Amendment of claim to include a claim of vicarious liability for the detriment of deciding to dismiss

By Colin McDevitt

3PB Barristers

Treadwell v Barton Turns Development Limited [2024] EAT 137

HHJ Barklem, August 7th 2024

Initial claim omitted a detriment claim

1. We know, from Osipov (*Timis and Sage v Osipov* [2018] EWCA Civ 2321), that a claimant may bring a claim against a former colleague for that colleague's decision to dismiss the claimant. The claim may be brought personally against the former colleague or against the ex-employer under the doctrine of vicarious liability. Such a claim is for a detriment and it is separate to any other claim for automatic unfair dismissal brought against the employer for a dismissal by reason of having made a protected disclosure.

2. However, in bringing her claim, the Claimant claimed only for s.103A ERA 1996 automatic unfair dismissal. She did not bring a detriment claim under ss.47B(1A) and (1B) ERA 1996.

The amendment application in the Employment Tribunal

3. At the first closed preliminary hearing, 4 months after lodging her claim with the Tribunal, the Claimant sought to amend her claim to include a claim that she also suffered a detriment in that a former colleague had been a party to the decision to dismiss, for which the employer was vicariously liable. The Claimant relied upon Osipov. At first instance, the Tribunal refused the amendment stating, in part, that

"… 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 [than] dismissal".

The appeal

4. HHJ Barklem referred to paragraph 91(1) of Underhill J's judgment in the Court of Appeal in Osipov,

> "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."

5. HHJ Barklem was referred to the recent EAT case of *Wicked Vision Ltd v Rice* [2024] ICR 675 a decision of the Employment Appeal Tribunal which 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. What decision did HHJ Barklem make, given the apparent conflicting authorities?

Wicked vision was not followed

6. HHJ Barklem declined to follow *Wicked Vision*. He was of the view that he was bound by Osipov as Court of Appeal authority and that he was not obliged to even regard Wicked Vision as persuasive authority.

Wicked vision is on the way to the Court of Appeal

7. As observed by HHJ Barklem, permission to appeal the EAT decision in Wicked Vision has been granted.

Disposal of the appeal

8. When deciding on an application to amend, the focus should be on the balance of injustice and hardship (following HHJ Tayler's decision in *Vaughan v Modality Partnership*, UKEAT/0147/20/BA). HHJ Barklem decided that the amendment application was re-labelling of facts that appeared in the ET1. He also observed that the only practical difference in allowing the claim to be argued as a detriment rather

than as an unfair dismissal claim was the value of any injury to feelings award. HHJ Barklem suggested that any remedy aspect of the claim could be postponed until after Wicked Vision had been determined in the Court of Appeal.

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Colin McDevitt

Barrister
3PB

0330 332 2633
Colin.mcdevitt@3pb.co.uk