Case No: 2601262/2020

EMPLOYMENT TRIBUNALS

JUDGMENT FOLLOWING PRELIMINARY HEARING

Claimant: Sean Coleman

Respondent: Sytner Group Limited

Heard at: Nottingham (in private) **On: 28 January 2021**

Before: Employment Judge Rachel Broughton (sitting alone)

Appearances

For the claimant: Mr Bidnell- Edwards - counsel
For the respondent: Mr Brown - counsel

JUDGMENT

The application to amend the claim is successful

REASONS

The claim and background

(1) The claimant was employed by the respondent in the role of Business Manager from 20 June 2016 up to 14 January 2020. He presented a claim before the Employment Tribunal on 21 April 2020 following a period of Acas early conciliation from 20th of February to 20 March 2020.

(2) The claimant is legally represented and has been throughout the proceedings so far. His solicitors submitted a very full claim form on his behalf, with a narrative style of drafting extending to approximately 17 ½

pages. The respondent is reminded of the EAT guidance in C v D UKEAT/0132/19/RN.

(3) The complaints are essentially that the claimant made protected disclosures pursuant to section 43A Employment Rights Act 1996 (ERA) and that he was subject to detriments by the respondent done on the ground that that he had made protected disclosures pursuant to section 47B ERA and further that his dismissal was both unfair under section 94 and 98 of the ERA and automatically unfair under section 103A ERA.

(4) The case has been listed for a final hearing; 5 days from the 4th to 8 October 2021. Case management orders for the preparation of the case for the final hearing were set out in the Notice of Claim dated 27th of April 2020 and those remain in place. Neither counsel were aware today of what progress has been made by the parties in respect of those case management orders and preparation for the final hearing, however both were content that no further orders were required at this stage and the parties are cooperating to prepare the case for the final hearing.

Case management hearing 22nd of July 2020

(5) The case became before Employment Judge Dyal at a preliminary hearing on 22 July 2020. Neither of the counsel present at today's hearing were in attendance at that hearing. Employment Judge Dyal set out within his case management summary following the hearing, the legal issues in the case.

(6) The particulars of claim had summarised the claims from paragraph 41 onwards and in respect of the alleged detriments pursuant to section 47B, paragraph 41 a – d of the claim form set them out as follows;

a. *subjected to performance improvement meetings*

b. *setting unrealistic targets following performance improvement meetings.*

c. *being pressured to increase GAP sales by being set unrealistic targets despite Chris Moorhouse being aware of the Claimant's concerns regarding the Respondents practice's concerning GAP sales.*

d. ***dismissal. [my stress]***

(7) Employment Judge Dyal's case management summary following the preliminary hearing set out the detriments as follows;

a. On 24 July 2019, the Claimant was subjected to a performance improvement meeting was set unrealistic targets to improve on GAP penetration, Gteching penetration and combined finance penetration to be achieved by end August 2019

b. On 16 October 2019, subjected to a further performance improvement meeting and set further unrealistic targets in respect of the same three matters identified above to be achieved by end November 2019

(8) The detriments as recorded by Employment Judge Dyal did not include dismissal as a detriment although this was set out in the list of detriments in the claim form. The claimant was represented by a solicitor at that hearing, Ms Patel.

(9) There is no record within that case management summary of any discussion about the pleaded act of dismissal as a detriment including no reference to it being withdrawn, indeed there was no reference to it at all.

(10) That case management summary was sent to the parties on 24 July 2020. Ms. Patel contacted the Employment Tribunal about 6 weeks later, by email of 7 September 2020 attaching what was referred to as the claimant's amendment application to the list of issues. All the amendments sought I was informed today, are agreed apart from the one which appears at paragraph 6 c and which is as follows;

"*Mr Steve Dickinson took the decision to dismiss the claimant on or about 14 January 2020".*

Today's hearing

(11) The purpose of today's hearing is to determine whether to permit the claimant's application to amend his claim. The amendments which have been agreed amount to a clarification of the claim and do not give rise to issues of jurisdiction, therefore the Tribunal granted the Claimant leave to make those amendments. The Tribunal is concerned only with the disputed amendment around the dismissal as a detriment.

(12) The parties had prepared an agreed bundle for the purposes of today's preliminary hearing which extends to 84 pages.

(13) On reading through the documents in advance of the hearing, I noted that the respondent was opposing the amendment as set out in their email of 14 September 2020, including on the ground that the amendment was not a claim which the claimant can bring. The respondent argues that the claimant is seeking to rely on the case of **Timis v Osipov [2019] IRLR 52** for the proposition that dismissal can be

pleaded as a detriment under section 47B ERA but that the facts of Osipov are to be distinguished from the instant case because this claim has been issued only against the employer. The respondent avers that the claimant would need to bring a claim against the person who dismissed him *personally* i.e. issue the claim against that person as a named respondent and only then would the claimant be able to bring a claim against the employer on the ground that it was vicariously liable. In support of this interpretation of the law as it should be applied, the respondent referred to a first instance decision of the Employment Tribunal; the decision of Employment Judge Stout in **Kong v Gulf International Bank (UK) Ltd UK/ET 2201761/2019.**

(14) On locating the decision on the Government's website, I noted that there had been a reconsideration judgement in which Employment Judge Stout had further commented on the application of section 47B (1A) and (1B) ERA at paragraphs 51 to 53 of that judgement. The Tribunal sent a copy of that reconsideration judgement by email to both the claimant and the respondent in advance of the preliminary hearing for their consideration.

(15) I now turn to what was discussed at the hearing itself;

Submissions

(16) Mr. Bidnell - Edwards made his submissions in support of the application.

(17) In summary; the claimant's submissions are that the claim that the dismissal was itself a detriment pursuant to section 47B (1A) was already pleaded within the claim for at paragraph 41. He argued that it was an important aspect of the claimant's case and that Mr. Dickinson the putative discriminator, had been involved throughout. It is not in dispute the Mr. Dickinson was the disciplining officer.

(18) It was argued that the Claimant would suffer a prejudice if this amendment were not granted in that he would be deprived of the ability to recover an amount for injury to feelings in respect of the decision to dismiss and interest which would be applied to such compensation and that it would be the interests of justice to allow the amendment.

(19) Counsel argued that the case management order of Judge Dyal was sent to the parties on 24 July and that this amendment application was made in' short order' on 7 September when it came to the attention of counsel. Counsel further argues that he does not consider that there would be any increase in the hearing length.

(20) Counsel argued that another reason to allow the amendment is that section 47B carries with it a different burden of proof; in any detriment claim under that provision, it is for the employer to show the ground on

which any act, or deliberate failure to act, was done: section 48 (2) ERA. In a claim of unfair dismissal, the employer has the burden of showing a fair reason but where the employee disputes this, the employee acquires an evidential burden to show (without having to prove), there is an issue which is capable of establishing the alleged automatically unfair reason whereupon the burden reverts to the employer, which must prove, on the balance of probabilities, which of the reasons was the principal reason for dismissal.

(21) A claim of detriment also does not require the protected disclosure to be the sole or principal purpose of the treatment, it need only be a material influence and therefore counsel argues that to not allow the claimant to pursue his claim that the decision to dismiss was itself an act of detrimental treatment, would cause him prejudice

(22) Counsel accepted that the claim needed to be expressed concisely and "unpacked" in the way he had in the application to amend, to expand to include Mr. Dickinson as the individual who took the decision, separate from the termination of employment as a separate claim against the employer. It is the taking of the decision this is the detriment and not the termination of the contract, the latter falling within the section 103A claim.

(23) Counsel argues that the label attached to the claim is correct. It is correctly identified as a claim of detriment. What he alleges the claimant is doing is clarifying the claim and no more.

(24) Counsel had no real explanation for why the amendment had not been made sooner other than a general reference to difficulties caused by the Covid pandemic but nothing specific to the preparation of the claimant's case.

(25) Counsel for the claimant was invited to address issues of time limits should I determine that this was a more substantial amendment which engaged time limits. Mr. Coleman was present on the call but counsel did not seek to call Mr. Coleman to give evidence on time limits, rather he made some further submissions on the point. However, counsel was robust in his view the time limit was not engaged in this type of amendment, the claimant is not looking to alter the existing claim and he submitted that he would "struggle "with an approach which were to treat this as anything other than a clarification of the existing claim.

(26) With regards to the respondents written submissions in its opposition to the application, counsel for the claimant referred to paragraph 12 of the Kong decision which refers out to Osipov and in particular paragraph 91 which Employment Judge Stout referred to as capturing the ratio of the Court of Appeal's judgement;

> " *91 SUMMARY ON THE EFFECT OF section 47B (2)*
> *The foregoing analysis has been regrettably dense, but I can summarise my essential conclusion is as follows:*
>
> ***(1)*** *it is open to an employee to bring a claim under section 47B (1A) against an individual co-worker for subjecting him or her to the detriment of dismissal i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B(1B).. All that s47B(2) excludes is a claim against the employer in respect of his own act of dismissal.*
>
> *(2) As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant's dismissal, s 47B(2) does not preclude recovery in respect of losses flowing from the dismissal, although the usual rules about remoteness and the quantification of such losses will apply*

(27) Counsel for the claimant argues that the above paragraph does not set a condition precedent that a claim of dismissal as a detriment, must be issued against the individual as a respondent under section 47B (1A) before a claim can be brought against the employer as a respondent under section 47B (1B). Counsel argues that it is open to a claimant to choose who to pursue a claim against. He asserted that if this was the findings of Employment Judge Stout, it was an 'invention' and not a correct interpretation of the law and the ability to pursue a claim based on vicarious liability does not require a previous claim to be issued against an individual as a respondent.

(28) In relation to the reconsideration judgement of Employment Judge Stout and in particular paragraph 51 which provides as follows;

> "*In my judgement, it is correct, and remains so post Timis v Osipov that it is in principle possible for a claim that dismissal is a detriment to proceed without the individual co-worker been named as a respondent <u>but only</u> if there is a pleaded case against an individual co-worker for which the employer except vicarious responsibility i.e. in respect of which the respondent does not seek to run the reasonable steps defence in section 47B (1D)."*

(29) Counsel for the claimant argues that this appears to be a 'retreat' from Employment Judge Stout's position in his judgement on liability.

(30) Counsel then referred to paragraphs 30 and paragraph 82 of the Osipov judgement;

> *30. I should spell out the essential effect of the changes made to section 47B by the 2013 Act:*
>
> *(1) The starting-point is that individual co-workers are, by sub-section (1A), made personally liable for acts of whistleblower detriment done by them. Although the principal purpose of the legislation may have been to*

provide a route to vicarious liability on the part of the employer, in order to fill the lacuna identified in Fecitt , the effect nevertheless is that the individual is rendered liable in his or her own right, irrespective of the liability of the employer. That is of course the position also under the Equality Act 2010 and its predecessors, and, as I note below, some of the following sub-sections are borrowed from that legislation. [4] But for co-workers to be rendered personally liable is unique not only as regards Part V but more generally as regards the protections afforded by the 1996 Act.

(2) Sub-section (1B), glossed by sub-section (1C), creates a form of vicarious liability for the employer. But it is not absolute. By sub-section (1D) an employer can escape liability if it shows (in short) that it took all reasonable steps to prevent the individual responsible from acting in the way complained of, in which case the claim will only succeed against that co-worker. These provisions are substantially identical to those of section 109 of the 2010 Act.

(3) Sub-section (1E) affords a defence to the individual in the limited circumstances there identified: this too is adopted directly from the anti-discrimination legislation – see section 110 (3) of the 2010 Act.

(4) As will be seen, sub-sections (2) and (3) are unchanged. Sub-section (2) thus applies to the terms introduced by amendment just as much as to sub-section (1).

82. Even if the effect of the language were less clear than I believe, there would be strong policy reasons for rejecting Mr Stilitz's proposition. It is not difficult to conceive of cases where conduct which was unlawful under section 47B resulted in the victim's (fair) dismissal but where it would be plainly unjust if he or she were not able to recover for the losses caused by that dismissal as compensation for the original detriment. Jhuti is such a case, but since it is possible that the Supreme Court may overturn the decision on the unfair dismissal issue, I can take a different example which was raised in oral submissions. Take the case of an employee who develops a serious long-term mental illness as a result of being victimised by his or her colleagues for having made a protected disclosure, with the result that the employer has eventually to dismiss them on ill-health grounds. Assuming that the decision-maker has no improper motivation, the dismissal is likely to be fair, but it would be extraordinary if the claimant were not entitled to claim against the individuals who victimised him or her (and thus, potentially, against the employer under sub-section (1B)) for the full financial loss suffered as a result of the loss of their job (subject to any issue as to remoteness). Indeed when this point was put to him Mr Stilitz acknowledged that, if causation could indeed be established, "compensation for dismissal consequent on detriment" could be awarded in such cases, though he said that they would be unusual. That concession is inconsistent with any submission that such recovery is unavailable in principle, and it is for that reason that I said at the start of this section that it is arguable that Mr Stilitz was in fact no longer advancing this part of his case.

(31) Counsel argues that those paragraphs set out above in the judgement do not support the argument presented by the respondent. Nowhere within paragraph 13 does it explain that the claim can only be brought against the employer on the basis that they are vicariously liable for the detriment which involves the decision to dismiss taken by a worker for which the employer is liable under section 47B (1B), unless the claim is first issued against that same worker and a section 47B (1A) ERA.

(32) Counsel argues that is not been able to find a single paragraph within the Osipov judgement to support the respondent's interpretation of it or in the head note to the case.

Submissions of the respondent

(33) Counsel for the respondent began his submissions on the basis that the claimant cannot issue proceedings against the employer in the absence of having brought proceedings against Mr. Dickinson. He referred to the Osipov case in which he referred to the employer having been a party to the proceedings at first instance but by the time the case reached the Court of Appeal the employee had been dismissed by the proceedings and the case proceeded against the individual directors.

(34) Counsel argues that section 47B (2) excludes a claim against an employer in respect of its own acts of dismissal and that it therefore acts as a bar to a claim which is brought directly against the employer of dismissal as a detriment, rather than the claim brought against a worker under section 47B (1A), and then pursued against the employee on the grounds that it is relies on the express provision of section 47B (1B) ERA. Counsel argued that section 47B (2) ERA cannot be a 'dead letter' which he argues it would be unless it is interpreted in the way that he suggests.

(35) In any event counsel argues that such a claim would have to be pleaded with some care, and he asserted that it had not been.

(36) Counsel referred paragraph 5 of the claim form where the claimant alleges he made a public interest disclosure at a meeting in October 2016 conducted by Mr. Dickinson. Paragraph 27 of the claim form then refers to the disciplinary meeting taking place on 10 January 2020, and he refers to the four-year gap between the date the claimant identified Mr. Dickinson as present when he made a public interest disclosure and the disciplinary hearing. Council also referred to paragraph 29 g. of the claim form where the claimant refers to asking whose decision it was to terminate his employment and Steve Dickinson informing him that as head of business, it was his and his alone and the particulars of claim state; "*if this was the case, the claimant did not understand why the decision could have been taken on Friday, 10 January 2020, instead of*

prolonging the matter". (I note that there would appear to be typing error in the sentence which only makes sense if the claimant was questioning why the decision could **not** have been taken earlier).

(37) Counsel for the respondent argues that the claimant was suggesting that Mr. Dickinson was not the decision-maker. In support of that counsel also referred me to the respondent's grounds of resistance paragraph 26 where it is alleged that the claimant had stated that; "*at some point in time, probably July 2019 it can be reasonably suggested that somebody decided I had to go".* Counsel makes the point that who was responsible for the alleged detriment is therefore not obvious from the claim as originally pleaded.

(38) Counsel also referred to paragraph 41 of the claim form where the extent of the pleading in the summary section in relation to this claim simply refers to; "*dismissal*" as a detriment, without identifying an individual responsible for making the decision to dismiss.

(39) Counsel argued however that what will be needed in such a claim is a very clearly pleaded claim. Counsel argued it is an unusual type of amendment application but that is not really an answer to say that because the facts relied upon are the same and the individuals involved are the same, that there will be no prejudice to the respondent. Counsel referred also to the issues of causation being different between sections 103A section 47B and the difference in the burden of proof.

(40) Counsel for the respondent argued that while it can be said that the claimant will be disadvantaged if the application was not allowed, both parties have been legally represented what we are presented with is not clearly pleaded claim.

(41) In turning to the Kong decision, counsel accepted there was 'tension' between the initial judgement on liability and what was said in the reconsideration judgement however, he argues that even in the reconsideration judgement Employment Judge Stout was saying that what was needed was two things;

1. A pleaded case against a co-worker; and

2. That it is necessary for the employer to accept vicarious liability the claim to proceed.

(42) Counsel for the respondent however accepted that the issue of whether an employer was vicarious liable or not is an issue to be determined by the Employment Tribunal, it is not something which an employer can simply deny.

(43) Counsel argued that this is an unusual situation but the amendment sought is not a mere re-labelling, it is not minor, and the fault lies in the claimant and the application should therefore be refused.

(44) Counsel for the claimant had an opportunity to respond and briefly submitted that the respondent had not sought to strike out the claims on the basis that they have no reasonable prospects of success and yet a claim that the sole or principal reason for the dismissal was a public interest disclosure is a more difficult claim to establish. Further, the claimant's case is that Mr. Dickinson was aware of the disclosures raised by the claimant because he raised a grievance prior to being invited to the disciplinary hearing.

(45) Counsel for the claimant also argued that paragraph 60 and 68 of Osipov, directly addresses the relationship between section 47 B (2) and section 47B (1B).

(46) Mindful that if the amendment was allowed the respondent may seek to amend its claim to plead the statutory defence, I invited counsel for the respondent to comment on its position. Counsel for the respondent indicated that the respondent's position may depend on whether or not the Tribunal determine that Mr. Dickinson should be joined as a party to the proceedings and therefore he was not in a position to confirm whether the respondent would seek an amendment at this stage.

(47) Counsel for the claimant did not consider that Mr. Dickinson should be added as a party. No application to join Mr. Dickinson as a respondent was made by either party.

Legal Principles

(48) I shall asset out the legal principles which I must consider before reaching my decision.

(49) It remains the case that only an employer, and not an individual worker or agent, can be liable for an automatically unfair dismissal by reason of a protected disclosure under section 103A ERA. A worker or agent may be personally liable for the dismissal of an employee or worker as a detriment under section 47B (1A) which provides as follows;

> "(*1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act. Done-*

(a) By another worker of W's employer in the course of that other worker's employment, or
(b) By an agent of W's employer with the employer's authority,

On the ground that W has made a protected disclosure

(50) The cause of action under section 103A ERA is only available against the employer and so are the remedies associated with an automatically unfair whistleblowing dismissal (interim relief, a basic award and the possibility of reinstatement or re-engagement). The remedies available for a detriment claim are set out at section 49 ERA.

(51) **Timis and anor Oispov (Protect intervening) 2019 ICR 655:** Mrs Justice Simler, President of the EAT held that the insertion of section 47B (1A) created 'a framework for individual liability of a fellow worker for detriments without restriction'. There was nothing in the wording of that provision to limit the detriments caught by it or to exclude from individual liability detriments amounting to the termination of the working relationship.

(52) On an appeal to the Court of Appeal, Lord Justice Underhill, giving the only judgment, agreed with Simler P that once the decision was taken to make co-workers personally liable for whistleblowing detriment, there was no reason in principle why they should not be so liable in a case where the detriment amounted to dismissal.

(53) Lord Justice Underhill set out the changes introduced in 2013 in his decision as follow;

30. ***I should spell out the essential effect of the changes made to section 47B by the 2013 Act:***

(1) ***The starting-point is that individual co-workers are, by sub-section (1A), made personally liable for acts of whistleblower detriment done by them. Although the principal purpose of the legislation may have been to provide a route to vicarious liability on the part of the employer, in order to fill the lacuna identified in Fecitt , the effect nevertheless is that the individual is rendered liable in his or her own right, irrespective of the liability of the employer****. That is of course the position also under the Equality Act 2010 and its predecessors, and, as I note below, some of the following sub-sections are borrowed from that legislation. [4] But for co-workers to be rendered personally liable is unique not only as regards Part V but more generally as regards the protections afforded by the 1996 Act.*

> *(2) Sub-section (1B), glossed by sub-section (1C), creates a form of vicarious liability for the* employer*. But it is not absolute. By sub-section (1D) an employer can escape liability if it shows (in short) that it took all reasonable steps to prevent the individual responsible from acting in the way complained of,* ***in which case the claim will only succeed against that co-worker.*** *These provisions are substantially identical to those of section 109 of the 2010 Act.*
>
> *32. The new provisions leave the original sub-section (1) in place, so that an employer may be* liable *under section 47B by one of two routes* ***– liability for its own act under sub-section (1) and vicarious liability under sub-section (1B).*** *The question of which route is available in a given case will be important in circumstances where the employer could advance a reasonable steps defence, since sub-section (1D) applies only to claims under sub-section (1A)"*

[my stress]

(54) The judgement of Employment Judge Stout in **Ms L Kong v Gulf International Bank UK) Limited case number 2201761/2019** dated 2 March 2020 and in particular paragraph 13; the claimant in that case had it appears from the list of issues, pleaded dismissal as a detriment without identifying the individual employee (or agent) responsible. The list of issues merely identified; "the dismissal of the claimant". Employment Judge Stout referred to the Timis case and specifically paragraph 91 of Lord Justice Underhill's judgment where he summarised the effects of section 47B. Employment Judge Stout went on to provide in the judgment as follows;

> "*We pointed out to the Claimant that the effect of this was that in order to bring a claim that dismissal is a detriment for the purposes of s 47B of the ERA 1996, it is necessary to bring a claim* ***against an individual*** *co-worker under s 47B (1A). Subject to the 'reasonable steps' defence in s 47B (1D), the employer will be vicariously (jointly) liable with the co-worker for the detriment by virtue of s 47B(2) precludes a claim being brought against an employer that a dismissal is a detriment"*

(55) Employment Judge Stouts in the reconsideration judgement dated 30 April 2020 clarified the reasoning as follows;

> "*51. In my* judgment*, it is correct, and remains so post-Timis v Osipov, that it is in principle possible for a claim that dismissal is a detriment to proceed* ***without the individual co-worker being named as a respondent****,* ***but only if there is a pleaded case against an individual co-worker for which the employer accepts vicarious responsibility****, i.e. in respect of which the Respondent does not seek to run the 'reasonable steps' defence in s 47B(1D).[my stress]*
>
> *52****. As noted in para 16, she had pleaded a case that dismissal was a detriment to which she was subjected by her employer (and***

> ***not an individual).*** *She had done so on the basis of legal advice and* because ***she "had not wanted to make the claim a personal one against individuals".*** *The claim had thus been deliberately pleaded as a claim directly against the employer that dismissal was a detriment. This is precisely the claim precluded by s 47B(2) as the Court of Appeal confirmed in Timis v Osipov.*
>
> *53.* ***The Claimant therefore needed to amend her claim to identify a particular individual (or individuals) who she alleged had subjected her to the detriment of dismissal. Had the Respondent in response indicated that it would accept vicarious liability and not sought to run the 'reasonable steps' defence, any such amended claim could have proceeded solely against the employer,*** *but there would still have been a need to consider whether the amendment should be permitted, bearing in mind its timing and the consequent widening in scope of the case* against *the Respondent. However, the Respondent was not willing to concede that it would accept vicarious liability in respect of the individuals Case Number: 2201761/2019 13 of 14 that the Claimant proposed to name (Ms Garrett-Cox and Ms Yates),* ***so the amendment application had to be considered by the Tribunal on the basis that not only was an amendment required that would have the effect of widening the case against the Respondent, but would also likely necessitate an adjournment of the hearing so as to give the proposed individual respondents and the Respondent an opportunity to take advice and prepare responses to the amended claim" [my stress]***

Secondary Liability of employer – section 47B (1A)

(56) ***Jones v Tower Boot Co Ltd 1997 ICR 254, CA*****,** the Court of Appeal expressly rejected the proposition that the common law principles of vicarious liability are to be imported into anti-discrimination legislation and it was held that it is a question of fact in the circumstances of each case for the industrial tribunal to determine on the ordinary meaning of the words whether the acts complained of were done in the course of employment.

Amendment

(57) The employment tribunal has a broad discretion to allow amendments at any stage of the proceedings under rule 29 of the Tribunal Rules. The discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in accordance with rule 2. Applications by a party for an amendment may under rule 30 (3) be dealt with an application in writing.

(58) ***Cocking v Sandhurst (Stationers) Ltd and anor 1974 ICR 650, NIRC*****,**: The key principle in exercising their discretion is that tribunals must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it.

The 'Cocking test' was restated by the EAT in ***Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT***.

(59) The then President of the EAT, Mr Justice Mummery provided further guidance on how the tribunal should approach applications for leave to amend in ***Selkent Bus Co Ltd v Moore [1996] ICR 386***. A tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mr Justice Mummery explained that the relevant factors to consider would include:

(60) **The nature of the amendment**: the tribunal will have to decide whether the amendment that the claimant is seeking is minor or a substantial alteration pleading a *new cause of action*. Applications may involve the addition of factual details to existing allegations, the addition or substitution of other labels for facts which have already been pleaded in the claim, or more substantially they may involve entirely new factual allegations which change the basis of the existing claim.

(61) **The applicability of time limit**s: if the application to amend includes adding a *new claim or cause of action* it is essential for the tribunal to consider whether that claim is out of time and if so whether the time limit should be extended. It will then be necessary for the party seeking to bring a claim out of time to also present their arguments about why time should be extended in their case to bring the new claim/cause of action.

(62) **The timing and manner of the application**: it is relevant for tribunal to consider why the application was not made earlier and why it is now being made.

(63) The above three factors are not exhaustive of what a tribunal has to consider, there may be other factors to consider in any particular case.

(64) It is important that amendments are not denied purely punitively or where no real prejudice will be done by their being granted: **Sefton Metropolitan Borough Council and anor v Hincks and ors 2011 ICR 1357 EA.**

(65) In **Abercombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148** Underhill **LJ** summarised the approach by the EAT and Court of Appeal when considering applications to amend which arguably raise new causes of action (para 48 – 50);

> *48. …the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas*

of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is *simply to put a different legal label on facts which are already pleaded permission will normally be granted…*

Reasonably Practicable

(66) Section 48 ERA;

48 (3)
"*An employment tribunal shall not consider a complaint under this section unless it is presented –*

(c) Before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(d) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was ***not reasonably practicable*** *for the complaint to be presented before the end of that period of three months"*

Claims out of time – discretion to amend retained.

(67) As Mr Justice Underhill observed in ***Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07*****,** why it is 'essential' that a tribunal consider whether the fresh claim in question is in time is simply that it is 'a factor, albeit an important and potentially decisive one,in the exercise of the discretion'. In other words, the fact that the relevant time limit for presenting the 'new' claim has expired will not prevent the tribunal exercising its discretion to allow the amendment, although it will be an important factor on the side of the scales against allowing it.

(68) The Court of Appeal have made it clear that just because time limits have expired does not mean that amendments to allow in new claims or causes of action should be rejected. **In *British Newspaper Printing Corporation (North) Ltd v Kelly and ors 1989*** IRLR ***222, CA***: Parliament had not laid down any rules imposing time limits in respect of amending applications already presented to a tribunal and stated that the proper test was that laid down in *Cocking v Sandhurst (Stationers) Ltd and anor*,which required an assessment of the relative hardships that would be caused to the parties depending on whether the amendment was or was not allowed.

(69) The Presidential Guidance on General Case Management for England and Wales, which states that 'the fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment' (para 11.1).

List of issues

(70) The status and legal effect of a list of issues was addressed by the court of Appeal in **Parekh v London Borough of Brent 2012 EWCA Civ 1630, CA.** There, Lord Justice Mummery made the point that the list of issues if agreed, will as a rule limit the issues at the final hearing to those in the list. However, the tribunal is bound to ensure that the case is clearly and efficiently presented and is not required to stick slavishly to the agreed issues where it would impair the discharge of its core duty to hear and determine the case in accordance the law and evidence.

(71) ***Hart v English Heritage 2006 ICR 555, EAT,*** case management decisions are not final decisions.

Conclusions

(72) I shall address first the respondent's argument that this claim cannot be brought at all because the respondent had not in the first instance pursued a claim against Mr. Dickenson as a named individual;

(73) I am not persuaded by the argument put forward by counsel for the respondent that to allow a claim to be brought directly against an employer for a detrimental act of dismissal by a worker/agent without the claim first being issued against the individual who carried out the detrimental act, would render section 47B (2) a 'dead letter'. Lord Justice Underhill when dealing with the apparent tension between section 47B (2) and 47 (1B) at Para 75 states; "*A more straightforward reading is that what sub-sections (1)and (1A) proscribe is simply the doing of a detrimental act…On that basis the reference in sub- section (2) to "the detriment in question" would connote the detrimental act of which the claimant complains and a claimant relying on sub-section (1A) could indeed say ; "I am not complaining of an act done by the employer but of an act done by my co-worker*."

(74) What is clear from the judgement in Osipov is that section 47B (2) excludes is a claim against the employer in respect of <u>its own act</u> of dismissal as defined by the ERA Part X i.e. an act of dismissal by the employer rather than a claim based on an individual worker or agents responsibility for it.

(75) There is no support I find in Osipov for an argument that the claimant who is pursuing a dismissal as a detriment claim, must issue the claim

against the fellow worker either as a first step or indeed at all. At para 156 of the Osipov judgment Lord Justice Underhill cites the decision of Simler P at the Court of Appeal whose construction of section 43 B (2) he approved, where Simler P comments on likelihood of such claims being issued against the fellow worker and states; "*It is likely to be an unusual case where an employee will wish to pursue a claim and seek a remedy against a fellow worker for a whistleblowing detriment amounting to dismissal, rather than pursuing the claim against the employer, but I can see no principled reason for excluding it."* It is clear that what Simler P is considering to be more likely, is a claim brought against the employer rather than the employee. Nowhere does he state that the claim must be brought against the worker/agent.

(76) With regards to the Kong judgment which is not binding in any event on this tribunal, it cannot be correct which counsel for the Respondent accepts, that a claim cannot be pursued against an employer on the grounds of vicarious liability unless the employer first accepts such liability. It is for the tribunal to determine whether the employer is vicariously liable. What I understand Employment Judge Stout to be saying, as clarified largely in the reconsideration judgment, is that unless the employer accepted vicarious liability in that case, the claim as put could not proceed. If vicarious liability was denied than Employment Judge Stout set out in para 53 what would need to happen next in that particular case, namely that the claimant in that case would need to amend her claim to identify an individual (who she alleged had subjected her to the detriment) and further that an adjournment would be required to give not only the proposed individual respondent an opportunity to take advice but the employer to do so. Employment Judge Stout is not saying that that the employer could not be liable without admission of vicarious liability. Employment Judge Stout I do not accept, was saying in the judgement that the claimant was compelled to issue the claim against individual worker/agent before they could issue a claim against the employer and I do not find that there is anything within the statutory language or in the decision of the Court of Appeal in Osipov which supports such an argument.

(77) What is required is for an individual to be identified who carried out the alleged detrimental act for which the employer may be liable and if the claim is not brought directly against that Individual, then it is open to an employer to rely upon the reasonable steps defence under section 47B(1D).

(78) Turning to the amendment application itself; the allegation of dismissal as a detriment is clearly pleaded in a different section to the claim under section 103A ERA. It is identified clearly as a detriment claim. It fails to identify the individual responsible however, the particulars of claim are

lengthy and set out the facts relied upon in detail. The claimant does not seek to amend the facts, the same facts are relied upon. The claimant is not seeking to add a claim of dismissal as a detriment, it is pleaded albeit not fully. The particulars of claim do not expressly identify Mr. Dickinson as the person who is alleged to have carried out the detriment amounting to dismissal and paragraphs 29 f. and g. of the particulars if claim do allude to the involvement of others however, it is not in dispute that Mr. Dickinson was the dismissing officer. Further, the respondent did not assert that it could not answer to the detriment as a dismissal claim or request further particulars. The respondent answered to the allegation in its response, denying the dismissal was on the ground that the claimant had made protected disclosures and referring to the fairness of the decision taken by Mr. Dickinson.

(79) Neither party could explain the omission of this detriment claim within the list of issues arising from the preliminary hearing before Employment Judge Dyal however it had not been withdrawn and the complaint is pleaded.

(80) On balance, I do not find that the claimant is seeking to add new factual details to support the claim, I do not find that the claimant is introducing a new cause of action or seeking to attach a new label to a claim which is pleaded, I find that the amendment sought amounts to a futther particularisation of the claim which is already pleaded.

(81) While allowing the claim does give rise to a prejudice to the respondent with regards to issues around burden of proof and causation in particular, the amendment does not of itself give raise to any prejudice, in that the respondent has answered to the claim on the basis that Mr. Dickinson conducted a fair hearing. The amendment Is not introducing a new cause of action or new facts which the respondent was not at the outset, in a position to respond to and the respondent did respond to it in its response. Providing these further particulars does not give rise to any additional prejudice. Counsel for the respondent did not seek to argue that it would give rise to a longer hearing or identify any hardship which it still suffer a as result of the delay in articulating the claim more clearly. The preparations are at a relatively early stage with the final hearing still approximately 7 months away. There would be greater prejudice to the claimant in denying him the chance to pursue this claim in light of the potential remedy for injury to feelings and the issues of causation in particular.

(82) In the circumstances and considering the overriding objective to deal with cases fairly and justly and the principles in Cocking and Selkent, the amendment is allowed.

(83) Neither party is seeking to add Mr. Dickinson as a respondent to the claim and I see no basis for making an Order to do so. There is an

obvious disadvantage for the claimant in only pursuing the employer, however the claimant has been legally represented throughout and no application has been made.

Further and Better Particulars of the Response

(84) Employment Judge Dyal made an Order at the Preliminary Hearing on the 22 July 2020 that the respondent send the claimant and the tribunal by no later than 10 August 2020, particulars of the allegations of misconduct which it alleges it discovered post termination and which it contends are relevant to remedy (if the complaint of unfair dismissal succeeds). The respondent provided further particulars on 10 August 2020. On reviewing those replies they do not identify the dates when the alleged acts of misconduct took place. No application for further details had been requested by the claimant however counsel for the claimant confirmed that it would be helpful to have dates. Counsel for the respondent asked that any order did not require compliance until March because of the availability of his instructing solicitor. It was therefore agreed that by **19 March 2020** the respondent is to provide dates of the alleged incidents relied upon.

(85) Counsel for the respondent raised concerns about anonymizing any further information to prevent disclosure of client details. I left it for the parties to cooperate with regards to the request for any further information about the alleged misconduct and any reasonable redaction of documents or anonymization of information.

Case management

(86) The matter remains listed for a final hearing on **4, 5, 6, 7, and 8 October 2021.**

(87) Both parties confirmed that there were no further orders that they required today.

Judicial mediation

(88) The claimant is interested in judicial mediation. Counsel for the respondent will take instructions and the parties can make a joint application for judicial mediation still should they wish to do so

Case Management

(89) The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’, which can be found at:

www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

(90) The parties are reminded of rule 92: "*Where a party sends a* communication *to the Tribunal (except an application under rule 32) it* shall *send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise) …*". If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written.

(91) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and to co-operate generally with other parties and with the Tribunal.

(92) The following case management orders were largely made by consent. Insofar as they are not made by consent, reasons, to the extent not set out below, were given at the time and written reasons will not be provided unless they are asked for by a written request presented by any party within 14 days of the sending of this written record of the decision.

ORDERS
Made pursuant to the Employment Tribunal Rules of Procedure

1. Documents

1.1 By no later than **19 March 2021** the respondent will provide to the claimant and the Tribunal in writing, with the dates of each alleged act of post termination misconduct carried out by the claimant, as set out in the respondent's email of the 10 August 2020.

2. Other Matters

2.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed. The parties must inform each other and the Tribunal in writing **within 14 days of the date this Order is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

2.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

2.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

2.4 **Public access to employment tribunal decisions**. All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

2.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

2.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Broughton

20 February 2021

Signed:

Sent to the parties on: