

BETWEEN:

WICKED VISION LIMITED

Appellant

-and-

IAN RICE

Respondent

and between:

BARTON TURNS DEVELOPMENTS

Appellant

-and-

GAIL TREADWELL

Respondent

APPELLANTS' CASE

References to §x CA Judgment are to the relevant paragraph of the judgment of the Court of Appeal below.

Introduction

1. This is the combined case on behalf of the Appellants, Wicked Vision Limited ('Wicked Vision') and Barton Turns Developments Limited ('Barton Turns'). This appeal concerns a question of statutory interpretation and the relationship between the claims which an employee who is a 'whistleblower' can bring under Part V and Part X of the Employment Rights Act 1996 ('the ERA') and specifically the meaning and effect of s47B(2) ERA.

pp.
194-195

2. In essence the question before the Supreme Court amounts to whether the ERA has provided one route for an employee to claim that their dismissal was caused by their protected disclosure ('whistleblowing'), via s103A ERA - as the Appellants contend, or two, via s103A and s47B - as the employees, Mr Rice and Miss Treadwell contend. **p. 197**

Summary of Appellant's case

3. The Appellants contend that as a matter of statutory interpretation:
- a) The architecture of the ERA is a carefully constructed scheme which provides relevantly two different regimes (both of liability and of the remedies that flow if liability is proven): the first, in historical terms, for unfair dismissal under Part X, and the second for protection against detriment (other than dismissal) under Part V.
 - b) There is one route only for an employee to claim in respect of their dismissal on a prohibited ground and one route only for a worker to claim in respect of the termination of their contract on a prohibited ground. In the context of whistleblowing detriment, this division is achieved through the express wording of s47B(2) ERA; and is replicated in materially identical provisions in respect of other prohibited grounds.
 - c) *Timis v Osipov* [2019] ICR 655 ('*Osipov*') was wrongly decided by the Court of Appeal. **pp. 1533-1564**

Structure of submissions

4. The Appellants' case sets out the combined position on:
- a) The factual background to the claims.
 - b) Principles of statutory construction.
 - c) The legal framework applicable to these appeals.
 - d) The core statutory interpretation issue namely whether s47B(2) ERA precludes an employee from bringing a claim against their employer or

their coworker in respect of their dismissal, as set out in Wicked Vision's Grounds 1 and 2 and Barton Turns Ground 1.

- e) The alternative statutory interpretation issue set out in Barton Turns' Ground 2, namely whether s47B(2) ERA can be read as an anti-overlap provision according precedence to the remedies available under Part X such that it prevents a Claimant from pursuing any claims under s47B ERA in respect of a dismissal which, if pleaded under Part X, could have led to an award of compensation for any of the various unfair dismissal claims under Part X.
- f) Whether *Osipov* was wrongly decided and/or whether the Court of Appeal was bound not to depart from it, as set out in Wicked Vision's Ground 3 and Barton Turns' Ground 3.

A. Factual background to the Claims

- 5. The issues in the instant appeal are pure legal issues and accordingly the factual background may be brief.
- 6. In Wicked Vision, Mr Rice was employed as the Head of UK Sales. He was dismissed in 2021. Wicked Vision stated that this was by reason of redundancy. Mr Rice alleged that the owner of Wicked Vision, Mr Strang, had decided to dismiss him because he made protected disclosures about alleged breaches of the Coronavirus Job Retention Scheme. He brought a claim against the company alleging his dismissal was unfair contrary to section 94 ERA and automatically unfair under s103A ERA because the reason or principal reason for it was that he had made a protected disclosure. He later sought to amend his claim to include complaints of detriments contrary to s47B. These included his dismissal. The Employment Tribunal granted permission to amend the claim to add the dismissal of the Claimant as a detriment in the following terms "*Dismissing the claimant. (This is a complaint that Mr Strang, a worker for the respondent, subjected the claimant to the detriment of dismissal contrary to section 47B(1B). This complaint is available to an employee notwithstanding the provisions of subsection (2))*".

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7. The Employment Appeal Tribunal ('EAT') allowed the employer's appeal against the decision to allow the amendment, on the basis that s47B(2) prohibited the claimant from bringing such a claim, and that the EAT was not bound by *Osipov*, which concerned claims against co-workers rather than claims against employers.¹ **pp. 140-153**
8. In the case of Barton Turns, Miss Treadwell was employed by Barton Turns Development Ltd as a Wedding & Events Manager until her dismissal on 20 June 2022. She brought claims of automatically unfair dismissal under s103A ERA (as well as under s100(1)(c), health and safety cases). Barton Turns alleges that her dismissal was on capability/performance grounds.
9. Miss Treadwell subsequently applied to amend her claim to include a claim that her dismissal was also a detriment done by her manager, Ms Wyss, for which Barton Turns was vicariously liable under s 47B(1B) (as well as two other detriments), alleging that "*by dismissing the Claimant Ms Wyss subjected the Claimant to a detriment*". To be clear, this was an amendment to raise a complaint against Barton Turns and not Ms Wyss personally. **p. 177**
10. The Employment Tribunal refused that amendment. Its reasons were: **p. 156**
- a) Section 47B(2) ERA specifically excludes 'detriment' from the definition of dismissal;
 - b) *Osipov* concerns the potential liability of individuals (in addition to the potential liability of employers) for whistleblowing claims. It does not displace the statutory definition; and
 - c) Insofar as it was 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 than dismissal.
11. The EAT (HHJ Barklem) allowed Miss Treadwell's appeal and permitted the amendment. That decision was upheld by the Court of Appeal (at a hearing joined with the Wicked Vision appeal), which considered that it was bound by its earlier **p. 161**
p. 105

¹ The facts of *Osipov* were set out in §51 CA Judgment.

decision in *Osipov*, even though its own construction was different (and favoured Barton Turns). The Court of Appeal gave permission to appeal to this Court. In its reasons for giving permission it stated, “*This court, considering itself bound by its previous decision, has determined the appeals in [a] manner that conflicts with its own interpretation of the legislation.*”

12. The Court of Appeal in the instant case dismissed the appeals by the (now) Appellants, concluding that it was bound by the Court of Appeal’s judgment in *Osipov*. The Court of Appeal confirmed that “*Had we been free to depart from that decision, which we are not, we would have done so, as we respectfully disagree with its interpretation of the legislation.*” (§4) **p. 108**

B. Principles of statutory construction

13. This case does not involve any novel approach to statutory interpretation and does not require extensive analysis of the authorities on statutory interpretation.
14. The Appellants adopt the position set out by the Supreme Court in its recent review. of the principles of statutory interpretation in *For Women Scotland v The Scottish Ministers* [2025] UKSC 16; [2025] 2 WLR 879 (“*FWS*”) at §§9-14. **pp. 757-760**
15. Those salient principles are as follows:
- a) Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. (*R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, §31). (*FWS* §9) **pp. 1137 p. 757**
 - b) The primary indication of legislative intention is the legislative text, read in context and having regard to its purpose (**Bennion, Bailey and Norbury on Statutory Interpretation**, 8th ed (2020) (‘Bennion’) §11.1). **p. 1772**
 - c) Words in a statute derive meaning from their context. As per Lord Hodge DPSC, giving the leading judgment in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255: **p. 1137**

“Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained.” (§29). (See also Lord Bingham’s observations at §8 of **R (Quintavalle) v Secretary of State for Health** [2003] UKHL 13; [2003] 2 AC 687; and **FWS** §9). p. 1107
p. 757

- d) There is a presumption of ideal, rational legislature.
- i. The legislature is taken to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner.
 - ii. There is a presumption that legislation has been competently drafted.
 - iii. An ‘ideal’ legislature never promulgates a meaningless enactment (**Bennion** at §11.3). p. 1777
- e) There is an important constitutional reason for having regard primarily to the statutory context. (**FWS** §12) As per Lord Nicholls in **R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd** [2001] 2 AC 349, 396: p. 759
p. 1198
- “Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”*
- f) The need for citizens to be able to understand the legislation points towards an interpretation that is clear and predictable (see **FWS** at §12 and Lord Hope DPSC in **Imperial Tobacco Ltd v Lord Advocate** [2012] UKSC 61; 2013 SC (UKSC) 153, at §14). p. 910

- g) External aids to interpretation, such as Explanatory Notes, Law Commission reports, and Government White Papers, play a secondary role. None of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. (*R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, §30 and FWS §9). (See also Lord Neuberger in *Williams v Central Bank of Nigeria* [2014] UKSC 10: “Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used”). **p. 1137**
- h) There is a presumption that a word has the same meaning throughout an Act when used more than once in the same statute (**Bennion**, §21.3.). **p. 1814**
Whether Parliament intended a word to have a different meaning in different sections of an Act must be determined by looking at the context of the section in question and the Act as a whole (FWS §§10, 14). **pp. 758,**

C. Legal framework

(i) The Employment Rights Act ('ERA')

16. The ERA is the main source of statutory rights for individual employees, with some provisions going back as far as the Redundancy Payments Act 1965 (CA Judgment §27). As originally enacted it comprised 15 parts, including relevantly Part V which is entitled “*Protection from suffering detriment in employment*” and Part X entitled “*Unfair Dismissal*”. **p. 112**
17. Part V prohibit an employer from subjecting a worker to a detriment on 14 proscribed grounds. These range from health and safety cases (section 44) to exercising the right to time off work for study or training (s47A) to flexible working cases (s47E) to protected disclosures cases (i.e. whistleblowing under s47B). **p. 222**
p. 235
p. 244
18. Part X of the ERA 1996, which is entitled “*Unfair Dismissal*” prohibits an employer from unfairly dismissing an employee. This right is conferred by section 94.

Section 95 sets out the circumstances in which an employee is dismissed. This is widely drafted and sets out relevantly at s95(1):

For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if) –

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

19. Further sections within Part X enable employees dismissed on the grounds listed in Part V to claim under Part X that their dismissal was automatically unfair. These provisions are contained in sections 98B – 104G ERA. Compensation in such cases is not subject to a cap (section 124(1A)).

20. There are accordingly parallel regimes under Part V and Part X in respect of the same prohibited grounds, including whistleblowing. Of the 14 sections setting out the different prohibited grounds in Part V, 13 have provisions which are materially identical in that they disapply the section where the worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X.²

² The one which does not have a disapplication provision within Part V is section 47C ERA, protection against detriment for taking leave for family and domestic reasons. This nevertheless does have a materially similar disapplication provision albeit that is contained within the Maternity and Parental Leave Regulations 1999 SI/3312 (reg 19(4)) rather than within the ERA 1996. Reg 19(1) provides: “An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2)”. And Reg 19(4) provides: “Paragraph (1) does not apply in a case where the detriment in question amounts to dismissal within the meaning of Part X of the 1996 Act.”

(ii) Rights for those making protected disclosures (whistleblowing) under the ERA

21. Whistleblowing protection was first introduced by the Public Interest Disclosure Act 1998 (“PIDA”)³, by amendment of the ERA. Section 1 of PIDA inserted Part IVA into the ERA, to define protected disclosures and to make other ancillary measures (including an extended meaning of ‘worker’ in s43K). Protection was conferred by s47B in Part V (protecting workers from detriment) and s103A in Part X (enabling an employee who had been dismissed on the ground that they had made a protected disclosure to claim that their dismissal was automatically unfair).
22. The key statutory provision at issue in these appeals is s47B, contained within Part V ERA, headed ‘Protected Disclosures’ which concerns the right not to be subjected to detriment by an employer or co-worker or agent of the employer on the ground that the worker has made a protected disclosure.
23. Section 47B as first introduced on 2 July 1999 by PIDA read:

47B Protected disclosures

p. 319

(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.

(2) Except where the worker is an employee who is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, 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 that Part).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “ worker ”, “ worker’s contract ”, “ employment ” and “ employer ” have the extended meaning given by section 43K.

³ Which materially came into force on 2 July 1999: Public Interest Disclosure Act 1998 (Commencement) Order 1999 (SI 1999/1547).

(Emphasis added)

24. Section 103A ERA sets out the circumstances in which employees are regarded as unfairly dismissed on grounds of a protected disclosure. It has remained unchanged since its introduced by PIDA on 2 July 1999: **p. 197**

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

25. Section 47B(2), set out above, was amended in 1999 in that the introductory words “Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal...” were repealed on 25 October 1999 by the Employment Relations Act 1999 c. 26 Sch.9 para.1.⁴ That change concerned the rights of Fixed Term Employees to bring claims in respect of their dismissal on proscribed grounds, and is discussed further below.

26. Section 47B was again amended on 24 June 2013 by the Enterprise and Regulatory Reform Act 2013 (“ERRA”) following the identification of a lacuna of protection by the Court of Appeal in the case of *Fecitt v NHS Manchester* [2012] ICR 372. In *Fecitt* nurse claimants made protected disclosures about the qualifications and clinical practice of another nurse. In response, the nurses were subjected to unpleasant treatment by various colleagues. The Court of Appeal determined that an employer can only be vicariously liable for the legal wrongs of its employees: without primary liability there can be no vicarious liability (§§6, 32). Since there was no provision in the ERA making it unlawful for workers to victimise whistleblowers the employer could not be vicariously liable for the victimisation (§§46, 48). This was despite the arguments to the contrary that in the absence of such protection it would discourage workers from making protected disclosures where it is in the public interest that they do and that the legislation would inadequately protect whistleblowers (§§56 and 58). Elias LJ (with whom Davis and Mummery LJJ agreed) concluded that it was not open to read in additional **pp. 671-697**
p. 674,
p. 683
p. 685

⁴ Similar introductory words applied to the other prohibited grounds originally enacted in 1996 set out in Part V and were similarly removed from 1999.

wording to the section as urged upon the Court and that this were “*far beyond the legitimate role of the court in construing legislation*” and that “*the purpose of a statute has to be gleaned from its language.*” (§58). If there was inadequate protection of whistleblowers, the remedy must lie with Parliament. (§61)

p. 686

27. That remedy was addressed by Parliament in the ERRA which inserted sub sections 47B(1A)-(1E) in Part V, including relevantly:

- a) (1A) – establishing that a worker has a right not be subjected to any detriment by any act/ deliberate failure to act done by another worker of his or her employer in the course of that other worker’s employment.
- b) (1B) – setting out that anything done mentioned in subsection (1A), is treated as also done by the worker’s employer.
- c) (1D) – providing a reasonable steps defence for the employer in respect of the acts or omissions of that other worker.

28. Accordingly, the version of s47B in force since 2013 reads:

47B Protected disclosures

p. 194

(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.

(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.

(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.

(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.

(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).

(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).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

(Emphasis added)

29. Notwithstanding the changes introduced, the overall scheme of the legislative framework at issue in this appeal remained unaltered. In particular:

a) Section 47B(2) stood unaltered and continues to exclude the entirety of section 47B ERA from operating in the case of an employee who complains of a detriment which amounts to dismissal by the employer.

b) Section 49 ERA (discussed further below) which sets out the compensation that can be awarded to workers and employees who succeeded in detriment claims remained unaltered.

30. In summary:

- a) The protection afforded under s103A ERA extends to employees only, whereas the protection afforded against detriment under s47B is for workers, who are a wider category and include employees (see s230(3) ERA and s43K ERA). **pp. xx-211**
- b) Section 47B(2) ERA provides an exclusion from protection under Part V for employees in respect of detriments which 'amount to dismissal (within the meaning of Part X)'.
- c) The causation tests under s47B and s103A are different. An employee is unfairly dismissed contrary to s103A where the reason (or principal reason) for the dismissal is the employee's protected disclosure, whereas under s47B a worker is subjected to detriment which was done on the ground that the worker has made a protected disclosure. This has been construed by the Court of Appeal as meaning that the protected disclosure was a material influence (in the sense of being more than a trivial influence) on the treatment of the whistleblower (*Fecitt* §45 per Elias LJ). **p. 683**

(iii) Remedies under the ERA

31. Parts V and X of the ERA contain distinct remedies.

32. Under Part V:

- a) Where a complaint is found to be well-founded the tribunal shall make a declaration to that effect and may make an award of compensation (s49(1)). **p. 254**
- b) The award of compensation is "*in respect of the act or failure to act to which the complaint relates*" (s49(1)(b)).
- c) The award shall be such as the tribunal considers just and equitable in the circumstances having regard to (a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right (s49(2)).
- d) A reduction may be made where the complainant's own conduct caused or contributed to the act/failure to act (s49(5)).

- e) Compensation must not exceed the compensation due under Part X where the detriment in question is the termination of the worker's contract and the that contract is not a contract of employment (s49(6)).
- f) However, it has been established at the level of the EAT that compensation may include an award for injury to feelings: *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210. P. 1657

33. Under Part X:

- a) Where a person complains of unfair dismissal for certain protected reasons (including under s103A) he may apply for an order for interim relief and if he shows that he is "likely" to succeed on that complaint, then the tribunal may make an order for reinstatement, reengagement or for continuation of the contract of employment pending the final determination of the complaint (ss128-130).
- b) Where an individual is unfairly dismissed, the tribunal may make an order for reinstatement or for reengagement or an award of compensation (s112).
- c) Orders for reinstatement or reengagement include making good any losses of benefit in the period between dismissal and reinstatement/reengagement (s114(2), s115(2)). If such an award is not complied with, then an additional award may be ordered (s117(3)).
- d) Awards of compensation comprise a basic award and a compensatory award (s118).
- e) The compensatory award shall be such as the tribunal considers just and equitable in the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer (s123(1)).
- f) A reduction may be made to the basic and/or compensatory award where the complainant's own conduct caused or contributed to the dismissal (s122(1), s123(6)).

- g) An award cannot be made for injury to feelings: *Dunnachie v Kingston upon Hull City Council* [2005] 1 AC 226. p. 542

SUBMISSIONS:

D. SECTION 47B(2) ERA PRECLUDES AN EMPLOYEE FROM BRINGING A CLAIM AGAINST THEIR EMPLOYER OR THEIR CO-WORKER IN RESPECT OF THEIR DISMISSAL (Wicked Vision Grounds 1 and 2 and Barton Turns Ground 1)

34. In summary, the Appellants' submissions are that an employee is precluded from bringing a claim against their employer under s47B(1) or s47B(1B), or co-worker under s47B(1A), in respect of their dismissal:

- a) *At every juncture* since the enactment of the ERA in 1996 and to date, Parliament has enacted materially identical provisions which delineate and adopt the boundaries between claims that employees may bring under Part X and Part V. At no point in the lifespan of the legislation has it been permissible for an employee to bring a claim in respect of their dismissal under both Part V and Part X.
- b) The words in section 47B(2) – “*This section does not apply where ... the detriment in question amounts to dismissal (within the meaning of Part X).*” – can and should be given their ordinary meaning, namely that an employee who seeks to bring a claim in respect of their dismissal on proscribed grounds is excluded from bringing a claim under Part V.
- c) The ERA is a coherent statute: each materially identical provision in Part V has the same meaning.
- d) There is no material distinction between primary and vicarious liability. Rather, tribunals must determine whether the complaint made by the claimant “amounts to” a complaint that they have been dismissed by their employer.

- e) The position under the Equality Act 2010 (“EA 2010”) cannot be read across to the ERA.
- f) The expansion of protection for whistleblowers, in the manner proposed by the Claimants, cannot be read into s47B(2) and would be a matter for Parliament.

(a) Delineation of Part V and Part X

35. The architecture of the ERA has, since its inception, been explicit in ensuring that employees and workers can only claim in respect of their dismissal under either Part V or Part X.

36. This submission may be illustrated by examples which show the consistent delineation of rights between Part V and Part X:

- a) grounds which have been in the ERA since its inception and which delineate between rights under Part V and Part X, namely ss47 and 103 on employee representatives;
- b) grounds which were later added but precede the addition of s47B namely ss45A and 101A on working time;
- c) grounds which have changed over time but have always provided that an employee only has one route to claim in respect of their dismissal, either under Part V or under Part X, namely s44 on health and safety, and s197 on fixed term employees;
- d) grounds which have received Royal Assent pursuant to the Employment Rights Act 2025, but have not yet been brought into force, namely s47H and s47I;
- e) that s43K on worker status acts as funnel, ensuring that each claimant is categorised as either a worker *or* an employee, and accordingly has rights under either Part V *or* Part X; and

- f) that section 49(6) on remedy for termination of employment under Part V becomes incoherent and unworkable when applies to employees (because those employees should bring their claims under Part X instead).

Sections 47 and 103 – employee representatives

37. Firstly, ss47 and 103 ERA concern the rights of an employee representative (for the purposes of TULRCA⁵ or TUPE⁶) or a candidate in an election to be such a representative not to be subjected to detriment on the ground that the representative performed (or proposed to perform) any functions or activities as an employee representative or candidate. The parallel right to unfair dismissal is contained in s103(1) ERA. **pp. 233,**
38. Unless disapplied, dismissal could itself constitute a detriment and it would be open to an employee to bring a dismissal claim under both Part X and Part V. However, that is why there is an express provision excluding the relevant detriment section from applying to an employee where the detriment amounts to dismissal within the meaning of Part X. Accordingly, under s47(2): *“This section does not apply where the detriment in question amounts to a dismissal within the meaning of Part X”*. The words *“[t]his section”* is a reference to s47. In other words, the entirety of s47 is disapplied where the detriment in question amounts a dismissal within the meaning of Part X.

Sections 45A and 101A – working time

39. Secondly, under s45A a worker has the right not to be subjected to a detriment on the ground that the worker had refused to comply with the requirement the employer imposed or proposed to impose in contravention of the Working Time Regulations 1998 or any one of the other matters identified in that section. S45A was inserted into the ERA on 1 October 1998 – after the ERA came into force but before PIDA. S45A(4) contains a disapplication provision akin to s47 which **pp. 229,**

⁵ Trade Union and Labour Relations (Consolidation) Act 1992.

⁶ Transfer of Undertakings (Protection of Employment) Regulations 2006.

prevents employees (but not workers) from bringing claims relating to their dismissal under Part V.

40. The parallel right not to be unfairly dismissed on the same proscribed grounds is contained in s101A ERA. Accordingly, a worker who is also an employee cannot bring a claim in respect of his or her dismissal under s45A but must instead bring that claim under s101A.

Sections 44 and 100 – health & safety

41. Where the scope of protection for a prohibited ground under Part V has *changed* over time to include workers and not only employees, as it has for s44 concerning health and safety cases, so too has the wording of the disapplication provision to ensure that non-employee workers may bring claims regarding the termination of their employment under Part V, but that employees may not. **pp. 222, 261, 317**
42. Prior to 31 May 2021, s44 prohibited employers from subjecting employees to a detriment on various proscribed grounds relating to health and safety. From that date, s44 was amended to include the new s44(1A) which provides protection to workers. Following the judgment of Chamberlain J in the judicial review in *International Workers Union of Great Britain v Secretary of State for Work and Pensions and another*⁷ [2021] ICR 372, s44(4) was accordingly amended at the same time⁸ to add the words in bold: **p. 920**

*“This section does not apply where **the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part X).**”*

⁷ The Claimant successfully sought declarations that the UK had failed properly to transpose into domestic law 2 EU directives dealing with that subject, namely Council Directive 89/391/EEC the framework directive and the PPE Directive, CD89/656/EEC. The Claimant’s central complaint was that the 2 directives required member states to confer certain protections on *workers* whereas the domestic legislation transposing the directives into UK law protected only employees, leaving those who were workers within meaning of Directives, but not employees under domestic law without protection.

⁸ Introduced by the Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 (SI 2021/618).

43. The new wording is identical to the wording in s47B(2). It has the effect of ensuring that a worker – now protected under subsection 44(1A) – can bring claims in respect of the termination of their employment on proscribed health and safety grounds under s44, but an employee continues to be excluded from bringing a claim in respect of his or her dismissal under s44. An employee continues to be able to use the parallel protection under s100 in Part X only if their complaint amounts to a complaint about their dismissal.

Section 197 – Fixed Term Employees

44. The legislative history relating to a special category of employees provides further support that Parliament has only ever provided one route for an employee to claim dismissal under a prohibited ground. As originally enacted, Fixed Term Employees (“FTEs”) were *not* eligible to bring claims for unfair dismissal under Part X as set out in section 197 (now repealed). Those FTEs were expressly permitted to bring claims relating to their dismissal under Part V. p. 342,
344

45. By way of example, s44(4) as originally enacted read:

“Except where an employee is dismissed in circumstances in which, by virtue of section 197, Part X does not apply to the dismissal, this section does not apply where the detriment in question amounts to dismissal (within the meaning of that Part X).” (Emphasis added) p. 318

46. The effect of the exception was that if such employees were dismissed on a proscribed ground they could bring claims under Part V relying on the dismissal as a detriment.

47. The highlighted introductory words were repealed on 25 October 1999 by the Employment Relations Act 1999 c. 26 Sch.9 para.1. Section 197 as originally enacted at the inception of the ERA included subsection (1) and (2) which said that Part X did not apply to FTEs (under certain conditions). Those subsections were also repealed on 25 October 1999. This meant that FTEs were no longer prohibited from making claims under Part X: they were protected from unfair dismissal in the same way as ordinary employees.

48. Accordingly prior to the 1999 amendments⁹ FTEs had to bring claims in respect of e.g. their health and safety related terminations of employment under s44. After the 1999 amendments FTEs were allowed to make claims under Part X but prohibited from bringing dismissal claims under s44 in Part V. Parliament *created a new route, and closed off the old route*, at the same time, ensuring that this class of employee only ever had one route to claiming unfair dismissal (see *Osipov* at §§17-18.)

The Employment Rights Act 2025

49. The Employment Rights Act 2025 ('ERA 2025') will introduce two new provisions within Part V of the ERA 1996. They have received Royal Assent but have not yet been brought into force. Those provisions are:

a) Section 47H¹⁰ protects zero hours workers on proscribed grounds. The parallel right to unfair dismissal on the same proscribed grounds is found in the new section 104BA.¹¹ **pp. 247, 281**

b) Section 47I¹² protects agency workers on proscribed grounds. The parallel right on the same proscribed grounds can be found in the new section 104BB.¹³ **pp. 249, 283**

50. Sections 47H and 47I apply to workers and include materially the same provision as s47B in that those respective sections do not apply where the workers are employees and the detriment in question amounts to dismissal.

⁹ The remaining provisions of s197 (subsections (3) to (5), concerning waiver of redundancy payment rights) ceased to have effect on 1 October 2002 by virtue of reg 11, Schedule 2, Part 1, para 3(15) of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (S.I. 2002/2034). The provisions relevant to the present case (the repeal of s197(1) and (2) concerning the waiver of unfair dismissal rights, and the consequential amendments to the Part V detriment sections including s47B(2)) had already taken effect on 25 October 1999 by virtue of s18 of the Employment Relations Act 1999 (brought into force by S.I. 1999/2830). Therefore, from 25 October 1999, FTEs had Part X rights and were excluded from claiming dismissal under Part V, in common with all other employees.

¹⁰ See paragraph 10 of Schedule 2 to the Employment Rights Act 2025.

¹¹ See paragraph 14 of Schedule 2 to the Employment Rights Act 2025.

¹² See paragraph 11 of Schedule 2 to the Employment Rights Act 2025.

¹³ See paragraph 15 of Schedule 2 to the Employment Rights Act 2025.

51. Parliament accordingly continues to provide both workers and employees with a single route by which to claim that their employment was brought to an end because of their protected disclosure: either within Part V or within Part X, but never both.

Sections 43K and 43KA – worker and employment status

pp. 211,
216

52. Section 47B(3) confirms that “worker” has the extended definition set out at section 43K, which includes those who are workers under s230(3), but also (for example):

- a) those in particular agency contexts – section 43K(1)(a);
- b) those working in NHS related capacities; e.g. those who perform services under contract with NHS England or provisions of various NHS Acts – section 43K(b); and
- c) those undertaking certain work experience pursuant to a course of education and training approved by the Nursing and Midwifery Council – s43K(cb).

53. All of these individuals may bring claims under s47B, but may not bring claims under s103A, in respect of the termination of their employment.

54. S43KA, however, categorises police constables and cadets as being treated as employed under a contract of employment and an employee for the purposes of Part IVA, s47B and s103A and other provisions of Part X concerning the unfair dismissal of an employee. Accordingly, police constables and cadets may bring claims for unfair dismissal under s103A but may not bring claims in respect of their dismissal under s47B.

55. The various provisions of the Act specify, to a level of granularity, not only that employees have certain different rights than workers; but also provide further sections which act as funnels to determine who should be treated as a worker under the extended definition, and who is to be treated as an employee.

Section 49 – remedy under Part V

56. Section 49(2) provides that compensation for Part V detriment claims shall be such as the tribunal considers “*just and equitable in all the circumstances having regard to (a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant’s right.*” On the *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210 line of authority, this includes compensation for injury to feelings. By contrast, section 123 ERA governs the compensatory award for unfair dismissal claims under Part X and, following *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, is limited to pecuniary loss and does not include injury to feelings. **p. 1657**
57. Section 49(2) is expressly made subject to three capping provisions: s49(5ZA), s49(5A) and s49(6). Each operates in the same way: it caps the compensation recoverable by a worker whose contract has been terminated, so that the worker cannot recover more than an employee would recover under Part X for the equivalent dismissal: **p. 254**
- a) Section 49(5ZA) (health and safety, inserted 31 May 2021): applies where the complaint is under s48(1XA), “*the detriment to which the worker is subjected is the termination of his or her contract,*” and “*that contract is not a contract of employment*”. Compensation must not exceed what would be payable under Chapter II of Part X if the worker had been an employee dismissed for the reason specified in s100.
 - b) Section 49(5A) (working time, inserted 1 October 1998): applies where the complaint is under s48(1ZA), “*the detriment to which the worker is subjected is the termination of his worker’s contract,*” and “*that contract is not a contract of employment.*” Compensation must not exceed what would be payable under Chapter II of Part X if the worker had been an employee dismissed for the reason specified in s101A.
 - c) Section 49(6) (whistleblowing, inserted 2 July 1999): applies where the complaint is under s48(1A), “*the detriment to which the worker is subjected is the termination of his worker’s contract,*” and “*that contract is not a contract of*

employment.” Compensation must not exceed what would be payable under Chapter II of Part X if the worker had been an employee dismissed for the reason specified in s103A.

58. A textual point of importance arises from the language of these provisions. In each of s49(5ZA), s49(5A) and s49(6), Parliament refers to the ending of the worker’s engagement as “*the termination of his worker’s contract*” (or, in s49(5ZA), “*the termination of his or her contract*”). Parliament does not use the word “dismissal”. By contrast, s47B(2) refers to a detriment which “*amounts to dismissal (within the meaning of Part X).*” “Dismissal” is defined in s95 ERA, which applies only to employees and only to contracts of employment. The distinction is deliberate: a worker who is not an employee cannot be “dismissed” within the meaning of Part X. Parliament chose the language of “termination” in the s49 capping provisions because those provisions were designed to address the position of workers (not employees) who claim the ending of their engagement as a detriment under Part V. The condition at s49(6)(c), “*that contract is not a contract of employment*”, makes this explicit.
59. Parliament did not enact any parallel provision in s49 to cap the compensation of an employee whose complaint under s47B amounts to dismissal. No provision in s49 refers to “dismissal” or to the termination of a contract of employment in the context of a Part V detriment claim. The reason is that s47B(2) was intended to prevent the situation from arising: an employee whose complaint amounts to dismissal within Part X cannot claim under s47B and must claim under Part X where compensation is governed by s123.
60. The consequences of the *Osipov* construction for this compensation framework may be illustrated by three situations. If an employee is permitted to claim the “detriment of dismissal” under s47B via s47B(1B), then s49(6) will not apply to that employee’s claim because the condition at s49(6)(c) (“*that contract is not a contract of employment*”) is not satisfied: an employee’s contract is a contract of employment. The upshot is as follows:

- a) An employee who brings an unfair dismissal claim under s103A has their compensation governed by s123, which is limited to pecuniary loss and does not include injury to feelings. The statutory cap under s124 is disapplied by s124(1A). A basic award is available under s119. Reinstatement and re-engagement are available under s113. The causation test is “the reason or principal reason” for the dismissal.
- b) A worker who brings a claim under s47B in respect of the termination of their contract has their compensation capped by s49(6) at what would be payable under Chapter II of Part X, a measure which, following *Dunnachie*, is limited to pecuniary loss and does not include injury to feelings. No basic award is available, nor is reinstatement or re-engagement. The causation test is the lower s47B threshold.
- c) An employee who brings a claim for the detriment of dismissal under s47B (if permitted to do so) would not have their compensation capped *at all* because their compensation is governed by s49(2), with no s49(6) cap, and may claim injury to feelings, a remedy which is not available under Part X. The causation test is the lower s47B threshold. The burden of proof is on the employer under s48(2). There is no basic award and no reinstatement or re-engagement.

61. Section 49(6) was enacted to ensure that a worker claiming the termination of their contract under Part V could not recover more than an employee would recover for dismissal under Part X. That capping mechanism presupposes that employees claim dismissal under Part X, not Part V. If employees may also claim dismissal under Part V, there is no equivalent mechanism to constrain their recovery: the employee is in an entirely unconstrained position, able to recover injury to feelings, on a lower causation threshold, with the burden on the employer, and with no statutory cap. Every time Parliament has permitted a claimant to bring a claim under Part V for the ending of their engagement, it has enacted a corresponding cap in s49: s49(6) for whistleblowing, s49(5A) for working time, s49(5ZA) for health and safety. Parliament has *never* created a Part V route for claiming the ending of

an engagement without a corresponding compensation cap. The suggestion that Parliament created precisely such an unconstrained route for employees in 2013, but forgot to enact the cap it had remembered on every previous occasion, is implausible.

62. The position is to be contrasted with the EA 2010, under which the same remedy provisions apply regardless of whether the claim concerns dismissal, other detriment, or co-worker liability. The difference between s123 ERA (compensatory award for unfair dismissal, excluding injury to feelings per *Dunnachie*) and s49 ERA (compensation for detriment, which on the *Virgo Fidelis* line of authority includes injury to feelings) is not a “wrinkle”, as Underhill LJ described it in *Osipov* at §72. It is a feature of the deliberate choice by Parliament to maintain two p. 1556 distinct remedial regimes. To permit a dismissal detriment claim under s47B would allow an employee to circumvent the Part X remedial framework and potentially obtain compensation for injury to feelings in respect of a dismissal, a remedy which Parliament has expressly and consistently denied in Part X.
63. If Parliament had intended for employees to be permitted to bring claims for the detriment of dismissal under s47B it surely would have amended s49 so that parity in compensation levels between workers and employees continued to exist. When the ERRA 2013 inserted subsections (1A)–(1E) into s47B, Parliament did not amend s49 to add any capping provision for employees claiming dismissal as a detriment. This is entirely consistent with s47B(2) continuing to operate as it always had: to prevent employees from claiming dismissal under Part V. There was no need to amend s49 because the situation which would require an amendment (an employee claiming dismissal under s47B) could not arise.

Conclusions on the delineation between Part V and Part X

64. In summary therefore, as shown, at every juncture, the legislation has provided, from inception to date, that whether an employee, or a worker, or the now defunct category of s197 employee without rights to claim unfair dismissal, the legislation has been carefully designed to ensure that each of those categories of the employed

had a *single route* to challenge the lawfulness of their dismissal under a prohibited ground, under *either* Part V or Part X.

65. It has never – at any stage in the lifespan of the ERA – been permissible for an employee or a worker to bring a claim about their dismissal in both Part V and Part X. The two parts work in parallel but are always mutually exclusive.
66. Parliament has been consistent and kept sacrosanct the different regimes applying to workers and employees, so that:
- a) For employees, claims must be brought under Part X if they concern their dismissal; and must be brought as detriment claims under Part V if they involve anything other than something amounting to dismissal.
 - b) For non-employee workers, claims for dismissal cannot be brought under Part X; and all claims must be brought as detriment claims under Part V, whether for detriment or dismissal.

(b) Ordinary meaning of the words in s47B(2)

67. Section 47B(2) has a plain and ordinary meaning: it excludes any claim for a detriment which amounts to dismissal. The effect of s47B(2) is to disapply the entirety of s47B. If the claimant is an employee and the act complained about is in substance one of dismissal – i.e. of the termination of the employment relationship – it must be brought under Part X not Part V.
68. Subsection (2) must apply to the entirety of s47B and not just to subsection (1). If Parliament had intended subsection (2) only to apply to subsection (1) it would have said so, and would have amended subsection (2) accordingly, in 2013 when subsections (1A) and (1B) were introduced. If Parliament had intended for an employee to be able to bring a claim in respect of their dismissal under both Part X and Part V it could have removed subsection (2) altogether or could have amended subsection (2) so that it applied expressly only to subsection (1). It did not do so. In the absence of an amendment or repeal of subsection (2) it would be

wrong to assume that Parliament intended to implicitly repeal or limit the application of subsection (2) by inserting subsections (1A) and (1B).

69. Further, elsewhere in Part V the drafter of the statute has selectively disappplied some subsections rather than the whole section. Section 45(4) disappplies s45(1) and (3) only; s45ZA(5) disappplies s45ZA(2) and (4) only but not in respect of the 2013 additions, or subsections (1A) and (1B) specifically. There are no textual grounds for supposing that this was a drafting oversight, still less for concluding that it is an “obvious” drafting error. As explained by the Court of Appeal, the criteria for correction of even an obvious drafting error are very strict, and there has been no suggestion that they are met (CA Judgment, §71). **pp. 227**
p. 123

70. Indeed, Underhill LJ acknowledged at §30(4) of *Osipov* that subsection (2) “*applies to the terms introduced by amendment just as much as to subsection (1).*” If that is right, as it is, given the unambiguous words “this section”, then it necessarily follows that where the detriment in question amounts to dismissal, the whole of s47B is disappplied, including subsections (1A)–(1E). **p. 1543**

(c) Each materially identical provision in Part V has the same meaning

71. Section 47B(2) includes materially the same exclusion as the other 14 sections in Part V (see CA judgment §72) and the two pending sections not yet in force. In each case those words keep Parts V and X distinct and mutually exclusive. The same words cannot mean one thing in s47B(2) and something else in other sections in Part V. If s47B(2) were to be limited in its application to s47B(1) only, rather than to the entire section, it would give s47B(2) a meaning which is inconsistent with the other ousters in all other sections in Part V. **p. 123**

72. Such an interpretation is not apparent on the face of the legislation and is not clear and predictable and the more than one meaning approach would render the statute incoherent.

(d) Primary vs Vicarious Liability

73. The Claimants' case (in submissions before the Court of Appeal) is that an employee may bring a claim against their employer in respect of their dismissal under s103A and may also bring a claim against their employer in respect of their dismissal under s47B on the basis that the employer is vicariously liable for the co-worker communicating to the employee that their contract of employment is being terminated. That cannot be correct because there is no material distinction between the two propositions. In both cases:

- a) The employer decides to end the employment relationship;
- b) The contract of employment is terminated; and
- c) The decision to terminate the contract is communicated to the employee by a co-worker.

74. The act complained of in both cases is dismissal; and it is dismissal within the meaning of Part X because that employee could bring a claim under s103A. A claim in respect of that act of dismissal could not be brought under s47B because it would be ousted by subsection (2).

75. Section 47B(1B) is a statutory deeming provision. Its express effect is that the co-worker's act "*is treated as also done by the worker's employer.*" It does not create a legal world in which the co-worker's act is treated as something other than the employer's act. On the contrary, it attributes the co-worker's act to the employer. As the Court of Appeal observed at §76 of its judgment, this means that if the act in question is the dismissal, then the dismissal "*is treated as also done by the employer.*" Its legal effect is that the employee is dismissed by the employer, and that act amounts to a dismissal within the meaning of Part X. The argument that the 2013 amendments created a conceptually distinct "dismissal by a co-worker" falling outside Part X is, on its own terms, circular: s47B(1B) itself provides that the co-worker's act is the employer's act. **p. 124**

76. Furthermore, there is no such thing as a "dismissal by a co-worker" which is distinct from a dismissal by the employer. A dismissal, by definition, terminates

the contract of employment between the employer and employee. It is always an act of the employer. In cases where the employer is a limited company, dismissal can only be effected by a person who is a co-worker of the claimant, as the company can only act through a human being (CA Judgment, §75).

p. 124

77. The proposition that the termination of the contract is separable and distinct from the fact of the termination being communicated to the employee by, for example, his or her manager, is a fiction. The only factual matrix on which the fact of communication is capable of constituting a separable detriment is where the contract is *not* in fact terminated, but the employee is erroneously told that it is being terminated. That factual scenario is unlikely to arise, but in principle it could arise if, for example, the manager is mistaken or is acting out of malice. In that case the detriment would be that the line manager telling the employee something which was untrue. That act would not amount to a dismissal, would not fall within Part X, and would not be ousted by section 47B(2).

78. The reasoning in *Osipov* sought to resist this conclusion by treating the “detrimental act” as two-sided: the doing of the act and the suffering of the detriment being “two sides of the same coin” (§75). But, as the Court of Appeal observed in the present case, the question under s47B(2) is not whether the liability for an act is primary or vicarious or secondary, or any other type of liability. The question is what the employer or co-worker is said to be liable *for*. In the terms of s47B(2), the question is what the act “amounts to” (CA Judgment, §77).

p. 1557

p. 124

79. The words “amounts to” self-evidently prioritise substance over form: the ouster is intended to apply to complaints which amount to dismissal. Whether a claim is ousted by subsection (2) depends on the factual allegation, i.e. whether the act complained of is the termination of the employment relationship, not the legal mechanics for bringing the claim. The fact that vicarious and primary liability may be conceptually different legal mechanisms is immaterial. What is material is whether or not the employee is complaining about the termination of their employment.

(e) The Equality Act 2010 cannot be read across to the ERA

80. The Claimants and Protect draw a comparison between the co-worker liability provisions of s47B(1A)-(1E) ERA and the analogous provisions in the EA 2010. This comparison does not assist in the construction of s47B(2) ERA and serves to underscore the differences between the two statutory regimes.
81. It is well established that the whistleblowing provisions of the ERA and the discrimination provisions of the EA 2010 cannot be read across from one to the other and that the statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross-fertilisation or legal transplants runs the risk of complicating rather than clarifying legal concepts. (*Kuzel v Roche Products Ltd* [2008] ICR 799, per Mummery LJ §48) **p. 1020**
82. The EA 2010 establishes a materially different framework. Dismissal is addressed at s39(2)(c) as one item in a list of proscribed discriminatory acts, alongside “any other detriment” at s39(2)(d). There is no exclusion provision equivalent to s47B(2) ERA. This is not an accident. It reflects the fact that the EA 2010 does not maintain a distinction between dismissal and detriment of the kind found in Parts V and X of the ERA. Dismissal is simply another form of prohibited conduct. No exclusion provision is needed and none exists, which reflects the structural difference between the two schemes. It is not a guide to how s47B(2) should be construed. **p. 346**
83. Moreover, section 109(1) EA 2010 provides that anything done by a person in the course of employment must be treated as also done by the employer; s109(4) provides a reasonable steps defence. These provisions are, as Underhill LJ acknowledged in *Osipov* at §30(2), substantially identical to s47B(1B)-(1D) ERA. Section 110(1) renders the co-worker personally liable, the analogue of s47B(1A) ERA. The EA 2010, however, goes further: ss111 and 112 create separate and freestanding causes of action for instructing, causing, inducing or aiding a discriminatory act, including a discriminatory dismissal. There is no equivalent of either provision in the ERA, although had Parliament wished to extend liability in that way for whistleblowing dismissals it could have enacted such provisions under Part X but did not do so. This further supports that Parliament did not **p. 353**
p. 1543
pp. 359, 361

intend the 2013 amendments to create a route to challenge dismissal under Part V which would circumvent Part X.

84. A further structural difference concerns the causation test. The test under s47B (“on the ground that” the worker made a protected disclosure, meaning more than a trivial influence: *Fecitt*, §45) is less demanding than the test under s103A (“the reason or principal reason” for the dismissal). This difference has no parallel in the EA 2010, where the same test applies uniformly to all forms of prohibited conduct including dismissal. The consequence of the *Osipov* construction is that a claimant may succeed on a s47B claim for the detriment of dismissal even where the protected disclosure was not the reason or principal reason for the dismissal, so long as it materially influenced the treatment. This creates the possibility that the employer is simultaneously found to have lawfully dismissed the employee for whistleblowing under s103A (because the protected disclosure was not the principal reason) but to have unlawfully subjected the employee to the detriment of dismissal for whistleblowing under s47B (because the disclosure materially influenced the decision). That result is not merely anomalous but contradictory, and is a direct consequence of permitting dismissal claims under Part V which were designed to be brought only under Part X. **p. 683**

85. Underhill LJ drew on the EA 2010 comparison at §69 of *Osipov*, observing that if the Appellants’ construction were correct, the scheme of protection for whistleblowers would be “less effective” than for victims of discrimination, whereas the two situations were “essentially similar.” This premise was unsound, given the ERA’s deliberate and consistent separation between dismissal claims and detriment claims, enforced by exclusion provisions in every detriment section. The fact that co-worker dismissal claims are unproblematic in the EA 2010 context says nothing about whether they are compatible with the ERA’s Part V/Part X framework, for the simple reason that the EA 2010 has no such framework. **p. 1555**

(f) Matter for Parliament

86. The rights granted – or not granted – to different individuals is a matter for Parliament and it is not for the Courts to remedy what may be perceived as an anomaly or disparity in protection.
87. Parliament has made different choices in different contexts. There are two key and material differences between claims under s47B and claims under s103A. First, claims under section 47B benefit from a lower causation threshold. Secondly, the burden of proof in relation to causation is on the claimant in a section 103A claim, but on the employer in a section 47B claim. This a natural and expected feature of the architecture of much if not all legislation, employment related and otherwise: different categories of worker have different rights, different causes of action have different causation tests, and different causes of action have differing burdens of proof.
88. The Court of Appeal addressed these differences in the CA Judgment (§§81–84). It **p. 125** held that the different causation tests between Part X and Part V, and the unavailability of compensation for injury to feelings under Part X, are not anomalous. They are consequences of a deliberate choice by Parliament to create two distinct remedial regimes, and they demonstrate that Parliament has created two distinct regimes rather than demonstrating incoherence. In three places in *Osipov*, Underhill LJ described his expectation that s47B(2) could only exclude liability where “*an identical remedy*” was available under Part X. The statutory scheme, however, unmistakably does not provide for identical remedies as between Part X and Part V, and it is therefore difficult to see how this expectation could ever be met.
89. In any event, permitting an employee to bring a claim for the detriment of dismissal under s47B would not create parity with workers. First, employees would be in the onerous position of having (1) to point to an individual who made the decision to dismiss and establish that that individual is liable by showing that they were acting in the course of their employment, or were an agent acting on the authority of the employer in accordance with s47B(1A) ERA, and (2) to show that

the employer is vicariously liable for that individual's conduct, which includes dealing with any reasonable steps defence under s47B(1D). By contrast, the worker would only need to point to s47B(1) and establish that the employer had terminated their contract. There would not be parity between workers and employees.

90. Secondly, employees who are employed by corporate entities would seemingly have better rights than those employed by individuals:

- a) An employee in a corporate entity would be able to point to the individual who dismissed them and allege vicarious liability for that individual's actions as against their employer under s47B(1B).
- b) An employee who is employed by an individual or sole trader, i.e. a "one man band", would not be able to do this because the person dismissing them would be the same legal entity as the employer. That employee would still be forced to bring their claim under s103A and would be subject to the higher causation threshold and would have the burden of proving their claim. The practical reality of this is that a nanny or a carer, employed by an individual, would face a higher causation threshold than someone working in a bank.

91. There is no principled reason why that should be the case, and it cannot be what Parliament intended. To distinguish rights based on the employment status of the claimant is an ordinary feature of employment and discrimination law. But to instead distinguish rights based on the characterisation of the respondent is not principled and creates uncertainty. Legal certainty is crucial to those who have blown the whistle. People should be able to look at the legislation and understand their rights. It is a constitutional imperative that those subject to the law know where they stand.

E. COMPENSATION: THE IMPACT OF THE DIFFERENT REMEDIAL SCHEMES (Barton Turns Ground 2)

92. It is inconceivable that Parliament intended that a claimant would be able to benefit from claims against his employer in relation to his dismissal which engaged the remedial schemes under both Parts V and X ERA, or that a claimant would in practice be able to elect which parts of each scheme – or indeed, which scheme – he sought to have applied to this case.
93. It is for precisely this reason that s47B(2) was included: where the detriment relied upon is dismissal, then the remedial scheme under Part X is to be applied.
94. There is a similar ‘anti-overlap provision’ in s126 ERA in relation to acts which are both unfair dismissal and discrimination. There are also anti-overlap provisions within the EA 2010: for example, where the sex equality clause applies (ss70-71); **pp. 348, 350, 351** where the maternity equality clause applies (s76); to define detriment to exclude conduct which amounts to harassment (s212).
95. The question in each case is one of substance not form. That is equally the position under s47B(2) ERA, as the wording makes clear (it is whether “the detriment in question amounts to dismissal”) and as the Court of Appeal in *Osipov* accepted **p. 1551** (§59). Indeed, it accepted that detriment (m) in that case (“*Any instructions or recommendations given by the second to fifth respondents which culminated in the claimant’s dismissal on 27 October 2014*” - §35) amounted to dismissal. **p. 1545**
96. Underhill LJ placed emphasis on the further words, “*amounts to dismissal (within the meaning of Part X)*” because s94(1) refers to an employee being dismissed “*by his employer*”. However, this reflects the fact that there are specific issues in attributing individual conduct in relation to the dismissal: it is necessary to search for the reason for an employer’s dismissal of an employee. Ordinarily, only the conduct (and motivation) of the decision-maker will be material. In *Royal Mail v Jhuti* [2020] ICR 731 this Court accepted that the exercise may be wider, extending to:

a) The situation where the decision-maker's beliefs have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation (*Jhuti* §53); and

p. 1330

b) The situation where a person in the hierarchy of responsibility above the claimant determines that the employee should be dismissed for an (impermissible) reason but hides it behind an invented reason which the decision-maker adopts (*Jhuti* §60, 62).

pp.
1331-1332

97. Thus, the inclusion of the words "*dismissal (within the meaning of Part X)*" merely identifies the act of dismissal: it will (inevitably) be by the employer; and the reasons why the employer dismissed must be seen through the actions of the dismissing officer, subject to the principles established in *Jhuti*. If there is a person whose motivation falls to be taken into account (because he has manipulated the process or invented a false reason) then that person's conduct is attributable to the employer as the reason for the dismissal. Liability is not separately founded by the operation of s47B(1B) because it is excluded by s47B(2). If a person's conduct is not attributable to the employer in establishing a dismissal, then it is conceivable that liability for that conduct (short of dismissal) would fall within s47B(1B), but in such a case the remedial scheme under Part V would apply.

98. It is of note that Lord Wilson JSC concluded in *Jhuti* that: "*Overarchingly, however, Parliament has by section 103A, provided that, where an employee's whistleblowing is the reason for it, a dismissal should automatically be unfair and should thus attract the remedies set out in Part X; and ... it has also, by section 47B(2), withdrawn the rights provided by that section from the whistleblowing employee who is subject to a detriment which amounts to dismissal*" (§58).

p. 1331

99. That language echoes that of Chadwick LJ (with whom Smith and Wilson LJ agreed), that "*Parliament did not intend to confer a right under Part V of the 1996 Act for the protection of whistleblowers in circumstances where the worker (being an employee) would have a right under Part X of that Act in relation to the same loss or detriment*": *Melia v Magna Kansei Ltd* [2006] ICR 410, §15.

p. 1029

100. In *Osipov* Underhill LJ took the view that an additional advantage of his construction was that “it eliminates the need to undertake the exercise of drawing a line between those of a co-worker’s acts which amount to dismissal and those that constitute distinct prior acts” (§76). However, what “amounts to dismissal” is precisely the exercise required by s47B(2). Applying *Jhuti*, it is vital to identify whether dismissal is the true detriment being relied upon because, if it is, it is necessary to consider whose motive is to be attributed to the employer. p. 1557
101. Identifying whether an act amounts to a dismissal, or something short of dismissal, is also precisely the exercise which is required in determining whether the statutory regime under Part X ERA applies or whether an employee can rely upon the conduct as a breach of a contractual term, applying the decision of the House of Lords in *Johnson v Unisys Ltd* [2003] 1 AC 518. This is commonly referred to as “the *Johnson* exclusion zone”¹⁴: where the act complained of amounts to dismissal then a claim in relation to it may only be brought under Part X (or under the EA 2010). p. 957
102. Underhill LJ described the exercise of identifying whether the act complained of amounts to a dismissal (or something short of dismissal) as “a necessary evil” (§76) but it is the exercise identified as necessary by the House of Lords. Lord Hoffmann (with whom Lords Bingham and Millett agreed) emphasised that the statutory unfair dismissal regime was “based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community” (§54).
103. Moreover, the exercise of identifying the boundary was described by Lord Nicholls (with whom Lords Hoffmann, Rodger and Brown agreed) as “comparatively straightforward”: *Eastwood v Magnox Electric plc* [2005] 1 AC 503, §27. This was because “The loss arises when the employee is dismissed and it arises by reason of his dismissal. Then the resultant claim for loss falls squarely within the *Johnson* exclusion area” (§28), though exceptionally that would not be so (§29). That exceptional case deals squarely with the example posited by Underhill LJ “of an p. 661

¹⁴ As recognised by Lord Nicholls in *Eastwood v Magnox Electric plc* [2005] 1 AC 503, §27.

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” (Osipov §82). Such acts of victimisation precede the dismissal and so would not (a) fall within the *Johnson* exclusion zone or (b) amount to a dismissal within s47B(2). p. 1558

104. That position corresponds to that under s47B: Parliament has decided that it is necessary to determine whether a detriment amounts to dismissal; if it does, then Part X (and only Part X) is engaged and the remedies within it may be claimed by a claimant, but not those within Part V.

105. Thus, the employment tribunal in *Barton Turns* was right to reject an argument that “*the decision to dismiss (as an act of detriment) can be separated from the act or effects of dismissal*”; that was “*an argument without substance*”.

106. The alternative construction of s47B(2) is that if a claimant has access to the panoply of remedies available from the employer under Part X then they are required to adopt that route. However, if for some reason they do not, then they are permitted to use the Part V route, though in such a case the employer will be able to rely on the reasonable steps defence in s47B(1D).

107. The approach articulated under this alternative construction avoids the possibility created by a narrow application of the approach in Ground 1, ie the risk of a claimant employee falling between two stools in that they may not have access to a Part X claim in respect of their dismissal for a particular and unusual reason, but would then find themselves in a worse position than a worker in also not having access to claims under s47B within Part V. For example, where the employer was already insolvent at the time of the liability hearing so that there could be no successful Part X claim against it and no access to the remedial regime under Part X, then (i) the claimant’s dismissal could not be said to amount to a dismissal within Part X (because its remedial regime was not available) such as to engage the anti-overlap provisions within s47B(2); and (ii) absent any overlap, there would be no bar to claims under s47B(1A) against a co-worker in respect of

that dismissal. In such a case, there could be no claim against the employer under s47B(1B) for the same reason: it was insolvent.

F. THE COURT OF APPEAL ERRED IN CONSIDERING ITSELF BOUND TO FOLLOW ITS OWN EARLIER DECISION IN OSIPOV (Wicked Vision Ground 3 and Barton Turns Ground 3)

108. The Court of Appeal accepted the construction of s47B(2) advanced by the Appellants. However, it considered that it could not adopt that construction because it was bound by its own earlier decision in *Osipov*. In reaching that conclusion it erred in law, by taking too broad an approach to the principle of *stare decisis*.

(i) Identifying the ratio decidendi of a case: principles

109. Judicial authority belongs not to the exact words used, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision (*Close v Steel Co of Wales* [1964] AC 367, 388-389, Lord Denning). On the facts, he added “*I fail to see how any speeches in this House can bind your Lordships to hold that a dangerous part of machinery need not be fenced, when the statute expressly says it shall be.*” pp. 424-425

110. The ratio decidendi of a case is any rule of law¹⁵ expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him (*R (Khadim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955, CA, Buxton LJ (giving the judgment of the court) at §16) approving a passage in *Cross & Harris, Precedent in English Law* (4th ed, p 72). p. 1093 p. 1829

111. The ratio of a case is almost always to be ascertained by an analysis of the material facts of the case (*FB & AB Ltd v Lupton (Inspector of Taxes)* [1972] AC 634, at 658, Lord Simon of Glaisdale). p. 712

¹⁵ It has been suggested that more accurately this should refer to a “ruling on a point of law” rather than a “rule of law”: see *R (Youngsam) v Parole Board* [2020] QB 387 at §48, Leggatt LJ.

112. A case is only an authority for what it actually decides; it cannot be quoted for a proposition that may seem to follow logically from it (*Quinn v Lethem* [1901] AC 495, 506, Earl of Halsbury LC). **p. 1049**
113. In *R (Youngsam) v Parole Board* [2020] QB 387:
- a) Nicola Davies LJ accepted the *Kadhim* approach, namely that the ratio of a case was something treated by the judge as a necessary step in reaching his conclusion (§21-22). Haddon-Cave LJ agreed, saying that this “*amply suffices to determine this matter*” (§39). **pp. 1253-1254**
p. 1258
 - b) Leggatt LJ considered that the reference to “a necessary step” was ambiguous, capable of bearing a range of meanings (§49). He concluded **p. 1261** that “necessary” did not mean logically or causally necessary, but as indicating that the ratio is part of the best or preferred justification for the conclusion reached: “*it is necessary in the sense that the justification for that conclusion would be, if not altogether lacking, then at any rate weaker if a different rule were adopted.*” He considered that whether a past decision should be treated as binding authority for a particular proposition may depend on a range of factors and involve evaluative judgments which cannot be reduced to a simple rule or algorithm (§57). This was because “*The doctrine of precedent operates in a more flexible and open-textured way, which recognises that the primary task of any court is to decide the case actually before it, and which gives scope for the law to evolve and adapt as circumstances change or new factual situations are presented*” (§56). **p. 1263**
114. In *Churchill v Merthyr Tydfil CBC* [2024] 1 WLR 3827 Sir Geoffrey Vos MR (with whom Birss LJ and Carr LCJ agreed) espoused the reasoning of Leggatt LJ (see §17). **p. 389**

(ii) Identifying the ratio decidendi of *Osipov*

115. On any basis, *Osipov* was not concerned with the liability of an employer. A claim had been brought against the employer and the employment tribunal had accepted that it had dismissed the employee contrary to s103A ERA (*Osipov* §1(3)). **pp. 1535-1536**
However, the employer played no part in the appeal (*Osipov* §3): “[t]he principal

issue¹⁶ on this appeal is whether it was open to the employment tribunal to award the claimant compensation against the directors, as individuals, for the losses occasioned by his dismissal” (*Osipov* §1(5)).

116. The reasoning in *Osipov* on the ‘principal issue’ had two limbs. The first was headed ‘Was the detriment caught by section 47B(2)?’ and encompassed §§58-78. **pp. 1551-1558**
The second was headed ‘Compensation for dismissal consequent on detriment’ and encompassed §§79-90. There was a final heading, ‘Summary on the effect of section 47B(2)’ (§91). **pp. 1558-1561**
117. The conclusion at the end of the first section was this: “*I would accordingly hold that section 47B(2) does not prevent the claimant proceeding against the appellant directors under Part V on the basis of their responsibility for the dismissal itself*” (§77). **p. 1557**
118. The second section was undoubtedly obiter: Underhill LJ stated explicitly that “*My conclusion thus far means that it is strictly unnecessary to consider this element of [the individuals’] submissions*” (§79). **p. 1558**
119. The final heading was simply a summary of the judge’s overall reasoning, drawn from the first and second sections. It did not, therefore, represent the ratio of the case. **pp 1561-1562**
120. In the EAT in *Wicked Vision*, Bourne J accepted that the ratio of *Osipov* was the conclusion set out in §77. That must be right. As Bourne J continued, “*the position of the employer was not the issue in the case and, in my judgment, forms no part of the ratio*” ([2024] ICR 675 § 42). **p. 151**
121. In the EAT in *Barton Turns*, Barklem HHJ considered that he was bound by the “*unambiguous words used in paragraph 91 [of Osipov]*” ([2024] EAT 137 §9-10). He **pp. 167-168** eschewed the invitation to take a more refined analysis of the ratio of the case.
122. The Court of Appeal (in the combined cases) recognised that the situation did not fall squarely within the facts of *Osipov* because the claimants sought to bring claims against their employer under s47B(1B), rather than against co-workers

¹⁶ The secondary issue concerned specific points about the liability of one of the directors (*Osipov* §§ 1(6) and 92-99).

under s47B(1A) as in *Osipov*. However, it concluded that “We are bound by the doctrine of precedent to give section 47B(2) the same interpretation in this slightly different context” (§89). It considered that the entirety of §91(1) of *Osipov* expressed the ratio of the case: “The first clause of the first sentence describes the actual decision in that case. But the rest of the paragraph flows inevitably from the first clause, because it is based on the essential reasoning in *Osipov*, as we have just described it” (§91). p. 126
p. 126

123. That reasoning was in error. The essential reasoning in *Osipov* in the first section was that “what section 47B(2) excludes is a claim against the employer for dismissing the claimant (on whistleblower grounds), and a complaint under subsection (1A) against an individual who is a party to the dismissal decision falls outside its scope” (§60). That was because ‘dismissal’ is defined in Part X (s94(1)) as being dismissal ‘by the employer’. Further, “Once the decision was taken to make co-workers personally liable for whistleblower detriment it is hard to see any reason in principle why they should, uniquely, not be so liable in a case where the detriment amounts to dismissal” (§68). The question was whether the liability was provided for by section 103A, or not (§71). pp.
1554-1555
pp.
1555-1556

124. The reference (in this part of the judgment) to subsection (1B) is in §75 and is passing: “or, which follows, any vicarious liability of the employer under subsection (1B)”. This was not a necessary part of the reasoning. p. 1557

125. Thus:

- a) The Court of Appeal in the present case should have found that the ratio of *Osipov* was confined to the right to bring a claim against a co-worker under (1A) and did not extend to the right to bring a claim against an employer under (1B), since that was not a necessary step in Underhill LJ’s reasoning on the principal issue before the court.
- b) Furthermore, if the approach of Leggatt LJ in *Youngsam* correctly states the law and if it was appropriate to go beyond the ‘starting point’ (identified in §58 of his judgment), the Court of Appeal should have accepted that its primary task was to decide the case actually before it, and to do so in a way which gave scope for the law to evolve and adapt in light of the specific claims before it. The Court of Appeal wrongly failed to apply a flexible and p. 1263

open-textured approach. It could have doubted the reasoning in *Osipov* insofar as it related to the liability of co-workers, but concluded that a different approach was to be applied to the liability of employers. Given that this was the unanimous view of a differently constituted Court, it should have adopted that approach.

Conclusion

126. The Appellants respectfully ask this Court to allow their respective appeals on the grounds set out at paragraph 3 of the Appellants' Case.

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