

# Into the mind of the employer

*Charles Wynn-Evans investigates how the courts and tribunals assess the reasons for an employer's actions in dismissal and discrimination claims*



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**'What if the decision-maker has been manipulated into making the decision to dismiss? This was recently considered in *Royal Mail Ltd v Jhuti* in the context of a claim of automatic unfair dismissal by reason of whistleblowing.'**

**T**he employer's reason or reasons for its actions can be crucial to the outcome of an employment-related claim. Is the employer's knowledge just what the decision-maker knows or does it include relevant facts known to others in the organisation of which the decision-maker ought to have been aware? In both unfair dismissal and discrimination cases, a potentially challenging question is therefore whether the courts and tribunals should consider the knowledge or motivations of a person or persons other than the actual decision-maker which in some way have influenced the employer's decision.

## The reason for an employer's decision

As Cairns LJ put it in *Abernethy v Mott, Hay and Anderson* [1974], the reason for dismissal in the context of an unfair dismissal claim is:

... the set of facts known to the employer or, it may be, of beliefs held by him which cause him to dismiss the employee.

The assessment of the employer's reason for dismissal needs therefore to focus on the actual thought process of the decision-maker. Similarly, in the discrimination context, in *CLFIS (UK) Ltd v Reynolds* [2015], the Court of Appeal held that, where a case:

... is not one of inherently discriminatory treatment or of joint decision making by more than one person acting with discriminatory motivation, only a participant in the decision acting with discriminatory motivation is

liable; an innocent agent acting without discriminatory motivation is not. If 'tainted information' is supplied to the decision maker then the discrimination is the supplying of the tainted information, not the acting upon it by its innocent recipient.

## Who is the decision-maker?

Identifying the decision-maker and considering that individual's thought process is crucial to assessing the reason for an employer's actions although, as was noted in *CLFIS*, the decision may have been reached jointly. *Dynamex Friction Ltd v Amicus* [2008] is a good reminder of the need to focus on the actual decision-maker. In this case, it was argued that the transferee had 'stage-managed' the administrator's dismissals of a number of employees before a TUPE transfer. It was alleged that this was so that the transferee, which was associated with the company's prior owner, could evade employing these employees or being liable for their dismissals. This would have meant that the employees were dismissed not because there were no funds available to pay them, as the transferee argued, but by reason of the transfer.

The dismissals were held to have been for genuine economic reasons given that, as the administrator made clear to the employees at the time of dismissal, the employer had no money for unpaid wages or redundancy payments. Ward LJ emphasised the need to focus on the reason of the relevant decision-maker for the decision to dismiss, indicating that:

In deciding whether the reason for dismissal was an economic one or a transfer-related one, one has to identify

whose thought process is the subject of this analysis. It has to be he who took the decision. It has to be [the administrator's] decision that comes under the microscope.

### The employer's knowledge

The decision-maker may, however, not be in full possession of the facts of a given situation. The question

has been carried out, only the facts known to the decision-maker are relevant in determining whether the dismissal was fair. The person whose knowledge or state of mind counts, for the purpose of an unfair dismissal claim, as the knowledge or state of mind of the employer is 'the person who was deputed to carry out the employer's functions under section 98

## The Court of Appeal identified four different types of potential manipulation.

then arises of whether a dismissal decision can be challenged despite the decision-maker's ignorance of key facts. That ignorance may go to the heart of the issue of whether the employer's investigations and procedures prior to dismissal were adequate. Nonetheless, in *Orr v Milton Keynes Council* [2011] the Court of Appeal established that an employer cannot be deemed to have knowledge of all the facts known to its employees when deciding whether it was reasonable for it to dismiss.

Mr Orr was dismissed for behaving in an offensive manner to his team leader. The manager who took the decision to dismiss was unaware that the team leader had allegedly made racist remarks to Mr Orr, so did not consider Mr Orr's behaviour against this context. The employment tribunal held the dismissal to be fair, a finding which was upheld on appeal. Provided that a fair and thorough investigation

[of the Employment Rights Act 1996 (ERA)], ie the dismissal function.

### Manipulation of the decision-maker

But what if the decision-maker has been manipulated into making the decision to dismiss? This was recently considered in *Royal Mail Ltd v Jhuti* [2017] in the context of a claim of automatic unfair dismissal by reason of whistleblowing. Ms Jhuti was employed by the Royal Mail Ltd as a media specialist in its sales division. Shortly after her employment started, she raised concerns to her direct manager, Mr Widmer, that her team might be in breach of Ofcom guidance due to the way in which they were offering tailor-made incentives. During a meeting with Mr Widmer, he placed Ms Jhuti under great pressure to withdraw her complaint. In fear of losing her job, she agreed

and later emailed Mr Widmer apologising for getting her wires crossed. After she withdrew her concerns, Ms Jhuti was subjected to harsh and unreasonable criticism by Mr Widmer about her performance. She registered a formal grievance about her treatment, was later signed off sick by her GP and ultimately did not return to work.

The employer's head of sales operations, Ms Vickers, decided to terminate Ms Jhuti's employment on the grounds of poor performance. However, she was misled about the nature and existence of Ms Jhuti's disclosures. In particular, she was sent Ms Jhuti's HR file but not the emails in which Ms Jhuti had raised her concerns.

When asked about the disclosures, Mr Widmer explained that Ms Jhuti had accepted that her concerns were based on a misunderstanding. Also, Ms Vickers was unable to speak to Ms Jhuti, who was too ill to attend a meeting. Consequently, she believed that Ms Jhuti's concerns had been settled and were irrelevant to her decision to dismiss.

Ms Jhuti brought proceedings for unlawful detriment contrary to s47B ERA and for automatic unfair dismissal contrary to s103A ERA. The employment tribunal dismissed Ms Jhuti's unfair dismissal claim, finding that her protected disclosures were not the reason for her dismissal because they did not affect Ms Vickers' thought process.

### Appeal decisions

On appeal, the Employment Appeal Tribunal (EAT) and the Court of Appeal considered whether the mindset and motivation of Mr Widmer – the manager whose actions influenced the ultimate decision-maker to dismiss – were relevant when determining the reason for the dismissal. The EAT overturned the tribunal's ruling on the basis that:

... a decision of a person made in ignorance of the true facts whose decision is manipulated by someone in a managerial position responsible for an employee, who is in possession of the true facts, can be attributed to the employer of both of them.

In reaching this decision, it took into account the fact that:

## The 'innocent discriminator'

In *Commissioner of Police of the Metropolis v Denby* [2017], a claimant brought successful claims for direct sex discrimination and victimisation after he was subjected to a criminal professional standards department investigation rather than the local action taken against a female comparator. The EAT rejected an appeal by the Metropolitan Police against the finding that one alleged discriminator was an 'innocent discriminator' consistent with the approach adopted in *CLFIS*. The EAT nonetheless made the point that the *CLFIS* decision should not:

... become a means of escaping liability by deliberately opaque decision-making which masks the identity of the true discriminator.

As a procedural matter, where relevant new information about who internally was responsible for an act of alleged discrimination arises at a late stage, it may be appropriate to allow an amendment during the hearing (as happened in this case) to add the relevant party to the proceedings.

- Ms Jhuti had made disclosures to Mr Widmer, which he realised were serious;
- Mr Widmer deliberately subjected Ms Jhuti to detriments;
- Mr Widmer set up a paper trial which set Ms Jhuti up to fail;
- Mr Widmer lied about the disclosures to Ms Vickers; and
- Ms Vickers was deprived of relevant information.

The EAT held that, in these circumstances, it was not only Ms Vickers' mental process which the employment tribunal needed to consider when determining the employer's reason for dismissal. It should also have considered Mr Widmer's reasons and motivation. Taking into account his role in and motivations towards the dismissal process, it was clear that the reason for Ms Jhuti's dismissal was that she had made protected disclosures to him.

The EAT had regard to comments made in *Co-operative Group Ltd v Baddeley* [2014] that, if the facts known to, or beliefs held by, the actual decision-maker have been manipulated by a manager with some responsibility for the disciplinary process and who has an inadmissible motivation, that motivation could in principle be attributed to the employer. Furthermore, the EAT considered that the approach adopted in *CLFIS* – effectively excusing an innocent decision-maker of liability – did not apply in this case. This was because *CLFIS* considered a claim of direct discrimination whereas *Jhuti* concerned a claim of whistleblowing, in relation to which the statutory language is very different.

The Court of Appeal allowed an appeal against the EAT's decision by reference to its decision in *Orr*, which neither the employment tribunal nor the EAT had considered. It was held that, when determining the reason for dismissal, only the mental processes of the person who was authorised to, and did take, the decision to dismiss are relevant. Therefore, it was only Ms Vickers' mental process that was relevant. She had not been aware of, and therefore had not considered, Ms Jhuti's disclosures and so the

dismissal was not by reason of those disclosures. What the employer reasonably believed when dismissing the employee had to be determined by reference to what the decision-maker actually knew, not what knowledge ought to be attributed to that person.

### Types of manipulation

In *Jhuti*, the Court of Appeal considered that the observations made in *Baddeley* about manipulation were obiter and were not made on the basis of any detailed analysis. However, bearing those observations in mind, the Court of Appeal did recognise the risk of manipulation of a decision-maker's decision and identified four different types of potential manipulation:

#### Type one

A colleague with no management responsibility for the victim procures his or her dismissal by presenting false evidence by which the decision-taker is innocently (and reasonably) misled.

In such circumstances, the dismissal is not unfair despite the injustice suffered by the employee.

#### Type two

The victim's line manager effects the manipulation but 'does not himself have responsibility for the dismissal'. On the basis of *Orr*, there is no scope for attributing the line manager's motivations to the employer.

#### Type three

'A manager with some responsibility for the investigation' – meaning a formal role in the decision-making process – manipulates the dismissal, for example by distorting the presentation of evidence to the decision-maker. There would be a strong case for attributing the manipulator's motivation and knowledge to the employer, even if these were not shared by the actual decision-maker.

#### Type four

Someone at or near the top of the management hierarchy – say, to take the most extreme example, the CEO – procures an employee's dismissal by deliberately manipulating, for a proscribed reason, the evidence before the decision-taker.

Without expressing a definitive view (as it was not an issue in *Jhuti*), the Court of Appeal recognised that it could be argued the manipulator's motivation should be attributed to the employer in such circumstances – as Underhill LJ put it, to find otherwise 'rather sticks in the throat'.

### Compensation by way of detriment

All was not, however, lost for Ms Jhuti. The Court of Appeal also considered whether she could recover compensation for loss of earnings arising from dismissal by way of a separate whistleblowing detriment claim as distinct from an automatic unfair dismissal claim. It was held that it was open to her at the remedy stage to argue that her eventual dismissal was not too remote a consequence of the detriments to which she had been subjected by way of the manipulation.

The recovery of compensation in a detriment claim may be more susceptible to challenge on grounds of causation than in a dismissal case. Nevertheless, it is clearly worthwhile for employees' representatives to plead the claims in the alternative in a case where the decision-maker's knowledge is a live issue.

### Motive is key

These cases demonstrate that the issue of an employer's knowledge and motivations can be of considerable importance in employment claims. Close attention may need to be focused on whether, how and to what extent a decision-maker's reasoning was manipulated and therefore open to challenge. ■

*Abernethy v Mott, Hay and Anderson*  
[1974] ICR 323

*CLFIS (UK) Ltd v Reynolds*  
[2015] EWCA Civ 439

*Commissioner of Police of the Metropolis v Denby*  
[2017] UKEAT/0314/16/RN

*Co-operative Group Ltd v Baddeley*  
[2014] EWCA Civ 658

*Dynamex Friction Ltd & anor v Amicus & ors*  
[2008] EWCA Civ 381

*Orr v Milton Keynes Council*  
[2011] EWCA Civ 62

*Royal Mail Ltd v Jhuti*  
[2017] EWCA Civ 1632