Neutral Citation Number: [2024] EAT 29

Case No: EA-2022-001412-RN

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 March 2024

**Before** :

**THE HONOURABLE MR JUSTICE BOURNE**

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**Between :**

**WICKED VISION LTD**

**Appellant**

**- and –**

**MR I RICE**

**Respondent**

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**Edmund McFarlane** (Representative, Peninsula Business Services) for the **Appellant**
**Tamsin Sandiford** (instructed by **The Wilkes Partnership**) for the **Respondent.** Relied on written submissions

Hearing date: 6 February 2024

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# JUDGMENT

## SUMMARY

### UNFAIR DISMISSAL, WHISTLEBLOWING, PROTECTED DISCLOSURES

An Employment Tribunal erred in allowing an amendment to add a claim that the employer, a company, was vicariously liable under section 47B(1B) of the Employment Rights Act 1996 for the act of a co-worker, the company's owner, who "subjected the claimant to the detriment of dismissal" on the ground that he had made a protected disclosure. That proposed claim was barred by section 47(2) of the ERA 1996 because the alleged detriment "amounts to dismissal (within the meaning of Part X)".

**THE HONOURABLE MR JUSTICE BOURNE:**

Introduction

1. This is an appeal against a decision by EJ Butler, sitting at Manchester ET on 8 July 2022, by which he granted permission to the Claimant to amend his claim. The Respondent below, Wicked Vision Limited, is the Appellant in this Tribunal.

2. As the issue is one of pure law, little need be said about the factual background. Wicked Vision Limited is owned by Mr David Strang. The Claimant was employed by it as Head of UK Sales from 19 December 2017 until he was dismissed on 18 February 2021. The reason given for his dismissal was redundancy. In his claim the Claimant alleges that Mr Strang decided to dismiss him because he had made protected disclosures about alleged breaches of the Coronavirus Job Retention Scheme consisting of employees being required to work despite having been placed on furlough. He brought a claim against the company alleging that his dismissal was unfair contrary to section 94 of the ERA 1996 and that it was automatically unfair under section 103A of the ERA because the reason or the principal reason for it was that he had made a protected disclosure.

3. A case management preliminary hearing took place on 22 October 2021. Shortly before that hearing, the Claimant's representatives communicated a wish to amend the claim to include complaints that he had been subjected to detriments, contrary to section 47B of the ERA. At that hearing the alleged detrimental acts were identified. They consisted of (1) building a disciplinary case against him, (2) denying him access to his work emails, (3) telling him that he was being made redundant and offering him the opportunity of resigning and (4) his actual dismissal by Mr Strang. The EJ decided that the application would be decided at a later date, and made known his provisional view that the Claimant should be permitted to add allegation (4) but not allegations (1) to (3).

4. By the time the application came before EJ Butler in July 2022, only point (4) was pursued. The Claimant sought, and the EJ granted, permission to amend the claim to add the following allegation of detriment:

> "*Dismissing the claimant. (This is a complaint that Mr Strang, a worker for the respondent, subjected the claimant to the detriment of dismissal contrary to section 47B(1A) of ERA, for which the respondent is liable under section 47B(1B). This complaint is available to an employee notwithstanding the provisions of subsection (2).)*"

5. The company had opposed the amendment on the ground that the proposed new claim (1) was barred by section 47B(2) and/or (2) was time-barred. The EJ decided that the time point would be dealt with at trial or perhaps at a further preliminary hearing on the company's application. However, he heard argument on the effect of section 47B(2) and ruled in the Claimant's favour.
6. By its single ground of appeal the company contends that this decision was an error of law and that section 47B(2) bars the new claim, in particular because such a claim could not be

made without a concurrent claim against Mr Strang (for which permission to amend was neither sought nor granted).

Statutory framework

7. Part X of the ERA deals with Unfair Dismissal. As is well known, the relevant sections apply only to employees and not to other workers. Dismissal is defined in section 95 by reference to the termination of the employee's contract of employment.

8. Whistleblower protection was introduced by provisions inserted into the ERA by the Public Interest Disclosure Act 1998. Further changes were made by the Employment Relations Act 1999 and then by the Enterprise and Regulatory Reform Act 2013.

9. The 1998 Act introduced the new Part IVA of the ERA which defined protected disclosures and, by section 43K, gave an extended definition of "worker" for this purpose.

10. It also added new sections to Part V, including section 47B which created the right for workers not to be subjected to any detriment by their employer on the ground that they had made a protected disclosure. As enacted but with an amendment introduced by the 1999 Act, it provided:

> *"(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
> *(2) This section does not apply where—*
> *(a) the worker is an employee, and*
> *(b) the detriment in question amounts to dismissal (within the meaning of Part X).*
> *(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker" , "worker's contract, "employment" and "employer" have the extended meaning given by section 43K."*

11. A new section 103A was also added to Part X, providing:

> *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

12. Thus the effect of the 1998 provisions was that an employee's claim to have been subjected by his employer to a detriment amounting to a dismissal within the meaning of Part X would be a claim for unfair dismissal. It could not be pursued also, or instead, as a claim for detriment under section 47B.

13. That distinction has always had practical significance. For example, section 103A requires a claimant to prove that the protected disclosure was the only or principal reason for the dismissal, whereas section 47B requires only that the detriment be inflicted "on the ground that" there had been a protected disclosure, meaning that the protected disclosure

"materially influenced" the employer's treatment of the claimant (see *Fecitt v NHS Manchester* [2012] ICR 372). And, according to case law summarised in *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, compensation for injury to feelings can be awarded in a detriment case but not in a claim for unfair dismissal. On the other hand, a statutory "basic award" and an order of reinstatement or re-engagement are available in an unfair dismissal claim but not in a detriment claim.

14. In *Fecitt v NHS Manchester*, the Court of Appeal also ruled that an employer could not be vicariously liable under section 47B for conduct by a co-worker of the claimant.

15. Following that decision, section 47B was further amended by the 2013 Act. The following sub-sections were inserted:

> *"(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.*
> *(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*
> *(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.*
> *(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—*
> *(a) from doing that thing, or*
> *(b) from doing anything of that description.*
> *(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—*
> *(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and*
> *(b) it is reasonable for the worker or agent to rely on the statement.*
> *But this does not prevent the employer from being liable by reason of subsection (1B)."*

16. As a result, a detriment claim can now be made against a co-worker. It can also be made against an employer on the basis of vicarious liability for the act or omission of a co-worker, subject to statutory defences such as "reasonable steps". But section 47B(2) continues to provide that the section, as a whole, does not apply to an employee's case where "the detriment in question amounts to dismissal (within the meaning of Part X)".

The EJ's ruling

17. The proposed amendment relied on the act of a co-worker, Mr Strang, in dismissing the Claimant, for which the company was said to be vicariously liable under section 47B(1B). The company contended that this new claim was barred by section 47B(2), and in particular that subsection (1A), and therefore subsection (1B), could not be relied upon unless a claim

was made against Mr Strang, whereas the proposed amended claim was directed only against the company.

18. The EJ allowed the amendment, giving the following reasons:

1) The judgment of Underhill LJ in *Timis and another v Osipov* [2019] ICR 655 CA, though not entirely on all fours with the present case as it concerned claims against co-workers, was of assistance in that:
    i. In a discussion at [30], although the vicarious liability regime introduced by the 2013 amendments was said to be not absolute, it was not suggested that it arose only where there was also a concurrent claim against a co-worker.
    ii. At [32] it was said that an employer could be directly liable under section 47B(1) or vicariously liable under subsection (1B), again with no suggestion that vicarious liability depended on there being a concurrent claim against a co-worker.
    iii. At [75] Underhill LJ said:
        > "I accordingly approach the construction of the language of section 47B(2) on the basis that I would expect Parliament to have intended to exclude liability under the operative provisions of the section only where the identical remedy was available under section 103A ; and thus that it would not exclude a co-worker's individual liability for the detriment of dismissal under subsection (1A) (or, which follows, any vicarious liability of the employer under subsection (1B)). I do not believe that the statutory language compels a different construction."

    iv. Summarising his conclusions at [91(1)], Underhill LJ said:
        > "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 section 47B(2) excludes is a claim against the employer in respect of its own act of dismissal."

2) As to the wording of section 47B:
    i. Subsection (1B) envisages a claim against the employer for detriments inflicted by a co-worker of the claimant.
    ii. Subsection (1D), which creates the "reasonable steps" defence, refers to "*proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a)*" without any qualification or condition about a need for a concurrent claim against the co-worker.
    iii. Had Parliament intended such a qualification or condition, it would have stated one.
    iv. It is common for employment claims to be brought against an employer through the principle of vicarious liability without any concurrent claim against an individual perpetrator of the unlawful conduct.

The parties' submissions

19. The Appellant was represented before this Tribunal by Mr Edmund McFarlane. He submitted that the EJ's decision impermissibly allowed the Claimant to bypass a requirement for a claim against a co-worker as a necessary precondition for a claim which would make an employer vicariously liable for an act amounting to dismissal. The 2013 amendments, he submitted, were intended to remedy the lacuna identified in *Fecitt* whereby there was no vicarious liability for a co-worker's infliction of a detriment, but were not intended to unravel the careful separation in the whistleblowing provisions of unfair dismissal and detriment claims. The effect of the EJ's decision would unravel the test for automatic unfair dismissal and would introduce compensation for injury to feelings into unfair dismissal claims by the back door. Conversely, it would be logical to allow a vicarious liability claim for a detriment amounting to dismissal where brought in tandem with a claim against a co-worker who might not be able to satisfy a judgment if found liable.

20. There was no attendance at the hearing on behalf of the Respondent but I received a skeleton argument from Tamsin Sandiford of counsel. She contended that section 47B does not state any requirement that there must be a parallel claim against a co-worker to support a claim against the employer based on vicarious liability, and that none should be implied. She pointed out the differences between claims under section 47B and section 103A respectively, which are reasons why claimants will continue to use the latter even if they are also claiming under the former.

21. Miss Sandiford placed particular reliance on *Timis v Osipov*, contending that the meaning and effect of section 47B(2) was the principal issue in that case. She emphasized a number of passages from Underhill LJ's judgment, including:
    1) The conclusion at [91] that whilst section 47B(2) precludes a claim against an employer for its own act of dismissal, it does not prevent an employer from being vicariously liable for a co-worker subjecting a claimant to the detriment of dismissal.
    2) The lack of any suggestion that a claim against an employer based on vicarious liability under section 47B(1B) must be brought in tandem with a claim under subsection (1A) against the co-worker.
    3) The observation at [82] that an employee should be able to recover compensation for loss arising from a dismissal which, though fair for the purposes of section 103A, is found to have resulted from earlier distinct conduct by co-workers victimising the employee for having made a protected disclosure.
    4) The observation at [76] that allowing claims based on a co-worker's conduct has the advantage of eliminating any need to draw "a line between those of a co-worker's acts which amount to dismissal and those that constitute distinct prior acts" which may involve "arid and artificial disputes, with the risk of arbitrary outcomes".

22. Miss Sandiford also commented on *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55, where Lord Wilson said at [58]:

> *"… Parliament has, by section 103A, provided that, where an employee's whistleblowing is the reason for it, a dismissal should automatically be unfair and*

> *should thus attract the remedies set out in Part X; and, as noted in para 28 above, it has also, by section 47B(2), withdrawn the rights provided by that section from the whistleblowing employee who is subjected to a detriment which amounts to dismissal."*

23. Whilst that gives the appearance of assisting the Appellant's case, Miss Sandiford pointed out that *Timis* was not referred to in the judgment of the Supreme Court in *Jhuti* and that that case was not concerned with a vicarious liability claim.

Discussion

24. The issue is one of statutory construction. Section 47B(2) provides that the section as a whole does not apply to a detriment which amounts to dismissal within the meaning of Part X. The question is whether section 47B can nevertheless found a claim against an employer arising from a co-worker's act amounting to dismissal.

25. *Timis* is authority, binding on this Tribunal, for the proposition that a claim can be brought against a co-worker under section 47B(1A) even where the co-worker's act amounts to dismissal. At first sight, that proposition seems to sit uneasily with subsection (2).

26. It is necessary to consider the reasons for the ruling in *Timis* and to determine whether that ruling goes any further than the proposition stated in the previous paragraph.

27. The claimant in *Timis* was the chief executive of a company and made protected disclosures relating to it. Two directors recommended that he be dismissed, and he was then dismissed by an e-mail sent by one director on the instruction of the other. He brought successful claims against the company for unfair dismissal under section 103A and against the directors for detrimental acts under section 47B(1A). The Employment Tribunal, whose ruling was upheld by this Tribunal and by the Court of Appeal, held that the directors had contravened section 47B(1A) by their recommendations and instructions which culminated in his dismissal. Although only the company could be liable for unfair dismissal, the directors were held jointly and severally liable to compensate the claimant for the losses resulting from his dismissal because those losses flowed from a pre-dismissal detriment.

28. At paragraph [68] of his judgment, Underhill LJ rejected a construction of the section which would prevent a claimant from claiming against an individual co-worker "based on the detriment of dismissal", because this "would produce an incoherent and unsatisfactory result and is accordingly unlikely to conform to Parliament's intention". It was unsatisfactory that a co-worker whose acts stopped short of dismissal could be liable, while a co-worker who went on to dismiss would escape scot-free, and that a non-employee worker could bring such a claim while an employee could not.

29. At [69] Underhill LJ observed that that proposed interpretation would also mean that whistleblowers would have less protection against co-workers than victims of other kinds of discrimination and victimisation at work.

30. At [70] Underhill LJ rejected the idea that the separation of the Part V and Part X regimes reflected any "great conceptual gulf". Anti-overlap provisions were "required in the interests of good order" but the underlying policy was probably only "that a claimant should not claim under Part V where the identical right was available under Part X".

31. It should be noted that rights under Parts V and X will seldom, if ever, be literally "identical". That is because of the differences in the causation test which is applied and in the remedies which are available under the two regimes. Those are differences of which Underhill LJ was obviously well aware.

32. At [71], Underhill LJ rejected the suggestion that the underlying policy was affected by the changes made by the 2013 Act, and said that there was "no basis for thinking that the introduction of individual liability meant that, for the first time, subsection (2) – the language of which was unchanged – was intended to exclude a liability which would arise under the other provisions of the section but which was not provided for by section 103A".

33. There was indeed no indication of such a policy intention outside the words of the legislation itself. However, the natural meaning of the words in subsection (2), which were retained unchanged, was to exclude liability which would arise under the other (new) provisions of the section – but not necessarily to exclude such a liability "which was not provided for by section 103A". Those words, it seems to me, are key to resolving this debate.

34. At [72] Underhill LJ accepted that it was anomalous that a claimant could recover compensation for injury to feelings which would not be recoverable from the employer under section 103A, and that a different causation test would apply, but he considered these to be mere "wrinkles" which may have escaped the attention of the draftsman when the 2013 amendments were made. So at [73] he rejected the suggestion that the draftsman intended to bar a claim under section 47B where the detriment took the form of dismissal, "even if it could not be advanced under section 103A". Those last words too are, in my judgment, of particular importance.

35. At [74] he also rejected the suggestion that "allowing individual liability under section 47B(1A), with the consequence that the employer is vicariously liable under subsection (1B), will mean that section 103A becomes a dead letter", because a claimant who claimed under subsection 1B would also need to rely on section 103A because of the lack of a "reasonable steps" defence to that type of claim and because of the further remedies which are available under that section.

36. That reasoning does not address a similar but different objection, namely that section 47B(2) will become a dead letter, at least in cases where the employer is a company and therefore will in general have to act by the agency of one or more human co-workers. I return to that point below.

37. Paragraphs [68]-[74] are the foundation for the conclusion at [75], as is indicated by the word "accordingly":

"*I accordingly approach the construction of the language of section 47B(2) on the basis that I would expect Parliament to have intended to exclude liability under the operative provisions of the section only where the identical remedy was available under section 103A; and thus that it would not exclude a co-worker's individual liability for the detriment of dismissal under subsection (1A) (or, which follows, any vicarious liability of the employer under subsection (1B)).*"

38. As I have said, the "remedy", in its technical sense of the ET's remedial orders for compensation, etc., would never or hardly ever be "identical" under sections 47B and 103A. In my judgment, what Underhill LJ meant in that sentence was simply that a claimant who had a claim under section 103A could not choose to re-package it as a claim under section 47B. In *Timis* that situation did not arise, because the issue there was whether there could be a claim against the directors, not the company, and the claim against the directors obviously could not be brought under section 103A.

39. That interpretation of *Timis* is supported by the words used in paragraphs 71 and 73 which I quote above.

40. The centrality of the question of whether the claim could be brought under section 103A is also apparent from the judgment of this Tribunal in *Timis* by Simler J (as she then was), with which Underhill LJ expressed agreement. At paragraph 154 Simler J said:

"*The starting point is to construe all the words used in light of that intended purpose, including the words in brackets in section 47B(2)(b) which qualify the extent of the disapplication. The provision does not seek to exclude all claims for detriment amounting to dismissal as it could have done. Rather, Parliament has chosen to limit the disapplication to those detriments amounting to dismissal within the meaning of Part X; in other words, to detriments amounting to unfair dismissal claims necessarily against the employer. The effect of Mr Forshaw's submissions* [on behalf of the directors] *is to ignore the words in brackets, which are redundant on his approach.*"

41. Underhill LJ went on to explain that he did not consider the statutory language to compel a different conclusion and that his construction eliminated the risk of tribunals having to draw arid or arbitrary distinctions between unlawful acts by co-workers which respectively did nor did not amount to dismissal. He concluded with what I understand to be the *ratio decidendi* of the case at [77]:

"*I would accordingly hold that section 47B(2) does not prevent the claimant proceeding against the appellant directors under Part V on the basis of their responsibility for the dismissal itself.*"

42. It is clear from [75] that Underhill LJ contemplated that vicarious liability of the employer would, or could, follow from the co-worker's liability, but the position of the employer was not the issue in the case and, in my judgment, forms no part of the *ratio*.

43. The present case is different from *Timis*. For reasons which are not known to me, no claim is pursued against Mr Strang under section 47B(1A). Instead the EJ had to decide whether there could be a claim based on Mr Strang's alleged contravention of subsection (1A) but directed solely against the Appellant under subsection (1B).

44. Another difference is that in *Timis* there were several alleged unlawful acts. They culminated in the sending of an email communicating the claimant's dismissal but other relevant acts clearly preceded the act of dismissal. The same was true of the claim against the employer in *Royal Mail Group Ltd v Jhuti*, where the Court of Appeal (in a part of its decision not challenged in the appeal to the Supreme Court) said that losses occasioned by a dismissal may be recoverable as compensation for an earlier unlawful detriment which caused the dismissal[1]. In the present case, by contrast, the amended claim explicitly and solely complains that Mr Strang "subjected the claimant to the detriment of dismissal".

45. This case also focuses attention on the potential artificiality of distinguishing between the acts of a company or other corporate employer and those of the human beings who act on its behalf. A company's liability for unfair dismissal could be viewed as "vicarious" in every case, because in practice the unfairness can always be expected to arise from the act or omission of one or more human beings working on the company's behalf.

46. In some cases, of course, the distinction is very important. A company may have a "reasonable steps" defence under section 47B(1D). Or it may be insolvent. Those are examples of cases where the availability of a discrete claim against the individual co-worker is crucial. Hence the need, referred to in *Timis*, not to interpret section 47B(2) as barring such a claim unless the language compels that conclusion.

47. However, it would be odd if Parliament, while barring any claim against an employer based on a detriment which "amounts to dismissal (within the meaning of Part X)", at the same time permitted precisely such a claim to be made under subsection (1B) in addition to (or instead of) a section 103A claim in virtually every case involving a corporate employer, and indeed in every case where dismissal is decided or communicated by any person who is not, legally, the employer.

48. In this case the company is the only respondent to the claim (amended or unamended). I am told that Mr Strang owned the company. His acts in the course of its business were the company's acts. To describe him as a co-worker rather than an employer, or to say that the Claimant was dismissed by Mr Strang instead of, or as well as, the company, is to draw a purely technical distinction. There being no real factual distinction between the company and Mr Strang, there is also no realistic possibility of a "reasonable steps" defence having to be considered.

49. I therefore consider that in this case, the amended claim is one which can be, and indeed already has been, advanced as a claim for automatic unfair dismissal under section 103A. This is not a case like *Timis*, where a claimant wished to advance a claim which could not be advanced under section 103A.

[1] The Court of Appeal's decision is reported at [2018] ICR 982 and is referred to by Lord Wilson at paragraph [28] of the judgment in the Supreme Court.

50. The differences between section 103A claims and section 47B claims to which I have referred do not undermine that conclusion. As I have said, those differences would exist in every case. The application of section 47B(2) does not depend on the potential outcome of the claim. It depends on whether the alleged detriment amounts to a dismissal to which Part X would apply.

51. Although the Supreme Court's decision in *Royal Mail Group Ltd v Jhuti* is not directly on point, it is consistent with the conclusion that I have reached. There, the claimant was victimised by her line manager because she had made protected disclosures about the employer's business. As a result she developed a stress-related illness and went off work. As a result of the illness she was dismissed by another manager who was unaware of the protected disclosures and was acting in good faith. The Supreme Court allowed her claim for automatic unfair dismissal under section 103A, holding that where the line manager had attempted to procure her dismissal because she had made a protected disclosure, that must be treated as the real reason for the dismissal even where it was hidden behind a different reason which was adopted by the decision-maker. In my judgment, *Jhuti* demonstrates that the "reach" of section 103A is sufficient to cover claims which fall within the policy intention behind the section, and therefore that tribunals should be slow to conclude that a dismissal resulting from whistleblowing falls outside Part X.

52. For all of these reasons I conclude that section 47B(2) does apply to the amended claim and therefore that the decision to grant permission to amend was wrong.

53. My decision is not based on the absence of any concurrent claim against Mr Strang under section 47B(1A), and I consider that the Employment Judge was right not to be persuaded that that was the critical factor. Mr McFarlane argued persuasively for that interpretation of section 47B, but although it would have been straightforward for the draftsman to include words having that effect, there are none.

54. Applying section 47B(2) as interpreted in *Timis*, all that was necessary was to scrutinise the proposed claim against the employer and to ask whether it was based on what Simler J (as quoted above) described as "*detriments amounting to dismissal within the meaning of Part X; in other words, to detriments amounting to unfair dismissal claims necessarily against the employer*". That question in this case could only receive an affirmative answer.

55. The appeal will therefore be allowed and I must substitute a decision dismissing the Claimant's amendment application.