

## "HIDDEN" REASONS FOR DISMISSAL

5 DECEMBER 2019 • ARTICLE



In response to an employee blowing the whistle, her manager engineered an evidence trail leading to a performance management review on invented grounds. A more senior manager then made the decision to dismiss relying in good faith on the invented evidence. What was the “principle reason” for the dismissal: the reason in the mind of the decision maker or the “hidden reason” in the mind of the manager?

In *Royal Mail v Jhuti*, the UK Supreme Court held that the principle reason was the “hidden reason”.

**"W retaliated by engineering an aggressive performance management review, in which he strongly encouraged J to retract her disclosure"**

Ms Jhuti (“J”) was a media specialist employed by the Royal Mail. She made a protected disclosure to her line manager, Mr Widmer (“W”), out of concern that incentives were offered to clients in breach of regulatory guidelines. W retaliated by engineering an aggressive performance management review, in which he strongly encouraged J to retract her disclosure, as well as repeatedly telling her that her performance was disappointing and holding weekly meetings which he said were “*necessary to monitor her performance*”, all of which she argued amounted to bullying and harassment.

J ended up suffering with stress-related alopecia. She raised several complaints about W with the HR department and was eventually signed off work.

Another manager, Ms Vickers (“V”), was asked to assess whether J should be dismissed based on the line manager’s reports of incompetence, but full information concerning the disclosure and the details of J’s complaints against W were withheld from her. J was unable to provide further evidence or present her case due to being unwell.

V made the decision to dismiss J based on the invented evidence. J then brought a claim for unlawful detriment and automatic unfair dismissal arising from making a protected disclosure.

At first instance J succeeded in the unlawful detriment claim, but not on automatic unfair dismissal. The tribunal found that the decision to dismiss was made in good faith on the information provided.

# WATSON FARLEY & WILLIAMS

The Employment Appeal Tribunal overturned the decision saying that V's decision was tainted by W's actions, although it did acknowledge that without knowing the full details of the bullying and harassment, it would appear to an observer that W was following a genuine performance management procedure.

The Court of Appeal reinstated the decision of the tribunal stating it would be "incoherent and unworkable" to consider the mental processes of a person other than the decision maker.

However, on 27 November 2019, the Supreme Court upheld the EAT's decision ruling that *"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"*.

Justice was clearly served with this decision, though it swims against the tide of previous cases where tribunals have been urged to only consider the motives of the decision-maker. Employers will need to take additional care when investigating disciplinary, capability and grievance issues to ensure the background and history is fully understood in any decision-making process.

## KEY CONTACT



**ANNA ROBINSON**  
PARTNER • LONDON

T: +44 20 7814 8086

[arobinson@wfw.com](mailto:arobinson@wfw.com)

## DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the "Information") is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.