Claiming dismissal as a whistleblowing detriment: *Wicked Vision Ltd v Rice*

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Wicked Vision Ltd v Rice [2024] EAT 29

Overview

1. *Wicked Vision* considers when a Claimant can claim as a detriment the act of dismissal, looking at s.47B ERA 1996, its interaction with s.103A ERA 1996 and the analysis of these issues in Osipov.

2. It considers a difficult and complex point of law and accordingly is a relatively difficult judgment to follow, particularly because of potential conflict with the more senior judgment of the Court of Appeal in *Osipov*. References herein to square brackets are to *Wicked Vision*'s judgment paragraph numbers.

3. The conclusion of *Wicked Vision* is understood as:

    a. A Claimant can claim for detriments that precede dismissal against a co-worker and against the corporate employer for its vicariously liability even if the losses that flow amount to those that flow from dismissal. *Osipov* says this and *Wicked Vision* was not concerned with this issue.

    b. A Claimant can claim for the detriment of dismissal against a co-worker. *Osipov* says this and *Wicked Vision* recognises this is binding.

    c. A Claimant is very unlikely to be able to claim for the detriment of dismissal against the corporate employer. Although *Osipov* seemingly says the opposite, *Wicked Vision* considers this was not part of the *ratio* (i.e. the reasoned, considered and binding part of a judgment) and disagrees.

Summary of Facts

4. In *Wicked Vision* Bourne J introduces the factual background by stating "as the issue is one of pure law, little need be said about the factual background"; a succinct summary that can likely apply to many more appellate cases than is often the case.

5. Following that approach, the following are the few basic facts needed to understand the position before the EAT stage:

    a. Mr Rice was dismissed for what Wicked Vision say was redundancy. The decision was taken by Mr Strang, the owner.

    b. Mr Rice claims he was dismissed due to having made a protected interested disclosure (a "PID", i.e. 'whistleblowing').

    c. Mr Rice issued a claim relying on s.103A ERA 1996 (automatic unfair dismissal because of a PID) and then was permitted to amend by adding in a claim under s.47B ERA 1996 (detriment on the grounds of a PID) for the detriment of dismissal against the company (Wicked Vision). There was no claim against Mr Strang as an individual.

    d. Wicked Vision appealed the decision to allow him to amend his claim.

6. The issue in the appeal was stated by the EAT as, "the question is whether section 47B can nevertheless found a claim against an employer arising from a co-worker's act amounting to dismissal" [24].

7. The appeal succeeded; the EAT finding that allowing the amendment of the claim was an error of law.

Does there need to be a concurrent claim against the individual?

8. The EAT record Wicked Vision's position to be that the new claim against them under s.47B that dismissal was a detriment was barred by s.47B(2) "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)" [6].

9. Despite this being the "particular" point made in the grounds of appeal, this was not the reason that the appeal succeeded. There is analysis of this point within the EAT's judgment but the basis for the EAT's decision is based on separate analysis, as explained below.

10. The conclusion on this particular point is dealt with very succinctly near the very end of the judgment. The reason why there does not need to be a concurrent claim against an individual for the detriment of dismissal in order to claim against the corporate employer is said to be because "it would have been straightforward for the draftsman to include words having that effect, there are none" [53]. This relatively simple application of statutory interpretation therefore means there is no pre-requisite for a claim against an individual if also claiming against a company for the detriment of dismissal.

11. Some confusion may be created because the EAT's conclusion is expressed as, "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" [53]. This does not so much say 'the absence of a claim against the individual is not a factor at all' as it says 'the absence is not the critical factor' and therefore could leave open a question over to what extent it is a factor. Similarly, this statement says that the conclusion was not based on the absence of the concurrent claim, but does not so much say 'the position that a concurrent claim is needed is wrong'.

12. Although there is some ambiguity, a reasonable view of the judgment as a whole is that the EAT does endorse the view that the absence of a concurrent claim against an individual is not necessary for a claim against the employer, hence it is not "the critical factor" as it would need to be if it were a pre-requisite or condition/requirement.

Can there be a claim for the detriment of dismissal against a co-worker?

13. The EAT expressly recognise that *Osipov* allows a claim against an individual co-worker for the detriment of dismissal. For example:

    a. *"Timis [v Osipov]* 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". [25]

    b. Again referring to the principle expressed in Latin, the EAT referred to paragraph 77 of *Osipov* and quoted "what I understand to be the *ratio decidendi* of the case" [41:

    "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

c. [28] and [46] give further support to this position and the application of *Osipov* on this point.

14. This point of *Osipov* therefore remains unscathed. The EAT in *Wicked Vision* recognises the hierarchy of tribunals/courts, expressly referring to the fact that this point is "binding on this Tribunal" and does not seek to overturn this point.

Can there be a claim for the detriment of dismissal against the corporate employer?

15. This was the heart of the issue on appeal and although the appeal succeeded, this was not for the "particular" point advanced by the appellant employer and the reasoning is focused on the EAT's analysis of *Osipov* and what it really meant.

16. In terms of this particular case, the EAT upheld the appeal and therefore found that it was an error to allow the amended claim of a detriment of dismissal against the employer.

17. A key piece of legislation considered was s.47B(2) ERA 1996:

> "(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)".

18. As the EAT noted, *Osipov*'s ruling that an individual can claim against a co-worker for the detriment of dismissal "seems to sit uneasily with subsection (2)" [25]. It may be that this unease was why the EAT consciously reminded itself in the same paragraph that the ruling on this point is nevertheless "binding on this Tribunal" [25] and why such scrutiny was then placed by the EAT on identifying the ratio to determine precisely how much was binding on the EAT.

19. *Osipov* expressly refers to a Claimant's right to claim against an employer for vicarious liability for the detriment of dismissal:

a. "[s.47B(2)] 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))", para. 75 of *Osipov*.

b. "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." para. 91 of *Osipov*

20. Both of the above two *Osipov* quotations appear in the *Wicked Vision* judgment. The EAT was clearly aware of the point because the EAT accepts of *Osipov*'s para. 75, "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..." [42].

21. However, the EAT go on to say, "...but the position of the employer was not the issue in the case and, in my judgment, forms no part of the *ratio*". The EAT therefore did not consider itself bound by *Osipov*'s 'comments' on the point and came to a different conclusion.

22. Whether the EAT is right that this did not form part of the ratio is likely to be something settled by the Court of Appeal in the future, whether in *Wicked Vision* or another case. It is right however that there was not a claim for vicarious liability against the *Osipov* employer for the detriment of dismissal (presumably because it was insolvent) and in any event the detriment in *Osipov* was a pre-dismissal detriment (although treated as 'amounting to dismissal' as explained by Osipov's paragraphs 58-59).

23. Having found that it was not bound by *Osipov* on this point, *Wicked Vision* held that no claim for vicarious liability against the employer could succeed because:

    a. "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 [in *Osipov* at the EAT]) 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"[54]

    b. The EAT emphasised the need to focus on the part in brackets of s.47B(2), "the detriment in question amounts to dismissal (within the meaning of Part X)". Part X of ERA 1996 concerns unfair dismissal, both under s.94 and s.103A.

    c. Considering the issue here of whether the claim amounted to dismissal within Part X, the EAT stated, "the amended claim is one which can be, and indeed already has been, advanced as a claim for automatic unfair dismissal under section 103A" [49].

    d. For this precise claim, the EAT placed particular weight on the fact that the decision maker was the owner:

> "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".

24. The EAT went further though in its views, expressing the wider legal position for all such claims rather than just that of Wicked Vision. The EAT explained how rare it would be that any claim for vicarious liability against an employer for the detriment of dismissal could succeed:

    a. The EAT referred to s.47B(1B), which provides for vicarious liability for a detriment and stated, "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" [47].

    b. The EAT also considered the Supreme Court's decision in *Royal Mail Group Ltd v Jhuti*, which it noted, "is not directly on point" [51] but considered that this, "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" [51].

Conclusion

25. *Wicked Vision* has not upset the basic point from *Osipov* that a Claimant can claim for the detriment of dismissal against a co-worker. One might consider that the EAT had doubts about this principle but they recognise they were bound to follow the Court of Appeal's higher authority.

26. *Wicked Vision* applies detailed scrutiny of exactly what was in issue in the *Osipov* and makes a bold, although quite possibly correct, analysis of its ratio. *Wicked Vision*

concludes that despite express statements to the contrary in *Osipov* (seen as obiter by the EAT), a Claimant is unlikely to be able to sue an employer for vicarious liability for the detriment of dismissal. The EAT considered that it would be "odd" to hold otherwise and that Tribunals should be "slow" to allow such a claim.

27. If problems can be seen in *Wicked Vision*, they may be the following:

    a. Whether the EAT was right to consider itself not bound by the full reasoning of *Osipov*.

    b. There are arguably three types of relevant claim:

        i. Detriment committed by a co-worker;

        ii. Vicarious liability for a detriment committed by a co-worker (s.47B(1B)); and

        iii. A claim directly against the employer for a detriment of dismissal.

    The distinction between ii and iii may be difficult to see but perhaps exists in ii's reliance on legislation rather than iii's reliance on the more general common law principle of vicarious liability, or ii's reliance on s. 47B(1B) rather than iii's reliance on 47B(1). This is arguably a distinction recognised in *Osipov* in its conclusion at para. 91 when referring to "a claim against the employer in respect of its own act of dismissal" (i.e. iii above, which would be an impermissible claim based on s.47B(1) rather than s.47B(1B)):

        > "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".

    If there is an error in *Wicked Vision*, it may be that the case concerned iii but its ruling applies to ii as well without recognising the distinction in legislative sections relied upon and *Osipov*'s reasoning in light of that distinction.

    c. On the EAT's reasoning, it is difficult to see how any cases will ever succeed in a vicarious liability claim against the employer:

        i. Weight was placed on the fact that Mr Strang was the owner and therefore his decisions were the company's decisions. This is often the case though

with owners and indeed positions such as CEOs and MDs, who also often make decisions whether to dismiss.

ii. Emphasis was placed on whether a claim could be made within part X. If a PID was the cause then s.103A will always come into play, thus limiting vicarious liability. If a PID was only a factor and not the principal reason then s.103A would not come into play. This will not be known until the case has been determined.

iii. The EAT considered that there was no conflict with *Osipov* because "This is not a case like *Timis*, where a claimant wished to advance a claim which could not be advanced under section 103A" but this reasoning is not clear, especially because there was a successful s.103A claim in *Osipov*, as noted in its paragraph 1(3).

d. There is an inconsistency with claims brought by workers. Workers cannot claim unfair dismissal under part X, therefore will presumably not be bound by the EAT's reasoning on s.47B(2). Workers would therefore be able to rely upon vicarious liability for the detriment of dismissal, claiming thereafter compensation for "the termination of his worker's contract" per s.49(6) ERA. The worker is therefore left with a claim against the employer on the lower threshold test of "material influence" (*Fecitt*) rather than principal reason of s.103A.

28. This case leaves many questions remaining and it is unlikely to be the last heard on the matter, whether in this case or another. Notably there was no attendance at the hearing on behalf of the Respondent and the arguments against the appeal were provided only by a skeleton argument.

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