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SUMMARY

2020/11 Whistleblowing dismissal unfair where decision-maker was manipulated by another manager (UK)

In a decision with implications for unfair dismissal law generally, the UK's Supreme Court (SC) ruled that it is not always necessary for a dismissing manager to know about whistleblowing disclosures made by an employee in order for that dismissal to be automatically unfair.

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Summary

In a decision with implications for unfair dismissal law generally, the UK's Supreme Court (SC) ruled that it is not always necessary for a dismissing manager to know about whistleblowing disclosures made by an employee in order for that dismissal to be automatically unfair.

Background

Under UK law, workers who 'blow the whistle' on wrongdoing have the right not to be dismissed or otherwise penalised as a result. The legislation, contained in the Employment Rights Act 1996 (ERA), applies to workers who make a 'protected disclosure' to their employer (or in some cases to an outside third party). Various ingredients need to be in place before a whistleblowing disclosure is protected in this way. The disclosure must be about one of a number of specified types of malpractice and must also, in the reasonable belief of the worker, be in the 'public interest'.

The ERA provides that a worker must not be subjected to any detriment by their employer on the ground that they have made a protected disclosure. In addition, if the main reason for an employee's dismissal is the fact that they have made a protected disclosure – even if other

factors are also involved – that dismissal will be automatically unfair.

It is generally easier to establish a detriment claim than unfair dismissal in a whistleblowing case – the test is whether the individual has been subject to a detriment 'on the ground' that they have made a protected disclosure, which means a 'material influence' on their treatment. This is wider than the unfair dismissal test, which requires a protected disclosure to be the main reason for dismissal.

Importantly, a detriment claim can be brought against individual managers as well as the employer. The employer can also be vicariously liable for detrimental treatment by managers, unless it took all reasonably practicable steps to prevent it.

Facts

Ms Jhuti, who was employed by Royal Mail, sent two emails to her manager complaining that colleagues had breached rules on customer discounts. The manager put Ms Jhuti under pressure to retract her allegations, and she sent an email saying "I am so sorry I got my wires crossed" because she was concerned for her job. After this, the manager set Ms Jhuti inappropriate targets and requirements for improvement and constantly criticised her performance. She complained to HR about how she was being treated, went on sick leave and raised a grievance.

Ms Vickers was appointed to review the case, but did not see the emails in which Ms Jhuti made her disclosures. She also did not meet with Ms Jhuti, as she was still unwell, but Ms Jhuti sent her a lengthy series of emails in which she referred to her previous allegations. Ms Vickers then spoke to the manager, who told her that Ms Jhuti had made allegations of improper conduct but retracted them on the basis it was a misunderstanding. Ms Vickers decided to dismiss Ms Jhuti for unsatisfactory performance, and an appeal against this decision was rejected.

Ms Jhuti made a claim to the Employment Tribunal (ET) that she had been automatically unfairly dismissed for making protected disclosures.

Earlier decisions

The ET found that Ms Jhuti had made protected disclosures, but she had not been automatically unfairly dismissed. This was because Ms Vickers had not seen the protected disclosures and genuinely believed that Ms Jhuti was a poor performer. There would only be an automatic unfair dismissal if Ms Vickers herself had been motivated to dismiss by the protected disclosures.

The Employment Appeal Tribunal (EAT) allowed Ms Jhuti's appeal, deciding that this could be an unfair dismissal because Ms Vickers had been manipulated by another manager.

The Court of Appeal (CA) disagreed with the EAT, and held that the dismissal had been fair. According to the CA, the question of what the employer reasonably believed had to be based on the mental processes of the person who made the actual decision to dismiss.

Supreme Court judgment

The SC allowed Ms Jhuti's appeal, ruling that the dismissal was automatically unfair because the real reason for her dismissal was that she had made protected disclosures. Although the dismissing manager had acted in good faith, she had been manipulated by another manager who wanted to get rid of Ms Jhuti because of her whistleblowing. The main points of the SC's judgment were as follows:

The key question is what was the company's reason for dismissing the employee? Usually it is not necessary to look beyond the reasons given by the decision-maker, but in this case the reason for dismissal given in good faith by Ms Vickers turned out to be bogus.
The ET has to find the real reason for dismissal, which can be hidden behind an invented reason. In this case, the real reason for dismissal was Ms Jhuti's whistleblowing but this was hidden behind the reason of poor performance that had been invented by her manager.
The manager had been placed in a management position above Ms Jhuti in Royal Mail's hierarchy. He had manipulated the decision-maker, Ms Vickers, who genuinely thought that there had been inadequate performance. The manipulating manager's state of mind and motivation could be attributed to the employer, meaning the dismissal was unfair.
Royal Mail had argued that there was no need to make it liable for unfair dismissal in this situation, because Ms Jhuti could make an alternative claim of being subjected to a detriment by her manager's actions. The SC was unimpressed by this argument, pointing out that the purpose of the legislation was for whistleblowing dismissals to be automatically unfair, giving the employee access to remedies such as reinstatement.

Commentary

The SC noted that the facts of the case were "extreme", involving a manager who deliberately created a false picture of inadequate performance which the dismissing manager then believed. Examples of decisions to dismiss taken in good faith, but for a reason which the employee's line manager has dishonestly constructed, "will not be common".

This means that similar whistleblowing claims are unlikely to arise often, but the SC's

decision nonetheless has some significant wider implications.

Unfair dismissal

The same reasoning would apply in all types of unfair dismissal claim. The SC made clear that this question of identifying the real 'reason' for dismissal does not just relate to automatic unfair dismissal for whistleblowing.

In a standard unfair dismissal claim, the employer has to show a potentially fair reason for dismissal. It is quite possible that the evidence presented to a decision-maker could be manipulated by another manager in order to engineer an employee's dismissal, particularly in cases of poor performance or misconduct. The SC's ruling confirms that this can still be an unfair dismissal for an impermissible 'hidden' reason, even if the dismissing manager genuinely believes there has been poor performance or misconduct.

The potential for this argument to be raised in dismissal situations makes it particularly important for employers to conduct a thorough investigation into performance or disciplinary allegations before making a final decision. Although it may not be common for managers to manipulate the evidence in this way, the possibility is now likely to be scrutinised more closely in an unfair dismissal claim. The decision-maker in this case was unable to meet with Ms Jhuti, and possibly failed to pay sufficient attention to a confused and lengthy series of emails from her which did refer to the protected disclosures. Decision-making managers should not simply accept all information from other managers at face value.

Whistleblowing detriment claims

Until recently, it was thought that detriment claims could only be brought about action short of, or prior to, dismissal. However, in *Timis – v – Osipov* [2018] EWCA Civ 2321, the CA ruled that a detriment claim could be brought against individual managers who dismissed an employee. The practical upshot of this is that:

Dismissed whistleblowers are now more likely to bring two claims – an automatic unfair dismissal claim against the employer and a detriment claim against both the individual manager and the employer.
Managers can be personally liable for whistleblowing dismissals. This is significant for many reasons, partly because they may be more reluctant to carry out the role of decision-maker in contentious dismissal processes.

Ms Jhuti did not try to bring a detriment claim about the dismissal itself directly against her

manager. In another case, there may be good reasons for doing so, including the lower hurdle of whether the detriment was 'materially influenced' by whistleblowing. It is also possible that this type of claim could be made against the 'innocent' decision-maker as well. A dismissing manager cannot be liable for unfair dismissal, but could potentially be sued for detriment arising from dismissal. While it is unclear whether a manager who genuinely knew nothing about a protected disclosure can still be liable if they were manipulated into a dismissal decision by others, there must at least be scope for personal liability if there has not been a thorough investigation.

Although the SC made some comments about detriment claims in its decision, it did not say directly whether or not it agreed with the CA's decision in *Osipov*. This leaves the position open, but for the time being it should be assumed that *Osipov*-type detriment claims about dismissal can still be brought against both individuals and employers.

Subject: Whistleblowing, Unfair Dismissal

Parties: Royal Mail Group Ltd – v – Jhuti

Court: Supreme Court

Date: 27 November 2019

Case number: [2019] UKSC 55

Internet publication:https://www.supremecourt.uk/cases/docs/uksc-2017-0207-judgment.pdf

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