Neutral Citation Number: [2025] EWCA Civ 1466

Case Nos: CA-2024-000736 &
CA-2024-001927

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
The Honourable Mr Justice Bourne
[2024] EAT 29
His Honour Judge Martyn Barklem
[2024] EAT 137

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2025

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE COULSON
and
LADY JUSTICE ELISABETH LAING

- -

Between:

IAN RICE	**Appellant**
- and -	
WICKED VISION LIMITED	**Respondent**
-and-	
PROTECT (FORMERLY PUBLIC CONCERN AT WORK)	**Intervener**

and between:

BARTON TURNS DEVELOPMENTS LIMITED	**Appellant**
- and -	
GAIL TREADWELL	**Respondent**

- -
- -

Adam Solomon KC, Chris Milsom and Tamsin Sandiford (instructed by **The Wilkes Partnership LLP**) for **Ian Rice**
Nadia Motraghi KC, Rad Kohanzad and Daisy van den Berg (instructed by **Atkinson Rose**) for **Wicked Vision Limited**
Schona Jolly KC and Dee Masters (instructed by **CM Murray LLP**) for **Protect (formerly Public Concern at Work)**

Nicholas Bidnell-Edwards (instructed by **Guardian Law Limited**) for **Barton Turns Developments Limited**
Jeffrey Jupp KC and Christopher Canning (instructed by **Premier Legal**) for **Gail Treadwell**

Hearing dates: 14 and 15 October 2025

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Approved Judgment

This judgment was handed down remotely at 2 pm on 14 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

1. This is the judgment of the Court, to which all members have contributed.

1. Introduction

2. These appeals concern the relationship between the claims which an employee who is a 'whistleblower' can bring under Part V and Part X of the Employment Rights Act 1996 ('the 1996 Act'). In each appeal, the claimant had brought a claim against their employer for unfair dismissal under section 103A of the 1996 Act, which falls within Part X. The question in each case is whether an Employment Tribunal ('ET') erred in law in its approach to applications to amend the claims so as to add claims based on the detriment of dismissal against co-workers under section 47B, which falls within Part V.

3. We will call the first appeal '*Wicked Vision*' and the second '*Barton Turns*'. In each case, the ET reached a different legal conclusion, and on appeal to the Employment Appeal Tribunal ('the EAT') each appeal was allowed, leaving conflicting EAT decisions. Ground 3 of the grounds of appeal in *Barton Turns* raises a discrete issue about the amendments, which we will consider separately (see paragraphs 94-100, below).

4. Whether the ET erred in law in its approach to the applications to amend the claims depends on whether or not it was bound by the decision of this court in *Timis v Osipov* [2018] EWCA Civ 2321; [2019] ICR 655 ('*Osipov*'). For the reasons given below, we have decided that the ETs were bound by *Osipov* and that, subject to any relevant differences on the facts (such as time limits) they should therefore have allowed the applications to amend the claims. Further, for the reasons given below, we have decided that we are ourselves bound by *Osipov*. Had we been free to depart from that decision, which we are not, we would have done so, as we respectfully disagree with its interpretation of the legislation.

5. We will start this judgment with a brief summary of the facts in each appeal (section 2 below). We will describe the legislation, and refer to two earlier decisions of this court (section 3). We will next summarise the reasoning in *Osipov* (section 4). We will then set out our own construction of the legislation and explain why we differ from the interpretation contained in *Osipov* (section 5). In section 6 we will explain why we are bound by *Osipov*, and identify the consequences for the present appeals. We deal, finally, in section 7, with the discrete point arising in the *Barton Turns* appeal.

6. In *Wicked Vision* Mr Solomon KC and Mr Milsom and Ms Sandiford represented the appellant employee, Mr Rice, while Ms Motraghi KC and Mr Kohanzad and Ms van den Berg represented the respondent employer. In *Barton Turns* Mr Bidnell-Edwards represented the appellant employer, while Mr Jupp KC and Mr Canning represented the respondent employee, Ms Treadwell. Permission to appeal was granted in both appeals by Bean LJ, who also permitted Protect, a whistleblowing charity, to intervene by written and oral submissions, which were made by Ms Jolly KC and Ms

Masters. We thank counsel for their written and oral submissions. All except Mr Bidnell-Edwards appeared pro bono, and we are especially grateful to them for that.

7. In broad summary, the parties' positions on this appeal are these:

    1) In both appeals the employees argue that they were entitled to be granted permission to amend. The ET and the EAT were bound by *Osipov*, which cannot be distinguished; if that is wrong, and the tribunals were not strictly bound they nevertheless were either right, in the case of the ET in *Wicked Vision*, or ought, in the case of the ET in Barton Turns, to have followed its general approach.

    2) The employers respond, on various grounds, that *Osipov* did not bind the tribunals on the issue in these appeals and does not bind this court.

2. The Facts in each appeal

Wicked Vision

8. The employer is owned by Mr Strang. Mr Rice was employed as Head of UK Sales from December 2019 until February 2021 when he was dismissed on the grounds of redundancy. His case was that Mr Strang decided to dismiss him because he had made protected disclosures. He claimed that his dismissal was unfair under section 94 of the 1996 Act and that it was automatically unfair under section 103A, because the reason or principal reason for his dismissal was a protected disclosure.

9. Just before a case management hearing in October 2021, Mr Rice's representatives indicated a wish to amend the claim to include complaints that he had been subjected to detriments, contrary to section 47B of the 1996 Act. There were four detriments, some before his dismissal, but including his actual dismissal by Mr Strang.

10. At a further case management hearing in July 2022 Mr Rice applied to amend his claim by adding a detriment in these terms:

> "Dismissing the claimant. (This is a complaint that Mr Strang, a worker for the respondent, subjected to the clamant to the detriment of dismissal contrary to section 47B(1A) of the ERA, for which the respondent is liable under section 47B(1B). This complaint is available to an employee notwithstanding the provisions of subsection (2).)"

Mr Rice did not ask to add Mr Strang as a respondent to his claim. The ET granted the application to amend, leaving the question of whether it had been made too late to a further hearing. It considered that section 47B did not make a claim for a co-worker's detriment depend on whether the co-worker had been joined, because the employer was in any event vicariously liable for that detriment.

11. On appeal to the EAT, the employer argued that section 47B(2) barred a new claim in particular because such a claim could not be made without a concurrent claim against Mr Strang, and no such amendment had been applied for. It submitted that a claim against the co-worker was a necessary pre-condition for a claim based on the employer's vicarious liability for the co-worker's detriment. The employee submitted that section 47B imposed no such requirement, and there was no suggestion to that effect in *Osipov*.

12. The EAT considered that this was an issue of statutory construction. *Osipov* was binding authority for the proposition that a claim can be brought against a co-worker under section 47B(1A) even when the co-worker's act amounted to a dismissal (paragraph 25). At first sight, that "sits uneasily" with 47B(2). The EAT then asked whether *Osipov* went any further than that.

13. The EAT noted that a detriment claim can now be brought against a co-worker, and that it could also be brought against the employer on the basis of vicarious liability. Section 47B(2) continued to provide that the section as a whole does not apply to a detriment which amounts to a dismissal (within Part X). The question was whether section 47B can nevertheless found a claim against an employer arising from a co-worker's act amounting to a dismissal.

14. The EAT said in paragraph 42 that the position of the employer was not part of the claim, so that, while *Osipov* contemplated that vicarious liability of the employer could or would follow from a co-worker's liability, the position of the employer was not in issue and was not part of the ratio. In paragraph 43, the EAT said that the present case was different. There was no claim against Mr Strang. The ET had to decide whether there could be a claim against Mr Strang under section 47B(1A) but directed solely at the employer under section 47B(1B).

15. The EAT observed in paragraph 47 that it would be odd if Parliament had barred a claim against an employer for a detriment 'which amounts to dismissal' but allowed such a claim to be made under section 47B(1B) in addition to or instead of a claim under section 103A. In virtually every case a dismissal would be communicated to an employee by another person.

16. The employer company was the only respondent to the claim (whether amended or unamended). Mr Strang owned the company; his acts in the course of business were the acts of the company. To describe him as a co-worker, not the employer, or to say that Mr Rice was dismissed by Mr Strang rather than the employer, or to say that Mr Rice was dismissed by Mr Strang instead of or as well as by the company, was to draw a purely technical distinction. There being no real factual distinction between the company and Mr Strang, there was also no realistic prospect of a reasonable steps defence (paragraph 48).

17. The claim was one which could be, and indeed had already been, advanced as a claim for automatically unfair dismissal under section 103A. It was not a case like *Osipov* in which a claimant wished to advance a claim which could not be advanced under section 103A (paragraph 49). The application of section 47B did not depend on the

outcome of the claim. It depended on whether the alleged detriment amounted to dismissal (within Part X) (paragraph 50). The EAT concluded that section 47B(2) did not apply to the amended claim and that the decision to give permission to amend was wrong.

18. In paragraph 53 the EAT made clear that its decision was not based on the absence of any concurrent claim against Mr Strang. The EAT considered that the ET had been right to hold that that was not the critical factor.

19. In paragraph 54 the EAT said that applying section 47B (as interpreted in *Osipov*), "all that was necessary was to scrutinise the proposed claim against the employer and to ask whether it was based on… *"detriments amounting to dismissal within the meaning of Part X; in other words to detriments amounting to unfair dismissal claims necessarily against the employer"*. That question in this case could only receive an affirmative answer."

20. The EAT accordingly allowed the employer's appeal.

Barton Turns

21. Ms Treadwell brought a complaint of automatically unfair dismissal based on her whistleblowing under section 103A of the 1996 Act on the basis she had disclosed information within section 43B(1)(c) (information tending to show the health or safety of any individual has been, is being or is likely to be endangered). The Claimant also brought a complaint of automatically unfair dismissal under Section 100(1)(c) of the 1996 Act. She had not been employed for long enough to bring an ordinary claim of unfair dismissal. She applied to amend her claim to include complaints of being subjected to non-dismissal detriments because she had made protected disclosures (pursuant to section 47B of the 1996 Act). The detriments on which she wished to rely included her dismissal. She relied on *Osipov*.

22. The ET allowed the application to amend in respect of the non-dismissal detriments on the grounds that it was "a genuine relabelling exercise" (paragraph 2). It refused the application to amend to add Ms Treadwell's dismissal to the list of detriments.

23. The ET's view was that *Osipov* was a case about the potential liability of individuals in addition to the liability of employers for whistleblowing claims. "It does not displace the statutory definition" (paragraph 3.2). "Insofar as it is relied on, the argument that the decision to dismiss (as an act of detriment) can be separated from the act or effects of the dismissal is an argument without substance. The plain wording of the statute is that detriment must constitute something other than dismissal" (paragraph 3.3).

24. The employee appealed to the EAT from the refusal of her application to amend to include her dismissal as a detriment. The employer cross-appealed from the granting of permission to amend to include non-dismissal detriment.

25. The EAT gave an oral judgment. In relation to the employee's appeal, it relied on paragraph 91(1) of *Osipov*, which held that:

> "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, that is for being a party to the decision to dismiss and 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".

26. The EAT referred to the EAT's decision in *Wicked Vision*, which had "sought to distinguish *Osipov*". It held that it was bound by *Osipov* and it declined to follow the decision in *Wicked Vision*. It dismissed the employer's cross-appeal against the ET's decision that the amendments were no more than a re-labelling exercise and should be allowed.

3. The Employment Rights Act 1996

27. The 1996 Act is the main source of statutory rights for individual employees. Some of its provisions go back as far as the Redundancy Payments Act 1965. It repealed and replaced the first statute which codified such rights, the Employment Protection (Consolidation) Act 1978 ('the 1978 Act'). All the rights in the 1978 Act were conferred on an employee, defined in section 153(1) (unless the context required otherwise) as "an individual who works under …a contract of employment".

28. The 1996 Act was originally divided into fifteen Parts. Twelve substantive Parts dealt with employment particulars (Part I), protection of wages (Part II), guarantee payments (Part III), Sunday working for shop and betting workers (Part IV), protection from suffering detriment in employment (Part V), time off work (Part VI), suspension from work (Part VII), maternity leave (Part VIII), termination of employment (Part IX), unfair dismissal (Part X), redundancy payments (Part XI), and insolvency of employers (Part XII).

29. The right not to be unfairly dismissed is conferred by section 94, which is in Part X. 'Dismissal' is defined in section 95, which is in the same Part. Section 95 is headed 'Circumstances in which an employee is dismissed'. The definition is wide, and includes the termination of the contract of employment by the employer, with or without notice, and 'constructive dismissal', as it has come to be known, when an employee accepts a repudiatory breach of the contract of employment by the employer. Provisions which have been in Part X since its enactment have enabled employees dismissed on grounds listed in Part V to claim, under Part X, that their dismissal was automatically unfair. Those provisions are now in sections 98B-104G. There is no qualifying period for such a claim (unlike the right not to be unfairly dismissed, conferred by section 94). The compensation which is available in the case of such a dismissal is not subject to a cap (section 124(1A)).

30. Two Parts have been added to the 1996 Act since its enactment: Part IVA, 'Protected Disclosures', and Part VIIIA, 'Flexible Working'. Part IVA was added by the Public

Interest Disclosure Act 1998 ('the 1998 Act'). Many other Chapters and provisions have also been added by amendment since the enactment of the 1996 Act. Section 103A, inserted in Part X by the 1998 Act, enables an employee who has been dismissed on the ground that he made a protected disclosure to claim, under Part X, that his dismissal was automatically unfair.

Employees and workers

31. Some, but not all, of the rights in the 1996 Act are conferred on workers as well as employees. Both concepts are defined in section 230. An employee works under a contract of employment. The term 'worker' is wider. It includes an employee and a person who agrees, under any other contract, "to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual" (section 230(3)). Section 230(6) was inserted by section 15 of the 1998 Act. It provides that "This section has effect subject to 43K and 47B(3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker", "worker's contract", and in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by section 43K". Section 43K gives the word 'worker' an extended meaning for the purposes of Part IVA of the 1996 Act. The word includes an individual who is not a worker but falls into one of the six categories listed in section 43K.

Part IVA

32. Part IVA was inserted in the 1996 Act by section 1 of the 1998 Act and has been amended since then. Section 43A defines a 'protected disclosure' as "a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H". As advertised, section 43B duly defines which disclosures qualify for protection. Section 43J(1) makes void any provision in an agreement in so far as it purports to stop a worker from making a protected disclosure. As noted above, section 43K extends the meanings of 'worker' and 'employer' for the purposes of Part IVA.

Part V

33. Part V has been in the 1996 Act since its enactment. It originally had four substantive provisions, section 44 ('Health and safety cases'), section 45 ('Sunday working for shop and betting workers'), section 46 ('Trustees of occupational pension schemes'), and section 47 ('Employee representatives'). Those all used the formula that 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…" 'Detriment' is not defined. It is an ordinary English word.

34. Section 48 gives an employee a right to present a complaint to an ET that he had been subjected to a detriment contrary to any of those provisions. Section 49 imposes a duty on the ET to make an appropriate declaration if it finds a complaint well-founded, and power to award compensation. Section 49(2)-(5) makes provision about

the measure of that compensation. Those provisions are still in the 1996 Act, with some later amendments.

35. Sections 44-47 all contain a provision which disapplies them, in whole or in part, where the detriment in question "amounts to a dismissal (within the meaning of Part X)" or, as the case may be, "(within the meaning of that Part)". This disapplication is in plain terms. In sections 44, 46, and 47, it makes clear that if Part X did not apply to a dismissal (in short, because the dismissal was the expiry of a fixed-term contract), the employee is not prevented from making a complaint under Part V that he has been subjected to a detriment which amounted to a dismissal.

36. Part V has been significantly amended since it was enacted. Its provisions retain the original formula to describe the relevant right (see paragraph 33 above). There are fourteen disparate grounds (examples are an employee's performance of his duties as the trustee of an occupational pension scheme, his application for flexible working arrangements, and his refusal to become an employee shareholder). In twelve cases, the relevant right is conferred on employees.

37. Three sections or subsections confer rights on workers. They are section 44(1A) (which concerns health and safety), section 45A ('Working time cases') and section 47B, the provision which is at issue in this case. Section 47B was inserted by section 2 of the 1998 Act. As amended by the Enterprise and Regulatory Reform Act 2013 ('the 2013 Act'), it now provides as follows:

> "**47B Protected disclosures.**
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority,
>
> on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

> (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
>
> (a) from doing that thing, or
>
> (b) from doing anything of that description.
>
> (1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
>
> (a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
>
> (b) it is reasonable for the worker or agent to rely on the statement.
>
> But this does not prevent the employer from being liable by reason of subsection (1B).
>
> **(2) This section does not apply where—**
>
> **(a) the worker is an employee, and**
>
> **(b) the detriment in question amounts to dismissal (within the meaning of Part X).**
>
> (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K."
>
> (**emphasis added**)

38. All fourteen substantive sections in Part V provide for the relationship between the section in question and Part X. Those provisions differ, depending on the context, suggesting a conscious drafting choice. Thus, most of the provisions which apply to employees contain a subsection which says: "This section does not apply where the detriment in question amounts to dismissal within the meaning of Part X". Later provisions use '10' instead of 'X'. Some of those provisions, however, do not disapply the whole section, but only parts of it: see section 45(4), which disapplies section 45(1) and (3), and section 45ZA(5), which disapplies section 45ZA(2) and (4). The provisions which apply to workers use the formula that the relevant section does not apply where the worker is an employee and "the detriment in question amounts to dismissal within the meaning of Part X" – sections 44(4), 45A(4) and 45B(2).

39. As originally inserted by section 2 of the 1998 Act, section 47B(1) confers a right on a worker not to be subjected to any detriment (using the common formula, see paragraph 33 above) on the ground the worker had made a protected disclosure. Section 47B(1) has not been amended since. Section 47B(2) in its original form catered for the expiry of fixed-term contracts (see paragraph 35). Section 47B(2) was amended in 1999 to its current form. Section 47B(3) provided, and still provides, that for the purposes of section 47B, and of sections 48 and 49, so far as they related to section 47B, 'worker' has the extended meaning given to it by section 43K.

Melia v Magna Kansei

40. In *Melia v Magna Kansei Limited* [2005] EWCA Civ 1547; [2006] ICR 410 ('*Melia*') this court (Chadwick LJ, with whom Smith and Wilson LJJ agreed) considered Part V as it then stood: so after the 1998 amendments, but before the amendments in 2013 (see paragraph 49 below). The claimant's allegation was that he was forced to resign because he was a whistleblower. The issue was whether he could base a detriment claim on the series of acts on which he relied as a repudiatory breach of the contract of employment, so long as those acts were before the date when he resigned. The ET had awarded the claimant compensation under Part V up until June 2001, the date when the ET found that the claimant would have been entitled to resign, rather than up until November 2001, when he had in fact resigned.

41. For our purposes, the significance of *Melia* lies in its treatment of the architecture of the 1996 Act as amended by the 1998 Act. Chadwick LJ described the provisions of the 1998 Act, and their introduction into Part V, and Part X. He said, in paragraph 15:

> "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 subsection (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."

42. Where compensation is awarded under Part X, it is limited to losses sustained in consequence of the dismissal and would not include compensation for loss suffered before the dismissal. It was important to keep that feature in mind when considering the relationship between the two remedial schemes (paragraph 21).

43. In that case, the claimant's main argument was that, to the extent that he had not been compensated for a loss under Part X, compensation should be available under Part V.

He accepted that if the loss could be compensated under Part X, he could not be compensated under Part V. Loss suffered before the dismissal was not taken out of section 47B and Part V by the limitation in section 47B(2) (paragraph 32).

44. Chadwick LJ accepted that submission. When the two sections were 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 – because it is not a loss sustained in consequence of the dismissal – then there is nothing to take it out of section 47B; and the provisions in section 49, which require compensation for that detriment, should apply" (paragraph 34).

45. Whether or not we are bound by *Melia*, we agree with Chadwick LJ's lucid analysis of the relationship between Parts V and X of the 1996 Act.

Fecitt v NHS Manchester

46. This court again considered the scope of section 47B as it then stood in *Fecitt v NHS Manchester* [2012] EWCA Civ 1190; [2012] ICR 372. The three claimants were nurses. They told their manager that they doubted the qualifications of a colleague. Their concerns were well-founded, but their employer decided to do nothing. Relations between staff deteriorated. Some of the staff felt that the claimants were subjecting the colleague to a 'witch hunt'. Their employer acknowledged that the claimants had acted properly, but moved two of them to different jobs and decided to give no more work to the third, who was a bank nurse.

47. The claimants made claims to the ET, relying on section 47B, and their disclosure about the qualifications of the other member of staff. Part of their complaint was that other employees had been unpleasant to them because of their disclosure, and that the employer was vicariously liable for the conduct of those employees. The ET found that they had been subjected to unpleasant conduct as a result of the disclosure and that the employer could have done more to stop the conduct. It also held that the failure to protect the claimants was not because of the disclosure, and the move to different jobs and the decision to give no further work to the bank nurse were the only feasible ways to resolve problems in the workplace. The EAT allowed the claimants' appeal. It held that the employer could be vicariously liable for acts of victimisation by fellow employees, and that the ET had failed to deal with this.

48. The employer appealed on two grounds. The first was that the EAT had erred in law in holding that an employer could in principle be liable for acts of victimisation when the claimants had committed no legal wrong. This court (Elias LJ, with whom Mummery LJ and Davis LJ agreed), allowed the employer's appeal on both grounds. Elias LJ dealt shortly with first ground. He referred to a decision of the House of Lords in which it "unambiguously held that an employer can be vicariously liable only for the legal wrongs of its employees" (paragraph 32). He added, in the following paragraph, "Absent any legal wrong by the employee, there is no room for the doctrine to operate". He drew a contrast with the discrimination legislation, under

which a person may be personally liable for their acts of victimisation. There was no provision making it unlawful for workers to victimise whistleblowers. The claim could not therefore succeed.

The 2013 amendments to section 47B

49. It is common ground that section 47B was amended by the 2013 Act in response to the decision in *Fecitt*. The purpose of the amendments was to make employees and agents of an employer liable for their acts of victimisation against a co-worker, and to make the employer vicariously liable for such acts. Section 19 of the 2013 Act is headed 'Worker subjected to detriment by co-worker or agent of employer'. Section 19(1) inserts subsections (1A)-(1E) in section 47B of the 1996 Act. Section 19(2) inserts words into section 48(5) of the 1996 Act (which deals with complaints to ETs) to make clear that in section 48 and in section 49, any reference to the employer includes, in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent. Section 47B(2) was not amended by the 2013 Act, and has not been amended since.

4. The decision in *Osipov*

50. This recent decision of this court (Underhill LJ, with whom Rafferty LJ and Sales LJ agreed) directly concerned the reach of section 47B(2).

51. The claimant, Mr Osipov was employed as the CEO of IPL (R1). Mr Timis (R2) was the largest individual shareholder and a director. Mr Sage (R3) was the Chairman. R2 decided that the claimant should be summarily dismissed. R3 agreed, and dismissed the claimant by email. An ET found that the principal reason for the dismissal was that the claimant had made protected disclosures; so his claim under section 103A that his dismissal by R1 was automatically unfair succeeded. The ET also held that R2 and R3 had subjected the claimant to a detriment or detriments contrary to section 47B and that they were jointly and severally liable with R1 to compensate him for his losses, amounting to over £2m. The detriments included instructions or recommendations given by R2 and R3 which culminated in the dismissal (referred to as 'detriment (m)').

52. The respondents appealed to the EAT (Simler P), and the claimant cross-appealed. There were many issues. The EAT dismissed R1's appeal (save in one very minor respect). It also dismissed the appeals of R2 and R3 on all issues, except that it held that they could not be liable for the basic award for unfair dismissal (see section 219 of the 1996 Act) as that award can only be made against "a party liable for the dismissal".

53. The reasoning of the EAT was that the express purpose of the legislation was to protect whistleblowers. It was therefore appropriate to construe section 47B(2), so far as it can properly be construed, to provide protection rather than deny it. All the words, including those in brackets, must be construed in light of that intended purpose. It did not exclude all claims for detriment amounting to a dismissal. Instead, it was limited to 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 submissions for the respondents ignored the words in brackets. Section 47B(2) did not relieve a co-worker of liability for a detriment amounting to dismissal not within the meaning of Part X. This approach was coherent and did not strain the meaning of the legislation. It put employees in the same position as workers who never lose the right to make claims against individuals for detriments amounting to dismissal and ensured 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. An employee would be unlikely to pursue a claim for a whistleblowing detriment amounting to a dismissal against an employee, rather than against the employer, but there was no principled reason for excluding it.

54. R1 tried to appeal to this court but its appeal was dismissed by consent after it became insolvent. R2 and R3 appealed on two grounds. The first was that section 47B(2) meant that they could not be liable to the claimant for an instruction to dismiss him, and could not be liable for losses flowing from his dismissal. The second was that R3 could not be liable to the claimant in any event because the ET had found that R2, not R3, had given the instruction to dismiss the claimant.

55. Underhill LJ gave the single reasoned judgment. It is detailed and multi-faceted and we only seek to draw out its essential reasoning.

56. At paragraph 1(5) he described the principal issue in the appeal as being whether it was open to the ET to award the claimant compensation against the directors, as individuals, for the losses occasioned by his dismissal. At paragraph 24, he noted that this turned on the meaning and effect of section 47B(2). He helpfully described the legislative history of the relevant provisions. At paragraph 32 he said that the effect of the amendment was that an employer could be liable by one of two routes: liability for its own act under section 47B(1), and vicarious liability under section 47B(1B). Which route was available would be important in cases in which an employer relies on a reasonable steps defence, as that defence is only available in claims under section 47B(1A). In paragraph 33 he adverted to the differences between this regime and the statutory provisions in the Equality Act 2010 which relate to discrimination.

57. In paragraph 59, Underhill LJ accepted that whether a detriment amounts to a dismissal is a question of substance, not form, and that it was artificial to treat detriment (m) as distinct from the claimant's dismissal. That was only part of the answer, however, as the claimant's case was that section 47B(2) did not apply to a claim as against the directors.

58. Underhill LJ recorded in paragraph 6 the respondents' argument that if the claimant's construction were correct, it would undermine the "careful demarcation" between Part V and Part X. In practice, every claimant could make a claim against the employer "(on the back of the co-worker's liability under subsection (1A)) as well as, or instead of, under section 103A". There were two advantages for claimants; they could get damages for injury to feelings and rely on a less restrictive causation test. Section 103A would become a dead letter. There was no reason to think that Parliament was concerned about the possibility that an employer could become insolvent. That was a risk in all litigation and Parliament had addressed it in Part XII, to the extent which it

considered appropriate. Nor did the respondents accept that it was more coherent for employees and workers to be treated in the same way; their circumstances are fundamentally different. Contrary to the view expressed by Simler P, it was not an unacceptable anomaly that a 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 division of labour between Parts V and X.

59. At paragraph 67, Underhill LJ said that he had not found this point straightforward, but he had decided that the decision of the EAT was right. He agreed with Simler P that a construction of section 47B(2) which prevented a claimant from bringing a claim against a co-worker based on the detriment of dismissal would produce an incoherent and unsatisfactory result and was accordingly unlikely to conform to Parliament's intention. If Parliament had decided to make co-workers liable for whistleblower detriment it was hard to see any reason in principle why they should, uniquely, not be so liable in a case where the detriment amounts to dismissal. That produced the obvious anomalies to which Simler P had referred.

60. Further, Parliament's allocation of different rights to Parts V and X was not as significant as the respondents argued:

> "70 … 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."
>
> (our emphasis)

61. Underhill LJ considered that there was no reason to suppose that that policy changed in 1998, or in 2013. There was no basis for thinking that the introduction of individual liability meant that, for the first time, section 47B(2), which had not been amended, was intended to exclude liability which would arise under the other provisions of the section but which was not provided for in section 103A. He said that he was initially troubled by two points: by the fact that compensation for injury to feelings can be recovered in detriment claims but not in unfair dismissal claims, and by the difference between the tests for causation in Part X and Part V. Those two points were anomalies but they were "particular wrinkles" in the statutory scheme without any wider significance. There was no indication that the draftsman had focused on compensation

for injury to feelings at all. The difference in the tests for causation, 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". He acknowledged that Parliament could have changed the law about compensation for injury to feelings by amendment, if that did not reflect its intention, in the same way as it had filled the gap identified in *Fecitt*; but that was not always a safe assumption.

62. He continued:

> "75 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 subsection (1A) (or, which follows, any vicarious liability of the employer under subsection (1B)). I do not believe that the statutory language compels a different construction."
>
> (our emphasis)

63. He therefore reached this conclusion:

> "77 I would accordingly hold that section 47B(2) does not prevent the claimant proceeding against the appellant directors under Part V on the basis of their responsibility for the dismissal itself.
>
> 78 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 contrary to the overall policy of these provisions".

64. Referring to the decision in *Melia,* Underhill LJ said that his analysis of the legislative policy was substantially the same as that of Chadwick LJ, but that *Melia* concerned a different issue and was decided before the 2013 Act. At that time the phrases "the same loss or detriment" and "the identical claim" necessarily meant the same thing. A more refined approach was now required.

65. Underhill LJ finally summarised his construction of section 47B(2):

> "91 …I can summarise my essential conclusions as follows.

(1) 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.

(2) 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."

5. Our construction of the legislation

66. For convenience, we reproduce section 47B(2). Referring to section 47B as a whole, it provides that:

> "(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)."

67. Section 47B(2) is part of a careful and detailed scheme which gives employees, and in some cases workers, rights not to be subjected to detriments on specified grounds. The scheme has many common features, such as the formula we describe in paragraph 33, above, which concerns the relationship between the relevant substantive sections in Part V and Part X. Those common features have been in Part V since its enactment, and have not changed; they have just been applied to an increasing number of proscribed grounds. In particular, those features were not changed by the amendments to Part V in 1998, or in 2013.

68. The formula in each substantive provision is Parliament's choice about the remedial scheme which is available to an employee who suffers a detriment on a relevant ground. Whether that scheme is rational, or could be better, is not a matter for the court. Parliament has decided that where the detriment in question "amounts to a dismissal (within the meaning of Part X)", the employee cannot make a claim under Part V. That provision is not ambiguous. It does not use the phrase 'unfair dismissal', so its scope is not restricted to cases in which a claim of unfair dismissal is or might be available. 'Dismissal' is defined in section 95 (see paragraph 29 above). The scope of the exclusion is defined by the phrase "amounts to dismissal (within the meaning of Part X)". The phrase 'amounts to' makes it clear that whether the exclusion applies in a particular case is a question of substance, not form. So, if an employee's complaint about a detriment is, in substance, a complaint about his dismissal, he cannot bring a complaint about that detriment under Part V; he is necessarily limited to making a claim under Part X. The regimes in the two Parts are parallel and complementary.

There is no warrant for the view that employees should, as well as being able to claim under Part X, be given the windfall of a claim under Part V also based on their dismissal, when Parliament has unambiguously decided that the extent of their protection from dismissal should be a claim under Part X.

69. The inquiry whether the exclusion applies, that is, whether the detriment amounts, in substance, to a dismissal ('within the meaning of Part X') has three main linked elements. First, is the detriment which is the subject of the complaint in substance a dismissal? Second, is the loss for which compensation is sought in substance a loss consequential on the dismissal, or compensation for a loss suffered before the dismissal? That is the approach of this court in *Melia* – see paragraphs 40-44 above – and we agree with it. Third, did the employer dismiss the employee? This third element might be thought to be redundant, since it might be thought that only an employer can dismiss an employee, but it needs to be stated, because of the suggestion in some of the authorities that someone other than the employer can, in law, dismiss an employee.

70. There is no exclusion provision in Part V which applies to workers who are not employees. The reason for that is, on our analysis, obvious: a worker who is not an employee cannot claim that he has been unfairly dismissed. There is therefore no need for an exclusion in their case. Such a worker can therefore complain about any detriment to which he has been subjected on a proscribed ground. It does not matter whether it is in substance a dismissal by the employer, or not.

71. There are two further important indicators. The first is that the draftsman has, in some cases, created an exclusion by reference to the whole section, and in two cases, an exclusion which disapplies only some subsections of the relevant substantive section (see paragraph 38, above). That technique was therefore available to, and has been used by, the draftsman. When section 47B was amended by the 2013 Act, the draftsman could, if that had been Parliament's intention, have used that technique, and have amended section 47B(2) so as to disapply section 47B(2) to the new subsections (1A)-(1E). The draftsman did not do that. Section 47B(2) therefore unarguably applies to the whole of section 47B, as amended, and not just to section 47B(1). There are no textual grounds for supposing that this was a drafting oversight, still less for concluding that it is an 'obvious' drafting error. The criteria which enable the court to intervene to correct even an obvious statutory drafting error are very strict: *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586 (HL (E)) ('*Inco'*). There has been no suggestion that they are met in this case.

72. The second indicator is that the relevant terms of the exclusion are identical, or virtually identical, in many different provisions in Part V. Those provisions must all have the same meaning throughout Part V, and must have had that meaning from the date of Royal Assent. We cannot accept Ms Jolly's submission that the same words could mean one thing in section 47B(2) and something else in other provisions. Nor, given that the draftsman could, when section 47B was amended in 2013, have used the technique we have referred to in the previous paragraph, yet chose not to, can section 47B(2) have had one meaning before the amendments in 2013, and then have acquired a different meaning after those amendments were made. It means the same now as it did when it was considered by this court in *Melia*.

73. The upshot is that, whether or not an employee relies on section 47B(1), or on section 47B(1A)-(1E), he cannot bring a detriment claim if, in substance, the detriment about which he wishes to complain 'amounts to' his dismissal by his employer, and he is claiming compensation for losses consequential on his dismissal. The words are clear. It is just not possible for such an employee to rely on section 47B(1A)-(1E), because, if his complaint is in substance about a detriment which amounts to his dismissal by his employer, the whole of section 47B is deliberately disapplied, including section 47B(1A)-(1E).

74. We should nevertheless consider further one aspect of the analysis which was pressed on us by some of the parties. In summary, the point is that Part X is said only to apply to a dismissal by an 'employer'. The new provisions are said to create the possibility of a dismissal by a co-worker, for which the employer would only be vicariously liable. That would mean that the detriment which is the subject of the complaint would not amount to a dismissal '(within Part X)' because the claimant has not been dismissed by his employer, but by a co-worker. We cannot accept that analysis for three reasons.

75. First, by definition a dismissal is always an act of the employer. A dismissal ends the contract of employment between the employer and employee. It is also obvious that, in cases like these, in which the employer is not a sole trader, but a limited company, dismissal can only be effected by a person who is a co-worker of the claimant, as the company can only act through a human being. We cannot accept that there is a relevant legal distinction in these cases between a dismissal 'by the employer' and a dismissal 'by a co-worker'. The effect of both, in substance (which is what section 47B(2) is aimed at), is that they amount 'to a dismissal (within Part X)'. In other words, there is no such thing as a dismissal of an employee with sufficient length of service which does not fall within Part X.

76. Second, and in any event, this argument, is, on its own terms and in these cases, circular. Section 47B(1B) provides that anything done by a co-worker 'is treated as also done by the employer'. If there were any doubt (and there is none) this means that the dismissal 'by the co-worker' is 'treated as also done by the employer'. Its legal effect, therefore, is that the employee is dismissed by the employer, and that act 'amounts to a dismissal (within the meaning of Part X)'.

77. Third, the question (if, contrary to our clear view, it arises) is not whether the liability for an act is primary or vicarious or secondary, or any other type of liability. The question is what the employer or co-worker is said to be liable for. In the terms of section 47B(2), the question, therefore, is what the act 'amounts to'. If it amounts to a dismissal (within the meaning of Part X), the employer is liable for it and the employee cannot therefore make a complaint under Part V.

78. We next seek to explain why we respectfully differ from the analysis in *Osipov*.

79. It can be seen that our construction of section 47B(2) is based on a straightforward reading of the words of the sub-section, considered in the context of the statutory

scheme. We do not consider the sub-section to be ambiguous or to require a remedial or purposive interpretation.

80. In contrast, we understand the approach to construction in *Osipov* in this court and in the EAT to be based on three themes. The first two themes are linked: in various respects, Parliament and the draftsman have not thought things through, or have overlooked things; and that the relevant provisions have a purpose which, in several respects, is contradicted by the statutory provisions. The third theme is that in this legislation dismissal by a co-worker is a distinct cause of action to dismissal by an employer. We have just explained at paragraphs 74-77 why we do not accept that proposition.

81. In regard to the first two themes, we have explained above why we consider that the statutory language is clear and not in need of interpretation, and we have referred to *Inco* at paragraph 71 above. Here, there are no circumstances which permit a court to ignore statutory language, or to downplay it, on the grounds that the draftsman might have overlooked something, or on the grounds that the words do not accord with a general purpose which is contradicted by those words or by their clear effect. In fact, we do not find the provision to conflict with the statutory purpose or share the view that applying it directly would produce "an incoherent and unsatisfactory result". In our view, the different tests for causation between Part X ('the reason or principal reason for the dismissal') and in Part V ('on the ground that') are not anomalous. Nor is the fact that an employee cannot get compensation for injury to feelings under Part X, but can under Part V.

82. As to the ability to recover losses from co-workers in respect of dismissal, *Osipov* was, perhaps unusually, a case where recovery was only likely to be possible against co-workers, and not against the employer. However, Parliament has considered, and provided protection for, the rights of employees in an insolvency to the extent that it has in Part XII, and no further.

83. These matters are the consequences of a deliberate choice by Parliament to give a remedy under Part X which differs in those respects from the remedy it has provided under Part V. Rather than being anomalous, they show that Parliament has created two distinct remedial regimes.

84. In three places, Underhill LJ describes his expectation that section 47B(2) could only exclude liability where "an identical remedy" was available under Part X. However, the statutory scheme unmistakeably does not provide for identical remedies as between Part X and Part V, and it is therefore difficult to see how this expectation could ever be met.

85. A further problem with the analysis in *Osipov* is that it gives no weight to the fact that provisions like section 47B(2) have been in the statutory scheme since enactment. The relationship between the two Parts of the 1996 Act has remained the same throughout. Its meaning and purpose were clearly explained in *Melia*, before the 2013 amendments. There is nothing to support the view that its meaning changed in 2013. To distinguish *Melia* on the basis that the issue was "wholly different" from the issue

in *Osipov* is in our view problematic: Chadwick LJ was undertaking a high level review of the Parts V and X that remains convincing. Further, when section 47B was amended in 2013, the draftsman could also have amended section 47B(2), but chose not to. That is a clear indication that no part of section 47B applies where the worker is an employee and can make a claim under Part X.

86. For these reasons, our analysis of section 47B respectfully differs from the analysis found in *Osipov*.

6. Is *Osipov* binding on us, and what are the consequences for the appeals?

87. The issue in these two appeals is whether a claimant who has made a whistleblowing claim against his employer under section 103A can later amend his claim so as to add a claim against his employer, complaining of whistleblowing detriment by a co-worker who, he alleges, was responsible for his dismissal, without joining the co-worker to the claim. Such a claim is expressly based on part of the 2013 amendments to section 47B, that is, section 47B(1A).

88. The core of the reasoning in *Osipov* is that section 47B(2) does not mean what it says. The consequence for Mr Osipov was that section 47B(2) did not prevent him, an employee who complained about his dismissal under Part X, from also relying on section 47B(1A), one of the provisions introduced by the 2013 Act. Section 47B(2) is, therefore, no bar to a claim by an employee for unfair dismissal against his employer, and a simultaneous detriment claim against a co-worker, also based on his dismissal. It follows from *Osipov* that an employee who initially makes a claim for unfair dismissal may later apply to amend that claim to include a detriment claim against a co-worker, which is based on his dismissal. Subject to any discretionary factors, such as the expiry of any relevant time limit, an ET faced with an application for such an amendment would be bound by *Osipov* to grant it.

89. The question raised by these appeals is whether the decision in *Osipov* binds us to decide that an employee may apply to amend an unfair dismissal claim to add such a detriment claim without joining the co-worker to the claim. An employee in such a case is in a relevantly similar position to that of the employee in *Osipov* and to that of the employee posited in the last two sentences of the previous paragraph. This employee also wishes to rely on a provision introduced by the 2013 amendments, section 47B(1B), despite the apparent statutory bar in section 47B(2). We are bound by the doctrine of precedent to give section 47B(2) the same interpretation in this slightly different context. If section 47B(2), as interpreted in *Osipov*, does not bar reliance on section 47B(1A), it cannot, at the same time, bar reliance on section 47B(1B). This means that we are bound to hold that, contrary to our own construction, section 47B(2) does not bar the amendments proposed in the present cases.

90. We note, further, that the EAT in *Wicked Vision* expressly held that whether or not the co-worker was added to the claim was irrelevant. There is no Respondent's Notice challenging that reasoning. The EAT was right to make this point: it is supported by what we have said in the previous three paragraphs.

91. We therefore consider that *Osipov* was binding on the ETs in these cases, and also on us. There was some discussion in argument about whether Underhill LJ accurately encapsulated the ratio of *Osipov* in the first clause of the first sentence of paragraph 91(1) of his judgment, or whether he expressed the ratio in the whole paragraph (see paragraph 65, above). The first clause of the first sentence describes the actual decision in that case. But the rest of the paragraph flows inevitably from the first clause, because it is based on the essential reasoning in *Osipov*, as we have just described it.

The consequences for these appeals

92. It is not necessary for us to consider the intervening reasoning of the EAT in either of the appeals. All we would say is that we share the misgivings of Bourne J (in *Wicked Vision*) about the implications of the decision in *Osipov*.

93. The upshot is that we are bound to allow the employee's appeal in *Wicked Vision* and to dismiss the appeal in *Barton Turns*, subject to the discrete point about amendment, which we consider next.

7. The other amendments in *Barton Turns*

94. Ground 3 of the employer's appeal in *Barton Turns* raises a different and self-contained point. Paragraphs 9, 12 and 13 of the grounds of complaint attached to the claim form in that case identify three specific incidents on 4 June, 17 June and 20 June 2022 respectively. The claimant sought to amend those three paragraphs by adding an allegation that the event in question "amounted to a detriment". Permission to make those amendments was granted by the ET and upheld by the EAT. When granting permission to appeal against that decision, Bean LJ said he was not so convinced that this ground was arguable "but there is a degree of overlap and I therefore grant permission on that ground also".

95. On analysis, this is, in substance, if not in law, a 'second appeal' because both the ET and the EAT granted permission for these amendments. Both tribunals indicated that these amendments amounted to no more than a relabelling exercise and were to be permitted. The employer complains about that, saying that these amendments add a new cause of action out of time and should not therefore be permitted.

96. We were referred to a number of authorities including *Selkent Bus Co Limited v Moore* [1996] ICR 836; *Vaughan v Modality Partnership* [2021] ICR 535; and *Abercrombie v Aga Rangemaster Limited* [2014] ICR 209. To summarise the principles from those authorities which are relevant to this application:

    1) When exercising the discretion to grant or refuse an amendment, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

2) The nature of the amendment will be important. An amendment may range from, on the one hand, the correction of clerical and typing errors or the addition or substitution of other labels for facts already pleaded to, on the other, the making of entirely new factual allegations which change the basis of the existing claim.

3) If a new complaint or cause of action is proposed, it is essential for the tribunal to consider whether that complaint is out of time.

97. Like Underhill LJ in *Abercrombie,* we are not persuaded that the additional sentence added to each of paragraphs 9, 12 and 13 in the present case amounted to a new cause of action. Reading the grounds of complaint as a whole we consider that a fair inference was always that these were intended to be allegations of detriment.

98. However, even if that were wrong, and this is in some way a new cause of action, we are in no doubt at all that both the ET and EAT were right to allow these amendments. They seem to us to be a classic example of relabelling. There is no change in the factual material relied on: the same material is simply now deployed in support of a clear allegation of detriment.

99. Although we were not referred to any of the older authorities on the point, Mr Jupp confirmed that these amendments arose out of the same or similar facts and matters as had originally been pleaded. That has always been the tried and trusted formulation when considering whether to allow late amendments, even if they introduce what might technically be regarded as a new cause of action: see CPR r.17.4, *Brickfield Properties v Newton* [1971] 1 WLR 862, *and Mulalley & Co v Martlet Homes Ltd* [2022] EWCA Civ 32. Here the amendments arise out of precisely the same facts and matters as had been originally pleaded. They were therefore rightly allowed by both tribunals.

100. We would therefore dismiss ground 3 of the *Barton Turns* appeal.

Outcome

101. The appeal in *Wicked Vision* is allowed and the appeal in *Barton Turns* is dismissed. It is plainly unsatisfactory that the construction of this legislation has now produced conflicting decisions at three levels of court, but that can only be resolved by the Supreme Court or by amendment to the legislation.
