Innocent decision-makers cannot be personally liable for the detriment of dismissing a whistleblower

In *Henderson v GCRM Ltd & Ors*, the Employment Appeal Tribunal has considered whether it is possible to hold an "innocent" decision-maker liable for the detriment of dismissing a whistleblower, in circumstances where another individual has manipulated or tainted the process motivated by the whistleblower's actions.

Background

Under the Employment Rights Act 1996 (**ERA**), whistleblowers are protected in the following key ways:

- It is automatically unfair to dismiss them if the reason or principal reason is that they made a protected disclosure (Section 103A).

- It is unlawful for their employer to subject them to any detriment through any act (or deliberate failure to act) on the ground that they made a protected disclosure

(Section 47B(1)). This claim is not available against the employer where the detriment is dismissal, as the remedy is an automatic unfair dismissal complaint under Section 103A (Section 47B(2)). Nevertheless, the employee may have a claim for detriment for any other actions taken by their employer leading up to the dismissal.

- It is unlawful for any co-worker or agent to subject them, in the course of that co-worker's employment (or agency), to any detriment through any act (or deliberate failure to act) on the ground that they made a protected disclosure (Section 47B(1A)). Under *Timis v Osipov [2018] EWCA Civ 2321*, this claim is available against an individual even where the detriment is dismissal, and the employer can become vicariously liable for the actions of that individual. The employer may have a defence if they took all reasonable steps to prevent the co-worker's actions. For further information, please see our briefing on *Osipov* here.

Under the previous case of *Royal Mail Ltd v Jhuti*, the Supreme Court found that a protected disclosure can still be the principal reason for an employee's dismissal even if the disclosure was hidden from the dismissing officer, and therefore a claim under Section 103A can succeed on that basis. Unlike in earlier cases where only the motivations of the decision-maker were said to be relevant, the Supreme Court in *Jhuti* confirmed that if the decision-maker is given false

reasons to dismiss by someone who is themselves motivated by the fact that the employee has blown the whistle, the Tribunal can look past those false reasons to establish the underlying motivation. In effect, if the underlying motivation to dismiss the employee is the protected disclosure, employers cannot evade liability by hiding that fact from a good faith disciplinary decision-maker.

For further information on the *Jhuti* case, please see our prior briefing here.

What happened in this case?

Ms Henderson was employed as an embryologist by GCRM Limited, a regulated clinic based in Glasgow providing fertility services and care, following a transfer under TUPE from Nuffield Hospital in Glasgow in September 2018.

Following the transfer, in March 2019 Ms Henderson began to raise concerns on several occasions regarding issues impacting the standard of patient care at GCRM. In particular, she was concerned regarding the low levels of available staff and inadequacy of training, which she felt was leading to excessive pressure for both nurses and the laboratory staff. Ms Henderson considered that patients were experiencing poor success rates and that there was a likelihood of errors and reportable incidents, and that patients were being misled about the standard of service. She continued to express concerns into August 2021 and raised a grievance in September 2021 on the basis that she felt singled out and unfairly treated. The grievance was not upheld, and an appeal submitted by Ms Henderson was not heard.

In October 2021, Ms Henderson was informed of disciplinary allegations relating to a reportable regulatory incident and an alleged failure to follow reasonable management requests. She was told that such concerns could amount to "*serious negligence/gross misconduct and/or lead to a loss of trust and confidence in your ability to perform your role*" and was suspended from her role.

The original disciplinary manager was set to be Mr Tomnay, who was Ms Henderson's line manager and who was therefore aware of her complaints. It was later changed to Ms Tracey, the Managing Director – UK, who had recently joined the group by the time of the disciplinary hearing in January 2022 and was employed by a separate entity. Ms Henderson was ultimately dismissed by Ms Tracey in February 2022 for "*numerous and collective examples of poor performance and leadership in fulfilling the duties of [her] role*", and received payment in lieu of notice. An appeal against the decision was unsuccessful.

Ms Henderson pursued a claim of: (i) automatic unfair dismissal against GCRM; and (ii) for the detriment of dismissal against GCRM and each of Mr Tomnay and Ms Tracey individually.

Employment Tribunal's decision

In the first instance decision, the Employment Tribunal determined that the disclosures made by Ms Henderson relating to staffing levels were protected under Sections 43A and 43B ERA, as she had genuinely believed that they tended to show breaches of legal obligation that were in the public interest (and that belief was objectively reasonable).

The Tribunal concluded that Mr Tomnay and the HR representative, Ms Young, had been motivated to initiate and conduct a disciplinary investigation against Ms Henderson because of her protected disclosures. Further, they found that Ms Tracey was extensively informed and guided in the disciplinary process by Mr Tomnay and Ms Young; the decision to instigate disciplinary proceedings had been Mr Tomnay's, and the process had only been handed over to Ms Tracey as he was no longer available to manage it. Ms Tracey admitted having little to know knowledge of the disciplinary allegations, which had been decided by Mr Tomnay and the HR representative, admitted that she had relied on them for shaping the process and providing information, and confirmed that she had spoken to Mr Tomnay during adjournment of the disciplinary hearing.

Having made the above findings of fact, the Tribunal's judgment was that:

- Under *Jhuti*, Ms Tracey could be 'imputed' with the knowledge of Mr Tomnay and Ms Young, as they had influenced her to a significant degree. The protected disclosures had therefore had a material influence on Ms Henderson's dismissal, and the claim against Ms Tracey for detriment based on Ms Henderson's dismissal therefore succeeded (Section 47B(1A)). As she was an agent of GCRM, GCRM were also liable for her actions (Section 47B(1B)).

- It was not possible to claim directly against GCRM for detriment based on protected disclosures where the detriment alleged was dismissal.

- Whilst the protected disclosures had been a material influence, they had not been the sole or principal reason for the dismissal and therefore the dismissal was not automatically unfair under Section 103A. It was nevertheless unfair under ordinary unfair dismissal principles, as there had been significant procedural failings and substantive issues with the findings and sanction.

- Mr Tomnay did not subject Ms Henderson to the detriment of dismissal, as he had only had an indirect influence, therefore the claim against him could not succeed.

EAT's decision

Both Ms Henderson and GCRM appealed against the Tribunal's findings.

Ms Henderson's Appeal

Ms Henderson alleged that the Tribunal had failed to properly consider the reason for the dismissal for her automatic unfair dismissal claim (Section 103A).

The EAT agreed with this, and confirmed that once *Jhuti* had been raised by Ms Henderson, the Tribunal should have made clear findings about whether or not Mr Tomnay had improperly manipulated Ms Tracey or created a false pretext which he induced Ms Tracey to adopt. If it was found that he did manipulate or intervene in the process, the Tribunal should then have considered what part that ultimately played in Ms Tracey's decision to dismiss. Ms Henderson's automatic unfair dismissal claim was therefore remitted to the same Tribunal to consider those questions, as it was not an inevitable conclusion that the dismissal would have been automatically unfair.

Ms Henderson also attempted to argue that Mr Tomnay could be held responsible for her dismissal as a result of his involvement, on the basis that the term "dismissed" should include actions causing or contributing to dismissal. The EAT did not agree with this, as this would blur the line between pre-dismissal detriment and the detriment of dismissal itself. No pre-dismissal detriment by Mr Tomnay had been alleged, and he had not dismissed Ms Henderson, therefore the complaint could not succeed.

GCRM's Appeal

GCRM argued that the Tribunal had erred in concluding that *Osipov* and *Jhuti* meant that Ms Tracey, an "innocent" dismissing manager, could be found personally liable under Section 47B(1A) and therefore make the employer also liable

under Section 47B(1B).

The EAT agreed with this, noting that *Jhuti* had only been concerned with an employer's liability for automatic unfair dismissal under Section 103A and the state of mind that can be attributed to the **employer**. The EAT considered that there was no reason to extend this analysis of a "composite approach" to liability to personal liability under Section 47B(1A), in particular because it could not have been the intention of Parliament to impose unlimited liability on **individuals** who have not been personally motivated by the making of protected disclosures. Both *Jhuti* and *Osipov* had taken a purposive approach to legislation in order to provide the claimant with an effective remedy, but without liability being imposed on an innocent party.

The EAT therefore set aside the judgment against Ms Tracey for detriment consequently the judgment against GCRM for detriment.

What does this mean for employers?

The judgment in *Henderson* has offered some helpful clarification as to the circumstances in which decision-makers can be imputed with the knowledge or motivations of others in the context of whistleblowing. In particular:

- For an automatic unfair dismissal claim under Section 103A, it is possible for the Tribunal to look at whether

or not the decision-maker may have been manipulated or influenced in a way that means that, even if they were not personally aware of the protected disclosures, it was still the sole or principal reason for dismissal.

- For detriment claims against individuals under Section 47B(1A) (and consequent liability for employers under Section 47B(1B)), the Tribunal should not impute knowledge to otherwise 'innocent' decision-makers in a way that makes them personally liable (and their employer vicariously liable) for whistleblowing detriment.

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