Judgment approved by the court Penicela v Sanctuary Care Ltd

Neutral Citation Number: [2022] EAT 181

Case No: EA-2020-001059-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building

Fetter Lane, London, EC4A 1NL

Date: 6 October 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MRS T PENICELA Appellant

-v-

SANCTUARY CARE LTD Respondent

- -

- -

Rad Kohanzad for the **Appellant**

Christopher Edwards (instructed by **Wragge Lawrence Graham & Co Solicitors**) for the **Respondent**

Hearing date: 6 October 2022

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL, PRACTICE, AND PROCEDURE

The claimant was dismissed at a probationary review hearing for the given reason of capability or performance. Her case was that she was unfairly dismissed because she had made a series of protected disclosures by raising concerns that understaffing at care homes run by the respondent was putting the safety of residents at risk. The probationary review meeting was to have been conducted by the claimant's line manager, but, after she stepped down from her role for personal reasons, it was conducted by another manager. That manager was provided with a copy of the former line manager's probation report, which contained a number of criticisms of the claimant's performance or capability.

The tribunal found that the claimant had made a protected disclosure on one occasion, that the dismissing manager dismissed her because she believed that the claimant lacked capability, relying in part on the line manager's report, and in part on her own knowledge and experience, and that the protected disclosure did not influence her decision, nor did any other contribution that the claimant had made to discussions about staffing and resident-safety issues.

Held: the list of issues had identified that it was specifically the claimant's case that her original line manager had been influenced in the way she wrote her probation report by the claimant having raised concerns about staffing levels and patient safety, and that it was this report that led to her dismissal, which was, for that reason, unfair. It was therefore incumbent on the tribunal specifically to address that case in its decision, including (a) whether it considered that this was a case where, in addition to the facts or beliefs operating on the mind of the dismissing officer, what influenced the mind of the line manager when compiling her probation report needed also to be considered; and (b) if so, whether the line manager's report was adversely influenced by the claimant's protected disclosure; and (c) whether, if so, having regard to the contribution that that made to the dismissing officer's reasons, that rendered the dismissal unfair. Given that this was the primary, if not the whole, basis of the claimant's case, the tribunal had erred by not specifically addressing those questions in its decision and the matter would be remitted to it to further consider and decide them.

HIS HONOUR JUDGE AUERBACH:

Introduction

1.
I will refer to the parties as they were in the employment tribunal as claimant and respondent. The respondent is a large national provider of care homes. The claimant was employed by it as a regional manager from August 2017 until she was dismissed in January 2018 for the given reason that she had not passed her probation review. The claimant presented a claim form acting as a litigant in person. Following preliminary hearings, the matter came to a full merits hearing before Employment Judge R Lewis, Mr D Bean and Mrs S Wellings sitting at Watford. The live complaints were of unfair dismissal for the reason or principal reason that the claimant had made protected disclosures, direct race discrimination and victimisation. All of the complaints failed. The tribunal upon request produced written reasons for its oral decision. An application by the claimant for reconsideration was rejected on preliminary consideration by the judge.

2.
As to the complaint of automatic unfair dismissal, the tribunal found that the claimant had made one protected disclosure in September 2017 but that this was not the sole or principal reason why she was dismissed. The claimant was again a litigant in person when she embarked on her appeal. At a rule 3(10) hearing, at which she was represented by Mr Kohanzad under the ELAAS scheme, Linden J permitted two amended grounds of appeal to proceed in relation to the tribunal's decision on the complaint of unfair dismissal for having made protected disclosures. Mr Kohanzad has appeared again today for the claimant and Mr Edwards, who also appeared in the tribunal, has appeared again for the respondent.

3.
I will say a little more now about the factual background, which I draw from the tribunal's decision. The claimant was appointed as a Regional Manager from 14 August 2017. There was a six-month probation period. The claimant was responsible for a number of care homes in the south-east of England, the managers of which each reported to her. Initially, the claimant reported to a Regional Director, Carol Cranfield. Just before Christmas 2017, Ms Cranfield stepped back from her role for personal reasons. She was succeeded as the claimant's line manager by the Director of Operations, Sheila O'Connor. Ms Cranfield had been due to hold a probation review meeting with the claimant in December, but that had been postponed. Ms O'Connor then took over responsibility for it, and, following a further postponement, the meeting took place on 11 January 2018. The tribunal found that

the claimant was very unhappy that the meeting had been postponed and about the change of manager and had raised a grievance about those things.

4.
The tribunal made further findings in the course of its decision about two aspects of the events that unfolded in the period between the claimant starting her job in August and the probation review meeting in January. The first concerned what the claimant said were her protected disclosures and the second concerned what the respondent said were matters giving rise to concerns about her performance or capability.

5.
As to the first aspect, the tribunal found that management had a significant responsibility for ensuring that safe levels of care were provided to all residents, many of whom are extremely vulnerable, operating within the constraints of a budgetary framework. The tribunal described at [41] to [43] how this involves an ongoing process of what it called “dynamic assessment”of individual needs of residents, assessment of the overall staffing and organisational needs of each home, and dialogue between individual home managers, the Regional Manager and more senior management.

6.
Within that context, the tribunal made findings about a budget meeting on 13 September 2017 relating to a home in the claimant’s patch, which was attended by the claimant, by the home manager, Ms Johnson, by Ms Cranfield, and by a regional finance manager, Ms Allden. At that meeting the claimant and Ms Johnson both said that the current level of staffing at that home was unsafe and that an additional staff member was required. The tribunal found that this amounted to a protected disclosure by the claimant. The tribunal also referred to a wider budget review meeting on 11 October 2017 attended by the claimant, Ms Cranfield and Ms Allden, at which the request for an additional staff member at the same home was repeated. But the tribunal said that it did not feel able on the evidence it had to find that a protected disclosure was also made on that occasion.

7.
The tribunal found that the claimant and Ms Johnson had, as a result of what was said at the meeting on 13 September 2017, the status of protected whistle-blowers; but it also found that the request for an additional staff member at the home in question was approved and that there was no evidence that Ms Johnson, for her part, was in any way subsequently prejudiced. It found that discussions of this sort were part of what it called “the daily working vocabulary of senior management,” such that there was nothing untoward about a request being raised for more staff, linked to an issue of patient safety, being raised.

8.
Further on in its reasons, the tribunal referred to the claimant’s case that she had made disclosures on other occasions about the staffing levels at the same home, and at two other homes. But it concluded that the evidence it had was not clear enough to support a finding that any further protected disclosures had been made on any other occasion. The tribunal also considered two particular emails relied upon by the claimant but concluded that neither contained information of the kind that would amount in law to a protected disclosure.

9.
As to the second aspect, the tribunal referred in the course of its decision to various matters said to have given rise to performance concerns in relation to the claimant, on the part of senior managers. Specifically, it referred to the Director of Nursing, Ms Earl, raising repeated concerns about the

claimant's communication style, and two other matters in relation to which Ms Earl and Ms Cranfield had a shared concern that the claimant seemed reluctant to carry out a task within her remit. Elsewhere it referred to the claimant having had responsibility for preparing responses to two draft CQC reports, following home inspections. One of those draft reports was praised by Ms O'Connor as being of high quality; but the other was considered so poor a piece of work that a number of other managers had to be enlisted to the urgent task of rewriting it.

10.
I return now to the probation review meeting in January 2018. For the purposes of it, Ms O'Connor read a report with accompanying materials that had been prepared by Ms Cranfield. The tribunal described how, in her report, Ms Cranfield identified some positive tasks or outcomes achieved by the claimant in relation to 5 particular matters, but also referred to some 14 other items or matters said to be of concern. These included the CQC report response in which other managers had had to become involved. There was reference also to a number of other specific events, and general observations made by Ms Cranfield about aspects of the claimant's management skills. The tribunal described how the report was supported by a 94-page bundle of evidential materials.

11.
At the probation meeting Ms O'Connor was supported by Ms El-Guindi of HR. The claimant had with her an RCN Officer, Mr Godecharle. The tribunal found that Ms O'Connor went into the meeting thinking that dismissal was the likely outcome. At the start of the meeting, Mr Godecharle raised the possibility of an agreed settlement, and there was a break for him and the claimant to discuss whether they wished to put forward a specific proposal; but when the meeting resumed, they did not pursue this in the ensuing discussion. The claimant's grievance was also briefly discussed.

12.
Mr Godecharle then raised the topic of settlement again at the end of the meeting, which led to it being adjourned with a view to a settlement being implemented. Later that day, however, the claimant emailed her resignation, referring to constructive dismissal and protected disclosures. Ms El-Guindi emailed the next morning that what had been agreed was that resignation would form part of an agreed settlement, and that if the claimant did not want to proceed with that, then the original decision to terminate her employment would stand. There were further exchanges of emails in which there was no meeting of minds and the claimant also raised allegations of race discrimination. Following this, Ms O'Connor wrote formal letters to the claimant on 15 January 2018 dismissing her and also rejecting her grievance.

13.
The tribunal noted that at an earlier preliminary hearing, it had been decided that the net effect of this sequence of communications was that the claimant's employment had come to an end by Ms O'Connor dismissing her. Accordingly, in the decision with which I am concerned, the tribunal proceeded on that basis.

14.
Having identified that it had been found that the employment had ended by Ms O'Connor's decision to dismiss, the tribunal continued as follows:

"64.
We need first find whether the reason for her doing so, or, if more than one, the main reason, was the protected disclosure which we find the claimant made on 13 September 2017. By 'reason' we mean the factual considerations which operated in Ms O'Connor's mind

to lead her to the decision to dismiss. Ms O'Connor did not dispute that broadly she was aware of the 13 September discussion.

65.
We find that the reason for dismissal was that Ms O'Connor had a genuine belief, based on the reporting and supporting documentary evidence provided by Ms Cranfield, and drawing further on her own knowledge from senior management discussions, notably of the CQC report; and drawing on events at the probation review meeting itself, that the claimant could not attain and sustain the standard of performance required of a Regional Manager. In short, the reason for termination was the claimant's lack of capability.

66.
We find that the disclosure of 13 September 2017 played no part whatsoever in the claimant's dismissal, or in any part of Ms O'Connor's decision making process. Although we have not found that any of the other protected disclosures relied upon was in fact a protected disclosure, we make the following finding. Ms O'Connor's decision to dismiss was wholly uninfluenced in any respect by any contribution which the claimant had made to dialogue about safety levels and staffing levels in any homes; and for avoidance of doubt wholly uninfluenced by the contents of any grievance raised by the claimant. Our decision on the reason for dismissal would therefore have been the same, even if we had found that the claimant had made more protected disclosures than we find she did make."

15.
As to the events at the probation review meeting, the tribunal had earlier, at [59], made findings to the effect that it became apparent to Ms O'Connor during the course of that meeting that Mr Godecharle and the claimant were not agreed on their approach to the possibility of settlement. Ms O'Connor attributed that to lack of preparation and poor communication on the claimant's part, both of which were issues highlighted in Ms Cranfield's report; and Ms O'Connor considered that the presentation the claimant had made during the course of that meeting had been disorganised.

16.
The tribunal went on to consider, and reject, the claimant's complaint that her race had influenced Ms O'Connor's decision to dismiss, in particular finding that an alleged remark said to have been made by Ms O'Connor was not in fact made in the words alleged. It went on to consider, and ultimately dismiss, the various victimisation complaints.

17.
The amended grounds of appeal that were live before me were two-fold, as follows.

"Ground 1

The ET erred in failing to consider whether the reason why Carol Cranfield initiated capability/performance concerns, which led to the Claimant's dismissal, was that the Claimant had made a protected disclosure. In essence, it was argued by the Claimant that the dismissing officer acted upon the tainted evidence of Ms Cranfield. The Agreed List of Issues set out that question as one to be determined by the ET in considering whether the Claimant was automatically unfairly dismissed. It is averred that the ET did not address the case before it and therefore erred.

Ground 2

The ET erred in failing adequately to address the Claimant's case as to what protected disclosures she made. A detailed schedule of purported protected disclosures formed part of the Agreed List of Issues. It is averred that the ET did not properly address the Claimant's case as to whether she had or had not made the protected disclosures contended for."

18.
I had the benefit of clear and focused skeleton and oral arguments from both counsel. Mr Edwards's skeleton incorporated by reference more detailed points that had been set out in the respondent's answer to the amended grounds of appeal. I will summarise what seem to me to have been their respective main points.

19.
In relation to Ground 1, Mr Kohanzad highlighted how, in the list of issues for the full merits hearing, the issues in relation to the unfair dismissal claim were framed. In particular, after addressing what was said to have been the protected disclosures, paragraph 2.3 read as follows:

"The Claimant states that the disclosures were the principal reason for Carol Cranfield to initiate capability/performance concerns which led to her dismissal:

a) Was the reason, or the principal reason for the dismissal that the Claimant had made protected disclosure(s) within the meaning of section 103A?

b) If not, what was the reason for dismissal?"

20.
Mr Kohanzad submitted that this made it clear that the claimant was specifically raising a case of the sort discussed in **Royal Mail Group v Jhuti** [2020] ICR 731 in which the Supreme Court concluded that:

"…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."

21.
The list of issues had made it clear that the claimant's case was that the dismissing officer, Ms O'Connor, had acted on tainted information supplied by Ms Cranfield in her probation review report. However, the tribunal failed to address that specific case. It made a finding that Ms O'Connor had a genuine belief about the claimant's capability, based in part on the content of Ms Cranfield's report, as well as other things. But it failed to address at all the claimant's case that Ms Cranfield had drafted a negative report because of the claimant's disclosures, which then led to her dismissal. In failing to address that case, the tribunal erred.

22.
Mr Kohanzad submitted that it was not a sufficient answer that the tribunal had made a finding that the protected disclosure which it found the claimant did make, played no part in the decision to dismiss. What the tribunal said about that at [66] had to be read in the context of [64] to [66] as a whole. It was clear from this passage, as well as the wording of [66] itself, that what the tribunal was addressing there was the thought processes of Ms O'Connor, not why Ms Cranfield had drafted her report in the way that she did.

23.
As to Ground 2, Mr Kohanzad referred to the fact that, as well as setting out in summary form the claimant's case as to the protected disclosures that she had made, the list of issues was accompanied by a schedule, the first 12 pages of which gave further particulars of the claimant's multiple claimed protected disclosures. The tribunal, he submitted, had not properly addressed the claimant's case as to each and all of the disclosures she claimed to have made, as particularised in that schedule; and it had failed properly to resolve the question of whether she had made any of those claimed disclosures, over and above the single one that it found that she did make.

24.
Mr Kohanzad in oral submissions took me to various passages in the schedule. He suggested that it should have been taken into account by the tribunal that the claimant was a litigant in person doing her best. In some instances where she had referred to certain meetings having taken place; the tribunal should have inferred that it was her point that she had made protected disclosures on all of those occasions. He also referred me to passages in the particulars in which the claimant referred to exchanges about what was called a "dependency tool" that she considered should have been used for the purposes of assessing staffing-need, but about which other managers disagreed. He submitted that the tribunal should have inferred that it was part of the claimant's case that, in failing to adopt her preferred dependency tool, the respondent was acting in a way that gave rise to a risk to health and safety, such that the exchanges on that subject also involved her making protected disclosures.

25.
For the respondent, Mr Edwards's principal points were as follows. Firstly, he submitted that it was important to read the tribunal's decision as a whole and benevolently, referring me to dicta in **Hollister v National Farmers Union** [1979] ICR 542 and **ASLEF v Brady** [2006] IRLR 576 to the effect that such a decision should not be approached with a fine-tooth comb or subjected to unrealistically detailed scrutiny. He reminded me of the provisions of Rule 62 of the rules of procedure, and of the well-known (to employment lawyers) guidance in **Meek v City of Birmingham District Council** [1987] IRLR 250, recently reiterated by the Court of Appeal in **Dray Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601. He submitted that, in relation to the aspects raised by both Grounds, this decision was **Meek**-compliant.

26.
More specifically in relation to Ground 1, he noted that it was incorrect to suggest that Ms Cranfield had initiated a performance or capability process leading to the claimant's dismissal. Rather, as the tribunal found, there was simply a probationary review meeting conducted in line with the respondent's ordinary process for that. He noted that the respondent's closing submissions to the tribunal had referred to the **Jhuti** case. He also said that in both cross-examination and his closing submissions, the issue of whether not only Ms O'Connor but also Ms Cranfield would have any reason for being so perturbed by the claimant having raised staffing issues related to health and safety concerns as to want to dismiss her, had been raised. He submitted that it could therefore safely be inferred that the tribunal had this aspect of the case in mind when it gave its decision.

27.
As to the decision itself, he highlighted the tribunal's statement, in its opening executive summary of the outcome, that the protected disclosure played no part whatsoever in the decision to dismiss. He submitted that the tribunal had also given full consideration to the role of Ms Cranfield and her report. He referred to [37] to [39], in which the tribunal drew on an observation of Ms O'Connor, that Ms Cranfield was not a forceful manager, as an indication that Ms Cranfield may have under-managed

the claimant, although it found her also to have been a knowledgeable line manager. He referred to [48] and [49], where the tribunal noted that there was no evidence that Ms Johnson had been prejudiced by having raised similar concerns as the claimant did and found that there was nothing untoward about a request for more staff or such a request being linked to patient safety. He also referred to the detailed analysis of Ms Cranfield's report at [55] and [56] which I have earlier summarised.

28.
Mr Edwards submitted that all of this material supported the inference that the tribunal, having considered Ms Cranfield's role and her report, did not find any basis for inferring that her report had been skewed because of the claimant having raised the concerns that she relied upon as protected disclosures. That, he said, should inform the EAT's reading of the employment tribunal's conclusions at [64] – [66]. He noted that at [66] the tribunal said that the disclosure that it found did occur played no part whatsoever in the claimant's dismissal or in any part of Ms O'Connor's decision-making process; and that her decision was wholly uninfluenced in any respect by any contribution which the claimant had made to dialogue on this subject. He submitted that, standing back, I could infer that the tribunal had considered the claimant's case as to what had influenced Ms Cranfield, and her case as to its effect in turn on Ms O'Connor's decision to dismiss her; and had rejected it.

29.
As to Ground 2 Mr Edwards submitted that the tribunal's reasons were adequate. The claimant, who was a litigant in person, had had great difficulty in understanding the concept of a qualifying disclosure in discussions at earlier preliminary hearings, something noted by this tribunal in its decision at [25] and [26]. The table in the list of issues emanating from the previous preliminary hearing fairly summarised her claimed disclosures. The more detailed accompanying schedule was a confused and confusing mix of evidence and argument, which was not of much assistance by way of providing any necessary further hard particulars. He submitted that the claimant's evidence at the hearing had also been confused on this aspect, as I could infer from the tribunal's observations.

30.
The tribunal had in its decision specifically referred to the list of issues. Indeed, in his skeleton for the tribunal, he had also made detailed submissions on the claimant's case on protected disclosures which it could be assumed the tribunal had had in mind. The tribunal had addressed the whole of her case on that subject and it only found that one disclosure was made out on the evidence before it. It did not need to go through her schedule paragraph by paragraph. Indeed, the tribunal found that the claimant had made a disclosure on an occasion which she had not clearly identified herself in that schedule as one on which she had made a disclosure. The tribunal had been fair and generous to her in that regard, the respondent having taken no point about that at the hearing.

31.
In any event, submitted Mr Edwards, the tribunal made a clear finding that the dismissal was wholly uninfluenced by any contribution which the claimant had made to dialogue about safety levels and staffing levels in any of the homes within her remit. It had therefore taken her case on the making of protected disclosures at its highest.

32.
It is convenient in setting out my conclusions, to take Ground 2 first. Where, as often occurs, a claimant claims to have made multiple protected disclosures, ideally what a respondent needs in order fairly to respond, and the tribunal in order fairly to adjudicate, is information from the claimant, in

some form or other, about each occasion on which they say they made a disclosure, including, for each such occasion, their factual case as to when it occurred, who the disclosure was made to, by what method, what information was disclosed and why it amounted to a qualifying disclosure in law; and in some cases, if not obvious, why it was also a protected disclosure.

33.
However, for a variety of reasons, the frequent experience particularly with litigants in person, is that such information is not forthcoming in that form, or not completely, even though a tribunal may give guidance to them, allow them more than one attempt, and the litigant may be doing their best. This may be because they lack the recollection or records to enable them to be precise, but it is also often because, even when trying to do their best, a litigant in person may struggle fully to understand exactly what is being required of them or to carry out the task.

34.
In the present case, the list of issues emerging from the most recent preliminary hearing set out in a table, particulars of the protected disclosures that the claimant claimed to have made. This cross-referred in turn to a lengthier 12-page table of further particulars that the claimant had provided. Both of these documents were in my bundle. The issues table sets out three categories of disclosures, all relating to staffing levels. The first category was said to relate to three homes, the second to one of those same three homes, and the third to another of those same three homes. Names of individuals to whom the disclosures were said to have been made were given, but the dates were given simply as respectively October to December 2017, December 2017 and October to December 2017. The third category appears also to have substantially overlapped with the first, save that an additional name was given in the list of managers to whom such disclosures were said to have been made. The table postulated that disclosures were made by phone, in meetings, by email or otherwise in writing but no specific dates were given for any such calls or emails.

35.
I agree with Mr Edwards's submission that the claimant's longer further and better particulars table did not offer much more by way of salient specific particulars. It gave a narrative of events on the claimant's case, but much of this material simply gave her take on the wider general context and background and developed her case as to why the concerns that she raised should have been taken seriously, and about the behaviour, attitudes, and responses of the respondent's managers. Much of the material was about things that the claimant said the managers did or communicated to her, rather than about the disclosures that she claimed she had made. In relation to the latter, there was some further information provided as to particular meetings at which the claimant said she herself did make disclosures, or emails in which she said she did so, but this additional information is, on examination, fairly limited. This was the material which, in terms of particulars of the claimed protected disclosures, the tribunal had to work with, as best it could, at the full hearing.

36.
Further, ultimately what findings of fact the tribunal felt able to make about what disclosures, if any, did occur, and whether such disclosures as it found did occur amounted in law to qualifying, and hence protected, disclosures, necessarily depended on what actual evidence was presented to it at the hearing and the tribunal's assessment and appreciation of that evidence. In its decision, the tribunal said at the outset that despite the resource devoted to case management and the relative simplicity of the case, there remained case management challenges and the list of issues was not entirely clear, and the material presented by the claimant, including in her witness statement, was not entirely clear.

The tribunal observed further on at paragraph 25 that the claimant did not, without criticising her, seem to understand a number of the fundamentals of the issues in her own case.

37.
While Mr Kohanzad submitted this morning that the claimant was doing her best in her detailed schedule of particulars, and the tribunal should have been prepared to infer, even if she did not spell it out, that she was claiming to have made disclosures at some of the meetings mentioned in that schedule, I do not see that this assists on this particular ground. That is because the tribunal still had to decide whether, on the evidence that was presented to it, she had made disclosures, in terms of being able to make findings of fact that would satisfy it that factually what had occurred on a given occasion or occasions fell within the definition of a qualifying and protected disclosure.

38.
In its decision, the tribunal did make a finding, drawing on the evidence it had, that the claimant had done something amounting to a protected disclosure at the meeting on 13 September 2017. It also considered another specific occasion, the budget meeting in October, but set out that it did not think that the evidence demonstrated that she had made what amounted to a further disclosure on that occasion. At paragraph 49 the tribunal also referred to a handover note prepared by the claimant before going on leave. At paragraph 51 it also addressed two particular emails which had been identified in the claimant's detailed particulars and explained why it did not conclude that either of these contained protected disclosures.

39.
It seems to me that the tribunal did not overlook or fail to address in its decision that it was the claimant's case that she had made protected disclosures on various other occasions than these. I think it is clear, from paragraphs 49 to 51 as a whole, that the tribunal did have in mind the claimant's case, as set out both in the table within the list of issues, and in her further and better particulars document. It specifically referred, at [50], to the list of issues alleging multiple disclosures, and noted that all of these were said to relate to safe staffing levels at the three homes. It accepted that budgeting and staff levels were a recurrent discussion topic among management in the framework of a shared desire to provide a safe service within budgetary and organisational constraints; but it also explained that it was not shown evidence of any other disclosure, of clarity comparable to the evidence it had, of the disclosure made on 13 September 2017.

40.
I do not think that Mr Kohanzad's submission about the claimant's raising the topic of her preferred dependency tool takes matters any further. As the summary schedule indicated, the nub of the claimant's case was that the disclosures she made were that staffing levels were so low at the three homes concerned that there was a risk to health and safety from those staffing levels being inadequate. That is the theme that runs through the summary schedule and it was rightly and fairly identified as the substantive basis advanced for her claimed disclosures falling within the legal definition.

41.
The claimant's point about her dependency tool may have been that it would have been a better way to assess safe levels than the respondent's way, but the underlying point was that the staffing levels in fact maintained were not safe. In any event, the tribunal considered the issue of the dependency tool at paragraph 43, noting that the claimant proposed to use a particular mechanism of assessing staff

need, which the respondent preferred not to use, and observing that it was not in a position to assess which method of assessing need was more appropriate.

42.
Finally, I note that a particular submission was made that the tribunal had failed to address a reference in the claimant's schedule to a discussion on 7 December 2017, as it only addressed the email the claimant sent following that discussion. But in the context of everything else I have said, I consider that it was sufficient that the tribunal addressed the email sent following the meeting, and it did not need also separately to address that discussion itself, given its overarching findings.

43.
I therefore conclude on this ground that the tribunal's decision did reflect its consideration of the whole of the claimant's case on this aspect. It explained that it was not able to make findings that she had made protected disclosures beyond the 13 September 2017 meeting because it did not consider that the evidence enabled it to make the necessary findings of fact about any other occasions. Overall, it gave sufficient consideration to her case that she had made other protected disclosures, and sufficiently explained why it had rejected it. It was not necessary, in order for her and the respondent to understand the reasons for the tribunal's conclusions on this part of the case, for it to go into any more detail. Indeed, I am not sure how much further it usefully could have said in any event.

44.
For all of these reasons, in my judgment the tribunal did not err as alleged in Ground 2, which accordingly fails.

45.
I turn to Ground 1. The decision in **Royal Mail Group Ltd v Jhuti** and associated authorities establish that it remains the case, in relation to a claim of unfair dismissal by reason of having made protected disclosures, that, as with any unfair dismissal claim, the ordinary starting point is that the reason for dismissal connotes the factor or factors operating on the mind of the decision-maker which caused them to take the decision to dismiss. However, **Jhuti** indicates that in a certain particular type of case where certain conditions are fulfilled it may be that the motivation of another manager involved at some earlier stage in the process should be attributed to the dismissing manager or otherwise treated as the true reason for dismissal by the employer.

46.
It is not necessary for the purposes of what I have to decide to go into any detail about what are the necessary elements that need to be found in order for the tribunal to need to take that more expansive approach when deciding what was in fact the reason for dismissal. That has been considered in **Jhuti** itself and also in subsequent authorities. I refer, only because it is a relatively recent authority on the subject, to my own decision in **Kong v Gulf International Bank (UK) Limited** EA-2020-000357-JOJ (which went to the Court of Appeal, but their decision did not relate to this point).

47.
I also do not have to go into any more detail about what sort of factual situation might fall to be treated as a **Jhuti** type of case, because the way that this ground of appeal is advanced is not to the effect that tribunal decided that this was not a **Jhuti** type of case and erred in doing so, nor to the effect that it accepted that this was a **Jhuti** type of case but erred in considering and dismissing that contention on its merits. Rather, the error is said to have been that the tribunal failed to consider or address in its decision at all, this essential distinct feature of how the claimant advanced her case.

48.
As I have noted, Mr Kohanzad focused on the fact that in the list of issues the case specifically advanced by the claimant was that her whistleblowing prompted Ms Cranfield to initiate capability/ performance concerns, which led to her dismissal. It is said that, in order to engage with that case, consideration needed to be given by the tribunal to what did or did not influence Ms Cranfield's mind and not just what influenced the mind of Ms O'Connor. The tribunal needed to address, and say, what it concluded from consideration of that question, or, if it did not agree that such separate consideration was in fact needed, it needed to explain why not.

49.
As I have indicated, Mr Edwards relied on a number of features of the decision read as a whole as indicating that it could safely be inferred that the tribunal did sufficiently engage with and address this aspect of the claimant's case. However, a difficulty for Mr Edwards is that the tribunal did not anywhere expressly state either whether it considered that the case advanced by the claimant was not a **Jhuti** type of case, so that consideration of Ms Cranfield's motivation was not in fact required in order to determine the reason for dismissal, nor, if it accepted that such consideration was required, did it expressly state anywhere that it found that Ms Cranfield was not motivated by the claimant's found protected disclosure, or, in the alternative, any of her claimed protected disclosures.

50.
I have found this ground to be finely balanced because I see some potential force in Mr Edwards's submission that, reading the tribunal's decision as a whole, it can nevertheless be inferred that it did not think that Ms Cranfield, in the compiling and contents of her report, was adversely influenced by the claimant's found, or claimed, protected disclosures, having regard to at least some of the material in the passages on which Mr Edwards relied. It can also be said that, had the tribunal expressly addressed this part of the claimant's case, there would have been sufficient findings of fact in its decision to support a conclusion that Ms Cranfield was not so influenced.

51.
Nevertheless, set against all of that are two matters. Firstly, the claimant in the list of issues specifically advanced her case on unfair dismissal on the footing that Ms Cranfield's mind in preparing her report had been influenced by what the claimant claimed were her protected disclosures. This was not even a subsidiary or alternative part of her case. Reading the list of issues, it appears to have been her whole case. The tribunal also did find that the contents of Ms Cranfield's report influenced Ms O'Connor's decision to dismiss, although it also found that Ms O'Connor was also influenced by her own knowledge of matters to do with the claimant's capability and performance during her short time with the respondent, and by her own impressions from the probationary review meeting. If the tribunal did need specifically to consider Ms Cranfield's motivation, and were it to find that she had been influenced by the protected disclosure, it might then also have needed to make a finding as to whether Ms O'Connor's reliance upon Ms Cranfield's report was such that it could be said that, through that channel, the protected disclosure was the principal reason for the dismissal.

52.
The second difficulty is that ultimately, I am not persuaded by Mr Edwards's submission that I can safely infer that the tribunal did specifically separately address the claimant's case that Ms Cranfield's motivation needed to be separately considered, and her case that it was decisive. There may have been an issue as to whether Ms Cranfield's motivation did need to be considered, but if the tribunal thought about that and concluded that it did not, it did not anywhere say so. Further, it does seem to me that, on a most benevolent reading of paragraphs 64 to 66, they do focus, in terms, and read as

whole, simply on what influenced Ms O'Connor's mind. I do not think that the fact that paragraph 66 refers to the disclosure having played no part in the dismissal or in any part of Ms O'Connor's decision-making process is sufficient to indicate that the tribunal addressed what may or may not have influenced Ms Cranfield as a separate matter. Nor does the reference to Ms O'Connor's decision to dismiss being wholly uninfluenced in any respect by any contribution which the claimant had made to dialogue about safety and staffing levels. That is because the start of that sentence refers, again, specifically to Ms O'Connor (not, for example, to the respondent's decision).

53.
The matter is finely balanced because of course it is well established as a general principle that the tribunal does not need to refer to every last detail of the issues or submissions that are made to it, but only needs to set out sufficient reasoning to dispose of the complaints and the issues before it so that the parties can understand why they have won or lost. But I am driven back to the fact that the claimant squarely advanced her case on unfair dismissal by reference to what she said was the motivation of Ms Cranfield in writing her report being the thing that she said made her dismissal by Ms O'Connor, in reliance upon it, an unfair dismissal contrary to section 103A **Employment Rights Act 1996**. This was so material and central a part of her case that the tribunal needed to address it explicitly one way or another. It may be that the tribunal in its mind did think about it, and it may be that it considered the claim not to raise a **Jhuti** type-point, or if it did, not to raise a meritorious point; but if the tribunal had such thoughts or views, it needed to spell it out. This is not one of those occasions where the EAT can say it can be safely inferred – even though it might have been open to it on the facts found to do so – that the tribunal considered this part of the claimant's case and concluded that it was not meritorious.

54.
I therefore am bound to conclude that the tribunal's decision was in this respect effectively not **Meek**-compliant. I therefore allow the appeal on Ground 1.

55.
I have now heard further submissions on what should happen next, in light of my having upheld this appeal on Ground 1. Both counsel agree that there is no need for, nor should there be, a full re-hearing of the section 103A complaint upon remission. Mr Kohanzad accepts in particular that the findings of fact already made by the employment tribunal, including of course as to the claimant having made a protected disclosure on one, but only one, occasion, should and must stand.

56.
However, both counsel also agree that the respondent should be permitted, if so advised, to call further evidence from Ms Cranfield on the question of what did or did not influence her when she wrote her report and Ms O'Connor on the question of how significant a part consideration of the contents of Ms Cranfield's report played in relation to her decision to dismiss, by comparison with the other aspects on which she said she relied from her own knowledge and experience. Both counsel have also agreed that if any further evidence is to be adduced it should be limited to that; and the tribunal will then have to reach a conclusion on this point drawing on the existing findings of fact together with any further findings it makes in light of any such further evidence.

57.
I note also, as I have noted in my decision but without expressing any view, that there may be some argument to be heard on the question of whether this is a **Jhuti** type of case, such that the tribunal is

required to consider the motivation of Ms Cranfield in order to determine the reason or principal reason for dismissal.

58.
All of that being so, I see considerable benefit and attraction in the matter being referred back for further consideration by the same three-member tribunal, or at any rate as many of the three of them as are available if they are not all now available. That is a more proportionate way of dealing with the matter. Although the hearing took place some time ago now, in two parts, in February and October 2020, I think that the same, or as nearly as possible the same panel, will have an advantage from being able to recall, and no doubt refer to its own notes of, the evidence given previously.

59.
As against that, Mr Kohanzad submits that there is a risk of this tribunal being consciously, if not unconsciously, disposed towards finding against the claimant, or there being that appearance, given the contents of its existing decision so far as it goes. However, I am not ultimately persuaded that there is a sufficiently compelling reason to direct that this matter should not be heard by the same tribunal. I do not think this is truly a second bite of the cherry case. The tribunal may or may not have had the point in mind, but, even if it did, it did not in terms address it in its decision. Nor can it be said that this was a totally flawed decision. It is significant that ultimately, while I have concluded that the tribunal failed to address this point and it needed to do so, as I have indicated, I have found the matter myself to be finely balanced; and this is not a flawed decision in the sense of the tribunal having addressed the point but fundamentally got the law wrong, or something of that sort.

60.
Furthermore, this is a highly experienced tribunal panel which showed in its decision a conscientious approach to the fact that the claimant was a litigant in person and to ensuring fairness to her. It has not been necessary for me to refer to it in deciding this appeal but, for example, it made some serious criticisms of the inadequate preparation for the hearing initially on the part of the respondent, although it accepted explanations that it was given for that, but these led it to the conclusion that fairness to the claimant demanded the hearing be adjourned in particular so that she have a fair opportunity to address materials that were not before the tribunal at the outset of the hearing, and to prepare her case and cross-examine the respondent’s witnesses in relation to it.

61.
As both counsel have agreed it should, the tribunal will have the benefit, if the respondent chooses, of hearing further witness evidence at the reconvened hearing. If it is called, the claimant will have the chance to test that evidence in cross-examination. Both parties will have the opportunity also of making further submissions in light of all the evidence which the tribunal will by the end have heard, and on any further issues of law arising, before it makes its final decision. Whatever the outcome, the tribunal will have to give a reasoned decision and I think it can be relied upon to do so with absolute fairness and professionalism.

62.
The balance is therefore in favour of directing that there be remission for a further hearing on the Ground 2 point, on the basis that the parties have agreed, and I have described, before the same tribunal panel or as nearly the same as can in practice be reconvened.