Neutral Citation Number: [2024] EAT 137

Case No: EA-2023-000492-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 August 2024

Before :

HIS HONOUR JUDGE BARKLEM

- -

Between :

MISS G TREADWELL

Appellant

- and –

BARTON TURNS DEVELOPMENT LTD

Respondent

- -
- -

Mr Jeffrey Jupp KC (instructed by Premier Legal LLP) for the **Appellant**
Mr Nick Bidnell-Edwards (instructed by Guardian Law Limited) for the **Respondent**

Hearing date: 7 August 2024

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JUDGMENT

SUMMARY

Practice and procedure

The claimant asserted in her ET1 that she had been dismissed having by reason of her having made protected disclosures. An ET refused an amendment made some months after the claim was made which sought to add a claim of vicarious liability for detriment in the form of dismissal by the co-worker who dismissed her.

Held: applying **Timis and Sage v Osipov [**2018] EWCA Civ 2321, which held, at para 91.

"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, that is 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."

the amendment should be allowed. The EAT was bound by that decision of the Court of Appeal and was not bound to follow the opposite conclusion reached by the EAT in **Wicked Vision Ltd v Rice** [2024] ICR 675. The cross-appeal was dismissed, the EAT holding that the employment judge was correct in describing the amendments as "re-labelling".

HIS HONOUR JUDGE BARKLEM:

1. In this judgment I will refer to the parties as they were before the Employment Tribunal. This oral judgment follows the hearing of an appeal and cross appeal which arises from a claim brought by the claimant following her dismissal by the respondent through one of its directors, Ms Wyss, on 28 June 2022. The claimant had commenced her employment on 20 January 2022 and consequently had insufficient service to bring a standard unfair dismissal claim. She was an events manager at hospitality premises operated by the respondent.

2. She brought a claim asserting that the true reason for her dismissal was that she had made protected disclosures to Ms Wyss and that her dismissal was automatically unfair pursuant to sections 103A of the **Employment Rights Act 1996** ("the Act"), alternatively unfair under section 98 and/or section 101C of **the Act**.

3. The form ET1 was submitted on 23 November 2022 and shortly before a closed preliminary hearing was due to be heard on 23 March 2023 the solicitors acting for the claimant forwarded a draft amended grounds of complaint. There were four amendments sought. Each amounted to a single sentence at the end of an existing paragraph. Paragraph 9 concerns a report made by Ms Wyss to the claimant concerning what she considered to have been a threat made to her by another employment which Ms Wyss is said not to have taken seriously. The proposed amendment read:

> "It is contended that by her conduct and failure to take the matter seriously Ms Wyss subjected the claimant to a detriment."

Paragraph 12 had made reference to the claimant seeking leave after a very busy period of work following her having made certain disclosures as to the state of the property. The proposed amendment read:

> "It is submitted that her failure to reply to and grant the claimant's plea for time off amounted to a detriment."

Paragraph 13 dealt with matters concluding with the claimant's dismissal, the proposed amendment

reading:

> "It is submitted that by dismissing the claimant Ms Wyss subjected the claimant to a detriment."

Paragraph 16 sought to add to the end of the paragraph setting out the legal basis of the claims brought the fact that she was subjected to detriments under section 47B of the **Employment Rights Act**.

4. A telephone hearing resulted in the employment judge allowing the amendments to paragraphs 9 and 12 but refusing that to paragraph 13. His reasons were set out briefly in writing, these having been sought by the claimant's solicitor at the hearing. I set out those which are relevant. Paragraph 2:

> **"Applying the guidance in *Selkent Bus Co v Moore* [1996] IRLR, the application to amend is granted to allow the claimant to add the additional wording to paragraphs 9 and 10 as set out above. The reason for allowing the amendment is that this is a genuine re-labelling exercise, the claimant relying on the existing pleaded facts in the ET1 and simply adding the label of detriment to them.**
>
> **3. The application to amend to add paragraph 13 is refused. The claimant relies on the decision in *Timis and Sage v Osipov* [2018] EWCA Civ 2321. The reasons for refusing the amendment are:**
>
> **3.1 Section 47B(2) ERA 1996 specifically excludes detriment from the definition of dismissal.**
>
> **3.2 *Osipov* concerns a potential liability of individuals (in addition to the potential liability of employers) for whistleblowing claims. It does not displace the statutory definition.**
>
> **3.3 In so far as it is relied on, the argument that the decision to dismiss (as an act of detriment) can be separated from the act or effects of a dismissal is an argument without substance. The plain wording of the statute is that detriment must constitute something other dismissal."** [sic: I assume the word "than" was inadvertently omitted]

5. Other case management directions followed. From that decision, the claimant appealed and the matter was permitted to proceed to this hearing on the basis that this construction of **Osipov** was arguably wrong. The respondent cross-appealed in relation to the amendments which were allowed, that also being permitted to proceed to a full hearing.

6. At the hearing the claimant was represented by Mr Jupp KC and the respondent by

Mr Bidnell-Edwards. Each had previously served a skeleton argument running to 14 and 10 pages respectively with an authorities bundle running to over 300 pages. I am grateful to both counsel for their focused and helpful submissions. The oral submissions took two full hours with my being taken through the relevant authorities in considerable detail. As a consequence, the three hours rather optimistically allowed for the appeal to include the preparation and handing down of judgment proved insufficient and I am delivering this ruling some days later.

7. I turn first to the appeal. In **Osipov** the Court of Appeal, Underhill LJ giving the only judgment, upheld the judgment of Simler P, as she then was, in turn upholding an Employment Tribunal in which two directors of a company which dismissed the complainant were held jointly and severally liable for losses suffered by the claimant in respect of his dismissal. Section 47B(2) of the ERA expressly excludes dismissal within the meaning of Part X of **the Act** from being a detriment suffered by an employee. However, **Osipov** held at paragraph 91(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, that is 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."**

8. Following the decision under appeal of the Employment Tribunal, the EAT, Bourne J, sitting alone in **Wicked Vision Ltd v Rice** [2024] ICR 675 ("Wicked Vision") held that an amendment should not be permitted to include concurrent claims of automatically unfair dismissal under section 103A and a detriment claim under section 47B in respect of the same dismissal where the employer is not insolvent and where there is no real distinction between the dismissing officer and the company. In so doing, he sought to distinguish **Osipov**. I am told that the Court of Appeal has recently granted leave to appeal the **Wicked Vision** decision.

9. Mr Bidnell-Edwards spent considerable time taking me painstakingly through the reasoning of Underhill LJ in **Osipov** effectively arguing that to allow a claimant to bring a claim based on its

vicarious liability for an employee would render section 47B(2) otiose and the decision should be regarded as applicable only to a situation where, as was the case in **Osipov** - by the time it reached the Court of Appeal at any rate - the employer was insolvent. He stressed the fact that unlike **Osipov**, this is not a case in which the claimant has brought any claim against her co-worker, Ms Wyss, and urges me to follow the decision in **Wicked Vision**. That is greatly to foreshorten his well-structured submissions but, with respect to him, I do not think it is appropriate in this judgment to seek to analyse the reasoning of the case and/or to explore any underlying reservations expressed by Underhill LJ which might detract from or limit the scope of what seem, in my judgment, to be unambiguous words used in paragraph 91.

10. I also do not consider it necessary to say other than that I consider that **Osipov** binds me as a decision of the Court of Appeal and to that extent I am not bound to follow **Wicked Vision**, nor even to regard it as persuasive authority. In my judgment, and applying **Osipov**, the employment judge erred in law in holding that that case had the effect which he contended for and he should not have refused the amendments on that ground. I will deal with disposal after considering the cross appeal.

11. The sole ground is that the tribunal erred in regarding the amendments as a re-labelling exercise. It is submitted that the amendments failed to plead expressly that any disclosures or particular disclosure had caused either of the detriments, neither was vicarious liability of the respondent for the actions of Ms Wyss pleaded. It is said that even if the amendments are interpreted such that they allege a causal connection between the protected disclosures and the two detriments, they should have been recognised as a substantial change and not a mere re-labelling. Mr Bidnell-Edwards expands this at paragraphs 20 and 21 of his skeleton argument to specify the individual defects in pleading in causation in each of the two amendments arguing in each case that the single sentence amounts none the less to a substantial change and not a re-labelling.

12. It is clear from the case law, notably Selkent referred to by the employment judge, as

restated relatively recently by HHJ Tayler in this court in **Vaughan v Modality Partnership**, UKEAT/0147/20/BA that in considering whether to grant an amendment the focus ought to be on the balance of injustice and hardship, the EAT should be slow to interfere with the case management decision. I bear in mind too the overriding objective specifically dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoiding unnecessary formality and saving expense. It is clear to me that the amendments as drafted carry a clear and necessary implication that what is being claimed is vicarious liability on the part of the respondent for the act of Ms Wyss and I reject the cross appeal in so far as it maintains the contrary.

13. I also agree with Mr Jupp that each, too, is simply a re-labelling of matters which precede them in the relevant paragraphs. Whilst acknowledging that the amendments which the judge permitted could have been better pleaded, this is a case which must be seen as being very much towards the lower end in terms of complexity that tribunals deal with. There are some straightforward disputes of fact but little in terms of legal complexity. At the start of the hearing the tribunal will be able readily to discern and set out the issues and if that involves tweaking the words of the pleading, that is something which happens on a daily basis in employment tribunals without difficulty being caused. No issues of prejudice or hardship arise and I therefore dismiss the cross appeal.

14. Dealing with the **Osipov** amendment, it seems to me that the same principles apply in relation to Selkent. The proposed amendment was similarly a re-labelling of the existing claim to add the section 47 claim. Had the judge not erred in his interpretation of **Osipov**, he would, in my judgment, have been bound to allow it. Under the principles in **Jafri v Lincoln College** 2014 EWCA Civ 449, I therefore make an order that the proposed amendment to paragraph 13 is allowed.

15. I add this coda: In practical terms the only difference in allowing the paragraph 13 amendment is likely to be the value of any injury to feelings award to the claimant in the event that

she succeeds in her claims of having been unfairly dismissed by reason of having made protected disclosures.

16. The final hearing date set by the employment judge at the hearing at which the order under appeal was made, January 2024, has passed without, I infer, any hearing having taken place. It would be surprising if the appeal in **Wicked Vision** has not been determined by the time the eventual hearing of this case takes place following the outcome of this appeal. However, it has not been and the claimant succeeds, an obvious solution would simply be to postpone the hearing of any relevant element of remedy until that case has been finally determined.