Employment

"Osipov" revisited – confirmation co-workers at personal risk for "whistleblower" dismissals

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In *(1) Timis (2) Sage v Osipov* [2018] EWCA Civ 2321, the Court of Appeal has unanimously confirmed the EAT decision in *International Petroleum Ltd & Ors v Osipov & Ors* (EAT/0058/17/DA) that employees may pursue claims against co-workers for whistleblowing detriment amounting to dismissal. The decision also confirms that s.47B(2) Employment Rights Act 1996 ("**ERA**") is no bar to claims, based on pre-dismissal detrimental acts, by whistleblowers for losses flowing from dismissal.

Background: the facts, the ET decision and the EAT

The Claimant, Mr Osipov, was employed by an oil exploration company, International Petroleum Ltd ("**IPL**") as its CEO before two of IPL's directors, Messrs Timis and Sage, decided he should be dismissed.

An Employment Tribunal found that the principal reason for the dismissal was that he had made protected disclosures. It accordingly held that the Claimant had been unfairly dismissed pursuant to s.103A ERA (Part X): that decision was not challenged in the Court of Appeal.

The ET also held that as a result of Messrs Timis and Sage's conduct in relation to Mr Osipov's dismissal, both they and IPL had subjected the Claimant to detriments, contrary to s.47B ERA (Part V), which proscribes "whistleblower detriment" inflicted by co-workers, as well as by the employer itself; and that they were all jointly and severally liable for the losses suffered as result of his dismissal.

Messrs Timis and Sage appealed on the basis that claims for dismissal related detriment under s.47B could only be pursued against IPL; they asserted that s.47B(2) barred any such claim by its exclusion of claims by employees where the "detriment in question amounts to dismissal". The Appellants also asserted that damages arising out of the dismissal could not be recovered in a detriment claim under s.47B. The EAT roundly rejected those arguments. Simler J (as she then was) did not accept the Appellants' interpretation of s.47B(2) which effectively ignored the words in parenthesis; these words made it clear that s.47B(2) only excluded detriment claims amounting to dismissals *within the meaning of Part X*, namely unfair dismissal claims against employers. Simler J also confirmed that detriment claims against individuals within Part V ERA could include losses flowing from dismissal (for a full analysis of the EAT decision see here)

The Court of Appeal decision

The appeal was brought by Messrs Timis and Sage only (the "**Appellants**"). The principal issue in the Court of Appeal was whether it was open to the Tribunal to award the Claimant compensation against the Appellants, as individuals, for the losses occasioned by his dismissal at their behest. Given the importance of the issues, the whistleblower charity Protect (until recently known as Public Concern at Work) sought and was given permission to intervene.

The Court undertook a detailed and helpful overview of the complicated legislative history of the "whistleblower" provisions in the ERA; specifically Part V "Protection from Suffering Detriment in Employment" and Part X "Unfair

Dismissal", which provide for substantially self-contained, albeit largely parallel, regimes governing the rights which they protect.

Under s.47B an employer may be liable by one of two routes: liability for its own act under sub-section (1) and vicarious liability under sub-section (1B). The case turned on the meaning of s.47B(2), which addresses the potential overlap between Parts V and X, it provides:

"…

(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).

…"

The Appellants' submissions focused on the assertion that if the detriment to the employee amounted to a dismissal it was excluded from s.47B. The Appellants sought to argue that the words in parenthesis at s.47B(2) simply defined the word "dismissal" rather than limiting the exclusion to detriments amounting to unfair dismissal (necessarily against the employer).

The Appellants argued that if the Claimant's construction were preferred, it would "undermine the careful demarcation between Part V and Part X" and result in every case of whistleblower dismissal being pursued against the employer under s.47B(1B) (for vicarious liability) as well as, or instead of, under s.103A. In support, the Appellants identified two anomalies:

(1) It would enable claimants to recover compensation for injury to feelings under s.47B, which would not, because of *Dunnachie v Kingston-upon-Hull Council* [2005] 1 AC 226, be available in a claim against the employer under s.103A.

(2) It would allow claimants to avail themselves of the less restrictive test of causation in s.47B.

Nonetheless, the Court accepted the Claimant's submission that what s.47B(2) excludes is a claim *against the employer* for dismissing an *employee* (on whistleblower grounds), and a complaint under sub-section (1A) against an individual is not excluded.

Underhill LJ, acknowledged the anomalies raised by the Appellants, but found that there was no positive statutory intention to prevent the advancement of claims under s.47B where the detriment took the form of dismissal, even if the claim could not be advanced under s.103A. Therefore these anomalies, which may have been overlooked by Parliament, could make no difference to his judgment. In fact, the anomalies would be more extensive and difficult to explain and understand if the Appellants' construction was correct. In particular if the Appellants were right:

(1) Individual co-workers whose unlawfully motivated acts short of dismissal caused the claimant to be dismissed would be liable for those acts (and for compensation for the losses caused by the dismissal) whilst an individual with the same motivation who decides on the actual dismissal would escapes scot-free.

(2) Individuals would be liable for all but the most serious forms of detriment. Therefore it would reduce whistleblower protection by potentially creating perverse incentives for individuals to dismiss, because they would escape personal liability.

(3) The scheme of protection for whistleblowers would be less effective than for victims of other kinds of discrimination and victimisation at work. Under the Equality Act 2010 dismissal is simply another form of detriment for which both the employer and any responsible co-workers are potentially liable: claims are commonly brought against individuals as well

as employers, and occasionally it is the individual who ends up having to pay, either because the employer is insolvent or because it has established a reasonable steps defence.

Despite it being strictly unnecessary given his prior conclusions that the Claimant could recover under s.47B for the dismissal itself, Underhill LJ nevertheless went on to consider the question of whether s.47B(2) placed a barrier to recovery of compensation for losses flowing from a dismissal which was itself caused by a prior act of whistleblower detriment.

Underhill LJ held that s.47B(2) excludes the operation of sub-sections (1) and (1A) where the cause of action *amounts to dismissal within the meaning of Part X* but it cannot be read as referring to or excluding recovery for losses caused by the detriment in question; including those which flow from subsequent dismissal.

The Appellants sought to rely on *Melia v Magna Kansei Limited* [2005] EWCA Civ 1547 (as they had done in the EAT) for the proposition that claims under Part V and under Part X were mutually exclusive and that once the detriment amounted to dismissal, the only route was that provided under Part X. However, Underhill LJ noted that the observations in *Melia* were made in an entirely different context (a claim to recover under Part X for injury suffered prior to dismissal) and well before s.47B was amended to enable claims to be made against co-workers. Unsurprisingly therefore, the scope of individual liability was not discussed.

Practical implications of the decision

As with the EAT decision before it, this decision will be considered a huge win for claimants and a worrying outcome for respondents; this is particularly for individuals in managerial positions, who are the most likely to be in positions similar to that of the Appellants in this case.

As Underhill LJ observed in most whistleblowing and other discrimination cases the issue of the individual liability of a co-worker is of limited practical significance because the employer usually has sufficiently deep pockets. But that is not always so. In this case the employer was practically insolvent, in other cases the employers may be start-ups or SMEs with limited capital and so co-workers may be equally vulnerable to claims.

In any event, whistleblowing claimants would be well advised to consider pursuing claims under both ss.47B (1B) (vicarious liability) and 103A. S.47B affords a lower hurdle in respect of causation and opens the door to an award for injury to feelings. The latter sidesteps an employer's 'reasonable steps' defence under s.47B(1D) and opens the door to orders for reinstatement or re-engagement, as well as the basic award; remedies which are unavailable under s.47B.

Employers should act pre-emptively, to ensure they have taken all reasonable steps to prevent their workers from subjecting co-workers to whistleblowing detriment. This could include putting in place systems to identify potential protected disclosures at an early stage so that they can be properly managed and addressed; and training to increase management awareness of the potential risks they face under s.47B.

This decision will also be of particular significance in cases where the dismissal decision itself is not taken on whistleblower grounds, as was the case in *Royal Mail Ltd v Jhuti* [2018] ICR 982 (subject to the outcome of the pending appeal), now referred to as "tainted information', or 'Iago', cases. Where the employee is dismissed for reasons which arise due to detrimental treatment (e.g. ill health as a result of whistleblowing detriment) the dismissal may still be fair, provided the decision-maker has no improper motivation. However, following *Osipov* a claimant can claim against the individual victimisers (and thus, potentially, against the employer under s.47B(1B)) for the full financial loss suffered as a result of the loss of their job (subject to any issue as to remoteness).

A further interesting point that arises where parties are jointly and severally liable for the same loss under ss.47B and 103A is of the appropriate contribution position between the parties. This issue did not arise in this case because the Appellants were insured and the employer was insolvent. Underhill LJ noted that the EAT in *Sunderland City Council v Brennan* [2012] ICR 1183 held that the Civil Liability (Contribution) Act 1978 does not apply to proceedings in the ET. Therefore it is likely that any dispute as to apportionment would have to be resolved in the civil courts between respondents, with the claimants being able to claim damages in full at the ET from any one of them.

With two decisive decisions on appeal, at the EAT and Court of Appeal, the correct legal position appears very clear. However, this may not be the end of the matter. An application for permission was made to, and rejected by, the Court of Appeal but it of course remains open to the Appellants to renew that application to the Supreme Court itself.

Bruce Carr QC appeared for the successful Respondent, Mr Osipov.

Bayo Randle practises in all areas of employment law and frequently appears in the employment tribunals and civil courts. Bayo has considerable experience acting in discrimination, whistleblowing, unfair and wrongful dismissal, TUPE and pay claims. He advises and appears on behalf of claimants and respondents in Employment Tribunal hearings, as well as contractual disputes in the civil courts. Notable cases include the long running Construction Industry Vetting Information Group Litigation, which was highlighted by The Lawyer as one of the Top 20 Cases to watch in 2016. Bayo regularly writes articles and blogs on issues spanning the full spectrum of employment law.

John Platts-Mills is developing a broad practice in employment law. He advises and appears on behalf of claimants and respondents in preliminary, one-day and multi-day Employment Tribunal hearings, as well as contractual disputes in the civil courts. John is regularly instructed to draft pleadings and witness statements in employment matters.