Michaelmas Term
[2019] UKSC 55
On appeal from: [2017] EWCA Civ 1632

JUDGMENT

Royal Mail Group Ltd (Respondent) *v* Jhuti (Appellant)

before

Lady Hale, President
Lord Wilson
Lord Carnwath
Lord Hodge
Lady Arden

JUDGMENT GIVEN ON

27 November 2019

Heard on 12 and 13 June 2019

Appellant	*Respondent*
Sean Jones QC Matt Jackson	Simon Gorton QC Jack Mitchell
(Instructed by Rainer Hughes Solicitors)	(Instructed by Weightmans LLP (Liverpool))

LORD WILSON: (with whom Lady Hale, Lord Carnwath, Lord Hodge and Lady Arden agree)

Question

1. Section 103A of the Employment Rights Act 1996 ("the Act") provides:

> "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."

In this appeal the dispute surrounds the reason for the dismissal of Ms Jhuti, the appellant, from her employment by Royal Mail Group Ltd ("the company"). As I will explain, the facts found by the employment tribunal ("the tribunal") show that

(a) Ms Jhuti made protected disclosures within the meaning of section 43A of the Act, colloquially described as whistleblowing, to her line manager;

(b) the line manager's response to her disclosures was to seek to pretend over the course of several months that Ms Jhuti's performance of her duties under her contract of employment with the company was in various respects inadequate;

(c) in due course the company appointed another officer to decide whether Ms Jhuti should be dismissed; and

(d) having no reason to doubt the truthfulness of the material indicative of Ms Jhuti's inadequate performance, the other officer decided that she should be dismissed for that reason.

So what was the reason for Ms Jhuti's dismissal? Was it that her performance was inadequate? Or was it that she had made protected disclosures? These specific questions generate the following question of law of general importance which brings the appeal to this court:

> In a claim for unfair dismissal can the reason for the dismissal be other than that given to the employee by the decision-maker?

Facts

2. On 17 September 2013 the company employed Ms Jhuti as a media specialist in its MarketReach unit under a contract terminable by either side on three months' notice. But the contract provided that, for the first six months, she would be on trial and that, if she failed it, the company could dismiss her on one week's notice. The unit had two teams. Ms Jhuti was assigned to Mr Widmer's team. The role of a media specialist in the company is to promote the use of mail by businesses engaged in marketing activities. Ms Jhuti had previously worked at a senior level in the media industry.

3. On 16 October 2013 Ms Jhuti was shadowing Ms Mann. Ms Jhuti formed the view that Ms Mann was or might be infringing Ofcom's guidance, reflected in the company's own policy, in respect of "Tailor-Made Incentives" ("TMIs"). The company's dominant position in the postal market had led its regulator, Ofcom, by the issue of guidance, to seek to control its offers of TMIs to customers: it provided that, while they could be offered to new customers or to existing customers in respect of new products, they should not be offered to existing customers in respect of repeat business. Ms Jhuti formed the view that Ms Mann was not complying with that guidance nor with the company policy which reflected it and that the business which flowed from her improper offers would assist her in achieving her targets and in securing a bonus for herself and, indirectly, for Mr Widmer himself. Ms Jhuti soon formed the same view about offers of TMIs made by another member of Mr Widmer's team.

4. By two emails to Mr Widmer dated 8 November 2013 and by a third email to him dated 12 November, Ms Jhuti reported her concerns about Ms Mann's perceived non-compliance with Ofcom's guidance and with company policy in relation to offers of TMIs.

5. Mr Widmer apprised his line manager, namely Mr Reed, the company's Sales Director, of Ms Jhuti's reports. By an email which the tribunal described as sinister, Mr Reed responded to him as follows:

> "The TMI issue is one we should look at, so she needs to provide evidence of that, and has to be aware that she is making quite strong and serious allegations in this area."

6. On 13 November 2013 there was a meeting between Ms Jhuti and Mr Widmer. It lasted for no less than four hours. Mr Widmer asked her at length about her

understanding of the guidance and policy in relation to TMIs. He commented that her understanding of them was questionable and that, if it was wrong, it would impact on her position. He asked her whether she was sure that she wished to make the allegations against Ms Mann. He observed that Ms Jhuti was on trial and that the allegation could cause problems for everyone. During a short break Ms Jhuti realised that, were she to press the allegations further, her employment would be at risk. When the meeting resumed, Ms Jhuti therefore apologised repeatedly; and she acceded to Mr Widmer's suggestion that, by email to him, she should admit that she had made a mistake and should retract the allegations. Thereafter Mr Widmer administered to her what she described as, and the tribunal accepted to have been, a "two-hour dress-down" in which, for the first time, he insisted that she was failing to meet the requirements of her role and in which he provided her with a list of fresh performance targets for her to meet.

7. Later that day Ms Jhuti duly sent the email by which she retracted the allegations. She said that her wires had been crossed in relation to Ms Mann's offers of TMIs.

8. Thereafter Mr Widmer set up intensive weekly meetings with Ms Jhuti, unmatched for other members of his team, which, so he said, were necessary in order to monitor her performance.

9. In an email dated 3 December 2013 to Ms Rock in the Human Resources department ("HR"), Mr Widmer, who had begun to tell Ms Jhuti repeatedly that her progress was disappointing, said that he intended to compile examples of material which would support concerns that she was not meeting expected standards.

10. In the absence of Mr Widmer, off sick for several weeks over Christmas 2013, the other team leader in the unit supervised Ms Jhuti's work. She told Ms Jhuti that she was happy with her progress. Her advice was "just keep [Mr Widmer] happy and you will be fine".

11. At a meeting on 18 December 2013 Mr Roberts, who within the company had particular expertise in connection with TMIs, acknowledged to Ms Jhuti that media specialists were offering them inappropriately. He said that "we all know …" and that changes were necessary to eradicate the abuses.

12. At two protracted meetings with Ms Jhuti in January 2014 following his return to work, Mr Widmer resumed his criticisms of her performance. Ms Jhuti found it hard to discern precisely what he expected of her. By then she was suffering from alopecia. Mr Widmer also sent a further email to HR to the effect that her performance was not up to expectations and that, in the absence of change, the company would need to consider "exiting" her.

13. At a further meeting on 5 February 2014 Mr Widmer told Ms Jhuti that she was to be placed on a six-week performance improvement plan and that, unless she complied with it, she would not pass her trial period. The fourth of the five stated objectives of the plan was for her to disclose to him all the key client contacts in the travel industry which she had made during her previous employments.

14. On 6 February 2014 Ms Jhuti sent an email to HR in which she expressed concern about Mr Widmer's conduct towards her. She alleged that it was all due to an issue which she had raised previously and which, being on trial, she had been forced to rescind. She stated that she had consulted her doctor for stress which, in her view, was causing her alopecia. She said that she believed that the demand for disclosure of information gained during previous employments was one with which she could not lawfully comply and that it represented part of an agenda to dismiss her if she failed to accede to it.

15. Ms Jhuti's email to HR precipitated a meeting with Ms Rock on 10 February 2014. Ms Jhuti reiterated that Mr Widmer had been harassing her because she had accused Ms Mann of an improper use of TMIs. She said that they had helped Ms Mann to achieve her performance targets and to secure a bonus for herself and indirectly for Mr Widmer himself, thereby in effect defrauding the company. Ms Rock responded that Mr Widmer was a respected employee; that he would be the one to be believed; that Ms Jhuti might regard the company as not right for her; and that, by reference to her performance, the company might find a way to dismiss her.

16. By email to Ms Rock dated 25 February 2014 Ms Jhuti wrote:

> "It is clear I am being managed to be removed, all on the basis of [Mr Widmer] holding what I believe is a grudge from the day I raised an issue … If you want me out, all based on the initial issue I raised, then just tell me to go …"

17. On 29 February 2014 Ms Jhuti was told that her request for a different line manager was granted and that it would be Mr Reed. Mr Reed extended Ms Jhuti's trial period by one month, to 17 April. He told Ms Jhuti that she was not making the progress which he would have expected. But he admitted that the length of Mr Widmer's meetings with her had been excessive. He said that he did not wish to discuss the allegations which she had made in 2013 because HR was addressing them.

18. On 12 March 2014 Ms Jhuti's general practitioner signed her off work by reason of work-related stress, anxiety and depression. She never thereafter returned to work.

19. A few days prior to Ms Jhuti's cessation of work, Ms Rock had on behalf of the company offered her three months' salary in return for a voluntary termination of her employment. Ms Jhuti had rejected the offer. Following its cessation, Ms Rock increased the offer to a year's salary. The tribunal described the ostensible generosity of it, to an employee with an insufficiently long period of employment to be able to claim unfair dismissal on the general basis set out in section 98 of the Act, as extremely strange. Ms Jhuti did not respond to the increased offer.

20. In April 2014 the company appointed Ms Vickers, a manager with the same seniority as Mr Reed, to decide whether it should terminate Ms Jhuti's employment. Ms Vickers had had no previous dealings with Ms Jhuti. Her instructions were to "review" the evidence rather than (so it appears) to investigate matters for herself. She was supplied with numerous emails passing between Mr Widmer and Ms Jhuti, including her email of retraction dated 13 November 2013, but not with the emails dated 8 and 12 November nor with her emails to HR dated 6 and 25 February 2014.

21. On 11 July 2014 Ms Vickers invited Ms Jhuti to attend a meeting on 18 July. Ms Jhuti responded in about 50 lengthy emails which the tribunal found to be often incoherent and irrational, in marked contrast to her earlier emails. She referred to being "sacked for telling the truth" so Ms Vickers asked Mr Widmer to explain what she meant. He replied that Ms Jhuti had alleged that TMIs were being offered inappropriately but that, when he had explained the unit's observance of the strict criteria for offers of TMIs, she had been happy to accept that she had misunderstood what had occurred.

22. Ms Jhuti did not attend any meeting with Ms Vickers, whether on 18 July 2014 or otherwise. She was too ill to do so. By letter to Ms Jhuti dated 21 July Ms Vickers communicated her decision that the company should dismiss her from her employment on three months' notice, thus with effect from 21 October. Ms Vickers explained that from November 2013 to March 2014, and despite having been subject in February 2014 to Mr Widmer's performance improvement plan, Ms Jhuti had failed to meet required standards of performance and that it was unlikely that she would do so in future.

23. In September 2014, having consulted solicitors, Ms Jhuti exercised her right to bring an internal appeal against Ms Vickers' decision. On 28 August 2015, so almost a year later, it was dismissed. The tribunal found that the conduct of it had been unsatisfactory.

24. By her claim to the tribunal, which had been lodged on 18 March 2015, Ms Jhuti presented two complaints.

First Complaint: Detriments

25. In the appeal before this court, nothing directly turns on the first complaint.

26. This complaint was presented under section 48(1A) of the Act, which falls within Part V of it. In it Ms Jhuti contends that she made protected disclosures within the meaning of section 43A, which falls within Part IVA of it. The contention is that they were disclosures of information which, so she reasonably believed, she made in the public interest and which tended to show that criminal offences had been committed or that persons had failed to comply with legal obligations to which they were subject (section 43B(1)(a) and (b)) and which she made to her employer (section 43C(1)(a)).

27. Ms Jhuti proceeds to contend that, contrary to section 47B(1) of the Act, she was subjected to detriments by acts of the company done on the ground that she had made the protected disclosures. She seeks compensation from the company for the detriments pursuant to section 49(1)(b).

28. At first sight a possible obstacle to the first complaint, not yet finally resolved, is presented by section 47B(2) of the Act, which provides:

> "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)."

Thus the exclusion provided by subsection (2) applies only where the detriment "amounts to" dismissal. In the present case the detriments which the tribunal identified, and which I will address in para 32(b) below, all preceded the dismissal. The detriments may well have *caused* Ms Jhuti's dismissal. But can it be said that they *amounted to* it? Neither party takes issue with the proposition articulated by Underhill LJ in the decision under appeal:

> "78. There is thus, on the arguments advanced before us, no obstacle in principle to the claimant recovering compensation [under section 49(1)(b)] for dismissal consequent on detriment. Whether she can do so in practice, or to what extent, is of course a matter for the employment tribunal at the remedy hearing."

The judge's proposition was confirmed in a formal declaration made in the Court of Appeal's order. Although, as I will explain, the tribunal had made observations suggesting that Ms Jhuti's dismissal was consequent upon the detriments to which it found her to have been subjected, the Court of Appeal there held that it remained open to the company to argue otherwise before the tribunal at a future remedy hearing; and the company says that it proposes to do so.

29. As I will explain, another potential obstacle to the first complaint was presented by section 48(3) of the Act, which provides:

> "An employment tribunal shall not consider a complaint under this section unless it is presented -
>
> > (a) before the end of the period of three months beginning with the date of the act … to which the complaint relates or, where that act … is part of a series of similar acts …, the last of them, or
> >
> > (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

Second Complaint: Unfair Dismissal

30. This complaint was presented under section 111(1) of the Act, which falls within Part X of it, entitled "Unfair Dismissal". Ms Jhuti alleges that, pursuant to section 103A, set out in para 1 above, her dismissal was unfair because the reason for it was that she had made protected disclosures. Section 103A is an example of what is often called automatic unfair dismissal. It is to be contrasted with the provision in section 98, entitled "General", under which, if pursuant to subsection (1) the employer establishes that "the reason (or, if more than one, the principal reason) for the dismissal" is of the kind there specified, the fairness of the dismissal falls to be weighed by reference to whether it was reasonable in all the circumstances pursuant to subsection (4). The application of subsection (4) to section 103A is excluded by section 98(6)(a). So there is no weighing by reference to whether the dismissal was reasonable in all the circumstances: under section 103A unfairness is automatic once the reason for the dismissal there proscribed has been found to exist. In *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] ICR 799, the Court of Appeal addressed the location of the burden of proof under section 103A. It held that a burden lay on an employee claiming unfair dismissal under the section to produce some evidence that the reason for the dismissal was that she had made a protected disclosure but that, once she had discharged that evidential burden,

the legal burden lay on the employer to establish the contrary: see paras 57 and 61 of the judgment of Mummery LJ.

The Decision of the Tribunal

31. The tribunal (Employment Judge Baty and two lay members) made a series of decisions upon the complaints in respect of liability and explained them in a comprehensive set of written Reasons.

32. In relation to the first complaint the tribunal decided as follows:

(a) Ms Jhuti had made four protected disclosures within the meaning of section 43A. She had made them in the three emails to Mr Widmer dated 8 and 12 November 2013 and also at her meeting with Ms Rock on 10 February 2014.

(b) In breach of her right under section 47B(1), Ms Jhuti had in four respects been subjected to detriments by acts of the company done on the ground that she had made the protected disclosures. First, Mr Widmer, who did not genuinely have serious concerns about her performance, had from 13 November 2013 imposed particular targets and mandatory weekly meetings solely on Ms Jhuti and had bullied, harassed and intimidated her. He had done so as a result of her disclosures to him and he had been setting her up to fail. Second, still lacking any serious concerns about her performance, Mr Widmer had on 5 February 2014 imposed upon Ms Jhuti a performance improvement plan, with which she was required to comply in order to pass her trial period and which included a demand for disclosure of key contacts made during previous employments. He had done so as a result, again, of her disclosures to him and he had again been setting her up to fail. Third and fourth, Ms Rock had in March 2014 made an offer to Ms Jhuti of three months' salary and had later increased it to one year's salary, as inducements to her to relinquish her employment, which Ms Jhuti did not wish to do. Ms Rock had done so as a result of all four disclosures, in particular the disclosure to her on 10 February.

(c) Ms Jhuti's complaint was not out of time because it related to a series of acts, the last of which occurred within the three months specified under section 48(3)(a). The tribunal's reasoning in this respect is irrelevant to the present appeal.

(d) Assessment of the amount of compensation to be paid by the company to Ms Jhuti in respect of the detriments should be conducted at a remedy hearing.

33. But the tribunal decided that the second complaint should be dismissed. It held that the complaint failed to satisfy section 103A because the reason, or at least the principal reason, for Ms Jhuti's dismissal had not been her making of the protected disclosures. It found that the disclosures had played no part in the reasoning of Ms Vickers who, albeit by reference to evidence which was hugely tainted, genuinely believed that the performance of Ms Jhuti had been inadequate and who had dismissed her for that reason.

34. But the tribunal added the following observation, which it underlined:

> "346. 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."

The Decision of the Appeal Tribunal

35. The company appealed to the Employment Appeal Tribunal ("the appeal tribunal") against decisions made by the tribunal in respect of the first complaint. In particular it challenged the decision that Ms Jhuti's first complaint had been presented in time. Ms Jhuti cross-appealed against the dismissal of her second complaint; and it was agreed that the judge in the appeal tribunal, Mitting J, should determine the cross-appeal first.

36. On 19 May 2016, by a judgment numbered UKEAT/0020/16 and reported at [2016] ICR 1043, Mitting J allowed Ms Jhuti's cross-appeal. He held, at paras 33 and 34, that, if someone in a managerial position, responsible for the employee, had manipulated a decision to dismiss her which had been made in ignorance of the manipulation, the manipulator's reason for dismissal could be attributed to the employer for the purpose of section 103A; and he held, at paras 35 and 36, that on the tribunal's findings the reason for Ms Jhuti's dismissal was therefore her making of the protected disclosures. Mitting J granted permission to the company to appeal to the Court of Appeal against his order in this respect. He also stayed the company's appeal to the appeal tribunal pending determination of its proposed appeal to the Court of Appeal.

The Decision of the Court of Appeal

37. On 20 October 2017, by judgments numbered [2017] EWCA Civ 1632 and reported at [2018] ICR 982, the Court of Appeal allowed the company's appeal. The only substantive judgment was delivered by Underhill LJ; by their judgments, Jackson

and Moylan LJJ did no more than to agree with it. The Court of Appeal held that, subject to possible qualifications said to be irrelevant to the present case, a tribunal required to determine "the reason (or, if more than one, the principal reason) for the dismissal" under section 103A of the Act, and for that matter under section 98(1)(a), was "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" para 57. It is against the Court of Appeal's decision to set aside Mitting J's order and to reinstate the tribunal's dismissal of her second complaint that Ms Jhuti brings the present appeal.

38. The Court of Appeal also remitted to the appeal tribunal the task of determining the company's appeal, stayed by Mitting J, against the tribunal's decision that Ms Jhuti's first complaint was presented in time in accordance with section 48(3) of the Act. It appears that the appeal tribunal allowed the company's appeal and remitted the issue under the subsection for re-determination by the tribunal; that, by a different route, the tribunal again determined that the complaint was presented in time; and that the company's appeal against the tribunal's re-determination has recently been dismissed.

Reason for the Dismissal

39. The question is whether the tribunal correctly identified "the reason (or, if more than one, the principal reason) for the dismissal" within the meaning of section 103A of the Act. But the same words also appear in numerous other sections in Part X of it. In particular, as explained in para 30 above, they appear in subsection (1) of section 98, which contains the current provision for a claim of unfair dismissal on the general basis; indeed those same words have been applied to a general claim for unfair dismissal ever since introduction of the claim into the law by section 24 of the Industrial Relations Act 1971. The court's answer to the question in relation to section 103A must relate equally to the other sections in Part X in which the same words appear, and also, for example, to section 98(4), which requires the tribunal to determine whether the employer acted reasonably in treating the reason for dismissal as sufficient.

40. At first sight, therefore, the question seems to be of wide importance.

41. On the other hand, as the company acknowledges, the facts of the present case are extreme:-

(a) an employee on trial blows the whistle upon improper conduct on the part of her line manager's team;

(b) her line manager responds by deciding to pretend that the employee's performance of her duties is inadequate and to secure a conclusion that she has failed her trial period;

(c) over the next months he bullies and harasses her with targets, meetings and an improvement plan, by which he sets her up to fail;

(d) he succeeds in creating, in emails and otherwise, a false picture of her inadequate performance;

(e) the decision to dismiss the employee is made by an officer who, in her review of the evidence, fails to perceive the falsity of the picture which he has created; and

(f) in particular the employee, in no condition to meet the decision-maker or otherwise to present her case clearly to her, fails to help her to understand the falsity of the picture.

Instances of decisions to dismiss taken in good faith, not just for a wrong reason but for a reason which the employee's line manager has dishonestly constructed, will not be common.

42. The need to discern a state of mind, such as here the reason for taking action, on the part of an inanimate person, namely a company, presents difficulties in many areas of law. They are difficulties of attribution: which human being is to be taken to have the state of mind which falls to be attributed to the company?

43. In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 a New Zealand statute required a holder of specified investments to give notice of its holding to a regulator as soon as it became aware of its holding. Unbeknown to any others in the company apart from one colleague, its chief investment officer improperly acquired such investments on the company's behalf. The judicial committee of the Privy Council held that his knowledge of the holding should be attributed to the company and thus triggered the requirement for the company to give notice; and that it was unnecessary to decide whether in some more general sense he was the company's "directing mind and will". On behalf of the committee Lord Hoffmann said, at p 507:

> "[G]iven that [a rule] was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc of the company? One

> finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

This context-dependent nature of the task of attributing a human state of mind to a company was re-affirmed by Lord Sumption in *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1, at para 67.

44. The context of the present case is a search for the reason for a company's dismissal of an employee. In *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, Cairns LJ offered the classic definition:

> "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."

45. In *West Midlands Co-operative Society Ltd v Tipton* [1986] AC 536 Lord Bridge of Harwich, in a speech with which the other members of the appellate committee agreed, indorsed at p 545 the definition of Cairns LJ; approved at p 544 observations by Lord Reid in *Post Office v Crouch* [1974] 1 WLR 89, 95-96, that statutory provisions for claims for unfair dismissal "must be construed in a broad and reasonable way so that legal technicalities shall not prevail against industrial realities and common sense"; and observed at p 545 that the reason for the dismissal to which the provisions referred might aptly be termed the "real" reason for it.

46. In enacting section 103A Parliament clearly intended to provide that, where the real reason for dismissal was that the employee had made a protected disclosure, the automatic consequence should be a finding of unfair dismissal. But is the meaning of the section, to be collected from its language construed in the light of its context and purpose, that, when the employee's line manager deliberately hides the real reason behind a fictitious reason, the latter is instead to be taken as the reason for dismissal if adopted in good faith by the decision-maker on the company's behalf?

47. In giving an affirmative answer to that question the Court of Appeal considered itself bound by its earlier decision in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704, which had not been drawn to the attention either of the tribunal or of the appeal tribunal. The tribunal in the *Orr* case had not clearly found all the relevant facts and the three judgments in the Court of Appeal differ in their recital of some of them as well as in relation to the legal issue to which they gave rise.

48. An attempted summary is as follows:

(a) Mr Orr was employed by the council as a youth worker.

(b) Contrary to his manager's instruction, Mr Orr discussed a recent sexual assault with the youths with whom he was working.

(c) The manager sought in an underhand way to reduce Mr Orr's working hours and Mr Orr discovered, or may have discovered, that the manager had done so.

(d) There was an altercation between Mr Orr and the manager, in which Mr Orr lapsed into Jamaican patois.

(e) The manager thereupon responded with words which were held to amount to unlawful race discrimination, to the effect that those who use the patois mumble unintelligibly.

(f) Mr Orr thereupon lost his temper and behaved in an insubordinate manner towards the manager.

(g) An officer was appointed to decide whether Mr Orr should be dismissed.

(h) Mr Orr chose not to contribute to the officer's inquiry.

(i) The manager did contribute to the officer's inquiry but withheld from him the facts at (c) and (e).

(j) Pursuant to the decision of the officer, who was unaware of the facts at (c) and (e), the council dismissed Mr Orr.

49. The main issue before the Court of Appeal was whether, for the purpose of section 98(4) of the Act, the council acted reasonably in treating Mr Orr's insubordination as a sufficient reason for dismissing him. For that purpose, what knowledge should be attributed to the council? Just the knowledge of the officer? Or also the knowledge of the manager? Moore-Bick LJ at para 58 gave a clear answer, with which Aikens LJ at para 86 agreed: it was the knowledge of the "person who was deputed to carry out the employer's functions under section 98", and only of that person, which fell to be attributed to the company for that purpose. So Mr Orr failed in his appeal against the rejection of his complaint of unfair dismissal.

50. But Sedley LJ dissented from the dismissal of Mr Orr's appeal. He held at para 19 that the officer appointed to decide whether an employee should be dismissed

> "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 [including] 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."

51. Mr Jones QC, on behalf of Ms Jhuti, does not seek to persuade this court to approve the need for an inquiry into the knowledge of facts as wide as Sedley LJ there suggested. He also accepts the criticism made by Moore-Bick LJ at para 60 that attribution *to the officer* of facts known to the manager would be artificial. It is attribution *to the company* of facts known to the manager (here Mr Widmer) for which Mr Jones contends; and he relies on a sentence in para 29 of the judgment of Sedley LJ, seemingly inconsistent with what he had said in para 19, in which he observed that Mr Orr's case involved imputing the manager's knowledge not to the officer but to the council.

52. For various reasons, some already visible, Mr Orr's case was not a satisfactory vehicle for any full, reasoned, articulation of principle in relation to the attribution to the employer of facts unknown to the decision-maker but known to those in the chain of responsibility above the employee. Nor were the facts of his case, in which what was told to the decision-maker was true but did not include part of the background, comparable to those in the present case, in which the decision-maker was deceived by the presentation to her of a falsely constructed set of criticisms.

53. While in the present case he correctly acknowledged that the Court of Appeal was bound by its majority decision in the *Orr* case, Underhill LJ identified at para 62 a different situation in which, so he suggested, it might be appropriate for a tribunal to attribute to the employer knowledge held otherwise than by the decision-maker. He was referring to the knowledge of a manager who, alongside the decision-maker, had had some responsibility for the conduct of the disciplinary inquiry. It was a suggestion which he had first made in his judgment in *The Co-Operative Group Ltd v Baddeley* [2014] EWCA 658. There, in para 42, he had referred to a situation in which the decision-maker's beliefs had "been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation". "For short," Underhill LJ had added (perhaps questionably), "an Iago situation". He had proceeded:

> "[Counsel] 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 respectfully agree that in the situation there identified by Underhill LJ it might well be necessary for the tribunal to attribute to the employer the knowledge of the manipulator; but, as Underhill LJ accepted, the proposition in no way helps to resolve the present case because Mr Widmer cannot be taken to have had responsibility, alongside Ms Vickers, for any part of the conduct of the inquiry.

54. In its opposition to the attribution to it of the knowledge of Mr Widmer for the purpose of identifying its reason for dismissing Ms Jhuti, the company, by Mr Gorton QC, relies principally on the provisions of section 47B of the Act, part of which has been addressed above. The argument is that the section gives a valuable right to workers not to be subjected to detriment by acts done on the ground that they have made a protected disclosure; and that there is therefore no reason under section 103A to (so it is said) "stretch" the attribution to the company of the reason for dismissal beyond that given by the appointed decision-maker.

55. It is in two different situations that section 47B confers the right to which the company refers. Subsection (1) caters for the first situation: here the worker's right is not to be subjected to detriment by any act done "by his employer" on the specified ground. Subsections (1A) to (1E), inserted into the Act by section 19(1) of the Enterprise and Regulatory Reform Act 2013, cater for the second situation: here the right is not to be subjected to detriment by any act done "by another worker …" on the specified ground but, subject to a limited defence to which it is unnecessary to refer, the other worker's act is treated as the employer's act so as to render the employer vicariously liable for it.

56. One aspect of the company's argument appears to be that, to catch the conduct of other employees who act against whistleblowers as Mr Widmer did, the provision for the employer's vicarious liability in subsections (1A) to (1E) of section 47B affords an entirely adequate remedy. With respect, this aspect of the argument seems curious. A close study of the documents in the present case yields the confident conclusion that, as set out in para 32(b) above, the right of Ms Jhuti under section 47B which the tribunal held to have been infringed was the right under subsection (1), arising in the first situation in which the employer does the act and is directly liable for it. It was not the right under subsections (1A) to (1E), arising in the second situation in which another worker does the act and the employer is vicariously liable for it. It follows that, of the four acts (including series of acts) by which the tribunal found Ms Jhuti to have been subjected to detriment, the two acts of Mr Widmer (and for that matter the two acts of Ms Rock) were attributed to the company so as to make it directly liable for the

detriments. This unchallenged attribution to the company of the acts of Mr Widmer, which, had it known of the circumstances surrounding them, it could not have authorised, affords no support for its approach to attribution under section 103A.

57. But the company's reliance on section 47B of the Act has a wider dimension. Rising above the dichotomy between the two situations there identified, its argument is that, in one way or the other, the right there given to those in the position of Ms Jhuti affords to them all the relief which they could reasonably expect. The argument has generated comparison between the time limit for presenting a complaint of subjection to detriment under section 47B (see section 48(3), set out in para 29 above) and the allegedly more generous limit for presenting a complaint of unfair dismissal under section 103A (see section 111(2)); and comparison also between the remedy for subjection to detriment, compensation for which can extend to injury to feelings, and the remedies for unfair dismissal, which do not provide such compensation but which include interim relief under section 128 and orders for reinstatement or re-engagement under section 113 such as have no parallel in relation to a complaint of detriment.

58. There is a limit to the utility of such comparisons. There will inevitably be facets of the two complaints which will make one of them more advantageous than the other to the complainant or to the employer. Overarchingly, however, Parliament has, by section 103A, provided that, where an employee's whistleblowing is the reason for it, a dismissal should automatically be unfair and should thus attract the remedies set out in Part X; and, as noted in para 28 above, it has also, by section 47B(2), withdrawn the rights provided by that section from the whistleblowing employee who is subjected to a detriment which amounts to dismissal.

59. It is therefore obvious that whistleblowers are not confined to remedies under Parts IVA and V of the Act. The task of this court, mandated by section 103A, is to determine whether the tribunal properly identified the reason for Ms Jhuti's dismissal. The company is right to object to any "stretching" of that word. On the other hand we should respond to the encouragement of Lord Reid in the *Crouch* case, cited in para 45 above, to approach the problem in a broad and reasonable way in accordance with industrial realities and common sense.

60. In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X, courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers

turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.

Conclusion

61. There is no need to remit to the tribunal an issue whether, upon the proper attribution to the company of Mr Widmer's state of mind, the reason for Ms Jhuti's dismissal was that she had made the protected disclosures. Mitting J in the appeal tribunal was correct to hold that, although the tribunal had considered it necessary to address the state of mind only of Ms Vickers, it had made findings determinative of that issue in favour of Ms Jhuti. Such part of the order of the Court of Appeal as allowed the company's appeal against his order should be set aside; and his order should be restored. There is no need to overrule the decision in the *Orr* case; by our decision, we attach only a narrow qualification to it.

62. The answer to the question of law identified in para 1 above is therefore as follows:

> Yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.