Neutral Citation Number: [2024] EAT 97

Case No: EA-2022-SCO-000135-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 18 June 2024

Before :

THE HONOURABLE LADY HALDANE

- -

Between :

DR ALAA JALAAL	**Appellant**
- and -	
GRAMPIAN HEALTH BOARD	
TAYSIDE HEALTH BOARD	
NHS EDUCATION FOR SCOTLAND	**Respondents**

- -
- -

The **Appellant** neither being present nor represented
Mr Kenneth McGuire (instructed by NHS National Services Scotland) for the **Respondents**

Hearing date: 13 June 2024

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JUDGMENT

The Honourable Lady Haldane:

Introduction

1. This matter came before me for a Full Hearing on 13th June 2024. The hearing was allowed in terms of an order dated 13th July 2023, following a Rule 3(10) hearing before Eady P in terms of which she permitted two of the proposed nine grounds of appeal to proceed. I shall refer to parties as the claimant and respondents, as they were below. Specifically, Eady P allowed a Full Hearing in respect of grounds of appeal 7 and 8 only, inter-related grounds raising the question of whether the ET erred in not applying the approach in **Royal Mail Group Ltd v Jhuti** [2019] UKSC 55, and **Uddin v London Borough of Ealing** [2020] IRLR 332 to the facts found established.

2. In the period leading up to the Full Hearing, the representative of the claimant made contact with the EAT administration, to advise that he had been unable to make contact with the claimant and thus had no instructions to prepare a skeleton argument or lodge any documentation in support of the appeal. He advised that he would not be attending the hearing. There was no contact from the claimant. The respondent had complied with the practice direction and was advised that the hearing would nevertheless take place. At the hearing itself, the respondent was represented by Mr Maguire, Advocate. I advised him that in the interests of justice, and consistent with the overriding objective, I would have regard to the documents lodged, the grounds of appeal that had been permitted to proceed to Full Hearing, and the reasons of Eady P for allowing those grounds to advance. I would in addition have regard to Mr Maguire's submissions, his skeleton argument and the core bundle lodged and provide a written decision. Mr Maguire indicated he was content with that approach.

Background

3. The background to this matter is set out in the helpful and detailed skeleton submitted by the respondents. The following summary is taken from the findings in fact in the Judgment, none of which were challenged on appeal. As the Tribunal itself notes, this matter was an evidentially complex one, with a considerable number of documents produced, and the evidence in relation to those documents not always emerging in a coherent or logical fashion. Read very short, the claimant was employed as a paediatrician by NHS Grampian, although *de facto* she carried out most of her duties at Ninewells Hospital in Dundee. Tayside Health Board are the second respondents. This arrangement came about as a result of a decision to transfer the employment of all trainees in paediatrics to the first respondent.

4. It was a condition of her contract of employment that the claimant continue to hold a place in an approved postgraduate training programme. In order to do so she had to obtain and maintain a national training number. The claimant wished to seek appointment as a consultant paediatrician and was undergoing training with that goal in mind. Her training was carried out under the auspices of the third respondent, NHS Education Scotland, she was 'operationally accountable' to the second respondent, Tayside Health Board, but it was a matter of agreement that at all material times she was employed by the first respondent, Grampian Health Board.

5. The claimant required to progress through various Annual Review of Competency Panels (ARCP). There were issues with her progression. At each stage of training there were six possible 'outcomes' only certain of which permitted seamless progression in the training programme. An ARCP was held on 26 February 2020 (one of a series of such panels) the result of which was that the claimant was given an 'Outcome 4'. This is defined as meaning that the trainee is released from training. The claimant appealed this outcome but the unanimous decision of the appeal panel was that her appeal be

refused. The consequence of that outcome and procedure was that her training number was removed by the third respondents. The claimant was informed by the first respondents that the lack of a training number meant that she could not remain in her post and unless she could be suitably re-deployed her employment would be terminated. No such alternative post was identified and the claimant was dismissed on 26 November 2020. She did not appeal that decision.

6. The claimant brought claims for discrimination in terms of sections 15, 20 and 53 of the **Equality Act 2010** and a claim for unfair dismissal under § 98 of the **Employment Rights Act 1996**. The unanimous Judgment of the ET was that the claims should be dismissed. For present purposes, the claim for unfair dismissal is at issue, and the ET's reasons for finding that the dismissal had been fair are set out at paragraphs [335]-[346]. The ET addressed its mind to the possible application of **Royal Mail Group Ltd v Jhuti** [2019] UKSC 55, and **Uddin v London Borough of Ealing** [2020] IRLR 332 at paragraphs [340]-[345] in the context of a submission made that the dismissal by the first respondent was unfair because of issues raised as to the procedures by which the claimant's national training number was removed by the third respondent. It concluded on this aspect of matters at paragraph [345]:

> "They were not however the acts of the first respondent and we did not consider that what the third respondent did in relation to those matters should be in some way taken to be acts of the first respondent for the purposes of assessing fairness. They were matters over which the first respondent had no control or influence. We make further comments in relation to those matters below. We did not consider that those acts of the third respondent could render the dismissal by the first respondent unfair".

7. The question for determination in this appeal is whether in so concluding the ET erred and whether the principles in **Jhuti** applied so as to impute to the first respondent the mind-set of the third respondent – in short whether in truth the dismissal by the first respondent was rendered unfair by virtue of being instructed by the third respondent or carried out for a 'hidden' reason.

8. The relevant parts of the opinion of the Supreme Court in **Jhuti** are set out at paragraph [240] of the Judgment as follows:

> "In searching for the reason for a dismissal for the purposes of s 103A of the Act, and indeed of other sections in Pt X, courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention

rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker." (Per Lord Wilson at paragraph 60).

9. The ET observed at paragraph [241] in relation to **Uddin** as follows:

"241. In **Uddin v London Borough of Ealing** [2020] IRLR 332 the EAT extended that principle to the second manager's knowledge of facts, which had deliberately not been passed on to the dismissing manager."

Submissions for the respondents

10. Mr Maguire adopted his skeleton argument and supplemented that with brief oral submissions. He placed particular emphasis on his argument in paragraph 31 onwards of his skeleton under reference to **Orr v Milton Keynes Council** 2011 ICR 704, where the Court of Appeal held by a majority that in determining the reasonableness of a dismissal for the purposes of section 98(4) of the **Employment Rights Act 1996** (**ERA**), the ET can only take account of the facts or beliefs that were known to the person (or persons) who made the decision to dismiss the employee in question (per Moore-Bick LJ at paragraphs 47, 58, and 60, and Aikens LJ at paragraph 86). Moore-Bick LJ explained at paragraph 58 that when assessing the fairness of a dismissal in terms of section 98(4) of the **ERA**, it is the person deputed to carry out the employer's functions whose knowledge or state of mind counts as the employer's knowledge or state of mind, and that 'reasonableness' must be considered in the light of that person's investigation and knowledge.

11. **Jhuti** expressly did not overrule **Orr**, rather only created a limited exception to the general principle enunciated above (**Jhuti**, paragraph 61). Here the first respondents are the employer but had no part to play in procedure leading to 'Outcome 4', which was the responsibility of the third respondent. That alone distinguishes this case from the type of scenario in **Jhuti** or **Uddin.**

12. There were, Mr Maguire submitted, other distinguishing features, but the fact that the respondents are entirely separate entities is an important distinguishing feature. There was no suggestion that this was a sham [342]. Mr Maguire had found no authority relevant to a situation where distinct entities were involved. In contrast, the line of authority flowing from **Jhuti** all concerned single employers. As a result, the facts and circumstances of this case do not fall within narrow exception created in **Jhuti**.

13. Mr Maguire submitted that even if wrong about the 'separate entity' point, and it were argued that such was an artificial distinction, that does not help the claimant. **Jhuti** was creating a narrow exception where there has to be manipulation or a 'hidden reason' before there can be attribution of knowledge. Looking at the findings in fact, that is not present in this case, and for that reason also the appeal should be dismissed.

14. So far as any potential application of **Uddin** was concerned, Mr Maguire contended that **Uddin** embraced what was said in **Jhuti**. Put another way, **Uddin** has to be read subject to **Jhuti**, the only additional factor **Uddin** adds is that Supreme Court in **Jhuti** were concerned with the reason for dismissal and in **Uddin** it was held that that consideration also applies to reasonableness question in s 98(4) **Employment Rights Act 1996**.

Analysis and decision

15. As indicated above, I have taken the papers available to me on behalf of the claimant at their highest. However, having done so, I conclude that there is force in the submissions

made by Mr Maguire. I accept his submission that, as the Supreme Court itself made clear, **Jhuti** has to be seen as a narrow exception to the principle set out in **Orr**, which is in short that in determining the reasonableness of a dismissal for the purposes of § 98(4) **ERA** the ET can only take account of the facts or beliefs known to the person or persons who made the decision to dismiss. The narrow exception created by **Jhuti** is where a manager has some responsibility for the conduct of the disciplinary inquiry, the Supreme Court accepted that it might also be necessary to attribute that manager's knowledge to the employer, even if this is not shared by the person who made the decision to dismiss the employee. The Supreme Court also makes clear that embraced within that exception is the principle that when a manager with no responsibility in the decision making process, but who is nonetheless above the employee in the employer's hierarchy of responsibility, hides the real reason for dismissal behind an invented reason which the decision maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason. As Mr Maguire submitted, there was no evidence at all before the Tribunal that the dismissal in this case had been manipulated, or was for some hidden reason. The Tribunal made an explicit and unchallenged finding to that effect at paragraph [342].

16. Furthermore there is no suggestion in the *ratio* of **Jhuti**, or even *obiter,* that this narrow exception should extend to a situation such as the present, where three separate entities are involved, one responsible for training, and another the employer, in whose contract with the claimant was a condition stipulating the claimant's continuing participation in the relevant training programme. There was no evidence of a hidden reason for dismissal, or any suggestion that the first respondents had been manipulated. In short, the conditions for applying the **Jhuti** exception were absent.

17. Thus in concluding that the claimant's dismissal was fair on the basis that she had been dismissed for 'some other substantial reason' (the loss of her training number, and thus her ability to participate in the relevant training programme) in terms of § 98 **ERA** and that **Jhuti** and **Uddin** did not apply to the facts of this case, the ET reached a conclusion that was permissibly open to it on the facts it found established.

Disposal

18. For all those reasons, I can identify no error of law in the approach of the Employment Tribunal, and the appeal is accordingly dismissed.