

Employers continue to be vicariously liable for “detriment of dismissal” claims brought by employee whistleblowers, for now, at least

The Court of Appeal has ruled that *Timis and Sage v Osipov* binds Employment Tribunals to permit claims brought by employee whistleblowers for the “detriment of dismissal” against co-workers and also against employers on a vicarious liability basis but only on the basis of precedent. They disagreed with the reasoning in *Osipov* and the question may now go to the Supreme Court. For now though this means employees complaining that they have been dismissed for whistleblowing only have to meet a lower legal threshold to succeed and can sue managers in an individual capacity.

What protections do whistleblowers have in the workplace?

Since 1998, whistleblowers at work have been protected from dismissal (employees only) and detrimental treatment (employees and workers). When the law was first introduced, only detrimental treatment meted out by the employer was covered. Further, if the detrimental treatment in question amounted to a dismissal, an exclusion clause in the law meant that employees (but not workers) could not frame it as a detriment claim. Instead, they had to pursue an unfair dismissal claim.

This was significant not least because the threshold for succeeding in a detriment claim is lower than in a dismissal claim. In other words it was harder for a claimant to complain about being dismissed than otherwise being treated unfavourably for being a whistleblower.

In 2013, detriment protection was expanded to cover detrimental treatment committed by co-workers. This change meant that a co-worker could be personally liable, and the employer could be vicariously liable for the actions of the co-worker (although the employer had a defence if it could show that it had taken "all reasonable steps" to prevent the detrimental treatment). However, the exclusion clause which prevented employees from bringing detriment claims about dismissal was left unchanged.

In 2018, in the landmark case of *Timis and Sage v Osipov (Osipov)* in which BDBF acted for the successful Claimant, the Court of Appeal considered whether an employee was entitled to bring a whistleblowing detriment claim against a co-worker, where the detriment was the dismissal, and where the compensation sought included loss of earnings flowing from the dismissal. In that case the employee did not claim that the employer was vicariously liable for that detriment because the employer was in administration.

The Court of Appeal, agreeing with the Employment Appeal Tribunal (**EAT**) and the Employment Tribunal, ruled that the purpose of the law was to protect whistleblowers, and, therefore, it was appropriate to construe the exclusion clause in such a way as to provide protection rather than deny it.

The Court said the exclusion clause only prevented employees

from bringing direct detriment of dismissal claims against an employer. However, it did *not* prevent detriment of dismissal claims against *co-workers*. Nor did it prevent the employer from being vicariously liable for such a claim (albeit that this was not a live issue before the Court because the employer in that case was insolvent). The Court concluded that if employees were prevented from bringing such claims by the exclusion clause, this would lead to an unsatisfactory situation where workers (e.g. independent contractors or LLP members) could bring such claims, but employees could not and that the employee who was treated badly at work but not dismissed had a lower legal threshold to meet than the employee who had suffered the ultimate form of retaliation: dismissal.

The Court acknowledged that its interpretation did not produce “*a particularly elegant result*” insofar as it meant that a dismissed whistleblower who was an employee could claim the employer was directly liable for their dismissal under the unfair dismissal provisions and vicariously liable for the detriment of dismissal under the detriment provisions. The inelegance was inherent in the fact that the causation test differs between the two claims (being higher in unfair dismissal claims), as does the possible compensation (with no injury to feelings award available in an unfair dismissal claim). However, the Court said these “*awkwardnesses*” were insufficient to justify a construction that would result in more serious anomalies, and which would be contrary to the underlying policy of the law.

What happened in these cases?

The key facts of *Rice v Wicked Vision Ltd* (**Rice**) and *Barton Turns Developments Ltd v Treadwell* (**Treadwell**) are the same.

Both claimants were dismissed allegedly after having blown the whistle. Both brought unfair dismissal claims against the employer. As the litigation unfolded, both sought to amend their claims, arguing that they had been subjected to the detriment of dismissal by their co-workers and that their employers were vicariously liable for such detriments. In neither case did the claimants seek to bring the detriment of dismissal claim against the co-workers as individual respondents. The aim of the amendment in each case was presumably to benefit from the lower threshold for liability in detriment claims. In *Rice*, the employer opposed the amendment on the basis that a vicarious liability claim for detriment of dismissal could not proceed where no claim had been made against the co-worker.

Decisions of the Employment Tribunal

In *Rice*, the Tribunal took a wide view of *Osipov*, holding that it permitted the amendment. It also held that it was *not* necessary for a detriment of dismissal claim to have been brought against a co-worker in order to bring the vicarious liability claim against the employer.

In *Treadwell*, the Tribunal refused the amendment on the basis that the exclusion clause meant that a detriment claim against an employer had to be about something *other than* a dismissal. The Tribunal's view was that the decision in *Osipov* was confined to the potential liability of individuals only and the exclusion clause prevented a claim that the employer was vicariously liable for the detriment of dismissal. As such, the Tribunal took a narrower view of *Osipov* than the Tribunal in *Rice*.

Decisions of the EAT

In *Rice*, the employer appealed to the EAT, again arguing that the claim could not proceed without a concurrent claim against the co-worker. The EAT considered that it was not necessary to bring a detriment claim against the co-worker. However, the EAT overturned the decision of the Tribunal, concluding that the exclusion clause prevented the vicarious liability claim against the employer. Notably, the EAT said it would be odd if Parliament had banned detriment of dismissal claims directly against employers but, at the same time, allowed them to be vicariously liable for the detriment of dismissal by a co-worker, since in virtually every case a dismissal has to be executed by a co-worker. As such, the EAT took a narrow view of *Osipov*, holding that it only determined that detriment of dismissal claims may be brought against co-workers.

In *Treadwell*, the EAT allowed the employee's appeal, taking a wide view of *Osipov* as meaning that detriment of dismissal claims could be brought against co-workers *and* against employers on a vicarious liability basis. It held that the exclusion clause only excluded direct detriment of dismissal claims against employers.

Unsurprisingly, both decisions were appealed to the Court of Appeal, and the appeals were heard together.

What did the Court of Appeal decide?

Delivering a unanimous judgment, the Court of Appeal ruled that *Osipov* was binding authority for the proposition that employers could be vicariously liable for detriment of

dismissal claims. Accordingly, the Court ruled that the amendments should have been allowed in both claims. However, the Court reached this decision with a great deal of reluctance, suggesting that a further appeal to the Supreme Court may lie ahead.

The meaning of the exclusion clause

The Court's reluctance was rooted in the fact that it considered the exclusion clause was unambiguous in preventing detriment claims about dismissal. Where a detriment amounts to a dismissal within the meaning of the legislation, the exclusion clause disapplied the *entire* detriment provision, meaning that detriment of dismissal claims are not possible against *anyone*, whether employer or co-worker.

The Court rejected the argument that "dismissal" only covers dismissals by the employer, and that there exists the possibility of a dismissal by a co-worker, which would sit outside the exclusion clause (because it would not be a "dismissal" within the meaning of the legislation). The Court rejected this approach for three reasons:

- First, the Court rejected the argument that the exclusion clause only applied to dismissals by the employer as meaningless because it said a dismissal is *always* the act of the employer – it ends the contract between the employer and employee. Where the employer is a limited company the dismissal can only ever be effected by a co-worker, and the Court did not accept

there was a relevant legal distinction between a dismissal by the employer and a dismissal by a co-worker.

- Second, the Court observed that under the vicarious liability provisions anything done by a co-worker is treated as having been done by the employer. The legal effect of this is that the employee is, therefore, dismissed by the employer and, in turn, that act will “amount to a dismissal” within the meaning of the legislation and so the exclusion clause applies.
- Third, the question is not about primary or vicarious liability, the correct question is simply: what does the act amount to? If it amounts to a dismissal then the employer is liable for it and *all* detriment claims about the dismissal are barred, including against a co-worker.

The decision in Osipov

Although it considered the exclusion clause was abundantly clear, the Court had to grapple with the decision in *Osipov*, which had permitted detriment of dismissal claims. The Court disagreed with the decision in *Osipov* for several reasons including:

- It ignored the clear and unambiguous statutory wording and improperly downplayed the statutory text in favour

of a perceived purpose.

- It wrongly assumed that Parliament or the draftsman made mistakes.
- It misconstrued the statutory purpose and ignored the fact that Parliament deliberately chose to have distinct remedial schemes for employees and workers.
- It wrongly treated dismissal by a co-worker as distinct from dismissal by an employer.
- Its conclusion that the exclusion clause only barred direct detriment of dismissal claims against an employer because the “identical remedy” of unfair dismissal was available was fundamentally flawed.

However, the Court said that, despite its own construction of the legislation, it was bound by the decision in *Osipov*. Importantly, it concluded that *Osipov* had ruled that detriment of dismissal claims are permissible against co-workers and that employers may be vicariously liability for such claims (thus taking a wide view of the decision unlike the Tribunal in *Treadwell* or the EAT in *Rice*). The Court said it was bound by the doctrine of precedent to give the same interpretation to the exclusion clause as was given in *Osipov*, even though the context in the present cases was slightly different.

Accordingly, despite the Court’s own view of the meaning of the law, it ruled that the exclusion clause did not prevent detriment of dismissal claims against the employer on a

vicarious liability basis. Therefore, the employees succeeded, and their claims were allowed to proceed.

The Court observed that it was “plainly unsatisfactory” that the construction of the legislation had produced conflicting decisions at three levels of court, but noted that this could only be resolved by the Supreme Court or through a change to the legislation.

What does this decision mean for whistleblowers and employers?

This decision underlines the impact and importance of *Osipov*, for now at least. It continues to bind Tribunals to permit detriment of dismissal claims against co-workers *and* against employers on a vicarious liability basis. The exclusion clause does not bite to prevent either type of claim. Further, as the Court identified in this case, no concurrent claim against a co-worker is needed in order to bring a vicarious liability claim.

Of course, the Court of Appeal has fired a warning shot about the validity of the decision in *Osipov*. In light of the Court’s profound misgivings about *Osipov*, it seems likely that permission to appeal to the Supreme Court would be given if sought. Whether there will be a further appeal remains to be seen (and it should be noted that Wicked Vision Ltd is currently in administration). However, even if there is no further appeal in this case, it seems inevitable that the point will arise in another case in due course. And when it does, there is a good chance that we will see a “leapfrog appeal” from the EAT to the Supreme Court, given that the remedies available to whistleblowers is a matter of general public importance.

In the meantime, it is business as usual for whistleblowers and employers. Employees who are dismissed for having blown the whistle should continue to bring unfair dismissal claims against their employer and should always explore the possibility of detriment of dismissal claims as well, pleading them where appropriate.

Employers wishing to avoid vicarious liability for such claims should take all reasonable steps to prevent such detriment. In practice, this will mean taking steps to ensure that anyone involved in the dismissal of a whistleblower is not materially influenced by the whistleblowing (essentially, the causation test in detriment claims). Codes of conduct should set out the standards expected from managers and emphasise the importance of honest and ethical behaviour in all dealings, and the consequences of failure. Ideally, a programme of whistleblowing training should support and reinforce this. In some sectors, relevant training may be mandatory. For example, the FCA requires financial services firms to provide tailored whistleblowing training to various stakeholders, including managers, which should explain that victimisation of whistleblowers is prohibited.

[\(1\) Rice v Wicked Vision Ltd \(Protect Intervening\); \(2\) Barton Turns Developments Ltd v Treadwell](#)

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