Neutral Citation Number: [2026] EAT 127

Case No: EA-2024-001579-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 03 September 2026

Before:

THE HON. LORD FAIRLEY, PRESIDENT

- -

Between:

MR B KRISTENSEN

Appellant

- and -

PORTMAN HEALTHCARE LIMITED

Respondent

- -
- -

Rad Kohanzad and **Emma Darlow Stearn,** of Counsel, (instructed by the **Free Representation Unit**) for the **Appellant**
Rachel Mellor, of Counsel, (instructed by **Robinson Ralph Solicitors**) for the **Respondent**

Hearing dates: 10 and 11 June 2026

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JUDGMENT

SUMMARY

Unfair dismissal; whistleblowing

The appellant, a dental hygienist, was suspended and thereafter summarily dismissed by the respondent. The date of dismissal was 30 September 2021. On 23 December 2021, he presented a claim form to the Employment Tribunal complaining of automatically unfair dismissal because of whistleblowing, ordinary unfair dismissal, protected disclosure detriment, and wrongful dismissal. Following an evidential hearing in July and August 2022, an Employment Tribunal dismissed his unfair dismissal and protected disclosure detriment complaints.

The appellant advanced 7 grounds of appeal. Three grounds related to the unfair dismissal complaints and four related to his complaints of protected disclosure detriument.

Held:

1) In the unfair dismissal complaints, the Employment Tribunal had erred by failing to make any finding about what was the respondent's principal reason for dismissal. Its conclusion that the principal reason was "misconduct" did not address section 98(1)(a) of the **Employment Rights Act, 1996** ("**ERA**"), and was not **Meek**-compliant.

2) In the protected disclosure detriment complaints, the Tribunal had erred in concluding that (i) the disciplinary suspension of the appellant was not an act "extending over a period" in terms of section 48(4)(a) **ERA**; and (ii) the expression "disciplinary investigation" in the list of alleged detrimental acts was limited by the terms of a letter calling the appellant to a first investigatory meeting. It had also failed to consider whether those detrimental acts were "part of a series of similar acts or failures" (in terms of section 48(3)(a) **ERA**) as another proven act of protected disclosure detriment – refusing to allow the appellant access to his personnel file – which had occurred on 16 August 2021.

THE HON. LORD FAIRLEY, PRESIDENT

Introduction and procedural history

1. The appellant, Mr Kristensen, was employed by the respondent as a dental hygienist. His employment began in 2008 and ended with his summary dismissal on 30 September 2021.

2. Following ACAS early conciliation between 29 October and 1 November 2021, the appellant presented a claim form (ET 1) to the Employment Tribunal on 23 December 2021 in which he brought complaints against the respondent under the **Employment Rights Act, 1996** ("**ERA**") and at common law of:

a) automatically unfair dismissal contrary to section 103A **ERA** (whistleblowing)
b) ordinary unfair dismissal contrary to section 98 **ERA**
c) protected disclosure detriment contrary to section 47B **ERA**; and
d) wrongful dismissal at common law.

3. The disputed issues in the case were established at a case management hearing in November 2023, and were incorporated into a detailed list of issues. A full hearing on liability and remedy took place before a Tribunal at London Central (EJ Nash, Ms T Shaah and Mr J Carroll) between 19 to 25 July and 7 to 8 August 2024. In a Judgment dated 14 August 2024, the Tribunal dismissed the complaints of unfair dismissal and protected disclosure detriment and gave oral reasons. The Tribunal's Judgment did not deal with the complaint of wrongful dismissal. Written reasons were requested and were provided on 23 October 2024.

4. In a Notice of Appeal presented on 4 December 2024, the appellant advanced seven grounds of appeal. All grounds were permitted to proceed to a full hearing by Order of HHJ Tucker dated 13 February 2025. An eighth ground was then added by amendment and allowed to proceed by Order of HHJ Beard dated 26 November 2025.

5. In the course of the appeal hearing before me on 10 and 11 June 2026, the appellant's counsel advised that grounds numbered 4 and 5 were no longer insisted upon. An application was, however, made on the second day of the hearing to add a further (ninth) ground. That application was opposed, but was allowed in restricted terms, and a timetable was set for parties to make written submissions on it to avoid the need for a further oral hearing.

6. Grounds 1, 2 and 9 relate to the complaints of unfair dismissal under sections 98 and 103A **ERA**. Grounds 3, 6, 7 and 8 relate to the complaints of protected disclosure detriment in terms of section 47B **ERA**.

Relevant legislation

Unfair dismissal

7. Section 103A **ERA** states:

> 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.

8. So far as material to this appeal, section 98 **ERA** states:

> (1) In determining…whether the dismissal of an employee is fair or unfair, it is for the employer to show –
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> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind as to justify the dismissal of an employee holding the position which the employee held.
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> (2) A reason falls within this subsection if it—
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> …
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> (b) relates to the conduct of the employee…
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

9. The "reason" for a dismissal in terms of section 98(1)(a) is the "set of facts known to the employer, or…beliefs held by him which cause him to dismiss the employee" (**Abernethy v. Mott, Hay and Anderson** [1974] ICR 323). An employer who fails to prove the reason for dismissal will fail to discharge the burden of proof imposed by section 98(1)(a), and the dismissal will inevitably be found to be unfair. Only if the employer proves its reason for the dismissal, will the Tribunal then require to consider whether or not that reason falls within one of the categories in subsection 98(1)(b) / 98(2), and the issue of fairness in terms of section 98(4).

10. Where there is more than one factor that makes up "the reason" for a dismissal, the employer must either prove what was the "principal" reason, or show that all elements of a composite reason were statutory reasons, reasonably held and, in combination, justified the sanction of dismissal (**Smith v. Glasgow City District Council** [1987] ICR 796; **Robinson v. Combat Stress** EAT 0310/14; **Broecker v. Metroline Travel Ltd** EAT 0124/16; and **Chand v. EE Limited** [2026] EAT 17).

Protected disclosure detriment

11. Section 47B(1) **ERA** states:

> (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.

12. Section 48 **ERA** confers jurisdiction upon Employment Tribunals in complaints brought under section 47B. Subsections 48(3) and (4) state:

> (3) An employment tribunal shall not consider a complaint under this section unless it is presented—
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> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
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> (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.
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> (4) For the purposes of subsection (3)—
>
> (a) where an act extends over a period, the "date of the act" means the last day of that period

Summary of key facts

13. The business of the dental practice that first employed the appellant in 2008 was sold to new owners in 2012 / 2013. By 2015, the appellant was of the view that the working environment in the practice under the new owners had become "toxic". He began covertly recording conversations with colleagues and managers.

14. In 2016, the appellant was asked to sign a new contract of employment. He refused to do so. In 2017, ownership of the business passed to the respondent. The appellant continued covertly to record conversations at work.

15. By 2021, relations between the appellant and the respondent had further deteriorated. By then, the respondent had engaged the services of a self-employed dental hygienist whose work was more profitable to it than the work performed for it by appellant. From February 2021, the respondent began to pressure the appellant to reduce his hours, but he refused to do so.

16. On 28 May 2021, the respondent's Practice Manager had a protected conversation with the appellant, during which an offer was made to him to encourage him to leave.

17. Thereafter, in June 2021, the appellant raised a series of grievances. During the grievance process, the appellant provided the respondent with copies of two of the covert recordings he had made, one of which was of the protected conversation on 28 May. He subsequently spoke of having made other recordings.

18. On 10 August 2021, the respondent wrote to the claimant to inform him that (i) any further covert recording; and / or (ii) any failure by him to hand over all existing recordings in his possession by 12 August 2021 would be treated as acts of gross misconduct. The 12 August 2021 deadline for handing over the recordings was subsequently extended to 17 August 2021, and the appellant was provided with a USB stick to assist with the transfer process of the relevant files.

19. On Friday 13 August 2021, the appellant met the respondent's Practice Manager and was shown his personnel file. The file included a document dated 21 April 2016 which bore to

be a contract of employment signed by him. The appellant believed that his purported signature on the document was a forgery. Over the weekend of 14 and 15 August 2021, the appellant contacted the police and persuaded them to attend with him at the respondent's premises on Monday 16 August 2021. In the presence of the police, he alleged that his signature had been forged on the disputed document and asked the Practice Manager to hand over his personnel file, but she refused to do so.

20. Later that day, the appellant was suspended. The appellant covertly recorded the suspension meeting. The suspension was confirmed in writing. The suspension letter referred to the attendance of the police at the respondent's premises, the appellant's allegation of forgery and his failure to hand over the recordings he had made.

21. The respondent's Head of Operations for England & Wales, Ms L Oates, was appointed to conduct a disciplinary investigation. In a letter dated 18 August 2021, she invited the appellant to attend a disciplinary meeting. The letter did not mention the appellant's allegation of fraud. The meeting ultimately took place by Teams on 23 August 2021. When Ms Oates asked the appellant why he had not produced the recordings he had made, the appellant stated that the 2016 contract was a forgery, and asked for another letter to be sent to him requesting that he produce them. The Tribunal found that the appellant was "evading the instruction to provide the recordings". He denied recording the suspension meeting, and told Ms Oates that he had made only two recordings.

22. Following the completion of the investigation by Ms Oates, the appellant was invited to a disciplinary hearing to answer three charges. Whilst the Tribunal does not say so expressly, it appears that the charges were framed by Ms Oates (ET § 57). The first charge was that the appellant had failed to comply with the direction of 10 August 2021 to hand over copies of all recordings made by him. The second was that he had made untrue allegations of forgery in bad faith. The third was that he had made an unauthorised covert recording of the suspension meeting having been told on 10 August 2021 that any further covert recording would be treated as gross misconduct.

23. The disciplinary hearing was conducted by the respondent's Head of People Operations, Mr Patterson, on 16 September 2021. During that hearing, the appellant again represented that he had made only two covert recordings. He denied recording the suspension meeting. In relation to the police attendance and the allegation of forgery, Mr Patterson formed the view that the appellant had been "playing games". He asked the appellant if he was aware of the outcome of the police investigation and the appellant replied: "you will discover". Following the disciplinary meeting, the appellant handed over a third covert recording made by him.

24. By letter dated 30 September 2021, Mr Patterson intimated his decision to dismiss the appellant. The letter identified three reasons for the decision to dismiss. The first was that the appellant had not handed over the covert recordings after being told that his failure to do so would be treated as gross misconduct. Mr Patterson concluded that the appellant was being untruthful in saying that he had made only two recordings. The second reason was a conclusion by Mr Patterson that the appellant's contact with the police and his allegation of forgery was connected to the request that he hand over the recordings. The third was a conclusion that the appellant had recorded the suspension meeting on 16 August 2021.

25. An appeal against the decision to dismiss was unsuccessful.

26. In his evidence to the Tribunal, the appellant accepted that he had made a total of 15 recordings of 13 different people at the respondent's premises.

The Tribunal's reasons

The section 103A complaint

27. The Tribunal accepted that the appellant had made a protected disclosure. Specifically, it found that his allegation, in the presence of the police, on 16 August 2021 that his signature had been forged on the purported contract of April 2016 qualified for protection in terms of section 43B **ERA**. That issue was the subject of an earlier appeal to the Employment Appeal Tribunal (**Kristensen v. Portman Healthcare Limited** [2023] EAT 121), and the Tribunal's conclusion that the appellant made a protected disclosure on 16 August 2021 is not challenged in this appeal.

28. In examining the section 103A complaint, the Tribunal considered the evidence about Mr Patterson's reasons for dismissing the appellant. At ET § 99 to 101. It stated:

> 99. Drawing this evidence together, the tribunal found that there were several factors which led Mr Patterson to dismiss the Claimant. The protected disclosure - the forgery allegation - was one of the factors. Mr Patterson was concerned by the allegation of forgery and the police coming onto the premises. Although the forgery and police allegation were not raised at the investigatory stage, Mr Patterson raised them at the disciplinary stage.
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> 100. Nevertheless, the Tribunal found that the protected disclosure was by no means the principal reason for disclosure (*sic*). It formed only one part of the respondent's reasons. The Respondent had sought since May to exit to the Claimant and had sought to reduce his hours significantly since February. The Claimant had then raised a number of grievances. He had made recordings without consent and continued to do so even when he was told it would constitute gross misconduct. He had told his employer that he had lied about the recordings. Mr Patterson saw him as playing a game. Mr Patterson believed, based on evidence, that the claimant was lying about recording the suspension interview. It was clear that the Claimant did not trust the Respondent and Mr Patterson concluded that he simply could not trust the claimant anymore.
>
> 101. Accordingly, the protected disclosure was not the principal reason for the decision to dismiss. Therefore the s. 103A unfair automatic unfair (*sic*) dismissal claim fails.

The section 47B complaint

29. The specific acts of the respondent that were relied upon in the section 47B **ERA** complaint (protected disclosure detriment) were set out at paragraph 7 of the agreed list of issues in the following terms:

> "7.1.1 On 16 August 2021 access to [the appellant's] personnel file was impeded
> 7.1.2 16 August 2021 Ms Ferguson was rude and acted improperly towards [the appellant]
> 7.1.3 The [appellant] was suspended from work
> 7.1.4 The disciplinary investigation
> 7.1.5 The claimant was side-lined at work in that he was not allowed to attend CPR training
> 7.1.6 The claimant had patients removed from his books."

30. The Tribunal concluded that refusing the appellant access to his personnel file on 16 August 2021 was an act of detriment on the ground of the making of the protected disclosure. In reaching that conclusion, the Tribunal stated (at ET § 109):

> "The Respondent, in the disciplinary, treated the Claimant's allegation of forgery as gross misconduct whereas it treated the attendance of the police only as misconduct. Accordingly, the Respondent saw the attendance of the police as somewhat less significant than the forgery allegation. The Tribunal found that the allegation of forgery was a material influence on the Respondent's refusal to permit the Claimant access to his file on the 16th."

31. For essentially the same reasons, the Tribunal also found that the act of suspending the appellant on 16 August 2021 was an act of detriment on the ground of his having made the protected disclosure:

> "The Tribunal was satisfied that it was not the method of disclosure, that is the attendance of the police, rather than the protected disclosure itself which led to the suspension. The Respondent treated the allegation of forgery as gross misconduct, but not the police attendance. Taking into account the wording of the suspension letter the tribunal could not but find that the forgery allegation - the protected disclosure - was a material influence on the decision to suspend." (ET § 116)"

32. The Tribunal did not accept, however, that the respondent's subsequent disciplinary investigation was "on the ground" of the protected disclosure (ET § 117 to 120). It also directed itself, having regard to the terms of section 47B(2) **ERA**, that the dismissal of the appellant could not be a detriment for the purposes of section 47B(1). Finally, it concluded that the appellant had not established detriment 7.1.2, and that exclusion of the appellant from training and the removal of patients from his books (detriments 7.1.5 and 7.1.6) were not "on the ground of" the protected disclosure but were merely consequences of the suspension.

33. In summary, therefore, the Tribunal concluded that the only proven acts of detriment that fell within section 47B(1) **ERA** were the refusal of access to his personnel file on 16 August 2021 and his suspension later that day. As a result, it concluded that the complaint under section 47B(1) had been presented outside the time limit contained in section 48 **ERA** in circumstances when it would have been reasonably practicable to have presented it within the time limit (ET § 159 to 170).

The section 98 complaint

34. In relation to the complaint of "ordinary" unfair dismissal, the Tribunal rehearsed the history of the respondent's reasons for wanting to end the appellant's employment, and the earlier attempts made by it to bring that about (ET § 128 to 131). It referred to the issue of the covert recordings and to Mr Patterson's belief that the appellant had raised the forgery issue with the police in bad faith. It noted that Mr Patterson believed that the appellant had been told not to record conversations but had then recorded the suspension meeting on 16 August 2021 and had then falsely denied doing so. At ET § 135 to 136 it stated:

> 135. In view (*sic*) of the Tribunal the Respondent may well have taken advantage of the Claimant's misconduct to rid themselves of somebody they viewed as a troublesome employee. The original deadline to provide the recordings on 10 August was entirely unrealistic and deeming a failure to comply as gross misconduct was entirely unreasonable. Nevertheless, the respondent quickly backtracked and extended the deadline and gave the claimant a USB in order to facilitate the transfer. Although it was clear to the Claimant that the respondent was only seeking copies and not originals, the claimant failed to provide all the recordings by the time of the dismissal. In any event, the respondent had not sought to dismiss the claimant prior to the recordings issue.
>
> 136. Whilst there were other reasons, the principal reason in the employer's mind at the time of dismissal was misconduct. As the respondent had a potentially fair reason for dismissal, the tribunal went on to consider reasonableness.

35. In applying its mind to the section 98(4) ERA question of the reasonableness of the dismissal, the Tribunal began by considering whether the respondent had a genuine and reasonably held belief in the misconduct in question, having carried out such inquiry as was reasonable (**British Home Stores v. Burchell** [1980] ICR 303 at page 304 C to E).

36. At ET § 140 to 144, it stated *inter alia*:

> 140. In respect of the first charge, the Respondent knew that the Claimant had refused to provide recordings, and it believed that there were more recordings that the Claimant had not provided. Mr Patterson simply did not believe the Claimant when he said…that he did not have more recordings, especially when immediately after the meeting the Claimant provided another recording. The Claimant's account of the number of recordings was highly inconsistent and unsatisfactory.
>
> 141. In respect of the forgery and the police, the Respondent relied on the timing of the forgery allegation. For Mr Patterson, it was suspiciously convenient for the Claimant - who was under pressure to provide the recordings - to then discover a forgery and bring in the police.

> 142. In view of the Tribunal, it was reasonable for Mr Patterson to believe that the Claimant did this in bad faith and in order to intimidate. This is so, even if we now know that this was not the Claimant's motivation…
>
> 143. In respect of the third charge Mr Patterson believed that the Claimant had recorded the suspension meeting and had lied about it. The Claimant's account of his conduct in the suspension meeting was not plausible….
>
> 144. Accordingly, the tribunal found Mr Patterson had a reasonable and genuine belief that the claimant had committed the three acts of misconduct."

37. At ET § 151 to 153, the Tribunal considered the reasonableness of the sanction of dismissal. It stated:

> 151. The circumstances were that the Respondent genuinely and reasonably believed - following a reasonable investigation - that the Claimant had made covert recordings of his colleagues which he had failed to hand over, that he had sought to intimidate the respondent out of obtaining the recordings by bringing the police on site and making a forgery allegation, and that he had recorded the suspension meeting knowing that this would be regarded as an act of gross misconduct, and then denied doing so.
>
> 152. The Claimant was specifically warned not to record any further meetings by way of the letter of 10 August and that the Respondent would view such action as gross misconduct. However, he went ahead and did so. The Respondent's view was it simply could no longer trust him and it could not trust him not to do it again. Further, the Claimant did not show any remorse or any intention of changing his behaviour. For instance, when he was asked about the police investigation, he said - you will find out. Whether or not this was intended as a threat, this led the Respondent to conclude that…he did not take their concerns seriously."
>
> 153. In circumstances where an employer has found its employee untrustworthy and when the employee has made covert recordings in the knowledge that this would be viewed as gross misconduct, the Tribunal could not but find that the decision to dismiss came within the reasonable range."

Wrongful dismissal

38. In the breach of contract claim, the Tribunal's reasons show that it concluded that the appellant knew that a refusal to provide the recordings and the recording of the suspension meeting would each be regarded as acts of gross misconduct. It also concluded that the appellant had been untruthful in the disciplinary meeting to conceal what he had done. The Tribunal accepted that these matters amounted to breaches of the implied duty of trust and confidence and entitled the respondent summarily to terminate the contract.

Summary of the grounds of appeal

39. In the seven grounds that were ultimately insisted upon, the appellant submitted that the Tribunal had erred in law in the following respects:

(i) in failing to consider whether the dismissal of the appellant was unfair in terms of section 98(4) in circumstances where whistleblowing was one of several reasons for dismissal (ET § 99) though not, in terms of the Tribunal's conclusion at ET § 100, the principal reason in terms of section 98(1)(a) (ground 1);

(ii) in failing to take into account its own finding (at ET § 135) that "the Respondent may well have taken advantage of the Claimant's misconduct to rid themselves of somebody they viewed as a troublesome employee" (ground 2);

(iii) in applying too restrictive a meaning to the expression "the disciplinary investigation" in the context of the section 47B complaint, and in reaching of a perverse conclusion that the disciplinary investigation was not materially influenced by the making of the protected disclosure (ground 3);

(iv) in failing to conclude that the act of suspending the claimant was an act "extending over a period" in terms of section 48(4)(a) ERA whilst the suspension continued (ground 6);

(v) in failing to conclude that the detrimental acts complained of by the claimant, up to and including his dismissal, were part of "a series of similar acts" for the purposes of section 48(3)(a) ERA, or in a mis-applying the test of "reasonable practicability" to the time limit issue (ground 7);

(vi) in failing to resolve the disputed factual issue of whether or not the appellant's signature had been forged on the April 2016 document (ground 8); and

(vii) in failing to consider whether, on the evidence, the respondent's reason for dismissing was a composite one (per **Smith v. Glasgow City District Council** or a series of independent reasons (per **Tayeh v. Barchester Healthcare Limited** UKEAT/0281/11/LA), failing to make a finding about what was the respondent's principal reason for dismissal; or, in the alternative, failing to give **Meek**-compliant reasons as to what was the principal reason (ground 9).

Summary of submissions

Appellant

40. Mr Kohanzad made submission for the appellant on grounds 1, 2, 3 and 9.

41. He submitted, in terms of ground 1, that the correct construction of section 98(4) **ERA** required the Tribunal to take account of all matters that it found to be causal in the decision to dismiss, even if those matters were not "the principal reason" established under section 98(1)(a) **ERA**. Even if that construction was thought to be excluded by the word "it" in section 98(4)(a), section 98(4)(b) – which requires fairness to be determined according to

equity and the substantial merits of the case – was a “stand alone” provision and was not restricted by the provisions of section 98(4)(a).

42. Ground 2 was advanced upon a similar basis. If the respondent’s wish to be rid of the appellant was any part of the reason for dismissing him, albeit not the principal reason, it required to be taken into account under section 98(4).

43. In the alternative (ground 9), the appellant submitted that the Tribunal had failed to identify the principal reason for dismissal. That failure was material and resulted in its reasons being non-**Meek** compliant. It was also unclear from the Tribunal’s reasons that it had recognised the distinction between a single principal reason and a composite one.

44. In relation to ground 3, the agreed list of issues had identified “the disciplinary investigation” as an act of detriment in the section 47B complaint. The Tribunal had erred in concluding that the scope of the investigation was fixed by the letter of 18 August 2021 inviting the appellant to attend a meeting with Ms Oates. On the facts found by the Tribunal, the disciplinary investigation was not so restricted. The finding that the appellant had not been subjected to the detriment of a disciplinary investigation on the ground of having made the protected allegation of fraud was perverse (ground 3).

45. Ms Darlow-Stearn made submissions for the appellant on grounds 6, 7 and 8.

46. Ground 6 was based upon the decision in **Tait v. Redcar and Cleveland Borough Council** UKEAT/0096/08, where the EAT had held that a disciplinary suspension was an act extending over a period. That decision was binding upon the Tribunal and should also be followed by the EAT. The Tribunal had, therefore, erred in its conclusion that it had no jurisdiction to consider the complaint under section 47B **ERA** to the extent that it was based upon the detriment of suspension.

47. The Tribunal had further erred in failing to consider issue 1.2.2 on the list of issues, namely whether all or any of the pleaded detriments amounted to a “series of similar acts” in terms of section 48(3)(a) **ERA**. Even if dismissal could not form the basis of a detriment complaint (see section 47B(2) **ERA**), the act of dismissal could still be taken into account when considering the “series of similar acts” provision of section 48(3)(a) in the context of limitation (ground 7).

48. The Tribunal had also erred (ground 8) in failing to determine whether or not the appellant’s signature had in fact been forged on the purported contract of April 2016. That question could have been relevant to the Tribunal’s conclusions on causation and / or the reasonableness of dismissal as a sanction if there had also been evidence that one of the relevant decision makers had actual knowledge that the April 2016 document was forged.

Respondent

49. For the respondent, Ms Mellor submitted (grounds 1 and 2) that the word “it” in section 98(4) could only be read as a reference to the reason / principal reason established under section 98(1)(a). Section 98(4)(b) simply explained the test by which the question under section 98(4)(a) fell to be answered. It was not a “stand-alone” provision that required matters other than the section 98(1)(a) reason to be taken into account. In relation specifically to ground 2 there was,

in any event, a distinction to be drawn between a motive and a reason (**Associated Society of Locomotive Engineers and Firemen v. Brady** [2006] IRLR 576 at para. [77]).

50. On ground 9, the Tribunal had found that all three of the charges of misconduct had been established on reasonable grounds. One of these was a genuine belief by Mr Patterson that the appellant had made the allegation of fraud in bad faith. In contrast to **Smith** and **Robinson**, this was not a situation where one part of the reason relied upon by the employer was found to have been held on grounds that were not reasonable. The Tribunal had properly carried out the exercise of identifying the principal reason and its reasons were **Meek**-compliant.

51. In relation to ground 3, the appellant's pleaded case had separated the investigative stage from the disciplinary process. The forgery allegation had first been introduced by the appellant during his discussions with Ms Oates. The Tribunal had been correct to conclude that the appellant had not been subjected to the detriment of "investigation" on the ground of having raised the fraud allegation.

52. On the issue of limitation (grounds 6 and 7), the Tribunal was correct to conclude that the disciplinary suspension was a "one-off" act with continuing consequences rather than an act extending over a period. The respondent relied upon **Flynn v Warrior Square Recoveries Limited** [2014] EWCA Civ 68; **Royal Mail Group v Jhuti** UKEAT/0020/16/RN, 19 March 2018; and **Ikejiaku v. British Institute of Technology Limited** UKEAT 0243/19. Dismissal was not one of the pleaded detriments founded upon in the section 47B complaint and could not therefore be part of series of similar acts for the purposes of section 48(3)(a).

53. On ground 8, the issue of whether or not the appellant's signature had, in fact, been forged was not part of the list of issues and was not relevant to determination any of the complaints that was before the Tribunal.

Analysis and decision

Ground 1

54. The premise upon which ground 1 is advanced is that the Tribunal was correct to conclude (at ET § 100) that the making of the protected disclosure was not the principal reason for dismissal in terms of section 98(1)(a).

55. As was noted by HHJ Richardson in **Tayeh**, at paragraph [33], the task of a Tribunal in applying section 98 involves a three-stage analysis. First, it has to decide whether the employer has shown what was the reason (or, if more than one, principal reason) for the dismissal. In **Abernethy**, Cairns LJ explained (at page 330B to C) that a "reason" for these purposes is the:

> "…set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

This first question is not, therefore, answered by a generic label such as "conduct" or "capability". Rather, it involves an examination of the evidence about the specific set of facts or beliefs that were the reason (or principal reason) that caused the employer to dismiss.

56. If the employer discharges the burden of proving the reason in terms of section 98(1), the second stage of the Tribunal's analysis is to determine whether that reason falls within one of the categories described in section 98(2) or is, alternatively, "some other substantial reason" in terms of section 98(1)(b). That is, therefore, the point at which a "label" is attached to the set of facts or beliefs.

57. The third stage of the analysis involves section 98(4). Once the employer has established a principal reason that falls within sub-sections 98(1) (or is "some other substantial reason in terms of sub-section (2)):

> "…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case"

58. The section 98(4) analysis is confined (in terms of section 98(4)(a)) to a consideration of whether the employer acted reasonably or unreasonably "in treating **it**" as a sufficient reason for dismissing. The word "it" in subsection (4) refers to the reason (or, if more than one, principal reason) established under subsection 98(1)(a). I do not, therefore, accept the appellant's submission that the section 98(4) analysis requires the Tribunal to take account of matters beyond the reason (or principal reason) for the dismissal established under 98(1)(a).

59. Whilst that conclusion arises from the natural meaning of section 98(4), it is also consistent with and supported by authority. In **Smith**, the House of Lords considered the terms of the materially identical provision in the **Employment Protection (Consolidation) Act, 1978** that ultimately became section 98 **ERA**. At page 803B to E, Lord Mackay of Clashfern, delivering the unanimous opinion of the court, stated:

> "It is important to notice that the resolution of the question what is the reason or, if there is more than one, the principal reason for the dismissal is important not only in relation to subsections (1) and (2)… but also in relation to subsection [(4)] for the question in subsection [(4)] is whether the employer acted reasonably or unreasonably in treating *it* as a sufficient reason for dismissing the employee and *it* must refer back to the reason or the principal reason determined under subsection (1). As Lord Simon of Glaisdale said in **W. Devis & Sons Ltd. v. Atkins** [1977] I.C.R. 662,682-683, referring to the predecessor of the present legislation:
>
> > "the employer must satisfy the tribunal that he acted reasonably in treating 'it' (i.e., the reason shown by the employer as the reason for the dismissal of the employee) as a sufficient reason for the dismissal. . . . The reference to 'equity and the substantial merits of the case'"— and I would add the reference to the circumstances including the size and administrative resources of the employer's undertaking added by the Employment Act 1980 —"merely shows that the word 'reasonably' is to be widely construed; but they in no way affect the proposition that what must be shown to be reasonable and sufficient is the employer's action in treating the reason shown by him (the employer) as the reason for dismissing the employee."

60. Neither of these passages was referred to during the appeal hearing. They are, however, consistent with the view that I have reached as to the correct construction of section 98 **ERA** and inconsistent with the interpretation of that section suggested by the appellant in this appeal.

61. I also reject the related submission for the appellant that section 98(4)(b) establishes separate "stand-alone" parameters to the section 98(4) inquiry wider than those in section 98(4)(a). If that were correct, section 98(4)(a) would be wholly redundant. The correct interpretation of subsection 98(4) is that the issue identified in section 98(4)(a) is determined in accordance with equity and the substantial merits of the case.

62. For these reasons, I reject ground 1.

Ground 2

63. As the appellant's counsel acknowledged, the second ground is largely dependent upon success in the first. In particular, if aspects of the employer's thought processes beyond the principal reason had to be taken into account as part of the section 98(4) analysis, that would include the fact that the respondent may consciously have taken advantage of the claimant's misconduct to rid itself of a troublesome employee.

64. For essentially the same reasons as I have already given in relation to ground 1, I reject ground 2. It is also important to recognise – as the Tribunal plainly did – the distinction between a motive and a reason. As Elias P pointed out in **Associated Society of Locomotive Engineers and Fireman v. Brady**, there is:

> "…a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason... An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords."

65. Where the reason for dismissal is genuinely held, and is not merely a pretext, the fact that the employer may also have been glad to be rid of the employee is irrelevant to the section 98(4) question.

Ground 9

66. A curious feature of the Tribunal's reasons is that it did not make any factual finding about what was the respondent's principal reason for dismissal. At ET § 136, it stated simply that the reason for dismissal was "misconduct". That conclusion, however, by-passed the important section 98(1)(a) question altogether and moved straight to the labelling exercise under section 98(2). As a result, the Tribunal failed to identify – as it should have done in terms of section 98(1)(a) – the particular set of facts and beliefs that operated upon in the mind of Mr Patterson as the principal reason that caused him to dismiss. Later, within its section 98(4) consideration of reasonableness, the Tribunal appears to have concluded that the misconduct that led to the dismissal comprised three matters. Again, however, it did not identify the principal reason.

67. In a simpler case involving only one allegation of misconduct, such a gap in a Tribunal's reasons could, potentially, be resolved by an inference that the principal reason must have been that single factor. That, however, was not the position here. Further, and as **Smith**, **Robinson**

and **Broecker** make clear, the "principal reason" may be a composite one and need not necessarily be a single complaint or "sole reason".

68. On the findings of fact made by the Tribunal, several factors operated on the mind of Mr Patterson (see ET § 99 to 100, ET § 128 and ET § 137 to 144 and 151). Those included the allegations about covert recording and also the making of the protected allegation of fraud, which Mr Patterson believed to have been made in bad faith. The Tribunal appears to have concluded that the respondent considered each of those matters to be acts of gross misconduct (ET § 109, 116, 120 and 134).

69. It was, therefore, necessary for the Tribunal to make clear findings about what (if anything) the respondent had proved to be the principal reason for the dismissal. In circumstances where the protected fraud allegation was treated by the respondent as an act of gross misconduct, and was plainly causal in the decision to dismiss, the Tribunal's conclusion (at ET § 100) that it was "by no means the principal reason" called for further explanation. In particular, the Tribunal needed to make a factual finding about what, amongst the various factors that operated upon the mind of Mr Patterson, *was* the principal reason for the dismissal. It needed also to consider whether the evidence led on behalf of the respondent disclosed a single principal reason or whether, alternatively, the principal reason for dismissal was a composite one (as in **Smith**, **Robinson** and **Broecker**). Its finding (at ET § 136) that the "reason" for the dismissal was "misconduct" demonstrates, however, that it failed to answer the section 98(1)(a) question at all.

70. In these circumstances, the Tribunal's reasons for dismissing the unfair dismissal complaints were not **Meek**-compliant, and ground 9 succeeds on that basis.

Ground 3

71. The list of disputed issues prepared for the full hearing was set out by the Tribunal at ET § 14. Paragraph 7.1.4 of that list raised the question of whether "the disciplinary investigation" was an act of detriment on the ground that the appellant had made a protected disclosure.

72. The Tribunal noted that the letter of 18 August 2021 inviting the appellant to attend the investigation meeting with Ms Oates made no mention of the forgery allegation (ET § 118). The forgery allegation was, however, part of the reason for the appellant's suspension, and it became part of the investigation that took place prior to the disciplinary hearing. As a result, the appellant's allegation of forgery ultimately featured on the list of misconduct "charges" prepared in advance of the disciplinary hearing. More importantly, the disciplinary hearing itself could properly be described as part of the "disciplinary investigation" in terms of paragraph 7.1.4 of the agreed list of issues.

73. For these reasons, I agree with the appellant that that Tribunal erred at ET § 118 in its conclusion that the scope of the disciplinary investigation was determined by the letter of 18 August 2021. The expression "the disciplinary investigation" in the list of issues included the investigatory steps taken by Ms Oates as well as the disciplinary hearing itself. It follows that I also agree with the appellant that it was perverse of the Tribunal to conclude, on the facts found by it, that the disciplinary investigation was in no sense whatsoever on the ground of the protected allegation of forgery (per **Fecitt and others v. NHS Manchester** [2012] ICR 372).

Ground 6

74. As was pointed out in **Ikejiaku v. British Institute of Technology** EAT 0243/19, there is an important distinction between, on the one hand, a continuing act and, on the other, a "one off" act with continuing consequences. Thus, in **Flynn v Warrior Square Recoveries Limited** [2014] EWCA Civ 68, the Court of Appeal endorsed the reasoning of the EAT (Langstaff P) that cause and effect must carefully be distinguished in applying section 48(3) **ERA**. The act, or deliberate failure to act, must be a cause of the detriment. The time limits relate not to when the detriment was suffered, but to when the act which gave rise to the detriment occurred. A detriment that is only a consequence of a deliberate act (or deliberate failure) is not an act extending over a period. It is, therefore, necessary for a tribunal to identify the specific act (or failure to act) that caused the detriment, and it will be an error of law for a tribunal to confuse a continuing detriment with a continuing cause.

75. In **Tait**, the Employment Appeal Tribunal considered how a disciplinary suspension should be regarded for the purposes of section 48(4)(a) **ERA**. At paragraph 8, Underhill J, giving the judgment of the Tribunal, stated:

> "…it seems to us that a disciplinary suspension is clearly 'an act extending over a period' within the meaning of the statute. Although there is no doubt an initial 'act' of suspension, the state of affairs thereafter in which the employee remains suspended pending the outcome of the disciplinary proceedings can quite naturally be described not simply as a consequence of that act but as a continuation of it…
>
> …We reach this conclusion the more readily because it seems to us that it would be difficult to regard the disciplinary proceedings against the Appellant as anything but an act extending over a period, and it would be very odd if the suspensions imposed for the purpose of those proceedings had to be characterised differently."

76. The decision in **Tait** is directly in point, and the Employment Tribunal was bound by it. In accordance with **British Gas Trading Limited v. Lock** UKEAT/0189/15/BA, **Tait** is also a persuasive authority which, in the absence of any of the **Lock** exceptions should be followed by the Employment Appeal Tribunal.

77. I therefore accept the submission for the appellant that the Tribunal erred in law in concluding that the disciplinary suspension of the appellant was a "one-off" act rather than an act "extending over a period" for the purposes of section 48(4)(a) **ERA**, and ground 6 succeeds on that basis.

Ground 7

78. Paragraph 1.2.2 of the agreed list of issues identified the question of whether the various detrimental acts founded upon by the appellant were "part of a series of similar acts". The Tribunal considered the issue of limitation between ET § 159 and 169, but did not ultimately engage with that question.

79. The Tribunal considered that the appellant had not established the alleged detriment 7.1.2 (ET § 110 to 112), and that the alleged detriments 7.1.5 and 7.1.6 were merely consequences of the suspension rather than separate detriments "on the ground of" the protected disclosure (ET § 122 to 125). Those conclusions are not challenged in this appeal.

80. Having regard to the conclusions that I have reached about grounds 3 and 6, the only live issue of limitation that remains in this ground 7 is, therefore, whether the refusal of access to the personnel file on 16 August 2021 was, in terms of section 48(3)(a) **ERA**, "part of a series of similar acts" to the suspension, the disciplinary investigation, and / or, possibly, the dismissal. I agree with the appellant that the Tribunal did not consider that question. Ground 7 succeeds to that extent.

Ground 8

81. In an extensive and carefully prepared list of issues extending over two and a half pages of the Tribunal's reasons, the question of whether the appellant's signature had actually been forged on the April 2016 document does not feature. That is entirely understandable, as it was not relevant to determination of any of the complaints that the Tribunal had to determine.

82. In particular, whether the allegation of forgery was true or false was of no relevance to the issue of whether the appellant's disclosure to the police was a protected disclosure. That issue was, in any event, determined in the appellant's favour. It also had no bearing upon the issue of causation in either the whistleblowing claims or the complaint of ordinary unfair dismissal. The appellant's counsel tenaciously sought to suggest that resolution of the issue of whether or not the signature had been forged could have been relevant to the Tribunal's conclusions on causation and / or the reasonableness of dismissal as a sanction if there had also been evidence that one of the relevant decision makers had actual knowledge that the April 2016 document was forged. As counsel properly conceded, however, there was no evidence of such knowledge, and that proposition was never put to any of the relevant witnesses. It was, therefore, never a live issue that was before the Tribunal.

83. Finally, determination of whether or not forgery had actually taken place also had no bearing upon Tribunal's conclusions in the wrongful dismissal complaint which was rejected solely because of the two issues about covert recording.

84. For these reasons, I reject ground 8.

Summary and disposal

85. Grounds of appeal 3, 6, 7 and 9 succeed and Tribunal's Judgment of 14 August 2024 is set aside. The remaining grounds are all dismissed.

86. On the issues that it is possible for me to determine, because no other conclusion is possible on the facts found by the Tribunal, I will substitute a Judgment that:

(a) the complaint under section 47B **ERA** succeeds in relation to the pleaded detriments of suspending the appellant on 16 August 2021 and subjecting him to a disciplinary investigation, in each case on the ground that he had made a protected disclosure; and
(b) the complaint of wrongful dismissal fails and is dismissed.

87. In relation to the matters that I cannot determine, because more than one answer is possible on the facts found by the Tribunal, I will remit the case to the same Tribunal to determine the following issues:

(a) the principal reason for dismissal;
(b) whether the dismissal of the appellant was fair or unfair in terms of section 103A or section 98 **ERA**;
(c) whether the refusal of access to the appellant's personnel file on 16 August 2021 was, "part of a series of similar acts" in terms of section 48(3)(a) **ERA** for the purposes of the complaint under section 47B **ERA**; and
(d) remedy.