EMPLOYMENT TRIBUNALS

BETWEEN

MR VILLE-VALTTERI HELENIUS

Claimant

-and-

WELLS FARGO BANK NATIONAL ASSOCIATION ("R1")
WELLS FARGO SECURITIES INTERNATIONAL LIMITED ("R2")
WELLS FARGO SECURITIES EUROPE SA ("R3")
PHYTON TALENT ADVISORS LLC ("R4")
PHYTON TALENT ADVISORS LTD ("R5")

Respondents

Heard at: OPH, held London Central, by CVP

On: 9 January, 2021

Before: Employment Judge O Segal QC

Representations
For the Claimant: Mr S Cheetham QC, Counsel
For the 1-3 Respondents: Mr M Lee, Counsel
For the 4-5 Respondents: Mr J Taylor, Counsel

JUDGMENT

(1) The First and/or Second Respondents were 'employers' of the Claimant within the meaning of s. 43K Employment Rights Act 1996.

(2) The claim against the Third Respondent is dismissed on withdrawal.

(3) The Fourth and/or Fifth Respondents were 'employers' of the Claimant within the meaning of s. 43K Employment Rights Act 1996.

(4) The Claims against the Fourth and Fifth Respondents are struck out pursuant to r. 37(1)(a) of the 2013 Rules, as having no reasonable prospects of success.

REASONS

1. The Claimant brings claims of whistle-blowing detriments against R1 and R2 ('**WF**') and R4 and R5 ('**Phyton**'). He had previously indicated that the wished the claim against R3 to be dismissed on withdrawal and confirmed that at today's hearing.

2. The hearing today was listed by the tribunal to consider the following preliminary issues:-

2.1. *Whether or not the Claimant was engaged as a worker of any of the Respondents as defined in the Employment Act 1996, for the purpose of these claims, ("the Worker Issue").*

2.2. *Whether or not the claim(s) or any of them, should be struck out as against any of ... the Fourth Respondent or the Fifth Respondent on the basis that that it has no reasonable prospect of success.*

2.3. *Whether or not the claim(s) or any of them, should be the subject of a Deposit order as against any of ... the Fourth Respondent or the Fifth Respondent on the basis that that it has little reasonable prospect of success.*

3. All parties were represented by counsel. The tribunal expresses its gratitude for the way in which they conducted the proceedings.

Evidence

4. There was an agreed core bundle and documents bundle. The tribunal had witness statements and heard live oral evidence from:

4.1. the Claimant;

4.2. Gleison Cabral, who worked for WF as part of the same team as the Claimant;

4.3. Neil Highland, International Operations Manager for the Contingent Resource Solutions Office at WF; and

4.4. Peter Hurley, Managing Director of the Fifth Respondent.

Facts

5. There were few disputed primary facts. I am therefore able to set out the relevant facts fairly shortly.

The Claimant and Simbalite Ltd

6. The Claimant ('**C**') has worked in the London banking sector as a programme director and business change leader for 20 years. His skills and experience include directing large change programmes, including regulatory compliance efforts, as well as team management to achieve those business objectives.

7. C formed Simbalite Ltd ('**SL**') in January 2011 as a vehicle to provide his personal services to a bank running a major change programme. C is the sole director of SL and holds its shares with his wife. SL has a website advertising the services that C was/is able to provide; it somewhat misleadingly asks those interested to 'Contact Our Team' – the reality is that SL was and is a 'team' of one. SL is properly described as a personal services company; that is, a company set up with the sole aims of making it possible for C to be engaged by clients and/or to provide greater tax efficiency and limited liability for C in respect of such work and the remuneration from it.

8. C's CV dating from late 2019 refers to him as the MD of SL and details 'Notable Assignments', which are all clearly roles performed by C within the financial sector.

9. C treated SL, in his words, as his "savings account". He took money out of the company as he needed it and as was most tax efficient. In the material period, he did so by way of a modest salary and substantial dividends.

Phyton and its relationship with WF

10. Phyton provide specialist recruitment services to various industries, including the financial services sector.

11. R4 (then called 'Linium Resources LLC') is contracted to WF for the provision of recruitment-related services. Phyton provide such services by way of subcontracting suitable companies and individuals. A Master Agreement was made between R4 and

Wells Fargo Bank N.A. in November 2017 in terms which Mr Highland explained were relatively standard to WF and written by WF's contract and legal teams. It provides for WF to *"engage Vendor [Phyton] from time to time to provide certain Products or Services"* as per the terms of the Master Agreement. Materially under this Agreement:-

11.1. *"**Transaction Document** means a document executed or otherwise agreed upon by authorized representatives of Vendor and Wells Fargo to procure specific Products or Services containing details related to the procurement of the Products or Services"*;

11.2. Phyton can contract to provide services using a **Dependent Provider**, a non-employee of Phyton without whom those services cannot be provided;

11.3. Phyton is responsible for the acts and omissions of such a person;

11.4. WF must give express written consent to Phyton using a Dependent Provider, inter alia by identifying that person in the Transaction Document

11.5. *"Once a key managerial, relationship or support individual is assigned to work on Wells Fargo's account or the Products or Services provided to Wells Fargo ("Key Person"), Vendor will not voluntarily transfer a Key Person from the Wells Fargo relationship without first consulting with Wells Fargo and receiving Wells Fargo's consent to such transfer"*;

11.6. The main terms in respect of each agreement to provide Services are set out in the Transaction Document agreed at that time. Those terms include, Pricing and Payment, Term and Termination.

11.7. In respect of the provision of Professional Services, the *"Transaction Document [also called the Statement of Work] will describe the Professional Services to be performed, the compensation therefor, and any other details related to such engagement*".

<u>WF engaging C through Phyton</u>

12. A senior employee of WF, Susan Johnson, described by C as 'Programme Sponsor and Chief Administrative Officer' and by WF as 'Programme Manager', needed someone to head up a team dealing with London-based projects within the Business Consulting Group (BCG) ('**the Role**'), more particularly a wide-ranging project that was underway to ensure that WF was fully compliant with its obligations under the Markets in Financial Instruments Directive II ('**the Project**').

13. Ms Johnson knew of C prior to September 2018, having interviewed him earlier in the year as the result of an introduction by Phyton, and considered he would be suitable to fill the Role. In effect, C would, in respect of the Project, take over the day to day aspects of the job of Ms Johnson, who moved from London to USA.

14. After an interview in August 2018 and consideration of C's CV, C was recruited for the Role. Four other individuals were also recruited by WF, to work in a team with/under C, at around the same time in connection with the Project.

15. Pursuant to the Master Agreement referred to above, WF and Phyton entered into a Statement of Work. There is no dispute that such a document must have been executed in late 2018, but it was not before the tribunal. However, a later Statement of Work was executed in August 2019, very likely by way of extending the engagements for the Project ('**the SOW**'). It is agreed that the SOW is materially the same as the original Statement of Work executed in 2018 would have been. I take the view that the SOW is the most material document to the issues before the tribunal at this hearing.

16. The SOW provides for:-

    16.1. A start date and end date for the Professional Services;

    16.2. A detailed description of the Project, including:

        16.2.1. That WF will provide computer hardware, systems and security access to Vendor Personnel;

        16.2.2. Detailed Deliverables, reporting to the Programme Manager;

    16.3. The Location of the work, with travel at the request of WF;

16.3.1. Five named Key Personnel, including C (there is no reference in the SOW to SL) ;

16.4. A (different) daily rate payable by WF to Phyton in respect of each of the five Key Personnel (£1,562 in respect of C).

17. Pursuant to the SOW, Phyton invoiced WF on a monthly basis in respect of 'Ville Valtteri Helenius' (not SL) at the rate of '£1,562/Day', which invoices were approved for payment by Alberto Mangione, who was the person managing the BCG Team in London.

18. Once the original Statement of Work had been agreed (or perhaps around the same time), Phyton and SL entered into a Subcontractor Service Agreement ('**SSA**'), comprising the main body of the Agreement and an attached 'Term Schedule'.

19. The main body of the SSA reads like a boiler-plate Phyton document and it is agreed that it was based on Phyton's standard documentation. C's evidence is that he did not in any material sense 'negotiate' its terms. Mr Hurley said that whilst he was not personally involved, he recalls there having been some 10-12 emails exchanged between C and Phyton's 'back office' raising questions and/or discussing potential amendments to its terms. He could not remember the contents any better than that. Phyton had surprisingly not been able, it says, to locate the emails. Mr Hurley did not point to any part of the SSA which differed from Phyton's standard terms. In the circumstances, I accept C's evidence that he did not negotiate or at least procure any significant amendments to those standard terms.

20. The relevant terms of the main body of the SSA provide in effect for the Subcontractor to perform the work required by the Client and to work when, where and how the Client directs. It also provides (relied on by Phyton) that *"Subcontractor is an independent contractor that offers its services to the general public. Subcontractor's relationship with [Phyton] is as an independent contractor and no employer-employee relationship exists or will exist between [Phyton] and Subcontractor or Subcontractor's worker. Both [Phyton] and Subcontractor are free to contract with other parties. This Agreement does not constitute a partnership, joint venture, agency or contract of employment between [Phyton] and Subcontractor"*.

21. It was signed by C as MD of SL on 7 September 2018.

22. The Term Schedule *"provides the specific details of the engagement that is the basis of the Agreement to which [it] is attached"*. It provides for:-

    22.1. The Client as WF, together with its relevant address;

    22.2. The Project Description as 'Programme Director';

    22.3. The Start and End dates as would have appeared on the original Statement of Work;

    22.4. The Name of the Consultant Performing the Work as 'Ville-Valtteri Helenius';

    22.5. A Rate of $1,600 per day (translating to £1,260 per day);

    22.6. SL to provide a UK National Insurance Number (ie, that of C).

23. The Term Schedule was signed by C as Director of SL, with C's NI number, on 7 September 2018. It is signed by Phyton's Operations Manager (undated).

24. There was a further Term Schedule agreed in similar terms on 2 July 2019 (close to the date from which the second SOW was to run). Other than the start and end dates being amended, the only change I can discern is that the daily rate is now expressed in sterling.

25. SL invoiced Phyton at the rate of £1,260 per day.

26. As to the rate of remuneration, other than telling Phyton some time prior what C's expectations were, C's evidence is that he had no role in determining the remuneration paid to SL. Mr Hurley's evidence was that Phyton has no standard mark-up, but that there was (naturally) generally a 'bill rate' to the client higher than the 'pay rate' to the subcontractor. He could not remember whether there had been any negotiation between himself and C in respect of this engagement. He accepted it is not uncommon for a subcontractor simply to accept the pay rate offered by Phyton, as C says he (on behalf of SL) did here.

27. I find that Phyton in effect determined the pay rate of £1,260 a day, albeit within the parameters of (1) the rate Phyton was being paid by WF according to the SOW, and (2) what Mr Hurley knew or believed would be acceptable to C.

Other matters

28. WF placed some reliance on a single invoice dated 3 May 2019 from SL to Phyton, which, in addition to requesting payment in respect of C, requested payment in respect of a Dan Andonovski for days. C's evidence, which I accept, is that Mr Andonovski's personal services company did not have the requisite insurance in place so far as WF was concerned, and that it was agreed with him, C and Phyton that SL would therefore invoice Phyton for those days' work to facilitate Mr Andonovski getting paid as being covered by SL's insurance policy. I do not accept that this reveals anything material about the nature of SL, still less about the substantial determination of the terms on which C/SL was engaged to perform the Role.

29. In his written evidence, C gives much detail about the way in which he says the Role was integrated into WF's business (paras 35-62 of his statement). That evidence was not challenged, WF's position being that it was not relevant. I am not convinced it is irrelevant, though in the event I was able to reach my conclusions on worker status without reference to it. However, lest this matter proceed further, I accept that C was integrated into WF's business and management to the extent he describes in those paragraphs of his statement.

The Law

Worker status under s. 43K

30. Originally, C relied in the alternative on the s. 230(3) definition of worker and the s. 43K definition. In closing submissions, Mr Cheetham QC told me he was instructed not to pursue the argument by reference to s. 230(3). I believe that concession to be correct. The only issue as to 'worker' status is therefore whether C was a worker of any of the Respondents pursuant to s. 43K(1)(a) and whether any of the Respondents was C's 'employer' pursuant to s. 43K(2).

31. Materially, section 43K provides:

(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 person or by both of them, …

(2) 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…

32. A recent and useful articulation of the approach to be followed in cases concerning section 43K(1)(a) of the ERA was provided by Simler J in **McTigue v University Hospital Bristol NHS Foundation Trust** [2016] ICR 1155:-

19. Section 43K provides an extended meaning of 'worker' and 'employer' for the purposes of Part IVA ERA 1996 only and has no wider application. It was enacted primarily to protect agency workers provided to an end user in circumstances where the worker could not fulfil the stricter 'limb (b)' requirements of s.230(3) by virtue of the absence of a sufficient contractual relationship with the end user…

20. Once it is established that an individual has been supplied by a third party to work for another person, a comparison must be made between the extent to which on the one hand the individual determines his or her terms of engagement to do the work, and on the other hand, somebody else determines those terms in order to ascertain whether the terms of the worker extension in s.43K(1)(a)(ii) are fulfilled. If the individual substantially determines his or her terms in comparison with the others, they are not a worker under this provision. If the other person or persons substantially determine the terms, the individual is a worker for these

purposes. The provision is focused on identifying who, as between the individual on the one hand and the other persons identified on the other, substantially determines the terms on which he or she is engaged to do the work. The question is answered by considering the situation as between the individual and the supplier, or the individual and the end user, or the individual and both the supplier and end user. A comparison between the supplier and the end user is not invited by the provision.

…

38 In conclusion, in the hope that it will assist tribunals dealing with these issues, it seems to me that, in determining whether an individual is a worker within section 43K(1)(a), the following questions should be addressed.

(a) For whom does or did the individual work?

(b) Is the individual a worker as defined by section 230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on section 43K in relation to that person. However, the fact that the individual is a section 230(3) worker in relation to one person does not prevent the individual from relying on section 43K in relation to another person, the respondent, for whom the individual also works.

(c) If the individual is not a section 230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?

(d) If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within section 43K(1)(a).

(e) If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them? If any of these is satisfied, the individual does fall within the subsection.

(f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.

(g) There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.

(h) In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

(i) If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within section 43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under section 43K(2)(a).

33. Mr Lee placed some reliance on the finding in **Sharpe v Worcester Diocesan Board of Finance Limited** [2015] ICR 1241 per Arden LJ at [113]-[115] that for s. 43K to apply, because there must be a contract the terms of which have been determined: *"It must inevitably follow from the statutory reference to 'term on which he is or was engaged to do work' that there must be a contract"*. However, that principle is only engaged in the rare case (such as that of the ordained minister in the Church of England in **Sharpe**) where the claimant is not in a contractual relationship as regards his work with any person.

34. Critically, in the context of the present case, two authorities have determined that a person supplying services through a personal services company is not for that reason outside the ambit of the provision.

35. The first is **Croke v Hydro Aluminium Worcester Limited** [2007] ICR 1303. I take the facts from the summary in the Headnote:

The claimant, an engineer, formed a company, A Ltd, of which he was the sole director. A Ltd entered into a contract with a recruitment consultancy whereby, as "the service provider", it agreed with the consultancy to provide the services of a consultant named as the claimant. The respondent company asked the consultancy to supply engineers and the claimant provided a CV which the consultancy forwarded to the company. He was interviewed and offered work. By

> *a separate agreement between the consultancy and the company the consultancy agreed to provide the claimants services with A Ltd named as service provider. When the company decided to terminate the claimant's contract he made a complaint to an employment tribunal that he had suffered a detriment as a result of making a protected disclosure …*

36. The similarities with the facts as found in this case, set out above, are obvious.

37. The issues examined by the EAT in **Croke** were whether the claimant *worked for* the respondent and whether he had been *introduced or supplied* to the respondent, notwithstanding that he operated through A Ltd. The tribunal had found that the respondent had substantially determined the terms on which the claimant worked for it and there was no cross-appeal from that finding: see at [19] and [43].

38. The EAT considered it obvious that the claimant *worked for* the respondent having been supplied by the agency, through the claimant's personal services company, A Ltd, to the respondent for that purpose: see at [36]. It is notable that in that context counsel for the respondent had submitted (see at [35]) that *"the terms on which the claimant was engaged to do the work were determined by him because he was the only person involved in formulating the terms on which he was engaged to perform work for [A Ltd]"*. That was not a submission which found favour with the EAT.

39. On the issue of whether the claimant had been *introduced* to the respondent, the EAT said this (emphasis added):

> *23. In our judgment the tribunal did err in law. It failed to consider at all a relevant aspect of the case, namely, whether,* ***regardless of whether Huxley supplied the claimant the individual or Amerstar the corporate vehicle, Huxley, none the less, introduced the claimant the individual to Hydro as a potential individual to do the work, albeit subsequently supplied through the corporate vehicle Amerstar****. We are further persuaded that the tribunal made all the relevant findings of fact on this issue and, having done so, that it is plain that Huxley did "introduce" the claimant to do that work. This was not simply Huxley forwarding a CV on spec. Huxley already had the claimants CV on its files.* ***Hydro made a specific request for potential candidates to perform work of a particular kind. Huxley considered this and identified the claimant as a***

potential individual to do that work. The claimant, with a view to being put forward by Huxley to do the work, supplied an up to date CV. That CV was sent by Huxley to Hydro. It was the claimant's individual CV not a document from Amerstar offering to provide his services. In consequence of that, the claimant, the individual, attended an interview with Hydro and following that he was offered the work. Thereafter Hydro and Huxley agreed that the form of the arrangement would be that the claimant would be supplied through the corporate vehicle Amerstar*.*

24. Accordingly, we have decided that the claimant was introduced to do that work by Huxley.

40. On the issue of whether the claimant had been *introduced* to the respondent, the EAT said this (emphasis added):

40. ***In our judgment the starting point is the contract between Huxley and Hydro, the contractual vehicle by which any supplying by Huxley to Hydro for the purpose of Hydro's work being done was achieved****. Under it, Huxley contracted to provide "the service provider" to Hydro and represented that "the service provider" was contractually engaged by Huxley under a contract for services.* ***"The service provider" was, however, defined in the contract by reference to the fact that it employs "the consultant", identified as the claimant.***

…

41. In our judgment, adopting the purposive approach referred to in ***MHC Consulting Services Ltd v Tansell*** *[2000] ICR 789, Mr Devonshire is correct in his submission that the tribunal misdirected itself in concluding that the claimant was not supplied to do that work by Huxley.* ***The tribunal concluded that the claimant "worked for" Hydro by reference to the realities rather than the strict contractual position. Adopting that approach to the question, who "supplied" the claimant to Hydro to do the work, the correct answer, in our judgment, is that it was Huxley. The claimant was the consultant named in the schedule as the employee of "the service provider" whom Huxley was agreeing would provide the services and he was the one who was supplied to the end user to perform the work and for whose work the end user paid Huxley****.*

41. The second case is **Keppel Seghers UK Ltd v Hinds** [2014] ICR 1105.

42. Again, I take the summary facts from the headnote:

> *The claimant, a health and safety adviser in the construction and civil engineering industry, formed a company, C Ltd, as a prerequisite in the industry for obtaining work. He was the sole director, shareholder and employee. C Ltd entered into a contract with a recruitment agency which was seeking a contractor for the respondent company and, following a meeting organised by the agency and attended by the claimant and a representative of the respondent company, C Ltd was engaged to provide safety advisory services to the respondent.*

43. Again, the similarities with the facts as found in this case, set out above, are obvious.

44. On the question of whether *the terms on which [the claimant] is or was engaged to do the work are or were in practice substantially determined* by the respondent, the EAT said this (emphasis added):-

> *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 focused, 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 agreements operation: ....* ***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*** *…. 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 (ie that it was not the claimant himself, through Crown, that had substantially determined those terms) and as to the continuing determination of those terms (ie that it was the respondent which was the employer for section 43K(2)(a) purposes).*

45. The respondent in **Hinds** did not argue that the relevant *"terms on which [the claimant] was engaged"* were, or included, the way in which the claimant took his remuneration from Crown Ltd.

46. Finally, I refer back to the statement in **Croke** that a purposive approach is appropriate in construing these provisions. That is cited with approval in **Hinds** at [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***.

47. With respect that seems to me clearly correct. Such an approach, in the context of 'worker' status, albeit under the Working Time Regulations and Minimum Wage legislation, has been given recent authoritative impetus by the Supreme Court in **Uber BV v Aslam** [2021] UKSC 5: see at [69] ff,

48. At [70] the Court held that:

The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. In ***UBS AG v Revenue and Customs Comrs*** *[2016] UKSC 13; [2016] 1 WLR 1005, paras 61-68, Lord Reed (with whom the other Justices of the Supreme Court agreed) explained how this approach requires the facts to be analysed in the light of the statutory provision being applied so that if, for example, a fact is of no relevance to the application of the statute construed in the light of its purpose, it can be disregarded. Lord Reed cited the pithy statement of Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454, para 35:*

> *"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."*

Discussion

52. All parties provided written submissions and supplemented those orally.

53. I have taken those fully into account and refer to them as appropriate.

54. I say immediately that this seems to me, on the facts, a clear case to which s. 43K applies to C and that WF, at least, is clearly an 'employer' within s. 43K(2).

The Position of WF

55. There was no real resistance to C's contention that he been *introduced or supplied* to WF by Phyton. For the same reasons as the EAT in **Croke** held that the claimant in that case had been introduced and supplied to the respondent by the agency, I find that C was introduced and supplied to WF by Phyton.

56. The heart of WF's argument that s. 43K did not apply was that *the terms on which [C] was engaged to do the work … were in practice substantially determined* by C/SL and not by WF.

57. This argument was put in two ways:

57.1. C was partly responsible for substantially determining the terms on which he was engaged to do the work because a fundamental such term was how C was remunerated by SL, which was determined by C.

57.2. If that were wrong, the relevant *terms* were substantially determined between Phyton and SL/C in the SSA and Term Schedule.

58. The first proposition I find to be entirely artificial, inconsistent with the purposive protective construction of s. 43K, and at least implicitly contrary to the decisions in **Croke** and **Hinds**. It would also mean, it seems to me (and despite Mr Lee's valiant efforts to construct a counter-example) that an individual supplying his services through a personal services company would never be protected by s. 43K, which Mr Lee acknowledged could not be right.

59. Consistently with the authorities I have quoted from above, I consider that the words *the terms on which he is or was engaged to do the work* mean, in the present context, the terms on which an individual or their personal services company are engaged to do the work for the client/end user: what specific duties are owed, the location of the work, the hours the work is to be performed in, the duration of the work, the amount to be paid to the individual or their personal services company, the way in which the work is to be performed (issues of control), etc.

60. The suggestion that Parliament could have intended that someone in C's position should be protected from making protected disclosures if Phyton supplied him as an individual, but not if Phyton supplied him as the Key Person to perform the work through SL (let alone, as Mr Lee suggested, that the protection would apply if SL had passed on all of the relevant remuneration straight to C as salary, rather than C deciding to take only a proportion as salary and rather more in dividends) is not, in my view, tenable.

61. As to the submission that it was Phyton and C/SL which substantially determined the *the terms on which he is or was engaged to do the work* through agreeing the SSA, that is equally artificial. The reality is that *in practice* all of the terms, save for Phyton's margin, were determined and dictated by WF, as set out in the SOW. The SSA and Term Schedule simply incorporated those terms as already determined by WF.

62. I do not accept Mr Lee's argument that the position is any different because many of the relevant terms determined by WF were expressly left for WF to determine according to the SSA. That seems to me both immaterial, and to some extent to put the cart before the horse. The question is who determined those terms, not whether or not it had been envisaged that they would be so determined. In any event the SSA and Term Schedule were conceptually parasitic on the SOW, not the other way round.

63. In the words of Ribeiro PJ, recently approved by the Supreme Court in a similar context, I consider it clear in this case that *"the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically"*.

64. By reference to list of questions set out by Simler J in **McTigue**, quoted above, I summarise the key factual findings I have made:-

(a) C worked for WF.

(c) C was an individual introduced and supplied to do the work by Phyton.

(d) The terms on which C was engaged to do the work were not determined by him

(e) Those terms were substantially determined by WF, the person for whom C worked (and to a lesser extent by Phyton: see below).

(f)/(g) In so finding, I take the starting point to be the contracts between C/SL and Phyton and between Phyton and WF.

(h) It was common ground that those terms were in writing and, in so far as they went, that they reflected the reality of the relationship in practice. The other "terms" on which C worked for WF (whether contractual or not) were determined by WF.

(i) WF was therefore an employer within section 43K(2)(a) for the purposes of the protected disclosure provisions.

The position of Phyton

65. Whether Phyton is an 'employer' within s. 43K(2) turns, in my view, on whether its determination of how much SL would be paid is sufficient to constitute a substantial determination of the terms on which SL/C was engaged to do the work.

66. In light of my finding that the claims against Phyton should be struck out for other reasons, this issue is academic. However, I find that Phyton is an 'employer' within s. 43K(2).

67. Mr Taylor's main argument was that the statutory language uses the words *terms* plural, and Phyton, he (rightly in my view) contended, only substantially determined one such term on which SL/C was engaged to do the work for WF. However, it is well established that more than one person can substantially determine the relevant terms and I see no reason why one of those persons cannot determine only one of those terms, provided it is of sufficient importance. I consider that the term as to remuneration is in that category.

The application by Phyton to have the claims against them struck out as having no reasonable prospect of success

68. The point is a short one.

69. It is not alleged that C made any protected disclosure to Phyton.

70. The only detriment C alleges he suffered at the hands of Phyton was that, at the time of the presentation of the ET1 at least, *"Phyton have also withheld payment for reasonable business expenses incurred by the Claimant while arrears of pay have still not been paid in respect of work performed to December 2019 inclusive. Phyton suggests that this is because the Claimant has not returned a laptop belonging to Wells Fargo … The Claimant believes that this failure to pay the Claimant his contractual entitlements is on the instruction of Wells Fargo and amounts to a further detriment".*

71. As Mr Cheetham effectively conceded, there is no allegation, express or implied, that this detriment was because of any protected disclosure. Indeed the reverse is true, C

gives two other potential reasons why the invoice was not paid: the non-return of WF's laptop and/or WF's client instruction.

72. There was no application to amend.

73. It is also inherently implausible that Phyton would take any detrimental action against C because of a disclosure(s) not made to it and supposedly providing information of failures not by Phyton but by WF.

74. In the circumstances, I can see no reasonable prospect of the detriment claim succeeding against the Phyton respondents. I therefore dismiss the claims against those respondents.

Directions

75. The parties confirmed that the existing directions were sufficient and appropriate.

76. The parties confirmed that they would cooperate to agree a List of Issues and file that with the tribunal.

Oliver Segal QC
Employment Judge

19 February, 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
26 February 2021

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FOR THE TRIBUNAL OFFICE