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King's Bench Walk

Is the prejudice of an investigating manager relevant to determining the propriety of a dismissal, even if the decision makers are not aware of and do not share that prejudice?

In *Cadent Gas Ltd v Singh* [2019] UKEAT 0024/19/0810, the Employment Appeal Tribunal has considered whether the personal animus of a manager who had been heavily involved in a disciplinary investigation had tainted the dismissal process as a whole, even though the dismissing managers had not shared that animus. Furthermore, the EAT considered whether that manager's prejudice towards the Claimant, informed by his trade union activities, could be attributed to the employer.

The Facts

Cadent Gas Ltd ("Cadent") manages the national gas emergency services. It operates a system whereby response engineers, such as the Claimant, Mr Singh, are dispatched on an urgent basis to deal with reported gas leaks. Response engineers were required to attend reported leaks within an hour of their report. If they are in any way delayed, they must contact the dispatch handlers promptly to ensure that alternative arrangements could be made in a timely fashion.

Mr Singh had been employed by Cadent for just short of 30 years and had an unblemished record. He was also the health and safety representative and trade union shop steward, positions he had held since 2012.

In the run up to the incident, Mr Singh had (separately) raised a number of grievances regarding, in particular, work allocation. Specifically, he complained that he had been allocated more emergency call-outs than other engineers and that this was due to his challenging the dispatch team in his role as a trade union representative. These grievances had led to Cadent apologising to Mr Singh on a number of occasions, and the Tribunal at first instance found that Cadent had, to some degree, accepted that Mr Singh had been unfairly allocated work.

On 17 June 2017, the Claimant attended a difficult and complex job on one of the hottest days of the year, lasting from 8.00am until 8.44pm. He spoke with dispatch on his journey home and said that he should be stood down from further duties under Cadent's Fatigue Risk Assessment policy. However, the dispatch team failed to do so. Consequently, at 1.13am on 18 June 2017, the Claimant was sent to a gas leak that had been reported at 12.58am (and therefore had to be responded to no later than 1.58am). Mr Singh explained that he was fatigued but, reluctantly, agreed to respond regardless. Having not eaten properly since before 8.00am the previous day, Mr Singh decided to stop at KFC on the way to the job. The stop took 13 minutes. As a consequence, he arrived at the job at 1.59am, one minute outside the response window. Following an informal debriefing with his managers, the Claimant understood that no further action would be taken despite him having arrived late.

However, a more senior manager, Mr Huckerby, with whom Mr Singh had had run ins previously in respect of his trade union duties, noticed that the response target had been missed. Mr Huckerby referred this to HR on 20 June 2017, saying there was a potential disciplinary issue, but leaving out key facts – such as the fact that Mr Singh had been assigned the job 15 minutes after the report had been made. Mr Huckerby flagged his email to another manager, and in doing so made reference to Mr Singh's trade union activities – as he did so in other documents, seemingly without reason.

HR recommended that the matter be dealt with as gross misconduct. Mr Huckerby then appointed an official investigating manager, but remained heavily involved in the investigation. For example, Mr Huckerby changed the terms of reference of the investigation, prepared by HR, to include reference to Mr Singh's role as a health and

safety representative, and suggested in investigation documents that Mr Singh, "*as a TU Rep*", may try to "*influence*" potential witnesses. Mr Huckerby also gave the official investigating manager incorrect factual information. On 10 July 2017, Mr Huckerby informed Mr Singh that a "*fact find*" had concluded and would lead to a gross misconduct case. In fact, the investigation had not concluded, no report had been generated and no recommendations had been made as to what (if any) disciplinary action should be taken.

An independent manager, Mr Wilson, was appointed to conduct the disciplinary process. Following two disciplinary hearings, the Claimant was dismissed by Mr Wilson on 21 September 2017. In the termination letter, Mr Wilson made reference to Mr Singh's role as a health and safety representative, noting that "*you above all people should have been aware of the seriousness of your actions*".

Mr Singh's disciplinary appeal was rejected on 1 December 2017.

The Law

Section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 states as follows:

152 Dismissal of employee on grounds related to union membership or activities.

(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a) was, or proposed to become, a member of an independent trade union,

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time…

The language of the test here is whether "*the reason for* [dismissal] *(or, if more than one, the principal reason)*" was the employee's trade union activities. In *Royal Mail Group Ltd v Jhuti* [2018] ICR 982, the Court of Appeal held that when determining the 'reason' for dismissal the Tribunal should only consider the mental process of the decision maker, not anyone else (per Underhill LJ at [57]).

Note that the Court of Appeal's decision in *Jhuti* was good law at the time, as the EAT heard this case (and delivered its judgment) before the Supreme Court's later decision in *Jhuti* ([2019] UKSC 55) was handed down. How much (if at all) this would have changed the outcome of this case will be considered below.

The EAT's Decision

The EAT held that "*what matters is whether the reason, or if more than one, the principal reason, for the dismissal is that the employee was engaged in trade union activities*" and that a distinction must be drawn between the reason why the employer dismisses and its purpose or motive for doing so (para. 43).

The EAT found that the Tribunal had, correctly, identified that Mr Wilson *had* been influenced by Mr Singh's trade union activities – in particular, in holding him to a higher standard as a result of his role as a health and safety representative. It was noted that similar incidents involving other engineers had not resulted in dismissal (or even, in some cases, any disciplinary sanctions at all). This was enough to shift the burden of proof onto Cadent to show that the reason for Mr Singh's dismissal was not his trade union activities (following the decision in *Serco Ltd v Dahou* [2017] IRLR 81) – a burden the Respondent failed to discharge. The EAT was also clearly concerned, as the Tribunal had been, that Mr Huckerby had not given evidence at first instance to explain his conduct (or, indeed, to demonstrate that he had not been prejudiced against Mr Singh because of his trade union activities).

Alternatively, the EAT held, following *Jhuti*, there were circumstances where the "*motivation and knowledge of a*

person who is not the decision-maker may be attributed to the employer even where that motivation and knowledge is not shared by the decision-maker". Because Mr Huckerby played a leading role in the investigation and was carrying out deputed functions of Cadent, "*this case is a good example of one where the motivation of the manager(s) deputed to conduct the investigation can be attributed to the employer, even if the eventual dismissing officers did not share that motivation*" (paras 53-54). Accordingly, the EAT determined that Tribunal was entitled to ascribe Mr Huckerby's animus of Mr Singh to the employer, Cadent, when considering the reasons Cadent had for dismissing the Claimant.

Post-*Jhuti* Position

The Supreme Court's decision in *Jhuti* reverses elements of the Court of Appeal's. Given that the EAT in this case relied on and referred extensively to Underhill LJ's Court of Appeal judgment in *Jhuti*, would the outcome have been different had the case been heard later?

Firstly the fact that *Jhuti* was a whistleblowing case, whereas *Singh* concerned automatic unfair dismissal for a trade union reason, does not change the nature of the test to be applied: Lord Wilson concluded at paragraph 39 of the Supreme Court's decision in *Jhuti* that, as the same wording is repeated throughout Part X of the Employment Rights Act 1996, the test will be the same in all of these cases.

Whilst the Supreme Court's decision in *Jhuti* deserves its own, much more detailed article, the essence of the decision was that where a person more senior than the dismissed employee decides that the employee should be dismissed for some reason (presumably, such reason being unlawful, as was the case in *Jhuti*, a whistleblowing claim) but hides that true reason behind an invented, potentially fair or lawful reason for dismissal, the Tribunals should take as the reason for dismissal the true, hidden reason rather than the invented reason. This remains the case even where the true reason has been hidden from the ultimate decision-maker.

It is highly likely, therefore, that the EAT would still have dismissed Cadent's appeal. Mr Huckerby's true reason for instigating the dismissal could be attributed to the company because of his more senior position. The evidence – such as amending the terms of the investigation to include references to Mr Singh's trade union positions and mentioning his involvement in the union to a more senior manager – also plainly showed that Mr Huckerby's true reason was Mr Singh's trade union activities. The evidence also showed that it was Mr Huckerby who had effectively initiated the disciplinary proceedings, by contacting HR, providing inaccurate or incomplete information, and guiding the investigation process. This demonstrated Mr Huckerby's efforts to conceal the 'hidden reason' for the dismissal behind the 'invented reason'.

Conclusion and Practical Points

The facts in this case will probably be all too familiar to many employment practitioners, who will have seen cases of managers interfering or putting pressure on HR or junior managers to make certain findings.

The EAT's decision in this case highlights the dangers of allowing potentially partisan managers to play a role on what ought otherwise to be an independent and transparent investigation (or, indeed, the disciplinary process itself). Where a manager initiates and then sits behind the investigation but guides it in a certain direction, that manager's reason for doing so is likely to be relevant for the purposes of determining the reason for dismissal. Even if that manager does not make the final decision, and even if the ultimate decision-maker has no knowledge of and/or does not share that manager's hidden reason for driving the process, their conduct may lead the tribunal to conclude that the real reason for the dismissal is their hidden reason, not the reason relied on by the decision-maker. Following the Supreme Court's decision in *Jhuti*, if anything the scope of managerial manipulation (to borrow Underhill LJ's description in the Court of Appeal) that the Tribunal can look at is broader than ever.

As such, practitioners should be on the lookout for managers who have involved themselves in disciplinary investigations and processes, and what they might have been trying to achieve and why. It will not necessarily be only the decision-maker(s) whose purpose and motivations will be scrutinised. Going forward, employers need to

take much more seriously allegations that managers have ulterior motives and/or some form of animus against the employee, and investigate those allegations thoroughly.

Singh also raises an important point about which witnesses to call. The fact that Cadent had not chosen to call Mr Huckerby clearly left a negative impression on the Tribunal, which was shared by the EAT. His absence was unquestionably damaging to Cadent's case, as the allegations regarding the true reason for his actions and his interference in the process were effectively left unanswered.