The 'real' reason for dismissal?

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Royal Mail Group Ltd v Jhuti [2019] UKSC 55

Following a game of appeal ping pong, the Supreme Court has ultimately concluded that, in some circumstances, the real reason for a dismissal can be other than that given by the dismissal officer.

Background

Ms Jhuti began working as a media specialist for Royal Mail in September 2013. After around a month of her employment, she became concerned that fellow employees were providing tailor-made incentives (TMIs) to some customers in breach of Ofcom regulations. Ms Jhuti informed her line manager, Mr Widmer, of her concerns in three emails in November 2013.

As a result of these emails, she was subjected to a lengthy interrogation from Mr Widmer and suggested, for the first time, that she was failing to meet the requirements of her role. Under the pressure, Ms Jhuti retracted her allegations. She was then subject to several months of rigorous performance review and targets, unlike anything her colleagues had to endure.

The pressure did not let up and in February 2014, Mr Widmer informed Ms Jhuti that she would be put on a performance review programme. At this point, Ms Jhuti emailed HR with her concerns about Mr Widmer's conduct towards her, which she explained had come about after she had raised an issue which she had been forced to rescind. This email precipitated a meeting, on 10 February 2014 with Ms Rock. During this meeting, Ms Rock stated that Mr Widmer was a respected employee and that he would be the one to be believed. It was also suggested to Ms Jhuti that the company might find a way to dismiss her.

In March 2014, Ms Jhuti was signed off sick with work-related stress, anxiety and depression. A few days before, she was offered her three months' salary in return for a voluntary termination of her employment. When she rejected this offer this was increased to one year (an offer the ET described as 'extremely strange', given the short length of her employment).

In April 2014, another manager (Ms Vickers) was appointed to decide if Ms Jhuti's employment should be terminated. She was instructed to 'review' the documentation rather than investigate. She was not provided with the emails that contained the protected disclosures, nor with Ms Jhuti's complaints to HR about her original line manager. Ms Jhuti was invited to a meeting but was too ill to attend. She was dismissed by letter dated 21 July 2014 for failing to meet required standards of performance.

Ms Jhuti brought two complaints in the ET: (1) she had suffered a detriment on the ground that she had made protected disclosures (s47B(1) ERA 1996) ("the detriment complaint"); (2) she was automatically unfairly dismissed for having made protected disclosures (s103A ERA 1996) ("the dismissal complaint").

ET decision (Employment Judge Baty and two panel members)

The ET allowed the detriment complaint but rejected the dismissal complaint.

It found that Ms Jhuti had made four protected disclosures (in the three emails in November 2013 and at the meeting on 10 February 2014). As a result of these disclosures she suffered four detriments:

- The targets and weekly meetings imposed by Mr Widmer, and the bullying and harassment that accompanied it
- The performance improvement plan, imposed by Mr Widmer
- The offer of 3 month's salary to leave
- Once she rejected this, the offer of 1 year's salary to leave

The ET also found the detriment complaint to be in time because it related to a series of acts, the last of which was within three months of bringing the claim.

However, the ET dismissed the dismissal complaint. It found that, as the decision maker had dismissed her on the ground of a genuine belief that her performance had been inadequate, this was the reason for her dismissal and s103A did not apply.

EAT decision (Mitting J)

Royal Mail appealed the detriment decision and Ms Jhuti cross-appealed the dismissal decision. It was agreed that the EAT should hear the cross-appeal first.

Mitting J found in Ms Jhuti's favour, holding that where a manager responsible for the employee had manipulated a decision to dismiss and the decision had been made in ignorance of the manipulation, the manipulator's reason for dismissal could be attributed to the employer for the purpose of section 103A. He granted Royal Mail permission to appeal to the Court of Appeal and stayed its appeal on the detriment complaint.

Court of Appeal decision (Underhill, Jackson and Moylan LJJ)

The Court of Appeal reversed the EAT's decision on the dismissal, allowing Royal Mail's appeal. Underhill LJ gave the only substantive judgment, in which he held that that the ET was "obliged to consider **only** the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss" (para 57, emphasis added).

The Court of Appeal also remitted the appeal on the detriment decision to the EAT on the issue of whether it was made in time. The EAT allowed the appeal, and remitted it to the ET for re-determination. The ET determined that the detriment complaint had been in time. It is awaiting a remedy hearing.

Supreme Court decision

As such, only the dismissal complaint was the subject of the appeal to the Supreme Court (although it made some comments in relation to the first). By a unanimous decision, the Supreme Court allowed Ms Jhuti's appeal. Lord Wilson gave the only judgment.

Complaint 1: Detriment

The Court commented that the main hurdle with this complaint was whether the detriments Ms Jhuti were subject to 'amounted to' a dismissal (this being precluded by s47B(2) ERA 1996). The Court of Appeal left this point open, saying that there is *"no obstacle in principle to the claimant recovering compensation [under section 49(1)(b)] for dismissal consequent on detriment"* (per Underhill LJ, para 78). It will be considered at the remedy hearing.

Complaint 2: Unfair dismissal

The Supreme Court confirmed the correct question is to identify "the reason (or, if more than one, the principal reason) for the dismissal". The answer to this question in relation to s103A must relate equally to the other sections in Part X ERA 1996 in which the same words appear (e.g. ordinary unfair dismissal in s98(1)).

In considering this issue, the Court first asked itself how to apply a rule to a company which requires attributing to it a state of mind. It took guidance from Lord Reid in *Post Office v Crouch* [1974] 1 WLR 89, 95-96, that statutory provisions for claims for unfair dismissal *"must be construed in a broad and reasonable way so that legal technicalities shall not prevail against industrial realities and common sense"* (para 45, 59). With this in mind the Court held that, in enacting s103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal (para 46).

Furthermore, the Court noted that the Court of Appeal had considered itself bound by the decision of *Orr v Milton Keynes Council* [2011] EWCA Civ 62, which held that the relevant knowledge for a dismissal was the knowledge of the *"person who was deputed to carry out the employer's functions under [in that case] section 98"* (para 47-49). However, in addition to it not binding the Supreme Court, the Court considered this case could be distinguished (para 50-53).

Finally, the Court rejected Royal Mail's arguments that Ms Jhuti already had an adequate remedy for the detriment she suffered under s48B(1), as Parliament has provided for remedies for detriment and dismissal separately (para 54-58).

With all of the above in mind, the Court concluded that where the real reason for a dismissal is hidden from the decision-maker behind an invented reason, it is the court's duty to penetrate through the invention rather than allow it to infect its own determination (para 60).

Therefore, the answer to the appeal's key question is: *"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"* (para 62).

Comment

Approaching the problem in a 'broad and reasonable way' was exactly what the Supreme Court did. However, departing from the orthodoxy that the focus should always be on the intention of the decision maker may make it difficult for employers to know how far and thorough investigations need to be, particularly in large organisations where line managers change on a regular basis. Furthermore, this decision represents a split from the position under the Equality Act 2010, where innocently acting on the basis of tainted information is not sufficient (see *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] IRLR 562). We will have to wait and see whether or not another case will reach the Supreme Court to iron this discrepancy.

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