IN BRIEF

- Establishing 'the reason' for dismissal in an organisation.
- Public interest and the claimant's motivation.

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Employment law brief

What makes people tick? Ian Smith signs off for the year with some sobering disclosures on motivation & revenge

The cases considered this month concern the law on protection of whistleblowers (as it happens, at the same time as the EU has produced a draft Directive on this issue, which hitherto has been purely a question of UK domestic law). The first, and most important, is the decision of the Supreme Court on how to determine the thinking/motivation of 'the employer' in an organisation, in particular where the dismissing manager has genuinely done so for another reason, but has been misled by another manager seeking revenge on the whistleblower. As will be seen, the significance of this case extends to other areas of unfair dismissal law. The second case is a decision of the Court of Appeal on the important but potentially difficult element of 'public interest' and the claimant's motivation in making the disclosure(s) in the first place.

Royal Mail Group v Jhuti

Royal Mail Group v Jhuti [2019] UKSC 55 is an important case across several areas of employment and discrimination law. It concerns the very concept of a 'reason' for dismissal where the employer is an organisation but the dismissal is effected by an individual decision-making manager. Where there have been pressures/interventions by another individual for legally challengeable motives, the question is—which individual is to be aligned with 'the employer', the dismissing manager or the manager really behind it? The facts and issues are set out with admirable clarity and brevity at the beginning of Lord Wilson's judgment of the court:

> '(a) Ms Jhuti made protected disclosures within the meaning of s 43A of the Act, colloquially described as whistleblowing, to her line manager;
> (b) the line manager's response to her disclosures was to seek to pretend over the course of several months that Ms Jhuti's performance of her duties under her contract of employment with the company was in various respects inadequate;
> (c) in due course the company appointed another officer to decide whether Ms Jhuti should be dismissed; and
> (d) having no reason to doubt the truthfulness of the material indicative of Ms Jhuti's inadequate performance, the other officer decided that she should be dismissed for that reason.
>
> 'So what was the reason for Ms Jhuti's dismissal? Was it that her performance was inadequate? Or was it that she had made protected disclosures? These specific questions generate the following question of law of general importance which brings the appeal to this court:
>
> In a claim for unfair dismissal can the reason for the dismissal be other than that given to the employee by the decision-maker?'

It can immediately be seen from this that, although this issue is of particular importance in whistleblowing cases (such as this), the decision is applicable across the whole of unfair dismissal law.

The employment tribunal (ET) had dismissed the claimant's Employment Rights Act 1996, s 103A claim because it had to look only at the motivation of the actual decision-maker. The Employment Appeal Tribunal (EAT) allowed the claimant's appeal, applying a wider approach but the Court of Appeal had allowed the employer's further appeal on the basis that the decision-maker was crucial (and the case did not come into its category of possible exceptions where the other manager was involved in the investigation/disciplining).

The decision of the Supreme Court allowing the claimant's final appeal looks at other areas of law where 'the company' has to be invested with the motivation or reasoning of an individual manager, showing that it has to be considered in context. More immediately, however, it cites venerable employment precedents, particularly *West Midlands Co-operative Society v Tipton* [1986] AC 536, [1986] IRLR 112, HL (approving the now-classic definition of a 'reason' for dismissal in *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, CA) to the effect that that 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. Applying that approach, concentration on only the decision-maker is too narrow. The judgment at [60] states that normally of course it will indeed be that individual who will be the subject of scrutiny (especially where the employee disputes his or her overt reason) *but* that there will be cases where a wider inquiry will be appropriate:

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

As with the introduction, this sums up the *ratio* of the case neatly. The last sentence sets out its main limitation ('hierarchy').

Six subsidiary points may be noticed:

(1) The Court of Appeal had felt itself bound by its earlier decision in *Orr v Milton Keynes Council* [2011] IRLR 317, [2011] ICR 704, CA where it was held in a non-whistleblowing unfair dismissal claim that in these circumstances the organisation is to be identified with the motivation of the individual deputed to carry out the employer's functions on dismissal. However, the Supreme Court here

pointed out that that was a difficult case with unclear acts, where there had been a majority decision but a strong dissent and which was 'not a satisfactory vehicle for any full, reasoned articulation of principle' on this issue. The court did not find it necessary to overrule it formally, but perhaps this is the sort of 'restrictive distinguishing' that amounts to the same thing.

(2) Historically, Underhill LJ had set this particular hare running in *Co-operative Group v Baddeley* [2014] EWCA Civ 658 when he had suggested the 'manager involved in the investigation' exception. This case is not mentioned, but presumably would now be decided under the court's wider principle (though whether with the same or different outcome is debatable because of the particular facts of the case).

(3) The claimant here had also brought a claim for whistleblowing *detriment* under the 1996 Act, s 47B. This was still current because it raised an issue about the relationship between detriment and dismissal in these cases which has yet to be resolved and so did not arise for decision in this appeal. However, it did feature indirectly because one employer argument was that the existence of the s 47B remedy meant that there was no need to give a wide interpretation to 'the employer' in s 103A. However, the court held against this, partly for the very reason that it is not certain whether detriment can be used in a case ending in dismissal. Thus, the claimant was not restricted to a s 47B claim.

(4) The invocation of s 47B does however also show one gap in the protection here. The court's decision is confined to cases (admittedly, likely to be the large majority) where the interfering individual is higher in the hierarchy than the claimant. Whereas s 47B (1A)–(1E) specifically covers the position of detriment by a fellow worker (making the employer vicariously liable, subject to an 'all reasonable steps' defence), there is *no* such provision in s 103A in a dismissal case. Thus, if false information was passed to an 'innocent' dismissing officer by an employee of similar or lesser status the court's extension of liability would not work.

(5) There has been an alternative source for the restrictive theory that only the mental processes of the decision-maker can be take into account, namely the *discrimination* case of *Reynolds v CLFIS (UK) Ltd* [2015] IRLR 562, [2015] ICR 1010, CA. The case is not cited in the Supreme Court's judgment, but should it now be considered impliedly overruled? Or could it still be argued that there should still be a difference between discrimination law and employment law on this point?

(6) As it happens, this month also saw the EAT decision in *Cadent Gas Ltd v Singh* UKEAT/0024/19 (8 October 2019, unreported) on the same issue but in yet another context, namely dismissal for trade union reasons. The dismissing manager was found not to be prejudiced against the claimant's union activities, but the *eminence grise* behind the whole affair was. The employer argued that the normal rule (at that time, under the decision of the Court of Appeal in *Jhuti*) should apply, restricting the ET to the motivation of the dismissing manager, but the EAT accepted the claimant's argument that this came within the then-exception because the orchestrating manager had been 'knee-deep' in the eventual decision to dismiss. This would now be decided the same way, but as a matter of principle, not as an exception.

One final minor point. In these cases at Court of Appeal level Underhill LJ has been the prime mover. As such, he coined the memorable phrase that these were 'Iago cases', which has been much used ever since. At [53] in the Supreme Court's judgment it cites this but describes it delphically as 'perhaps questionably'. Your humble author has to confess that this has gone over his head. Any thoughts out there as to why such an apparently apt and erudite epithet might not be accurate?

Ibrahim v HCA International

Two issues arose in *Ibrahim v HCA International* [2019] EWCA Civ 2007 relating to whistleblowing: (i) was a claim that the claimant had been defamed at work enough to constitute failure to comply with a 'legal obligation' under the Employment Rights Act 1996, s 43B(1); and (ii) had the claimant shown an actual and reasonable belief that the potential disclosure was in the public interest?

On issue (i) the EAT held that this could be sufficient. There was no further appeal on this point and so the Court of Appeal did not have to rule on it. To that extent, the EAT's decision stands, *but* at para [10] of Bean LJ's judgment of the court he states obiter that it may be 'counterintuitive' for such an allegation to found a protected disclosure and that it 'remains open to challenge in this court in a future case'. We thus may not have heard the last of this.

The appeal was principally about issue (ii), where there had been a timing problem—the leading case of *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837, [2017] ICR 731, CA was handed down after the liability hearing. It was dealt with by further submissions from the parties but without hearing any further evidence. Although the decision of the Court of Appeal in the instant case relates most immediately to the need for such further evidence from the claimant on one particular point, the appeal raised important questions more generally about how an ET is to approach the mental element in the 'public interest' aspect and the distinction between belief and motive; the two were interrelated.

On the first question, the Court of Appeal in *Chesterton* at [27] to [37] had laid down clearly a two-stage approach for an ET: (i) did the claimant believe that the disclosure was in the public interest; then (ii) was it reasonable for them to have done so? This had not been adopted by the ET (expressly or implicitly) with the result that the claimant had not been *asked* whether he had had such a belief at the relevant time. The case was remitted for this stage to be covered properly. Possibly more important legally was *why* the ET had not asked the two separate questions. This was because of the second question, namely the significance (or otherwise) of the claimant's *motivation*. The facts were that the claimant had raised a grievance about rumours circulating at work about him; on termination he could not claim ordinary unfair dismissal (he was not an employee) and so claimed whistleblower protection. The ET held (and the EAT upheld) that this failed because his motivation at the time was to clear his name, a personal matter lacking public interest. As the ET put it: '... disclosure was not in the public interest, *but rather* with a view to the claimant clearing his name and re-establishing his reputation'. The added italics contain what the Court of Appeal found wrong in this. As Underhill LJ put it, 'the necessary belief is simply that the disclosure in question was in the public interest' and 'the particular reasons why the worker believed that it be so are not of the essence'. The question at this stage is simply whether the worker actually believed it; given the ET's formulation of the test, this had not had to be decided, hence the remission. **NLJ**

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