Neutral Citation Number [2024] EAT 58

Case No: EA-2022-001078-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 24 April 2024

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

DR THERESE MARY WILLIAM

Appellant

- and –

LEWISHAM AND GREENWICH NHS TRUST

Respondent

- -

David Welch (instructed via Direct Access) for the **Appellant**
Robert Moretto (instructed by Capsticks LLP) for the **Respondent**

Hearing date: 13-14 February 2024

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JUDGMENT

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

There was no error of law in the Employment Tribunal's findings that (1) the Appellant did not have a reasonable belief that the relevant parts of her allegedly protected disclosures tended to show that the health or safety of any individual had been, was being or was likely to be endangered and (2) the making of any disclosures by the Appellant did not have a material influence on the decisions of the Respondent which were detrimental to her.

This Tribunal applied the decision of the EAT in *Malik v Centros Securities plc* EAT/0100/17 where Choudhury P held that, in a claim under section 47B of the Employment Rights Act 1996, if an individual who makes a decision which inflicts a detriment did not know of protected disclosures and therefore could not have been materially influenced by them, the knowledge and motivation of another individual who influenced the decision maker cannot be ascribed to the decision maker. *Malik* is not inconsistent with *Royal Mail Group v Jhuti* [2019] UKSC 55, [2020] ICR 731, in which the Supreme Court held that a dismissal should be ruled unfair under section 103A of the Employment Rights Act 1996 where a person superior to the claimant in the hierarchy of the organisation determined that they should be dismissed because they had made one or more protected disclosures but hid this behind an invented reason, and the decision maker, unaware of that motivation, adopted the invented reason.

An application by the Appellant to rely on a document which was not available to be adduced at the hearing below was refused because it did not satisfy the second of the criteria in *Ladd v Marshall* [1954] 1 WLR 1489 i.e. it was not probable that it would have had an important influence on the result.

THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. On 6 July 2022, following a 5 day hearing in June 2022, the Employment Tribunal ("ET") sitting at Croydon dismissed the Appellant's complaint under section 47B of the Employment Rights Act 1996 that she was subjected to detriments by the Respondent on the ground that she had made one or more protected disclosures.

2. With permission granted by HH Judge Auerbach on 5 July 2023, the Appellant advances four grounds of appeal which appear in the amended notice of appeal as follows:
    1. The ET erred by holding that the Appellant did not have a reasonable belief that her disclosure concerning the failure to adopt guidelines tended to show that the health or safety of any individual has been, is being or is likely to be endangered.
    2. The ET erred in its construction of the disclosure concerning NEC Rates, wrongly assessed the Appellant's credibility and the accuracy of the disclosures and hence held that the information the Appellant conveyed was at odds with the information in the audit.
    3. The ET erred by failing to properly apply the statutory test of causation for detriments, and in holding that it was bound by *Malik v Cenkos Securities plc* (EAT/0100/17), and hence failed to take into account whether the motivations of Dr Ezzati and Dr Obi were materially influenced by the Claimant's protected disclosures, and further failed to determine whether their actions materially influenced the series of detriments the Respondent imposed on the Claimant.
    4. The ET erred by failing to properly apply the material influence test in determining whether the decisions to exclude the Appellant and then to subject the Appellant to MHPS investigations and a sanction, were done on the ground of the Appellant's evidential based protected disclosure, concerning Dr Ezzati compromised patients' care by failing to handover patients on 13 July 2019.

3. There is also an application by the Appellant to rely on a document which was not adduced in evidence before the ET because it did not exist at that time. It is the report of an external report entitled "External Review of Lewisham and Greenwich NHS Trust Neonatal Services by the London Neonatal Operational Delivery Network (ODN), April 2023".

Factual background

4. The Appellant, a medical doctor, worked from 2018 onwards as a consultant paediatrician and neonatologist at the University Hospital Lewisham which is operated by the Respondent NHS trust. The ET found that there were serious issues with the neonatology department at the hospital including some dysfunctional working relationships between consultants. There was evidence of a particularly poor relationship between the Appellant and a Dr Ezzati, in which each had filed incident reports about the other's clinical practice.

5. An important incident occurred on 30 July 2019 when a complex twin birth was expected in the department. There was some sort of confrontation between the Appellant and Dr Ezzati. Dr Ezzati used her mobile phone to make two videos which captured some of what took place. Later that day Dr Ezzati posted on a consultant WhatsApp group, criticising the Appellant.

6. On 2 August 2019 the Appellant sent two emails to the Divisional Director, Dr Joanna Lawrence, making complaints or disclosures about Dr Ezzati. On the same day she made a third disclosure by posting details of the incident with Dr Ezzati on the Respondent's safeguarding system.

7. These disclosures included the following allegations or information which remain relevant to the grounds of appeal:
    1. "My guideline I spent 4 months writing was dismissed by declined by Dr Obi as [Dr Ezzati] was not ready with her contribution, without caring about patients, and the audit we did confirmed that our NEC rates is higher than average national rates, and we had few deaths following babies inappropriately fully fed within 2 days by [Dr Ezzati]."
    2. "On 13th August, I had no Handover at all after [Dr Ezzati] finishes her week, which had negative implications on patients care, and this never dealt with, I put an incident form and it was advised to close it without any investigations." The Appellant said that the lack of handover had the effect of leaving a chickenpox alert on the neonatal ward.
    3. "We usually handover in advance, and send handover sheet to the overtaking consultant, I have done that when I finished my week, as I felt it is my responsibility to do so. This never happen when [Dr Ezzati] finished her week."

8. As was later agreed, the references to 13 August 2019 should have been to 13 July 2019. So the alleged lack of handover occurred 17 days before the incident which appeared in the mobile phone videos.

9. "NEC" refers to necrotising enterocolitis (NEC), which is a serious illness and a relatively common surgical emergency affecting new-born babies. A review or audit was conducted, under the Appellant's supervision, of rates of NEC in the department.

10. The reference to a "guideline" was to a document which the Appellant compiled in 2018. She had raised the fact that the neonatology department did not have guidelines in place for feeding pre-term infants, and started drawing up her document. During that process the Department Manager, Dr Ozioma Obi, first suggested that the department should adopt guidelines used at King's College Hospital, and later decided that it would adopt guidelines used in the East of England, effectively dismissing the Appellant's work.

11. Following the incident on 30 July 2019, Dr Lawrence asked Dr Obi to find out what had happened. Dr Obi spoke to Dr Ezzati and watched the videos. She set out her views in an email on 6 August 2019, suggesting that the incident should be investigated by independent staff members, though her account of the videos was inaccurate in some important respects. Dr Harding, a Deputy Medical Director for Performance and Professional Standards, decided to start an MHPS (Maintaining High Professional Standards) investigation. He excluded the Appellant from the hospital site (i.e. suspended her), and that decision remained in force until 30 September, when she was told that her first clinic would be on 11 October 2019. The MHPS investigation would be carried out by Dr McCall.

12. Byron Charlton, the Respondent's Head of Information Governance and Assurance, filed a further incident report about the 30 July incident on 2 October 2019 but the system recorded this as coming from the Appellant. Dr Harding assumed that she had entered the premises in breach

of the exclusion to file it. He responded by excluding her again on 8 October and widened the MHPS investigation to deal with the question of whether she had done so and had lied about it.

13. The Appellant submitted a grievance on 7 October 2019. The Respondent decided to deal with that in the MHPS process as well, to the extent that the subject matter overlapped.

14. On 25 November 2019 it became apparent that the Appellant had not filed the further incident report, but the exclusion nevertheless was not lifted until 7 January 2020.

15. Dr McCall provided her MHPS report on 25 January 2020. She found that the Appellant had provided an incorrect account of the events of 30 July but did not intend to mislead as she was upset at the time. No other allegations against the Appellant were made out. Dr McCall found a pre-existing dysfunction in the team which was leading to poor communications. She made criticisms of both the Appellant and Dr Ezzati and, to a lesser extent, Dr Obi.

16. Nevertheless, Dr Harding on 12 February 2020 informed the Appellant that there was a case to answer on the charge that she had provided misleading information about the incident of 30 July and that this would proceed to a disciplinary hearing.

17. On 24 February 2020 the Appellant updated her grievance to include allegations of bullying and harassment.

18. The disciplinary was conducted by Helen Peskett who had recently joined the Respondent as Divisional Director of Operations, Surgery and Cancer. A hearing took place on 22 April 2020. In an outcome letter of 5 May 2020, Ms Peskett issued the Appellant with a written warning for twelve months on the basis that she had provided incorrect information about the incident of 30 July.

19. The Appellant appealed against the warning but the decision was upheld by Rachael Backler, Director of Performance, on 24 June 2020.

20. On 9 September 2020 Professor Andrews, the interim divisional medical director, informed the Appellant that part of her grievance had been upheld including her allegation that Dr Ezzati had called her a liar. Other parts were not upheld. The Appellant appealed but, following a hearing on 26 October 2020, Kate Anderson, Director of Corporate Affairs, upheld the decision on the grievance.

The ET's decision

21. The ET made the following findings relevant to the grounds of appeal:

    1. The Appellant's complaint about the lack of a handover by Dr Ezzati on 13 July 2019 (to which I shall refer as "the handover disclosure") was a protected disclosure because it tended to show that health and safety had been, was being or was likely to be endangered.

    2. The Appellant's complaint about the rejection of her feeding guidelines was not a protected disclosure because she did not reasonably believe that it tended to show that health and safety had been, was being or was likely to be endangered. The "force" of her complaint was about the unjustifiable dismissal of the work she had

done, rather than the effect on patients of a lack of guidelines. Before the Appellant's guidelines were completed, the department had identified other guidelines to be adopted, and the Appellant did not suggest that using the guidelines from King's College Hospital or the East of England was endangering or would endanger health and safety.

3. The Appellant's allegation about NEC rates was not a protected disclosure because she did not reasonably believe that it tended to show that health and safety had been, was being or was likely to be endangered. She did not state the outcome of the audit accurately, in that the audit did not find that the Respondent's rate of NEC was above national rates; it found instead that it was higher than rates in higher income countries in general. It was also not accurate to say that there had been "a few deaths" following shortcomings in treatment by Dr Ezzati. Only one death was referred to in evidence, and there was no corroborating evidence that Dr Ezzati's feeding regimes were responsible for it, and a clinical reviewer had found nothing wrong with Dr Ezzati's practice. So any belief by the Appellant that the information tended to show a relevant failure or danger was not objectively reasonable.

4. The Respondent subjected the Appellant to a detriment by its decisions to exclude her, and not to lift the exclusion until 7 January 2020, and to subject her to the MHPS investigation. She was not subjected to a detriment when Dr Harding merely told her on 2 January 2020 that the investigation could result in dismissal (but not, as she alleged, that she would be dismissed). Ms Peskett also did not make any threat of dismissal.

5. Although the decisions to exclude the Appellant and to subject her to the MHPS process were not reasonable, they were not motivated to any extent by the fact that she had made the handover disclosure. Dr Harding was much more focused on the incident of 30 July 2019, and also the matter had been presented to him as a concern about the Appellant and his practice, good or bad, was to prefer the account of a manager to that of a subordinate. Dr Harding's decision to proceed to a disciplinary hearing was harsh, in view of Dr McCall's findings, but was motivated by his wish for someone else to take ownership of the decision.

6. The decision to issue the written warning was a bad decision which had been affected by material errors. However, Ms Peskett had no links with the 13 July handover and was focused on what happened on 30 July. This detriment was not motivated to any extent by the protected disclosure.

The Law

22. A "protected disclosure" is a "qualifying disclosure" which is made in a prescribed way. Defining a qualifying disclosure, section 43B of the Employment Rights Act 1996 provides (so far as relevant):

> "(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
> …
> (b) that a person has failed, is failing or is likely to fail to comply with any legal

> obligation to which he is subject,
> …
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> … ."

23. Section 47B provides (so far as relevant):

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
> (a) by another worker of W's employer in the course of that other worker's employment, or
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
> (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A) (a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
> (a) from doing that thing, or
> (b) from doing anything of that description.
> …
> (2) This section does not apply where—
> (a) the worker is an employee, and
> (b) the detriment in question amounts to dismissal (within the meaning of Part X).
> … "

24. "On the ground that W has made a protected disclosure" means that the protected disclosure materially, i.e. more than trivially, influenced the decision maker who subjected the worker to the detriment: *Fecitt v NHS Manchester* [2012] ICR 372.

25. The law of unfair dismissal also deals with protected disclosures in section 103A, which provides that if an employee is dismissed and the reason or principal reason for the dismissal is that the employee made a protected disclosure, the dismissal is automatically unfair.

26. In *Malik v Centros Securities plc* EAT/0100/17, the EAT heard an appeal against an ET's dismissal of a claim brought under section 47B. The alleged detriments included various acts and decisions and the claimant also contended that these amounted to constructive dismissal. He argued that even if the individuals responsible for any relevant decision did not know of protected disclosures and therefore could not have been materially influenced by them, nevertheless their treatment of him was influenced by someone else who did have that knowledge and who was influenced by the protected disclosures, and therefore that the disclosures materially influenced the decision. Choudhury P rejected that submission, holding at [86] that "importing the knowledge and motivation of another to that decision maker … is not permissible in considering the reason why the decision maker acted as he or she did."

27. The case of *Royal Mail Group v Jhuti* was decided by the Court of Appeal in 2017 ([2018] ICR 982), before the EAT heard *Malik*. It concerned the question of whether the employer would be liable for unfair dismissal under section 103A where the person making the dismissal decision did not know about a protected disclosure but was persuaded or manipulated to take that decision by an individual who knew of the protected disclosure and acted because of it. The claim failed in the Court of Appeal but at [62] Underhill LJ, obiter, said that there would be a "strong case" for attributing to the employer the relevant knowledge and motivation of a person who had a formal role in the decision even if they were not the decision maker.

28. In *Malik*, Choudhury P also held at [93] that that passage from *Jhuti* did not assist the claimant because that was a whistleblowing dismissal case, where liability would lie solely with the employer, rather than a detriment case where a decision maker (who was manipulated by another individual) could be personally liable under section 47(1A).

29. The Supreme Court allowed an appeal in *Jhuti* in 2019: [2019] UKSC 55, [2020] ICR 731. It held that since Parliament in enacting section 103A had clearly intended that a dismissal should be unfair where the making of a protected disclosure was the real reason for it, where a person superior to the claimant in the hierarchy of the organisation determined that they should be dismissed for one reason but hid it behind an invented reason, and the decision maker adopted the invented reason, a court (or tribunal) should penetrate through the invention and identify the hidden reason as the real one. The Supreme Court did not refer to *Malik*.

Ground 1

The parties' submissions

30. The Appellant was represented before me by David Welch of counsel, who did not appear below.

31. Mr Welch sought to attack the ET's finding that the Appellant did not have a reasonable belief that her disclosure concerning the failure to adopt guidelines tended to show that the health or safety of any individual has been, was being or was likely to be endangered.

32. By way of background, Mr Welch relied on evidence of a high neonatal mortality rate at the hospital. This, he said, was precisely what was driving the Appellant's belief that there was a danger to health and safety.

33. In this regard he sought to rely on the external review document which was not available at the time of the ET hearing. The review concerned acute paediatric departments at the hospital and another of the Trust's hospitals (Queen Elizabeth, Woolwich). The report recited that in early November 2022, consultants at the hospital had "raised concerns about patient and staff safety in paediatrics". The review looked at activity levels, bed occupancy, staffing and funding. It noted that junior doctors and trainees were much less satisfied with their experience at the hospital and expressed dissatisfaction with some consultants. It set out mortality rates for the Respondent as a whole which were above an average based on some UK trusts, and stated:

> "Trust perinatal mortality is high compared to other London LNU Trusts. Although the underlying population risk is likely to be a major factor, system-wide maternity and neonatal issues across the South East London LMNS may also contribute to any excess perinatal mortality. This requires some Lewisham and Greenwich Trust

> ownership and review in conjunction with South East London LMNS and Public Health colleagues."

34. The report made six recommendations of which the only potentially relevant ones appear to be:

> "d. Trust to investigate excess perinatal mortality for LGT via the SEL LMNS, maternity services and local public health teams.
> e. Ensure cross site neonatal medical guidelines are implemented consistently on both sites.
> f. Investigate and resolve consultant leadership behaviour in the UHL neonatal unit, particularly with respect to feedback from junior doctors."

35. This material, Mr Welch submits, bolsters the credibility of the Appellant's claim to have been raising health and safety related issues and undermines the ET's finding that she could not reasonably have believed that her disclosure about the rejection of her feeding guideline tended to reveal a health and safety risk.

36. More generally Mr Welch submitted that the ET failed to grapple with the nature of the disclosure. In particular he points out that tribunals should distinguish between "information", which is a statutory component of any protected disclosure, and a mere "allegation" (such as a statement to an employer of an employee's position in a dispute) which may not amount to a protected disclosure. See *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325 EAT per Judge Serota QC at [20].

37. So, Mr Welch submitted, they failed to focus on the words "without caring about patients". Had they done so, they could not have failed to place weight on those words as supporting the Appellant's belief that she was raising a genuine health and safety issue falling within section 43B.

38. Meanwhile the Appellant in her skeleton argument reminded me, by reference to *Ibrahim v HCA International Ltd* [2019] EWCA Civ 2007, [2020] IRLR 224, that a tribunal should consider first whether the Appellant held the belief in question and, if so, whether the belief was objectively reasonable.

39. The Appellant also argued that the ET had erred by failing to conclude that the East of England guideline was not suitable for the Respondent and by concluding that it was adopted in October 2018, rather than (as the Appellant contended) December 2020.

40. The Respondent was represented before me and at the ET by Robert Moretto of counsel.

41. Mr Moretto reminded me of the need not to engage in pernickety analysis of ET decisions and instead to read them fairly and as a whole, and to be slow to conclude that an ET which has stated the correct legal principles has not applied them correctly. See *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, [2021] IRLR 1016 at [57-8].

42. He also cautioned me against reliance on the distinction between information and allegations made in *Cavendish* (above), pointing out that this was described as leading to confusion in *Kilraine v Wandsworth LBC* [2018] ICR 1850 at [34] per Sales LJ.

Discussion

43. In my judgment the Appellant's submissions do not fully engage with what the ET decided, having heard the evidence of the witnesses and in particular of the Appellant herself. The key findings (which relate to both grounds 1 and 2) were expressed in the Reasons:

> "145. … In determining reasonableness of the claimant's belief, the tribunal took into account the claimant's submissions during her grievance which expressly date [sic] dealt with the guidelines issue. The claimant titled this section as 'undermining and dismissing my work (enteral feeding guidelines).' She went into some detail in the history of feeding guidelines in 2018. She stated that she had raised that the unit did not have any guidelines in use. Dr O suggested using King's College Hospital guidelines when the claimant was partway through writing her guidelines. Dr O then, following a conversation with Dr E, decided that the unit would adopt the East of England guidelines, thereby in effect dismissing the claimant's work on drafting guidelines. The claimant characterised this incident as bullying by Dr E.
> 146. The tribunal did not find that the claimant reasonably believed that disclosing information about the guidelines tended to show that health and safety had been, was being or was likely to be endangered. The reasons for this were as follows. Before the claimant had completed her guidelines, the department had identified other guidelines to be adopted. The force of the claimant's complaint about guidelines in the grievance was not that the guidelines from King's College Hospital or the East of England were endangering health and safety, but rather that her contributions were unjustifiably dismissed. The claimant did not state in her grievance that the East of England guidelines were inferior, still less that they could endanger health and safety.
> 147. Secondly, the Tribunal considered the rates of NEC. Did the claimant reasonably believe that the comments she made about the respondent's rates of NEC tended to show that health and safety had been, was being or was likely to be endangered? Again, the tribunal reminded itself that it must show respect for the claimant's specialist knowledge, in particular in the area in which she had run an audit, the respondent's rates of NEC.
> 148. The difficulty was that the claimant did not state the outcome of the audit accurately. (This was an audit that the claimant had conducted with Junior Doctors into the respondent's rates of NEC.) This had happened some time prior to the events material to this claim. According to PD1, the respondent's NEC rate was higher than national rates. However, according to the documents and the claimant's evidence before the tribunal, this is not what the audit found. The audit found that the respondent's rate was higher than the rates in higher income countries in general. It did not find that the rate was higher than the average in the UK.
> 149. The Tribunal did not accept the respondent's submissions that there can never be a reasonable belief if there is no evidential basis for a disclosure. However, if there is not an evidential basis, this makes it far harder for the claimant to establish a reasonable belief, particularly in an area of her specialist expertise. On the facts, the tribunal did not find that the claimant had an objectively reasonable belief that the information disclosed about NEC rates tended to show that health and safety was endangered, because the evidence on which she relied did not show this. She was responsible for the audit and she would have been familiar its results and

> methodology. This was not a case where she had misunderstood a study conducted by another clinician.
> 150. The third part of the potential disclosure was the information that there had been 'a few deaths' following Dr E's shortcomings in treatment. The difficulty again was that this was not an accurate statement. In cross-examination, the claimant did not say that there was more than one death. In the view of the tribunal there was a considerable difference between one death and "a few deaths," particularly in a relatively brief time period and within a single department. Again, the claimant could not have misunderstood the numbers because she worked in the department and was intimately involved in outcomes. Further, there was no corroborating evidence that Dr E's feeding regimes were responsible for the single death. Whilst the Tribunal reminded itself that it should have respect for the claimant's expertise, it noted that a clinical reviewer had found nothing wrong with Dr E's practice.
> 151. In the view of the Tribunal, whilst the claimant had some genuine concerns about NEC rates and the guidelines she had spent time drafting, PD1 was an email sent in the context of a dysfunctional and unhappy working relationship with Dr E, which had just come to a head on 30 July. The claimant was angry and this led to exaggeration. The tribunal could not find that she had an objectively reasonable belief that this information tended to show a proscribed failure as she was aware that the information was not accurate. Accordingly, this did not amount to a protected disclosure."

44. The comments about the way in which the Appellant's grievance was put and the absence of a suggestion that the East of England guidelines could endanger health and safety were fair points which provided a logical basis for the view that the disclosure did not tend to suggest any danger to health and safety. It is true that, conversely, the use in the disclosure of the words "without caring about patients" suggest that the Appellant had a health and safety issue in mind, but in my judgment those words did not compel that conclusion and the refusal to draw that conclusion was not perverse.

45. I also bear in mind that the ET chose to give separate consideration to three components of the alleged protected disclosure. The ET's finding that the part of the disclosure relating to guidelines was not concerned with health and safety did not stop it from considering the health and safety context of the parts of the disclosure relating to NEC rates (discussed under ground 2 below) and deaths.

46. So far as *Ibrahim v HCA International Ltd* is concerned, the ET did not expressly state whether it found that the Appellant (1) held the relevant belief but that it was not reasonable or (2) that she did not hold such a belief at all. However, its reasoning relating to guidelines was different from that relating to NEC rates and deaths. The ET found that in respect of NEC rates and deaths she expressed a health and safety concern but strayed into inaccuracy or exaggeration, whereas in respect of guidelines her expressed concern was not about health and safety at all. I conclude that it is tolerably clear that on the latter point its finding was that the Appellant did not hold the belief in question.

47. In reaching that decision I have not been assisted by the external review document to which I referred at paragraph 33 above. Although it contains a reference to a need to ensure the consistent implementation of neonatal medical guidelines, in my judgment it does not undermine the ET's finding of fact, namely that when the Appellant disclosed the Respondent's

dismissive attitude to her draft guideline, she did not believe that that attitude had relevant health and safety implications.

48. In *Ladd v Marshall* [1954] 1 WLR 1489 the Court of Appeal decided that permission to adduce new evidence on appeal will only be granted if (1) the evidence could not have been obtained with reasonable diligence for use at the trial, (2) it would probably have an important (though not necessarily decisive) influence on the result and (3) it appears to be credible. The second of these criteria plainly cannot be satisfied by the external review document. I note also that if the Appellant wished to rely on fresh evidence, the correct first step would have been an application to the ET for reconsideration: see paragraph 8.12.2 of the EAT Practice Direction 2023.

49. For these reasons ground 1 will be dismissed and I refuse the application for permission to rely on the review document.

Ground 2

The parties' submissions

50. In her skeleton argument the Appellant argued that the ET had wrongly construed what she had meant by "average national rates", and therefore was wrong to hold that her disclosure was at odds with the information in the audit. By way of explanation of her disclosure, she said:

> "The Claimant's reference to 'average national rates' was a reference to the unfavourable statistics findings of the NEC study, in the content of the Claimant's disclosure, which was that there was '10% NEC incidence, Vs recent systematic R/V found 2-7% NEC rates across high income NICUs' (Page 37 ASB). The NEC audit drew on a meta study carried out by a British Professor of Neonatal medicine in London (UK), about the NEC rates across numbers of Organisation for Economic Co-operation and Development (OECD) countries. The NEC audit also drew on another study which proved that inappropriate feeding preterm babies causes advanced NEC where the mortality rates approach 100% and emphasised that proper feeding guidelines are a powerful measure to reduce NEC by 87%, and hence it was essential to reduce the neonatal mortality rates at the Respondent which were found to be 5% higher than the national rates."

51. Mr Welch referred to the ET's ruling, in particular paragraphs 148-149 which I have quoted above. He submitted that the distinction drawn by the ET between average NEC rates in the UK and average NEC rates in a group of higher income countries including the UK was nitpicking, and not a sufficient basis for the conclusion that the Appellant did not have an objectively reasonable belief that the information tended to show that health and safety was endangered.

52. In response, Mr Moretto submitted that no error of law is alleged by this ground of appeal and that ground 2 is therefore an impermissible challenge to the ET's findings of fact. So far as the analysis of the facts is concerned, he pointed out that the ET in paragraphs 142-151 first broke the disclosure down into its component parts and considered each part, but then assessed the disclosure as a whole. That, he said, was consistent with the way in which the Appellant had put her case. Thus paragraph 101 of her witness statement set out the three matters which she had raised (dismissal of her guidelines, NEC rates and deaths) and paragraph 102 stated that the

health and safety concern arose from "all three matters". Mr Moretto accepted that the ET may have been harsh in rejecting the point about NEC rates just because the reference to "national" rates was wrong, but submitted that the ET's pulling together of the strands in paragraph 151, finding that "the claimant was angry and this led to exaggeration" and concluding that it "could not find that she had an objectively reasonable belief that this information tended to show a proscribed failure as she was aware that the information was not accurate" was not nitpicking, because it was based on (1) an observation about the NEC rates that was accurate even if harsh, together with (2) its finding that health and safety was not the focus of the guidelines point and (3) its very important finding, not challenged on this appeal, that the Appellant had referred to a "few deaths" associated with treatment by Dr Ezzati when in fact there was only one death and no evidence to link it with such treatment.

Discussion

53. There was some force in the points made by both sides. If the finding about the Appellant's lack of reasonable belief in the health and safety implications of the NEC rates had stood alone, I would have concerns about it being a harsh finding. However, I have concluded for three reasons that ground 2 cannot succeed.

54. The first is that the ET's Reasons included an important caveat about the relevant finding, namely that the Appellant did have "some genuine concerns about NEC rates" (paragraph 151). When paragraphs 149 and 151 are read together, it can be seen that the ET's finding was to some degree nuanced.

55. The second is that the difference between national rates of NEC and rates in a group of higher income countries may in fact be important, and not nit-picking. I have not been shown information to establish that above-average rates in the latter group necessarily give rise to a plausible health and safety concern.

56. The third is Mr Moretto's point about the disclosure being assessed as a whole. In my judgment the ET cannot be criticised for concluding that the disclosure was made in anger and that it contained conscious and significant exaggeration, especially about the alleged deaths. The ET was also entitled to find that the point about NEC rates contained deliberate exaggeration in the reference to national rates. On the basis of all of the ET's findings of fact, having rejected the Appellant's evidence on many points though it accepted it on some, it was also entitled to form a negative view of her credibility. In those circumstances the ET was entitled to conclude that the Appellant did not have the belief that she had claimed in relation to the information contained in her disclosure, even if she did in fact have some reasonable concerns about the health and safety implications of NEC rates.

57. Ground 2 will therefore be dismissed.

58. If I am wrong about ground 1 and/or ground 2 and either has merit in principle, it would still be necessary to consider the ET's finding as to causation before either ground could make headway. That finding is the subject of grounds 3 and 4, to which I now turn.

Grounds 3 and 4

The ET's reasoning

59. Before considering these grounds it is necessary to focus more closely on the ET's decision about the cause of, or the grounds for, the Respondent's infliction of detriment on the Appellant (as summarised above). If the ET made a sound finding of fact, not undermined by any of the grounds of appeal, that none of the Appellant's disclosures had any material influence on the Respondent's relevant decisions, then the appeal must fail even if there is merit in either of grounds 1 and 2, because the question of whether more of the disclosures were protected would be academic.

60. The ET dealt with the question of why the Respondent subjected the Appellant to detriments under the heading "Causation" at paragraphs 153 to 202.

61. Having reminded itself of the protected disclosure that it had found and of the meaning of "detriment", it then referred to the law relating to causation. Neither party criticises that direction, in which the ET cited the well known decision in *Fecitt* (referred to above) and reminded itself of the principles concerning the burden of proof and the drawing of inferences.

62. The ET then considered the first of the detriments which it had found, consisting of the two decisions to exclude or suspend the Appellant. It summarised the Respondent's explanation for these decisions and commented that these were "inconsistent and confused", not in accordance with the Respondent's policy on suspension and not even-handed when the treatment of the Appellant was compared with the treatment of Dr Ezzati.

63. In relation to the first exclusion/suspension the ET concluded:

> "165. In the view of the Tribunal, Dr Harding concentrated only on the claimant because he had been asked to investigate the claimant and because Dr O had, in effect, come down on Dr E's side and against the claimant. The incident was referred to Dr Harding by the Divisional Director in respect of the claimant only.
> 166. In the view of the Tribunal, Dr Harding saw that there was clear dysfunction in the relationship between Dr E and the claimant. Separating Dr E and the claimant was a quick and simple solution. There was an obvious concern that this relationship was deteriorating and things might get a good deal less manageable if they continued to work together. Dr O was backing Dr E. So the claimant, who was the subject of the referral, was the obvious one to be suspended."

64. The ET then reminded itself that Dr Harding's second decision to extend the suspension/exclusion was because he believed that she had come onto the site and put in a second incident report at a time when she was not allowed to be there, and disbelieved her denial of this. It found it "to some extent understandable" that he was concerned that she had submitted a second report just to ensure that an allegation that Dr Ezzati had assaulted her was on the safeguarding records. Although he then found out that she had not submitted the second report and was telling the truth, he still felt that she was trying to hinder the investigation and manipulate evidence, and he was "under pressure from Dr E and Dr O who said that they were in fear".

65. Having concluded that Dr Harding's decision was not reasonable, the ET then nevertheless decided that the handover disclosure did not have a material impact on that decision, giving the following reasons:

> "172. Dr Harding suspended because firstly the Divisional Director in her email

> suggested the disciplinary route and not mediation. This strongly influenced Dr Harding's approach. He started by considering this as a disciplinary matter against the claimant only. Secondly, rightly or wrongly, he had practice of preferring the word of the manager over that of the subordinate. When it came to the extension, he was under pressure from the claimant's colleagues. Put simply, it was easier for Dr Harding to exclude the claimant and extend her exclusion, than to step back and consider if the respondent's approach was even-handed or reasonable.
> 173. Further, the handover disclosure was far from Dr Harding's focus. The fact that Dr Harding had exaggerated concerns about the claimant (for instance his references to violence) indicated that it was the incident on 30 July, which was the reason he suspended, rather than anything else. The handover disclosure was significantly overshadowed by what Dr Harding considered to be the most important matters - the 30 July incident.
> 174. Finally, the Divisional Director viewed the 13 July incident as a matter of consultants failing to work together to effect handovers, and it is hard to see why Dr Harding, as a Senior Manager, would be so concerned at a single handover going wrong."

66. Having dealt with the matters which it found were not detriments, the ET then turned to the further detriment of subjecting the Appellant to the MHPS investigation. In this regard it made similar criticisms of Dr Harding but then concluded:

> 182. However, the tribunal found that the protected disclosure did not have a material impact on his decision for the following reasons. Dr Harding instigated the MHPS for broadly the same reasons as he excluded the claimant. This was how the matter was originally presented to him – as a concern about the claimant. His practice was to prefer the account of a manager to that of a subordinate. Whilst the tribunal did not find that the decision to instigate the MHPS was reasonable in the circumstances, there was no basis to link it to the disclosure about the handover on 13 July. Dr Harding was not focused on the handover, but on the incident on 30 July.
> 183. The tribunal saw the decision to proceed to a disciplinary hearing as part of the MHPS detriment. Dr Harding's decision to progress to a disciplinary hearing was arguably harsh, particularly following Dr McCall's findings. Dr McCall had found the claimant did give an inaccurate account, but the claimant believed it at the time, i.e., she had not deliberately misled.
> 184. In the view of the Tribunal, however, Dr Harding made the decision because he wanted someone else to take ownership of the decision, particularly in light of the pressure from Dr O. Further, the decision to go to a disciplinary was taken in January 2020 and it is even less that Dr Harding would be affected by the claimant's making a disclosure about a single handover on 13 July by this time. In effect, too much water had passed under the bridge since then. Dr Harding's focus was on the 30 July incident and, although Dr McCall had found that the claimant had not deliberately misled the respondent, she had found that the claimant's account was not accurate."

67. Then the ET turned to the final detriment i.e. the written warning imposed by Ms Peskett. It was critical of Ms Peskett's evidence and her explanation for what she did. The ET concluded:

> "189. The Tribunal did not find that this was a good decision. It was a decision which was not fully supported by the evidence. Ms Peskett made material errors. However, there were grounds for Ms Peskett to reach her conclusion on the information before her. Dr McCall's account established that the claimant's account was inaccurate.
> 190. The difficulty for the tribunal in drawing the necessary inferences was that Ms Peskett was a new member of staff. She had no links with the 13 July handover or,

> indeed, to any events between Dr E and the claimant. She came to the matter afresh. She was not a doctor. She was not involved professionally. There was no reason the protected disclosure would have had an impact on Ms Peskett's decision. Ms Peskett was focused, as shown by the minutes of the meeting, on what happened on 30 July. The tribunal could find no basis to find that the shortcomings in Ms Peskett's decision were linked to the protected disclosure about a single handover 9 months before, in circumstances where the entire focus of the hearing was on the events of 30 July."

68. Finally the ET considered and rejected a submission based on the Supreme Court's decision in *Royal Mail v Jhuti* (above) that even if the decision makers were not directly motivated by protected disclosures, they were manipulated by persons who were so motivated. It considered itself bound by this Tribunal's decision in *Malik* (also referred to above). It noted that applying different rules to dismissal claims under section 103A and detriment claims under section 47B was explicable because the claimant in the latter may bring a claim against the alleged manipulator whilst the claimant in the former may not. The ET also distinguished an EAT decision to contrary effect in *Ahmed v City of Bradford MDC* (EAT 0145/14), because that case was decided under section 47B before that section was amended to add subsection (1A), under which the claim can be made against the manipulator.

69. The ET also noted that the "manipulator" argument was not raised until the ET asked the Appellant whether she was relying on it. Neither Dr Ezzati nor Dr Obi had been added as a respondent to the claim and she did not call them as witnesses. As they were not before the tribunal, the Respondent was not in a position to deal with an allegation as to their motivation. It was raised too late, without good reason, and it was also inconsistent with the Appellant's "main case" which was that Dr Harding had the proscribed motivation himself.

The parties' submissions on ground 4

70. Both parties addressed grounds 3 and 4 in reverse order and I shall do the same.

71. The skeleton argument drafted by the Appellant was, with respect, difficult to follow in relation to ground 4. It describes the ET's finding that Dr Harding did not focus on the handover disclosure as a "hypothesis", but that is incorrect because it was a finding of fact. The skeleton argument criticises that finding as being inconsistent with evidence that Dr Harding was aware of the handover issue, but that criticism does not work because the one is not logically inconsistent with the other: Dr Harding could be aware of the handover issue without focusing on it. The skeleton argument criticises the ET's findings about the consequences (factual and legal) of the lack of handover and the finding that on 13 July 2019 there was "no proper handover" as opposed to no handover at all, but those criticisms do not begin to undermine the separate and crucial finding that Dr Harding's decisions were not motivated by the handover disclosure.

72. In his oral submissions Mr Welch emphasized the strength of the ET's criticisms of Dr Harding. His short point was that the persistence of Dr Harding's inappropriate actions and the lack of any good reason for them overwhelmingly invited an inference that the true reason was the making of the protected disclosure. The ET erred, he said, by using the incident of 30 July 2019 as an excuse for Dr Harding's actions instead of focusing on the Appellant's disclosures about serious health and safety issues.

73. In response, Mr Moretto reminded me again that this Tribunal should be slow to overturn an ET which has correctly directed itself in law as this one did. The ET's causation finding was a finding of fact which was clearly reasoned and logical. It also reflects the fact that the Appellant lost on a number of important factual issues, having made some very serious allegations which were found not to be credible. She therefore failed to establish that most of her disclosures were protected. She established a single protected disclosure which concerned a narrow issue. It is not surprising that that single protected disclosure did not have a material influence on her employer's decisions.

Discussion

74. It is common ground that the ET directed itself correctly as to the law. Its findings of fact can be overturned only for perversity.

75. The ET's reasons, quoted above, show that it was fully aware of the scope of the defects in what was done by Dr Harding and Ms Peskett. It explicitly asked itself whether it should draw an inference in favour of the Appellant's case. It gave logical reasons for not drawing the inference and, in my judgment, it was not obliged to draw it.

76. I therefore see no merit in ground 4.

The parties' submissions on ground 3

77. The Appellant in her skeleton argument submitted that the decision of this Tribunal in *Malik* was wrong and cannot stand with *Jhuti*, where the Supreme Court applied a "composite approach" of bringing together the motivation of another with the act of a decision maker. That was in the context of a claim for dismissal under section 103A where the protected dismissal must be the only or principal reason for the dismissal. She noted that the statutory test of causation is wider in a claim under section 47B, where the protected dismissal need merely exert a "material influence" on the decision to inflict a detriment. She contended that her making of one or more protected disclosures contributed to the dysfunctional relationship between her and Dr Ezzati and Dr Obi, and that this dysfunctional relationship gave rise to the series of detriments by persuading Dr Harding and Ms Peskett to take the steps that they did. She went on to make a number of submissions contending that the ET should have found the necessary facts to establish that causal sequence.

78. Those submissions were followed by others criticising the ET's failure to make further findings of fact in her favour. Those, in my judgment, strayed beyond the boundaries of ground 3 for which permission to appeal was granted, and/or amounted to mere disagreement with the ET's view of the facts, falling far short of the threshold of perversity. In reality, ground 3 depends wholly on the submission that this Tribunal's decision in *Malik* was wrong in light of the Supreme Court's decision in *Jhuti*.

79. In oral submissions Mr Welch, in brief, repeated the submission that *Malik* must be wrong in light of *Jhuti*. The evidence before the ET was of a "toxic atmosphere" arising from the Appellant's poor relationship with Dr Ezzati and Dr Obi and that the ET failed to "grapple" with this. Had it done so, it should have applied *Jhuti* and found causation to be established.

80. Mr Moretto, on the other hand, submitted that the legally correct route is clearly an approach of separating the motive of one worker from a decision made by a second worker, rather than merging them in a "composite" approach to liability. This Tribunal so ruled in *Malik*, mirroring the approach in discrimination cases such as *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439. The decision in *Jhuti*, he submitted, was firmly based on the premise that it was a dismissal claim under section 103A, whereas there is a clear and different statutory scheme in detriment cases. Mr Moretto also submitted that the point is academic, first because it was raised in the ET too late for the Appellant to rely on it and second because the ET's findings of fact regarding causation would prevent a *Jhuti* approach from succeeding in any event.

81. So far as my treatment of *Malik* is concerned, both counsel agreed that, as Singh J decided in *British Gas v Lock* [2016] ICR 503 at [75], I should not depart from a previous decision of this Tribunal unless it was "*per incuriam, in other words where a relevant legislative provision or binding decision of the courts was not considered*", or it was "*manifestly wrong*" or there are "*other exceptional circumstances*".

Discussion: ground 3

82. Following the approach set out in *British Gas v Lock*, I am not satisfied that I should depart from this Tribunal's decision in *Malik*. It was not reached per incuriam and I find no "*other exceptional circumstances*". The only question is whether *Jhuti* now shows it to have been manifestly wrong. In my judgment it does not. As Lord Wilson made clear in his judgment at [46], the decision in *Jhuti* turned on the meaning and purpose of section 103A. Lord Wilson compared that unfair dismissal regime with the detriment regime under section 47B at [54]-[58] and went on, at [60], to set out the Court's decision as to "the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X". That decision does not purport to change, and does not logically change, the interpretation of section 47B or the other sections in Part IVA.

83. I therefore follow *Malik* and dismiss ground 3.

84. Even if I were wrong to hold that *Jhuti* does not govern the interpretation of section 47B, it does not follow that the appeal would succeed. I note the narrowness, or specificity, of the principle stated in *Jhuti*. Even on the Appellant's view of the facts of the present case, she would not be able to show that an employee in a more senior position than hers determined that she should be disciplined or excluded or should receive a warning because she had made one or more protected disclosures and then hid this behind an invented reason which was adopted by a decision maker.

The effect of the causation finding on grounds 1 and 2

85. In my judgment the ET carried out a comprehensive examination of the grounds for, i.e. of all matters which had a material influence on, the detrimental decisions made by the Respondent. It is true that each part of the ET's discussion sets out the question as being whether or not the handover disclosure had such an influence. It did so because that, on the ET's findings, was the relevant question to be asked under section 47B. It therefore did not ask itself in terms whether any other disclosure had such an influence. However, in order to answer the question, the ET in my judgment had to, and did, identify all material influences. It was fully aware of the further matters disclosed and the Appellant's reliance on them as protected disclosures. If either of

those further disclosures had had a material influence on the decision-making, then I have no doubt that the ET would have said so and would have explained that the claim therefore failed only because the disclosure in question was not a protected disclosure.

86. To put it another way, I am sure that if the ET had decided that either of the feeding guidelines and NEC rates disclosures was a protected disclosure, it would have gone on to find that that protected disclosure did not have a material influence on the decision-making, because that conclusion flows inexorably from the comprehensive findings of fact contained in the ET's reasons.

87. It follows that, even if I have reached a wrong decision about ground 1 and/or ground 2 below, success on either or both of those grounds would not overturn the ET's decision. The question of whether either of the further disclosures was protected is academic, because the ET found that the detriments were caused by matters other than any of the disclosures.

Conclusion

88. The appeal will be dismissed.