

# Whistleblowing and Discrimination Claims involving Directors, Partners and LLPs

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# Overview

- Cases where an innocent decision-maker has acted upon tainted information;
- Complaints of detriment which amounts to dismissal;
- Personal liability of Directors, Partners etc;
- Recovery of losses consequent on pre-dismissal/pre-termination detriment.

# Tainted Information Cases

- Discriminatory dismissals
- Discriminatory decision-making – detriment short of dismissal
- Whistleblowing dismissals
- Whistleblowing detriment
- Detriment claims – separate acts
- Dismissal claims – different approach for whistleblowing dismissals

# Reynolds v CLFIS (UK) Ltd

[2015] EWCA Civ 439

- Separate acts
- *“Supplying information or opinions which are used for the purpose of a decision by someone else does not constitute participation in that decision”*
- Discriminatory acts cannot be attributed to an innocent decision-maker
- Note, not a case of joint decision-making
- In joint decision-making, discriminatory motivation of one of the decision-makers would taint the decision

# *The Commissioner of Police of the Metropolis v Denby*

*UKEAT/0314/16/RN*

- Ability to amend claims to add the correct decision-maker.
- An example of sole and joint decision-making.
- CLFIS, *“should not become a means of escaping liability by deliberately opaque decision making which masks the identity of the true discriminator. Where a claimant is for good reason unable readily to identify which individual is responsible internally within the employing organisation for an act of discrimination, the claimant may, as this case demonstrates, sometimes be permitted to amend during the hearing once the correct person is, or persons are, identified from the evidence.”*

# *Royal Mail Group Ltd v Jhuti*

*[2017] EWCA Civ 1190.*

- Whistleblowing dismissal under section 103A
- Motives of line manager could not be attributed to innocent decision-maker
- Examine the mental processes of the person deputed to perform the employer's functions
- Four possible scenarios:
  - False evidence by a colleague with no managerial responsibility
  - Manipulation by line manager without responsibility for the dismissal
  - Manipulator with a formal role in the decision-making
  - Manipulator at or near the top of the hierarchy

# Dr N Malik v Cenkos Securities Plc

UKEAT/0100/17/RN

- In order to succeed with the chain of command argument, he would have had to argue that there were joint decision-makers involved or that there were separate acts of detrimental treatment by others
- *“The case of Royal Mail Group v Jhuti does not assist the Claimant for the simple reason that that was a dismissal case and not one relying upon detriment. One can attribute the motivation of someone other than the dismissing officer to the employer in a dismissal case in some circumstances. That is because the liability for the dismissal lies only with the employer, and the injustice which concerned the Court of Appeal in CLFIS does not arise.”*

# Dismissal/Detriment Distinction

- EqA – dismissal and detriment are separate types of discriminatory acts
- ERA – separate whistleblowing regimes for dismissal and detriment
  - section 103A – automatic unfair dismissal
  - section 47B(1) - detriment claim against employer
  - section 47B(1A) – detriment claim against co-worker
  - section 47B(1B) – vicarious liability for detriment by co-worker
  - section 47B(1D) – reasonable steps defence for detriment claims by co-workers

# Impact of distinction

- Different causation tests for detriment and dismissal
- Different remedies
- Reasonable steps defence in relation to vicarious liability for co-worker detriment
- Detriment claims more advantageous, particularly after recent cases concerning detriment which amounts to dismissal and dismissal consequent on prior detriment

# The impact of (1) Timis (2) Sage v Osipov

[2018] EWCA Civ 2321.

## Section 47B(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)”*

- Exclusion concerns dismissal claims against employers – s103A
- Does not preclude complaints against co-workers for detriment amounting to dismissal

# The impact of Roberts v Wilsons Solicitors LLP & Others [2018] EWCA Civ 52

- Ability to recover post-termination losses attributable to earlier acts of detrimental treatment
- Influenced by **CLFIS** and **Jhuti**

# Part V ERA 1996 and Detriment Claims

## [47B Protected disclosures]

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

# Personal Liability and the ERA 1996

- *Fecitt v NHS Manchester* [2012] ICR 372
- Enterprise and Regulatory Reform Act 2013

# Personal liability of co-workers

- (1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
- (a) by another worker of W's employer in the course of that other worker's employment, or
  - (b) by an agent of W's employer with the employer's authority,
- on the ground that W has made a protected disclosure.

# Vicarious Liability of Employer

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

# Reasonable Steps Defence

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

- (a) from doing that thing, or
- (b) from doing anything of that description.

# Defences available to co-workers

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).]

## s.47B(2): Excludes Dismissal by an Employer

(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]).

- So personal liability of a co-worker is wider than the liability of an employer.

# ET's Jurisdiction

## 48 Complaints to [employment tribunals]

(1) An employee may present a complaint to an [employment tribunal] that he has been subjected to a detriment in contravention of section [43M,] 44, 45, [46, 47[, 47A[, [47C(1)] *or* [47E] [, 47E[, 47F or 47G]]]]].

.....

[(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.]

# Remedies

## 49 Remedies.

(1) Where an [employment tribunal] finds a complaint [under section 48(1), (1ZA), (1A) or (1B)] well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

# Cap – but meaningless

[(6) Where—

(a) the complaint is made under section 48(1A),

(b) the detriment to which the worker is subjected is the termination of his worker's contract, and

(c) that contract is not a contract of employment,

any compensation must not exceed the compensation that would be payable under Chapter II of Part X if the worker had been an employee and had been dismissed for the reason specified in section 103A.]

# Territorial Scope of s.47B(1A)

- *FCO & Ors v Bamieh [2019] EWCA Civ 803*
- Modified *Lawson v Serco* test

# Personal Liability and the Equality Act

## 109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

# Reasonable Steps Defence

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

# Liability of employees and agents

**110** (1) A person (A) contravenes this section if—(a) A is an employee or agent, (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if—(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and (b) it is reasonable for A to do so.

# Instructing, causing or inducing contraventions

**111** (1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

...

(6) For the purposes of subsection (5), it does not matter whether (a) the basic contravention occurs; (b) any other proceedings are, or may be, brought in relation to A's conduct.

...

# No Actual Contravention Required

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

# Aiding contraventions

**112** (1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

(2) It is not a contravention of subsection (1) if—(a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and(b) it is reasonable for A to do so.

# Examples of Personal Liability

- Decision makers on grievance/appeals etc.;
- Non-executive Directors;
- External Solicitors and Counsel;
- Authors of guidance or report applied or relied on by an employer.

# Caused or Induced: Recent Examples

- *Davda v Institute and Faculty of Actuaries, ET, 2207536/2017*

# Considerations for Claimants

- Detriment prior to dismissal from which significant financial losses might flow? (see below)
- Detriment subsequent to dismissal, from which significant financial losses might flow? (see below)
- NB S.47(1B) ERA 1996, just because detriment claims don't have to pursue against individuals.

# Vicarious Liability of Employer

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

# Considerations (2)

- Other reasons why claim against employer might not succeed:
  - Insolvency (e.g. *Osipov* where IPL was insolvent);
  - LLP dissolved (e.g. *Murray v Maclay, Murray & Spens LLP*);
  - Joint decision making;
  - Tainted information cases e.g. *Jhuti*, *CLFIS*.
- Different remedies available.

# Considerations for Respondents

- Reputational concerns;
- Regulatory concerns;
- Need for separate legal representation;
- Appropriate insurance policies e.g. Directors' insurance.

# Tactics for Respondents

- Obtaining proper particulars of any detriment claim;
- Strike Out;
- Substantive PH on knowledge of protected disclosure and/or knowledge of disability;
- Substantive PH on time points;
- Privacy applications;
- Accept Vicarious Liability;
- Costs pressure.

# Impact of Distinction on remedies available

- Act of prior detriment before termination? (*Wilson*).
- Dismissal not on Unlawful Grounds? (*Jhuti*)
- Dismissal Claims vs Co-workers? (*Osipov*)

# Example of Prior Detriment

*'Take the case of an employee who develops a serious long-term mental illness as a result of being victimised by his or her colleagues for having made a protected disclosure, with the result that the employer has eventually to dismiss them on ill-health grounds. Assuming that the decision-maker has no improper motivation the dismissal is likely to be fair, but it would be extraordinary if the claimant were not entitled to claim against the individuals who victimised him or her (and thus potentially against the employer under sub-s (1B) for the full financial loss suffered as a result of the loss of their job (subject to any issue as to remoteness).'*

# *Roberts v Wilsons Solicitors*

*[2018] ICR 1092*

*'...[S]ection 49 governs the basis on which compensation may be awarded for a breach of the relevant provisions by the tribunal. The fundamental basis for the exercise of that jurisdiction is that the compensation should be "just and equitable". As a matter of law the tribunal is now in fact bound to apply principles of causation which are familiar to lawyers who are steeped in the common law. What the legislation does require is that, in arriving at its decision about whether compensation is just and equitable, the tribunal must have regard to a number of factors. One of those factors is whether the loss claimed is "attributable to" the breach.'*

# Chain of Causation

*'The fact that the claimant's purported resignation was not effective for the purposes of LLP law does not determine the question of what loss was attributable to the unlawful detriments on which he relied. If the unlawful 'victimisation' of the claimant made his position untenable and led him to withdraw his labour, thereby exposing him to the likelihood of expulsion, it is hard to see why that should as a matter of law (or inevitable fact) be regarded as too indirect or unnatural a consequence to attract compensation in accordance with the statutory test, provided it is satisfied.'*

# *Royal Mail Group v Jhuti [2018] ICR 982*

Underhill in CoA at [78]:

*'there is thus, on the arguments advanced before us, no obstacle in principle to the claimant recovering compensation for dismissal consequent on detriment.'*

## 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]).

## *Timis & Or v Osipov [2019] IRLR 52*

Underhill at [84]:

*'it follows that I would hold that s.47B(2) places no barrier to recovery of compensation for losses flowing from a dismissal which was itself caused by a prior act of whistle-blower detriment. For the avoidance of doubt, such compensation would be subject to the usual rules about remoteness and discounting for contingencies (including the contingency that the employment might have terminated in any event).'*

# When Need to Bring Detriment Claims

- Dismissal Claims vs Co-workers – No – see *Osipov*;
- But still need to pursue a separate detriment claim (although not necessarily a separate claim against a co-worker) if:
  - dismissal not on unlawful grounds,
  - Losses flow from act of prior detriment,
  - Losses flow from act of subsequent detriment.

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