EMPLOYMENT TRIBUNALS

Claimant: **Ms V Kyriazopoulou**

Respondent: **Pearl Restaurants Limited**

Heard at: **Cardiff** **On: 2 and 3 December 2019, 19 December 2019 (Chambers)**

Before: **Employment Judge S Moore**
Members:
Mrs J Kiely
Ms C Lovell

Representation:
Claimant: Richard O'Keeffe, Southwark Law Centre
Respondent: Mr S Wyeth, Counsel

JUDGMENT

1. The Claimant was not a worker within the meaning of S230 (3) (b) Employment Rights Act 1996. The Claimant's claims are dismissed.

REASONS

Background

1. The ET1 was presented on 29 May 2019. The period of Acas early conciliation lasted from 16 April 2019 to 1 May 2019. The Claimant brought claims for holiday pay and detriments contrary to S44 and 47B ERA 1996. The S44 claim was withdrawn by amendment dated 13 August 2019 as well as amending some factual points. The amendment was permitted by EJ Brace at the preliminary hearing on 14 August 2019.

2. The Tribunal heard evidence from the Claimant with the assistance of a Greek interpreter on the first day. The interpreter had not been booked for the second day. The Claimant was given the opportunity to adjourn pending rearrangement of the interpreter but wished to continue without one. We also heard from Mr T Osborne, Mr K North and Mr D Cizek of the Respondent. There was an agreed bundle of documents of 210 pages and CCTV footage of an incident between the Claimant and a customer on 18 January 2019.

3. A preliminary issue arose at the outset of the hearing. The Claimant had made an application under Rule 50 (3) (b) Employment Tribunal Rules of Procedure for anonymisation of the identity of the Claimant. This was refused with reasons provided in a separate order.

4. The issues that fell to be determined were as follows:

Status

5. Was the Claimant a worker as defined under section 230 (3) ERA 1996? The Respondent contended that the Claimant was engaged on a self - employed basis.

S47B Detriment Claim

a. Did the Claimant make one or more protected disclosures (Sections 43B & 43C ERA) as set out below?

b. The Claimant relies on subsection (1) (a) of section 43B(1)(a-f):

c. a criminal offence had been committed (battery by a customer of the Respondent).

d. Did the Claimant reasonably believe that the disclosure was made in the public interest?

e. The disclosure was made to the employer;

f. The Respondent defends the claim on the following basis in particular:
(i) The Claimant was not a worker within the meaning of S230 ERA;
(ii) The Claimant did not have a reasonable belief that the disclosure was in the public interest and tended to show [that a criminal offence had been committed;
(iii) The Claimant had not been subjected to a detriment as she was offered further work and;
(iv) The alleged detriment was not on the ground of the protected disclosure but due to her inappropriate conduct and volatility.

g. Did the Respondent subject the Claimant to the detriment of terminating her engagement? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

h. If so was this done on the ground that she made one or more protected disclosures?

Holiday Pay

6. (If the Claimant establishes she was a worker) when the Claimant's employment came to an end, was she paid all of the compensation she was entitled to under Regulation 14 of the Working Time Regulations 1998/ S13 ERA 1996?

Findings of Fact

7. The Claimant entered into a contract ("the contract") with the Respondent on 23 October 2015. The Claimant was engaged as a Dancer at the Fantasy Lounge in Cardiff following an audition with the then Manager. We set out the relevant sections of that contract as follows.

8. The contract was 11 pages long. It was signed by the Claimant on 23 October 2015. The front cover was a "Contract Confirmation Note Agreement". The "Client" was defined as Fantasy Lounge. The "Dancer" was the Claimant. Fantasy Lounge agreed to provide the club premises and changing room facilities, The Claimant agreed to provide her own dresses, shoes, makeup and other items necessary.

9. The preamble to the agreement provided as follows:

"Whereas

A. The Dancer carries on a self-employed business of the provision of Dancer services relating to the services ("the Dancer services") specified in the attached Contract Confirmation Note ("the Confirmation Note").

B. The Client has requested the Dancer and the Dancer has agreed with the Client, to provide Dancer Services on the terms and subject to the conditions of this agreement ("the Agreement").

10. Paragraph 2 provided:

DANCER

2.1 The Dancer's obligation to provide the Dancer services shall be performed by the Dancer or a substitute. If a substitute is used it must be an approved Dancer accepted by the Client. Only on approval of the Client can the substitute be used.

2.2 The Dancer has the right, at her own expense, to provide a substitute giving at least 8 hours' notice and subject to the Client being reasonably satisfied that the conditions at 2.1 apply. However, the Client reserves the right to provide a substitute themselves.

2.3 The Dancer shall take all reasonable steps to avoid any unplanned changes and the use of a substitute. If the Dancer is unable for any reason to perform Dancer services, the Dancer shall inform the Client in accordance with clause 2.2.

2.4 In the event that the Dancer continually is unable to supply either themselves or acceptable substitute, then the Client is entitled to cancel this agreement forthwith.

2.5 Save as otherwise stated in this agreement, the Client acknowledges and accepts the Dancer is in business on her own account and the Dancer shall be entitled to seek, apply for, accept and perform work or to supply her services to any third party during the terms of this agreement provided that this in no way compromises or is detrimental to performance of the Dancer services.

11. Paragraph 3 provided as follows:

THE CONTRACT

3.1 This agreement constitutes the contract between the Client and the Dancer and governs the performance of the Dancer services by the Dancer for the Client.

3.3 No variation or alteration of these terms shall be valid unless approved by the Client and the Dancer in writing except where changes to the Dancer services are necessary to comply with applicable safety and other statutory requirements.

12. Paragraph 4:

UNDERTAKING OF THE DANCER

4.1 The Dancer agrees to the Client that by entering into and performing its obligations under this agreement it will not thereby be in breach of any obligation which it owes to any club or third party.

4.2 The Dancer warrants to the Client that she will carry out the Dancer services with reasonable skill and care and so far as possible in accordance with the terms of this agreement. The Dancer also agrees to speak with the Client's customers at the club.

4.3 The Dancer agrees on her own part and on behalf of any substitute Dancers (that she supplies) will work in accordance with the terms of this contract as follows; -

4.3.1 Not to engage in any conduct detrimental to the interest of the Client which includes any conduct tending to bring the Client into disrepute or which results in the loss of custom or business including while talking to customers.

13. Under the paragraph 6 headed "Equipment", it provides that the Dancer shall provide at her own cost all clothing, footwear, makeup, props and other equipment necessary as reasonable for the satisfactory performance

of a Dancer. The Client agrees to provide the club and facilities for her to perform her services.

14. Under paragraph 7, "Method of Performance Services" it provides the Dancer will use her own initiative as to manner in which the Dancer services are delivered provided that in doing so the Dancer co-operates with the Client and complies with all reasonable and lawful instructions of the Client. At paragraph 7.2 it provides as follows:

    7.2 The Dancer may provide the Dancer Services at such times and on such days as the Dancer shall decide but shall ensure that The Dancer provides the Dancer Services on such days and at such times as are necessary for the proper performance of the Dancer Services in agreement with the Client.

    7.3 the relationship between the parties is between independent companies / individuals acting at arm's length and nothing contained in the Agreement should be construed as constituting or establishing any partnership or joint venture or relationship of employer and employee between the parties and their personnel.

15. Under "Fees" the Claimant was able to withdraw or suspend her services at any time if she wishes without giving reasons and was responsible for income tax and national insurance on fees earned during her work at the premises. If she was unable for any reason to provide Dancer services no fee would be payable by the Client during any period that the Dancer services were not provided.

16. Under paragraph 11, "Relationship between Client and Dancer" it states as follows:

    11.1 The Dancer acknowledges to the Client that there is no intention on the part of the Dancer or the Client to create an employment relationship between any of these parties and that the responsibility of complying with all statutory and legal requirements relating to the Dancer (including but not limited to the payment of taxation, redundancy payments, holiday payments, maternity payments and statutory sick pay) shall fall upon and be wholly discharged by the Dancer.

    11.2. The Client is under no obligation to offer work to the Dancer and the Dancer is under no obligation to accept any work that may be offered by the Client. Neither party wishes to create or imply any mutuality of obligation between themselves either in the course of, or between, any performance of Service under the Agreement.

17. Under paragraph 19, "Dance Chips / Vouchers", it states **"The contract for the performance of a dance is strictly between the customer and the dancer. The only role the club plays in this is ensuring that the Sexual Entertainment Venue License conditions are not breached in any way. The club does not get involved in this contract between customer and performer, until or unless the manager of the club in question needs to intervene for the protection of the license".**

18. The Claimant had signed a "Code of Conduct for Dancers" on 21 April 2018. This set out a number of rules about appropriate behaviour,

induction process, an explanation of the stage and podium requirements, schedule of requirements and changing etiquette, customer relations and conflict management and fire and health and safety. The Dancers were not permitted to leave the premises during shift except for emergencies and then only with express permission of the Duty Manager and had to sign out before leaving the premises. If they left early for any reason they would not be readmitted during that shift. It went on to say if any Dancer was in violation of the rules they would be subject to the cancellation of pre-booked shifts. This was signed on 21 April 2018.

19. This code of conduct was to ensure compliance with the Sexual Entertainment Licence rather than being analogous to controls being implemented by the Respondent.

20. The Claimant worked regularly at the Fantasy Lounge between 2015 and 2018. The arrangements for the working practice were as follows.

21. The Claimant did not dispute that she could decide when to work. She was free to offer to work when she wanted which she did so by texting the manager Mr North offering what days she was available. The work was also offered via text messages by Mr North who would text the Claimant to ask if she was available for certain shifts. The days varied from week to week. There were no set days when the Claimant worked. The arrangement was such that the Claimant was able to choose specifically when she wanted to work and when she did not want to work, she was able to turn down work without any penalty.

22. The Claimant accepted that she wanted the freedom and flexibility to take bookings for shifts when she wanted.

23. There was a dispute of fact between the parties about what would happen if the Claimant cancelled, once she had committed to work. This was in theory as the Claimant had never actually cancelled a shift. The Claimant's evidence was that she could cancel a shift up to 2pm or 3pm on that particular day without consequence. The contract was silent on the issue of a cancellation fee. At 2.2 it provided the Claimant could provide a substitute giving at least 8 hours' notice. The Claimant told the Tribunal she would have had to pay the Respondent a "House Fee" (see below) if she cancelled after 3pm.

24. The Claimant relied on a WhatsApp group chat between the Dancers who worked at the Fantasy Lounge. On 21 July 2018 one of the Dancers (who we will refer to as "P") messaged the group say that she had cancelled her shift. She asked if another Dancer (who we will refer to as "M") would check the situation when she attended the club (**...." I'm not sure if there**

gunna (sic) charge me for tonight's shift that's all"). M replied **"of course hun they shouldn't xxx I'll say you put it in a group chat"**.

25. There was another message where M had stated **"You can cancel b4 3pm babes without being charged."**

26. The Respondents evidence in the case was that there was no house fee charge in the event of a cancellation by a Dancer regardless of time. Mr North's evidence was that there had never been any charge in practice and this reflected the agreement that the Claimant had signed.

27. The group what's app chat plainly showed that the Dancers understood they could substitute from the group chat "pool". It was also understood amongst the Dancers there was a potential charge that could be implemented against them if they cancelled after a certain time and had not found a substitute. Whether or not it actually would be then imposed was not established.

Remuneration

28. The arrangements in respect of payment were as follows: At the beginning of a shift Dancers are required to pay a house fee to the Respondent. At the time the Claimant was employed this was £40 (week days), £90 (Fridays) and £120 on Saturdays. The Dancers would pay this to a member of management. All Dancers were responsible for their own money during the course of the evening. They were paid directly from customers for private dances. They could be paid in cash or in chips which customers could purchase from the bar using a credit or debit card. The chip system attracted a handling fee, for example, if a customer paid £20 for a chip they would be charged a £4 handling fee. The Dancers were charged a handling fee for receiving chips.

29. In addition to the house fee the Dancers were required to pay the club a percentage commission which was either 0% if the dance was for 3 minutes but then went up to 20% for dances of 9 minutes or more. The Dancers would also pay commission on chips as well as a handling fee. The charge for dances were as follows; 3 minutes £20, 9 minutes £50, 20 minutes £100, 30 minutes £150 and 60 minutes £300. It was suggested to the Claimant that she could negotiate more money (it was accepted that there was a minimum price) but the Claimant was insistent that the prices were fixed and she was not able to negotiate more. We accepted her evidence. The Dancer would be expected to keep a record of the dances that she had performed. In addition, the Respondent had a "chip girl" who would record the sales of the chips and then at the end of the evening the Dancer was required to go through a cashing out process with the Respondent. This involved the Claimant going to the office at the end of the shift and there would be a discussion about what dances she had

performed. The Manager would have a record from the CCTV. The Claimant would then receive payment of dance fees earned from chips (having been received by the Respondent via a credit or debit card), minus the fees and commission which appeared to be agreed at the end of each shift. She in turn may have paid the Respondent cash for their share of the commission earned from cash payments.

30. The Respondent set the charges for the dances, commission and chip handling fees. The Claimant was not free to negotiate these charges. She was free to accept tips from customers.

31. The Claimant accepted that in theory she was free to attend a shift, pay the house fee and not perform any dances. She was able to simply attend for the shift and if she had wanted to, sit and have a drink with the other dancers or customers. There would be no consequence other than an economic one as she would not have earned any money and would have in fact lost money as she would still have had to pay the Respondent the house fee. The Respondent was not obliged to pay the Claimant anything at all if she did not perform any dances. They only became obliged to pay the Claimant commission or chip handling fees if the Claimant had performed dances for a customer not paying cash thus triggering such payment.

32. There was a dress code operated by the Respondent. Dancers were asked to wear long dresses before midnight and underwear thereafter. This was not obligatory. The Claimant adhered to this dress code although she accepted that other Dancers did not do so.

33. The Respondent did not provide what we were informed is an industry terminology name “housemother” which is a person employed in similar establishments to look after the appearances and wellbeing of the Dancers.

34. The Claimant was free to dance for who she wanted to dance for. The Respondent did not exercise or operate any control over which customers the Claimant could dance for. In respect of the stage dances there was a system whereby Dancers would be asked to perform stage dances for which they were not paid, this was to facilitate encouragement or interest in a particular Dancer so that a customer would then want to have a private dance with that Dancer. The Dancers would be called to the stage to perform the dance by the DJ. If they were in a private dance they would be expected to go and do the stage dance when they had finished. The Claimant accepted that she was free not to perform the stage dance if she chose not to do so.

35. The Claimant sometimes tipped the managers of the clubs.

36. In relation to tax and national insurance the Claimant was a self-employed person who completed her own tax returns. She did not receive any holiday pay or sick pay. The Claimant's evidence was that she was required to give 2 week's notice she was going on holiday. The contract provided she could suspend her provision of services on reasonable notice. Mr North agreed that whilst it may have been a matter of courtesy for her to inform him that she was going on leave or going to be away for a period of time there was no obligation to do so.

37. The Respondent opened a new club called For Your Eyes Only ("FYEO") in September 2018 and asked the Claimant to go and work there instead of Fantasy Lounge. After this the Claimant predominantly worked at FYEO but did a small number of shifts at Fantasy Lounge and Playhouse, another lap dancing establishment. It was accepted by the Respondent that the agreement that we refer to above continued whilst she was dancing at FYEO.

38. There was no similar What's App group for FYEO. The Claimant told the Tribunal she accepted she could still send a substitute in theory but never did and would not have known how to as there was no group chat. She also had heard other dancers asking each other to cover for them but told the Tribunal she was not told how to do this so never did.

39. Mr North's evidence about the substitution arrangements was as follows. He was aware the dancers had various what's app groups. The Respondent did not exercise any control or were part of these group chats. The Dancer could decide not to turn up but there was an expectation that they would give the Respondent some notice so the Respondent could ask other Dancers. The Dancer could offer her slot to other Dancers and it was up to her to make contact. We saw evidence in the texts from Mr North that he also would ask other Dancers to cover shifts.

40. The Claimant also understood, and we accepted her evidence on this, that if she wanted to work on 'rugby days' she would be required to have worked regularly 'week in week out'. This was not a rule of the Respondent but an understanding amongst the Dancers. The Respondent would have up to 40 dancers in the club on rugby days. Rugby days were days when there were major rugby games being played in Cardiff. This apparently led to a surge in the demand for lap dancing services and were lucrative evenings both the Claimant and Respondent.

41. The Claimant also signed a document titled "Declaration of Earnings" on 17 September 2018 when she started at FYEO. This stated the Claimant

was a self-employed person responsible for her own tax and national insurance contributions. Under "General Manager" is stated as follows:

"I acknowledge that I am a self-employed person and not an employee of 'For Your Eyes Only'….

42. The Claimant had produced a schedule of loss dated 4 July 2019. Attached to the schedule was a breakdown of her earnings between September 2018 – January 2019 the total sum of which was £13146.00. This had an average weekly total earnings of £973.78.

43. The schedule of loss was updated on 19 November 2019 and those figures above were repeated in the claim.

44. These figures were not the same as declared in the Claimant's tax return for 2018/19. The Claimant's tax return declared £7476.00 in her tax return as the total of all income for 2018/2019. This had resulted in a payment of zero tax for that year and £153.00 national insurance.

45. The Claimant accepted, when it was put to her in cross examination, that what she had declared as earnings to HMRC compared to her schedule of loss was short by almost half. She had engaged an accountant to prepare tax returns but was unable to provide receipts or written documentation confirming what fees she had earned and the commission paid as this was not supplied by the Respondent. She was therefore advised to remove the commission payments and declare what she had actually received. She kept a record on her phone in an excel document but this had not been disclosed to the Respondent nor was it in the bundle. She agreed the amount claimed on the schedule of loss was "really big" and she had not excluded fees, accepting it was her mistake and she "owned up to it".

46. On 18 January 2019 the Claimant was working at FYEO. After approaching a group of 3 customers one of the customers splashed beer on the Claimant. She complained to a bouncer then returned with a glass of water and threw it over the customers. The Claimant did not mention this in her witness statement but asked to add this when she gave her evidence. Mr North had seen this incident on CCTV and went down to instruct the Claimant to stay away from the customers for the rest of the evening, having formed the view it was an accident.

47. The Claimant then ordered a coca cola from the bar and ignoring Mr North's instruction she returned to the group and can be seen engaging in a conversation with the customer who had initially squirted beer on her. It was evident that the Claimant was remonstrating with the man. She was very close to his face and leaning over him. The Claimant accepted she had called him "an ugly version of Ed Sheeran". The Claimant alleges he then insulted her. She then tipped the glass of coke over him and he

squirted more beer on the Claimant which also hit another dancer. The group were immediately ejected from the club by the bouncers.

48. The Claimant's ET1 initially stated that she had slipped on the wet floor and that she "may" have split the glass of coke on the customer. The Claimant subsequently amended her ET1 (see above) and accepted she had tipped the coke into the customer's lap. It was clear from the CCTV footage that the Claimant deliberately (twice) thrown her drink at the customer. (There was also no mention in the claim of any allegations that it had been suggested by the chip girl (who we shall refer to as "A") on a previous shift that the Claimant should allow customers to touch her to earn more money. This allegation was first referenced in the Claimant's witness statement.)

49. The Claimant was called up to the office by Mr North. It was at this point the Claimant alleges she made her protected disclosure. Her witness statement stated:

"I went upstairs and into the office. Kyle said "Sit down. You ordered Coke and threw it on customer." When I realised I was being confronted about my reaction to this customer, I decided to tell Kyle how strongly I felt not only about being attacked at night, but also about (A)'s suggestion to me on my previous shift. I considered the two issues to be related, as part of an overall decline in standards and respect for dancers. I said "First I need to tell you that (A) suggested that I let customers touch me". He said "we are not talking about that now". I said "so when he [the customer] throws a drink it's an accident and when I spill a drink it is deliberate?" He said "you purposefully ordered Coke, you never order coke". I said "I know for a fact what the customer did was not an accident. I was the one who happened to. It was deliberate." He said "no it wasn't it was an accident" I started to question my judgement. I said "can I have a look at the CCTV?" He said "sure see for yourself". Kyle put on the CCTV of the first incident shortly before midnight, and I said "look you can clearly see he did it on purpose". I was pleased to see there was clear evidence of that. Kyle denied that it was deliberate. He said "no. It was an accident". I found this so disrespectful. I can see the incidents were not being taken seriously and said "let's call the police". He said "they won't come for that it's not serious enough". I said "why didn't someone tell them this is not how you treat dancers?" He said you wanted them to be thrown out didn't you". I said "no what would I gain from that? I just wanted the bouncers to tell them to treat the dancers with respect". Kyle was visibly frustrated and he said "here, take the house fee. Go home".

50. The Claimant called the police from the dressing room but they would not come out to the club. The Claimant told the Tribunal that she did not have knowledge of the criminal law but she knew what had happened was an unprovoked attack and that is what she reported to the bouncers, Mr North and subsequently to the police.

51. Mr North agrees that he asked the Claimant to go home and take a day or two to calm down. She was very animated and despite having been asked not to approach the customers after tipping water on them she had returned and thrown the glass of coke. He had concerns that she might continue her behaviour downstairs in the club and this could have affected

the club's reputation and safety of the dancers and security staff. Mr North was aware, as the other dancers informed him, that the Claimant had contacted the police.

52. Mr North reported the incident to Mr Osborne is the operations manager. On 21 January 2019, the licensing police officer visited the club for a routine visit. He had been asked by the investigating officer investigating the alleged assault reported by the Claimant to view the CCTV footage of the incident. The policeman reviewed the footage and no further action was taken.

53. Mr North subsequently had no further contact with the Claimant. He told the Tribunal that he was expecting her to contact him after she had calmed down, as usual to offer to work but she never did. Mr North did not send the Claimant text messages offering her any more shifts. He was asked why not. He told the Tribunal he thought she would have got in touch. Had she done so they would have had to sit down and have a conversation and also discuss with the directors. The Claimant subsequently sent text messages to the manager (Mr Gentles) of the Playhouse (26 January 2019) and Mr Cizek of Fantasy Lounge (1 February 2019) requesting work but no work was offered to the Claimant. Mr Gentles replied **"I heard you had a problem at FYEO! Will have to speak to Tony when back!"**

54. The Fantasy Lounge has been closed for refurbishment in January 2019 and reopened on 1 February 2019.

55. Mr Cizek was the manager of the Fantasy Lounge at this time and he told the Tribunal that he had received a text from the Claimant asking for shifts. Mr Cizek was also asked by another dancer and behalf of the Claimant if there was any work and he informed dancer that they did not have any spare shifts and understood that she would be explaining this to the Claimant.

56. The Claimant did not work any further shifts for the Respondent following the incident on 18 January 2019. On or around 8 February 2019 the Claimant's evidence was that she was called by Mr Gentles. The Claimant told the Tribunal that Mr Gentles told her Mr North was not going to take her back and she should speak to the owners, admit she was wrong and be very nice. The Claimant decided she was not going to do this.

57. We accepted Mr North's evidence rather than the Claimant's in that we do not find Mr North made a positive and deliberate decision the Claimant was not permitted to return to FYEO at that stage. This reflected the reality of the casual nature of the way work was offered and accepted by both parties. Mr North was insistent that he had not deliberately decided to prevent the Claimant from working at FYEO. The Claimant's account was

hearsay and we did not hear from Mr Gentles. We also concluded that Mr North's evidence had more credibility than the Claimant's hearsay evidence given her changed positions in respect of the drink throwing incident and her schedule of loss.

58. The Claimant visited the Fantasy Lounge in March 2019 to request a copy of her contract. Mr Cizek informed Mr Osborne of the request. Mr Osborne contacted the Claimant by telephone on 12 March 2019 and thereafter he emailed her with a copy of her contacts on 28 March 2019. In his email he confirmed that they were unclear if the Claimant wanted any further shifts as they have not heard from her since January 2019. Mr Osborne told the Tribunal that they would have provided the Claimant with shifts at the Fantasy Lounge if they were available and that shifts had remained available to the Claimant at FYEO but she had not contacted them to offer to work any shifts.

59. The Claimant text Fantasy Lounge requesting shifts after receiving this email from Mr Osborne twice on 15 and 24 April 2019 but did not receive a reply.

60. The Claimant told the Tribunal that she had a separate online business selling clothing and fashion accessories. The Tribunal saw evidence that the Claimant had offered meet and greet dating services via her various online platforms (evidence was presented that showed her engaged in these activities following the ending of her working shifts for the Respondent. We did not have any evidence of these activities during her agreement with the Respondent).

The Law

61. The parties provided written closing submissions, as well as a bundle of authorities.

Worker status

62. The statutory definition of a worker is contained within S230 (3) (b) Employment Rights Act 1996 ("ERA"). The Claimant was not relying on the extended definition under S43K (1) ERA 1996.

63. The Claimant relied on **Singh v Bristol, Sikh Temple UKEAT/0429/11** as authority for the submission that the contract test under S230 (3) (b) suffices for a party to have provided some consideration for services provided and that consideration need not be remuneration and any remuneration payable need not be certain or guaranteed.

64. In **Autoclenz Ltd v Belcher & Others [2011] UKSC 41** it was held that in the context of employment relationships where the written documentation might not reflect the reality of the relationship that it was necessary to determine the parties actual agreement by examining all of the circumstances and identify the parties actual legal obligations.

65. The Court of Appeal considered limb (b) workers in **Uber BV and others (appellants) v Aslam and others (respondents) [2018] EWCA Civ 2748.** Whether or not there was a contract between the claimants and Uber was a mixed question of fact and law. The written document may not reflect the reality of the relationship. The parties actual agreement must be determined by examining all of the circumstances of which the written agreement is only a part. The fact that he or she has signed a document will be relevant evidence but not conclusive where the terms are standard and non-negotiable and where the parties are in an unequal bargaining position. Tribunals should take a realistic and worldly wise, sensible and robust approach to the determination of the true position.

66. **Pimlico Plumbers Ltd and another (appellants) v Smith (respondent)[2018] UKSC 29.** The Supreme Court held that in order to qualify as a limb (b) worker, it was necessary for Mr Smith to have undertaken to perform personally work or services for Pimlico. In that case there was no express contractual right to appoint a substitute but the Tribunal found his only right of substitution was another Pimlico operative. On the facts the Tribunal was entitled to hold that the dominant feature of the contract was an obligation of personal performance. The limitation on his right to appoint a substitute was significant as it had to come from the ranks of Pimlico operatives, also bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation where the other party is uninterested in the identity of the substitute provided the work gets done.

67. In **Town and Country Glasgow Ltd v Munro UKEATS0035/2018,** the Scottish EAT considered that the ability of the Claimant to provide a substitute to do the work of receptionist in the business in question deprived the contract of its personal character. The EAT discussed the degree of latitude the Claimant enjoyed in the provision of a substitute and concluded that the main interest of the Respondents was the provision of a suitably qualified worker and that the identity of the worker was not a significant factor. In this case, substitutes were sourced from a pool.

68. **Quashie v Stringfellows Restaurants Ltd [2012] EWCA Civ 1735** the Court of Appeal upheld the tribunal's decision that the lap dancer had not been employed under a contract of employment. The fact that the

dancer took the economic risk was a very powerful pointer against the contract being a contract of employment. The tribunal/s conclusions were strongly reinforced by the terms of the contract accepting the dancer was self-employed and conducted her own fairs on that basis, paying her own tax. There were some mutual obligations in play when the dancer was in work.

69. The 'customer or client' exception was considered in **Byrne Brothers (Formwork) Ltd v Baird and Ors [2002] ICR 667, EAT**. In this case the EAT held the structure of limb (b) in reg. 2(1) is that the definition extends prima facie to all contracts to perform personally any work or services but is then made subject to an exception relating to the carrying on of a "business undertaking". The intention behind the regulation is plainly to create an intermediate class of protected worker who, on the one hand, is not an employee but, on the other hand, cannot in some narrower sense be regarded as carrying on a business. Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services, but with the boundary pushed further in the putative worker's favour. It may be relevant, for example, to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might do so as workers.

70. Existing S43B definition:

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

55. In **Kilraine v Wandsworth London Borough Council [2018] ICR 1850**, the Court of Appeal held that the concept of information in S43B (1) was capable of covering statements which might also be allegations. In order for a statement to be a qualifying disclosure it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) and this was a question of fact for the Tribunal. The disclosure should be assessed in the light of the context in which it is made.

Reasonable belief and public interest

56. In **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837),** the following approach when considering reasonable belief was set out (per Lord Justice Underhill:

"26. The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B (1) .
27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.
28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters are that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.
29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable. [4]

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase " in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it. "

57. Public interest is not defined in ERA. The question is whether in the worker reasonably believed the disclosure was in the public interest, not whether objectively it can be seen as such. **Chesterton** also discussed the issue of public interest (paragraphs 34 and 37).

Motive and good faith

58. Street v Derbyshire Unemployed Workers' Centre [2005] ICR 97 is authority when considering the issue of good faith. It provides that a Tribunal should only find that a disclosure was not made in good faith when they are of the view that the dominant or predominant purpose of making it was for some ulterior motive unrelated to the statutory objectives.

Detriment claim

59. Under S47B ERA 1996 the employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

60. A detriment will exist if by reason of the act or acts complained of a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work. An unjustified sense of grievance cannot amount to a detriment but it is not necessary to demonstrate some physical or economic consequence **(Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).**

Causation

61. If the employee establishes that they made protected disclosures and there were detriments, S48(2) ERA 1996 provides it is for the employer to show the ground on which any act or deliberate failure to act was done, only by showing that the making of the protected disclosure played no part whatsoever in the relevant acts or omissions. The standard of the burden of proof required is if the protected disclosure materially influences (in the

sense of more than a trivial influence) the employer's treatment of a whistle-blower **(Fecitt v NHS Manchester [2012] ICR 372).**

62. An employer will not be liable if they can show the reason for the act or failure to act was not the protected act but one or more features properly severable from it **(Martin v Devonshires Solicitors [2011] ICR 352, Panayiotou v Kernaghan [2014] IRLR 500).**

Time Limits – Detriments

63. The Respondent's response pleaded the claim was out of time but this was not pursued in submissions.

Conclusions – S230 Limb (b) status

64. Taking each element of S230 (3) (b) in turn as follows.

Was there a contract between the Claimant and the Respondent?.

65. There was plainly a contract between the Claimant and the Respondent. The Respondent, whilst not directly conceding this point did not make any submission to the contrary. The focus of both parties was in relation to personal performance.

66. Having regard to the unequal bargaining position between the parties, and in accordance with **Autoclenz**, we have taken into account all of the circumstances and not just the contract between the Claimant and the Respondent in reaching our conclusions.

67. The contract itself was drafted in a way so as to reflect a legal relationship between the Claimant and Respondent as a Client and independent contractor. It specifically stated and was repeated (and agreed by the Claimant on several occasions) that the Claimant was self-employed. The agreement was for the Claimant to provide dancer services. The contract for the dancer services was said to be between the Claimant and the customers. In essence the Respondent asserted they merely provided the club facilities to enable the Claimant to engage in a contract with the customer for dancer services.

68. This was no doubt intended to be the type of business model commented upon in **Pimlico** (Court of Appeal) as operating as a business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker'.

69. We find that the facts were consistent with the contract itself and the contract reflected the reality of the agreement between the Claimant and Respondent.

Does the contract provide for the Claimant to carry out individual services?

70. The Claimant could choose when to work.

71. The contract provided the Claimant could send a substitute. Although the Claimant never actually did so, she accepted that she could do so and that other dancers had done so. The Claimant could send a substitute simply if she did not wish to work. There was no limitation on the circumstances in which she could choose to send a substitute. The Claimant only had to send a substitute if she cancelled with less than 8 hours notice. If she did not send a substitute she understood she would have to pay a house fee but this also never actually happened.

72. We have considered whether this was an unfettered right of substitution. It did not fall into the category of the Respondent not caring who did the work as long as the work was done. The Respondent retained a right to approve of the substitute and it was therefore a conditional right to substitute. A conditional right to substitute another person may or may not be inconsistent with personal performance depending on conditionality **(Pimlico)**.The Respondent accepted a substitution from the pool of Fantasy Lounge Dancers. There was no evidence that this had to go through a specific approval process or that they exercised a high degree of control over the choice of substitute. In reality we can see the Dancers organised this amongst themselves. A dancer from within that group chat could simply turn up in place of the Claimant. The Respondent also sourced their own substitutes. We have concluded that the right of substitution in this case was concerned with supplying a Dancer who was suitably qualified to do the work (recognising that this would also be in regard to personal appearance as well as performance ability) rather than a specific identify of an individual.

73. There was no similar “pool” for FYEO establishment. Mr North told the tribunal, and we accepted his evidence, that it was up to the dancers to make arrangements to send a substitute and although he had knowledge of the various what’s app groups this was the extent of the Respondent’s involvement. It was accepted that the Respondent’s right to approve substitutes continued when the Claimant commenced at FYEO.

74. The respondent’s requirements for approving a substitute was in our view to ensure that the substitute dancer was qualified to perform the dancer

services rather than being concerned as to the personal identity of the substitute.

75. If the Claimant was unable to provide a substitute she did not remain liable for covering the shift. In other words, the responsibility for providing a substitute did not fall back on the claimant. The respondent would ask other dancers if they were available, or not cover the shift.

76. There was no evidence as to the level of degree of control over the substitutes was anything more than a provision that the Respondent approve that substitute. If the Respondent approved the substitute there was no evidence they would have to sign up to the same agreement as the Claimant. There was evidence from the Fantasy Lounge WhatsApp group chat that the Respondent would approve a substitute from that group if necessary but they did not control or monitor the pool of potential substitutes.

77. For these reasons we find that the Claimant was not contracted to personally perform the work.

Was the work or services for the benefit of another party to the contract who was not a client or customer of the individual's profession or business undertaking.

78. It was submitted by the Respondent that the Claimant was undertaking a business of her own account and was self-employed, taking her own economic risks . She could choose to dance or not to dance and was in competition with the other dancers for customers. The Respondent had no power to do anything to require the Claimant to earn them money via commission and chip fees. The Respondent merely provided a forum and the Claimant was not integral as when there were not enough dancers the Respondent operated as a club.

79. The Claimant submitted that she was absolutely integral to the Respondent's business. She did not have the ability to set her own prices nor could she negotiate what elements of the sums paid by the customers to retain. Whilst she had a contractual right to work elsewhere in practice she worked exclusively for the Respondent's clubs. She was subject to significant control, required to perform two stage dances in the course of a shift for no payment

80. We considered the approach to take in determining this issue as set out in **Byrne Brothers.**

81. We did not find that the Claimant was required to perform the stage dances. She was free not to undertake these but accepted in evidence that it was in her interest to do so, in ordered to generate interest for private dances.

82. The only element of control we found the Respondent to exercise was the setting of the prices and the commission and monitoring the number of dances so as to ensure they took the correct amounts of commission and fees from the Claimant. The rules contained in the code of conduct were in place so as to ensure compliance with licensing matters rather than exercising control about how the Claimant worked. For example, being required to inform a manager when leaving the club early was not so the manager could control or restrict the Claimant's movements and compel her to stay it was so the manager would know who was present on the premises in the event of a fire, emergency and for reasons of personal safety. This was reflected in the code of conduct as necessary for licensing reasons. In all other aspects the Claimant was free to work as and when she chose, how to perform, for whom to perform, how long, what to wear. We particularly have taken into account that the Claimant could choose to not work at all. Even if we regarded the requirement to pay a house fee in the event of a cancellation this in our judgment pointed more towards the Claimant taking an economic risk. The Claimant tipped the managers which also pointed towards the Claimant being in business on her own account.

83. We also accepted the Respondent's submission that the Claimant took the economic risk. It was entirely a matter for the Claimant as to the level of work she undertook. If she chose not to perform any work at all she would make a loss as she would have had to pay the house fee, but she was free to do so. The Claimant was free to work elsewhere the fact that she chose not to do so was again a matter of her choice. We placed limited weight on the evidence that the Claimant was operating a separate business in her own right. Whilst it was not in dispute the Claimant had operated the meet and greet service this was after the relevant period. The Claimant did however accept she ran an online clothing and fashion website.

84. The Claimant arranged her own tax and national insurance affairs and completed self-assessment returns with the assistance of her accountant. Whilst this is not in itself indicative of worker status, taken into account all of the other relevant factors it reflected the Claimant's understanding of her position at the relevant time. The arrangement also fully suited the Claimant. She accepted that the arrangements suited the dancers and gave her the freedom and flexibility to take bookings when she wanted.

85. Lastly in terms of mutuality of obligations we have concluded that there was no mutuality. The Respondent was under no obligation to offer work and the Claimant was under no obligation to accept work if offered nor was she obliged to offer work. If she was going to be away for holidays or longer periods there was no obligation to seek permission.

86. For these reasons we find that the Claimant does not satisfy the definition of the limb (b) worker.

Protected disclosure claim

87. For the sake of completeness, having heard the evidence, we set out our conclusions on the protected disclosure claim.

88. We have concluded that the Claimant clearly and reasonably believed that she had been assaulted by the customer when he sprayed beer on her and she informed the Respondent of this. Whether it was an accident or not is irrelevant to this issue, it was what the Claimant believed at the time. She described it as an unprovoked attack. She may not have had a detailed knowledge of what type of criminal activity this was but we accepted that she did believe it to be unlawful. She telephoned the police on the night of the incident. It was not a mere allegation. The Claimant disclosed such information with a level of specificity to have amounted to a disclosure of information.

89. However where the disclosure does not amount to a qualifying disclosure is the public interest test. We do not agree that the Claimant has shown that she reasonably believed the disclosure to be in the public interest. We remind ourselves that the question is whether in the worker reasonably believed the disclosure was in the public interest, not whether objectively it can be seen as such. The Claimant's witness statement was not very clear about this issue. The Claimant referred to this "not being how dancers should be treated". We can see that if there had been a disclosure that the Respondent were allowing dancers to be assaulted or treated badly by customers then this could be reasonably believed to have been in the public interest. This was not the case here. This was an unfortunate incident for the Claimant, but it was a one-off incident and there was no evidence to show the Claimant believed this to be about dancer safety in general.

90. We have also concluded that the Claimant did not make the disclosure in good faith. The Claimant only made the disclosure after being called to the office by the manager having thrown two drinks over the customer in question. If she believed that being sprayed by beer by the customer amounted to an assault this did not sit comfortably with her subsequent reaction which was to also deliberately throw two drinks over the

customer. This in turn led to further beer throwing by the customer which also hit another dancer and required the intervention of the security staff.

91. Had we found that the disclosure was a qualifying disclosure, we considered whether the Respondent had subjected the Claimant to a detriment on the grounds of the disclosure. The Respondent denied that they had deliberately decided not to offer the Claimant any further shifts because of the protected disclosure. They asserted a variety of reasons namely no shifts available at Fantasy Lounge and a lack of contact from the Claimant. We find that initially, Mr North had not taken this decision but by April 2019 there must have been a decision not to offer the Claimant any further work as her attempts to obtain shifts were ignored. The relevant question was why?

92. We concluded the reason was not due to the Claimant's complaint about the customer throwing beer on her but due to her retaliatory behaviour on 18 January 2019. The Claimant was understandably upset at her treatment by the customer. However it was entirely plausible that her behaviour and reaction to the events would be a matter of concern to the Respondent and was in our view plainly why she was not offered any further shifts.

Illegality

93. Had we found the Claimant to have been a worker, the Respondent submitted that the Claimant was prevented from relying on a contract as she had failed to pay income tax on her earnings as set out in the schedule of loss.

94. The Claimant's representative accepted that the schedule of loss was "grossly inflated". He apologised for the error and explained that it appeared the calculations had been done without removing the fees and commission and it was the schedule of loss that was wrong not the tax returns. He asked us to take into account that instructions had been taken from a distance (the Claimant was residing in Greece) and English is not the Claimant's first language.

95. The Claimant also accepted that she had made an error in the schedule of loss.

96. We did not have sufficient evidence to conclude that there was illegality in the Claimant seeking to avoid appropriate payment of tax. On the basis of the evidence and submissions it was the schedule of loss that was entirely discredited. This would have been a matter for remedy but this does not arise given our findings.

Employment Judge S Moore
Dated: 12 February 2020

JUDGMENT SENT TO THE PARTIES ON 14 February 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.