

Neutral Citation Number: [2018] EWCA Civ 2321

Case No: A2/2017/2282

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL

Simler P

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19/10/2018

**Before :**

LORD JUSTICE UNDERHILL

(Vice-President of the Court of Appeal (Civil Division))

LADY JUSTICE RAFFERTY

and

LORD JUSTICE SALES

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**Between :**

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| --- | --- | --- |
|  | 1. **FRANK TIMIS**
2. **ANTONY SAGE**
 | Appellants |
|  | **- and -** |  |
|  | **ALEXANDER OSIPOV** **- and -****PROTECT** | Respondent Intervener |

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**Mr Daniel Stilitz** **QC** and **Mr Simon Forshaw** (instructed by **Clyde & Co LLP**) for the **Appellants**

**Mr Bruce Carr QC** (instructed by **Brahams Dutt Badrick French LLP**) for the **Respondent**

**Ms Schona Jolly QC** and **Mr Christopher Milsom** (Instructed by **Leigh Day & Co.**) for the **Intervener**

Hearing dates: 9th & 10th July 2018

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Approved Judgment

**Lord Justice Underhill :**

**INTRODUCTION**

1. The issues in this appeal can be summarised as follows, albeit at the cost of some over-compression:

(1) The Respondent, Mr Alexander Osipov, to whom I will refer as “the Claimant”, was employed by an oil exploration company called International Petroleum Ltd (“IPL”) as its CEO. Two of IPL’s directors were Mr Frank Timis and Mr Antony Sage, who are the Appellants. Mr Timis is IPL’s largest individual shareholder. Mr Sage was at the material time its Chairman.

(2) In late October 2014 Mr Timis, with the agreement of Mr Sage, decided that the Claimant should be summarily dismissed, and the dismissal was effected by an e-mail from Mr Sage sent on 27 October.

(3) An Employment Tribunal found that the principal reason for the Claimant’s dismissal was that he had made protected disclosures – that is, that he was a whistleblower. It accordingly held that he had been unfairly dismissed by IPL, by reference to section 103A of the Employment Rights Act 1996, which proscribes “whistleblower dismissal”: that decision is not challenged before us.

(4) However, the ET also held that by their conduct in relation to his dismissal the Appellants had subjected him to a detriment, or detriments, contrary to section 47B of the same Act, which proscribes “whistleblower detriment” by individuals employed[[1]](#footnote-1) by the same employer, as well as by the employer itself; and that they were jointly and severally liable, with IPL, to compensate him for the losses suffered as result of his dismissal in an amount then quantified at £1,744.575.56. That decision was in substance upheld by the Employment Appeal Tribunal, although the amount had to be re-calculated and is now agreed as £2,003,972.35.

(5) The principal issue on this appeal is whether it was open to the ET to award the Claimant compensation against the Appellants, as individuals, for the losses occasioned by his dismissal. It is their case that such compensation could only be awarded by way of compensation for unfair dismissal and thus only against IPL (since only the employer can be liable for unfair dismissal).

(6) There is also an issue as to whether, even if Mr Timis is liable on the basis found, the same reasoning can apply to Mr Sage.

1. In most discrimination cases the issue of the individual liability of a co-worker is of limited practical significance because the employer usually discharges the full amount of the award. But that is not always so. In this case we were told that IPL is insolvent and that the Claimant is accordingly looking to recover from the Appellants personally. We were also told that the Appellants have the benefit of directors’ insurance which will cover the full amount of the claim[[2]](#footnote-2); but that would not always be so. The issue of the extent of individual liability in such cases is one of real importance, and for that reason the whistleblower charity Protect (until recently known as Public Concern at Work) has applied for and been given permission to intervene in the appeal.
2. I should mention for completeness that IPL also initially sought permission to appeal, but its application was adjourned to the full hearing because it was unclear how the pleaded grounds, which went only to the liability of the individuals, affected its own liability. In the event an order was made by consent prior to the hearing dismissing its appeal.
3. The Appellants have been represented before us by Mr Daniel Stilitz QC and Mr Simon Forshaw. Mr Forshaw also represented them (and IPL) in the EAT and in the final stage of proceedings in the ET; but at the main hearing in the ET they were represented by Mr Damian Brown QC. Mr Bruce Carr QC has acted for the Claimant throughout. Protect has been represented by Ms Schona Jolly QC and Mr Christopher Milsom.

**THE STATUTORY PROVISIONS**

1. It is necessary to start with the applicable statutory provisions. These have a complicated legislative history, which it is necessary to understand in order to address the issues raised by the appeal. I will accordingly trace their development chronologically.

THE EMPLOYMENT RIGHTS ACT 1996

1. Whistleblower protection is effected by provisions of the Employment Rights Act 1996 first introduced by the Public Interest Disclosure Act 1998, though some further changes were made, only a few months later, by the Employment Relations Act 1999. It will be useful to make some points about the overall structure of the 1996 Act first. Two Parts are relevant for our purposes – Part V, “Protection from Suffering Detriment in Employment”; and Part X, “Unfair Dismissal”. I take them in reverse order.

Part X

1. I start by observing that the right not to be unfairly dismissed goes back to the Industrial Relations Act 1971, and Part X of the 1996 Act is only the latest of a series of statutory embodiments of that right, all in substantially similar terms. The key provisions to note are as follows.
2. Section 94 (1) provides for the basic right not to be unfairly dismissed, as follows:

“An employee has the right not to be unfairly dismissed by his employer.”

“Employee” is defined by section 230 (1) and (2) of the Act in the narrow sense of a person employed under a contract of service. Section 95 is headed “Circumstances in which an employee is dismissed”. I need only set out sub-section (1), which reads:

“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.”

Section 98 sets out the well-known test of unfairness applicable in the ordinary case.

1. There follow a series of sections – originally sections 99-105, but since added to and given the heading “Other Dismissals” – which provide for a dismissal to be automatically unfair where the reason (or principal reason) is one against which particular protection is regarded as necessary. I will refer to such reasons as “proscribed grounds”.
2. Section 108 requires employees to have a minimum qualifying period before they can bring an unfair dismissal claim, though, as will appear, that is disapplied in cases of dismissal on proscribed grounds.
3. Sections 111-134 (Chapter II) deal with enforcement. Section 112 provides for two different kinds of remedy – reinstatement or re-engagement (under sections 113, elaborated in sections 114-117), or compensation (under section 118, elaborated in sections 119-127). Formally, reinstatement or re-engagement are the primary remedies, in the sense that the tribunal can only make an award of compensation where it has decided not to make an order under section 113.
4. Section 118 provides that compensation for unfair dismissal shall take the form of a basic award (calculated in accordance with sections 119-122) and a compensatory award (calculated in accordance with sections 123, 124, 126 and 127). I should set out the terms of section 123 (1)-(2), which contain the basic principles governing the amount of a compensatory award, together with sub-sections (4) and (6):

“(1) Subject to the provisions of this section and sections 124, 124A and 126 the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all 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.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) …

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) …

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

1. Section 124 provides for a cap on compensation, which has increased over the years. It was originally applicable in all cases, but, as will appear, it has since been disapplied in the case of some (though not all) kinds of automatically unfair dismissal.

Part V

1. As originally enacted, Part V contained four sections conferring on employees the right not to be subjected to detriment on various grounds corresponding to the proscribed grounds under Part X. The rights in question do not go as far back as the unfair dismissal provisions: they were created at various stages during the 1990s. I take as an example section 44, where the proscribed ground is, broadly, acts done to promote health and safety. Sub-section (1) begins:

“An employee 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 …”

Sections 45-47 adopt the identical formula.

1. The definition of “employee” in section 230 (1) and (2) applied to those provisions as it does to unfair dismissal, so only those employed under contracts of service could claim.
2. As regards enforcement, section 48 gave the right to complain to what was then still called the industrial tribunal of a breach of the rights conferred by sections 44 to 47 and contained procedural provisions which I need not set out. Section 49, headed “Remedies”, read:

“(1) Where an industrial tribunal finds a complaint under section 48 well-founded, the tribunal —

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

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

(2) The amount of the compensation awarded 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.

(3) The loss shall be taken to include —

(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and

(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.

(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(5) Where the tribunal finds that the act, or failure to act, to which the complaint relates was to any extent caused or contributed to by action of the complainant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.”

Those provisions are in most, though not all, respects identical to the provisions governing compensation in Part X (see para. 12 above).

The Relationship between Part V and Part X

1. It will be seen that both Part V and Part X provide for substantially self-contained, albeit largely parallel, regimes governing the rights which they protect. However the draftsman appreciated that, absent provision to the contrary, dismissal would itself constitute a detriment, which would mean that a claim of dismissal on whistleblower grounds could in principle be brought under either Part. That overlap was addressed by including a provision in identical terms in each of sections 44-47 (for convenience I will refer to it as section 44 (4)) as follows:

“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).”

That was not an innovation: similar provisions are to be found in the pre-1996 Act legislation covering unlawful detriment.

1. The exception provided by the introductory words of section 44 (4) reflected the fact that section 197 of the 1996 Act excluded employees on fixed-term contracts (subject to some conditions) from unfair dismissal protection. 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. The exception was removed by the 1999 Act.

THE ORIGINAL WHISTLEBLOWER PROVISIONS

1. I set out under this head the effect of the amendments to the 1996 Act introduced by the 1998 Act, which took effect on July 2 1999, together with some further amendments introduced by the 1999 Act which took effect only three months later, on 25 October 1999. I start with the new Part IVA, but thereafter I again take Part X before Part V.

Definition of Protected Disclosure

1. A new Part IVA was introduced into the 1996 Act containing a number of sections – 43A-43L – defining “protected disclosure”. Nothing turns on those provisions for our purposes, save that section 43K gives the term “worker”, whose primary definition is to be found in section 230 (3), an extended meaning for the purpose of Part IVA: I need not set it out, but it is, we were told, unique to the whistleblower legislation.

Whistleblower Dismissal

1. A new section 103A was added to the group of sections in Part X providing for cases of automatic unfair dismissal, as follows:

“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.”

1. The only other change made to Part X by the 1998 Act was to amend section 108 so as to disapply the provisions requiring a qualifying period of employment for a claim under section 103A: see section 108 (3) (ff). However, shortly afterwards the 1999 Act amended section 124 so as to remove the statutory cap in the case of section 103A dismissals: see section 124 (1A).

Whistleblower Detriment

1. The 1998 Act introduced a new section 47B into Part V, giving workers – not, NB, just employees – the right not to be subjected to a detriment for making a protected disclosure. I need not reproduce it in its original form because it was shortly afterwards amended by the 1999 Act so as to read:

“(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) 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.”

The amendment made by the 1999 Act was to sub-section (2), which had originally begun with the same words of exception as section 44 (4) – see paras. 17-18 above. I will refer to acts or omissions falling within the terms of sub-section (1) as “whistleblower detriments”.

1. It will be seen that, subject to the important difference that the right extended to workers (in the extended sense – see sub-section (3)) and not just employees, section 47B follows the same pattern as the other substantive provisions of Part V. In particular, section 47B (2), both in its original form and as amended shortly afterwards, is in substantially identical terms to section 44 (4). (In so far as the wording is rather more elaborate, that simply reflects the fact that an anti-overlap provision with Part X is unnecessary in the case of workers who are not employees, because they have no unfair dismissal rights.) As will appear, it is on the meaning and effect of this sub-section that the main issue in this appeal turns.
2. The introduction of section 47B required changes to sections 48 and 49. As regards section 48 I need only set out sub-section (1A), which reads:

“A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.”

1. The only substantial change to section 49 was the addition of a sub-section (6) in the following terms:

“Where –

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

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

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

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

There was some discussion before us about the purpose of this sub-section. The background is of course that, since section 47B (2) applies only to employees, a worker who is not an employee, and who thus has no unfair dismissal rights, is entitled to complain of the termination of his or her contract on whistleblower grounds as a detriment under Part V (just as fixed-term employees initially were – see para. 18 above). The effect of sub-section (6) is to ensure that in any such claim the worker will not recover any more than if he or she had been an employee dismissed on such grounds. On the face of it such a provision might be thought to be unnecessary, since, as noted above, the provisions governing compensation under Part V and Part X are very similar; but it seems likely that it was initially included so as to ensure that workers in such a case were subject to the statutory cap which at that point applied to compensation for claims under section 103A. But if that is the explanation the question arises of why it was retained when the cap was removed shortly afterwards (see para. 22 above). Presumably the draftsman either did not notice that it was no longer necessary or decided to retain it on the basis that the principle was correct and that there might be idiosyncratic cases where it would be valuable for it to be expressly stated[[3]](#footnote-3).

1. Although, as noted above, the compensation provisions of Part V and Part X are in most respects identical, I should note one divergence which has emerged in the case-law. It has from the early days of the unfair dismissal legislation been held, and it was confirmed by the House of Lords in *Dunnachie v Kingston-upon-Hull Council* [2004] UKHL 36, [2005] 1 AC 226, that the reference to “loss” in what is now section 123 (1) refers only to pecuniary loss and thus excludes injury to feelings. However, there is EAT authority, reviewed by HHJ Ansell in *Virgo Fidelis Senior School v Boyle* [2004] UKEAT 0644/03, [2004] ICR 1210, to the effect that “loss” in section 49 (2) has a wider meaning which *does* extend to injury to feelings; and such awards are almost invariably made in whistleblower cases. For reasons which will appear, the existence of that distinction is relevant to the issues which we have to decide. Mr Carr submitted that it was questionable whether the *Virgo Fidelis* line of authority is correct, and he drew attention to the recent decision of this Court in *Gomes v Higher Level Care Ltd* [2018] EWCA Civ 41, [2018] IRLR 440, which concerned similar provisions in the Working Time Regulations 1998. He did not, however, invite us to decide the point, and both Mr Stilitz and Ms Jolly submitted that we should not do so: it had not been raised in either the ET or the EAT (and the ET had indeed made an award of injury to feelings (see para. 39 below)). In those circumstances we heard no detailed argument, and we should proceed on the assumption that *Virgo Fidelis* was correctly decided.

THE CHANGES INTRODUCED IN 2013

1. The Enterprise and Regulatory Reform Act 2013, which came into effect on 25 June 2013, amended section 47B in response to the decision of this Court in *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372. The claimants in that case were nurses employed by an NHS entity who were subjected to “unpleasant behaviour” by fellow-employees as a result of having made protected disclosures. The EAT held that the conduct in question was in breach of section 47B and that the employer was vicariously liable to the claimants in respect of it. This Court overturned that decision. Elias LJ observed at para. 64 (p. 375 E-F) that under section 47B:

“… the worker is protected only against acts or omissions *by his employer* [original emphasis]*.* There is no separate protection afforded to acts of victimisation perpetrated by fellow workers.”

At para. 33 (p. 381 F-G), he said:

“Absent any legal wrong by the employee, there is no room for the doctrine [of vicarious liability] to operate. Here, in contrast to the discrimination legislation where individuals may be personally liable for their acts of victimisation taken against those who pursue discrimination claims, there is no provision making it unlawful for workers to victimise whistleblowers. It was solely on the ground of such alleged victimisation that it was sought to make the employer vicariously liable, and therefore the claim could not succeed.”

1. Against that background section 19 of the 2013 Act amended section 47B so that it now reads as follows:

“(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.”

1. I should spell out the essential effect of the changes made to section 47B by the 2013 Act:

(1) The starting-point is that individual co-workers are, by sub-section (1A), made personally liable for acts of whistleblower detriment done by them. Although the principal purpose of the legislation may have been to provide a route to vicarious liability on the part of the employer, in order to fill the lacuna identified in *Fecitt*, the effect nevertheless is that the individual is rendered liable in his or her own right, irrespective of the liability of the employer. That is of course the position also under the Equality Act 2010 and its predecessors, and, as I note below, some of the following sub-sections are borrowed from that legislation.[[4]](#footnote-4) But 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.

(2) Sub-section (1B), glossed by sub-section (1C), creates a form of vicarious liability for the employer. But it is not absolute. By sub-section (1D) an employer can escape liability if it shows (in short) that it took all reasonable steps to prevent the individual responsible from acting in the way complained of, in which case the claim will only succeed against that co-worker. These provisions are substantially identical to those of section 109 of the 2010 Act.

(3) Sub-section (1E) affords a defence to the individual in the limited circumstances there identified: this too is adopted directly from the anti-discrimination legislation – see section 110 (3) of the 2010 Act.

(4) As will be seen, sub-sections (2) and (3) are unchanged. Sub-section (2) thus applies to the terms introduced by amendment just as much as to sub-section (1).

1. The introduction of individual liability required a consequential change to the remedy provisions, so that they applied also to claims against co-workers (or agents). Section 48 (5) was amended so as to read (so far as material):

“In this section and section 49 any reference to the employer includes

(a) …

(b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.”

1. The new provisions leave the original sub-section (1) in place, so that an employer may be liable under section 47B by one of two routes – liability for its own act under sub-section (1) and vicarious liability under sub-section (1B). The question of which route is available in a given case will be important in circumstances where the employer could advance a reasonable steps defence, since sub-section (1D) applies only to claims under sub-section (1A).
2. Although I have noted above the parallels between the amended provisions and those of the 2010 Act, I have also noted some differences, and it is not possible simply to read across from the one to the other. In *Royal Mail Ltd v Jhuti* [2017] EWCA Civ 1632, [2018] ICR 982, I said (p. 991 A-F):

“26. It is worth adding something about how section 47B and section 103A (with their various ancillary provisions) relate to the provisions proscribing discrimination in the Equality Act 2010. In one sense they too are concerned with discrimination, and the phrase ‘whistleblower discrimination’ is very commonly used. That is not inapt since the underlying concept is the same. But it is important to appreciate that the two statutory schemes are not identical, and there are likewise some significant differences in terminology. Thus, while it no doubt makes sense to interpret identical language (where it occurs) in the same way, it is not safe always to read across from one scheme to the other. In *Kuzel v Roche Products Ltd* [2008] EWCA Civ 380, [2008] ICR 799, which involved a claim of whistleblower dismissal, Mummery LJ said, at para. 48 (p. 809 D-E):

‘Unfair dismissal and discrimination on specific prohibited grounds are ... different causes of action. 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 the legal concepts.’

That case was concerned specifically with section 103A, and the structure and language of section 47B is closer to that of the Equality Act, particularly since the changes introduced by the 2013 Act. But even so there is no precise correspondence, and caution is required in using authority on the one statute as a guide to the other.

27. One particular difference between the two schemes which it is important to bear in mind in this case is that whereas the whistleblower provisions of the 1996 Act provide separately for dismissal and ‘detriment’, as explained above, the 2010 Act makes no such distinction: although discrimination by dismissal is specifically identified in section 39 (2) (the principal provision prohibiting discrimination in employment), it is simply one of a list of proscribed discriminatory acts alongside ‘subjecting [the employee] to any other detriments’ (see heads (c) and (d)). The separate provision for dismissal and detriment … is a peculiarity of the whistleblower provisions.”

**THE DECISIONS OF THE ET AND THE EAT**

1. I do not propose under this head to recite the findings of fact made by the ET or the detailed reasoning of either it or the EAT. The primary issue is one of pure law and does not depend in any way on the particular facts beyond those summarised in para. 1 above. The secondary issue will require some reference to the findings of the ET, but those are more usefully set out at that stage. Likewise, it will be more convenient to refer to the reasoning of the EAT in my discussion of the issues. Accordingly I confine myself to a summary of what the actual decisions were, so far as relevant to the appeal.

THE EMPLOYMENT TRIBUNAL

1. The Claimant’s ET1 named IPL and four individuals as respondents: these were, apart from Mr Timis and Mr Sage, a Dr Lake and a Mr Matveev. There was a claim against IPL of whistleblower dismissal under section 103A, with a fallback claim of “ordinary” unfair dismissal under section 98. This appeal is, however, concerned with the detriment claim, and more specifically with the claim against the Appellants that in breach of section 47B they subjected the Claimant to detriments which led to his dismissal. As to that, the original Details of Claim did not articulate any specific case. But particulars were subsequently provided and in due course embodied in an agreed list of issues. This listed, at para. 9, fourteen detriments, labelled (a)-(n). Many could perhaps have been considered to be part of the chain of causation leading to the Claimant’s dismissal, but the focus before us has been on detriment (m), which reads:

“Any instructions or recommendations given by the 2nd to 5th Respondents which culminated in the Claimant’s dismissal on 27th October 2014 …”

1. The claim was heard in the London Central ET, chaired by Employment Judge Lewzey, over two weeks in December 2015. The Judgment and Reasons were sent to the parties on 6 April 2016. Although the Reasons are clearly structured, and a good deal of work evidently went into them, the reasoning is not always clearly spelt out, and some work has to be done to understand what the tribunal intended. I take separately its decisions as to liability and remedy.
2. As to liability, the tribunal found that the Claimant had been unfairly dismissed by IPL under section 103A. I need say nothing more about that aspect. As regards the detriment claims, it found some but not all of the pleaded detriments to be proved, including “detriment (m)”. It then, at para. 133, turned to consider which particular respondents had done – or, in its paraphrase, were “responsible for” – the acts by which the Claimant had been subjected to those detriments. It held that IPL was responsible for all of them, and that Mr Timis and Mr Sage were each responsible for some (more in Mr Timis’s case than Mr Sage’s): both of them were held responsible for detriment (m).
3. As to remedy, the formal decision under head (iv) of the Judgment was that:

“The Claimant is entitled to be paid the sum of £843,372.56 as compensation for unfair dismissal and detriment for making protected disclosures.”

Head (v) records that that sum is “provisional”, because it is subject to grossing-up to allow for the incidence of tax, and it gives liberty to the parties to apply if they cannot reach agreement on the appropriate grossed-up figure.

1. It will be observed that the Judgment rolls up the award for unfair dismissal and for the unlawful detriments. A break-down appears at para. 179 of the Reasons, which identifies four elements – (a) £563,461.92, described as “the award for unfair dismissal”; (b) £16,500 “in respect of injury to feelings”; (c) £169,702.58 “for unpaid salary”; and (d) £93,708.06 by way of a 12.5% uplift for failure to comply with the ACAS Code (see section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992). Some points need to be made about that assessment:

(1) The Judgment does not specify who is responsible for what element. The solicitors for the Appellants wrote to the ET asking for clarification and pointing out that since only the employer can be liable for unfair dismissal they could not be liable for element (a).

(2) As already noted, it is well established that in an unfair dismissal case no award can be made for injury to feelings. Element (b) must therefore be in respect only of injury to feelings caused by the unlawful detriments found by the tribunal. The discussion of the amount of the award at paras. 146-149 appears to proceed on that basis, though the point is not expressly adverted to. There is no other head of compensation in respect of the detriments: that presumably reflects the fact that they were not alleged to have caused any pecuniary loss beyond that caused by the dismissal.

(3) Element (c) looks odd because there was no claim in the proceedings for unpaid wages under Part II of the 1996 Act. However, the EAT subsequently held that the ET must have had in mind a specific provision in the Claimant’s contract which entitled him to be paid on termination “any accrued salary and bonuses” and that the authorities establish that a claim to such a sum can be advanced by way of compensation under section 123 of the Act: see para. 203 of the judgment of Simler P. There is no appeal against that decision.

1. There was a further hearing in the ET in November 2016, in order (inter alia) to decide the grossed-up final award, on which the parties had failed to agree, and to consider the point raised by the Appellants noted at para. 39 (1) above. The tribunal reserved its decision, and a Judgment and Reasons were sent to the parties on 5 December 2016. The decision can be summarised for present purposes as follows.
2. As regards the grossing up, the final award of “compensation for unfair dismissal and detriment for making protected disclosures” was quantified in the figure previously mentioned of £1,744,575.66.
3. As regards the liability of the Appellants, the tribunal’s reasoning is obscure. It acknowledges at para. 8 of its Reasons that Mr Timis and Mr Sage could not be liable for unfair dismissal and that “only [IPL] can be responsible for the losses flowing from the dismissal”, but it points out that they were individually liable for the detriments for which it had found them to be responsible and thus “for all the losses flowing from the detriments up to the point of dismissal”. The latter formula, which is repeated at para. 12 and incorporated in para. 1 of the formal Judgment, is ambiguous. If the phrase “up to the point of dismissal” is read as governing “losses”, rather than “detriments”, it would mean that Mr Timis and Mr Sage were not liable for “element (a)” in the award (or indeed, in the light of the EAT’s subsequent clarification, for “element (c)”) but only for element (b). However it seems that the phrase was intended to govern “detriments”. Mr Carr had argued in his closing submissions at the first hearing, as he does (on one alternative) before us, that the losses occasioned by the dismissal were recoverable against the Appellants because the dismissal was itself caused by the earlier unlawful detriments. The ET refers to that argument, and although it nowhere says so in terms it appears to have accepted it. If it had intended to distinguish between losses occurring before and after the dismissal it would have had to revise its original award of “compensation for unfair dismissal and detriment for making protected disclosures” by making some apportionment, but it did not do so. Certainly the parties understood the effect of this further Judgment to be that Mr Timis and Mr Sage were liable for the full £1,744,575.66, and they appealed to the EAT on that basis.
4. The upshot of all that is that, although the Appellants were not held liable for the Claimant’s unfair dismissal as such, they were held liable for the losses that he suffered in consequence of the dismissal, on the basis that those losses flowed from the pre-dismissal detriments for which they were liable, and specifically from detriment (m) – that is, the instruction or recommendation to dismiss him, which the tribunal clearly regarded as distinct from the dismissal itself.

THE EMPLOYMENT APPEAL TRIBUNAL

1. IPL, Mr Timis and Mr Sage appealed to the EAT against both the ET’s principal decision and the subsequent decision of 5 December 2016. The Claimant also cross-appealed. There were challenges to the ET’s conclusions over a wide range of issues going to both liability and quantum, and the hearing, which took place before Simler P in May 2017, lasted three days; in fact a further hearing was necessary in July to address the issues relating to grossing-up.
2. Simler P handed down her principal judgment on 19 July 2017. It runs to no fewer than 226 paragraphs and deals with the multifarious issues in a masterly fashion. Her judgment on the grossing-up issues was handed down on 27 July. Taking the two together, her conclusions can be sufficiently summarised for our purposes as follows:

(1) She dismissed IPL’s appeal, save in one very minor respect.

(2) She likewise dismissed the appeals of Mr Timis and Mr Sage on all the issues – including their joint and several liability for “element (a)” in the ET’s award – save only that she held that they could not be liable for the basic award under section 119 of the 1996 Act (amounting to £2,088) which had been included in that figure: the basic award can only be awarded against a party liable for unfair dismissal.

(3) She ruled on various issues that both parties had raised about the approach to grossing-up and directed that they seek to agree the correct figure on that basis. That has now been done, and the agreed figure is, as I have said, £2,003,972.35.[[5]](#footnote-5)

It is the second of those decisions that we are concerned with on this appeal.

**THE APPEAL**

1. The Appellants appeal against the decision of the EAT on what were originally pleaded as three grounds but are re-cast in Mr Stilitz’s skeleton argument[[6]](#footnote-6) as two, as follows:

“(A) By reason of section 47B (2) ERA 1996, neither Mr Timis nor Mr Sage could be liable to the claimant in respect of an instruction to dismiss the claimant, nor under section 47B (2) of ERA1996 could they be liable for losses which flowed from the claimant’s dismissal.

(B) In any event, Mr Sage could not be liable to the claimant in relation to any instruction to dismiss the claimant because, as the ET found, it was Mr Timis who gave the instruction to dismiss, not Mr Sage.”

I take those two grounds in turn.

**(A) THE EFFECT OF SECTION 47B (2)**

*CLFIS* AND *JHUTI*

1. I should refer by way of preliminary to two recent cases which foreshadow the issues arising on this part of the appeal.
2. *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010, was an age discrimination case in which the contract under which the claimant worked for the employer as a consultant had been terminated. The decision-maker had not been motivated by her age, but he had relied on a report from another employee who it was suggested might have been so motivated. It was relevant to consider whether, even though the claimant could not base any claim on the dismissal decision itself, she could rely on the prior act of the author of the report as a detriment which had caused her dismissal and on that basis recover against the employer for the losses consequent on that dismissal. It was held that she could. I delivered the only judgment, with which Longmore and Jackson LJJ agreed. Addressing the question schematically, with “C” as a dismissed employee and “Y” as the person whose discriminatory report had led to her dismissal, I said, at para. 39 (5) (p. 1926 G-H):

“The losses caused to C by her dismissal could be claimed for as part of the compensation for Y's discriminatory act, since they would have been caused or contributed to by that act and would not (at least normally) be too remote.”

1. In so far as *CLFIS* is significant in the present case, it is because it confirms that in principle, where a prior detriment has caused a worker to be dismissed, he or she can recover in respect of losses caused by the dismissal as compensation for the consequences of the original detriment, subject to any issue about remoteness. In my judgment in *Jhuti* (see below) I referred to such losses, rather clunkily, as “compensation for dismissal consequent on detriment”.
2. However, *CLFIS* was a discrimination case, and, as I said in *Jhuti* (see para. 33 above), its reasoning cannot be automatically applied in the whistleblower context. As also there noted, one fundamental difference between the whistleblower legislation and (what is now) the 2010 Act is that the latter does not distinguish conceptually between dismissal and other forms of detriment, and there is accordingly no provision equivalent to section 47B (2). The relevance of that difference was considered, but not in the end finally decided, in *Jhuti*, with which I must now deal in more detail.
3. In *Jhuti* the claimant employee was dismissed as a result of unfairly adverse reports from her line manager, who resented her having made a protected disclosure. The ET rejected her claim of unfair dismissal under section 103A because the manager who took the decision was unaware of the line manager’s motivation and it could not therefore be regarded as the reason for the dismissal; but it held, purportedly applying *CLFIS*, that she could nevertheless in principle recover compensation for the losses caused by her dismissal because they were consequences of the line manager’s adverse report, which constituted an unlawful detriment under section 47B (1A) for which the employer was liable under section 47B (1B).
4. Mitting J in the EAT allowed an appeal against the rejection of the unfair dismissal claim under section 103A (see [2016] UKEAT 0020/16, [2016] ICR 1043), and it was accordingly unnecessary for him to decide whether the alternative route under section 47B was available. But he expressed the view obiter that it was not. At paras. 28-29 of his judgment (p. 1051 B-E) he said:

“28. … The Employment Tribunal appears to have believed that, notwithstanding the terms of section 47B(2), it could treat the earlier acts of victimisation as giving rise to a claim for compensation for losses flowing from dismissal subject only to proof of causation.  ...  Although I have not heard argument on this issue I believe that the Employment Tribunal’s approach to this question of compensation to be erroneous.  Section 47B(2) expressly excludes the detriment of dismissal and so of necessity to the financial and other consequences of dismissal from consideration whatever the causative link.

29. The Tribunal’s conclusion was based, I believe, on a misunderstanding or misapplication of paragraphs 39 and 43 of the judgment of Underhill LJ in *Reynolds v CLFIS (UK) Ltd*[2015] ICR 1010, in which he explained the subject to proof of causation in a discrimination claim under the Equality Act 2010, it was possible for compensation to be awarded when dismissal followed acts of unlawful discrimination, subject only to proof of causation.  There is, however, no read across from discrimination principles and the discrimination scheme, which contains no equivalent to section 47B(2), and the whistle blowing scheme (see *Kuzel v Roche Products Ltd*[2008] ICR 799at paragraph 48, per Mummery LJ).”

1. The employer appealed. In this Court we restored the decision of the ET that the claimant could not claim for unfair dismissal. That revived the question of whether she had an alternative route to recovery under section 47B. Counsel for the employer accepted that there was no objection to such a route in principle, and he made it clear that he did not rely on Mitting J’s views about the effect of section 47B (2); but he submitted that, for reasons peculiar to the case, it was not open to the claimant to put her case that way. We rejected that submission, with the result that the case was remitted to the ET for the assessment of compensation on that basis. At para. 79 of my judgment, with which Jackson and Moylan LJJ agreed, I said (p. 1007-8):

“[Counsel’s] disavowal of the more root-and-branch approach based on the effect of section 47B (2) which Mitting J adopted in para. 28 of his judgment means that it is unnecessary for us to decide whether that approach was right. It is tempting nevertheless to undertake that task because the point may be of importance in other cases. However for that very reason I think it would be wrong to express a concluded view without having heard argument. I will confine myself to the following observations. I held in para. 39 (5) of my judgment in *CLFIS v Reynolds* … that in principle losses occasioned by a claimant's dismissal may be recoverable as compensation for an unlawful detriment which caused the dismissal. That was said in the context of age discrimination, but this is an area where I can see no reason in principle (i.e. subject to what follows) for adopting a different approach in a case of whistleblower discrimination. The real issue is whether a claim on that basis is inconsistent with the terms of section 47B (2). What the sub-section does is preclude a claim under the operative parts of the section where the detriment which is the subject of the complaint to the tribunal – what in other contexts would be called the cause of action – ‘amounts to a dismissal’; and it is clearly arguable that in this kind of case the relevant detriment is the prior treatment complained of, the dismissal being only a consequence of that detriment. But it may be that that distinction is not as straightforward as it seems: one authority that would require careful attention in this connection is the decision of this Court in *Melia v Magna Kansei Ltd* [2005] EWCA Civ 1547, [2006] ICR 410, to which brief reference was made in the skeleton arguments but on which we were not addressed.”

1. I should also set out para. 20, which concluded my exposition of the background law. I said (at p. 989 E-F):

“The draftsman's decision to treat whistleblower dismissal as a different kind of animal than whistleblower detriment gives rise to one anomaly already identified in the case-law. This is that for the purpose of section 103A the proscribed motivation must be the only, or at least the principal, reason for the dismissal, whereas the phrase ‘on the ground that’ in section 47B comprises any case where it is a significant part of that motivation: that this was anomalous was acknowledged by Elias LJ in *Fecitt* – see para. 44 (p. 384 C-D). Another anomaly, following the changes effected by the 2013 Act, is that a worker can be individually liable for whistleblower detriment whereas under section 103A, as for unfair dismissal generally, only the employer can be liable. Other anomalies may await exploration.”

I need to explain the reference to *Fecitt*. In the passage to which I refer Elias LJ declined to adopt a construction of the phrase “on the ground that” in section 47B (1) which equated to the “principal reason” test in section 103A; he observed that, although having different tests was anomalous, “that is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law”.

1. I should say that the Supreme Court has given permission to appeal in *Jhuti*, but it was not suggested that we should adjourn this appeal to await the outcome.

THE APPELLANTS’ CASE

1. For convenience I will set out again the relevant terms of section 47B (2):

“This section does not apply where … the detriment in question amounts to dismissal (within the meaning of Part X).”

Mr Stilitz in his skeleton argument contended that the present case falls within the terms of section 47B (2) for two reasons. He submitted that:

“a detriment amounts to dismissal where:

(i) the losses sought to be recovered are losses flowing from the dismissal; and/or

(ii) the act said to be the detriment is, in substance, nothing more than the dismissal”.

1. Although both are based on the terms of section 47B (2), those propositions are distinct and have different effects. I take them in turn, though in the reverse order. In my judgment in *Jhuti* (see para. 53 above) I said that it would be necessary to consider with some care the decision of this Court in *Melia v Magna Kansei Ltd* [2005] EWCA Civ 1547, [2006] ICR 410, but I think it will be more convenient at this stage to leave it to one side: I return to it at paras. 85-90 below.

(1) WAS THE DETRIMENT CAUGHT BY SECTION 47B (2) ?

1. The starting-point for Mr Stilitz’s case is the submission that, although “detriment (m)” was pleaded as an instruction/recommendation that the Claimant be dismissed, rather than as the dismissal itself, that was a distinction without a difference. On the ET’s findings the reality was that the decision to dismiss was taken by Mr Timis (perhaps jointly with Mr Sage, though that is immaterial to the present point) and Mr Sage’s e-mail was no more than the communication of that decision. Mr Stilitz placed some weight on the statutory phrase “amounts to”, which he submitted was chosen by the draftsman in order to make clear that an approach based on substance rather than form was required – though in truth it seems to me that the submission would have been open to him even if the verb used had been “constitutes”, or simply “is”. In this case the Claimant’s complaint was in substance about his actual dismissal and so fell within the terms of the sub-section.
2. I agree that the question whether a detriment relied on by a claimant “amounts to dismissal” should be treated as one of substance rather than form. I further agree that, although the ET’s findings as to the governance arrangements within IPL were unsatisfactory, it seems that Mr Timis had by one route or another the authority to dismiss the Claimant and that Mr Sage could or would not have done so on his own; in which case I think Mr Stilitz must be right that it is artificial to treat “detriment (m)” as distinct from the dismissal. There will, as Mr Stilitz acknowledged, be cases where it will not be easy to draw the line between a step taken in the process leading to the dismissal and the dismissal itself, but this does not seem to be one of them.
3. However, that only gets Mr Stilitz to first base. Although Mr Carr made no concessions on the question whether the pleaded “instruction/recommendation” amounted to dismissal, his primary case, supported by Ms Jolly for Protect, was that section 47B (2) would in any event still not apply to the claim *as against the Appellants* (as opposed to IPL). His argument depended on the fact that section 47B (2) does not refer simply to “dismissal” but to “dismissal (within the meaning of Part X)”. He pointed out that the right conferred by Part X is a right only against the employer. The language of the key provisions is explicit: section 94 (1) refers to an employee being dismissed “by his employer”, and the same language is used in section 95 (1) (see para. 8 above). Thus what section 47B (2) excludes is a claim *against the employer* for dismissing the claimant (on whistleblower grounds), and a complaint under sub-section (1A) against an individual who is a party to the dismissal decision falls outside its scope. He and Ms Jolly submitted that that construction accorded with the policy behind section 47B (2) and its cognates and that the exclusion of individual liability in a case where the detriment amounted to dismissal would produce serious anomalies. I need not summarise their submissions more fully at this stage.
4. That was essentially the case that Simler P accepted in the EAT. I should set out in full the reasoning at paras. 153-158 of her judgment:

“153.           … 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 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.

154.          The starting point is to construe all the words used in light of that intended purpose, including the words in brackets in s.47B(2)(b) which qualify the extent of the disapplication.  The provision 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.  The effect of Mr Forshaw’s submissions is to ignore the words in brackets, which are redundant on his approach.

155.          Furthermore, there is nothing in the express words of s.47B(2) that relieves a fellow worker or agent of his or her liability for a detriment amounting to dismissal not within the meaning of Part X.  The distinction drawn by s.47B(2) turns on whether or not the detriment in question amounts to an unfair dismissal claim (because it is within the meaning of Part X) which must necessarily be brought against the employer.  It maintains the distinction between claims against the employer of detriment other than dismissal falling under Part V, and claims for detriment amounting to dismissal within the meaning of Part X, which can only be pursued under s.103A in Part X.  These claims are mutually exclusive.  However, just as a worker who is not an employee has always been able to pursue detriment claims against the employer where the detriment in question amounts to dismissal (but cannot be pursued under Part X because the worker is not an employee) under s.47B in Part V, the amendments to s.47B introduced by the ERRA create a framework for individual liability of a fellow worker for detriments without restriction.  There is nothing in the wording of s.47(B)(1A) that limits the detriments caught by the provision or that excludes from individual liability detriments amounting to termination of the working relationship.

156.          This construction does not strain the meaning of the legislation, and to my mind creates a coherent approach.  It puts employees in the same position as workers who never lose their right to make claims against individuals for detriments amounting to dismissal and ensures that employees are given the same protection as workers who are subjected to the most serious detriments and not put in a worse position than those workers.  It is likely to be an unusual case where an employee will wish to pursue a claim and seek a remedy against a fellow worker for a whistleblowing detriment amounting to dismissal, rather than pursuing the claim against the employer, but I can see no principled reason for excluding it.

157.          Nor is there a 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 losses.  Although the statutory framework for victimisation based on protected disclosures and the anti-discrimination legislation in the Equality Act is different, given that Parliament decided that individuals should have unlimited liability for all aspects of unlawful discriminatory treatment under the Equality Act, I cannot see any rational basis for a difference in approach to whistleblowing claims that means fellow workers or agents should be protected from liability for the consequences of the most serious detriments to which they subject others.  The scheme of compensation under Part V is in more or less identical terms to that provided for in relation to Part X claims (compare s.49(2)-(6A) with s.123(1)-(6A)).  The ‘reasonable steps’ defence is available to an employer in relation to Part V detriment claims attributed to the employer: see s.47B(1D).

158.          Moreover, to construe the legislation as Mr Forshaw argues it should be is liable to produce other unjust results.  For example, in a ‘tainted information case’ which results in a finding that the unlawful act of the victimising manager cannot be attributed to the employer (and therefore does not ‘amount to dismissal’), the reasoning in *CLFIS v. Reynolds* would apply with the result that losses would be recoverable from the person responsible for the detriment short of dismissal.  This would include losses flowing from a consequential dismissal subject only to any legally applicable limitation on such losses.  On that basis the worker responsible for the victimisation would remain liable to pay full compensation under s.49(1)(b) ERA 1996.  On the other hand, where the victimising manager’s rationale or recommendation is attributed to the dismissing officer and so is treated as the employer’s reason for dismissal, the worker responsible for the unlawful conduct escapes liability.  Further, complainants may be left without any remedy at all even in a clear case in which dismissal results in part from a detriment done ‘on the ground that’ a protected disclosure was made: where the victimising manager responsible for the detrimental recommendation leading to dismissal is relieved of liability because his act ‘amounts to dismissal’ putting the case within s.103A ERA 1996, the employer might be able to argue that even if the protected disclosure was material to the decision to dismiss, it was not the reason or principal reason’ for the dismissal.”

1. Mr Stilitz in his submissions in reply contended that the construction of section 47B (2) advanced by Mr Carr and accepted by Simler P did not correspond to the Claimant’s pleading or the way that the case had been put in the ET, where the tribunal clearly proceeded on the basis that it was concerned with a distinct pre-dismissal detriment and not with dismissal as such: see para. 43 above. Mr Carr said that he had in fact put it both ways in the ET, but in any event it is clear from Simler P’s judgment that her reasoning reflected the case advanced by him before her, and it does not appear to have been argued that it was not open to him to advance the case that he did; nor was any such objection raised in the grounds of appeal to this Court or in Mr Stilitz’s skeleton argument. I do not believe that any objection can be taken now.
2. As regards the substance of the argument, Mr Stilitz focused first on the words of the sub-section. He submitted that the parenthesis “within the meaning of Part X” did no more than define the word “dismissal”. It did not literally or on any natural reading refer to whether the detriment amounted to *unfair* dismissal. Simler P’s paraphrase at para. 154 of her judgment – “in other words … detriments amounting to unfair dismissal claims necessarily against the employer” – went beyond the statutory language. If the intention had been that co-workers should be liable as individuals for the detriment of dismissal, that could easily have been achieved, when the 2013 amendments were made, by amending sub-section (2) so that it read “*sub-section (1)* does not apply where …[etc]”.
3. More generally, Mr Stilitz contended that if the Claimant’s construction of section 47B (2) were accepted it would undermine the careful demarcation between Part V and Part X. In practice, in every case of whistleblower dismissal the claimant would proceed against the employer under section 47B (1B) (on the back of the co-worker’s liability under sub-section (1A)) as well as, or instead of, under section 103A. There would be two particular advantages in claimants taking that course:

(1) It would – assuming that *Virgo Fidelis* is correctly decided (see para. 27 above) – enable them to recover compensation for injury to feelings, which would not, because of *Dunnachie*, be available in a claim against the employer under section 103A.

(2) It would allow them to avail themselves of the less restrictive test of causation in section 47B (see para. 54 above).

It cannot, he submitted, have been the intention of Parliament to allow the particular requirements of Part X to be circumvented in this way. Section 103A would become a dead letter.

1. Mr Stilitz acknowledged that there would be rare occasions when, because of doubts about the employer’s solvency, it would be in the interests of an employee dismissed on whistleblower grounds to proceed, if the Act allowed, against the individual responsible under section 47B (1A). But he submitted that there was no reason to suppose that Parliament was concerned with an unusual case of that kind. The possibility that respondents might prove insolvent is a risk of all litigation, and it is addressed, to the extent Parliament thought appropriate, by Part XII of the 1996 Act, which provides for a scheme under which the Secretary of State is obliged to pay some liabilities of insolvent employers. Apart from such cases, the remedy under section 103A was not only equivalent but superior.
2. Mr Stilitz did not accept that it was more coherent for dismissed employees to be treated, as regards the right to claim against co-workers, in the same way as workers whose employments had been terminated: their circumstances were fundamentally different, because the former had a right to claim under Part X whereas the latter did not. Nor was it, in his submission, an unacceptable anomaly, as Simler P said in para. 157 of her judgment, that the individual co-worker could not be liable for a whistleblower dismissal when he or she could be liable for a prior act which caused it: that was simply a consequence of the intended “division of labour” between Part V and Part X and analogous to the anomaly which Elias LJ had accepted in *Fecitt* (see para. 54 above).
3. I have not found this point straightforward, but I have come to the conclusion that the decision of the EAT was right. My reasons are as follows.
4. I start by saying that I agree with Simler P that a construction of section 47B (2) which prevented a claimant from bringing a claim against an individual co-worker based on the detriment of dismissal would produce an incoherent and unsatisfactory result and is accordingly unlikely to conform to Parliament’s intention. 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. Such a state of affairs produces the obvious anomalies identified by Simler P at paras. 156-158 of her judgment – namely, in short:

(a) that co-workers whose unlawfully motivated acts short of dismissal cause the claimant to be dismissed will be liable for those acts (and, subject to the point considered at paras. 77-82 below, for compensation for the losses caused by the dismissal) while an individual with the same motivation who decides on the actual dismissal escapes scot-free; and

(b) that there is no such bar to individual liability in the case of a claimant who is a worker rather than an employee and who has his or her contract of employment terminated, even though the two situations might be thought to be substantially identical.

1. I would add that if Mr Stilitz were right the scheme of protection for whistleblowers will be less effective than for victims of other kinds of discrimination and victimisation at work. As noted at para. 33 above, under the 2010 Act dismissal is simply another form of detriment for which both the employer and any responsible co-workers are potentially liable: claims are commonly brought against individuals as well as employers, and occasionally it is the individual who ends up having to pay, either because the employer is insolvent or because it has established a reasonable steps defence.[[7]](#footnote-7) That point is not in itself decisive because (again, as noted above) there is a limit to the extent to which it is right to try to assimilate the two schemes; but the two situations are nevertheless essentially similar and, other things being equal, one would expect Parliament to have intended to follow the same substantive approach in each.
2. Mr Stilitz’s principal answer is, as we have seen, that it is necessary to respect Parliament’s decision to allocate different kinds of whistleblower rights to Part V and to Part X of the 1996 Act. In my view that distinction does not have the significance that he attaches to it. I deal first with the question of the overall scheme of the legislation and the role of section 47B within it. It is of course right that the two Parts constitute distinct and largely self-contained regimes. However, that simply reflects the separate and historically prior development of protection against unfair dismissal. As it came to be recognised that treatment on certain proscribed grounds required additional protection, the choice was made not to disturb the existing unfair dismissal regime but to create a complementary regime covering detriments other than dismissal. But the different regimes address different aspects of the same mischiefs; and, as I have shown, they mostly employ substantially the same drafting. There is no reason to believe that they reflect any great conceptual gulf perceived by Parliament between dismissal and other kinds of detriment. That being so, although anti-overlap provisions of the kind found in section 44 (4) were required in the interests of good order, the policy behind them is unlikely to have been anything more than that a claimant should not claim under Part V where the identical right was available under Part X.
3. There is no reason to suppose that that policy changed when in 1998 statutory protection for whistleblowers was incorporated into the existing structure[[8]](#footnote-8); and indeed the preservation in section 47B (2), albeit for a short time, of the exception for fixed-term employees (see para. 23 above) shows that it did not. No more can I see any reason to suppose that the policy was affected by the changes made by the 2013 Act. That is, I see no basis for thinking that the introduction of individual liability meant that, for the first time, sub-section (2) – the language of which was unchanged – was intended to exclude a liability which would arise under the other provisions of the section but which was not provided for by section 103A.
4. As for the two more specific points identified at para. 64 above, I was initially rather troubled by these. It seems clear that the draftsman’s overall intention was that the rights under Part V and Part X would be so far as possible parallel, albeit that employees who had been unfairly dismissed would enjoy the additional remedies available under sections 113 (reinstatement/re-engagement) and 119 (basic award): that is why, for example, the compensation provisions in the two Parts are in substantially identical terms. Against that background the two points identified by Mr Stilitz are indeed anomalies. But in the end I am not persuaded that they undermine my analysis. They represent particular wrinkles in the scheme of the Act without, so far as I can see, any wider significance. As to the availability of compensation for injury to feelings, there is no indication that the draftsman had focused on this question at all. As for the different tests of causation, this too may have been inadvertent; or the draftsman may simply have taken the view that the difference would rarely matter in practice and that it would be too difficult to find a way of assimilating the two tests. I accept that it might be said that if the subsequent case-law – *Virgo Fidelis* and *Dunnachie* in the one case and Elias LJ’s observations in *Fecitt* in the other (see para. 54 above) – had not reflected Parliament’s intention the opportunity could have been taken in 2013 to make any necessary adjustments. But that is not always a safe assumption.
5. In any event these anomalies – intentional or not – are only of significance for our purposes if they suggest that there was a positive statutory intention that no claim could be advanced under section 47B where the detriment took the form of dismissal, even if it could not be advanced under section 103A. I do not believe that they do. I would add, as regards compensation for injury to feelings, that, but for the mismatch with *Dunnachie*, there is nothing surprising about such compensation being available in a case where the detriment takes the form of dismissal. It has always been understood to be available for detriments other than dismissal, and it is also available in the case of discriminatory dismissals under the 2010 Act. It might indeed be thought that the real anomaly was that it was not available in a claim under section 103A, in which case it is an advantage of my construction that it mitigates that anomaly.
6. Mr Stilitz is not right to say that allowing individual liability under section 47B (1A), with the consequence that the employer is vicariously liable under sub-section (1B), will mean that section 103A becomes a dead letter. Employees who claim to have been dismissed on whistleblower grounds may indeed wish to advance a case under section 47B (1B) for the reasons which he gives. But they will certainly also need to rely on section 103A, not only because it gives the employer no “reasonable steps” defence but also because orders for reinstatement or re-engagement, and for a basic award, are only available in a claim under Part X.
7. I accordingly approach the construction of the language of section 47B (2) on the basis that I would expect Parliament to have intended to exclude liability under the operative provisions of the section only where the identical remedy was available under section 103A; and thus that it would not exclude a co-worker’s individual liability for the detriment of dismissal under sub-section (1A) (or, which follows, any vicarious liability of the employer under sub-section (1B)). I do not believe that the statutory language compels a different construction. The point is not so much that “dismissal” means “dismissal by the employer”. I agree with Mr Carr that, for the reasons which he gives, it plainly does so; but that is not a complete answer, since it could be said that “the detriment in question” (which must mean the detriment complained of) is “dismissal by the employer” whether the claimant wishes to complain (under sub-section (1)) of the act of the employer in dismissing him or (under sub-section (1A)) of the act of the individual which constitutes that dismissal – whichever way the *act* is characterised, the resulting *detriment* is the same, so that sub-section (2) bites in either case. However, I do not think that so literal a construction of the rather elaborate statutory language is necessary. A more straightforward reading is that what sub-sections (1) and (1A) proscribe is simply the doing of a detrimental act: the doing of the act and the suffering of the detriment are, for this purpose at least, two sides of the same coin. On that basis the reference in sub-section (2) to “the detriment in question” would connote the detrimental act of which the claimant complains, and a claimant relying on sub-section (1A) could indeed say “I am not complaining of an act done by the employer but of an act done by my co-worker”. For the reasons given above, I think that such a construction produces a more rational and coherent statutory scheme and conforms better with the purpose of section 47B (2).
8. An additional advantage of this construction is 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. Having to do so is likely to involve tribunals in arid and artificial disputes, with the risk of arbitrary outcomes. It is true that a similar exercise is sometimes required in other contexts as a result of the decision of the House of Lords in *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518; and in his skeleton argument, though not in his oral submissions, Mr Stilitz pointed out that parallel. But the state of affairs produced by *Johnson* is widely regarded as, at best, a necessary evil, and I have no enthusiasm for reproducing it where it can be avoided.
9. I would accordingly hold that section 47B (2) does not prevent the Claimant proceeding against the Appellants under Part V on the basis of their responsibility for the dismissal itself.
10. I accept that this approach to the meaning of section 47B (2) does not produce a particularly elegant result. It is clumsy that an employee dismissed on whistleblower grounds should be able to pursue distinct causes of action, with significant differences as regards the conditions of liability and (perhaps) compensation, against his or her employer. It may well be that Parliament did not really think through the technical challenges of inserting into the framework of the 1996 Act a scheme of individual liability largely borrowed from the discrimination legislation. But the resulting awkwardnesses are insufficient to justify a construction that would produce much more serious anomalies and seems to me contrary to the overall policy of these provisions.

(2) COMPENSATION FOR DISMISSAL CONSEQUENT ON DETRIMENT

1. My conclusion thus far means that it is strictly unnecessary to consider this element of Mr Stilitz’s submissions: if the Claimant can recover against the Appellants for the dismissal itself he does not need to rely on any prior detriment. But the point will arise in other cases where the dismissal decision was not taken on whistleblower grounds – as was the case in *Jhuti* (subject to the outcome of the pending appeal) – and I think I should address it.
2. Mr Stilitz did not seek to argue that *CLFIS* was wrongly decided or, therefore, that compensation for dismissal consequent on detriment was not recoverable outside the whistleblower context. His case was that it was excluded in the case of whistleblower detriment by the language of section 47B (2). That corresponds to what I understand to have been Mitting J’s position in *Jhuti*, where he says that section 47B (2) “necessarily excludes the financial and other consequences of dismissal whatever the causative link”. It is in fact arguable that in the course of his oral submissions Mr Stilitz abandoned that case: see para. 82 below. However, I will consider the point on its merits.
3. With respect to Mr Stilitz and to Mitting J, their argument appears to confuse the detriment of which the worker complains with the loss caused by that detriment. As I have already observed, the “detriment in question” in sub-section (2) must be the detriment to which the claimant complains that he or she has been subjected contrary to section 47B (1) or (1A) – in other words, his or her cause of action – which in a case of the kind which we are now considering is not the dismissal but the distinct prior act which caused it. What section 47B (2) does is to exclude the operation of sub-sections (1) and (1A) where the cause of action “amounts to” dismissal. Whatever the precise scope of that phrase (as to which see above), it cannot be read as referring to losses caused by the detriment in question.
4. Even if the effect of the language were less clear than I believe, there would be strong policy reasons for rejecting Mr Stilitz’s proposition. It is not difficult to conceive of cases where conduct which was unlawful under section 47B resulted in the victim’s (fair) dismissal but where it would be plainly unjust if he or she were not able to recover for the losses caused by that dismissal as compensation for the original detriment. *Jhuti* is such a case, but since it is possible that the Supreme Court may overturn the decision on the unfair dismissal issue, I can take a different example which was raised in oral submissions. Take the case of an employee who develops a serious long-term mental illness as a result of being victimised by his or her colleagues for having made a protected disclosure, with the result that the employer has eventually to dismiss them on ill-health grounds. Assuming that the decision-maker has no improper motivation, the dismissal is likely to be fair, but it would be extraordinary if the claimant were not entitled to claim against the individuals who victimised him or her (and thus, potentially, against the employer under sub-section (1B)) for the full financial loss suffered as a result of the loss of their job (subject to any issue as to remoteness). Indeed when this point was put to him Mr Stilitz acknowledged that, if causation could indeed be established, “compensation for dismissal consequent on detriment” could be awarded in such cases, though he said that they would be unusual. That concession is inconsistent with any submission that such recovery is unavailable in principle, and it is for that reason that I said at the start of this section that it is arguable that Mr Stilitz was in fact no longer advancing this part of his case.
5. The Appellants’ arguments in the EAT do not appear to have distinguished so clearly between the two propositions identified at para. 56 above, and Simler P was not required to confront proposition (i) as such. Mr Forshaw did, however, rely on para. 28 of Mitting J’s judgment in *Jhuti*. Simler P said at para. 162 of her judgment that she was not prepared to follow Mitting J’s observations. She said that he had overlooked section 48 (5) of the Act and had proceeded on the basis that the claimant could only succeed by attributing the motivation of the line manager to the person who took the decision to dismiss. That reasoning may be different from mine but our conclusions are the same.
6. It follows that I would hold that section 47B (2) places no barrier to recovery of compensation for losses flowing from a dismissal which was itself caused by a prior act of whistleblower detriment. For the avoidance of doubt, such compensation would be subject to the usual rules about remoteness and discounting for contingencies (including the contingency that the employment might have terminated in any event).

*MELIA*

1. I have deliberately postponed considering *Melia*; but it should be possible at this stage to explain quite shortly why I do not believe that there is anything in it inconsistent with the conclusions reached above.
2. The claimant in *Melia* suffered a series of detriments – characterised generally as “bullying” – over a long period as a result of having made a protected disclosure; and on 9 November 2001 he resigned. The ET found both that the bullying which he had suffered up to 8 November constituted unlawful detriments contrary to section 47B and that he had been unfairly (constructively) dismissed under section 103A. When it assessed compensation it held that he was entitled to an award for the injury to feelings caused by the unlawful detriments but not for the injury caused by the unfair dismissal: no doubt it was following the decision of the EAT in *Dunnachie*, which was to the same effect as the later decision of the House of Lords. The question then arose as to the period which such an award should cover. The ET held that it should cover only the period up to “late June”, on the basis that it was at that point that the employer’s conduct reached a sufficient level of seriousness to constitute a fundamental breach, and that it should therefore be regarded thereafter as constituting part of the dismissal. The claimant appealed on the basis that the period in respect of which he was awarded compensation for injury to feelings should have extended up to the point of his resignation. The EAT dismissed his appeal, but this Court allowed it.
3. Chadwick LJ, with whom Smith and Wilson LJJ agreed, began the substantive part of his judgment with a careful analysis of the whistleblower provisions in Parts V and X of the 1996 Act, which had not of course at that date been amended by the 2013 Act. Having set out the provisions relating to liability, he said, at para. 15 (p. 415-E-G):

“As I have explained, sections 47B and 103A of the 1996 Act spring from the same root – the Public Interest Disclosure Act 1998. The two sections are parallel elements in the protection which Parliament has decided to give to whistleblowers. The sections would, in any event, be read together; if only because they are now sections in the same Act, the 1996 Act. But the fact that they spring from the same root (the 1998 Act) – and the fact that section 47B is plainly made subject to the limitation imposed by sub-section (2) with section 103A in mind – lead irresistibly to the conclusion that the two provisions are intended to be complementary. To put the point more simply: 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.”

He then proceeded to summarise the provisions of the two Parts relating to remedy. At para. 21 (pp. 416-7) he said:

“It is clear, therefore, that in a case where compensation is to be awarded under Part X it is limited to compensation for loss sustained in consequence of the dismissal. It will not include compensation for loss sustained prior to the dismissal. Loss sustained prior to the dismissal cannot be loss sustained in consequence of the dismissal. That is an important feature to keep in mind when considering the inter-relation between compensation under section 49 for detriment suffered as a result of the infringement of the right conferred by section 47B, and the compensation which can be awarded under Part X of the Act.”

It is that paragraph which foreshadows the ratio of the case.

1. Chadwick LJ then summarised the claimant’s argument (at pp. 419-420) as follows:

“32. … He submits that the rights given by section 47B of the Act are only limited by the words where the worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X’. So, he submits, the relevant inquiry is: ‘to what extent is the detriment about which he is complaining a detriment for which he can be compensated under Part X?’ To the extent that the loss is one for which he can be compensated under Part X, he will obtain compensation under Part X and he cannot be compensated under Part V. But there is no reason why he should be denied compensation under Part V in respect of any detriment flowing from the fact that he made a protected disclosure if his loss arising from that detriment is not capable of being compensated under Part X.

33. [The claimant] points out that the detriment for which he can be compensated under Part X – having regard to section 123 – is loss sustained in consequence of the dismissal. That is loss which he suffered after the effective date of dismissal – 9 November 2001. Detriment sustained before 9 November 2001 is not taken out of section 47B (and Part V) by the limitation in section 47B(2). It is not detriment which ‘amounts to dismissal’ when the two sections are properly read together.”

He continued, at para. 34 (p. 420 A-B):

“In my view, [the claimant] is correct in the submissions which he makes. When the two sections are read together, the proper meaning to be given to the phrase ‘the detriment in question amounts to dismissal’ is that it excludes detriment which can be compensated under the unfair dismissal provisions. If the detriment cannot be compensated under the unfair dismissal provisions – for the reason that it is not a loss sustained in consequence of the dismissal – then there is nothing to take it out of section 47(B); and the provisions in section 49, which require compensation for that detriment, should apply.”

1. At paras. 35-36 (pp. 420-1) Chadwick LJ considered the reasoning of Burton P in the EAT. This was based on the terms of section 95 (1) (c) of the 1996 Act. Burton P held that in such a case what “amounted to” the dismissal was the conduct of the employer which entitled the employee to resign, and thus that it fell within the terms of section 47B (2). Chadwick LJ’s reasons for rejecting that argument were expressed at para. 36 as follows (p. 421A-B):

“It is the employee's determination of the contract under which he is employed … which amounts to dismissal, under section 95(1)(c), for the purposes of Part X of the Act. I reject the proposition that the act of termination by the employee (in circumstances where he may have no other realistic option) cannot, of itself, amount to a detriment. Section 47B(2) of the 1996 Act requires that ‘dismissal’ be given the meaning that it has in Part X. The meaning of ‘dismissal’ in Part X, as I have sought to explain, is that dismissal occurs when the employment is terminated, which, in the present case, was 9 November 2001; and not at some earlier date.”

1. Mr Stilitz understandably sought to rely on Chadwick LJ’s observations to the effect that the policy behind sub-section (2) was to prevent a claimant recovering under Part V where he had a right under Part X in respect of the same detriment: see the end of para. 15, and his approval at para. 34 of the claimant’s arguments summarised at para. 32. But those observations were made in the context of the particular issue in that case, namely whether the claimant could recover under Part X for an injury suffered prior to the dismissal. That was a wholly different question from the issue before us. Chadwick LJ’s analysis and mine of the policy behind sub-section (2) are broadly the same, but he refers to the “the same loss or detriment” whereas I refer to “the identical claim”. His language was entirely appropriate in the context of the pre-2013 legislation when the two phrases necessarily connoted the same thing: a more refined approach is only necessary now because of the possibility of having claims against different respondents arising out of the dismissal. That issue was not before the Court in that case and Chadwick LJ’s language cannot be treated as having any bearing on the question which we have to decide.

SUMMARY ON THE EFFECT OF SECTION 47B (2)

1. The foregoing analysis has been regrettably dense, but I can summarise my essential conclusions as follows:
2. It is open to an employee to bring a claim under section 47B (1A) against an individual co-worker for subjecting him or her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B (1B). All that section 47B (2) excludes is a claim against the employer in respect of its own act of dismissal.
3. As regards a claim based on a distinct prior detrimental act done by a co-worker which results in the claimant’s dismissal, section 47B (2) does not preclude recovery in respect of losses flowing from the dismissal, though the usual rules about remoteness and the quantification of such losses will apply.

**(B) THE LIABILITY OF MR SAGE**

1. The ET’s findings about how the decision to dismiss the Claimant was made are not as clear as they could have been, but the relevant passages in the Reasons are as follows.
2. First, the relevant part of the factual findings is at paras. 79-81. On 25 October 2014 the Claimant sent an e-mail to Mr Lake about certain assets in Niger. Mr Timis strongly believed that the e-mail should not have been sent. He wrote to the Claimant and Dr Lake, with a copy to Mr Sage, saying so. Two days later Mr Sage e-mailed the Claimant. The e-mail begins by saying that he and Mr Timis had been trying to contact him. It goes on:

“Your email was unwarranted and against the wishes of the Board. Your conduct has undermined the sale of the Niger assets and you have caused undue distress to several staff within the Group. As such you have left us no option but to terminate your employment to be effective immediately.”

After quoting the e-mail the Tribunal at para. 81 refers to Mr Sage’s evidence in cross-examination about the reason for the Claimant’s dismissal. I need not attempt to summarise it save to say that he advanced an explanation which the Tribunal did not accept. As regards the actual decision-making process, it says:

“In his witness statement Mr Sage said that Mr Timis had telephoned him and stated that the situation with Mr Osipov was untenable and that he felt his employment should be terminated. Mr Sage’s evidence was that, after [the] problems in the preceding months, he agreed.”

Although the Tribunal does not say so in terms, it is reasonably clear that it accepted that evidence. Mr Timis’s evidence was “that he requested the dismissal, but did not himself dismiss Mr Osipov”. That is not inconsistent with Mr Sage’s account, but even if it were the Tribunal made it clear that it did not regard Mr Timis as a reliable witness.

1. Secondly, at paras. 85-98 the Tribunal considered whether each of the respondents was (in the rather awkward statutory language) “a worker of [IPL]”. At para. 96 it itemised a number of matters which supported its conclusion as regards Mr Timis. This included that “it was Mr Timis who took the final decision to dismiss Mr Osipov”.
2. Thirdly, at para. 132 the Tribunal considered the Claimant’s case as regards responsibility for “detriment (m)” (see para. 35 above). It said:

“This can only refer to the instruction to dismiss and not the decision to dismiss itself. Dr Lake and Mr Matveev were not involved in the decision to dismiss. The decision to dismiss was that of Mr Timis who instructed Mr Sage to dismiss Mr Osipov. There has been no clear explanation by Mr Timis of why he decided to dismiss Mr Osipov and the tribunal draws an inference that the reason for the dismissal of Mr Osipov and the instructions given to effect that were because of the protected disclosures.”

1. Mr Stilitz made the point that in so far as reliance was placed on the pleaded detriment, i.e. detriment (m), it was hard to see how Mr Sage could be liable for “instructing” (or “recommending”) himself to dismiss the Claimant: instructions can only be given to someone else. That seems right, but for the reasons already given the argument has moved on: the true act complained of is the dismissal itself. The real issue is whether, on the Tribunal’s findings, Mr Sage was a party to that act as well as Mr Timis.
2. As to that, Mr Forshaw submitted in the EAT that on those findings it was not open to the ET to find that Mr Sage had any responsibility for the Claimant’s dismissal. Simler P rejected that submission. At para. 141 of her judgment she said:

“Mr Sage could have said that he was not exercising any independent judgment of his own (if this was the case) but was simply acting on instructions from Mr Timis.  He did not do so, but instead gave his own false reasons for his actions.  It seems to me in these circumstances that the Tribunal was entitled to reach the conclusion it did on both detriments.  The Employment Tribunal found (at [132]) that Mr Sage implemented Mr Timis’ instructions, having already found (at [81]) that he agreed with the decision to dismiss.  So, although Mr Timis was the originator of both decisions, Mr Sage was not simply a messenger acting on instructions.  He put forward false reasons for doing what he did.  These were rejected.  The Tribunal found instead that he acted as he did because of the protected disclosures.  I can detect no error of law in these conclusions.”

1. Mr Stilitz developed before us essentially the same submissions as Mr Forshaw had advanced in the EAT. He relied in particular on the clear statements of the ET at paras. 96 and 132 that it was Mr Timis who took the decision to dismiss and instructed Mr Sage to effect it (see paras. 94 and 95) above, which he said showed that Mr Sage was no more than a “mouthpiece”.
2. I would reject that submission for the same reason as Simler P. It is not uncommon for more than one person to be party to a decision to dismiss. Indeed in this case Mr Carr pointed out that it had been the case of IPL and the Appellants in the ET that the dismissal of the Claimant had been a board decision (both Mr Timis and Mr Sage being directors of IPL). In such a case one individual may take the leading role, but that does not mean that the other participants are not also responsible for the act in question. In this case Mr Timis, the largest shareholder, was evidently, on the tribunal’s findings, the prime mover in the dismissal decision; but, as Simler P points out, the Tribunal found at para. 81 that he discussed it with Mr Sage, his Chairman, who expressly agreed and who did not in his evidence disavow any responsibility. On that basis the ET was entitled to make a finding that he was a party to the decision and shared Mr Timis’s motivation; and that finding is not inconsistent with the findings which it made about the principal role of Mr Timis.

**DISPOSAL**

1. For those reasons I would dismiss this appeal.

**Lady Justice Rafferty:**

1. I agree.

**Lord Justice Sales:**

1. I also agree.
1. I use the term “employed” and its cognates to cover not only employment in the traditional sense but also the relationship between a “worker” within the meaning of the relevant provisions and the person to whom he or she provides their services. I will refer to individuals who may be liable on this basis as “co-workers”, but I do so with some reluctance, not only because of the ugliness of the term but also because it tends to suggest a colleague of the same status whereas often the relevant “co-worker” will be the claimant’s manager or someone more senior. [↑](#footnote-ref-1)
2. Had they not been insured, and indeed had IPL not been insolvent, an interesting question might have arisen as to the contribution position between the two Appellants and between them and IPL, since it has been decided at EAT level that the Civil Liability (Contribution) Act 1978 does not apply to proceedings in the ET: see *Sunderland City Council v Brennan* [2011] UKEAT 0286/110, [2012] ICR 1183.

 [↑](#footnote-ref-2)
3. Another possibility floated in oral submissions is that it was intended to prevent a worker whose contract was terminated on whistleblower grounds from recovering compensation for injury to feelings, since such compensation would not be available to an employee who was dismissed on the same grounds: see para. 27 below. That possibility cannot be excluded – and it may in any event be one effect of the sub-section, whatever the original intention – but I am myself doubtful whether the draftsman in 1998 was consciously considering the question of compensation for injury to feelings. [↑](#footnote-ref-3)
4. However, the drafting of the provisions as a whole is not identical. The rather complicated scheme of the 2010 Act is explained at para. 14 of my judgment in *CLFIS v Reynolds*, discussed at para. 48 below. [↑](#footnote-ref-4)
5. I assume that this is the figure payable by the Appellants and so includes the necessary adjustment to take out the basic award. [↑](#footnote-ref-5)
6. Mr Forshaw will, I hope, forgive me if for convenience I refer to the skeleton argument simply as Mr Stilitz’s, though both are responsible for it. [↑](#footnote-ref-6)
7. This happened, for example, in the case, which is well-known for other reasons, of *Yeboah v Crofton* [2002] EWCA Civ 794, [2002] IRLR 634. [↑](#footnote-ref-7)
8. In a witness statement lodged for the purpose of the appeal Francesca West, the Chief Executive of Protect, summarised the background to the passing of the 1998 Act and submitted that it showed that the decision to afford protection to whistleblowers through the mechanisms of the 1996 Act, rather than by stand-alone legislation on the model of the anti-discrimination statutes, was essentially pragmatic. Plugging the rights into the structure of an existing statute greatly reduced the legislative resources necessary for what originated as a private member’s bill; and there was of course at that time no single anti-discrimination statute. I have no reason to doubt that explanation. However, the route taken does not seem inappropriate. At the conceptual level, whistleblowing is not an inherent characteristic like sex or race; and it may naturally be regarded as belonging to the same family as the kinds of protected ground dealt with by the 1996 Act. Making a protected disclosure is very much the same kind of thing as taking action to promote health and safety (see section 44). [↑](#footnote-ref-8)