Whistleblowing held to be the principal reason for dismissal even though protected disclosures hidden from the dismissing officer

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Whistleblowing held to be the principal reason for dismissal

even though protected disclosures hidden from the dismissing officer

Employers should take note of a landmark decision from the Supreme Court regarding liability for all unfair dismissal cases (not just whistleblowing). The Court ruled that an employer who had been manipulated into dismissing an employee for a false reason was liable for unfair dismissal based on the hidden reason. This was the case even though the employer's dismissing officer had dismissed in good faith for another reason.

What does the law say?

Workers who make protected disclosures acquire special employment rights. First, they are protected from being mistreated by their employer and/or their co-workers on the grounds they have blown the whistle. Second, they are protected from being dismissed if the principal reason for the dismissal is the fact they have blown the whistle. Any such dismissal will be automatically unfair.

Earlier cases have told us that only the motivations of the decision-maker are relevant when deciding whether the dismissal was fair. In this case, the Supreme Court had to assess whether an employer should be found liable for a whistleblowing dismissal where the real reason for the dismissal – whistleblowing – had been concealed from the dismissing officer by the employee's manager.

What happened in this case?

The claimant, Ms Jhuti, made several whistleblowing disclosures to her manager, Mr Widmer, during her probationary period. He forced her to retract them and retaliated by bullying her and painting a false picture of inadequate performance. While Ms Jhuti was off sick with stress, Royal Mail began a process to decide whether she should be dismissed for poor performance. Ms Vickers was appointed to chair that

process and review the evidence.

As Ms Jhuti was too ill to attend a hearing, she made written submissions in the form of some 50 lengthy and incoherent emails. Within them, she alleged that she was going to be *"sacked for telling the truth".* Ms Vickers asked Mr Widmer about this and he said that Ms Jhuti had made allegations of malpractice, which she later accepted were wrong and had withdrawn. He maintained that Ms Jhuti was a poor performer. Ms Vickers accepted Mr Widmer's evidence at face value and did not probe the whistleblowing issue any further. She decided to dismiss Ms Jhuti for poor performance.

Ms Jhuti went on to bring two claims against Royal Mail. First, she claimed that she had been mistreated because she had blown the whistle, including suffering bullying and harassment, being subjected to a performance improvement process and being made financial offers to leave the business. She was successful in this claim and this decision was not appealed by Royal Mail. Second, she claimed that she had been automatically unfairly dismissed by Royal Mail because she had blown the whistle.

She initially lost the unfair dismissal claim on the basis that Royal Mail was only responsible for the motivations of the dismissing officer. Here, Ms Vickers had acted in good faith and had genuinely believed Ms Jhuti's performance to be unacceptable. It didn't matter that Mr Widmer had concocted the poor performance story to try to secure a dismissal. These improper motivations did not belong to the dismissing officer nor, in turn, Royal Mail.

On appeal, the Court of Appeal upheld this decision, agreeing that only the motivations of the dismissing officer could be attributed to the employer. Ms Jhuti appealed to the Supreme Court.

What was decided?

Royal Mail argued that whistleblowers were protected from wrongdoing by co-workers (for which the employer could be liable) under the detriment provisions. Ms Jhuti had succeeded in that claim and Royal Mail had been found liable. As such, it was unnecessary to construe the unfair dismissal provisions in such a way as to make them liable for a co-worker's wrongful motivations.

The Supreme Court rejected this argument and allowed Ms Jhuti's appeal, finding that she had been automatically unfairly dismissed by Royal Mail. The Court said that the clear intention of Parliament was that if the real reason for a dismissal was whistleblowing then this would automatically be unfair. If the real reason has been concealed from the dismissing officer, then the Court's role is to *"penetrate through the invention rather than to allow it also to infect its determination".* The Court said that if a person senior to the dismissed employee hides the real reason for a dismissal behind a false one, and the false reason is accepted by the dismissing officer, then the employer's reason for dismissal is the real reason not the apparent reason.

What are the learning points?

Although this case was concerned with an automatically unfair whistleblowing dismissal, the reasoning applies equally to everyday unfair dismissals. Successfully forcing a dismissal based on an entirely fictional reason will be unusual. What's more common, however, is for the real reason to be significantly downplayed and another reason unjustifiably amplified.

Employers can protect themselves by taking sensible precautionary measures. Firms should work hard to prevent managers acting unethically in the first place. Codes of conduct should set out the standards expected from managers and emphasise the importance of honest and ethical behaviour in all dealings, and the consequences of failure (including

dismissal and, if relevant, reporting dishonest behaviour to a regulator). Ideally, a programme of training should support and reinforce this. In some sectors, relevant training may be mandatory. For example, the FCA requires financial services firms to provide tailored whistleblowing training to various stakeholders, including managers, which should explain that victimisation of whistleblowers is prohibited.

Crucially, employers need to ensure that their dismissal processes are unimpeachable. Both investigating and dismissing officers should receive detailed training on the scope of their role. They need to understand the importance of looking for, and interrogating, evidence that supports the proposed reason for dismissal, as well as any evidence that supports the employee's position. As the Supreme Court noted, dismissing officers should *"address all rival versions of what prompted the employer to seek to dismiss the employee".*

Although employers must conduct dismissal processes without unreasonable delay, this should not be at the expense of a fair and thorough process. Dismissing officers must satisfy themselves that the apparent reason is the real reason, even if this requires obtaining more extensive witness evidence and/or reviewing more documentation than initially planned or desired. This will be of even greater importance where the employee is too ill to participate in the process and make cogent submissions in their defence.

Royal Mail Group Ltd v Jhuti

If you would like to discuss any of the issues raised in this article, please contact Amanda Steadman or your usual BDBF contact.

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