The Silencing of Public Interest Concerns and Hidden Motives: *Jhuti v The Royal Mail Group*

1. INTRODUCTION

The recent Supreme Court judgment in *Royal Mail Group Ltd v Jhuti*[1] addresses an important question of law as to whether in an unfair dismissal claim under Part X of the Employment Rights Act 1996 (ERA 1996) the reason for the dismissal can be other than that given to the employee by the employer's appointed decision-maker. The issue for the Supreme Court was the knowledge that should be attributed to an employer in a situation where a manager determines the dismissal of an employee for one reason, but hides it behind an invented reason which the decision-maker then adopts. The Supreme Court departs from previous authorities in finding that the reason for the dismissal is the hidden reason in such circumstances, and the importance of this ruling is examined in this case note.

Jhuti involved the dismissal of an individual for making protected disclosures and so has implications for the law on the complex whistleblowing provisions of the ERA 1996, as examined in Part 3 of this case note. The appeal to the Supreme Court concerned the reason for the dismissal and whether it was for inadequate performance or for making protected disclosures. As with all whistleblowing decisions that have reached the highest court, the judgments of the lower courts and tribunals in this case failed to adopt a consistent approach with regard to the relevant provisions, as considered in Part 4. As further recognised by Lord Wilson, who gave the lead judgment in the Supreme Court, this question of law is of general importance beyond the area of unfair dismissal for making a protected disclosure and also concerns the interpretation of the unfair dismissal provisions of Part X of the ERA 1996 more widely, as assessed in Part 5. The case note finally explores the wider implications of the decision for both the areas of whistleblowing and of unfair dismissal in general, and reflects on the inconsistency of approach between courts in establishing important issues with regard to dismissals.

2. FACTS

In September 2013 Ms Jhuti was employed as a media specialist by Royal Mail and assigned to Mr Widmer's team who was her line manager. During her trial period, she became concerned that another member of the team was infringing Ofcom guidance in respect of Tailor-Made Incentives to achieve targets and secure bonuses for themselves and indirectly for Mr Widmer. She reported her concerns in an e-mail to Mr Widmer in November 2013, but following an intense four-hour meeting with Mr Widmer, she agreed to retract the allegations as a result of the pressure he exerted. Thereafter, over several months, Mr Widmer sought to project an image that Ms Jhuti was inadequate in the performance of her duties. In doing so the employment tribunal found he bullied, harassed and intimidated by repeatedly telling her that her progress was disappointing and imposing targets and mandatory weekly meetings that were not required of other members of the team. Mr Widmer also e-mailed the Human Resources Department on several occasions complaining of Ms Jhuti's poor performance. In March 2014 Ms Jhuti was signed off work for stress, anxiety and depression, and did not return

[1] [2019] UKSC 55 ('*Jhuti*').

to work. The company then appointed Ms Vickers, a manager, in April 2014 to decide whether to terminate Ms Jhuti's employment with the instruction to 'review', rather than investigate, the evidence. Ms Vickers was supplied with numerous emails between Ms Jhuti and Mr Widmer, but not the e-mails in which Ms Jhuti made protected disclosures. Ms Jhuti failed to attend a meeting with Ms Vickers because of ill-health and Ms Vickers terminated her employment for poor performance, having no reason to doubt the truthfulness of material, even though tainted, indicating this. As found by the tribunal, Mr Widmer had been setting up Ms Jhuti to fail and prepared an e-mail trail to evidence inadequate performance.

3. LEGISLATION

Jhuti primarily concerns the intricate whistleblowing provisions of the ERA 1996, inserted by the Public Interest Disclosure Act 1998 (PIDA), and section 103A in particular, which formed the basis of one claim by Ms Jhuti. In its ruling, the Supreme Court also examines Part X of the 1996 Act, in which section 103A falls, and remedies provided in Part V, which were also claimed in this case. In seeking to extend protection to workers, and not limit it to employees, as in remedies for dismissal under Part X of the 1996 Act, the PIDA reflects the importance of whistleblowing and that 'public interest was at the heart of socio-political impetus for PIDA'.[2] However, in providing protection for public interest disclosures, the ERA 1996 distinguishes between dismissal claims made by employees and workers, resulting in complexity and difficulties for the courts in interpreting provisions that can leave individuals blowing the whistle at work vulnerable. In the opening paragraph of his judgment, Lord Wilson sets out the facts found by the employment tribunal, which showed Ms Jhuti, as an 'employee', made protected disclosures within the meaning of section 43A of the ERA 1996 to her line manager. The issue then was whether she could claim unfair dismissal under section 103A of the ERA 1996 in respect of her dismissal for making these disclosures. A dismissal of an employee, but not a worker, is automatically unfair under section 103A if the reason for the dismissal (or, if more than one, the principal reason) 'is that the employee made a protected disclosure'. There is no ceiling on the level of compensation and no qualifying threshold of employment in such claims and as such, it is a better claim for a whistleblower dismissed for raising protected concerns.

Although Ms Jhuti was an employee, she was unable to claim under section 103A in the first instance, as the employment tribunal decided that the section was not satisfied, as the principal reason for her dismissal was not for making protected disclosures. As stated above, the decision-maker genuinely believed Ms Jhuti's performance was inadequate and the tribunal found she was dismissed for that reason. As a result of the failure of her unfair dismissal claim, Ms Jhuti's other claim under section 47B(1) in Part V of the ERA 1996 became important for consideration. Under this provision, a worker has the right not to be subjected to a detriment 'on the ground that they made a protected disclosure', and for workers, but not employees, this can include detriment of a dismissal. Section 47B(2) of the 1996 Act provides that a claim for detriment cannot be made if the worker is an employee and the 'detriment in question amounts to a dismissal'. If an employee is unable to claim unfair dismissal for making a protected disclosure under section 103A, then the exclusion provided by section 47B(2) prevents them from claiming compensation for the detriment of a dismissal under section 49(1)(b). For this

[2] J. Ashton 'When is Whistleblowing in the Public interest: Chesterton Ltd & Another v Nurmohamed Leaves this Question Open' (2015) 44(3) Industrial Law Journal 450-459, at 450.

reason, as noted by Lord Wilson[3], the tribunal's observations that Ms Jhuti's dismissal was consequent upon the detriments rather than forming the detriment is important. The employment tribunal held that, in breach of her right under section 47B(1), Ms Jhuti had been subjected to four detriments by the acts of the company, on the ground she had made protected disclosures. These detriments involved the setting of unreasonable targets, the bullying, harassment and intimidation by her line manager, the imposition of a performance improvement plan setting her up to fail and two offers inducing her to relinquish her employment which she did not wish. This findings of detriment prior to her dismissal was key to her claim under section 47B(1) succeeding in the employment tribunal. Without the finding that the detriment was not the dismissal, but actions taken prior to it, Ms Jhuti would have been denied any remedy for making protected disclosures. This is important, as 'rights without remedies are an illusion'.[4] This problematic distinction between claims for detriment and dismissal is a 'historical anomaly, resulting from implanting the whistleblowing protection into the pre-existing legislative provisions'.[5] The legislation contrasts with the Equality Act 2010 which makes no such distinction between detriment and dismissal. As noted by the Court of Appeal in *Jhuti*[6], an appreciation that the two statutory schemes are not identical, and so there are significant differences in terminology, is important.[7] The result of this technicality is a lack of coherence, which the Court of Appeal did not resolve and the Supreme Court had to consider, even if it was not the basis of the appeal to it.

4. GROUNDS FOR APPEAL

As stated above, Ms Jhuti made two complaints to an employment tribunal. Her first complaint was that, contrary to section 47(B)(1) of the ERA 1996, she had been subjected to detriments by acts of the company for making protected disclosures. The tribunal found that Ms Jhuti had made four protected disclosures under section 43A of the Act and she had been subjected to detriments by acts of the company on the basis of these disclosures. The second complaint that her dismissal was unfair under section 103A of the 1996 Act, formed the basis of appeal to the Supreme Court. The tribunal dismissed this complaint, finding that the section was not satisfied as the reason, or principal reason, for Ms Jhuti's dismissal was not her disclosures. The employment tribunal considered the disclosures had played no part in the reasoning of Ms Vickers, who, although relying on tainted evidence, genuinely believed the performance of Ms Jhuti was inadequate and dismissed her for that reason.

The company appealed to the Employment Appeal Tribunal (EAT) against the decision of the employment tribunal in respect of the first complaint and Ms Jhuti cross-appealed against the dismissal of her second complaint. In a judgment delivered by Mitting J, the EAT[8] allowed Ms Jhuti's cross-appeal. Mitting J held that 'as a matter of law', a decision by a person in ignorance of the true facts that is manipulated by someone in a managerial position responsible

[3] *Jhut*i (SC), n.1 above, at [28].
[4] J. Gobert & M. Punch, 'Whistleblowers, the public Interest and the Public Interest Act 1998' (2000) 63 Modern Law Review 25, at 46.
[5] J. Bowers & J. Lewis, 'Whistling for Dismissal and Detriment Remedies: Royal Mail v Jhuti' (2018) 47(1) *Industrial Law Journal* 121-134, at 123.
[6] *Jhut*i (CA) [2017] EWCA Civ 1632.
[7] Ibid., at [26].
[8] *Royal Mail Group Limited v Jhuti* UKEAT/0020/16/RN, [2016] ICR 1043.

for an employee, in possession of the true facts, can be attributed to the employer of both[9]. Therefore, the reason held by the 'manipulator of an ignorant and innocent decision-maker' could be attributed to the employer[10], and so the reason for Ms Jhuti's dismissal was within section 103A of the ERA 1996 for making the protected disclosures.

The Court of Appeal[11] allowed the appeal of Royal Mail with the only judgment being delivered by Underhill LJ, with Jackson LJJ and Moylan LJ agreeing. The Court of Appeal held that if an employee's line manager deliberately hides the reason behind a fictitious reason, the later reason is to be taken as the reason for dismissal if the decision-maker adopts this reason in good faith. Underhill LJ found that a tribunal in determining the reason for dismissal under section 103A of the ERA 1996, and also under section 98(1)(a), was 'obliged to consider only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss'[12]. As section 103A fell under Part X of the 1996 Act, Underhill LJ considered it must be interpreted 'consistently' with the other provisions governing liability for unfair dismissal[13].

In coming to its decision, the Court of Appeal considered itself bound by its earlier decision in *Orr v Milton Keynes Council*[14]. In *Orr* an employee was dismissed for behaving in an offensive and insubordinate manner towards his team leader, Mr Madden. The dismissal decision was taken by a more senior manager, Mr Cove, after a disciplinary hearing in which the claimant declined to attend, but Mr Madden gave evidence of the conduct in question. It was later established that the conduct in question had been in response to unreasonable conduct on the part of Mr Madden including a racist comment by him to the claimant. In *Orr* the leading judgment for the majority was given by Moore-Bick LJ, who held the knowledge which counted as the knowledge of the employer was the person deputed to carry out the employer's functions under section 98 of the ERA 1996, and in that case Mr Cove. The Court of Appeal in *Jhuti* considered the 'essentials' of the factual situation in the case to be similar to those in *Orr.*[15] That finding can be challenged as, although *Orr* was a case that involved mis-information, it was not a case involving whistleblowing nor a manager who sought to secure a dismissal in breach of both the spirit and purpose of the relevant whistleblowing provisions of the ERA 1996.

Ms Jhuti appealed to the Supreme Court and the dispute at the heart of the appeal surrounded the reason for her dismissal. In considering whether the reason for dismissal was for poor performance or for making protected disclosures, the court examined a number of issues raised by judgments in the lower courts including the relevance of *Orr* and the interaction between detriment and dismissal provisions of the ERA 1996.

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[9] Ibid., at [34].
[10] Ibid., at [33].
[11] *Jhuti* (CA), n.6 above.
[12] Ibid., at [57].
[13] Ibid, at [58].
[14] [2011] EWCA Civ 63; [2011] ICR 704 ('*Orr*').
[15] *Jhuti* (CA), n. 6 above, at [45].

5. SUPREME COURT DECISION: A reason for a dismissal can be a reason hidden to the decision-maker

The question for the Supreme Court was whether the tribunal correctly identified the reason for dismissal within the meaning of section 103A of the ERA 1996. The decision of the Supreme Court in *Jhuti* was unanimous with Lord Wilson giving the only judgment with which the other Justices (Lady Hale, Lord Carnwath, Lord Hodge and Lady Arden) agreed. Lord Wilson determined that questions as to the reason for Ms Jhuti's dismissal, and whether it was for inadequate performance or for making protected disclosures, all generated the following 'question of law of general importance of the appeal'[16]:

> In a claim for unfair dismissal can the reason for dismissal be other than that given to the employee by the decision-maker?

The Supreme Court found the answer to that question of law as follows:

> Yes, if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.[17]

This ruling on this legal question is of significance to dismissals for whistleblowing, but also the law on the unfair dismissal more widely.

A. Whistleblowing

Although the answer to the question of law forming the basis of the appeal is also of application to the law of unfair dismissal, the Supreme Court, in its focus on the whistleblowing provisions of the ERA 1996, determined *Jhuti* to be primarily a whistleblowing case rather than a case of dismissal to which the general principles of dismissal should be applied. In doing so Lord Wilson observed that section 103A 'mandated' the court to determine whether the employment tribunal in *Jhuti* properly identified the reason for dismissal[18]. The Supreme Court held that the reason for the dismissal given by Ms Vickers, albeit in good faith, was 'bogus' and found that upon the 'proper attribution to the company of Mr Widmer's state of mind', the reason for the dismissal was for the making of protected disclosures[19] and so automatically unfair under section 103A of the ERA 1996. The Supreme Court ruled that there was no need to remit the case to the tribunal and restored the order of Mitting J in the EAT, which it held to have been correct in finding that, although the tribunal only addressed the state of mind of the decision-maker, it had determined that Ms Jhuti had been dismissed for making protected disclosures.

Lord Wilson was clear that section 103A could capture reasons for dismissal other than that held by the decision-maker. He determined that a court was required to consider whether there was dismissal for the hidden reason of whistleblowing and not allow an invented reason to infect its judgment:

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[16] [Jhuti (SC), n. 1 above, at [1].
[17] Ibid., at [62].
[18] Ibid., at [59].
[19] Ibid., at [60].

> 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 allow it also to infect its own determination.[20]

The Supreme Court examined the two different regimes provided by the ERA 1996 in respect of detriment and dismissal, although the provisions relating to detriment did not form the basis of the appeal. Lord Wilson found that by enacting section 103A, the clear intention of Parliament was that if the real reason for dismissal was that the employee had made a protected disclosure, then the automatic consequence should be a finding of unfair dismissal.[21] He rejected the argument of Counsel for Royal Mail that section 47B gives a valuable right not to be subjected to a detriment for making a protected disclosure, and there is no need to 'stretch' under section 103A the attribution to the company of the reason for dismissal beyond that provided by the appointed decision-maker[22]. The argument of the company that section 47B affords 'an entirely adequate remedy' was found to be 'curious'. Lord Wilson regarded the company's argument, that this section affords an individual in Ms Jhuti's position all the relief they can reasonably expect, to have a 'wider dimension'.[23] He considered that in enacting section 103A of the ERA 1996, Parliament had provided that if an employee was dismissed for whistleblowing then automatically unfair dismissal entitled the employee to remedies set out in Part X of the 1996 Act. The Supreme Court found that whistleblowers should not be limited to remedies for victimisation under Part IVA and V of the ERA 1996. Lord Wilson accepted that there should be no stretching of the legal provisions, but relied on the judgment of Lord Reid in *Post Office v Crouch*[24] who stated that 'legal technicalities should not prevail against industrial realities and common sense'.[25] Therefore, section 103A could capture reasons for dismissal other than that of the decision-maker.

In coming to his conclusion Lord Wilson distinguished the case of *Orr* on which the Court of Appeal in its judgment in *Jhuti* had placed so much emphasis. He found that the facts of *Orr*, where what was imparted to the decision-maker was a partial account rather the decision-maker being presented with a 'falsely constructed set of criticisms', as in *Jhuti*, were not 'comparable'.[26] In *Orr*, the employee was dismissed for misconduct after he discussed a sexual assault with young people at a community centre in breach of express instructions from his manager to whom he was then rude and truculent in a later discussion about working hours. The employee's behaviour was in part provoked by the manager attempting to engineer a reduction in the employee's working hours and a racist remark to him, but these circumstances are quite different from an employee seeking to raise public interest concerns and then being micro-managed to engineer a dismissal for poor performance. The Supreme Court's distinguishing of *Orr* is welcome, as dismissal for whistleblowing is distinct from general dismissals for misconduct, and should be treated as such. Although there were exculpatory

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[20] Ibid.
[21] Ibid., at [46].
[22] Ibid., at [54].
[23] Ibid., at [56].
[24] [1974] 1 WLR 89 ('*Crouch*').
[25] Ibid., at [95]-[96].
[26] *Jhuti* (SC), note. 1 above, at [52].

facts in *Orr* that were known to the employee's manager, but withheld form the decision-maker, the case is not an appropriate comparator. Lord Wilson observed that *Orr* was not a 'satisfactory vehicle for any full, reasoned articulation of principle'[27] that could be applied to the attribution to the employer of facts unknown to the decision-maker, but known by those directly in the line of responsibility above the employee. Further in distinguishing *Orr*, Lord Wilson noted that the tribunal in Orr had not 'clearly found all the relevant facts' and that the three judgments of Court of Appeal in *Orr* 'differ in their recital of some of them as well as in relation to the legal issues to which they give rise.'[28] Although the Supreme Court stated there was no need to overrule the decision in the *Orr* case, but only 'attach only a narrow qualification to it'[29], the court's treatment of this case is important for the area of general unfair dismissal. This is just one of the implications of the Supreme Court's ruling for the area of unfair dismissal.

B. Unfair Dismissal

The ruling of the Supreme Court in *Jhuti* is also of significance to the application of the legal framework on unfair dismissal. The same words: 'the reason (or, if more than one, the principal reason) for the dismissal' appear in numerous other sections in Part X of the 1996 Act other than section 103A. The judgment of the Supreme Court is therefore of relevance and of application to the general unfair dismissal provisions of Part X. As noted by Lord Wilson in his Supreme Court judgment, the answer of the court in respect of section 103A of the ERA 1996 'must relate equally' to the other sections in Part X[30]. He referred to section 98(4) in particular which requires a tribunal to decide whether an employer acted reasonably in treating the reason for dismissal as sufficient. Therefore, in decisions relating to the general unfair dismissal provisions, the ruling of the Supreme Court in *Jhuti* should be followed. A reason for dismissal can now be held to be other than that given by the employer's appointed decision-maker, and if the real reason is hidden from the decision-maker behind an invented reason the courts are now required to penetrate through the invention. This should also be applicable to a determination of the fairness of the dismissal. In establishing the reason for dismissal, it is no longer sufficient to just look at the knowledge and reason of the decision-maker. Investigations should allow employees to participate fully in dismissal decisions to explore whether there is an alternative reason for dismissal.[31] A dismissal will be unfair if the real reason for dismissal is withheld from the decision-maker who cannot effect a fair dismissal if they are not in possession of all the facts. Lord Wilson considered that in establishing the reason for dismissal for both the purposes of section 103A, and also other sections in Part X of the ERA 1996, courts generally do not need examine further than the reasons given by the appointed decision-maker. Unlike in *Jhuti,* most employees will contribute to the decision-maker's inquiry, which will consider all rival versions of the events leading to dismissal and identify the reason for it. The Supreme Court observed that decisions to dismiss in good faith, not just for a wrong reason, but a reason dishonestly constructed by that the employee's line manager, as in *Jhuti*, will 'not

[27] Ibid., at [52].
[28] Ibid., at [47].
[29] Ibid., at [61].
[30] Ibid., at [39].
[31] See S. Palmer, 'Supreme Court ruling in favour of Royal Mail employee extends protections for whistleblowers' *Personnel Management*, 27th November 2019. Accessed at https://www.peoplemanagement.co.uk/news/articles/supreme-court-ruling-in-favour-of-royal-mail-employee-extends-protections-for-whistleblowers.

be common' and regarded the facts of the case to be 'extreme'[32]. This veracity of this finding will be considered below.

6. WIDER IMPLICATIONS

The Supreme Court decision in *Jhuti* extends the scope of the whistleblowing provisions of the ERA 1996 by ruling that a dismissal for making a protected disclosure will be automatically unfair, even if the decision-maker is unaware that this is the reason. This extension of protection requires courts to penetrate through any invented reason for dismissing a whistleblower and not allow its determination to be infected by the invented allegations of wrongdoing or poor performance against the whistleblower. This constructive approach is demonstrated by Lord Wilson relying on Lord Reid's judgment in *Crouch* to argue that courts should approach the problem of determining a reason for dismissal in a 'broad and reasonable way in accordance with industrial realities and common sense'[33] rather than focussing on the complex wording of the relevant provisions.

A. The right to voice concerns

Lord Wilson's purposive interpretation of the relevant legislative provisions in *Jhuti* reflects the approach of the other two whistleblowing judgments of *Clyde & Co LLP v Bates van Winkelhof*[34] and *Gilham v Ministry of Justice*[35] also delivered by the Supreme Court. Lady Hale, who also sat in judgment in *Jhuti*, provided the lead judgment in both *Clyde* and *Gilham* and this is significant. Although both *Clyde* and *Gilham* concerned the definition of 'worker' in the whistleblowing provisions of the ERA 1996, there are parallels between the judgments of Lady Hale in these cases and the ruling of the Supreme Court in *Jhuti* as to the role of the relevant provisions. In *Clyde*, the Supreme Court held a solicitor, who was a fixed-share equity partner of a limited liability partnership was also a 'worker' within the meaning of section 230(3)(b) of the ERA 1996. This was an important development that extended the scope of protection to a number of professionals including solicitors and accountants. In overruling the Court of Appeal, the Supreme Court found that the appellant was 'clearly' a worker within the meaning of section 230(3(b) of the 1996 Act and so entitled to the protection of the whistleblowing provisions[36]. The court considered this conclusion to be 'entirely consistent with the underlying policy of the provisions'[37]. In the recent case of *Gilham*, the Supreme Court ruled that a judge was an office-holder and not a worker' under section 230 of the ERA 1996, but in an unanimous judgment delivered by Lady Hale, the court determined that the 1996 Act should be interpreted with regard to human rights[38], so as to extend its whistleblowing

[32] *Jhuti* (SC), n. 1 above, at [41].
[33] Ibid., at [59].
[34] [2014] UKSC 32 ('*Clyde*').
[35] [2019] UKSC 44 ('*Gilham*').
[36] *Clyde*, n. 34 above, at [46].
[37] Ibid.
[38] The relevant human rights are the Convention right to freedom of expression (Article 10 of the European Convention on Human Rights) and the right to non-discrimination in respect of the securing of that right (Article 14). The right to non-discrimination is parasitic and provides for the open-ended ground of 'other status' which Lady Hale determined in *Gilham* to include the discrimination on the ground of 'occupational status' against the appellant as she was denied access to the relevant provisions of the ERA 1996 as she was found to be outside the statutory definition of 'worker'.

protection to the holders of judicial office, as required by the Human Rights Act 1998 (HRA)[39]. In doing so, the Supreme Court took a different approach to the Court of Appeal that rejected the human rights arguments of Gilham. In *Clyde*, Lady Hale reached her decision without relying on the right to freedom of expression incorporated into domestic law by the HRA, but acknowledged it 'operates as a protection' for whistleblowers who act responsibly[40]. In comment on the Supreme Court case, Prassl advanced the view that the judgment might change judicial interpretation of employment legislation under the HRA to support a 'broad, purposive, re-reading of the scope of the vast majority of employment rights'.[41] Unfortunately, *Clyde* did not result in an increased readiness to advance human rights arguments in employment cases. However, in *Gilham* there was a clear decision by Lady Hale to employ human rights to address the technical difficulty of 'worker' status. In *Jhuti,* the Supreme Court reaches its conclusion without needing to refer to human rights as a practical statutory interpretation of the relevant provisions effected a remedy.[42] Also, the approach in *Clyde* and *Gilham* is unsurprising as Lady Hale can be viewed as a strong advocate of human rights and powers afforded to judges under the HRA, having decided a large number of key human rights cases since the enactment of the Act[43]. However, the judgment of Lord Wilson in *Jhuti* can be viewed, with *Clyde* and *Gilham,* as extending the protection afforded to whistleblowers by adopting a purposive interpretation of the whistleblowing provisions of the ERA 1996. Lord Wilson is firmly of the view that section 103A of the ERA 1996 mandates courts to properly identify the reason for a dismissal. He adopts this view as a reflection of common sense and industrial reality, rather than focusing on the technicalities of the provisions. The Supreme Court in all three of its decisions is conscious of the policy underlying the key legislative provisions. This is important as policy considerations in favour of purposive construction are 'powerful'[44].

As outlined above the tribunals and courts in *Jhuti* came to very different decisions on the same issue as to the knowledge to be attributed to an employer in a dismissal if the actual reason for the decision is hidden from the decision-maker. In particular, as with *Clyde* and *Gilham,* the Court of Appeal adopted a distinct approach from that of the Supreme Court, that failed to protect the whistleblower. This highlights the different approach of courts and individual judges with Underhill LJ in the Court of Appeal rejecting the arguments of the whistleblowers in both *Gilham* and *Jhuti*, relying on precedent, if finding some merit in the arguments[45]. As

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[39] Section 3 of the Human Rights Act 1998 requires the courts in the interpretation of legislation to 'read and give' effect to the Convention rights 'so far as it is possible' to do so.

[40] *Clyde*, n. 34 above, at [41].

[41] J. Prassl, 'Members, Partners, Employees, Workers? Partnership Law and Employment Law revisited. *Clyde & Co LLP v Bates van Winkelhof*' (2014) *Industrial Law Journal*, 43(4), 495-505, at 504.

[42] It does not appear that any human rights arguments were made although such argument might have been advanced on the basis of the right to freedom of expression, as well as the right to a fair hearing, but *Jhuti* was heard at the same time (judgment in November 2019) as *Gilham* in June 2019 (judgment in October 2019) so the potential for human argument following *Gilham* yet to seen. Following *Gilham* such arguments have a clear value if a question regarding the whistleblowing provisions were to arise today.

[43] Lady Hale has given a number of lectures on the role of judges following the enactment of the Human Rights Act 1998. For example see B. Hale, What is the United Kingdom Supreme Court for?, Macfadyen Lecture 2019, Retrieved from: https://www.supremecourt.uk/news/speeches.html.

[44] J. Bowers & J. Lewis, n. 5 above, at 133.

[45] J. Bowers & J. Lewis, Ibid., argue that some 'unease' at the result can be detected in Underhill LJ's judgment in *Jhuti*, at 127. Underhill LJ in Jhuti (CA), states if the mater were 'free from authority' he could see dome fore in the argument, n. 6 above, at [61].

discussed elsewhere[46], for 20 years since the enactment of the PIDA, judges have struggled to interpret the statutory provisions. The provisions the Act inserted into the ERA 1996 are complex and questions of definitions and the relationship between different Parts of the Act have caused the courts difficulties. The differing approaches to the interpretation of the provisions in the determination of such questions by the highest courts of the Court of Appeal and Supreme Court is problematic. This conflict of approach and decisions results in a lack of coherence and certainty for workers blowing the whistle, although the consistently purposive approach of the Supreme Court in its three rulings is to be welcomed.

B. Detrimental treatment of whistleblowers & the actions of colleagues

In *Jhuti*, the hostility of the response of Mr Widmer to the public interest concerns of Ms Jhuti was viewed as unusual by Lord Wilson, but it is not clear that such a response to the internal raising of concerns by workers is uncommon. For example, two reports published in 2020 by the Care Quality Commission (CQC) into the abuse of patients at Whorlton Hall Hospital[47], highlight the detrimental treatment whistleblowers can suffer at the hands of organisations who are unwilling to respond to public interest concerns, or fail to recognise a culture of suppression in respect of such concerns. In his 2020 independent report to the CQC on the failure to address whistleblower concerns in relation to the regulation of Whorlton Hall Hospital, Noble notes healthcare professionals in this case 'paid a considerable price personally and professionally for their actions in whistleblowing'.[48] His review was primarily in respect of the failure by the regulator to act on the concerns raised by its inspector, Barry Stanley-Wilkinson, who inspected the hospital in 2015 and expressed concerns in an internal report. His inspection report was deleted and never published. He blew the whistle and there was an internal review which recommended publication of the report, but still the CQC did not publish the report and Barry Stanley-Wilkinson left the service in 2016. In the second review for the CQC into the regulation of the Whorlton Hall Hospital between 2015 and 2019, Professor Murphy identified a 'toxic culture' in which staff raising concerns were subjected to changes of shifts including the allocation of prolonged night shifts, as a 'means of control'[49] to suppress worker voice. In *Jhuti*, Lord Wilson does place a limit on attributing to the employer the state of mind of the deceiver, who orchestrates the dismissal, rather than the deceived decision maker. He observes there is no 'conceptual difficulty' if this attribution is 'limited to a person placed by the

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[46] C. Hobby, 'Worker and Organisational Protection: The Future of Whistleblowing in the Gig Economy' in R. Page-Tickell & E. Yerby (2020). *Conflict and Shifting Boundaries in the Gig Economy: An Interdisciplinary Analysis*, Emerald Publishing Limited, 105-125, at 110.

[47] On 22nd May 2019, a BBC Panorama programme, using film of an undercover reporter, showed the abuse of patients with learning difficulties and/or autism by staff at Whorlton Hall Hospital. Following the release of the programme the CQC commissioned two independent reports. The first by David Noble QSO reviewed the CQC's handling of the concerns of the a former CQC inspector Barry Stanley- Wilkinson who inspected Whorlton Hall in 2015. This was published in January 2020. The second review was commissioned from Professor Glynis Murphy who conducted a review of all the CQC's inspections and regulation of Whorlton Hall between 2015 and 2019. This second review was published in March 2020.

[48] D. Noble, *Report to the Board of the Care Quality Commission ("CQC") on how CQC dealt with concerns raised by Barry Stanley-Wilkinson in relation to the regulation of Whorlton Hall Hospital and to make recommendations,* 2020 at 9. Accessed at https://www.cqc.org.uk/sites/default/files/Report_to_the_Board_of_the_CQC.pdf.

[49] G. Noble, *CQC inspections and regulation of Whorlton Hall 2015-2019: an independent review*, 2020 at 44. Accessed at https://www.cqc.org.uk/sites/default/files/20020218_glynis-murphy-review.pdf.

employer in the hierarchy of responsibility above the employer'[50]. This limitation could be problematic for whistleblowers claiming automatic unfair dismissal, if their dismissal is caused by the actions of colleagues at the same level. The 2020 report of Murphy details the actions of a small group of staff at Whorlton Hall Hospital, who colluded to conceal the abuse and created a 'toxic' culture of detrimental action against those who raised concerns. The strong signal of support for public interest whistleblowing in *Jhuti* should now be a consideration for the management of dismissals. The judgment is a welcome step in the recognition that the 'employer' is a complex organisational entity and not a single individual. However, the dismissal of whistleblowers engineered by colleagues may yet prove to be a gap in the protection extended by *Jhuti*.

C. Application of principles in *Jhuti*

As identical language is set out in both section 103A and Part X of the ERA 1996 the mirrored provisions mean that the Supreme Court judgment in *Jhuti* is applicable to all unfair dismissals. The potential wide impact of the Supreme Court's ruling in *Jhuti* is shown by the EAT's application of the judgment to the reasonableness of the dismissal in *Uddin v London Borough of Ealing*.[51] In *Uddin*, Auerbach J held that the principles established in *Jhuti* do not just apply to establishing the reason for dismissal, but also whether the dismissal was fair or unfair under section 98(4) of the ERA 1996. In this case, an employee was dismissed for misconduct arising out of an allegation of inappropriate sexual behaviour towards an intern at after-work drinks. One ground for appeal against the employment tribunal's finding of a fair dismissal was that the investigating officer, who knew that a complaint had been made to the police about the alleged assault, did not inform the disciplining officer that the complaint had been withdrawn. In considering this ground, Auerbach J held that the strict ratio of *Jhuti* was not applicable as the significance of the conduct in this case was 'of a different kind'[52]. However, he draws on the obiter observations of Lord Wilson in *Jhuti*, to conclude that the relevance of the knowledge and conduct of a person other than the dismissing person could be relevant as to the fairness of a dismissal, both in relation to examining the reason for dismissal under section 98(1) and also the consideration of its reasonableness under section 98(4) of the ERA 1996. He ruled that the dismissal was unfair in *Uddin* as the investigating officer knew, but failed to notify the disciplinary officer that the police complaint had been withdrawn. The disciplinary officer had attached some weight to the complaint, and this was relevant to a consideration of the fairness of the dismissal.[53]

There was some comment following the Supreme Court judgment that, despite Lord Wilson's narrow qualification to *Orr* in *Jhuti,* it was overruled in all but name by 'restrictive distinguishing'[54]. *Uddin* is therefore also interesting in that Auerbach J adopts the possible exception to *Orr*, considered by the Court of Appeal in *Jhuti*, an 'Iago' situation, that was first identified by Underhill LJ in his judgment in *The Co-operative Group Ltd v Baddeley*[55]. Auerbach J makes reference to Lord Wilson's discussion in *Jhuti* of Underhill LJ's 'Iago' situation where a decision-makers' beliefs had been manipulated by some other person

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[50] *Jhuti* (SC), n. 1 above, at [60].
[51] [2020] UKEAT/0165/19/RN ('*Uddin*').
[52] Ibid., at [73].
[53] Ibid., at [79] & [83].
[54] I. Smith, 'What makes people tick?' *Employment Law Brief*, 11th December 2019, at 3.
[55] [2014] EWCA Civ 658, at [42].

involved in the investigatory process, where it might be appropriate to attribute to the employer knowledge held otherwise than by the decision-maker[56]. Auerbach J notes that the Supreme Court did not overrule, but only qualified *Orr* before applying the exception to *Uddin.* It should be noted that in considering such a situation of a manager who, alongside the decision-maker has some responsibility for the conduct of the disciplinary inquiry, Lord Wilson in *Jhuti* appears dismissive of the term 'Iago situation', which he states Underhill LJ added 'perhaps questionably'.[57] However, it is an apt phrase which covered the situation in *Uddin* in which the manager conducted the pre-investigation and then presented the report and recommendations at a disciplinary hearing, but failed to inform the disciplinary officer of relevant information. The EAT in *Uddin* has, in its application of the exception in *Orr*, extended the application of *Jhuti* principles to a situation where a manager is involved in the investigation.

D. Internal procedures

Following *Jhuti,* and the application of its principles in *Uddin*, employers should ensure that they have complete information before dismissing an employee. As discussed above, the Supreme Court determined its ruling in *Jhuti* must be equally applied to the other sections in Part X of the ERA 1996, including section 98(4), which requires an employment tribunal to determine whether the employer acted reasonably in treating the reason for dismissal as sufficient[58]. Jhuti has 'heralded a new direction' in both whistleblowing cases and unfair dismissal law generally[59]. A fair and reasonable procedure is no longer sufficient.[60] Large companies with more layers of management are more at risk following the judgment and should provide employees with a full opportunity to make representations in disciplinary proceedings. Checks should also be carried out to ensure that an employee facing dismissal has not voiced concerns that has led to the dismissal. Companies can protect themselves with clear procedures, including a whistleblowing policy that prohibits detrimental treatment for raising concerns. This indicates a company should ensure adherence to their policies to avoid employment tribunal claims, as it will now be more difficult to avoid claims of automatic unfair dismissal. Article 8 of a new European Union (EU) Whistleblowing Directive[61] requires all organisations in both the public and private sectors to establish internal procedures for the reporting of concerns[62]. This requirement applies to companies in the private sector if they employ more than 50 people. Detailed requirements for procedures for internal reporting and follow-up are set out in Article 9 with feedback to be provided to the reporting person within

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[56] See *Jhuti* (SC), n. 1 above, at [53].
[57] Ibid.
[58] Ibid., at [39].
[59] R. Tuck, S Brittenden, & B. Criddle, *Labour Law Highlights 2020*, 2020, Liverpool: Institute of Employment Rights, at 21.
[60] See A. Webber, 'Supreme Court: Whistleblowing led to the Royal Mail employee's dismissal', *Personnel Today*, 27th November 2019. Accessed at https://www.personneltoday.com/hr/royal-mail-v-jhuti-whistleblowing/.
[61] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23rd October 2019 on the protection of persons reporting on breaches of Union law was adopted by the European Council in October 2019 and published in the Official Journal of the European Union on 26th November 2019, entering force 20 days later in December 2019.
[62] Article 8(1).

three months. Member States must implement the provisions by 17th December 2021[63]. There is no requirement for the United Kingdom (UK) to enact legislation to implement the Whistleblowing Directive following Brexit and its exit from the EU on 31st January 2020[64]. The Department of Business, Energy & Industrial Strategy expressed concerns regarding the Whistleblowing Directive and 'its overall proportionality' in confirming that it had no intention of adopting it in October 2019.[65] This is unfortunate, as its adoption would require the amendment of existing provisions in the ERA 1996 to enhance and extend the protection provided to whistleblowers. In briefing notes to the Queen's Speech of December 2019, the Government stated its commitment to 'protect and enhance workers' rights as the UK leaves the EU, making Britain 'the best place in the world to work'[66]. It also committed to promote fairness in the workplace through employment legislation, 'striking the right balance' between flexibility and security for workers[67]. Article 23 of the Whistleblowing Directive provides that there should be 'effective, proportionate and dissuasive penalties' applied to those who hinder, or attempt to hinder reporting or take retaliatory measures against reporting person. The UK may refuse to implement legislation to give effect to the Directive, but its government should consider its structure and objectives in any much-needed reform of the domestic whistleblowing laws[68]. Best practice also requires companies to implement reporting channels or review existing procedures to meet the criteria of the Directive, particularly if operating in the EU.

7. CONCLUSION

Although *Jhuti* is primarily a whistleblowing case, it is also of importance for the general area of unfair dismissal, as demonstrated by its swift application in the decision of the EAT in *Uddin.* The unfair dismissal aspect of the ruling is likely to prove more far reaching than the effect of the decision in the area of whistleblowing. The Supreme Court judgment of *Gilham*

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[63] The deadline is 17th December 2023 in relation to the obligation to create internal reporting procedures for legal entities with more than 50 but less than 250 workers.

[64] The UK left the EU on 31st January 2020, but is in the process of withdrawal from the EU: *European Union (Withdrawal Agreement) Act 2020*. See *Zipvit Ltd v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 15.

[65] See Letter of Kelly Tolhurst MP, Minister for Small Business, Consumers & Corporate Responsibility to Sir William Cash on 4th October 2019.

[66] The Prime Minister's Office, *The Queen's Speech 2019: background briefing notes*, 19th December 2019 at 43. Accessed at https://www.gov.uk/government/publications/queens-speech-december-2019-background-briefing-notes

[67] Ibid.

[68] Arguments for reform have been made for a number of years. See C. Hobby, *Public interest whistleblowing: 12 years of the Public Interest Disclosure Act 1998*. Liverpool: Institute of Employment Rights, C. Hobby, *The Whistleblowing Framework: Call for evidence, Submission to the Department for Business, Innovation & Skills*. An IER Response. Institute of Employment Rights. Retrieved from: https://www.ier.org.uk/sites/ier.org.uk/files/The%20Whistlebowing%20Framework%20Consultation%20Response.pdf. See also D. Lewis, 'Nineteen years of the whistleblowing legislation in the UK: is it time for a more comprehensive approach?' (2018) *International Journal of Law and Management* 59(6) 1126-1142 and Protect, 'Queen's Speech represents a cross-road for whistleblowing protection, 19th December 2019 that highlights areas for reform. Accessed at https://www.pcaw.org.uk/queens-speech-represents-a-cross-road-for-whistleblowing-protection/.

may 'encourage the boundaries of protection to be explored further'[69], but its decision in *Jhuti* in respect of the legal framework of unfair dismissal will be of wider reach. However, the clear recognition of the importance public interest whistleblowing in *Jhuti* is significant. It reflects the approach of the Supreme Court in its previous decisions in *Clyde* and *Gilham* and is in contrast to the apparent reluctance of the Court of Appeal to extend protection for whistleblowers.[70] This unfortunate reticence results in conflicted boundaries in respect of key provisions that determine when an individual can make a claim for making a protected disclosure and uncertainty for whistleblowers. As recognised by the European Parliament and Council, whistleblowers 'play a key role' in exposing and preventing public interest breaches and also for 'safeguarding the welfare of society'.[71] The reports to the CQC in 2020 again highlight, as with many public inquiries and reviews, that workers are the first to identify wrongdoing or malpractice within an organisation, but will either raise concerns that are ignored or remain silent through fear. The wider value of whistleblowers has also been acknowledged with the Presidents of the Employment Tribunals in April 2020 issuing a document addressing FAQs arising from the Covid-19 pandemic, that states priority is to be given to applications for interim relief, if dismissed for whistleblowing.[72] Current times highlight the importance of judicial recognition of the rights of workers to voice their concerns relating to the widest range of concerns including safety, working conditions and breach of regulations[73].

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[69] J. Bowers & J. Lewis, 'Judges, Human Rights and Worker Status: Gilham v Mistry of Justice' (2020) 49(1) Industrial Law Journal 135-58, at 158.

[70] It is noted that the Court of Appeal has ruled in favour of whistleblowers in other cases such as *Timis v Osipov* [2018] EWCA Civ 2321; [2019] IRLR 52, in which Underhill LJ gave the lead and only judgment, and the earlier decision in *Day v Health Education England* [2017] EWCA Civ 329; [2017] ICR 917.

[71] Preamble to Directive EU 2019/1937 at 1.

[72] Judge Simon and Judge Doyle, *The Employment Tribunals in England and Wales and in Scotland: FAQs arising from the Covid-19 pandemic*, 3rd April 2020. This priority is also given if the dismissal is for trade union reasons.

[73] A number of issues in the reporting of the Covid-29 pandemic have highlighted the concerns of health and care workers regarding testing, PPE equipment, the supply of ventilators and the response of management to the voicing of concerns. See for example, the Secret Consultant 'I am angry. The tide is coming' in The *Guardian*, 4th April 2020.

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