as it goes, but it does not go anywhere that matters. The term "manipulation" entered the case-law in *Baddeley* because that is what was said to have happened in that case, and I have used it also in this judgment in order to test the relevant principles. But it does not appear in the statute. In a case of this kind the only question (subject to the possible effect of section 47B (2)) is whether the unlawful detriment found has, applying the applicable remoteness principles, caused the losses consequent on the dismissal. If it has, it does not matter whether the label "manipulation" is used or indeed whether it would be apt on the particular facts of the case.

75. At para. 17 of his supplementary skeleton argument Mr Gorton appears still to be relying to some extent on section 47B (2), because he says that "in the absence of such a claim [sc. of the kind formulated in his para. 10] section 47B (2) bites". That is rather opaque. It is common ground that sub-section (2) bites where the detriment which is the subject of a claim "amounts to a dismissal". The question is whether that language excludes recovery of compensation for dismissal even if the dismissal is caused by something formulated as a distinct prior detriment. Mitting J thought that it does: see para. 28 of his judgment (para. 67 above). The "para. 346 route" which the Claimant advances proceeds on the basis that it does not. But so, necessarily, does Mr Gorton's alternative route, since it too allows recovery for losses caused by dismissal consequent on a prior detriment: the only difference is that Mr Gorton defines the circumstances in which that is so more narrowly than the Claimant. As I have said, Mr Gorton in his oral submissions expressly dissociated himself from Mitting J's reasoning at para. 28 of his judgment.

76. At para. 18 Mr Gorton makes it clear that his alternative route is not advanced merely as a matter of concession but is positively relied on, because it avoids what he accepts is the unattractive position, if he were right about section 103A, that claimants would be left unable to recover for a loss which plainly flowed from the original detriment. I note that, but it does not bear directly on the issues.

77. At para. 19 Mr Gorton makes a factual point about the extent to which any withholding of documents on the part of Mr Widmer truly affected Ms Vickers' decision-making. That must be a matter for the Tribunal at the remedy hearing.

78. There is thus, on the arguments advanced before us, no obstacle in principle to the Claimant recovering compensation for dismissal consequent on detriment. Whether she can do so in practice, or to what extent, is of course a matter for the ET at the remedy hearing. The view about causation which the ET expressed at para. 346 of the Reasons cannot be conclusive, since formally it did not fall within the scope of the liability hearing and the Tribunal heard no submissions specifically directed to the point: as I understand it, it was putting

down what it hoped would be a useful marker. In so far as involved any findings of fact, it was based on the evidence which the Tribunal had heard and may accordingly prove difficult to shift; but the Tribunal will nevertheless have to consider carefully any submissions from Royal Mail about all aspects of the issue.

79. Mr Gorton's disavowal of the more root-and-branch approach based on the effect of section 47B (2) which Mitting J adopted in para. 28 of his judgment means that it is unnecessary for us to decide whether that approach was right. It is tempting nevertheless to undertake that task because the point may be of importance in other cases. However for that very reason I think it would be wrong to express a concluded view without having heard argument. I will confine myself to the following observations. I held in para. 39 (5) of my judgment in *CLFIS v Reynolds* – see para. 32 above – that in principle losses occasioned by a claimant's dismissal may be recoverable as compensation for an unlawful detriment which caused the dismissal. That was said in the context of age discrimination, but this is an area where I can see no reason in principle (i.e. subject to what follows) for adopting a different approach in a case of whistleblower discrimination. The real issue is whether a claim on that basis is inconsistent with the terms of section 47B (2). What the sub-section does is preclude a claim under the operative parts of the section where the detriment which is the subject of the complaint to the tribunal – what in other contexts would be called the cause of action – "amounts to a dismissal"; and it is clearly arguable that in this kind of case the relevant detriment is the prior treatment complained of, the dismissal being only a consequence of that detriment. But it may be that that distinction is not as straightforward as it seems: one authority that would require careful attention in this connection is the decision of this Court in *Melia v Magna Kansei Ltd* [2005] EWCA Civ 1547, [2006] ICR 410, to which brief reference was made in the skeleton arguments but on which we were not addressed.

DISPOSAL

80. I would allow Royal Mail's appeal. However, I would also declare that the Claimant is not precluded by the way in which her claim had been put in the ET (that being the only point taken) from advancing a claim for losses occasioned by her dismissal as compensation for the unlawful detriments found under section 47B. Subject to the following paragraph, the remedy hearing in the ET can now at long last proceed.

81. There is one potential loose end. As noted at para. 34 above, Royal Mail had a distinct ground of appeal before the EAT based on the contention that any claim based on unlawful detriment was out of time. We were not entirely sure, based on the very partial comments made by counsel before us, that this is a live issue. If it is, it is not one that we can decide, and the case will have to be remitted to the EAT for it to be determined. If this is really necessary, I would hope that the parties can agree on case management directions that will allow the remaining issues to be determined as efficiently and expeditiously as possible. If the right course is for the time issue in the EAT to be expedited, I would certainly lend the weight of this Court to the appropriate application.

POSTSCRIPT

82. Following the conclusion of the argument before us, Royal Mail drew our attention to the judgment of Simler P in the EAT in *International Petroleum Ltd v Osipov* [2017] UKEAT 0058/17, handed down on 19 July 2017. Paras. 145-163 of that judgment consider the effect of section 47B (2) of the 1996 Act, and at para. 162 Simler P declines to follow Mitting J's observations at para. 28 of his judgment in the present case. Although I have read Simler P's clear and careful analysis with interest, the way in which the issues arose in that case was rather different from the present case and different arguments were advanced. Both counsel lodged written submissions about the effect of *Osipov*, but I think that it would add complication without any corresponding advantage (and possibly prejudice the appeal which I understand has been filed) if I embarked on an analysis of it.

Lord Justice Moylan:

83. I agree.

Lord Justice Jackson:

84. I also agree.