TIMIS V OSIPOV: PERSONAL LIABILITY? DECISION MAKERS AND ADVANCES IN WHISTLEBLOWING

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SUMMARY

Much has been written recently about employment status including bogus self-employment, atypical workers, zero hours contracts and about vicarious liability in the law of torts and employment law. The case under discussion does not deal with these issues but with related interesting issues involving categorisation of working people into employees and workers so as to determine the remedy for whistleblowing under statute and with whether liability in that area of law can be both direct and vicarious. To understand the case one needs to appreciate that the law of unfair dismissal as set out in the Employment Rights Act 1996 applies only to 'employees' and therefore both those classified as 'workers' and as independent contractors do not; however, workers, though not independent contractors dismissed solely or principally for one of the reasons which would be potentially unfair (prima facie invalid) may have a different remedy when the claim is one whistleblowing. In relation to vicarious liability under the relevant statute, the Employment Rights Act 1996, there was on the facts of the case to be discussed no doubt that the employers were vicariously liable, but could they also be directly liable? The authority below demonstrates that because of the scheme of the Act both that a worker dismissed for whistleblowing has a remedy not for unfair dismissal because he is not an employee but for 'detriment', the detriment being put through a disciplinary process. This preserves the law since 1 January 1972 that remedies for unfair dismissal are granted only to those classed as employees. In respect of vicarious liability, as this commentary shows, both direct and vicarious liability are available against employers in a whistleblowing case. The consequences of these decisions are noted at the end.

FACTS

The issues of whistleblowing and the personal liability of individuals was considered by the Court of Appeal in *Timis & another v Osipov*.[1] Alexander Osipov was engaged by International Petroleum Ltd (IPL), an oil exploration company, as its Chief Executive Officer. Mr Timis was its single largest shareholder and Mr. Sage was the company's Chairman. Osipov had been working at IPL for approximately three days when he discovered wrongdoing in contracts involving the Republic of Niger. He approached two of the directors at IPL, Timis and Sage, and raised his concerns. Following this discussion Timis and Sage brought about the dismissal of Osipov through a (sham) disciplinary procedure before actioning a summary dismissal.

ISSUES FOR THE COURT OF APPEAL

The Employment Tribunal, as confirmed by the Employment Appeal Tribunal, held the principal reason for the dismissal of Osipov was his making protected disclosures (often referred to as whistleblowing). The Public Interest Disclosure Act 1998 (PIDA), which amends the Employment Rights Act 1996 (ERA), safeguards individuals who make 'protected disclosures' and then have their contracts of employment terminated as a result. This protection

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[1] *Timis & another v Osipov* [2018] EWCA Civ 2321; [2019] I.R.L.R. 52.

further extends to situations where the individual suffers a detriment at work and applies here not just to employees and workers, but also to independent contractors (s. 43K of the 1996 Act) and agency workers. Detriment may include action such as preventing the individual gaining promotion or limiting their opportunity to undertake training.

Protection under PIDA applies where a 'qualifying disclosure' is made in the public interest and relates to a 'relevant failure'. A relevant failure may involve a criminal offence; a breach of a legal obligation; a miscarriage of justice; danger to an individual's health and safety; damage to the environment; or the deliberate concealment of information relating to one or more of the failures just listed. Failures need not occur in the UK to qualify, nor do they have to be based on the English law. The whistleblower must have reasonable belief that the information they disclose relates to one of the relevant failures and the belief must be honestly held, albeit it is not required to be correct. The protected disclosure must be made to a 'prescribed person' (somebody beyond the organisation as prescribed by the Secretary of State: the list is updated at least annually); or to the employer of the whistleblower or to another person the whistleblower believes to be solely or mainly responsible for the failure.

For the purposes of *Osipov*,[2] the disclosure was made to the two directors who Osipov considered responsible for the wrongdoing. The ERA protects the individual from being subjected to a detriment by another worker of the employer or an agent acting on the employer's authority (s,47B(1A)(a) and s.47B(1A)(b)) – for example a manager, member of human resources or a director. Where the individual is so subjected to a detriment, this is considered to be done also by the individual's employer (s.47B(1B)). The limitation to holding another worker liable for the detriment experienced by the whistleblower is where that detriment amounts to dismissal (s.47B(2)). Employers are thus liable under s.47B in one of two routes: first, for their own act (s.47B(1)) and, secondly, vicariously under s.47B(1B). An employer may present a defence of having taken reasonable steps to prevent the detriment (under s.47B(1D)) but this is only available to claims made under s.47B(1A).

Osipov, who was as stated above an employee was held to have been unfairly dismissed by IPL in accordance with ERA s.103A. This was not an issue of concern for the Court of Appeal. At first instance, the Tribunal had held that by their conduct Timis and Sage had subjected Osipov to one or more detriments contrary to s.47B as individuals employed by the same employer (and thus by the employer itself). They were jointly and severally liable with IPL for the losses suffered by Osipov. The amount in damages suffered by Osipov, on the basis of his loss of future earnings, was a little over £2 million. The Court of Appeal was tasked with determining if it was open to the Tribunal to award compensation against Timis and Sage for the losses occasioned by the dismissal of Osipov. Osipov had only been employed for a matter of days by IPL before his discovery of the wrongdoing in the company and bringing this to the attention of Timis and Sage. Osipov did not have the required continuity of service, two years, to qualify for 'ordinary' unfair dismissal protection (having been employed for only ten days before his dismissal), but as he was claiming dismissal due to a protected disclosure, such action constituted an automatically unfair reason to dismiss for which there was no such qualifying period. This would have allowed a claim against the employer. However, being privy to the details of IPL's financial affairs, Osipov was aware that the company would not remain solvent for the foreseeable future. He therefore sought damages from Timis and Sage directly, knowing that they had directors' insurance which would cover the full amount of his claim. Both directors argued that they could not be liable for Osipov's compensation due to the

[2] *Timis & another v Osipov* [2018] EWCA Civ 2321; [2019] I.R.L.R. 52.

application of s.47B(2). However, Osipov's claim was based on the directors having instigated the disciplinary procedure which led to the dismissal, not the dismissal decision itself. The Court of Appeal explained that, according to the effects of the Enterprise and Regulatory Reform Act 2013 s.19, which amended s.47B, individual co-workers are, by virtue of s.47B(1A) made personally liable for the acts of the whistleblower's detriment done by them.[3] The Court continued that whilst this part of the Act may have had as its principal purpose a route to the vicarious liability of the employer, it nonetheless rendered an individual liable in his or her own right regardless of the liability of the employer. Timis and Sage were left personally responsible for Osipov's compensation.

IMPLICATIONS OF THE JUDGMENT

For the whistleblower, there may be advantages for establishing the personal liability of the individual decision-maker. Beyond the satisfying effect of holding an individual to account personally for their actions and the negative impacts felt by the complainant, there are practical advantages for individuals suing individuals. Whilst s.47B(2)(b) precludes an individual whistleblower from seeking redress against an individual where the detriment in question is a dismissal, any action short of this *will* enable the whistleblower to seek such a remedy. For protection against an unfair dismissal on this basis, the Tribunal will assess the principal reason for the dismissal and this must be whistleblowing. However, in relation to a claim of detriment against an individual, a lower threshold applies and whistleblowing must simply be a factor in the detrimental action, not necessarily the principal reason. The tactic of holding individuals accountable can also help to apply pressure on an employer to settle the claim. The prospect of a director (for example) being personally accountable for compensation may encourage that director to settle the claim through company funds rather than face the possibility of losing the claim and having to settle through personal funds. Further, whilst recovery for injured feelings is unavailable in unfair dismissal cases (*Dunnachie v Kingston-upon-Hull Council*),[4] compensation is available for injury to feelings following a detriment due to a protected disclosure (the Court of Appeal choosing to proceed on the basis that *Virgo Fidelis Senior School v Boyle*[5] was correctly decided rather than in *Gomes v Higher Level Care Ltd*).[6]

Finally, what might an employer do in relation to this development in whistleblowing? Some complainants may not appreciate the differences in approaches regarding the limitation periods for claims. It is well known that the claim for unfair dismissal must be lodged within three months (less one day) from the effective date of termination. However, the detriment claim must be lodged within three months (less one day) from the date of the detriment. This cannot be the date of dismissal due to s.47B(2)(b) – it may well be the decision to run the investigation, to hold the meeting and so on which starts the process leading to the dismissal, but it cannot be the decision to dismiss. Hence the time limits are different and employers and their advisers should be mindful of the potential for complainants missing the opportunity to have their claim of detriment heard against the individuals. An employer might also attempt to ask the complainant to remove some of the respondents from their claim. In so doing, the employer has to accept their vicarious liability for the actions and thus not attempt to invoke the statutory defence. For this tactic to succeed, the employer must be in a position to prove that it can satisfy any claim, but having done so, it may be considered by a Tribunal unreasonable for the complainant to refuse the invitation.

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[3] at [30].
[4] *Dunnachie v Kingston-upon-Hull Council* [2004] UKHL 36, [2005] 1 A.C. 226.
[5] *Virgo Fidelis Senior School v Boyle* [2004] UKEAT 0644/03, [2004] I.C.R. 1210.
[6] *Gomes v Higher Level Care Ltd* [2018] EWCA Civ 41, [2018] I.R.L.R. 440.

Lessons should certainly be learned by employers and workers when dealing with whistleblowing allegations and the response to it. *Osipov*[7] has provided whistleblowers with a new suite of tactics and sources of action against individuals. Directors, human resource managers, line managers and so on may choose forthwith to dismiss summarily rather than risk exposing the individual to a sham disciplinary procedure or performance management exercise which could result in a whistleblowing claim and personal liability for them.

[7] *Timis & another v Osipov* [2018] EWCA Civ 2321; [2019] I.R.L.R. 52.