Appeal No. UKEAT/0019/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 23 May 2014
Judgment handed down on 20 June 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

KEPPEL SEGHERS UK LTD — APPELLANT

MR M HINDS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LENA A AMARTEY (of Counsel) Instructed by: Lewis Silkin LLP Solicitors King Charles House Park End Street Oxford OX1 1JD
For the Respondent	MR MICHAEL LEE (of Counsel) Instructed by: Andrew Jackson & Co Solicitors 80 Lodge Lane Liverpool L8 0QL

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

Extended definition of "worker" etc for the purposes of **Part IVA Employment Rights Act 1996** - approach to **section 43K(1)(a)(i)** ("worker") and **section 43K(2)(a)** ("employer").

In construing these provisions, it was relevant to have regard to the fact that section 43K was explicitly introduced for the purpose of providing protection to those who have made protected disclosures and it was appropriate to adopt a purposive construction, to provide protection rather than deny it, where one can properly do so, see per Wilkie J in **Croke v Hydro Aluminium Worcester Ltd** [2007] ICR 1303, EAT. The whole purpose of this statutory extension to the definition of "worker" and "employer" was to go beyond the normal contractual focus of those terms for statutory purposes in the employment field and did not require the existence of a contract, see per Cox J in **Sharpe v (1) The Worcester Diocesan Board of Finance Ltd and (2) The Bishop of Worcester** UKEAT/0243/12/DM, and extended to the situation where (as here) the individual had been introduced or supplied by an agency and was operating through their own service company (see **Croke**).

In the present case, the Employment Tribunal had proper regard for the contractual provisions between the parties and reached conclusions on the questions whether the Claimant was "introduced or supplied" (section 43K(1)(a)(i)) that were open to it on the evidence.

As for the question of the substantial determination of the terms of the Claimant's engagement for the purposes of section 43K(1)(a)(ii) or section 43K(2)(a), the Tribunal was entitled to look at the various contracts relevant to the relationship and to see how these worked in practice. To the extent that there was a distinction between the approach to be taken in respect of each subsection, the Tribunal made no error of law but again reached conclusions that were properly open to it on the evidence.

Appeal dismissed.

HER HONOUR JUDGE EADY QC

1. This case is concerned with the extended meaning afforded to the terms "worker" and "employer" applicable in whistle-blowing cases under section 43K **Employment Rights Act 1996**.

2. In giving judgment, I refer to the parties as the Claimant and the Respondent as they were before the Employment Tribunal below.

Introduction

3. This is an appeal by the Respondent against a judgment of the Liverpool Employment Tribunal, Employment Judge Barker sitting alone at a Pre-Hearing Review on 1 May 2013, written reasons for which were sent to the parties on 8 July 2013. Before the Tribunal, the Claimant was represented by his solicitor, before me by Mr Lee, counsel. The Respondent was represented by Ms Amartey, counsel, both before the Employment Tribunal and here.

4. The preliminary issue before the Employment Tribunal at the Pre-Hearing Review was whether the Claimant was a "worker" for the purpose of the extended definition of that term under section 43K(1) **Employment Rights Act 1996**, so as to entitle him to bring a claim of having suffered detriment under section 47B by reason of having made a protected disclosure. If the Claimant was a worker for those purposes, a related question arose as to who was his "employer", as so defined by section 43K(2).

5. It is apparent that the Employment Tribunal had regard to the documentation presented at the Pre-Hearing Review, which included the relevant contractual documents (see below). It

also received oral evidence from the Claimant, who had provided a witness statement and was cross-examined. The Respondent did not seek to adduce any witness evidence itself.

6. The Employment Tribunal concluded that the Claimant was indeed a worker within the meaning of section 43K **Employment Rights Act 1996** and that his employer for the purposes of section 43K(2)(a) had been the Respondent.

The background facts

7. The Claimant describes himself as a site-based Health and Safety Adviser. He works within the construction and civil engineering industry and is engaged on projects as a consultant. His evidence, which was accepted by the Tribunal, was that it is a prerequisite for obtaining work as a Health and Safety consultant within his industry that he provides his services through a company. He has, himself, established a company, Crown Safety Management Limited ("Crown"), of which he is the sole share-holder, director and employee. He has never employed anyone else and the only purpose of establishing Crown was to meet industry requirements in providing his own consultancy services.

8. The Respondent is a company that is involved in the construction of energy recovery facilities. At the relevant time it was working on a construction project for a final client, TPS, and approached a recruitment agency, First Recruitment Limited ("First") with a specification for a contractor that it required for this project.

9. First is an employment agency that acts as an intermediary. As the Tribunal found, in this case it:

> **"sourced that individual [contractor] according to those specifications and put him forward for interview. The respondent conducted the interview themselves; the interview**

was not conducted through First. The respondent interviewed [the Claimant] in person …" (paragraph 10)

10. It was common ground that there was no direct contractual relationship between the Claimant and the Respondent such as might enable this case to fall within the definition of employment for the purposes of section 230 **Employment Rights Act 1996**. The Employment Tribunal found that the Claimant was:

> **"… ultimately supplied to the respondent via two corporate entities. The first was his own umbrella company Crown … . The services of Crown were not directly supplied to the respondent but instead a further intermediary, a recruitment agency called First … set up an interview with the respondent which [the Claimant] had at their site in Runcorn, and subsequently was engaged to provide services to them in connection with a construction project that was being done for a final client called TPS." (paragraphs 2-3)**

11. In considering how the Claimant had been introduced to the Respondent and how his services were then supplied, the Employment Tribunal found that it was:

> **"… [the Claimant] himself that was introduced to and supplied to do work ultimately for the respondent and not his company, Crown. In the interview that he had with the respondent … the interview was with him personally. It was clearly the claimant himself who was being engaged by the respondent. …"**

12. In arriving at that conclusion, the Employment Tribunal had regard to the contract between the Respondent and First, in particular:

12.1 The requirement at clause 2.5 that any individual contractors providing services to the Respondent have to do so through intermediary companies.

12.2 The contract envisaged that the contractors (rather than the companies via which they were required to supply their services) would be subject to suitability checks, see clause 8.1.

12.3 It was not in the parties' contemplation that any intermediary company could substitute anyone else for the individuals who had thus been assessed.

12.4 Whilst the terms on which First engaged the Claimant allowed for a substitute, the Tribunal found that the terms of the end user (the Respondent) did not envisage that.

13. As to the determination of the terms of his engagement, the Tribunal expressly rejected the Respondent's argument that the Claimant was in fact employed by Crown and he was able to determine his own terms through that entity (see paragraph 8). The Tribunal held, instead, that the Respondent substantially determined the terms of the Claimant's engagement for section 43K(1)(a)(ii) purposes and was the employer for section 43K(2) purposes. In particular, the Tribunal found (paragraphs 10-11) as follows:

13.1 The Respondent set the specification for the work.

13.2 It was the Respondent that authorised changes to the Claimant's hours; he could not dictate his hours.

13.3 The Claimant was obliged to report regularly to a manager within the Respondent and was generally subject to the Respondent's control, albeit as a health and safety professional he worked on his own much of the time and was not micro-managed.

14. Although not expressly referred to in the Tribunal's reasons, I have also been directed to the Claimant's evidence (not contested below) as to the termination of his engagement; where he says (see paragraphs 31-35 of his witness statement) that it was the Respondent that

decided that he should leave and also determined the terms of his departure (i.e. his period of paid notice).

The legal principles

15. The relevant provisions of the legislation are found in s 43K **Employment Rights Act 1996**. As the sub-heading to that provision expressly states, this provides for an extension to the meaning of "worker" etc for the purposes of Part IVA of the 1996 Act, which concerns the protection afforded in respect of protected disclosures.

16. Section 43K(1)(a) provides (relevantly):

> **"(1) For the purposes of this Part "worker" includes an individual 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 party or by both of them.**
> **…"**

17. As for "employer", section 43K(2)(a) provides:

> **"For the purposes of this Part "employer" includes-**
> **(a) in relation to a worker falling within paragraph (*a*) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,**
> **…"**

18. It is common ground that, in construing these provisions, it is relevant to have regard to the fact that section 43K was explicitly introduced for the purpose of providing protection to those who have made protected disclosures. Given that background, it is appropriate to adopt a purposive construction, to provide protection rather than deny it, where one can properly do so, see per Wilkie J in **Croke v Hydro Aluminium Worcester Ltd** [2007] ICR 1303, EAT, at paragraph 33, (and in saying this, I note the warning given in **Redrow Homes (Yorkshire)**

Ltd v Wright [2004] ICR 1126, CA, against the determination of cases by reason of policy consideration rather than the correct application of the law).

19. In thus approaching section 43K, the EAT in **Croke** held that the introduction or supply of an individual for the purpose of section 43K can include an individual introduced or supplied by an agency even where that person is operating through their own service company.

20. Any contractual terms governing the relationship may well provide the starting point in determining whether the complainant is a "worker" for these purposes and, if so, who her "employer" is. Where there are express contractual terms, those should ordinarily be taken to represent the entirety of the agreement between the parties, save that it has been recognised that the Courts should be alive to the danger, in the context of an employment contract, that the written terms might not properly reflect the reality of the situation. That does not mean to say that the focus should be on the parties' intentions or expectations; what needs to be identified is the true nature of the parties' actual legal obligations, see **Autoclenz Ltd v Belcher and ors** [2011] ICR 1157, SC.

21. Having recognised that any contractual terms can provide the starting point for a Tribunal's determination, it is notable that section 43K puts the focus on the way in which the relationship has arisen and has been governed: the introduction or supply and the "in practice" substantial determination of the terms of the engagement. This no doubt reflects the fact that the whole purpose of this statutory extension to the definition of "worker" and "employer" was to go beyond the normal contractual focus of those terms for statutory purposes in the employment field. Thus, as recognised by Cox J in **Sharpe v (1) The**

Worcester Diocesan Board of Finance Ltd and (2) The Bishop of Worcester UKEAT/0243/12/DM the phrase "terms on which he is or was engaged to do the work" do not imply the existence of a contract (see paragraph 237).

22. Although going beyond the traditional tests of employment or worker status, to the extent that 'control' was relevant to the questions to be determined under section 43K, absence of actual day-to-day control would not be determinative. Regard would need to be had to the totality of the contractual provisions and all the circumstances of the relationship, see **White v Troutbeck SA** [2013] IRLR 949, CA.

The appeal and the Respondent's submissions

23. By its Notice of Appeal, the Respondent took issue with the Tribunal's conclusions (1) that the Claimant was a worker within the extended definition at section 43K(1)(a) **Employment Rights Act 1996**, and (2) that the Respondent was the Claimant's employer for the purposes of section 43K(2)(a) of that Act.

24. Taking those points in turn, the Respondent first contended that the Tribunal erred in concluding that it was the Claimant, rather than Crown, who had been "introduced or supplied" (section 43K(1)(a)(i)) or "engaged" (section 43K(1)(a)(ii)).

25. In this regard, the Respondent placed reliance on the contracts which governed the relationships between (i) the Claimant and Crown, (ii) Crown and First, and (iii) First and the Respondent. The contractual provision would not be determinative of all cases for these purposes but in this case it was significant given the Claimant's concession that the contracts were genuine and reflected the true agreements made between the parties. Here the Claimant

was not himself named in the contract between Crown and First and it was allowed that Crown could supply anyone (unlike the position in **Croke**, where the Claimant had been expressly identified in the contract).

26. Any attempt to go behind the contract to place reliance on the fact that the Claimant was interviewed by the Respondent went nowhere. To the extent that it was open to the Claimant to argue this alternative ground (which, the Respondent contended, had not been taken below), there was no evidence before the Tribunal as to the nature and content of the interview and thus no proper basis to find that it had been the Claimant as an individual who had been so introduced. The finding that the Claimant was interviewed by the Respondent went nowhere given that he was the sole director and employee of Crown and so would have been representing Crown in any event.

27. Given the contractual provisions in this case, who supplied the Claimant was clearly a matter of contract. The approach adopted in **Croke** did not alter that position: indeed the EAT in **Croke** emphasised that the starting point was the contract (see paragraph 40) and obviously considered it significant that the contractual 'right' of substitution could be vetoed. Whilst the contract between First and the Respondent might have specifically named the Claimant, the Respondent contended that it allowed for a substitute so as to distinguish it from the facts of **Croke**. The Tribunal simply fell into error by making assumptions as to the parties' intentions, rather than focusing on what was actually agreed, contrary to the warning laid down in **Autoclenz** (see paragraph 32).

28. The second issue under section 43K(1)(a) was whether the Tribunal had erred in concluding that it was the Respondent that determined the Claimant's terms (as opposed to

the Claimant himself). Once the Claimant had accepted that the terms of his contract with Crown were genuine, it simply was not open to the Tribunal to find other than that it was the Claimant (as sole Director of Crown) who determined his terms and conditions.

29. Further, having regard to the contractual agreements in this case, it was clear that these governed the way in which the Claimant's terms were to be determined in practice and that this was not by the Respondent. That was not simply because there was no contract between the Claimant and the Respondent (this would not be determinative, see **Sharpe**) but because the contract between First and the Respondent expressly provided that the latter would not take on direct control over or responsibility for First's "personnel", stating that these professionals would use their own initiative and "not be subject to, or to the right of, supervision, direction or control" in providing their services. Similar provision was also contained in the contract between the Respondent and Crown.

30. The Tribunal had also erred in focusing simply on the question of the Claimant's hours of work. First, because that was simply one term and the statutory provision required one to look at "terms" in the plural. Second, because in fact the Claimant had instigated the change to his working hours; the Tribunal was converting evidence of communication of a change (by the Claimant) to determination of his terms (by the Respondent).

31. On the separate question of identifying the "employer" for section 43K(2)(a) purposes, the Respondent submitted that there was a difference in approach when considering who substantially determines or determined the terms of the engagement. Under section 43K(1)(a), the focus was on considering how, as a matter of contract, the Claimant was engaged and thus allowed for a finding that both the third person (here, First) or the end-user

(here, the Respondent) determined the terms of the engagement to do the work. For section 43K(2)(a) purposes, the focus was, instead, on the terms on which the person was engaged to do the work, which fell short of extending the protection to the genuinely self-employed as they would substantially determine the terms they were engaged upon and benefitted from their self-employed status.

32. To the extent that the Tribunal failed to appreciate the distinction, it had erred in law, albeit that there was some degree of overlap between the two tests and the Respondent again relied on the points it had made in respect of section 43K(1)(a).

33. Further, however, the Tribunal had erred in seeing the issue of 'control' as determinative of this question. That was not the statutory language: the question was who determined the terms upon which the Claimant was engaged rather than who controlled him.

34. In any event, the Tribunal had incorrectly equated a practical ability to control with a contractual right to do so. The latter was the relevant question (**White v Troutbeck SA**).

35. In the present case there was no contractual right of control and it was insufficient to elevate communication (e.g. of a change in working hours or shift pattern) to something higher, equating to control.

36. In any event, given that it was the Claimant's evidence that he worked unsupervised (which was consistent with the contractual provisions) and given that he was an employee-director of Crown, it would be perverse to find that 'control' by the Respondent was made out in this case.

37. Ultimately, whilst the Tribunal was entitled to adopt a purposive approach, it erred by effectively deciding the case by policy considerations (contrary to **Redrow Homes**).

The Claimant's submissions

38. In resisting this appeal, Mr Lee, for the Claimant made three general observations at the outset. First, the statutory provisions in play were expressly designed to extend the whistle-blowing protection to a wider class of worker (and the Claimant was not seeking to extend the protection to any other rights). As such, it is appropriate to construe those provisions, so far as possible, to provide that protection rather than to deny it, see **Croke**. Second, the Tribunal findings in issue were made following a Pre-Hearing Review at which the Claimant had given evidence and been cross-examined but at which the Respondent chose not to call any witness evidence itself. Third, ultimately this was a perversity appeal. If the Tribunal correctly directed itself, the EAT should be reluctant to interfere with its findings: the test for perversity appeals rightly set the bar high.

39. On the first ground of appeal, relating to the question of "introduced or supplied", there was no suggestion that the Tribunal had misdirected itself as to the statutory test: was there an introduction or supply of the Claimant as an individual to the Respondent by a third party? Whilst not perhaps clearly distinguishing between "introduction" and "supply" that was not fatal; it was clear that the Tribunal had the correct question (relating to the introduction or supply of the individual) in mind, so the only question could be whether the conclusion was perverse or inadequately reasoned.

40. The Claimant had provided sufficient evidential basis for the finding of a personal introduction (see his witness statement at paragraphs 7 and 10) and the Respondent had not adduced evidence to challenge this. More than that, however, the Tribunal found it was the Claimant himself who was being assessed, which was consistent with the specific reference to one contractor in the contract between the Respondent and First and the complete absence of any reference to Crown.

41. The nature of the contractual arrangements as a whole did not serve to prevent a finding that it was the Claimant as an individual who was "introduced". Even if this was wrong, then it was possible to read the Tribunal's conclusions as allowing for a finding that it was Crown that had introduced the Claimant, which would still have been the introduction of the Claimant as an individual.

42. On the question of supply, the Respondent was wrongly seeking to limit the enquiry to the contractual position and that was neither required by the statute nor consistent with the statutory purpose. In any event, however, if regard was had to the contractual provisions between the Respondent and First, then it was apparent that it was the Claimant as an individual who was being supplied, not Crown. Indeed, given that the agreement in this case specifically referred to the Claimant (and not Crown), the Claimant's argument here was even stronger than that in **Croke**.

43. The contractor was plainly the Claimant as an individual – thus, for example, the provision at clause 8.1 (the right to work in the UK etc) would make no sense unless relating to the individual (rather than an intermediary company). The fact that the contract required contractors' services to be supplied through intermediary companies made clear the

expectation that the supply would be of the individual contractor (not the intermediary company itself), something the Tribunal relied on in reaching its conclusion.

44. The weight of the evidence supported the conclusion that it was the Claimant as an individual who was introduced. Any lack of detail in the reasoning had to be seen in light of the fact that the Respondent had not itself adduced any evidence to contradict the picture painted by the Claimant.

45. As to the question of "substitution", in truth this issue was not relevant to the question of introduction; it could only properly go to the question of "supply". In either event, it would not be determinative: someone could be introduced or supplied as an individual even if they could be substituted.

46. In any event, the Tribunal had found that it was not within the parties' intentions that the Claimant could be substituted in this case. This was not a case where regard to the express contractual provisions was particularly helpful. Although **Autoclenz** had confirmed that this will generally be the starting point, that was in the context of the standard definition of employee or worker, where the focus was on the contract. This was very different; there did not need to be any contractual relationship between the Claimant and the Respondent for section 43K purposes – the focus was on the practical reality of the relationship. That was what the EAT had recognised in **Croke** (see paragraph 41).

47. In fact, in this case not only did the evidence of the reality of the relationship support the Tribunal's conclusion, that was also a finding consistent with the contractual provisions. It was the Claimant's evidence that he would have been told to leave if he had sent a

substitute and so any suggestion of anything different in the relationship between him (or Crown) and First would be irrelevant.

48. Finally, should there be any concern as to the adequacy of the Tribunal's reasoning on this point and consideration given to how this might properly be addressed in terms of disposal, it was notable that the Respondent's subsequent witness statement simply gave further weight to the conclusion that the Claimant had been introduced and supplied as an individual.

49. Turning to the question of the determination of the Claimant's terms for the purposes of section 43K(1)(a)(ii), the statute required (i) regard to be had to what had happened in practice and (ii) to which entity *substantially* determined those terms. The Respondent's case failed to properly engage with those requirements.

50. The suggestion made by the Respondent - that the terms on which the Claimant was engaged were governed by the contract between him and Crown - would place a very narrow construction on the language of this provision and would effectively defeat the intention of the provision to extend the protection of the legislation in cases where an individual provides services through an intermediary company. The statutory protection did not imply the existence of any contract (see **Sharpe** per Cox J at paragraph 237) let alone that the Tribunal should focus on the immediate contractual terms rather than what happened in practice. Section 43K will almost inevitably be brought into play in cases where there is an absence of contract between the complainant and the end-user of her services. Any contract is likely to be between the complainant and the agency. If that is to be held determinative of the question as to which entity determines the terms of the engagement then the end-user would always

escape potential liability and the extension to the definition of "worker" would have been undermined.

51. Section 43K(1(a)(ii) required the Tribunal to identify who *in practice substantially* determined the terms. That allowed for the fact that there might be more than one entity involved in the determination of the Claimant's terms and that regard would need to be had to the reality of the situation rather than simply a technical analysis of the strict contractual position.

52. Adopting that approach, the simple answer to this point was that the Tribunal reached permissible findings of fact on the evidence. Given that evidence (and the Respondent chose not to adduce any witness evidence itself on the point), the suggestion that Crown determined the Claimant's terms rather than the Respondent would be a fiction.

53. Moreover, in finding that the Respondent had, in practice, substantially determined the Claimant's terms, the Tribunal did not err by considering only one term. It gave the example of the change in hours (paragraph 11) but that did not suggest that it had limited its consideration to simply that term (and see the more general overview of the point at paragraph 12). The Tribunal also found that the Claimant had been required to report to an employee of the Respondent and to work under its control (see paragraph 11), which implied that the Respondent would have control of the terms of the relationship as it developed. There was more than sufficient evidence to support those conclusions (and see the Claimant's witness statement relating to the Respondent's approval of an increase in his pay; the need to get the Respondent's agreement to changes in his shift pattern and hours; the way in which the Respondent divided up and allocated the work; the reporting requirements; and,

ultimately, the fact that it was the Respondent who terminated the Claimant's engagement and decided upon his notice entitlement).

54. Turning to section 43K(2)(a), the Respondent was seeking to make a new point in drawing a distinction between this and s 43k(1)(a)(ii). The Respondent's argument was suggesting that section 43K(2)(a) requires determination in relation to one person and not to have regard to what happens in practice. The Claimant disagreed. There was no statutory requirement that determination had to be by one entity, although in this case the Tribunal had plainly found that the Respondent had determined the terms of the engagement and had specifically rejected the argument that Crown had done so (see paragraphs 8, 11 and 12).

55. Further, it could not be the case that section 43K(2)(a) could not refer to the terms on which the complainant was actually engaged to do the work: what else could the provision (allowing for a purposive approach) be referring to?

56. On the question of 'control', the Respondent was arguing that the Tribunal had effectively substituted the control test for that required by the statute. That was clearly not the case. The Tribunal specifically referred to the statute and paragraph 11 demonstrated that regard was had to other factors, such as the Claimant's hours. In any event, the question of control was not irrelevant (and see how it was taken into account in **Croke**, paragraph 11).

57. As for the **Autoclenz** point, where a contract governs the relationship between the parties it is plainly right to start with that contract. Here, however, the context was one in which there generally will be no contract between the Claimant and the Respondent. The

Tribunal was entitled to look at the various contracts relevant to the relationship and to see how these worked in practice.

58. As for the factual finding, the Claimant's evidence as to lack of supervision did not undermine the conclusion on control. Control is a matter of degree and cannot always be equated with supervision. The Claimant could not determine his own hours; plainly saw the Respondent's manager as his line manager and could not determine how work was divided up and allocated. The contractual provisions relied on by the Respondent did not alter this position.

Discussion and conclusions

59. I start with some general observations as to the statutory definitions with which this appeal is concerned. Section 43K is expressly stated to provide an extended meaning to terms such as "worker". It is specific to Part IVA of the **Employment Rights Act 1996**, i.e. to the protection in respect of protected disclosures. It does not have wider application. It is plainly intended to extend this protection to a wider range of relationships than would be encompassed by the definitions of "employee" or "worker" with which employment lawyers are more familiar. Indeed, it is a provision that takes employment lawyers outside the comfort zone of the contractual approach normally required in determining employment status. The protection extends to relationships where there is no contract in existence between the parties (see Cox J in **Sharpe** at paragraph 237) and to cases where there might be no direct contract between the complainant and the user of her services but contracts between each of them and other parties, impacting upon (if not governing) their relationship. This might include a contract between the complainant and an employment agency where the complainant is engaged through her own service company (see **Croke**).

60. In the present case, the Claimant was seeking the protection of the legislation in respect of treatment he alleges was meted out to him by the Respondent as a result of a protected disclosure he claims to have made. He did not have a direct contractual relationship with the Respondent. His services were engaged through a series of contractual agreements. I see force in the submissions made for the Claimant in this appeal that using those various contracts as the starting point might be less helpful in a case under section 43K(1)(a)(i). The focus of that provision is on what happened in practice rather than on the contractual agreement. Given, however, that there was no suggestion that the contracts did other than reflect the genuine legal obligations of the various parties, I can agree with the Respondent that the contracts provide a useful starting point in this case. I do not, however, consider that the Tribunal lost sight of that or reached conclusions inconsistent with the contractual provisions in question.

61. I start with the criticism made of the Tribunal's conclusions in respect of introduction or supply (section 43K(1)(a)(i)). The Tribunal had regard to the contract between the Respondent and First and noted that this recognised that contractors such as the Claimant would be engaged through intermediary companies (paragraph 4, referring to clause 2.5). It further had regard to the warranty provided in respect of the contractors' right to work in the UK, suitability etc (clause 8.1) and concluded that it was clear that this referred to the individual contractors, not the companies through which they were required to provide their services. Given the language of that clause, that seems to me to be an entirely permissible conclusion. It is also consistent – as the Tribunal further found – with what happened in practice. The focus was on the suitability of the Claimant as an individual (not on Crown): he was "sourced" as an individual meeting the Respondent's specification (paragraph 10) and

was interviewed as such (see the finding that the interview was with him "personally", at paragraph 4) and not as a representative of Crown (see the finding at paragraph 10).

62. Those findings provide sufficient basis for the Tribunal's conclusion that the Claimant was introduced as an individual for section 43K(1)(a)(i) purposes. Nothing in the Respondent's submissions persuades me that the contractual provisions undermine rather that support that conclusion.

63. For completeness, I also address the question of the Tribunal's finding in respect of supply. It is perhaps unhelpful that the Tribunal did not expressly separate out its consideration of this issue from that of introduction but I can equally see that there might be some degree of overlap in terms of the relevant findings of fact in respect of these terms. In any event, I bear in mind that I should read the judgment as a whole and, doing so, it is apparent that the Tribunal clearly kept in mind the important point in each respect: was it the Claimant as an *individual* who had been introduced or supplied?

64. In respect of supply, the Tribunal was again entitled to rely on the matters I have summarised above in relation to the question of introduction. It was here, however, that the issue of substitution might also have been relevant. In saying that, I see force in the Claimant's submission that a contractual right to provide a substitute need not exclude the application of section 43K. The focus of the definition at 43K(1)(a)(i) is on the factual question as to whether or not the complainant has been supplied; it does not include a requirement that no-one else could be supplied in her place. The existence of a right of substitution might point to the fact that it was not, in truth, the complainant who was being supplied but I see some force in the argument that this might not necessarily be so.

Ultimately, however, this is not a point I have to determine in this appeal. The Tribunal here had regard to the right of substitution in the terms under which the Claimant was engaged by First but concluded that this did not extend to the terms on which he was supplied to the Respondent (see paragraphs 4 and 6). Having regard to the contractual terms between First and the Respondent (i.e. the terms on which the Claimant was supplied to the Respondent) supports rather than detracts from this conclusion, not least as the Claimant was the named contactor to be supplied (Schedule 2: The specification).

65. In my judgment, therefore, the Employment Tribunal adopted the correct approach to the questions raised under section 43K(1)(a)(i), had proper regard to the relevant contractual provisions and reached permissible conclusions (that are adequately explained) on the evidence before it.

66. I turn to the issues raised on the question of determination of the terms of the Claimant's engagement. In so doing, I address these issues under both sections 43K(1)(a)(ii) and 43K(2)a) at the same time. That enables me to consider in context the Respondent's submission as to a distinction between the two provisions.

67. As I understand the Respondent's submission in this regard, the suggestion is that the statutory provisions require a subtly different approach. Under section 43K(1)(a)(ii), the focus can be broader – the terms might be determined by more than one entity and might include terms on which the complainant was engaged to do the work (i.e. projecting forward) rather than simply being the terms upon which she is engaged (the reality of what has transpired).

68. It seems to me that both provisions allow that the terms of the engagement might have been determined by more than one entity. Section 43(1)(a)(ii) simply distinguishes between terms substantially determined by the Claimant themselves and terms substantially determined by others. Section 43K(2)(a) then takes the assessment further forward to define the employer as being the party (which, by this stage, cannot be the Claimant) who *substantially* determines or determined those terms.

69. As for the question of the terms upon which the Claimant was engaged "to do the work", it is to be noted that the context of this phrase is in respect of those terms which "are or were in practice substantially determined …". There may be a distinction to be drawn as between this provision and the wording of section 43K(2)(a) but it seems to me that the subtlety of it seems likely to limit its usefulness. In any event, I have been unable to understand how it is a distinction with practical application in the present case. Certainly, apart from generally asserting an error of law on the part of the Tribunal in failing to appreciate the distinction, the Respondent's submissions have focussed on the same factors in respect of both provisions.

70. Before the Employment Tribunal, the Respondent had contended that looking at who had substantially determined the terms on which the Claimant was to do the work inevitably led to the answer that Crown did and that, as the sole Director of Crown, that really meant that the Claimant had done so. The Tribunal rejected that contention. It held that Crown was simply a vehicle through which the Claimant's services were supplied (as an industry requirement). It focussed, as it was entitled to do, on the specific terms of the engagement in question. It found that the Respondent was in the position of determining both the Claimant's initial terms of engagement ("the terms on which he was engaged to do the work") *and*

during the course of the agreement's operation (see paragraph 12). Given that the Tribunal had found that it was the Respondent which had laid down the specification for the engagement and had interviewed the Claimant personally to see if he was suitable, it was entirely consistent for the Tribunal to conclude that the Respondent had also determined the initial terms of the engagement. In so doing, the Tribunal was not restricted to looking at the terms of the various contracts but to have regard to what had occurred "in practice". Not only is that the language of the statute, it will inevitably be required where there is (as here) no direct contract between complainant and Respondent. Here the Tribunal was entitled to look at the various contracts relevant to the relationship and to see how these worked in practice.

71. In terms of the determination of the Claimant's terms "in practice", it is right that the Tribunal had regard to the question of control. In so doing, I do not consider that it thereby lost sight of the statutory language. As the Claimant submitted, control is not irrelevant to the question as to who determines the terms on which work is to be done. In the present case, the Tribunal was plainly influenced by the fact that the requirements of the work were laid down by the Respondent and the Claimant was obliged to report to its employee (paragraph 11). Those were findings of fact that it was entitled to make on the evidence before it and which plainly supported its conclusion as to both the initial determination of the terms on which the Claimant was "to do the work" (i.e. that it was not the Claimant himself, through Crown, that had substantially determined those terms) and as to the continuing determination of those terms (i.e. that it was the Respondent which was the employer for section 43K(2)(a) purposes).

72. For completeness I should make clear that I do not see this conclusion on control as having been undermined by the Claimant's evidence that he worked on his own a lot of the

time and was not micro-managed on a regular basis. The case-law has long recognised that many employees (particularly those carrying out professional duties) will be largely unsupervised in their work. That does not, however, mean that their employer does not exercise control over their employment. It seems to me that the Tribunal properly recognised this distinction and made clear that it was (correctly) having regard to the question of control in relation to the terms of the Claimant's engagement.

73. As well as having regard to the question of control, it is also right to observe that the Tribunal used the example of the Claimant's working hours and shift arrangements as demonstrating that it was (in practice) the Respondent that had substantially determined the terms of the engagement (paragraph 11). In so doing, I do not accept that the Tribunal thereby erred in focusing solely on one term as opposed to the "terms" required by the statute. As the language of the judgment makes plain, the Tribunal was having regard to the Respondent's ability to determine (or control) the terms of the Claimant's engagement and was using the question of hours and shift arrangements as examples of how this worked in practice. That discloses no error of law. As was demonstrated to me during oral argument on this appeal, other examples were also set out in the evidence. The Tribunal was not obliged to go through each one; it was entitled to use particular instances as making good the point. Its conclusion was one open to it on the evidence and is sufficiently explained in its reasons.

74. To the extent that the Respondent sought to challenge the findings of fact in this regard by characterising them as elevating necessary communications with the Claimant (as to the requirements of his work or his working hours or shifts) into illustrations of control, it seems to me that is an attempt to re-argue the factual case and does not begin to meet the test of perversity that would be required.

75. Finally, whilst the Tribunal plainly had regard to the purpose behind the statutory provisions in issue in this case, I do not read paragraph 15 as suggesting that it wrongly determined this matter by regard to public policy concerns rather than a correct application of the law to the findings of fact it had made. The concern expressed at paragraph 15 is as to what seemed to be the potential consequence of how the Respondent was putting its argument. It is fair to say that, in her submissions on this appeal, Ms Amartey has been at pains to stress the case-specific nature of her focus on the contractual provisions. The Tribunal was, however, entitled to have regard to the potential repercussions of that argument in the industry specific context it was considering. It did not thereby lose sight of the necessity of having regard to the statutory language and applying that to its findings of fact in this case.

76. For the reasons set out above, I dismiss this appeal.