

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
[2025] EWCA Civ 1466; [2026] ICR 286

APPEAL NUMBERS: UKSC/2026/0005

BETWEEN:

WICKED VISION LIMITED

Appellant

-and-

MR IAN RICE

Respondent

APPEAL NUMBER: UKSC/2026/0008

BETWEEN:

BARTON TURNS DEVELOPMENTS LIMITED

Appellant

-and-

MISS GAIL TREADWELL

Respondent

RESPONDENTS' CASE

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1 **INTRODUCTION**¹

1. This appeal raises a single question of statutory construction: what is the meaning and effect of s. 47B(2) of the *Employment Rights Act 1996* (ERA 1996) [p.194-196]?
2. In 2013, Parliament enacted ss. 47B(1A) to (1E) [p.194-196], creating personal liability for co-workers who victimise whistleblowers and corresponding vicarious liability for employers. Those provisions were enacted in response to *Fecitt v NHS Manchester* [2012] ICR 372 [p.671-687], to fill a recognised gap in protection. The core issue is whether s. 47B(2), unamended in 2013, operates to exclude employees from the benefit of those provisions when the detriment suffered at the hands of a co-worker or agent is a dismissal.
3. Mr Rice and Miss Treadwell were dismissed in circumstances where they allege a co-worker was responsible for that dismissal by reason of their protected disclosures and the employer is vicariously liable. Without the protection of s. 47B(1B) [p.194], they are confined to a claim of unfair dismissal under s. 103A [p.197] under which the causation threshold is higher: the protected disclosure must be the sole or principal reason for the dismissal rather than a material influence on it.
4. The question of whether the Court of Appeal was bound by *Osipov CA* [p.1533-1564], which is ground 3 in both appeals, is addressed briefly in section 8 below.

¹All references to Sections and Parts are to *Employment Rights Act 1996* unless otherwise stated.

5. The factual background is summarised in the Court of Appeal's judgment at [8]–[26] [p.109-112] and rehearsed in the Appellants' Written Case (AWC) [p.17-19]. It is not repeated. There is no material factual difference between the two cases affecting the outcome of this appeal.

2 SUMMARY OF RESPONDENTS' CASE

6. The Respondents contend that: (i) properly construed, s. 47B(2) [p.194-196] does not prevent a claim by an employee against a co-worker under s. 47B(1A) or against the employer vicariously under s. 47B(1B) in respect of the detriment of dismissal; and (ii) *Timis v Osipov* [2018] EWCA Civ 2321; [2019] ICR 655 (**Osipov CA**) [p.1533-1564], was correctly decided.
7. The co-worker provisions in ss. 47B(1A) to (1E) [p.194-196] are unique within the statutory scheme. They were enacted for a specific purpose: to ensure that individuals who victimise whistleblowers, including by bringing about their dismissal, bear personal liability for their conduct, and that employers are vicariously liable for the conduct of those individuals if they are workers or agents of the employer.
8. The correct construction of s. 47B(2) [p.194-196] is that it applies only where two conditions are both satisfied. First, the act complained of must be the employer's own act of dismissal; that is, a claim based on the primary liability of the employer and not on the liability of a co-worker or agent. Secondly, that dismissal must amount to a dismissal '*within the meaning of Part X*', that is, one where the protected disclosure is the sole or principal reason for the dismissal. Where either condition is absent, s. 47B(2) is not engaged and claims under Part V [p.219-257] remain

available. This construction gives full effect to the qualifying words '*amounts to a dismissal (within the meaning of Part X)*'.

9. The Appellants' construction strips the 2013 amendments of any practical effect in the most consequential whistleblowing cases and entirely misconstrues the words '*within the meaning of Part X*'. The Appellants' approach would have the effect of putting workers in a better position than employees and will in many cases leave employees without any remedy for having been dismissed because they blew the whistle. There is no principled justification for imposing co-worker liability for lesser detriments such as demotion or denial of promotion, while denying it for the most consequential: termination of employment. That cannot have been Parliament's intention.
10. The Appellants' repeated contention that there is only 'one route to dismissal'² misconstrues the qualifying words of s. 47B(2) [p.195]; fails to take account of Parliament's intention in enacting the unique co-worker provisions; wrongly treats claims not based on any fault of the employer as equivalent to claims that are; supposes a conceptual gulf between dismissal and other kinds of detriment where there is none³; and leads to absurd and unprincipled outcomes. The Appellants elevate their theory to the way in which this entire appeal should be framed. That is wrong; apart from anything else, the 2013 amendments do not align with that theory. The question for this Court is simply one of statutory construction. The Appellants' approach should be rejected.

² see: AWC §2, 3(b), 36(c), 48 [p.15-56].

³ See *Osipov CA* at [70] [p.1533-1564].

3 PRINCIPLES OF STATUTORY CONSTRUCTION

11. The general principles of statutory construction have recently been set out in *For Women Scotland v The Scottish Ministers* [2025] UKSC 16; [2026] AC 315 at [9]-[14]⁴ [p.757-760] and are detailed in the AWC which is not repeated.⁵

3.1 The purpose of the legislation

12. Lord Leggatt at [70] in *Uber BV v Aslam* [2021] ICR 657 [p.1611], in the context of employment protection legislation, stated: ‘*The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.*’

13. The preamble to the *Public Interest Disclosure Act 1998* [p.362], which introduced the whistleblowing provisions into the ERA 1996, provides that it was: ‘*An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.*’

14. As Simler P observed in *International Petroleum Ltd v Osipov* UKEAT/0058/17/DA (*Osipov EAT*) [p.1427-1532] at [153] [p.1501], in the specific context of considering the meaning of s. 47B(2): ‘*The express purpose of the whistleblowing legislation is to protect individuals from victimisation. In its amended form, the legislation provides employees and workers with protection from the prohibited acts and deliberate omissions of employers and fellow workers or agents of the employer. That being the mischief at which*

⁴ See also *Uber BV v Aslam* [2021] 4 All ER 209 at [70], per Lord Leggatt [p.1611]; ‘*The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.*’

⁵ See: AWC §15 [p.19-20].

the legislation is directed, it is appropriate to construe this provision, so far as it can properly be construed, to provide protection, rather than deny it.' (See also *Osipov CA* at [68] [p.1553-1555].)

15. In the field of whistleblowing, a construction that has regard to the underlying purpose will be one that enhances rather than restricts protection: see the preceding paragraph and *Croke v Hydro Aluminium Worcester Ltd* [2007] ICR 1303 at [33] [p.459-460], approved in *Day v Lewisham and Greenwich NHS Trust* [2017] ICR 917 at [15] [p.491].

3.2 The presumption against absurdity

16. It is a well-established presumption that Parliament does not intend to produce results that are absurd, unworkable, anomalous or illogical: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) (**Bennion**) Ch. 13 §13.1 [p.1797-1801]. As submitted below, the Appellants' construction produces several such results.

3.3 The legislature is presumed to legislate with knowledge of relevant judicial decisions

17. This principle is stated in *Bennion* Ch 24 §24.20 [p.1822-1827] as follows: '*the legislature is normally presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions on an enactment*' [p.1823]. And further: '*[it can be inferred] that where the legislature re-enacts a statutory provision which has been the subject of previous judicial interpretation, it intends the re-enacted provision to be given the same meaning... The previous judicial authority then forms part of the background context against which the new provision is enacted*' [p.1823]. See also authorities cited in

footnotes 8 and 9 of this paragraph of Bennion and in particular: '*Lachaux v Independent Print Ltd* [2019] UKSC 27 per Lord Sumption at [13] ('Parliament is taken to have known what the law was prior to the enactment'); *Campbell v Gordon* [2016] UKSC 38 per Lady Hale at [44] ('Parliament is presumed to legislate in the knowledge of the current state of the law when it is doing so'); *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34 per Lady Hale at [72] ('Parliament must be assumed to legislate in the knowledge of the general law')'.

4 THE STATUTORY FRAMEWORK

18. Section 47B sits within Part V [p.194-196]. It provides as follows (emphasis added):

47B Protected disclosures.

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

(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.'

19. When ss. 47B(1A) to (1E) were added by ERRA 2013, s. 47B(2) [p.195] was not amended.
20. 'Dismissal' is defined in s. 95.⁶ The right to claim unfair dismissal conferred by Part X is a right only against the employer. Both sections 94 and 95 refer to an employee being dismissed 'by his employer'. Thus, the exclusion under section 47B(2) [p.195] is for a claim against 'the employer' and a claim against an individual falls outside its scope.
21. Where the sole or principal reason for the dismissal is the making of a protected disclosure, a claim may be brought against the employer under s. 103A [p.197], which falls within Part X. That claim is available to employees only, not to the wider category of workers protected by s. 47B [p.194-196].

⁶ Meaning (i) termination of the contract by the employer (with or without notice); (ii) expiry of a fixed term contract; (iii) termination by the employee (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (i.e. constructive dismissal); and (iv) termination by the employee during the notice period given by the employer, defined as termination by the employer.

22. The causation tests under s. 47B [p.194-196] and s. 103A [p.197] are different. To succeed in an unfair dismissal claim, the employee must establish the reason (or principal reason) for the dismissal is the employee's protected disclosure. Under s. 47B a worker will succeed in a detriment claim if the protected disclosure was a material (in the sense of being more than a trivial) influence on their treatment (*Fecitt* at [45] [p.683]).
23. Parts V and X contain separate remedy regimes. Under Part V, compensation is assessed on a just and equitable basis under s. 49(2) [p.254-256], which currently includes compensation for injury to feelings, *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210 [p.1657-1680].⁷ Under Part X, the compensatory award under s. 123 is limited to financial loss and does not include injury to feelings: *Dunnachie v Kingston upon Hull City Council* [2005] 1 AC 226 [p.542-568]. Part X [p.258-316] additionally provides for interim relief, a basic award and reinstatement or re-engagement, none of which is available under Part V.

5 THE RESPONDENTS' CASE ON THE MEANING OF SECTION 47B(2)

5.1 **The qualifying words: 'within the meaning of Part X'**

24. The starting point is the statutory language. Section 47B(2) [p.195] excludes cases where '*the detriment in question amounts to dismissal (within the meaning of Part X)*'. On

⁷ However, the Court of Appeal in *Santos Gomes v Higher Level Care Limited* [2018] ICR 1571 [p.1370-1389] held that under reg. 30(3) of the *Working Time Regulations 1998* which has virtually identical wording to s. 49(2) such losses were not recoverable. As was observed in *Osipov* CA at [27] [p.1541], it is '*questionable whether the Virgo Fidelis line of authority is correct*'.

its proper construction, this provision applies only where two conditions are both satisfied.

25. The first condition is that the act complained of must be the employer's own act of dismissal⁸. This is clear from the reference to '*Part X*' in the qualifying words of s. 47B(2) [p.195]. Part X [p.258-316] concerns dismissals for which the employer is liable and this is because when s. 47B(2) was enacted, s. 47B imposed obligations only on the employer for the employer's own acts. Its function, subject to the second condition, was to prevent an employee from bringing a claim under Part V against the employer in respect of the employer's own dismissal when Part X provided the appropriate and exclusive route. That remains its function in relation to s. 47B(1), as it does with the corresponding provisions in the other sections of Part V. Claims under ss. 47B(1A) and (1B) do not satisfy this condition: they are based on the wrongdoing of the co-worker, not the act of the employer (see section 5.3 below). Section 103A [p.197] provides no equivalent route for such claims and s. 47B(2) was not enacted to address them.
26. The second condition is that the dismissal must fall within the meaning of Part X [p.195], that is, the protected disclosure must be the sole or principal reason for the dismissal. This condition reflects and gives effect to the words '*amounts to a dismissal (within the meaning of Part X)*'. A detriment of dismissal influenced by a protected disclosure, but for which it is not the sole or principal reason, is not, for that reason, one that *amounts* to a dismissal within the meaning of Part X (see s. 103A [p.197]). Therefore s. 47B(2) is not engaged even where the first condition is satisfied.

⁸ This proposition was accepted in both *Osipov CA* (at [60] and [68] per Underhill LJ) [p.1551; 1555] and *Osipov EAT* (at [154]-[155] per Simler P) [p.1502].

27. Had Parliament intended to exclude from s. 47B [p.194-196] all cases where an employee is dismissed, it would have referred simply to dismissal or dismissal 'within the meaning of s. 95' rather than 'within the meaning of Part X'. The reference to Part X is deliberate. As Simler P correctly identified in *Osipov EAT* at [154] [p.1502], s. 47B(2) 'does not seek to exclude all claims for detriment amounting to dismissal as it could have done. Rather, Parliament has chosen to limit the disapplication to those detriments amounting to dismissal within the meaning of Part X; in other words, to detriments amounting to unfair dismissal claims necessarily against the employer.'

5.2 The uniqueness of the co-worker provisions and the *Fecitt* mischief

28. The co-worker provisions in ss. 47B(1A) to (1E) [p.194-196] are unique in Part V [p.219-257]. They are not replicated anywhere else in the ERA 1996. That uniqueness reflects a specific legislative purpose.

29. In *Fecitt* [p.671-687], the Court of Appeal held that, as s. 47B was then enacted, an employer could not be vicariously liable for a co-worker or agent's detrimental treatment in circumstances where there was no primary liability imposed on the co-worker or agent. The 2013 amendments were enacted specifically to fill that gap.

30. The Appellants' reliance on other Part V provisions, ss. 44, 45A, 47 and others [p.222, 229, 233], is misplaced. Those provisions impose obligations only on employers. None incorporates co-worker liability. They therefore say nothing about how s. 47B(2) [p.195] should be read in the context of the unique co-worker provisions introduced in 2013. The pre-existing Part V architecture cannot determine the meaning of provisions that have no parallel elsewhere in Part V or in the ERA 1996. As was held in *Osipov CA* at [30(1)] [p.1543], 'for co-workers to be rendered personally

liable is unique not only as regards Part V but more generally as regards the protections afforded by the 1996 Act’.

31. A construction of s. 47B(2) [p.195] that excludes co-worker liability for the detriment of dismissal in every case is irreconcilable with the purpose for which the 2013 amendments were enacted.

5.3 The distinction between primary and vicarious liability

32. The Appellants contend that there is no material distinction between primary and vicarious liability for the purposes of s. 47B(2).⁹ That contention does not engage properly with the nature of the liability under ss. 47B(1), 47B(1A) and (1B).
33. Within s. 47B [p.194-196], s. 47B(1) is concerned with the primary liability of the employer¹⁰; s. 47B(1A) is concerned with the primary liability of the co-worker or agent; and s. 47B(1B) is concerned with the employer’s vicarious liability.

5.3.1 The employer’s vicarious liability generally

34. Vicarious liability is a secondary form of liability under which one party, here the employer, is held responsible for the wrongful acts of another. It does not render the employer personally at fault. In *Trustees of the Barry Congregation of Jehovah’s Witnesses v BXB* [2024] AC 567 at [1] [p.1570], Lord Burrows explained that vicarious liability is not a form of personal liability, but a secondary liability imposed on a defendant for the wrongdoing of another. It arises not because the defendant has committed any tort itself, but because the primary actor has done so. It is

⁹ AWC §34(d) [p.29].

¹⁰ As is s. 103A [p.197].

conceptually distinct from strict liability. See also: *E v English Province of Our Lady of Charity and another* [2013] QB 722 at [19]–[20] [p.576-577].¹¹

5.3.2 The legal effect of s. 47B(1A) and (1B)

35. Claims under s. 47B(1A) and s. 47B(1B) [p.194] are each of an entirely different character. A claim under s. 47B(1A) is a claim that a co-worker, acting in the course of their employment or as agent, wrongfully subjected the claimant to a detriment. The employer's liability under s. 47B(1B) does not arise because the employer subjected the employee to a detriment. It arises because the employer is responsible for the wrongdoing of its employee or agent.
36. The wording of s. 47B(1B), '*that thing is treated as also done by the worker's employer*' [p.194], simply reflects the common law position. The detriment is the act of the co-worker or agent which is, in the words of the statute, '*treated*' as the act of the employer, but it is not, as is explained in the authorities cited in paragraph 34 above, actually the act of the employer. The detriment remains the act of the co-worker.
37. The Court of Appeal's reasoning at [76], that s. 47B(1B) deems the co-worker's act to be also done by the employer, and therefore the legal effect '*is that the employee is dismissed by the employer, and that act 'amounts to [a] dismissal (within the meaning of Part X)*' [p.124] is, with respect, wrong. Section 47B(1B) attributes liability to the employer for the co-worker's or agent's conduct. It does not convert the character of the liability: the liability arises from the wrongdoing of the co-worker or agent, not that of the employer.

¹¹ Sub nom *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*.

5.3.3 The nature of claims under s. 47B(1) and s. 103A

38. A claim under s. 47B(1) [p.194] that the employer subjected the employee to a detriment is a complaint about the employer's own conduct. Where that concerns the detriment of dismissal, s. 103A [p.197], which is also concerned with the employer's primary liability, is the route Parliament designated for it. That is what s. 47B(2), and the other equivalent disapplication provisions in Part V, were enacted to address. The anti-overlap function of s. 47B(2) was to prevent an employee from bringing a claim under Part V in respect of the employer's own act of dismissal when Part X provided the appropriate route for that complaint if the protected disclosure was the sole or principal reason for the dismissal.
39. Finally, if s. 47B(1B) [p.194] had the effect for which the Appellants contend, the statute does not need both that subsection and s. 47B(1) as both, on their analysis, serve the same purpose. There would have been no reason to enact s. 47B(1B).

5.3.4 The importance of the co-worker or agent's motivation

40. The primary nature of co-worker liability is further demonstrated by the requirement that the individual must themselves be motivated by the protected disclosure. That principle, established in *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 [p.1267-1290] in relation to direct discrimination claims under the EA 2010, has been applied consistently in whistleblowing claims and most recently in *Henderson v GCRM Ltd and ors* [2026] ICR 101 (Fairley P) [p.887-903].¹²

¹² See also *Malik v Cenkos Securities plc* UKEAT/100/17 (Choudhury P); *William v Lewisham and Greenwich NHS Trust* [2024] EAT; [2024] ICR 1065 (Bourne J).

41. The effect is that a co-worker who is unknowingly manipulated by another (as in *Royal Mail v Jhuti* [2020] ICR 731 [p.1317-1332]) will not be personally liable under s. 47B(1A) and the employer will not be vicariously liable under s. 47B(1B), see *Henderson* at [51]-[52] (though the employer may still be primarily liable under s. 47B(1)).¹³ This confirms that liability under s. 47B(1A) is personal and fault based.

5.3.5 Liability for dismissal under s. 47B(1A) and (1B)

42. The Appellants' submission is that only the employer and not the co-worker can terminate the contract of employment, and therefore that dismissal is necessarily an act of the employer.¹⁴ That is correct as a matter of contract law. However, it does not determine the question of statutory liability under ss. 47B(1A) and (1B) [p.194-196].

43. Section 47B(1A) [p.194] is not concerned with who has the legal power to terminate the contract. It is concerned with who subjects the worker to a detriment on the ground of a protected disclosure.

44. The Appellants' analysis conflates contractual attribution with statutory liability and also the nature of that liability. It assumes that because only the employer can terminate the contract, only the employer can be legally responsible for a dismissal-related detriment. That does not follow. The statute expressly recognises that individuals who are not parties to the contract may nevertheless be legally responsible for conduct which culminates in dismissal. In this context, a dismissal is no different from other measures taken 'by the employer' such as the imposition

¹³ As in *First Great Western Limited v Moussa* [2024] IRLR 697 [p.716-731].

¹⁴ AWC §§75–76 [p. 41&42]; accepted by the Court of Appeal [69] and [75] [p.122 & 124].

of a warning, demotion or suspension. Each of these is both the exercise of a contractual power which the employer has, and each can also be acts of detrimental treatment by a co-worker for which they would be personally liable.

45. Finally, the Appellants' approach is inconsistent with fundamental principles of company law. A company is a separate legal person and is not to be treated as indistinguishable from those who act on its behalf, even in 'one-man bands': *Salomon v Salomon & Co Ltd* [1897] AC 22 [p.1333-1369]. The fact that a dismissal is attributed to the company does not eliminate the independent liability of the individuals whose conduct caused it.

5.4 The absurdity of the Appellants' construction

46. The Appellants' construction produces results that are anomalous and unprincipled in ways that Parliament cannot have intended.

5.4.1 The most consequential detriment by a co-worker attracts no sanction

47. On the Appellants' construction, s. 47B(1A) and (1B) [p.194] have no application to dismissal cases. If a manager demotes an employee, denies them promotion, or suspends them for mixed reasons including a protected disclosure, the employee may bring a claim under s. 47B(1A) against the manager personally, and the employer will be vicariously liable under s. 47B(1B). But if the same manager then *dismisses* the employee because the employee had made a protected disclosure, the following is the position:

- (1) the employee cannot bring a claim against the manager under s. 47B(1A) or the employer under s. 47B(1B) or s. 47B(1);

- (2) if, as is frequently the case, the dismissal is for mixed reasons with the making of the protected disclosure being one reason, a claim against the employer under s. 103A [p.197] will fail because the protected disclosure is not the sole or principal reason for the dismissal.
- (3) the purpose of co-worker liability in s. 47B(1A), which is to disincentivise the victimisation of whistleblowers by making those who may be tempted to do so personally liable, will be defeated. Using the example above, the manager will know that any detriment less than dismissal could lead to personal liability whereas if they dismiss the whistleblower, they will face no liability.
48. Simler P was right to observe in *Osipov EAT* at [157] [p.1503] that there is no '*principled reason for making fellow workers personally liable for losses caused by detriments short of dismissal but relieving them from individual liability for the consequences of what are likely to be the most serious detriments (such as an instruction or a recommendation that the complainant's employment or contract be terminated) and that have the potential to cause the most substantial loss.*'
49. Treating all detriments of a co-worker alike is also consistent with the policy of vicarious liability. An important reason for the doctrine is usually understood as including that liability is borne by a defendant with the means to compensate the victim; and the nature of the employment relationship provides justification for this imposition on employers.¹⁵ In light of the underlying policy, Parliament cannot have intended that the most compensable act be excluded.

¹⁵ See, for example, *Various Claimants v Catholic Child Welfare Society and ors* [2012] UKSC 56; [2013] 2 AC 1 at [34] and [35] [p.1644] and *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 377 at [22] [p.508].

5.4.2 The worker is in a more advantageous position

50. Within statutory employment law, those with employee status obtain the highest level of protection, while those with worker status have more limited rights. On the Appellants' construction this is turned on its head. Take the example in the paragraph 47 above but assume that a colleague of the employee who was a worker made the same protected disclosure at the same time and had their contract terminated by the same manager for the same mixed reasons. By contrast with the employee, the worker can recover all subsequent loss of earnings. It is highly unlikely that when enacting the co-worker provisions this was Parliament's intention and nothing in the wording of s. 47B requires such an outcome.
51. The Court of Appeal's reference at [68] [p.122] to the employee being given the *windfall* of a claim under Part V is, with respect, entirely inapposite. In fact, on the Appellants' construction, by contrast with workers, they will be deprived of dismissal detriment claims and thereby have reduced protection. They have certainly not obtained a windfall.

5.4.3 Confusion in constructive dismissal cases

52. The Appellants' proposed construction gives rise to several anomalies in constructive dismissal cases. For example:
- (1) If an employee is subjected to a detriment because they have made a protected disclosure, and resigns and claims constructive dismissal, the employee would argue that it is the detriment which has caused the future loss of earnings and

they can bring a claim under s. 47B(1A) and (1B) [p.194].¹⁶ However, the co-worker and employer would argue that this is a dismissal, and they can only bring a claim under s. 103A.

- (2) The co-worker liability is entirely dependent on what the whistleblower does. If the whistleblower does not resign, they can bring a claim against the co-worker. If they do resign, they cannot.

5.4.4 The insolvent employer

53. Another significant anomaly arising out of the Appellants' construction concerns the insolvent employer. *Osipov* itself arose in precisely that context: the employer was insolvent and the only realistic prospect of recovery was against the individual directors who had brought about the dismissal. Under the Appellants' construction, those directors would face no personal liability under s. 47B(1A) for the dismissal. The employee would be confined to a Part X claim against an employer from whom, in practice, no recovery was possible. Part XII provides only very limited protection in insolvency.

54. It is no answer to say that the risk of insolvency is a risk in all litigation. The whole point of the 2013 amendments was to ensure that individuals who victimise whistleblowers, including by bringing about their dismissal, are personally liable for their conduct. To read s. 47B(2) as excluding that personal liability in every case

¹⁶ It is well-recognised that a detriment claim under s. 47B may give rise to post-termination financial losses under the principles of 'but for' causation and that an act of termination will not break the chain of causation: *Roberts v Wilsons Solicitors LLP and ors* [2018] ICR 1092 (CA) at [59] and at [87]-[91] [p.1301 & 1307-1308].

of dismissal (irrespective of whether it falls within Part X) is to deprive the co-worker provisions of precisely the protection they were designed to give.

6 RESPONSE TO THE APPELLANTS' ARGUMENTS

6.1 The legislative architecture argument

55. The Appellants rely [p. 30-40] on a consistent legislative pattern across Part V by which detriment sections are disapplied in their entirety where the detriment amounts to dismissal within Part X. The Respondents do not dispute that this pattern exists across the other Part V provisions. The critical point is that s. 47B is the only provision in Part V that also contains co-worker liability provisions. The comparison with ss. 44, 45A, 47 and others is therefore inapt: those provisions impose obligations only on the employer and the anti-overlap provision operates as a simple gateway between Part V employer liability and Part X.
56. If Parliament had intended s. 47B(2) [p.195] to apply to the 2013 co-worker provisions to exclude them in dismissal cases, that would have been made explicit, given the specific purpose for which those provisions were enacted. The more natural inference from the absence of an amendment is that Parliament, when introducing the co-worker provisions in 2013, did not consider that s. 47B(2) would cut across the new personal liability regime: Parliament understood s. 47B(2) to exclude claims against the employer in respect of the employer's own acts of dismissal, while leaving intact the new co-worker regime for which Part X provides no equivalent.

6.2 The s. 49(6) argument

57. The Appellants argue that the absence of a cap in s. 49 [p.254] for employees claiming dismissal as a detriment under Part V demonstrates that Parliament never intended that an employee would be permitted to bring a detriment of dismissal claim.¹⁷ The Respondents agree that s. 49(6)(c) limits the application of s. 49 to cases where '*that contract is not a contract of employment*' and that s. 49(6) would impact on the amount of compensation an employee could recover under s. 47B in respect of the detriment of dismissal. However, it does not follow that this section becomes '*incoherent and unworkable*'.¹⁸
58. Section 49(6) [p.255] was enacted to ensure that a non-employee worker claiming termination of their contract under Part V could not recover more than an employee would recover under Part X. Section 49(6) was necessary when enacted because Part X did not apply to workers, so without it their compensation would not have been subject to the statutory cap in force when s. 47B and s. 103A were enacted.¹⁹
59. It is rightly not suggested by the Appellants that because employees are not covered by s. 49(6) [p.254], they can recover the same loss twice if they succeed in both a Part V and Part X claim, which would of course contravene the general rule against double recovery. The argument is simply that employees can, as the law currently stands, recover injury to feelings if they succeed in a detriment of dismissal claim under Part V which would not be available if they were limited to a claim under

¹⁷ AWC §§56-63 [p.36-39].

¹⁸ AWC §36f [31]. In the context of whistleblowing, describing this as a cap is a misnomer because compensation is not capped for whistleblowing, s 124(1A).

¹⁹ On 2 July 1999, see *Osipov CA* at [19] and [26] [p.1539-1541]. The cap was removed from 25 October 1999, see section 124(1A) introduced by *Employment Relations Act 1999*.

Part X.²⁰ However, the availability of an injury to feelings award under Part V in dismissal detriment claims, while unavailable under Part X for unfair dismissal, does not render the Respondents' construction incoherent. An employee who succeeds in claims brought under both Part V and Part X in respect of their dismissal may recover a basic award under Part X (unavailable under Part V) and injury to feelings under Part V (unavailable under Part X). This is in practice no different than an employee succeeding in a discrimination claim under the EA 2010 and an unfair dismissal claim under Part X. In such a scenario, the employee will recover injury to feelings under EA 2010 and a basic award under ERA 1996.

60. The only difference between the worker and the employee is that the worker cannot recover a basic award and this is for the good reason that they are not an employee and a basic award is the statutory award for loss of employment.
61. It is not, as the Appellants suggest, that the Respondents' argument must be that Parliament 'forgot' to enact the cap²¹; it is that the co-worker claim by an employee under Part V is a free-standing claim which may be brought alongside a Part X claim and there is no legitimate reason why an employee should not be entitled to recover losses under Part V and under Part X if they succeed in both claims. The worker position is different for the very reason that they do not have a contract of employment and are not covered by Part X.

²⁰ The enactment of s. 49(5) of course had nothing to do with injury to feelings awards because *Virgo Fidelis* had not been decided when it came into force in 1999.

²¹ AWC §61 [p.38].

6.3 ERA 2025 and other legislative comparators

62. The Appellants rely on ss. 47H and 47I of the *Employment Rights Act 2025* (not yet in force)²², which replicate the same disapplication provision as in s. 47B(2) [p.195]. The enactment of these provisions postdates *Osipov*. Two points are relevant here. First, ss. 47H and 47I contain no co-worker liability provisions equivalent to ss. 47B(1A) to (1E). The comparison is therefore as inapt as those with ss. 44, 45A and 47. Secondly, notwithstanding that it amended Part V including with provisions that have the same effect as s. 47B(2), Parliament did not take the opportunity to legislate to ‘correct’ *Osipov*. As Parliament is presumed to legislate in the knowledge of the current state of the law, it can be inferred that it was content with the law following *Osipov*.
63. The s. 197 fixed-term employee and the s. 43K and s. 43KA arguments [p.211-217]²³ are further examples of the general Part V [p.219-257] pattern which, for the reasons given above, does not engage with the unique position created by the 2013 amendments to s. 47B [p.194-196].

6.4 Employees of sole traders

64. A further reason relied on by the Appellants to support their proposed construction is that corporate employees would be in a favoured position over those employed by sole traders because employees of sole traders will not be able to rely on the co-worker provisions in s. 47B(1A) and (1B) [p.194-196].²⁴ Firstly, it is not correct that

²² AWC §§49-51 [p.34-35].

²³ AWC §§44 to 48 and §§52 to 55 [p.33-34; 35].

²⁴ AWC §90 [p.47].

employees of sole traders will never be able to rely on s. 47B(1A) or (1B). In many cases sole traders will be co-workers alongside the employee and so such claims will be open to the employees. Secondly, it does not support the proposed construction because if the claimant does not have a co-worker that will be the reason they cannot bring a claim. Section 47B(1A) makes co-workers liable and does not apply if there is no detrimental treatment by a co-worker or agent.

6.5 The Johnson exclusion zone argument

65. The Johnson exclusion zone argument was rejected by Simler P in *Osipov EAT* at [159] [p.1504-1505], correctly for reasons the Respondents adopt: *'There is no question here of developing a common law remedy in parallel to the statutory scheme... The statutory scheme exists in s. 47B ERA 1996. On any view it allows workers to claim for pre-dismissal and dismissal-related detriments, and the losses that flow from both. The exclusion zone reasoning has no application here.'* Similarly, this argument was also rejected in the *Osipov CA* at [76] [p.1557], in which the Court noted that the state of affairs produced by *Johnson* is widely regarded as, at best, a necessary evil, and should be avoided, as the construction adopted in *Osipov CA* did. That is plainly correct.

7 BARTON TURNS GROUND 2

66. This Ground of Appeal is that if the claimant has a potential unfair dismissal claim under Part X, s. 47B(2) precludes any detriment claim under Part V in respect of the same dismissal.

67. Where distinct remedies are available under each regime, for example, a basic award under Part X, and an injury to feelings under Part V, there is no reason in principle why both should not be recovered.
68. The anti-overlap provisions in employment legislation come in different forms. For example, s. 126 operates to prevent double recovery in unfair dismissal and discrimination claims without excluding the claims themselves. By contrast, s. 212(1) EA 2010 operates to prevent the same conduct being both a detriment and an act of harassment.²⁵
69. Section 47B(2) [p.195] operates to prevent overlap between identical claims under Parts V [p.219-257] and X [p.258-316], not to exclude the distinct forms of liability created by the co-worker provisions. This was made clear in *Osipov CA* at [70]–[71] [p.1555-1556]. A claim under s. 47B(1A) and (1B) and a claim under s. 103A are not identical: the root of liability is different, as is addressed in section 5.3 above.
70. In *Jhuti*-type cases, a determination will be required as to whether the decision-maker or the manipulator or both had the protected disclosure in mind at the relevant time, and this will determine which type of claim is available. That is a function of the different forms of liability in play and does not affect the construction of s. 47B(2).

²⁵ It is of note that in such a case claims are usually brought as alternatives – a typical claim will be that the claimant has been subjected to an act of harassment under s. 26 EA 2010 or, in the alternative, it is a detriment under s. 13 EA 2010.

8 RATIO OF OSIPOV

71. This issue, which is Ground 3 in both Appeals, is academic in this Court, which will determine the correct construction of s. 47B(2) afresh. It is addressed briefly.
72. The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted: *R (Kadhim) v Brent LBC Housing Benefit Review Board* [2001] QB 955 at [16] [p.1093]. In *R (Youngsam) v The Parole Board* [2020] QB 387 at [51] [p.1262], Leggatt LJ held that the ratio is that part of the reasoning which is (or is regarded by the judge as being) part of the best or preferred justification for the conclusion reached.
73. The full reasoning of Underhill LJ, summarised at [91(1)] of *Osipov CA* [p.1561-1562], constitutes the ratio of that decision. Underhill LJ described [91] as his '*essential conclusions*.' Those conclusions address both co-worker personal liability under s. 47B(1A) and employer vicarious liability under s. 47B(1B) [p.194-196]. The analysis of what s. 47B(2) does not exclude, the new co-worker and vicarious liability provisions, is intertwined with the analysis of what it does exclude, the employer's primary liability for its own dismissal. The rest of [91] flows inevitably from the first clause, as the Court of Appeal below correctly held. The ratio is not confined to [77], which addressed only the co-worker point.
74. The Court of Appeal was accordingly right to conclude at [91] that it was bound by *Osipov CA* [p.1533-1564].

9 CONCLUSION

75. The Respondents invite this Court to dismiss both appeals for the following reasons.
76. First, s. 47B(2) [p.195] applies only where two conditions are satisfied: the act complained of must be the employer's own act of dismissal, and the dismissal must amount to a claim within Part X, that is, one where the protected disclosure is the sole or principal reason for the dismissal. Claims under ss. 47B(1A) and (1B) do not satisfy the first condition because they are based on the wrongdoing of the co-worker, not the fault of the employer. Section 103A [p.197] provides no equivalent route for such claims. Section 47B(2) was not enacted to address them. The second condition will not be satisfied in mixed reasons cases because the sole or principal reason for the dismissal will not be the making of the protected disclosure and therefore the dismissal will not be within Part X.
77. Second, ss. 47B(1A) to (1E) were enacted to ensure that individuals who victimise whistleblowers bear personal responsibility for their conduct, including in the most serious cases. A construction that excludes co-worker and agent liability for dismissal in every case is irreconcilable with that purpose.
78. Third, s. 47B(2) excludes the employer's primary liability for its own act of dismissal. It does not exclude the co-worker or agent's primary liability under s. 47B(1A) or the employer's vicarious liability under s. 47B(1B) for the co-worker or agent's conduct.
79. Fourth, the Appellants' construction produces anomalous and unprincipled results: the most consequential detriment a whistleblower can suffer is the one for which the individual responsible faces no personal liability; workers are in a better

position than employees in the most serious cases; and co-worker claims will be excluded even where the employer is insolvent and Part X provides no practical remedy.

80. Fifth, *Osipov CA* [p.1533-1564] was correctly decided and correctly applied by the Court of Appeal below.

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ADAM SOLOMON KC
CHRISTOPHER MILSOM
TAMSIN SANDIFORD

Counsel for Mr I Rice

JEFFREY JUPP KC
CHRISTOPHER CANNING
Counsel for Miss G Treadwell