Dismissing for poor performance when the employee has raised 'whistleblowing' concerns

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The case of Royal Mail Group Limited v Ms K Jhuti concerned a scenario that might be unnervingly familiar to many.

The facts

Ms Jhuti was a new employee who was discontented about the allocation of accounts to her. Early in her employment she had witnessed what she believed was wrongdoing and she raised it with her manager by e-mail at the same time as asking him to rectify the situation with her accounts.

There followed a discussion between Ms Jhuti and her manager about the alleged wrongdoing (which related to a standard company practice called 'TMIs'). The two individuals' later accounts of that discussion varied 'dramatically'. Her account was that she was pressured into retracting the e-mailed allegations and was given a dressing down. His account was that he explained to Ms Jhuti why her understanding of the matter was mistaken.

Subsequently, during her probationary period, Ms Jhuti's manager required her to attend weekly meetings to monitor her performance and gave her a list of, in her view, unattainable requirements. By contrast, in the manager's absence over Christmas and New Year, she was complimented on her work by the manager's counterpart in a similar team. Around the same time, she also spoke to the architect of the TMI practice, who told her 'we all know' it was being abused.

Upon the manager's return to work, he e-mailed HR to say that Ms Jhuti was not up to expectations and 'if things don't change, we will need to look at exiting [her]'. He remained critical of her and set up a performance plan. Ms Jhuti then e-mailed HR to express concern at her treatment since raising the issue of potential wrongdoing. She met with HR and reiterated her concerns. HR responded by suggesting that her manager was a respected one and perhaps the company was not right for her.

Ms Jhuti and her manager continued to meet, and her probationary period was extended. A short while later, she was offered 3 months' pay to terminate her employment (later increased to 12 months' pay). She then went on sick leave and raised a formal grievance.

Another manager, Ms Vickers, was appointed to review Ms Jhuti's position, excluding the grievance. During her review Ms Vickers became aware of references to cheating the business and the public, although (for unexplained reasons) she never saw Ms Jhuti's specific e-mailed allegations. Ms Jhuti's manager told Ms Vickers that Ms Jhuti has misunderstood the situation about TMIs and he showed Ms Vickers the e-mailed apology from Ms Jhuti. Ms Vickers did not meet Ms Jhuti owing to her ill health. Subsequently, she decided to dismiss Ms Jhuti, genuinely believing her to be failing in her performance in role.

For unexplained reasons relating to the TMI practice, the grievance procedure was not concluded until several months later. The grievance was not upheld. Subsequently, and also for unexplained reasons, the TMI practice was discontinued.

Ms Jhuti complained to the employment tribunal that she had suffered detriment and been dismissed for whistleblowing.

The judgment

The employment tribunal found that Ms Jhuti had been subjected to unlawful detriment during her employment on the grounds of her whistleblowing.

The detriments included:

1. the manager's performance plan and other unobtainable requirements; and

2. HR's offer to terminate her employment for 3 (and then 12) months' pay. The tribunal decided that, as Ms Jhuti did not have normal unfair dismissal rights (having been employed for a short period only) and given all the 'hiatus' around the TMI practice, the most likely explanation for the offer was that it was because of her whistleblowing. And, because she did not want to leave, the offer was a detriment.

However, the employment tribunal did not find that the dismissal was on the ground of her whistleblowing. This was because the person who dismissed Ms Jhuti (Ms Vickers) genuinely believed she was dealing with a bona fide performance procedure and had not been provided with copies of Ms Jhuti's 'whistleblowing' e – mails. The tribunal was following a Court of Appeal case, in the context of unlawful discrimination, which indicated that the dismissing manager must herself have had unlawful motivations for the dismissal by the employer to be unlawful. However, on appeal, the Employment Appeal Tribunal overturned this part of the judgment.

This case is therefore authority for the proposition that a decision to dismiss can be unlawful if it is made by a person who is in ignorance of the true facts but whose decision is manipulated by another person (who holds a managerial position responsible for the employee) who does know the true facts.

What could the employer have done differently?

Several things. Perhaps the most important thing to remember about this case is that the individuals catapulted in to support the manager in his dealings with Ms Jhuti seem to have taken it at face value that they were dealing with a simple case of under-performance, not influenced by unlawful factors. Without accepting, recognising or perhaps even considering that the case might be more complex than this, they were simply unable to put themselves in a position to dismiss Ms Jhuti fairly. Had they done otherwise, the result might have been different.

These are some other simple things that could have made a difference:

1. Deal with the grievance first

The employer separated the grievance and dismissal processes. This is often a sensible thing to do but usually only if the employer deals with the grievance first.

By leaving the grievance in abeyance (especially for reasons not fully explained), the employer was effectively shouting to the tribunal 'We're more bothered about dealing with our concerns than hers'. That never goes down well.

2. Be informed

As this case demonstrates, ignorance is not a defence. The dismissing officer was seriously curtailed in her ability to act fairly by not being allowed access to the right information. She was given a one-sided story, but an Employment Tribunal expects employers to consider both sides of the story. The dismissing officer would not have been in this position had the grievance been dealt with first.

3. Provide an explanation

You might have noted the repeated references to 'unexplained' in the summary above. Employment Tribunals expect employers to be able to explain their actions in full. If they cannot, it is likely an adverse inference will be found to fill the gap.

Had the employer in this case tackled the allegations / grievance head on, and attempted to put forward a cogent explanation for why the manager's treatment of Ms Jhuti was unrelated to the whistleblowing, it would have been far better placed to defend the claim.

4. Handle exit discussions with care

We don't know exactly how the discussions in this case about an agreed termination proceeded, but here are some common mistakes that might have applied:

(a) Not setting the discussion up to try to take the benefit of the 'without prejudice' rule. See our note on this here.

(b) Not gauging interest in an agreed termination. Sometimes it is best to ask if an employee would be interested in talking about an agreed exit, rather than leaping straight in with an offer.

(c) Not explaining the context to the discussion / offer. Had the employer written a carefully drafted letter explaining why it was wishing to talk about an agreed exit and how it reached the value of any specific offer, this might have helped. In the absence of such an explanation, adverse inferences can (and often will) be drawn.

(d) Not adopting a conciliatory and understanding tone. In this case, the first mention of an exit appeared to come hand in hand with a comment about the respectability of Ms Jhuti's manager. The implication (even if not intended) was that Ms Jhuti was not respected by the employer.

5. Know when to make records (and when not to)

It appears from the judgment in this case that neither Ms Jhuti nor her manager made contemporaneous notes of their critical meeting about her concerns. The Tribunal preferred her account of this meeting. If the manager had made (good) notes, his chance of being believed would have been much greater.

6. Know your limits

The Employment Tribunal described Ms Jhuti's manager as providing 'evasive and disingenuous' evidence. This is about as damning as it gets. By contrast, Ms Jhuti was found to be a 'very credible witness'.

Whilst not every management matter will end up in Tribunal, sometimes it is best to have in the back of your mind 'How will this look if it goes to tribunal?'

If an HR person thinks a manager will be a poor witness (and most HR managers will have a good sense of whether or not this is the case), they should tread with even greater care when implementing the demands of that manager – for the manager's good as much as anyone else's.

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