Case Number: 2206396/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr P Wright	**v**	Aegis Defence Services (BVI) Limited (1) Aegis Worldwide (Australia) Pty Limited (2) Gardaworld Security Corporation (3) Aegis Defence Services Limited (4)

PRELIMINARY HEARING

Heard at: **London Central** **On: 12 and 13 January 2017**

Before: Employment Judge K Welch

Appearances
For the Claimant: Mr E Kemp (Counsel)
For the Respondent: Mr J Anderson (Counsel)

JUDGMENT

1. The correct Respondent is the First Respondent, Aegis Defence Services (BVI) Limited.

2. The claims against the other Respondents are therefore dismissed in their entirety.

3. The Claimant is found to be a worker in respect of his contractual relationship with the First Respondent. He is not an employee of the First Respondent.

4. Therefore, the Claimant's claims for unfair dismissal, automatic unfair dismissal and breach of contract are dismissed against the First Respondent.

5. The Tribunal does not have territorial jurisdiction in relation to the Claimant's remaining complaint of detriment for having made a protected disclosure under section 47B of the Employment Rights Act 1996. This claim is also dismissed against the First Respondent.

REASONS

1. The Claimant brought claims for the following against all 4 Respondents:
    a. Unfair dismissal under section 94(1) of the Employment Rights Act 1996 ('ERA')
    b. Unfair dismissal under section 103A ERA for making a protected disclosure
    c. Detriment for making a protected disclosure under section 47B ERA; and
    d. Breach of contract in relation to notice pay.
2. The Claimant confirmed at the beginning of the Preliminary Hearing that his claims were only being pursued against the First and Fourth Respondents. Therefore, the claims against the Second and Third Respondents were dismissed.
3. The parties had attended an earlier Preliminary Hearing dealing with case management issues on 1 November 2016 before Employment Judge Snelson. At this hearing, the following issues were agreed to be determined at a later preliminary hearing:
    a. The identity or identities of the proper Respondents to the claims;
    b. The Claimant's employment status: employee, worker or neither;
    c. Territorial scope in respect of the statutory claims;
    d. Jurisdiction (international) in respect of the contract claim;
    e. The Claimant's period of continuous service (for unfair dismissal purposes).
4. Whilst the Tribunal had received correspondence concerning disclosure disputes, these had been resolved by the time of the open preliminary hearing.
5. I had before me an agreed bundle of documents, and references to page numbers in this Judgement are to page numbers in that bundle. In addition, I was handed in one further document provided by the Claimant, following his evidence, which, with the agreement of the Respondent, I added to the bundle.
6. I heard evidence from the Claimant himself and Sylvia White, General Counsel of the Aegis group of companies, employed by the Fourth Respondent. Their witness statements stood as their evidence in chief, but their evidence was tested by cross examination and additional questions from myself.

7. Mr Kemp confirmed on behalf of the Claimant that his client was not seeking to claim continuous service for his unfair dismissal claim by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'). It was accepted that his service with either the First or Fourth Respondent alone was insufficient to claim general unfair dismissal but the Claimant relied upon section 218(2) of the ERA to claim continuous service from his previous contractual arrangement with Hart Security Australia working on the same contract.

FINDINGS OF FACT RELEVANT TO THE PRELIMINARY HEARING

8. The Claimant was originally recruited by Hart Security Australia ('Hart') to work on a contract providing security services to Australian diplomats in Kabul Afghanistan from July 2013. It was referred to by the Claimant as "AEK" referring to the Australian Embassy Kabul, an abbreviation I shall adopt in this Judgment.
9. The Claimant had previously held a UK passport, having dual nationality with Australia, which expired whilst working for Hart on the AEK contract. He did not need to renew his British passport at that time as he had the use of a diplomatic passport whilst working on the AEK contract. His British passport has subsequently been renewed.
10. The Claimant owned a house in Lincoln, England on which he had a mortgage whilst engaged on the AEK contract. His evidence was that this had not been rented out. However, it became apparent that he had rented his house out at some stage whilst working on the AEK contract. The Claimant confirmed that this was for the first year that he was engaged on the AEK contract for Hart but not whilst engaged by the Respondents.
11. The Claimant gave evidence that he considered he was an employee whilst working for Hart, although provided no evidence supporting this other than his oral testimony. He confirmed that whilst engaged by Hart, he received no holiday entitlement or holiday pay, nor did he claim it and was paid for the services provided against invoices.
12. The AEK contract was put out to tender by the Australian Department of Foreign Affairs & Trade ('DFAT') during 2015. The Fourth Respondent entered a response to the DFAT tender and was awarded the AEK contract by DFAT on 13 June 2015 to commence on 1 November 2015. This meant that

between 13 June and 1 November 2015, it was necessary to make preparations for the taking over of the AEK contract.

13. Syliva White's evidence was that this included reviewing the plan against the operating environment, ensuring that the correct people were in place to carry out the AEK contract and reviewing the intelligence regarding the operating environment and the current threats.

14. The Aegis group of companies is now part of GardaWorld International Protective Services Division. This happened just after the AEK contract was taken over by the Fourth Respondent. The Aegis group is made up of a number of separate companies including all of the Respondents in this case; the Third Respondent being the ultimate holding company for all companies within the group.

15. The Respondent's evidence was that the First Respondent engages personnel in support of contracts. Sylvia White stated that the First Respondent provided personnel for security contracts (amongst others) for other group companies and receives a fee for providing the personnel and for managing them from within the Country in which they are deployed. Most of these personnel are engaged as self employed contractors, which was said by the Respondents to be usual within this industry. The Fourth Respondent did not engage personnel on overseas contracts. It only employed individuals in providing UK services or to manage the provision of services overseas.

16. The Claimant asserted that the First Respondent was in fact a 'shell company' for tax reasons. However, the evidence from Sylvia White was that the First Respondent was not set up for tax reasons but was originally set up when an off shore company was required to be set up quickly. Her evidence confirmed that the First Respondent filed accounts and continued to trade. Without further evidence to substantiate the Claimant's assertion, I therefore do not consider that the First Respondent was a shell company. It was accepted that no one employed or engaged by the First Respondent was based in the British Virgin Islands.

17. The Claimant was one of a number of personnel who remained servicing the AEK contract when Hart lost the contract to the Fourth Respondent. The AEK contract ended with Hart and the Fourth Respondent immediately took over the contract. There was little evidence before me of the nature of the respective

contracts although it appeared to me that, save for the cost of the contract and some reductions in contractors' pay (see below), the contract continued to be run in a similar way. However, Sylvia White gave evidence that there was no corporate relationship between Hart and the Respondents and that Hart made it very difficult for Aegis, due to wanting them to fail.

18. It was clear from the Claimant's evidence, which was not disputed, that he was not interviewed for the AEK contract post. However, the Claimant and others attended a meeting collectively to discuss working on the AEK contract.

19. The Respondent's evidence was that Toby Jackman, an employee of the First Respondent, visited Kabul during the period 13 June to 1 November 2015. He was accompanied by Kevin Marsden, who was at the time employed by Aegis Recruitment Limited (now GardaWorld Recruitment Limited) and Steve Barclay Eveley, the First Respondent's Country manager. Also, Matt Hughes of the Fourth Respondent accompanied this visit, whose purpose was said to be to tell the incumbent contractors of the award of the contract together with meeting DFAT and the Ambassador.

20. The Claimant considered that Kevin Marsden was employed by the Fourth Respondent due to his linked in account referencing the Fourth Respondent as his employer and also due to his email signature block and disclaimer. Sylvia White gave evidence that Mr Marsden's linked in account was not correct. She had specifically checked who employed Kevin Marsden prior to coming to the Tribunal; that Aegis Recruitment Limited employed him and that the disclaimer was wrong.

21. Having considered this, I did not feel that a disclaimer from any particular company in a group of companies had any bearing on who that individual was ultimately employed by. Whilst Kevin Marsden's linked in account [pages 434 to 437] did name his former employer as 'Aegis Defence Services Limited', I accept the evidence of Sylvia White that Kevin Marsden was, in fact, employed by Aegis Recruitment Limited (now GardaWorld Recruitment Limited). It was clear that he was involved in recruitment for the projects run by various group companies.

22. The Claimant considered that his true employer was the Fourth Respondent who had been successful in being awarded the AEK contract and who, in his

view, had had significant involvement in his work in order to become his employer.

23. The Respondent's evidence was that a number of sessions took place, with Matt Hughes of the Fourth Respondent opening up the sessions. The contractors were told that Aegis were keen to retain incumbent contractors subject to going through Aegis' own due diligence. Whilst it was expressed that this included an interview, it was accepted by both parties that no interview took place with the Claimant.

24. The contractors were informed that should they be offered a contract, it was likely to be at a reduced rate due to the value of the contract that had been entered into with the Australian Government. However, it was clear that whilst a number of individuals suffered a reduction in their rate of pay, the Claimant's rate remained the same following the Fourth Respondent taking over the AEK contract.

25. The Claimant completed personnel forms for the AEK contract. In these forms he listed his parents' address in Australia. His evidence was that he believed that if he had put a UK address it would have (in his words) "hindered his chance of being offered the job" due to it being with the Australian Government. He also stated in his Personnel Security Verification Check form [pages 135 to 139] that his addresses covering the 4 years prior to the application were in East Fremantle Western Australia and further stated that he was not lawfully resident in the UK.

26. The Claimant signed an Official Secrets Act 1911-1989 declaration [page 117] and Consultant Data Protection Undertaking (referring to the Data Protection Act 1998) [page 125] both of which referred to UK laws although were provided for the benefit of the First Respondent. Ms White gave evidence that the Claimant should have signed an Australian declaration in addition and that this was an administrative error on the part of the person providing the forms on behalf of the First Respondent.

27. Emails concerning the Claimant's appointment were sent between Stephen Constant, Deputy Personnel Manager, the Claimant and Kevin Marsden. Sylvia White gave evidence that Stephen Constant was also employed by Aegis Recruitment Limited. The Claimant considered that Mr Constant was also employed by the Fourth Respondent as, again, his emails stated the

London Bridge office [an example appears at pages 92-93] and also had a disclaimer saying it was sent from Aegis Defence Services Limited, but for the reasons set out above, I do not accept this as evidence of his employment by the Fourth Respondent and accept the evidence of Sylvia White.

28. Negotiations were carried out between individuals on behalf of some of the incumbent contractors (including the Claimant) with Hart working on the AEK contract. These included payment terms for invoices and rates for travel days [pages 157-161].

29. It was clear from these emails [see pages 165-168] that the team in which the Claimant worked required 3 amendments to the draft contract:

"2. FEE

Invoice and Payment

you have said via email that your invoicing and payment schedule will be in line with Harts, however, we request it to be added in the FEE section of the contract.

4. INSURANCE

Insurance Summary

We require your insurance summary included within the contract…..

ANNEX B. 6. LAWS

Relevant Laws; we are subject to Australian Law – not UK/EU, as the Australian embassy sites are run under Australian laws and policy's, and Aegis Worldwide (Australia Pty Ltd) is registered in NSW. Remove all reference to UK/EU laws and only include Australian Law…".

30. It was confirmed by Aegis that only 'applicable' relevant laws were covered, and not all UK laws. "For example, the UK has extra-territorial jurisdiction over the crimes of torture, hostage-taking and war crimes in international armed conflicts Therefore we would prefer to leave this in." [page 166].

31. The Claimant confirmed that he knew that a couple of people were engaged by the First Respondent on the AEK contract awarded to the Fourth Respondent; the rest being engaged by the Second Respondent. His evidence was that as he was not an Australian resident, he was engaged through the First Respondent as opposed to the Second. There were no contractors engaged by the Fourth Respondent to work on the AEK contract.

32. The Claimant was informed that he must have a full medical and HIV test before being deployed. The email dated 12 October 2015 [pages 143-148] attached a list of Doctor's surgeries within England and Wales who would be able to provide a suitable report. However, the email also stated:
"For those joining from overseas, you must organize your own Medical and HIV testing at you[r] preferred doctors surgery."
It was therefore clear to me that this was a standard email sent to recruits whether from the UK or overseas.

33. The Claimant was required to supply a Personnel Security Verification check [pages 135-139] including disclosure of his Nationality and Immigration status, in which he confirmed that he was Australian but had dual nationality with Britain. He also confirmed at page 137 that he was not lawfully resident in the UK.

34. This form included declarations concerning any convictions "in any country". The form was slanted towards the UK, since it referred to the Data Protection Act 1998, and confirmed that checks would be carried out against the UK's immigration and nationality records. Sylvia White confirmed that this should have been carried out for any other Countries where the applicants had lived.

35. In one of the Claimant's emails to Stephen Constant on 16 October 2015 [page 149] the Claimant asked:
"1. What insurance and liability coverage will aegis provide me as a subcontractor or a[n] employee of my business contracting to Aegis……
"3. As a company or employee of my company contracting to Aegis and I invoice aegis back for services provided to them can I make legal stipulations as to when reasonable payment may be made for my company's invoice for services undertaken.. currently Aegis state they wish to pay one month in ar[r]ears if we were contractors directly employed by aegis. So I can invoice as my company or employee of and stipulate my company request payment for services within, for example, 7 working days?
"And for people in country currently like myself, how within the next 14 days of which 10 are working days do you expect me to complete the Pre contractual obligations and get my workplace lawyer and accountant to look over a contract which is currently yet to be presented to me."

36. The Claimant was sent a new contract with the First Respondent [pages 174-179 and 183-191]. The documents were entitled: "Contract of Engagement" and "Contract of Engagement general terms and conditions" and were said to be between the First Respondent and the Claimant. The general terms and conditions [pages 174-179] provided:

"2. SERVICES

The Consultant acknowledges that this Contract is a subcontract with Aegis Defence Services (BVI) Limited ("Aegis BVI") in support of a prime contract held by the Aegis Group with the Client…"

"3.4 Any Consultant who is deemed to have acted willfully in breach of local law, UK (or his home nation) law with extra-territorial application and/or the Relevant Authorities' regulations or international law … will not be supported by Aegis BVI or the Aegis Group in any subsequent legal action and may be prosecuted under Host Nation Laws"….

"3.6 During the course of this Contract the Consultant confirms that he will not directly or indirectly seek to benefit in any way financially or otherwise howsoever from his work with Aegis BVI other than from receipt of his Fee for Services rendered. The Consultant confirms that he is aware of and will abide by all restrictions of the UK Bribery Act and the US Foreign and Corrupt Practices Act which prohibit inter alia bribes and/or payments intended to unduly influence business activities and other anticompetitive activities.

3.7 The Consultant shall not consume any alcohol nor consume drugs or substances prohibited in the Host Nation, UK or the USA whilst providing the Services ….

3.9 The Consultant will be issued with badges, clothing and/or equipment necessary for the fulfillment of his duties.…The Consultant is responsible for its maintenance and protection at all times and for its safe and proper use in the field. This applies in particular to all weapons and ammunition. Any equipment lost/stolen or damaged must be reported immediately. The cost of replacement and/or repair of equipment will be charged to the Consultant in the event of any loss, theft or damage which arises from the Consultant not taking all reasonable steps to maintain, care for and safeguard such equipment…

4. FEE, INVOICES AND STATUS

4.1 All payments will be made in Australian dollars by direct transfer to the

Consultant's nominated bank account. Aegis BVI and the Consultant will each be responsible for their own bank charges…..

4.3 The Consultant's status shall be that of self-employed consultant to Aegis BVI and accordingly he shall be paid gross and shall be fully responsible for, and shall indemnify and keep indemnified Aegis BVI and the Aegis Group against, the payment of any and all tax, and other tax equivalents or similar contributions in respect of the provision of his Services.

4.4 The Consultant hereby acknowledges that he is solely responsible for and undertakes that he will pay to any appropriate authorities all income tax, national insurance contributions or social security taxes and any other liabilities, assessments or claims arising from or made in connection with the Services, their performance and/or the termination of this Contract….

5 HOURS OF WORK AND LEAVE

5.1 There are no fixed hours of work for the Consultant. The Consultant may be called upon to provide his Services throughout each and every day of the Period of Engagement. When not on duty, the Consultant will be informed whether he is off duty or on standby. The Consultant shall ensure that he is available for immediate deployment when on standby, and for recall within 24 hours when not on duty or on leave…

5.3 Owing to the specialist nature of the activities anticipated under this Contract, to the extent they are applicable, some of the rights afforded to workers by the Working Time Regulations 1998 ("WTR") will not apply to the Consultant or are subject to variation by agreement….To the extent that the Consultant's engagement is subject to this provision of the WTR, he agrees that the 48 hour limit will not apply to him….

"10.1 Data Protection

(a) The Consultant hereby authorizes and gives consent to the processing by Aegis BVI and any entity of the Aegis Group…..of information (including information defined as Sensitive Personal Data by the Data Protection Act 1998…."

"10.3 (c) In the event that it is or becomes impossible to obtain a visa or a PSC card for the Consultant, Aegis BVI reserves the right to suspend (without any obligation to pay the Fee) or terminate the Contract without notice and without compensation…"

37. The Contract of Engagement also contained provisions relevant to the issues for the preliminary hearing. In its definitions, it defines 'Relevant Laws' as: "means Host Nation laws, applicable laws, treaties or MOUs of the Commonwealth of Australia (including the Public Service Act 1999 (Cth), the Privacy Act 1998 (Cth) and the Work Health and Safety Act 2011 (Cth) and any applicable UK or Afghan laws, and any regulations relating to those laws."
It again provided for payment of a "fee" subject to receipt of detailed invoices in Australian dollars.

38. The Contract of Engagement also provides:
"1. SERVICES
The Consultant shall provide the Services to Aegis BVI, performing the Role and will report to his Line Manager in the Host Nation or such other person as Aegis BVI may direct from time to time….

39. It also provides clauses on termination [Clause 5 pages 184-186] which are not necessary for me to detail here.

40. Further, the Contract of Engagement provides:
"1.2 …..The Consultant will respect all religions and customs of the Host Nation and shall perform the Services in a proper, loyal, sensible and professional manner and in accordance with all Relevant Laws, the Australian Public Services Values and Employment Principles and Code of Conduct…and the DFAT Code of Conduct for Overseas Service…the Code of Conduct –Kabul and any policies notified by Aegis BVY or the Client from time to time…."
"8 GENERAL
8.1 This Contract constitutes a contract for the provision of Services. Nothing in this Contract shall constitute or be construed as constituting or establishing a contract of employment or a partnership or a joint venture or an agency between the parties hereto for any purpose whatsoever and whether under the laws of England or otherwise….
8.3 The Consultant shall not assign, transfer, subcontract or by any other manner make over to another party the benefit or burden of this Contract without the prior written consent of Aegis BVI."
9. GOVERNING LAW
9.1 This Contract shall be governed by the laws of England. The parties agree to submit to the exclusive jurisdiction of the courts of England to settle any

claim or matter arising under or in connection with this Contract provided that if the Consultant does not have substantial assets in the United Kingdom, Aegis BVI may take legal action against the Consultant before the courts of any other country in which the Consultant does have such assets."

41. The acceptance of terms document provided:

"5. I have read and understand, and will comply at all times with the Australian Public Services Values and Employment Principles and Code of Conduct …the DFAT Code of Conduct for Overseas Service…, the Code of Conduct-Kabul, the Aegis Statement of Ethics and Aegis Code of Business Conduct, copies of which are available to me on my request.

6. I will comply with all existing and future Australian, UK, EU, Host Nation Laws and any other applicable laws, regulations, orders directives, rules and instructions promulgated by the Relevant Authorities. Further and without limitation of any other terms regarding civil/ criminal liability, I understand that use of a firearm and non-compliance with any of the terms of this Contract regarding arming and/or any other applicable law may result in my being subject to criminal and/or civil liability in Australia, the US, UK or the Host Nation…"

"10. I am not prohibited under US law or the law/regulations of any other jurisdiction from carrying or owning weapons or ammunition …."

42. The Claimant also signed a document called, "Self-employed consultant undertakings" which included 12 month restrictive covenants not to deal with, solicit or offer goods or services to clients of the First Respondent or the Aegis group.

43. The Claimant gave evidence that he knew at the time the contract was given to him that his status was that of a self employed contractor, although he considered that his status turned out to be that of employee once he commenced work on the contract.

44. It was clear from both parties that some of the administration of the Claimant's engagement was carried out from the UK. This is because Aegis Recruitment Limited, GardaWorld and the Fourth Respondent were based in the UK. The Claimant's evidence was that his contract was administered entirely from the UK and that all communications/correspondence came from the Fourth Respondent. I do not find that to be true. Whilst some of the administration

was carried out from the UK, and some of this from the London Bridge office, this was not necessarily from the Fourth Respondent. Mostly it came from Aegis Recruitment Limited or GardaWorld but not the Fourth Respondent.

45. Aegis' group legal team was based from the London office although it was clear from Ms White's evidence that, whilst employed by the Fourth Respondent, she carried out legal work for all of the Group companies. This included drafting template letters and contracts and providing advice around the various jurisdictions in which group companies operated. Ms White's evidence was clear in that she provided business advice based on her legal background but that she did not provide advice on the particular Countries' Laws.

46. The Claimant believed that his personnel file was held in England since requests were made of Rachel Naya to provide copies and she was based in England. However, Ms White gave evidence that the original personnel files were held in Dubai (which was where notices had to be sent to the First Respondent) although were accessible from anywhere since a soft copy was held on the 'cloud'. I accept Ms White's evidence that the hard copy of the Claimant's personnel file was held in Dubai.

47. The Claimant's role was to provide armed security services to Australian diplomats in Kabul for which he was paid a fee at a daily, agreed rate. He worked on a 8 week on and 4 week off rotation. The Claimant was provided with all of the equipment necessary to carry out his role. However, I would expect this, in light of the type of services the Claimant was providing. I would not expect him to provide, for example, his own firearms for use in servicing the contract.

48. The Claimant was required to provide personal service to the First Respondent under the terms of the contract, which is again to be expected for this type of contract. He did not provide his services through a company – although it was clear that he considered doing so from the emails sent by him prior to entering into the contract with the First Respondent. For example, see references to being an employee of his own company in an email from the Claimant referred to at paragraph 345 above.

49. As far as the Claimant's day to day activities were concerned, he was managed by a team leader in Kabul. There was a briefing in the evening to explain the activities for the following day.

50. Clause 8.3 in the Contract of Engagement agreed between the First Respondent and the Claimant [page 186] provided that the Claimant could not assign or subcontract the contract without the First Respondent's prior written consent. Any substitute would have needed to pass the First Respondent's security checks, medical requirements etc and therefore consent would have proved extremely difficult to obtain. Sylvia White accepted in cross examination that the reality was that consent would not have been given. Rigorous checks were required due to the type of work being undertaken. It was clear that this had not happened in practice, although the Claimant and other contractors were able, should they wish, to swap some of their assignments between themselves in order to attend family engagements etc.

51. The First Respondent agreed to provide the Claimant with insurance should he be killed or injured whilst working on the AEK contract.

52. The Claimant was told that disciplinary action could be taken should the Claimant "not follow the correct processes outlined in the SOI" [page 259] relating to changing flights directly with the airline against company agreed procedures. This email came from Sephie Mitchell, Travel Coordinator GardaWorld International Protective Services.

53. It was clear that other consultants had in fact been subjected to disciplinary action concerning the matter which resulted in the Claimant's termination of contract [page 278].

54. Whilst engaged on the AEK contract, the Claimant was paid against the invoices he raised in Australian Dollars into a bank account held in the UK, for which he was responsible for paying his own tax.

55. The Claimant worked on a 60 days on/ 30 days off basis whilst working on the AEK contract. He was unable to choose when to take leave and gave evidence that he was not able to work for any other company or organisation during his leave periods.

56. The Claimant had listed his personnel address for registration purposes as his parents' address in Australia. The Claimant contended that this was so that his body could be returned there should anything happen to him. Australia also

was his home port for the purposes of flights home from the AEK contract, from which the Claimant would then make his own onward travel arrangements.

57. The Claimant's evidence was that the decision to terminate his engagement ultimately came from the Fourth Respondent. The clear evidence was that David Apps wanted the Claimant removed from the AEK contract. His 'Memo for the Record' dated 19 February 2016 [page 287] made clear, that he thought the Claimant was "not suitable for a High Profile Diplomatic position in my opinion". His email of 18 February 2016 [page 280] states: "…however I wish to remove Paul Wright from the contract as of today…" David Apps was the project manager for the AEK contract working in Afghanistan and was not employed by the Fourth Respondent.

58. There was email correspondence concerning the termination [pages 274-286], between David Apps, Syliva White, Rachel Naya (Operations and Recruitment Senior Manager for Garda World based in Hereford), David Roberts (Director Operations Support for GardaWorld), Brian Bonfiglio (Regional Director Afghanistan employed by GW Consulting Middle East Limited) and Daniel Menard (Brian Bonfiglio's boss). This confirmed that sanctioning of the Termination documents was required "as per GardaWorld protocol, by senior colleagues…" [Page 281]. David Apps requested of Brian Bonfiglio and Rachel Naya by email of 18 February, "Can we have a corporate answer soonest as you can be assured the rumour mill will start" [page 275].

59. I am satisfied that the decision to terminate originally came from David Apps and was then authorised by Brian Bonfiglio, who was not employed by any of the Respondents. His involvement was due to the acquiring of Aegis by GardaWorld and the wish to integrate the companies such that Brian Bonfiglio was taking responsibility for the contractors engaged by the First Respondent.

60. I was therefore satisfied that the Fourth Respondent was not involved in the decision to terminate the Claimant's engagement. The Claimant was initially told of the termination of his engagement before receiving written confirmation.

61. The Claimant accepted that David Apps made the initial recommendation for his termination. However, this needed to be authorised. The Claimant considered that David Apps was also employed by the Fourth Respondent due to the disclaimer on his emails being the same as for other employees of various companies in the Respondents' group of companies and his belief that

he had a base in the London Bridge office. However, the evidence which I accepted from Ms White, was that Mr Apps was not employed by the Fourth Respondent. His emails show that he was "Security Project Manager Australian Embassy Kabul" and his email address was aek.pm@aegisworld.com. One email chain at page 284 showed a gap with a missing image and then the London Bridge address. However, I do not consider that this showed that Mr Apps was based there. There was clearly something missing in that particular chain of emails.

62. Mr Apps did not have the authority to terminate the engagement and therefore requested "a corporate answer soonest" [page 275]. A letter was sent to the Claimant terminating his engagement with the First Respondent, which had originated from Dubai [page 292]. It was signed by Toby Jackman a Director of the First Respondent. This letter had a Dubai office address for the First Respondent.

SUBMISSIONS

63. The Respondents had provided the Tribunal with a written skeleton argument and was given the opportunity to expand upon this orally. In brief, the Respondents asserted that the First Respondent was the correct respondent to the proceedings, since the contractual relationship was between it and the Claimant.

As regards territorial jurisdiction, the starting point was that the ERA had no application to work carried on outside the UK unless there was a 'sufficiently strong connection'. The Claimant did not fall within the 3 main categories identified in Lawson v Servo Ltd [2006] ICR 250 and therefore had to show that he had an 'equally strong connection with Great Britain'. In this case, the Respondent considered that there was no good reason for this to be an exceptional case.

64. Clause 9.1 (being the Governing Law clause) should be read in accordance with section 204(1) ERA; namely that it is immaterial and should be disregarded for the purposes of the ERA. If not, the Respondent contended that clause 9.1 should be a factor taken into account when coming to a decision on territorial jurisdiction, but that this was not determinative. Or finally, that disputes concerning the terms of the contract (eg payments) would be

brought in the English Courts but that this did not confer the application of the ERA to the Claimant.

65. The Respondent considered that the Claimant's status was that of an independent contractor, which was standard for the industry in which he worked, relying upon Autoclenz v Belcher and Others [2011] ICR 1157. The Claimant was said to be a skilled individual entering into a well remunerated contract, which was negotiated on his behalf; he was aware of the written agreement he was entering into and even when using a purposive approach, this favoured the Claimant being self employed.

66. The Respondents did not accept that the Claimant had been continuously employed since July 2013 and therefore lacked the service to claim ordinary unfair dismissal.

67. The Claimant also provided a written skeleton argument together with a response to the Respondent's skeleton argument, which were expanded upon orally. The Claimant contended that he was an employee, or at the very least a worker, under the extended definition for worker in the whistleblower protection provided by section 43K(1)(b) ERA.

68. There was plainly mutuality of obligation between the parties. The Claimant provided his services personally and there was no express right to provide a substitute. The Claimant bore no risk in respect of the contract since the Respondent provided insurance for him. The Respondent also provided all of the Claimant's equipment. The Claimant was fully integrated into Aegis and was subject to disciplinary proceedings.

69. The proper respondent was the Fourth Respondent, although considered this had little impact on the Claimant's claims since he was considered to be within the territorial scope of the ERA and the international jurisdiction of the Employment Tribunal, even if employed by the First Respondent.

70. The Tribunal had territorial jurisdiction for the ERA complaints under the "sufficiency of strength of connection between the circumstances of his employment and Great Britain and British employment law is applicable." Even should an especially strong connection be required, the Claimant considered that this had been satisfied.

71. The Claimant relied upon the case of Ravat v Halliburton Manufacturing and Services Limited [2012] ICR 398 stating that as the Claimant's home was in the

UK, the less onerous test of showing a sufficiently strong connection is applicable.

72. The breach of contract claim was also said to be within the Tribunal's jurisdiction because there had been effective service under the Civil Procedure Rules Part 6 as the parties had chosen English Law to govern the contract.

73. Finally, the Claimant submitted a further note on section 218(2) ERA and relied upon the case of D36 Ltd v Castro UKEAT/0853 for the proposition that the word "transfer" in section 218(2) can be construed in the same way as the definition of transfer in regulation 3(1) of the TUPE Regulations. The Claimant therefore contended that he had continuous service from when he had been employed by Hart under section 218(2) ERA. Any period working outside Great Britain still counts for continuous service under section 215(1) ERA.

LAW

74. I had regard to the following sections of the ERA which provide definitions for the status of individuals most relevant to this case:

Section 230(1) ERA:

"…"employee" means an individual who ….worked under a contract of employment…"

Under section 230(2) ERA, a contract of employment means "a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".

There has been much caselaw on this, which I will briefly refer to below.

75. Section 230(3) ERA defines a worker:

"(3) In this Act, "worker" … means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes 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"

76. The worker definition under the ERA is extended for those claiming to have been subjected to a detriment by virtue of having made protected disclosures. Section 43K ERA provides:

"Extension of meaning of 'worker' etc for Part IVA
(1) For the purposes of this Part 'worker' includes an individuals who is not a worker as defined by section 230(3) but who -
(a) works or worked for a person in circumstances in which -
(i) he is or was introduced or supplied to do that work by a third person, and
(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,
(b) contracts or contracted with a person for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for 'personally' in that provision there were substituted '(whether personally or otherwise)'…"

77. Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1967] 2 QB 497 is a useful starting point in considering the question of whether someone satisfies the definition of an employee. MacKenna J stated: "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service….. … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be"

78. In Autoclenz Limited v Belcher [2011] IRLR 820, Clarke LJ giving the leading judgment in the Supreme Court stated at paragraph 29, "The question in every case is, as Aikens LJ put it at paragraph 88 quoted above, what was the true agreement between the parties." He went on at paragraph 35 to say:
"So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This

may be described as a purposive approach to the problem. If so, I am content with that description."

79. There have been other, recent cases on whether an individual is to be classed as a worker or an employee. Some of these are Employment Tribunal decisions and are therefore persuasive but not binding. However, I have had regard to the recent Court of Appeal decision concerning worker status of Pimlico Plumbers Ltd and Mullins v Smith [2017] EWCA Civ 51 which was handed down after the hearing date. Sir Terence Etherton MR gave a useful summary of the position as regards personal performance at paragraph 84 of his judgment:

"I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

80. As regards territorial jurisdiction under the ERA, I had regard to section 94(1) ERA and noted that it had removed the constraints provided by its predecessor; namely that the right not be unfairly dismissed did not apply to any employment where the employee ordinarily worked outside Great Britain. This leaves the Tribunal to consider whether section 94(1) applies in a particular case.

81. I also had regard to the leading case of Lawson v Serco Limited [2006] ICR 250 which recognised that the circumstances would have to be unusual for an employee who worked and was based abroad to come within the scope of British employment law. Guidance was given on the characteristics which these exceptional cases would ordinarily have. It was accepted that the Claimant's circumstances did not fit within the three example exceptions given.

82. Lord Hoffman said at paragraph 37, "First, I think that it would be very unlikely that someone working abroad would be within the scope of section 94(1) unless he was working for an employer based in Great Britain. But that would not be enough. Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary."

83. He went on to say, in addition to the types of employees Lord Hoffman highlighted as being possible exceptions to the general rule that place of work is decisive, he said in paragraph 40:
"I do not say that there may not be others, but I have not been able to think of any and they would have to have equally strong connections with Great Britain and British employment law."

84. Duncombe v Secretary of State for Children, Schools and Families (No 2) [2011] ICR 1312 further clarified that the examples given by Lord Hoffman in Lawson v Serco were exactly that and that it would be a mistake to try and "torture the circumstances of one employment to make it fit one of the examples given, for they are merely examples of the application of the general principle." It stated that "the principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law."
This case also considered the effect of working under contracts governed by English law at paragraph 16, when Baroness Hale said, "…the terms and conditions were either entirely those of English law or a combination of those of English law and the international institutions for which they worked. Although

this factor is not mentioned in Lawson v Serco Ltd, it must be relevant to the expectation of each party as to the protection which the employees would enjoy." The judgment referred to "this very special combination of factors" resulting in the decision that there was territorial jurisdiction in this case. It went on to confirm that businesses (whether British or otherwise) recruiting local people to work within them, had "somewhere else to go" to enforce their rights. "It would indeed be contrary to the comity of nations for us to assume that our protection is better than any others'".

85. In Ravat v Halliburton Manufacturing & Services Ltd (Supreme Court: Scotland) referred to above, an employee, being a British citizen resident in Preston Lancashire was employed by a British company to work in Libya, brought a claim for unfair dismissal. The Courts had to therefore decide whether it had jurisdiction to hear the employee's unfair dismissal complaint. It was noted, correctly, that section 94(1) ERA could not apply to all employment anywhere in the world. Lord Hope stated at paragraph 27 that: "the starting point needs to be more precisely identified. It is that the employment relationship must have a stronger connection with Great Britain that with the foreign country where the employee works. The general rule is that the place of employment is decisive. But it is not an absolute rule. The open-ended language of section 94(1) leaves room for some exceptions where the connection with Great Britain is sufficiently strong to show that this can be justified."

86. Lord Hope goes on at paragraph 29 to say: "The fact that the commuter has his home in Great Britain, with all the consequences that flow from this for the terms and conditions of his employment, makes the burden in his case of showing that there was a sufficient connection less onerous….The question of fact is whether the connection between the circumstances of the employment and Great Britain and with British employment law was sufficiently strong to enable it to be said that it would be appropriate for the employee to have a claim for unfair dismissal in Great Britain."

87. The case also found that the documentation he was given indicated that the relationship should be governed by British employment law and his dismissal was handled by a human resources department in Aberdeen, all "fits into a pattern, which points quite strongly to British employment law as the system with which his employment had the closest connection." It was necessary to

consider "whether the connection was sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim."

88. I therefore considered in light of these authorities and also Bates van Winkelhof v Clyde & Co LLP (Court of Appeal) [2012] IRLR 992, that the test is whether the connection is sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the Tribunal to deal with the claim.

89. Section 108(1) ERA provides the service requirement of 2 years in order to bring a claim for unfair dismissal. In addition, section 218 ERA provides:

"(2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—

(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and

(b) the transfer does not break the continuity of the period of employment."

90. I understand that this section of the ERA was in force prior to the TUPE regulations. The Claimant was unable to rely upon the TUPE regulations themselves in this case since the undertaking was not "situated in the UK immediately before the transfer" as is required by regulation 3(1)(a) of TUPE nor was he part of "an organised grouping of employees situated in Great Britain immediately before the service provision change" (regulation 3(3)(a)(i) TUPE). The Claimant therefore sought to rely upon this older provision, which operates independently of TUPE.

91. Neither section 218 ERA nor the definitions section within the ERA provides any assistance on the meaning of "transfer" in section 218. However, the case of D36 Ltd v Castro (submitted by the Claimant and referred to above) provides that "the Employment Tribunal was right in seeking to avoid a conflict between section 218(2) of the 1996 Act and TUPE in trying to give the same meaning of "transfer" to both." This case predates the amendments to the TUPE Regulations in 2006, which provided the additional definition of transfer in regulation 3(3)(b) TUPE 2006 where there is a service provision change. However, I consider that the same principles should be applied in considering whether there has been a transfer under section 218(2) ERA for both tests of transfer under the TUPE regulations.

APPLICATION OF FACTS AND LAW

92. I am satisfied that the correct respondent was the First Respondent. Whilst I accept that the AEK contract, on which the Claimant worked, was awarded to the Fourth Respondent, this is not an unusual situation between group companies. It does not mean that the party contracting with the Claimant changed from the First Respondent to that of the Fourth Respondent.

93. All of the contractual documentation was entered into with the First Respondent. I must consider whether the reality was something different; however, I do not find that to be the case in these circumstances.

94. The Employee was engaged by the First Respondent to provide services on behalf of the Fourth Respondent on the AEK contract. There was a contractual relationship between the First and the Fourth Respondent to enable this to be done with an inter-company transaction.

95. It was clear that none of the individuals working on the AEK contract were in fact engaged by the Fourth Respondent. They were engaged by either the First or Second Respondents to provide their specialist services in Kabul.

96. Whilst it was clear that when recruited, the Fourth Respondent had representatives there to oversee the project, it was clear that the First Respondent was also represented.

97. Throughout the Claimant's assignment, the Fourth Respondent did not subject him to any control. There appeared to be little involvement between the Fourth Respondent and the Claimant directly.

98. The decision to terminate the Claimant's engagement was not taken by the Fourth Respondent. All of the individuals concerned with this decision were not employed, and did not appear to be instructed, by the Fourth Respondent.

99. Whilst I can understand the Claimant's perception that he may have been engaged by the Fourth Respondent, as some of the communications came from the UK, the email disclaimers referred to the Fourth Respondent and the Fourth Respondent was a London based company, I do not find that his perception was justified in this case. Therefore, the case against the Fourth Respondent is also dismissed.

100. As regards the Claimant's employment status, having applied the facts of this case to the Law in this area, I find the Claimant to have been a worker of the First Respondent.

101. In coming to this conclusion, I considered the following to be relevant to my decision, having considered the case law above and the authorities provided by the parties. I was not satisfied that the Claimant satisfied the 3 conditions provided by Ready Mixed Concrete.

102. I was satisfied that there was mutuality of obligation in the Claimant agreeing to provide personal service to the First Respondent, namely specialist security services for the AEK contract and there was a corresponding obligation on the First Respondent to provide work during the period of the engagement.

103. The Claimant did not carry out work for other organisations whilst engaged on the AEK contract. Nor was he able to. His evidence, which was confirmed by Ms White, was that he could have been called back even whilst on leave and therefore, even though this had never happened, it prevented him working in any capacity for other organisations whilst engaged on the AEK contract.

104. There was an extremely limited right, under clause 8.3 of the contract, to obtain prior written consent to subcontract the contract. However in reality, this was never done and would have proved extremely difficult. The Claimant could try and swap his duties with colleagues who had already been security cleared to work on the AEK contract, however, it would have been very difficult for him to provide a substitute. Therefore, he was required to provide personal service.

105. I accept that the Claimant might have been able to agree 'cover' from other contractors already working on the AEK contract should he be unable to carry out all of his duties for personal reasons (for example to attend a wedding), however I do not consider this means that the Claimant did not have to provide personal service.

106. There was a level of control exerted over the Claimant, however, not sufficient in my view to make the First Respondent "the master" in an employment relationship. I have taken into account the particular type of service being provided by the Claimant and that due to this, sufficient control would have to be applied in order to ensure that the services were carried out in accordance with health and safety and appropriate rules in place, particularly as weapons were to be used.

107. Both parties initially intended the relationship to be that of a self employed contractor, which I understand to be the 'norm' for the industry in which the Claimant worked. This was clearly evidenced by the emails he sent to Stephen Constant requesting information concerning insurance "as a subcontractor or a[n] employee of my business contracting to Aegis." [page 149]. All of the contractual documentation points to being a contractor as opposed to an employee.

108. There were negotiations on behalf of the Claimant in relation to the terms of the contract to be entered into, which is materially different to the car valeters in Autoclenz Ltd v Belcher. The contracts were amended by virtue of these negotiations and the relative bargaining powers of the parties suggests to me that the written agreement was intended to be a proper reflection of the true arrangement.

109. The Claimant accepted that the written terms represented the truth, however suggested that there was a mis-labelling of the relationship. The terms were, in the Claimant's view, entirely consistent with the relationship of employer/ employee. I do not agree with this, since the contract documentation provides, for example, for payment of fees against invoices and for the Claimant to be responsible for his own taxes.

110. The Claimant was provided with all equipment other than his shoes, including uniform and he was obliged to keep within a certain standard of dress, otherwise action could be taken against him. However again, I would expect this to be the case and whilst this is a factor taken into account, I have to consider the entirety of the position between the parties and what I consider to be the true agreement between them.

111. The Claimant was not in business in his own right such that the First Respondent was his customer or client. He was instructed in the way in which to carry out his work, he had a team leader and whilst he had some autonomy in how he carried out his assignment, he was subjected to rules, received training and could have been 'disciplined' should he have breached any of the rules applicable to his engagement.

112. Whilst I accept that training would have to be provided, and that there would have to be an element of control due to the type of work being undertaken, I am satisfied that this level of control did not cross the threshold in order to make the Claimant an employee.
113. This was reflected in the paperwork and the fact that throughout his engagement with Hart or the First Respondent, he had never requested or taken paid holiday.
114. As I do not consider the Claimant to be an employee, this means that he is not able to continue with his claims of unfair dismissal, automatic unfair dismissal and breach of contract. These claims are therefore dismissed.
115. However, in light of my findings, I consider that the Claimant was a worker under the ERA, which is required to bring a complaint of being subjected to a detriment having made a protected disclosure. However, in order to do so, I have to turn to the issue concerning territorial jurisdiction.
116. It is clear that the Claimant never worked in the UK. He was not interviewed here, nor did he provide any services at all in the UK. As the authorities show, normally, place of work is conclusive as to whether the Tribunal has jurisdiction. However, from the leading case of Lawson v Serco, which is relevant to other claims under the ERA, there are exceptions to this general principle where the Claimant is able to show a sufficiently strong connection to the UK in order to bring his claim here.
117. I accept that the Claimant had dual nationality with Australia and the UK and that he has subsequently renewed his British passport. The Claimant had a home in the UK, although chose not to disclose this at the time of completing his forms for an engagement with the First Respondent as he considered this might affect his chances of being given a contract.
118. Whilst the Claimant had a home in Lincoln, and gave evidence that he spent some of his periods of leave at this home address, he also spent periods of his leave visiting his parents' home in Australia (where his flights from Afghanistan went to) and visiting his partner in the USA. I therefore consider that this is materially different to the situation in Ravat where the employee commuted from his home in Preston to his employment in Libya every 28 days. Further,

unlike in this case, the employee in Ravat was assured that he would continue to have the protection of the UK law whilst working abroad.

119. The Claimant's home in the UK was not rented out during the few months of his engagement with the First Respondent, although had been rented out for some of the time he was contracted with Hart on the AEK contract. It was clear that all flights from Afghanistan went initially to Australia, although I accept the Claimant's evidence that he spent some of his leave in the UK at his home in Lincoln, and some in America with his partner.

120. The contractual documentation refers to various laws in various countries. Whilst this includes the laws of the UK, it is not, in my view, conclusive.

121. Some correspondence emanated from the UK, and some of the administration of his employment was clearly done in the UK, due to group companies being based there. However, the Claimant's termination letter was sent from Dubai and not from the UK.

122. In light of the above, I am not satisfied that the links to the UK are sufficiently strong to satisfy the test concerning jurisdiction set out above. The Claimant only ever worked in Afghanistan, for a Company not based in the UK, on the AEK contract entered into between the Fourth Respondent and the Australian Government. I do not consider that Parliament would ever have intended a claimant in these circumstances to be afforded the protection of the UK employment legislation.

123. In coming to my decision, I have taken into consideration that there was a clause in the contract stating that it was governed by English law (clause 9.1). However, even if this raised an expectation as to possible protection that might be enjoyed by the parties (as referred to in Duncombe v Secretary of State for Schools), I have considered this as a factor in my decision and do not find that this is sufficient in light of the facts of this case, to enable the Claimant to bring claims in the UK.

124. As I have found that the Claimant was not an employee, it is not necessary for me to consider whether he had sufficient service for which to bring an unfair dismissal complaint by virtue of section 218(2) ERA.

125. In light of the above, the remaining complaint of detriment for making a protected disclosure under section 47B of the ERA is dismissed.

Employment Judge Welch
20 March 2017