Jhuti in the context of unfair dismissal proceedings

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Uddin v London Borough of Ealing UKEAT/0165/19/RN

(Judgment published on 13 February 2020)

The Facts

The Claimant ("**C**"), at the time of his dismissal, had worked for the Respondent ("**R**") for a number of years and was employed as a Deputy Team Leader in the family intervention programme. He had been seconded however to a role within the Acton Team as a Support Worker. The complainant, referred to in the Judgment as "SR", was a university student who was undertaking a 3-month work placement with R within the Ealing Team. She had shadowed C on 2 occasions but wasn't mentored or supervised by him.

On Friday 11 November 2016, the Acton and Ealing teams went out to a local pub for drinks. At around midnight, many of the other employees had left, but SR, C and 2 other employees remained. They had all been drinking. An incident was said to have taken place whereby inappropriate sexual behaviour occurred between C and SR in a disabled toilet at the pub.

C was suspended on the following Friday, pending an investigation into the following:

(a) An incident of inappropriate sexual behaviour during the social gathering on Friday 11 November 2016
(b) A further incident of intimidating and threatening behaviour to a work colleague on Monday 14 November 2016
(c) Bringing the council into disrepute

The investigation commenced later in November 2016, undertaken by Ian Jenkins, the Head of Youth Offending. SR went to police in January 2017 and gave them an account of events on 11 November. The Tribunal found that the investigating officer had urged SR to go to the

police[1]. SR at some stage withdrew those allegations and signed a withdrawal statement stating that she "did not remember being sexually assaulted". On 23 February 2017, C was interviewed by the police under caution. On 24 February 2017, the police took the decision not to pursue a criminal case against him. After the conclusion of the investigatory stage but before the disciplinary hearing, the investigating officer learned of SR's withdrawal of her complaint to the police. He, nor anyone else, had not communicated this to the disciplinary officer at the point the decision to dismiss was taken however.

C's disciplinary hearing took place on 31 March and 5 April 2017 before an employee of R, Carolyn Fair. In the dismissal letter, it was recorded that SR had been credited with having complained to her manager and having gone to the police. C's appeal failed.

The ET Decision

At the ET, C pursued claims of unfair and wrongful dismissal, direct age and direct sex discrimination. C's complaints of sex and age discrimination were dismissed unanimously.

On the issue of unfair and wrongful dismissal, a majority decision was reached in dismissing those claims. The EJ and panel member's reasoning on the issue of unfair dismissal and the knowledge of the disciplining officer was as follows:

> *"54. We considered that the decision maker had all the evidence before her, and all the relevant witnesses were questioned at the hearing. We also considered that generally there were few inconsistencies in SR's account: she was mostly very careful to state what she knew from memory and what she had been told by others, and particularly so at the police station. The exaggeration of the term "dragged" was spotted by Carolyn Fair for herself from the CCTV - SR was being led, on one view, or had walked alongside the claimant. She also identified that the photograph showed bruising not from the collarbone, as Ian Jenkins had described it, but across the mid part of both breasts. Carolyn Fair was an experienced social worker in children and families, used to how people react to violence, and used to judging when and how people reveal information, which she used when considering how SR had added information over time. Her letter shows she had several reasons for preferring SR's account.*
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> *55. The only exception may be where she included the fact that SR had been to the police, as a reason to accept her evidence, not knowing she had retracted her*

[1] Para 23 EAT Judgment

complaint. We considered the effect on the reasoning in her letter if the words "and to the police" was removed from the sentence where it appears. We concluded she had sufficient reasons even so for concluding that the claimant had grabbed or pushed R's breasts, and this complaint had little weight. She already knew the police were taking it no further; and knew there were different standards of proof. More, she had already identified and considered the discrepancies ("dragged", and the inconsistency of what she could remember in the toilet) …

57. … We were satisfied that Ms Fair was alive to discrepancies, and that over a two-day hearing the claimant had ample opportunity to challenge the evidence and any inferences that might be drawn from it. She demonstrated sufficient independence for us to be confident her decision was based on the evidence and did not replicate Ian Jenkins's suspicious hostility. Nor do we think any hostility impaired the claimant's ability to give an account of himself– it seemed to us that he genuinely could not remember, perhaps because he is likely to have gone on drinking through the night. Just as a thorough appeal can "cure" defects in an unfair dismissal decision, so we concluded a thorough and fair hearing "cured" any deficiency in his interview and report."

It is right to say that, within her evidence to the Tribunal, Ms Fair said that had she known that SR had withdrawn her statement, she would have wanted to find out from her why[2].

Having lost all his claims, C appealed to the EAT and advanced 4 grounds of appeal before the EAT, 3 of which were permitted to proceed to a full hearing, namely:

Ground 1

The complainant had withdrawn her complaint to the police but the dismissing manager, who knew the complainant had made such a complaint, was not told that it had been subsequently withdrawn.

Ground 3

The complainant and C had been too drunk to have a clear recall of what had taken place and that, as there weren't any independent witnesses to corroborate the alleged incident, there was no proper basis for determining that C was guilty of the alleged misconduct.

[2] Paragraph 39 ET Judgment

Ground 4

The tribunal should have considered the allegations of sex and age discrimination levelled against the investigating officer more widely than those agreed in the List of Issues at the Preliminary Hearing.

The EAT Decision

For the purposes of this article, the focus is on Ground 1 of the appeal, but for completeness, Grounds 3 and 4 were unsuccessfully argued before the EAT.

In terms of Ground 1, a majority in the ET held that the fact that the dismissing officer didn't know about the withdrawal of the police complaint did not affect the fairness of that dismissal as C could have been dismissed fairly, had that originating police complaint never been made.

It was argued by Counsel for the Claimant, amongst other points, that "*Ms Fair's ignorance of the withdrawal of the police complaint could not be relied upon, as Mr Jenkins' knowledge of it could and should be attributed to the Respondent as employer*"[3]

The EAT concluded, on the basis that, the dismissing officer had taken the police complaint into account and given her evidence was that had she known that police complaint had subsequently been withdrawn she would have wanted to know why it was withdrawn, the ET had erred in the approach taken.

In considering *Royal Mail v Jhuti* [2019] UKSC 55, the EAT concluded that given the investigating officer knew that the police complaint had been withdrawn but did not pass this information on to the disciplining officer, the only conclusion that could have been reached was that the dismissal was unfair.

HHJ Auerbach determined that, in respect of the decision in *Jhuti*:

> "*Lord Wilson (and his fellow Justices) were of the view, first, that the question of whether the knowledge or conduct of a person other than the person who actually decided to dismiss, could be relevant to the fairness of a dismissal,* ***could arise, both in relation to the Tribunal's consideration of the reason for dismissal under section 98(1) and/or its consideration of the section 98(4) question****; and*

[3] Para 45 EAT Judgment

that, in a case where someone responsible for the conduct of a pre- investigation did not share a material fact with the decision-maker, that could be regarded as relevant to the Tribunal's adjudication of the section 98(4) question"[4] [emphasis added]

The EAT went on to conclude that the investigating officer's involvement did not end with the finalisation of the investigation report and recommendations. However:

"*this did not require any finding about why Mr Jenkins did not share this information with Ms Fair…It turns simply on the propositions that: (a) given Mr Jenkins' role, the* ***information was something that fell to be treated as known to the employer****; (b) it was* ***at least potentially relevant evidence*** *that could potentially be argued to provide some support to the Claimant's case; and (c) because* ***she did not in fact know about it, it was, however, not given any consideration by Ms Fair, when she came to her decision***."[5] [emphasis added]

The EAT resolved therefore that:

"the Tribunal should have concluded, at the liability stage, that ***fairness demanded that Ms Fair be informed of, and take into account, the fact that SR had withdrawn her police complaint****, but this did not happen, it would have been* ***bound to conclude that the dismissal was, for this reason, unfair****. Further, at the remedy stage, the Tribunal would then need to consider,* ***not merely what Ms Fair could have found, but whether Mr Fair would, or the chance that she might, still have (fairly) dismissed the Claimant, had she been aware of, and considered, this additional fact****."* [6]

Ground 1 was therefore successful and the EAT substituted a finding of unfair dismissal on that basis. The *Polkey* question was remitted to the same tribunal to consider.

Comment

Whilst *Jhuti* was principally concerned with whether, and if so, in what circumstances a Tribunal could impute to the employer a reason for dismissal different from that which

[4] Para 78 EAT Judgment
[5] Para 80 EAT Judgment
[6] Para 87 EAT Judgment

influenced the mind of the person who actually took the decision to dismiss[7], this case was clearly not concerned with a reason for dismissal having been invented.

This decision appears to be one of the first cases where the principles in *Jhuti* have been applied since the Supreme Court decision last November.

On the face of it, this decision appears to be quite concerning for employers (especially those on the larger size) as the reason the information didn't reach the decision maker appears to be irrelevant. Instead the focus will likely come down to an assessment of the importance and significance of evidence (the "missing piece of the jigsaw"), the impact on any disciplinary process and whether the individual holding that piece of the jigsaw is sufficiently senior and significant within the corporate structure to be determined to be in the mind of the employer.

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[7] Para 72 EAT Judgment