When can a whistleblower rely on a line manager's malice?

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The decision in Jhuti confirms that only the decision-maker's motivation can be considered in a whistleblowing dismissal claim. But this may not be straightforward to apply and it need not leave the employee without protection.

When considering whether the principal reason for dismissal is that the claimant made a protected disclosure, only the motivation of the decision-maker can be taken into account under s.103A ERA. If dismissal is on the basis of fabricated evidence, which the line manager has provided because the claimant made a protected disclosure, that will not be an automatically unfair dismissal. This is the Court of Appeal's decision in *Jhuti*, reversing the EAT, which had held that a dismissal decision made in ignorance of the truth, which has been manipulated by someone in a managerial position, can be attributed to the employer.

This case is more than simply a reiteration of the principle in *CLFIS*, which said broadly the same thing in relation to dismissal as an act of discrimination under the EqA. LJ Underhill's judgment in *Jhuti* gives valuable guidance in various respects:

- the analysis of the construction of s.103A ERA is important as the construction of the very differently worded provisions of the EqA in *CLFIS* could not be applied to whistleblowing claims;
- it acknowledges that when analysing the reason for dismissal, certain factual circumstances might permit the motivations of more than one person to be taken into account;
- it considers how the test would apply in a number of specific scenarios, depending on the involvement of the third party or line manager, which may allow a more nuanced approach to the issue than might have been suggested by *CLFIS*;
- it confirms that if there is no liability for dismissal under s.103A, the claimant can claim that the provision of information was a detriment under s.47B(2) which caused the dismissal and claim damages flowing from the dismissal on that basis.

The decision

The claimant made protected disclosures during her probation to her line manager (W) who made veiled threats to terminate her employment if she did not withdraw them in writing, which the claimant did as instructed. W was then unfairly critical of her performance and imposed unreasonable targets, and the claimant went off sick with stress. A manager who was innocent of W's motivation then dismissed the claimant for her unsatisfactory performance on the basis of partial and self-serving information from W.

The Court of Appeal pointed out that according to its decision in *Orr*, under s.98 ERA only the motivation of the people who took the decision could be taken into account. This must apply to an automatically unfair dismissal because the wording under s.103A was identical to s.98(1), focusing on 'the reason ... for the dismissal', albeit under s.98(4), once the reason is established, it is necessary to apply the further test of reasonableness; whereas under s.103A the reason determined liability. The tribunal had been correct to reject the claim under s.103A.

Degree of involvement in dismissal

LJ Underhill considered how the test might apply to various scenarios in which the innocent decision-maker is misled by the false evidence of another who was motivated by the protected disclosure (the manipulator).

He said that if the manipulator were a colleague with no managerial responsibility for the victim, the dismissal would not be unfair. If the manipulator were the victim's line manager without responsibility for the dismissal, as in this case, it was again not unfair. However, if the manipulator were a manager with some responsibility for the investigation, but not the decision-taker, there would be a strong case

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for attributing to the employer both the motivation and knowledge of the manipulator, even if not shared by the decision-taker.

The example given is a disciplinary procedure under which the line manager has responsibility for investigating allegations of misconduct, which are then presented to another manager as the factual basis for a disciplinary decision (albeit challengeable at a hearing).

The decision also considered whether there might be an unfair dismissal where the CEO of a company manipulates the evidence before an innocent decision-maker. LJ Underhill declined to give a definitive view and acknowledged that this fell outside the principle in *Orr*, but added: 'There may well be an argument for distinguishing the case of a manager in such a senior position' (para 63).

Softening the boundary?

The suggestion that the motivation of the line manager (as investigator, not decision-taker) could be taken account of under s.103A implies a softer boundary between the dismissing officer and other personnel than that suggested in *CLFIS*, where it was stated that 'the individual employee who did the act complained of must himself have been motivated by the protected characteristic' (para 36). LJ Underhill said the investigator's motivation could be included in the reason for the dismissal because the conduct of the investigation was part of the 'deputed "functions under s.98"' (para 62).

Nonetheless, there is no reason why the same approach cannot be adopted in discrimination cases. The possibility of more than one party being involved in a decision was acknowledged in *CLFIS*, where it was stated that there may be cases where it is difficult to distinguish between supplying information and opinions for the purposes of a decision that are used by someone else and participation in that decision.

Defining the boundary

A move away from the clear bright line drawn around a single decision-maker brings problems of definition. If the test of those whose motivation is relevant encompasses anyone who has a 'deputed function' under s.98, that might include others such as HR personnel whose job is to administer a disciplinary process and whom claimants often accuse of having influence over the dismissal process. Also, within smaller employers with less formalised processes, a line manager or CEO might have a significant input into the process, or might, in practice, gather and pass on information, without being formally designated the investigator. Fine distinctions will therefore need to be made by employment tribunals.

S.47B detriment claims for dismissal

Importantly, the Court of Appeal held there was no obstacle, in principle, to the claimant claiming compensation under s.47B for the financial consequences of termination, on the basis that her manager's tainted information subjected her to a detriment and that caused the dismissal. The court in *CLFIS* had raised the possibility of a detriment claim in the same circumstances. It did not matter that the claimant had not pleaded W's communication to the ultimate decision-maker, as the tribunal had found other acts of detriment and it could be argued at the remedy stage that her dismissal was a consequence of the detriment that was not too remote.

If a claimant who has failed under s.103A can argue that the detriment caused the dismissal, they ought to have a straightforward route to claiming the same compensation. However, there are key differences between detriment-based and dismissal-based claims, particularly from the claimant's perspective.

First, with a detriment claim, there is a risk the claimant will not be compensated, or compensated in full, for the loss of the job, as there might be scope for the employer to argue points about causation.

Secondly, real care needs to be taken in how the claim is framed. It might not be possible at tribunal to rely on motivations of non-decision-making managers if the claim has been pleaded and advanced simply as a discriminatory dismissal. In *CLFIS*, the Court of Appeal emphasised that the tribunal is not required to examine the motivations of people around the decision-maker unless the claimant alleges their actions are discriminatory. The claimant's failure to do this was fatal to her argument that the tribunal should have looked into the motivations of other people.

Thirdly, it is often unclear which people involved in the dismissal process might be tainted. It may be wise for a claimant to plead a case in the alternative based on the actions of those who provided information in order to head off the 'innocent decision-maker' argument. It may be necessary to seek disclosure emanating from people other than the decision-maker.

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S.98 unfair dismissal

It is worth noting the implications of *Jhuti* on claims for ordinary unfair dismissal under s.98 ERA given that the relevant words in s.98(1) and s.103A ERA are identical.

In (say) a capability dismissal, if capability issues were fabricated, but the dismissing officer did not know that, the true reason for dismissal would not be capability but the dismissal would nonetheless be fair because the decision-maker acted correctly on the basis of the information in front of him or her and dismissed for a proscribed reason. While this would be unfortunate for the employee, it is consistent with the rule that facts discovered subsequent to the dismissal that exculpate the employee do not render the dismissal unfair.

Conclusions

Concern that a claimant with a whistleblowing or discrimination claim could be without a remedy if a manager provides false information in a disciplinary or capability process is unfounded in most cases, because the claimant would have an alternative route to the same remedy as a detriment claim. The number of cases where causation arguments would preclude recovery on these stark facts is likely to be small.

A bigger concern is the complexity that arises from requiring the claimant to claim by reference to separate acts of detriment leading to dismissal, rather than under s.103A. The tainted information may have been generated several stages before the dismissal (for example, if the tainted information is passed to someone who wrote a report on the claimant's conduct), which the claimant may not become aware of until late in proceedings and this might hamper his or her ability to explore the issue at the hearing. LJ Underhill acknowledged that this was an undesirable consequence but said that such cases would be rare as normally the issue would be identified, at least, by the time of disclosure.

Finally, the decision in *Jhuti* highlights the anomaly between s.98 unfair dismissal, where a claimant might not be able to get any compensation having been dismissed on the basis of allegations that have been fabricated by a manager unknown to the person dismissing, and a dismissal arising from false allegations in response to a protected disclosure, where an employee could get compensation under s.47B in the same circumstances. This anomaly is an inevitable consequence of the statutory schemes to protect against discriminatory or whistleblowing-related detriments. However, an unfortunate side effect is that it might give unfair dismissal claimants greater encouragement to assert that their treatment was discriminatory or protected-disclosure-related on insubstantial grounds.

KEY:

Jhuti	*Royal Mail Ltd v Jhuti* [2017] EWCA Civ 1632
ERA	Employment Rights Act 1996
EqA	Equality Act 2010
CLFIS	*CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439
Orr	*Orr v Milton Keynes Council* [2011] EWCA Civ 62

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