SLAUGHTER AND MAY

Employment Bulletin

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Dismissal was unfair because dismissing officer was not told of key fact

Summary: The Employment Appeal Tribunal applied the knowledge attribution principle established by the Supreme Court in *Jhuti* and held that an investigating officer's awareness of a significant fact could be attributed to the employer for the purposes of establishing the fairness of a misconduct dismissal (*Uddin v London Borough of Ealing*).

Key practice point: It is now clear that *Jhuti* applies to the reason for dismissal and to the assessment of whether the employer acted reasonably in dismissing for that reason. Employers need rigorous disciplinary procedures to ensure not only that there has been no bad faith, but also that all relevant factors have been taken into account.

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Facts: U was dismissed for gross misconduct after he allegedly assaulted an intern (SR) at a pub after work. An investigating officer conducted a disciplinary investigation on behalf of the employer, during the course of which SR made a complaint to the police. After discussions with the police, SR withdrew her allegations. At the disciplinary hearing, the manager considered that the fact that SR had been to the police was a factor supporting her account of events. The investigating officer had not told the manager that SR had withdrawn the complaint. The manager concluded that U should be dismissed for gross misconduct. The Tribunal rejected U's unfair dismissal claim and he appealed.

Decision: The EAT allowed the appeal. Although, strictly, *Jhuti* did not apply to the facts, because there was no suggestion that the investigating officer had a different reason for acting than the dismissing manager, the EAT concluded that the principle went wider than the reason for dismissal. The knowledge or conduct of a person other than the person who decided to dismiss could be relevant to both the reason for dismissal, as in *Jhuti* itself, and to the reasonableness of dismissal for the given reason. The investigating officer's failure to share a material fact with the decision-maker was therefore relevant to the question of reasonableness of the dismissal in this case.

The decision-maker had attached some weight to the fact that there had been a police complaint in reaching the decision to dismiss and had stated in evidence that, had she known about the withdrawal of the

complaint, she would have wanted to understand the reason for it. The EAT held that, if the Tribunal had approached the issue correctly, it would have been bound to conclude that the dismissal was unfair. The EAT therefore substituted a finding of unfair dismissal.

Analysis/commentary: The *Jhuti* case involved a manager who deliberately concealed the real reason for dismissal from the decision-maker. The Supreme Court found that the dismissal was automatically unfair (because the real reason was whistleblowing) even though the dismissing manager acted in good faith (see our Bulletin dated December 2019). Although the Supreme Court accepted that the facts in *Jhuti* were extreme, it did warn that the decision could have wider implications and apply to "ordinary" unfair dismissal. Here, the EAT has not only applied it to a misconduct dismissal but to a scenario where there was no concealment of the reason for dismissal – the only fact that was (inadvertently) hidden was one, albeit significant, factor relevant to the fairness of the decision to dismiss.

On the face of it, the employer in this case had conducted a fair investigation and disciplinary procedure. The EAT said that it was irrelevant that the investigating officer's failure to tell the manager was not deliberate or malicious. However, the gravity of the allegations and the consequences of dismissal for the employee meant that the standard of the investigation had to be high. Clearly, the more thoroughly a disciplinary investigation is conducted, the greater the likelihood that all relevant facts will become known.

Inaccurate rebuttal of whistleblowing allegations was a detriment but employer's motive was damage limitation

Summary: The Court of Appeal held that a surgeon was subjected to a detriment when his former employer made statements to third parties, incorrectly stating that his allegations of fundamental failings on the part of the employer had been found to be unsubstantiated. However, the Court also held that the detriment was not because of his protected disclosures; the employer's motivation was to minimise damage from misleading information he had given to the media (*Jesudason v Alder Hey Children's NHS Foundation Trust*).

Key practice point: The Court of Appeal's decision makes clear that, although the employer's motive is not relevant to whether there has been detrimental treatment, it is a factor in deciding whether the causation test has been met.

Facts: From 2009, J made complaints to the Trust, regulatory bodies and the press about what he considered to be fundamental failings in how the department in which he worked was run. Following his resignation in 2012, and the signing of a compromise agreement (settling his existing whistleblowing claims), J continued to make allegations to third parties. In 2013/14, the Trust made various statements to third parties, rebutting his allegations. J made tribunal claims that the statements constituted a detriment on the grounds of his protected disclosures, because they incorrectly stated that the allegations were "completely without foundation". J's claims were rejected by the Tribunal and EAT and he appealed to the Court of Appeal.

Decision: The Court of Appeal dismissed the appeal. There had been detriment but it was not caused by the protected disclosures.

The Trust was entitled to respond to J's allegations but, in attempting to "put the record straight", it had failed to reveal that some of his complaints were justified. The employer's motive could not prevent the comments being a detriment.

However, the critical issue was causation. The offending passages were not included in the Trust's correspondence in retaliation for earlier protected disclosures. The Trust's objective was to nullify the

adverse, potentially damaging and (in part) misleading information that J had put into the public domain. The detriment resulted from the employee's false statements and was not linked to the making of any protected disclosures.

Analysis/commentary: This was an unusual case in that the alleged detriment arose out of statements which were a response to the employee's disclosures to third parties. However, it contains a helpful discussion of the causation test in whistleblowing claims, confirming that the employer was entitled to respond to the disclosures in order to rebut what had been alleged and to put their side of the case, "*even robustly*". Although the rebuttal also contained misleading statements which constituted a detriment, it did not follow that the reason for making those statements was the fact that the employee had made protected disclosures. Having said that, the decision could easily have gone the other way and employers need to be cautious about attempting to protect their reputation in whistleblowing cases.

The case is also a warning that, although an employee may not be able to rely on detriments that occurred before a settlement agreement, post-agreement detriment on the grounds of having made pre-agreement protected disclosures is possible. As for future disclosures, these cannot be prevented by a non-disclosure agreement and the Government has said it will legislate to require this to be made clear in settlement agreements.

Dismissal of employee with client-facing role was not disability discrimination

Summary: The Employment Appeal Tribunal confirmed a Tribunal decision that an employer had not subjected an employee to disability discrimination when it dismissed her because her disability prevented her from performing her job. She was unable to carry on with her client-facing role and there were no adjustments that could have been made (*Shah v TIAA Limited*).

Key practice point: There may be circumstances in which a point is reached when an employer can dismiss for incapacity in a non-discriminatory way. Medical evidence and a thorough exploration of other options is likely to be crucial, however.

Facts: S's back problems, which made her disabled within the Equality Act 2010, caused difficulty because her role for her employer - auditing the performance of NHS bodies - required her to visit clients. She was expected to work 150 chargeable days each year to cover the cost of her salary. She wanted to work from home but there were not enough clients within a manageable travelling distance to enable her to meet her financial targets. There were no suitable alternative vacancies. She was eventually dismissed on capability grounds, after an Occupational Health report indicated that her back condition was likely to be ongoing.

Decision: The EAT upheld the Tribunal's dismissal of her claims of disability discrimination and unfair dismissal. Dismissal was a proportionate response and there were no reasonable adjustments that could have been made.

The EAT's view was that an impasse had been reached and S had failed to come up with any solution that would avoid the losses her employer would incur. Travel that was essential to the role would cause damage to S, in the view of the medical report. S's position - that her employer should carry the losses by supporting her continued employment at home - was not realistic or reasonable.

S claimed that the employer should have considered part-time work. The EAT noted that it was for the employer to suggest reasonable adjustments and that, in principle, a duty to make an adjustment can arise even if it had not been suggested by, or even occurred to, the employee. On the other hand, the fact that

an employee has not thought to suggest an adjustment may be relevant to whether it is reasonable. S had not requested part-time work, still less part-time work with pay reduced to reflect the hours she was able to work. The EAT said it was difficult to regard as reasonable an adjustment in which the employee apparently had no interest.

The EAT also rejected S's argument that the decision to dismiss was made too hastily. The employer's decision that there was no point in waiting for a further medical report was reasonable.

Analysis/commentary: It can be a difficult to decide how long to wait before taking a decision to dismiss for capability, especially when the employee is not absent from work. Evidence of the impact of absence on the employer, and up-to-date medical reports, will be required in order to show that dismissal was a proportionate response.

The facts in this case were different from *O'Brien v Bolton St. Catherine's Academy*, where the Court of Appeal found that it was disproportionate to dismiss an employee who had long been off sick (see our Bulletin dated 24 March 2017). In that case, there was evidence that the employee was likely to be fit to return to work very shortly. Here, neither S, nor the doctor's report, said that she would be able to travel to clients at some time in the future. Matters had reached an impasse and the employer was entitled to some finality.

Part-time working was apparently not one of the options considered – possibly because the employee did not want to take a cut in pay. The cases on the issue of making up pay for reduced hours as a reasonable adjustment have been mixed. In *Newcastle NHS Trust v Bagley*, the EAT held that the employer was not required to supplement earnings. In *G4S Cash Solutions (UK) Ltd (G4S) v Powell*, by contrast, the EAT found that an employer was required, as a reasonable adjustment, to preserve an employee's pay when the employee was re-deployed to a different role.

Misconduct dismissal could be discrimination arising from a disability

Summary: The Employment Appeal Tribunal decided that a Tribunal should have considered whether the conduct for which the claimant was dismissed arose, directly or indirectly, as a result of his disability, as well as the possibility of imposing a lesser sanction (*Scott v Kenton Schools Academy Trust*).

Key practice point: Dismissal for misconduct of an employee with a disability can be discriminatory, even if the link between the disability and the misconduct is not obvious.

Facts: S, a teacher, was dismissed for misconduct following his admission that he had carried out a request, made by a colleague, to give her manuscript notes to pupils taking an assessment exam. S claimed discrimination arising from disability under Section 15 Equality Act 2010. A psychiatric report stated that his decision-making was impaired by high levels of anxiety and depression. The Tribunal found that his conduct did not arise in consequence of his disability and, in any event, that dismissal was a proportionate response. S appealed.

Decision: The EAT upheld the appeal and sent the case back to the Tribunal. The Tribunal had not properly engaged with the evidence of S's mental health and that his conduct was out of character. The Court of Appeal in *City of York Council v Grossett* made clear that, whilst there must be some connection between the disability and the employee's conduct, the connection can be a relatively loose one. The Tribunal was not obliged to accept automatically the contents of the psychiatric report, but it was significant evidence that was placed before it, which it needed to weigh up.

The Tribunal should have considered also the question of whether dismissal was a proportionate response. A sanction short of dismissal might have been sufficient to meet the employer's objectives.

Analysis/commentary: The Court of Appeal in *Grosset* emphasised that an employer that is aware that an employee has a disability must also consider the full effects and consequences of that disability (see our Bulletin dated July 2018). Employers on notice of a disability can be liable for any unfavourable treatment even if the link between that and the disability is not apparent.

This case also highlights that employers proposing to dismiss in circumstances where they know that the employee has a disability must not only obtain medical evidence but also document their reasons if they disagree or decide not to follow it.

Horizon scanning

What key developments in employment should be on your radar?

11 March 2020	Budget 2020
April 2020	Annual updates to employment rates and limits
6 April 2020	All termination payments above £30,000 threshold will be subject to employer class 1A NICs
6 April 2020	Written statement of terms to be provided to employees and workers from day one of employment, and to contain extra details
6 April 2020	Threshold for valid employee request for information and consultation will be lowered from 10% to 2% of employees
6 April 2020	Abolition of the opt-out of the equal pay protections of the Agency Workers Regulations (the "Swedish derogation")
6 April 2020	Change in reference period for calculating holiday pay for workers with variable remuneration, from 12 to 52 weeks
6 April 2020	Extension of off-payroll working rules to private sector – client rather than intermediary will be responsible for determining whether IR35 applies

We are also expecting important case law developments in the following key areas during the coming months:

- **Employment status**: *B v Yodel Delivery Network Limited* (CJEU: whether couriers have worker status under the Working Time Directive); *Uber v Aslam* (Supreme Court: whether drivers are workers for employment protection, minimum wage and working time purposes); *Addison Lee v Lange* (Court of Appeal: whether private hire drivers were workers); *IWGB v CAC* (Court of Appeal: whether couriers are workers for trade union recognition purposes)

- **Data protection**: *Wm Morrison Supermarkets Plc v Various Claimants* (Supreme Court: whether employer was vicariously liable for deliberate disclosure of co-workers' personal data by rogue employee; *Dawson-Damer v Taylor Wessing LLP* (Court of Appeal: correct response to subject access request)

- **Discrimination / equal pay**: *Ravisy v Simmons & Simmons* (Court of Appeal: territorial jurisdiction); *Asda Stores v Brierley* (Supreme Court: whether workers in retail stores could compare themselves with those working in distribution depots for equal pay)

- **Trade unions**: *Jet2.com v Denby* (Court of Appeal: refusal of employment)

- **Unfair dismissal**: *Awan v ICTS UK* (Court of Appeal: dismissal while employee entitled to long-term disability benefits)

- **Vicarious liability:** *Barclays Bank plc v Various Claimants* (Supreme Court: whether employer vicariously liable for assaults by doctor engaged to carry out pre-employment assessments).

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