27 November 2019

PRESS SUMMARY

Royal Mail Group Ltd (Respondent) v Jhuti (Appellant)
[2019] UKSC 55
On appeal from [2017] EWCA Civ 1632

JUSTICES: Lady Hale (President), Lord Wilson, Lord Carnwath, Lord Hodge, Lady Arden

BACKGROUND TO THE APPEAL

The appeal concerns the dismissal of Ms Jhuti, the appellant, from her employment by Royal Mail Group Ltd ("**the company**"). The key question of law that it raises is as follows: in a claim for unfair dismissal under Part X of the Employment Rights Act 1996 ("**the Act**"), can the reason for the dismissal be other than that given to the employee by the employer's appointed decision-maker?

The facts found by the employment tribunal ("**the tribunal**") in this case included the following. During her trial period, Ms Jhuti made 'protected disclosures' under section 43A of the Act, commonly described as whistleblowing. Her line manager's response was to pretend that her performance was inadequate, including by bullying her and by creating, in emails and otherwise, a false picture of her performance. The company appointed another employee to decide whether Ms Jhuti should be dismissed. Ms Jhuti, who had in the meantime been signed off work for work-related stress, anxiety and depression, was unable to present her case to the decision-maker in meetings or otherwise. Having no reason to doubt the truthfulness of the material indicative of Ms Jhuti's inadequate performance, the decision-maker decided that she should be dismissed for that reason.

Ms Jhuti brought two complaints in the tribunal. The first complaint (on which nothing in the present appeal turns directly) was that, contrary to section 47B(1) of the Act, she had been subjected to detriments by acts of the company done on the ground of her whistleblowing. The second complaint was that her dismissal was unfair under section 103A, which provides that a dismissal is unfair 'if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure'. The tribunal dismissed this second complaint. It found that, as the decision-maker had dismissed her on the ground of a genuine belief that her performance had been inadequate, the reason for dismissal was her performance and so section 103A did not apply. The Employment Appeal Tribunal ("**the EAT**") reversed this decision, holding that the reason for dismissal was the making of the protected disclosures.

The Court of Appeal allowed the company's appeal against the EAT's decision and reinstated the tribunal's dismissal of the complaint of unfair dismissal. It held that a tribunal required to determine the reason for dismissal under section 103A was obliged to consider only the mental processes of the employer's authorised decision-maker. Ms Jhuti appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal. It sets aside the part of the Court of Appeal's order allowing the company's appeal against the EAT's order and reinstates the latter order. Lord Wilson gives the only judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The question is whether the tribunal correctly identified 'the reason (or, if more than one, the principal reason) for the dismissal' under section 103A, which relates specifically to whistleblowing. But these words also appear elsewhere in Part X, including in section 98, the general provision for unfair dismissal. So the court's answer must relate equally to those other sections **[39]**. While the question seems to be of wide importance, however, the facts of this case are extreme: instances of decisions to dismiss taken in good faith, not just for a wrong reason but for a reason which the employee's line manager has dishonestly constructed, will not be common **[40-41]**.

When applying a rule to a company which requires attributing to it a state of mind, it is necessary to consider the language of the rule (if it is a statute), as well as its content and policy **[42-43]**. By section 103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal **[44-45]**. The Court of Appeal in this case determined that, when an employee's line manager hides the real reason behind a fictitious reason, the latter is to be taken as the reason for dismissal if adopted in good faith by the decision-maker **[46]**. It considered itself bound by its earlier decision in *Orr v Milton Keynes Council* [2011] EWCA Civ 62, [2011] ICR 704 ("***Orr***"), which held that it was the knowledge only of the decision-maker which fell to be attributed to the employer for the purposes of section 98 **[47-49]**. Yet, for various reasons, *Orr* was not a satisfactory vehicle for the articulation of principle; nor were its facts comparable to those in the present case **[50-53]**.

The company, in opposing the attribution to it of the knowledge of Ms Jhuti's line manager, argues that section 47B of the Act already gives protection to whistleblowers, such that there is no reason to construe section 103A as capturing reasons for dismissal other than the decision-maker's **[54]**. Section 47B protects workers from being subjected to detriment by acts of the employer (subsection (1)), or of another worker (subsections (1A) to (1E)). In the latter case the employer is liable for the other worker's acts **[55]**. But the tribunal attributed to the company the acts of Ms Jhuti's line manager which it found to have caused detriment to her, and held that subsection (1), rather than subsections (1A) to (1E), applied. This attribution to the company (which it does not challenge) of acts which it could not have authorised had it known of the circumstances surrounding them provides no support for its approach to attribution under section 103A **[56]**.

The wider dimension of the company's argument based on section 47B is that the right it gives to workers in Ms Jhuti's position affords to them all the relief they could reasonably expect **[57]**. Yet Parliament has, by section 103A, provided that a dismissal should automatically be unfair where an employee's whistleblowing is the reason for it. It has also, by section 47B(2), withdrawn the protection of that section from whistleblowers subjected to a detriment which 'amounts to' dismissal **[58]**. It is therefore obvious that whistleblowers are not confined to remedies under section 47B **[59]**.

In searching for the reason for a dismissal, courts need generally look only at the reason given by the decision-maker. But where the real reason is hidden from the decision-maker behind an invented reason, the court must penetrate through the invention **[60-61]**. So the answer to the appeal's key question is, 'yes, if a person in the hierarchy of responsibility above the employee determines that she should be dismissed for one 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' **[62]**.

References in square brackets are to paragraphs in the judgment