EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr D. Aukett**
(2) Ms V. Saunders

Respondents: **(1) Sentimental Care Ltd**
(2) Mr J. Ellis
(3) Ms T. Ellis

Heard at: **East London Hearing Centre (by CVP)**

On: **19-21 January 2021**

Before: **Employment Judge Massarella**

Representation
For the Claimant: Mr C. Milsom (Counsel)
For the Respondent: Mr E. Kemp (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimants having accepted that they did not work under contracts of employment, their claims of unfair and wrongful dismissal are dismissed on withdrawal;**

2. **the Claimants were not workers within the meaning of s.230(3) Employment Rights Act 1996 ('ERA');**

3. **the Claimants were not workers within the extended definition in s.43K ERA 1996;**

4. **the Claimants' exclusion from whistleblowing protection is not in breach of their rights under the ECHR; there is no requirement for a conforming construction of s.230(3) or s.43K ERA;**

5. **accordingly, the Tribunal lacks jurisdiction in relation to their claims of detriment and automatically unfair dismissal on the grounds of making a protected disclosure, contrary to ss.47B(1) and 103(A) ERA, and their claims are dismissed.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. By a claim form presented on 16 June 2020, after an ACAS early conciliation period between 24 April and 9 May 2020, the Claimants complained of ordinary unfair dismissal, detriment and automatically unfair dismissal on the grounds of making a protected disclosure, contrary to ss.47B(1) and 103(A) of the Employment Rights Act 1996 ('ERA'); and breach of contract (notice pay).

2. At that stage there were four Respondents, including Insight Strategic Associates Ltd as the Fourth Respondent.

3. On 10 August 2020, a notice of preliminary hearing for case management was sent to the parties, listed for 19 October 2020. That hearing was later converted to an open preliminary hearing to address the issue of employment status, listed for one day.

4. In the ET3 the First, Second and Third Respondents denied that there had been a change of service provision. In the light of that, the Claimants withdrew their claims against the Fourth Respondent. The Tribunal acknowledged the withdrawal, but did not dismiss the claim against the Fourth Respondent; if the Claimants decide to pursue the claim against it at a later stage, it will be necessary for them to apply for permission to do so.

5. By a joint application, dated 15 October 2020, the parties applied to postpone the hearing listed for 19 October 2020, on the ground that one day was not enough to deal with employment status. It was relisted for three days.

The hearing

6. The parties provided me with a main bundle running to some 970 pages, although Counsel (Mr Milsom for the Claimant, and Mr Kemp for the Respondent) assured me that they would only be referring to a fraction of those documents. There was a small, supplementary bundle of documents from the Respondents. I spent the morning of the first day reading the witness statements, and some of the documents, to which they referred; Counsel confirmed that they would take me to any other documents, on which they proposed to rely in submissions in the course of cross-examination.

7. At my request, they also provided a joint list of legal and factual issues for determination, and a joint, electronic bundle of authorities. A timetable for evidence and submissions was agreed.

8. I heard evidence from Mr David Aukett (the First Claimant), who also relied on a supplementary witness statement; and from Miss Valerie Saunders (the Second Claimant). On the second day of the hearing, after the conclusion of

Miss Saunders' evidence, the Claimants applied to admit a small number of additional documents. Mr Kemp made no objection to one of them, but objected to the other two. I agreed with Mr Milsom that that both were relevant to the issue of how Mr Aukett came to be the Responsible Individual for Morgannwg House Care Home, and to the credibility of Mr James Ellis (the Second Respondent), and admitted them into evidence. To obviate any prejudice to the Respondent, I gave Mr Kemp the opportunity to recall Mr Aukett to put any questions arising out of those documents. Having taken instructions, Mr Kemp indicated that he did not seek to do so. I then heard evidence from Mr Ellis.

9. Both Counsel provided detailed, written closing submissions, and supplemented them orally. After the conclusion of the case, and before I reached my final decision, the Supreme Court gave judgment in *Uber BV v Aslam* [2021] UKSC 5. I wrote to the parties, inviting them to address *Uber*. Both Counsel lodged supplementary submissions. I will refer to their original and supplementary submissions in context in my discussion below. I am grateful to both Counsel for their assistance.

10. I apologise to the parties for the delay in promulgating this judgment. This was caused by the pressure on judicial resources and the competing demands of other cases.

Overview and structure of the judgment

11. The Claimants no longer contend that they were engaged by the First Respondent, SCL ('R1') under a contract of employment, pursuant to s.230(3)(a) ERA 1996, and their claims of ordinary unfair dismissal and wrongful dismissal are dismissed on withdrawal. They maintain that they were 'workers' of R1.

12. If the Claimants establish that they are workers under s.230(3)(b) ('limb (b) workers'), that is the end of the matter; if they do not, I must go on to consider whether they come within the extended definition of worker, in the context of the whistleblowing legislation, in s.43K ERA; if they do not, the Claimants invite me to consider whether a conforming construction of s.230(3)(b) ERA and/or s.43K(1) is necessary, pursuant to s.3 HRA 1998 and their Convention rights under Articles 10 and 14 ECHR, on principles approved by the Supreme Court in *Gilham v MoJ* [2019] ICR 1655 ('the *Gilham* argument').

Findings of fact

<u>The companies</u>

13. R1 is a company operating care homes, which was founded by the Second Respondent, Mr James Ellis. He is a director of R1, and its sole shareholder. His wife, Mrs Tazmina Ellis, the Third Respondent, is also a director of R1.

14. Mr Aukett is a chartered accountant, who has incorporated, either alone or jointly with Miss Saunders, a number of companies.

15. Mr Aukett previously ran Aukett & Co., a firm which provided accountancy services to a range of clients, including care providers. He founded the

company in 1983. By around 2004, it had about five employees. It was listed in Yellow Pages as a local accountancy firm.

16. Around the same time he set up a firm called Business Management Services, to provide payroll, accountancy, bookkeeping and management services to third parties.

17. On 7 June 2001, Mr Aukett incorporated Care Management Support Ltd ('CMSL'), a firm which provided specialist strategic and operational support to a number of care homes. Mr Aukett is a director of CMSL, but not its employee.

18. On 10 October 2003, R1 was incorporated. From 2003, R1 owned and operated Horton Cross Nursing Home in Ilminster; and from 2009 Hamilton Park Nursing Home in Taunton, and Morgannwg House in Brecon.

19. On 7 November 2005, Mr Ellis incorporated Sentimental Care Asher Ltd ('SCAL'), in order to purchase Asher house in Walton-on-the-Naze, Essex. He was its sole shareholder.

20. In May 2007, Mr Aukett incorporated Care Compliance Support Ltd ('CCS'), to deal with compliance work outside the formalities associated with the money laundering regulations, and to avoid CMSL having to become VAT-registered. Mr Aukett is a statutory director, and shareholder, of CCS.

21. In 2008, Mr Aukett recruited Miss Saunders, by way of a formal offer of employment from CMSL in a letter dated 27 January 2008. At the same time, he proposed that she should become a statutory director of CMSL, which occurred sometime later, on 1 December 2010. In the interim, she was appointed a statutory director of CCS on 1 April 2008.

22. On 4 October 2011, the Claimants incorporated BMS Sussex Ltd ('BMS'), which subsumed the activities of Aukett & Co. The Claimants, who are life partners as well as business associates, are both statutory directors of BMS, as well as 50/50 shareholders in BMS and CCS.

23. On the evidence I heard, and on the balance of probabilities, I find that Mr Aukett and Miss Saunders worked closely together, shared the running of their companies between them, and reached important business decisions jointly.

24. BMS, CMSL and CCS ('the group of companies') are all active companies. They provide services for clients other than R1. They operate from their registered offices in Eastbourne. Some of their clients also use the Eastbourne address as their registered office. R1 uses their office as its registered address.

25. Each of the companies in the group has had a small number of employees other than the Claimants, around four or five in total at any given time. With one exception, they all did some work for R1, which Mr Aukett described as 'back-office work'.

26. The group of companies market themselves under a collective brand name: 'Care Management Group'. There is a Facebook page for BMS. The companies are also listed on a large number of other sites, including 192.com

and Scoot. I was taken to a brochure with the title Expert Care Management Support, which sets out the services provided by the group of companies. The introduction states:

> 'We offer complete care home management solutions, from dealing with admissions contracts and financial control, including payroll, to operations and the day to day running. We can also make sure you comply with all the latest laws and regulations governing the industry with a range of supportive services designed to relieve these stresses on management hours and increase fiscal and operational efficiency without sacrificing the quality of care provided.
>
> If you like to know more or have any questions see our contact us page, we would love to hear from your or click below to see our services.'

27. Although Mr Aukett stated that it had not been updated for ten years, the copyright date on the document was 2017, the address shown on the website where it is posted is the Eastbourne address to which the companies moved in 2012, and the email address shown is the one actively used by staff at BMS. I do not accept the Claimant's evidence that they did not market their companies' services; the website suggests otherwise, and Mr Aukett's evidence on this issue was unsatisfactory.

<u>The Claimants' dealings with Mr Ellis / contractual documentation</u>

28. Mr Aukett and Mr Ellis met in around 2004. Mr Ellis had bought a nursing home (Horton Cross), and required assistance in running it to the satisfaction of the CSCI (the regulator at the time).

29. Mr Aukett became Company Secretary of R1 on 1 August 2005, and became its second statutory director on 1 November 2005.

30. On 10 September 2014, Miss Saunders and Mrs Ellis were appointed statutory directors of R1 and SCAL, joining the board of both companies. I find that that was a decision taken jointly by Mr Aukett and Mr Ellis, in consultation with Miss Saunders and Mrs Ellis.

31. A striking feature of this case was the complete absence of any contractual documentation. The parties agree that there were originally written contractual terms between Aukett & Co. and R1, but they are unable to locate them; there was no written contract between the Claimants and R1. At no point in their statements did either Claimant lead evidence that they, as individuals, entered into contracts with R1, let alone by reference to when they did so, or to the usual indicators, such as offer and acceptance.

32. As recorded above, Miss Saunders was originally an employee of CMSL, but that employment terminated at some point (Miss Saunders could not remember when). The parties agree that, at all material times, the Claimants were both employees of BMS. Mr Aukett's own evidence was that BMS was the Company through which they provided most of their services to R1.

33. Insofar as it was suggested (for example, at paras 14 and 114 of Mr Aukett's statement) that BMS was a mere payment vehicle, or service company, I reject that evidence. BMS was an active company in its own right. R1 was its

main, but not its only, client. I was taken to a turnover summary, which showed that R1 accounted for between 73% and 79% of BMS's income between 2016 and 2019. However, BMS had around ninety other clients, mainly individual tax returns for people with whom Mr Aukett had a long-standing professional relationship. Further, BMS employed staff other than Miss Saunders and Mr Aukett.

Fees and remuneration

34. Mr Aukett accepted in cross-examination that the original letter of engagement between Aukett & Co. and R1 set out Aukett & Co.'s standard fees and charges, and was 'the same sort of letter sent to any of its other clients'. He fixed the level of fees proposed to Mr Ellis, who decided whether to accept them.

35. Within an overall remit set by Mr Ellis, Mr Aukett created the annual budgets for R1, which were approved by Mr Ellis. The individual invoices raised under that budget were then approved by Mr Aukett.

36. Miss Saunders denied having discussions with Mr Aukett about how much BMS would charge R1 for providing the services. I found her evidence on this issue unconvincing. I considered it improbable that, as an experienced businesswoman, and shareholder and director of BMS, she would not have retained a significant degree of oversight in such matters. I note Mr Aukett's evidence in his supplementary statement that 'Val and I discussed the level of the monthly fee with James Ellis'. I find that, when it came to key decisions such as this, she and Mr Aukett took them together.

37. Mr Aukett explained in his statement that, in the early days, Aukett & Co. invoiced R1 for the work which he and Miss Saunders did. They then invoiced from CMSL and CCS. After they incorporated BMS, BMS raised invoices, depending on the type of work done, and in such a way as to keep CMSL and CCS under the VAT thresholds. R1 paid those invoices to BMS. The invoices identify the nature of the services, often in broad terms, but not the individuals performing them (for example, 'to assist the Directors' or 'head office charges'). BMS accounted for those invoices.

38. The Claimants' Directors' fees and the vast majority of the care home management work that the Claimants did, were charged by BMS to R1 by way a monthly management fee, which increased from around £13,000 in the financial year ending October 2017 to around £18,500 in the year ending 2019. The level of those fees was proposed by the Claimants, and agreed with Mr Ellis, on an annual basis.

39. In an email of 19 November 2019, Mr Aukett wrote to Mr Ellis:

> '1. The current charges for Val and I to be the only active executive Directors for the company amount to £134,140 gross per annum between us. Obviously, this is considerably less than the amount I quoted to you which would have been £150,000.
>
> As a comparison, the total annual wages bill for the company is £2,300.000.

> As a comparison, the trading profits absorbed by funding your and Tasmina's monthly drawings from the company amount to more than £500,000.
>
> […]
>
> On the telephone, only this morning, you were very, very concerned over the company paying Val and I for our services and you demanded to know exactly how much and what for.
>
> […]
>
> Obviously, we are not going to deviate from them and, therefore and in future, any charges for work outside of the regular and pre-agreed charges will be specified and quantified in advance and will require approval by the shareholders. You, as the only shareholder, will need to give that approval in writing to us before the work is undertaken on the company's behalf."

40. The tone of this email reflects the deterioration in the relationship by this stage. I find that this email reflects the fact that the Claimants continued to set the fees charged to R1, within the framework of an overall quote, agreed by Mr Ellis. In particular, it is implicit in this email that previously the Claimants had not 'specified and quantified in advance' fees for work outside the regular charges, and those fees did not 'require approval by the shareholders', i.e. Mr Ellis. I infer that such fees were simply set by the Claimants themselves.

41. The email went on to specify what the fees, including travel expenses, would be for a forthcoming piece of work.

> 'The first instance of that will be our attendance at the Somerset QiM meeting on 28th November 2019. Our costs will be fees of £350 each plus travel of 425 miles at 50p per mile. We will not require an overnight stay. Please consider this as soon as possible and let us know whether you approve. You could, of course, attend the meeting by yourself to reduce the cost to the company.'

42. In March 2020, R1 was preparing to deal with an Employment Tribunal claim. An issue arose as to who would attend from the company. Mr Ellis wrote to Mr Aukett asking: 'what will charges be for the three days?' Mr Aukett replied:

> 'Re the Company's costs: the Tribunal is being held in Aberystwyth from 09.30 Monday.
>
> The company will pay my accommodation and subsistence costs for the three days plus travel. My time is covered by the monthly Director's fees so there will be no extra charge for that.'

43. The Claimants received monthly salaries from BMS. In addition to his salary, Mr Aukett received dividends and mileage, which took his annual income to approximately £70,000. Miss Saunders received a combination of salary and dividends from BMS; her total income from this source averaged £50,000 per year. Neither Claimant took salaries from CMSL or CCS, although they did take modest dividends.

44. The arrangements described above were financially beneficial, from a tax point of view, both to the Claimants and to R1.

45. In early 2020, Mr Aukett and Miss Saunders discussed with Mr Ellis the possibility of the Claimants moving on to R1's payroll. Mr Ellis initially agreed, but then changed his mind.

The services provided by the Claimants

46. Initially, Aukett & Co. provided only accountancy services. Mr Aukett is a chartered accountant; Miss Saunders is not; those were duties that only Mr Aukett could discharge.

47. By the time of the material period, the services the Claimants provided to R1 were wide-ranging, and included quality assurance and direct oversight of the individual care homes. Other than specific tasks, where there was a regulatory requirement for named individuals to perform specific duties, Mr Ellis did not dictate which of the Claimants was to discharge which duties; the Claimants had a considerable degree of freedom in that respect. When Miss Saunders had a period of serious ill health, Mr Aukett stood in to cover some of her duties, although she continued to discharge others.

48. The Claimants were free to appoint their own employees, including Miss Saunders' son, to provide some services to R1, although most of this was 'back-office' work.

49. Under the Welsh system, each care home must have a Responsible Individual, who has ultimate accountability for the home being safe and compliant. In 2016 Mr Aukett took over from Mr Ellis as Responsible Individual for Morgannwg House. Mr Ellis's evidence was that Mr Aukett appointed himself, without seeking his consent. I reject that evidence. It is inherently implausible, and inconsistent with an email of 23 June 2016, to which Mr Aukett attached a letter for Mr Ellis to sign, nominating him as Responsible Individual. I accept Mr Aukett's evidence that Mr Ellis asked him to take on the position, and he agreed.

50. As Directors of R1, the Claimants were subject to personal, and non-delegable, duties, under the Companies Act 2006, including to promote the success of the company, to exercise independent judgment, and to exercise reasonable care, skill and diligence.

51. In around August 2006, Ms Stephanie Blake, who was an employee of Mr Aukett's group of companies, was appointed an interim statutory director of R1, to cover a short period when both Mr Ellis and Mr Aukett were away on holiday. On the balance of probabilities, I find that that was a decision proposed by Mr Aukett and approved by Mr Ellis.

52. The great majority of the services provided by the Claimants were provided remotely from their offices in Eastbourne. The decision to be based at the Eastbourne office was entirely the Claimants' own; Mr Ellis only visited the office once in ten years.

53. Meetings between Mr Ellis and the Claimants took place either in London or in Surrey, and usually over dinner. Mr Ellis usually chose the venue, but

sometimes invited them to do so. At those meetings, the overall strategy in relation to the care homes was discussed. Mr Ellis would identify areas in which he was satisfied/dissatisfied with the performance of the care homes, having particular regard to occupancy levels and financial performance.

54. Some of the compliance work, which the Claimants did, could only be done on site, and one or other of the Claimants made visits to R1's care homes around once a month. The Claimants attended staff and residents' meetings. When safeguarding concerns arose, they attended meetings with local authorities in behalf of R1. Mr Ellis did not instruct the Claimants as to when they should visit the homes, or which of them should do so on any particular occasion; that was a matter for them, and was often decided in consultation with the manager of the respective home, so as to coincide with staff or resident meetings.

55. In around 2009, the Claimants were held out to the care homes as running them through Aukett & Co., on behalf of R1 (HN 23). However, later documents showed the Claimants being presented to residents and relatives as Director (Mr Aukett) and Operations Manager (Miss Saunders). Mr Ellis accepted that residents' relatives would not have been aware that the Claimants were consultants. When R1 acquired Morgannwg house, Mr Ellis wrote to residents referring to the Claimants as 'two of the company's representatives'.

56. The same impression was also given to outside bodies, including regulators and local authorities. I find that, to the outside world, the Claimants would have been perceived as being an integral part of R1's operation. The Claimants also signed contracts as agents of R1, for example contracts with NHS England and insurance renewal contracts, and were counterparties to a financing agreement with Berkeley's. When a business opportunity opened up in Dubai, Mr Aukett wrote an email tendering for the business, in which he wrote:

> 'as well as running four of our own establishments, two of our UK Directors, Mr David Aukett and Mrs Valerie Saunders, act as consultants to other Care Home groups, assisting them with operational management, financial management and regulatory compliance.'

57. In the covering email, Mr Aukett wrote to Mr Ellis:

> 'if anything comes of it then SCL would charge Val and I out to them as consultants. This would be for a daily fee plus travel and accommodation costs.'

58. That opportunity did not materialise, and so there was no evidence as to whether Mr Aukett's proposal as to charging would have been adopted.

59. Mr Ellis accepted that when R1 offered contracts of employment, they were signed by the Claimants; they provided references on behalf of R1; they ran grievance procedures, and could issue disciplinary warnings; they had the power to suspend employees.

60. Both Claimants used their own email addresses and mobile phones at all times, and paid their own bills. Mr Aukett signed his emails, referencing BMS.

Both Claimants signed off using the contact details of their office in Eastbourne.

Control by Mr Ellis

61. I find, on the balance of probabilities, that Mr Ellis's primary concern was in achieving the maximum financial benefit to himself, and that he left the delivery of that objective largely to the Claimants. I find that he had little day-to-day control over the way they delivered that objective; his oversight tended to be high-level, and erratic in terms of its frequency and level of involvement. On one occasion he complained about lack of consultation by the Claimants; on another, he complained of 'having to get personally involved'.

62. One email will suffice to capture the intermittent quality of his interventions, and his reliance on the Claimants. In an email of 9 September 2014 to Mr Aukett he wrote:

> 'Have not caught up with you both for a long time! […] In a nutshell, how are we to maximise what we have in order to add value as soon as is possible! I will trust you to fill in all the gaps David.'

63. Mr Ellis accepted in cross-examination that he only visited the care homes a handful of times after completion. The Claimants were responsible for the quality management of care delivery, CQC registration, setting fees for residents, managing resident's finances, setting pay rates for employees, approving expenditure and managing cash flow in the homes. They also dealt with employment issues, dealt with statutory and regulatory compliance issues, and resolved complaints, including from residents and families. They had a very wide discretion to deal with all these matters, which Mr Ellis had delegated to them. There is very little contemporaneous evidence of Mr Ellis closely scrutinising expenditure on behalf of R1. Mr Milsom relied on an occasion, when Mr Ellis queried payment of £218.32 for an insurance policy.

64. Mr Ellis had no control over the Claimants' working hours. There was no evidence of any kind of disciplinary procedure, which was applicable to the Claimants.

65. The Claimants were free to decide how much holiday to take, and when to take it. There was, however, an expectation (Miss Saunders' own word in cross-examination), and, I find, no more than that, that they would not take it at the same time as Mr Ellis.

66. On the other hand, there were occasions when Mr Ellis stepped in and overruled the Claimants. For example, in relation to the Employment Tribunal claim, referred to above, Mr Ellis initially asked the Claimants to deal with it, but then intervened personally. As sole shareholder in R1, Mr Ellis had an ultimate right of veto, which he exercised from time to time, for example in resisting the suggestion that the Claimants should be put on R1's payroll, and indeed in terminating his relationship with the Claimants, including their directorships of R1, in 2020.

67. However, all the evidence suggests that this was, until the latter stages at least, a close relationship, and one of friendship and trust. In an email dated 5 July 2016, Mr Ellis described Mr Aukett as:

'my dear guardian angel. After all you are here to protect me from myself!'

The law to be applied

'Limb (b) worker status'

68. S.230 ERA, so far as relevant, provides:

> **(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) -**
>
> > **(a) a contract of employment, or**
> >
> > **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**
>
> **and any reference to a worker's contract shall be construed accordingly.**

69. There are thus three categories of relationship, conveniently summarised in *Bates van Winkelhof v Clyde & Co. LLP* [2014] ICR 730 (*per* Baroness Hale at [24] and [25]):

> **'24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.**
>
> **25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] ICR 1004 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act.'**

70. A worker who meets the definition in s.230(3)(b) ERA is now commonly referred to as a 'limb (b) worker'.

71. A contract can be implied between parties only if it is necessary to do so. The relevant principles were summarised by Elias LJ in *Tilson v Alstom Transport* [2011] IRLR 169 CA at [7-8]:

> **'7. The principles for determining when such implication can take place are now well established and they were not in dispute before us. First, the onus is on a claimant to establish that a contract should be implied: see the observations of Mance LJ, as he was, in *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192, para 102.**
>
> **8. Second, a contract can be implied only if it is necessary to do so. This is as true when considering whether or not to imply a contract between worker and end user in an agency context as it is in other areas of contract law. This principle was reiterated most recently in a judgment of the Court of Appeal in *James v Greenwich London Borough Council* [2008] ICR 545 which considered two earlier decisions on agency workers in this court, *Dacas v Brook Street Bureau (UK) Ltd* [2004] ICR 1437 and *Cable and Wireless plc v Muscat* [2006] ICR 975. It is sufficient to quote the following passage from the judgment of Mummery LJ, with whose judgment Thomas and Lloyd LJJ agreed: (paras 23 - 24). Mummery LJ stated that the EAT in that case had:**
>
> > **"23. … correctly pointed out, at para 35, that, in order to imply a contract to give business reality to what was happening, the question was whether it was *necessary* to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in *The Aramis* [1989] 1 Lloyd's Rep 213, 224:**
> >
> > > ***"necessary . . . in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."***
> >
> > **24. As Bingham LJ went on to point out in the same case it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."'**

72. As for personal performance, the Supreme Court in *Pimlico Plumbers v Smith* [2018] ICR 1511 endorsed the principles set out by Sir Terence Etherton MR in his judgment in the same case in the Court of Appeal ([2017] ICR 657 at [84]).

> **'84. In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'**

73. As for the question of whether the status of the party for whom the Claimants worked was that of a client or customer, the relevant authorities were summarised by Baroness Hale in *Bates van Winkelhof* at [34] onwards.

> **'34. In Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, para 53 Langstaff J suggested:**
>
> > **"a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."**
>
> **35. In James v Redcats (Brands) Ltd [2007] ICR 1006, para 50 Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all. He also accepted, at para 48:**
>
> > **"in a general sense the degree of dependence is in large part what one is seeking to identify—if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached—but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."**
>
> **36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in Mirror Group Newspapers Ltd v Gunning [1986] ICR 145, he concluded, at para 59:**
>
> > **"the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? … Its purpose is to distinguish between the concept of worker and the independent contractor who is in business in his own account, even if only in a small way."**
>
> **37. The issue came before the Court of Appeal in Hospital Medical Group Ltd v Westwood [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. Hospital Medical Group Ltd ("HMG") argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers: the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and HMG for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to HMG.**
>
> **38. Maurice Kay LJ pointed out, at para 18, that neither the Cotswold "integration" test nor the Redcats "dominant purpose" test purported to lay down a test of general application. In his view they were wise "to eschew a more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the appeal tribunal had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That**

> **was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the court might give some guidance as to a more uniform approach: "I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his 'integration' test will often be appropriate as it is here." For what it is worth, the Supreme Court refused permission to appeal in that case: [2013] ICR 415, 427.**
>
> **39. I agree with Maurice Kay LJ that there is not "a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in the Redcats case [2007] ICR 1006, a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood's case [2013] ICR 415, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.'**

74. In *Uber BV v Aslam* [2021] UKSC 5, the Supreme Court reviewed the question of worker status, from which the following principles emerge:

74.1. in determining whether an individual is a worker, there can be no substitute for applying the words of the statute to the facts of the individual case; in applying that language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation (at [87]);

74.2. the statutory definition of a worker's contract has three elements: (1) a contract whereby an individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual (at [41]);

74.3. whether a contract is a worker's contract is not to be determined by applying ordinary principles of contract law, such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake (at [68]);

74.4. workers' rights are not contractual rights, but were created by legislation, and the task of the Tribunal is to determine whether the claimant falls within the definition of a worker in the relevant statutory provision, so as to qualify for those rights, irrespective of what had been contractually agreed (at [69]);

74.5. the approach to that exercise should be purposive (at [70]); the general purpose of the legislation is to protect vulnerable workers from (among other things) being victimised for whistleblowing (at [71]);

74.6. the efficacy of such protection would be undermined if the putative employer, by the way in which the relationship is characterised in the written contract, determine whether or not the other parties to be classified as a worker (at [76]);

74.7. in so far as the contract in question seeks to limit or exclude relevant statutory rights (such as providing that the individual shall not be deemed to be a worker within the meaning of the ERA), such clauses are void (at [79-82]);

74.8. the task of the Tribunal is to glean the true nature of the agreement from all the circumstances of the case, of which the written agreement is only a part (at [84]);

74.9. this does not mean that the terms of any written agreement should be ignored; the conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other (at [85]).

The extended definition of worker status in s.43K ERA

75. The statutory protection available to whistleblowers applies to a worker, who makes a protected disclosure within the meaning of Part IVA ERA 1996, and has been subjected to detriment by any act, or deliberate failure to act, by his employer on the ground that the worker made a protected disclosure.

76. Section 43K ERA provides an extended meaning of 'worker' (and associated terms) for the purposes of Part IVA, beyond that found in s.230 ERA. So far as relevant, it 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,**
> >
> > **[…]**

77. The extended definition in s.43K ERA was considered by the EAT in *Keppel Seghers UK Ltd v Hinds* [2014] ICR 1105, and *McTigue v University Hospital Bristol NHS Foundation* Trust [2016] ICR 1155; and by the Court of Appeal in *Day v Lewisham & Greenwich NHS Trust and another* [2017] ICR 917. From these authorities, the following principles emerge.

77.1. The principal set of relationships caught by the extended definition is agency relationships, but the section is not limited to them: *Day* at [10].

77.2. The extended definition does not apply, if the worker already falls within the scope of s.230(3) ERA, in relation to the respondent in question: *Day* at [12 and 17-18].

77.3. However, if the individual is a s.230(3) worker in respect of either the end user or the supplier, he may still rely upon the extended definition against the other: *McTigue* at [24-29]; *Day* at [20-23].

77.4. If the terms on which the individual is engaged are substantially determined by the individual himself, he cannot bring himself within this extended definition. That is so, even if the end user and/or supplier can also be said substantially to determine the terms of engagement: *Day* at [11].

77.5. If the terms of engagement are not substantially determined by the individual, his employer is the person who does substantially determine them. That may be both the supplier and the end-user, who may both be subject to the whistleblowing provisions: *Day* at [11].

77.6. The question is likely to include consideration not only of who determined the individual's initial terms of engagement, but also the terms during the course of the agreement's operation. In doing so, the Tribunal is not restricted to looking at the terms of the various contracts, but they also 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 no direct contract between Claimant and Respondent: *Keppel* at [70].

77.7. The Tribunal should make the assessment on a relatively broad-brush basis, having regard to all the factors bearing on the terms on which the claimant was engaged to do the work: *Day* at [29].

77.8. The exercise is not a comparative one, requiring the Tribunal to determine the single body which was primarily responsible. The person who substantially determines terms may be both the supplier and the end user. That might be either because the introducer and the end user determine the terms jointly, or because each determines different terms but each to a substantial extent: *Day* at [11, 25 and 27].

77.9. 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, a purposive construction is appropriate, in order to

provide protection rather than deny it, where one can properly do so: *Keppel* at [18].

78. In *Day* at [29], Elias LJ observed as follows:'

> **'There is one further matter which I should address which emerged during the course of submissions (although I doubt whether it will have any material impact upon the analysis which the ET will have to carry out in this case). The issue is whether, when considering the terms on which the person is engaged, the tribunal is limited to considering contractual terms and must ignore other matters which might affect the way in which the work is carried out but are not contractual in nature. The argument in favour of so limiting it is that in *Sharpe v Bishop of Worcester* [2015] ICR 1421 the Court of Appeal held that in order for section 43K to bite, there must at least be a contract of some sort with the putative employer. So, it is said, the reference to terms must be to contractual terms. It is right to say that neither party sought to challenge the *Sharpe* decision nor to suggest that we need not follow it. However, even if it be the case that some of the terms of engagement must be contractual (on the assumption that the relationship needs to be contractual) I do not accept that it follows that a tribunal should limit itself to focusing solely on the contractual terms, although no doubt the terms will be overwhelmingly contractual. The section requires the tribunal to focus on what happens in practice and I do not think that Parliament will have envisaged fine arguments on whether a term is contractual or not before it can be taken into account. In my judgment when determining who substantially determines the terms of engagement, a tribunal should make the assessment on a relatively broad brush basis having regard to all the factors bearing upon the terms on which the worker was engaged to do the work.'**

<u>The *Gilham* argument</u>

79. In *Gilham v MoJ* [2019] ICR 1655, the Supreme Court held that, properly construed, the whistleblowing protection in the Employment Rights Act 1996 Pt IVA extended to the holders of judicial office. The Court found that, because there was no contractual relationship between a judge and the executive or any member of it, or between a judge and the Lord Chief Justice, the claimant was not a 'worker' for the purposes of Part IVA of the ERA, she was an office-holder. However, being a judge was a 'status' within the meaning of article 14 and, since the difference in treatment was without reasonable justification, the exclusion of judges from the protection in Part IVA of the 1996 Act was in breach of their rights under article 14, read together with article 10 of the Convention. In all the circumstances, the 1996 Act should be read and given effect so as to extend the protection given to whistle-blowers to the holders of judicial office.

80. The Court held, *per* Baroness Hale at [28] onwards:

> **'28. […] The claimant also complains that the failure to extend the protection of Part IVA to judicial office-holders is a violation of her rights under article 14 of the ECHR read with article 10 . Article 14 , it will be recalled, reads:**
>
> > **"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."**
>
> **This gives rise to four well-known questions: (i) do the facts fall within the ambit of one of the Convention rights; (ii) has the claimant been treated less favourably than others in an analogous situation; (iii) is the reason for that less favourable**

> **treatment one of the listed grounds or some "other status"; and (iv) is that difference without reasonable justification—put the other way round, is it a proportionate means of achieving a legitimate aim?**
>
> **29. The answer to question (i) is clearly "yes". Indeed, not only do the facts fall within the ambit of the right to freedom of expression protected by article 10 ; unusually there may well have been a breach of that article in this case; but that is not required.**
>
> **30. The answer to question (ii) is also clearly "yes". The claimant, and others like her, have been denied the protection which is available to other employees and workers who make responsible public interest disclosures within the requirements of Part IVA of the 1996 Act. She is denied protection from "any detriment", which is much wider than protection from dismissal or other disciplinary sanctions. She is denied the possibility of bringing proceedings before the employment tribunal, with all the advantages those have for Claimants. She is denied the right to seek compensation for injury to feelings as well as injury to her health. This is undoubtedly less favourable treatment than that afforded to others in the workplace—employees and "limb (b)" workers—who wish to make responsible public interest disclosures.**
>
> **31. It is no answer to this to say that, by definition, judicial office-holders are not in an analogous situation to employees and "limb (b)" workers. That is to confuse the difference in treatment with the ground or reason for it. What matters is that the judicial office-holder has been treated less favourably than others in relation to the exercise or enjoyment of the Convention right in question, the right to freedom of expression. She is not as well protected in the exercise of that right as are others who wish to exercise it.**
>
> **32. The answer to question (iii) is also clearly "yes". An occupational classification is clearly capable of being a "status" within the meaning of article 14 . Indeed, it is the very classification of the judge as a non-contractual office-holder that takes her out of the whistle-blowing protection which is enjoyed by employees and those who have contracted personally to execute work under limb (b) of section 230(3) . The constitutional position of a judge reinforces the view that this is indeed a recognisable status.**
>
> **[…]'**

Conclusion: 'Limb (b) worker status'

81. It is accepted by both parties that, at the outset, there was an express agreement between R1 and Aukett & Co. for the latter to provide accountancy and consultancy services. According to Mr Aukett, it took the form of a letter of engagement between R1 and Aukett & Co., which can no longer be found. Mr Aukett went on to explain that, when Aukett & Co. was subsumed into BMS in 2011, he did not recall issuing a new letter of engagement. He stated further that there was 'no single, written agreement in relation to the care home management services that [Miss Saunders] and I provided via BMS, separate to the accounting services'. He went on:

> 'I was very clear throughout that our obligation, *as far as BMS was concerned*, was to do whatever was needed to keep the homes running and [R1's] compliance with its obligations as a registered provider of care services to the elderly' [emphasis added].

82. I note that he expressly acknowledges that the services were 'provided via BMS' and identifies the 'obligation' to which the Claimants were subject as BMS's obligations. I also note that Miss Saunders refers in her statement

(paragraph 4) to 'my role with CMSL'; and goes on to state that 'the work I was doing migrated from CMSL to BMS, although nothing about it changed'. I note that she does not state that the work migrated from CMSL to R1. At no point in their statements did either Claimant lead evidence that they, as individuals, entered into contracts with R1, or when and how such a contract came into existence.

83. Mr Milsom, in his written closing submissions, asserted that 'there may be some dispute as to the nature of the legal relationship but there can be no sensible argument that there was no contract at all', a submission which was not developed further in writing. In oral closing, I asked him to identify what kind of contract was said to exist between the Claimants and R1; he asserted that it was an implied contract, which arose by conduct. That was the first time such a suggestion had been made.

84. Mr Kemp's submission in his original closing was that there was no express contract for services between the Claimants and R1, and that such a contract could only be implied if it was necessary to do so, which was not the case here. He cited the passage from *The Aramis*, which Elias LJ incorporated in to his judgment in the *Tilson* case, and which I have quoted above (at para 72).

85. In his supplementary submissions, dealing with the judgment of the Supreme Court in *Uber*, Mr Milsom addressed the issue of necessity, arguing that: 'the question of imputing a worker relationship or a contract need not satisfy a threshold of necessity'. He observed that in *Uber* there was no written agreement between the drivers and Uber London, and submitted that 'the SC had no hesitation, however, in implying the existence of a contract of services with the London entity since this was the more direct means of giving effect to statutory workplace rights and as such Parliamentary intention. In light of *Uber* the assertions of the respondents at [8-12] of their written submissions are no longer sustainable.'

86. Mr Kemp, in his supplementary submissions, maintained that there was nothing in the *Uber* decision that could 'plug the glaring *lacuna* in respect of the Claimant's case on limb (b) status', which was that there was no contract, express or implied, between either Claimant and R1.

87. At the material time, I am satisfied that there were contracts in place between the Claimants and BMS, whose employees they were, and between BMS and R1 for the provision of services by BMS's employees (including the Claimants). The invoicing arrangement is consistent with the Claimants' services, and those of the other employees of BMS, being provided through BMS. Payments were made by R1 to BMS, and accounted for by it. I agree with Mr Kemp that the evidence of offer, acceptance and payment of consideration for the services provided is between R1 and Aukett & Co. and its successor companies, including BMS. Those arrangements were deliberately put in place, and maintained over many years, in order to achieve substantial tax advantages for all parties.

88. Insofar as Mr Milsom appears to be arguing that, post-*Uber*, the necessity test has fallen away, I disagree.

89. S.230(3)(b) ERA requires there to be a contract, whereby the putative worker undertakes to perform services for the other party to the contract. The difficulty the Uber drivers faced was that the only express agreements, to which they were parties, were not with Uber London Ltd (the putative employer), but with Uber BV (the Dutch parent company). Uber argued that Uber London Ltd merely acted as the drivers' agent in accepting bookings, so as to create a contract between the driver and passenger. The Supreme Court rejected that argument (at [54]), as being unsupported by any findings of the Tribunal, or any evidence capable of founding such an inference.

90. The Court held at [46] that it was reasonable to assume that the parties intended to comply with the law in the way they dealt with each other. It went on to say at [47] that:

> **'the only contractual arrangement compatible with the licensing regime is one whereby Uber London as the licensed operator accepts private hire bookings as a principle (only) and, to fulfil its obligation to the passenger, enters into a contract with a transportation provider (be that an individual driver or a firm which in turn provides a driver) who agrees to carry out the booking for Uber London'**

The Court continued at [56] that, once the booking agent argument was rejected,

> **'the inevitable conclusion is that, by accepting a booking, Uber London contracts as principle with the passenger to carry out the booking. In the circumstances Uber London would have no means of performing its contractual obligations to passengers, nor of securing compliance with its regulatory obligations as a licensed operator, without either employees or subcontractors to perform driving services for it. Considered against that background, it is difficult to see how Uber's business could operate without Uber London entering into contracts with drivers (even if only on a per trip basis) under which drivers undertake to provide services to carry out the private hire bookings accepted by Uber London.'**

91. On my reading, the Supreme Court concluded that it was necessary to imply contracts between the drivers and Uber London Ltd, to give business reality to their relationship. Having reached that conclusion - and given that the other elements of the test in s.230(3)(b) ERA (personal performance and lack of client/customer status) - were not in issue, strictly speaking there was no need for the Court to go further and give more general guidance as to worker status. It did so because of the importance of the wider issues; it was only able to do so, because it had first concluded that it was necessary to imply contracts directly between the drivers and Uber London Ltd.

92. Given that the only direct contract contended for by Mr Milsom between the Claimants and R1 was an implied contract, the question for me remains: is it necessary to imply such a contract, or would the parties have acted as they did, in the absence of such a contract? In circumstances where a contract to provide the services existed between BMS and R1, and the Claimants (and others) provided those services as employees of BMS, I conclude there is no need to imply a direct contract between the Claimants and R1 to account for the reality of the business relationship between the Claimants and R1. I am satisfied that the existing contracts achieve that, and the parties would have acted exactly as they did in the absence of such an implied contract.

93. Because I have concluded that there was no contract between the Claimants and R1, for the purposes of 'limb (b)' worker status, it is not necessary to go on to consider the other elements of the test. I deal with the client/customer issue later in the judgment, because it is relevant to the *Gilham* argument.

Conclusion: worker status under s.43K ERA

94. For the purposes of s.43K ERA, it is accepted by both parties that the Claimants worked for R1. Mr Kemp accepted that both Claimants were supplied to do the work for R1 by BMS. Mr Milsom also accepted in oral submissions that, if I find that the Claimants were not 'limb (b) workers', then they were supplied to work for R1 by BMS.

95. Because the Claimants were not limb (b) workers, they are not excluded from protection under the extended definition, by reason of s.43K(1) ERA. The key question is: were the terms on which the Claimants were engaged substantially determined by them? If so, they are excluded from the extended definition of 'worker', by reason of s.43K(1)(ii) ERA. That is so, even if the supplier and/or end-user can also be said substantially to determine the terms of engagement: see the observations of Elias LJ in *Day* at [11].

96. This is an unusual case. In the authorities to which I was taken, the issue before the Tribunal was whether it was the supplier or the end-user, which substantially determined the terms of engagement of the individual; it was not suggested that the individuals substantially determined the terms themselves.

97. There is then a further layer of complexity: in most cases the putative worker has no connection with the supplier; here, the Claimants are shareholders and directors of the supplier. Mr Milsom argues that, by submitting that the Claimants substantially determined the terms of their engagement, Mr Kemp seeks to 'have it both ways'. For the purposes of his argument under s.230 ERA (Mr Milsom argues), Mr Kemp relies on a strict analysis of the contractual nexus, as set out above, and resists any suggestion that the corporate veil should be pierced. Mr Milsom argues that the same principle must apply in the context of s.43K ERA: if the contractual relationship is between BMS and R1, then, insofar as terms of engagement are substantially determined other than by R1, it must be BMS which is determining them, not the Claimants.

98. Mr Kemp resists that analysis as artificial: he argues that the individual Claimants are the controlling minds of BMS, and s.43K ERA requires the Tribunal to focus on 'the individuals', and on what happened 'in practice'; decisions as to the terms on which the Claimants were engaged, which might (on a strict contractual analysis) be characterised as taken by BMS were, in practice, taken by the Claimants themselves.

99. That the phrase 'in practice' requires me to look beyond the strict contractual position and consider the reality of the situation, is confirmed by Elias LJ in *Day*, in the passage I have quoted in full above (at para 78): I must make the assessment 'on a relatively broad brush basis having regard to all the factors bearing upon the terms on which the worker was engaged to do the work', which may include 'matters which might affect the way in which the work is carried out but are not contractual in nature'.

100. Further, Mr Kemp submits that it is important not to lose sight of the mischief s.43K ERA is designed to address: the lack of protection in the whistleblowing context for individuals, who are supplied to work for an end-user on terms negotiated between the supplier and the end-user, into which they themselves have little or no input; the extended definition maintains the distinction between workers, such as the Uber drivers, who have no bargaining power, and people in business on their own account, who do. I accept that submission.

101. I then considered the meaning of 'substantially' in a case of this sort. The Court of Appeal held in *Day* that both supplier and end-user may substantially determine the terms; the Tribunal is not required to decide which of them determined the majority of the terms. In my opinion, 'substantially' must be given the same construction throughout the section; it is not necessary to show, when considering the individual, that s/he determined the majority of the terms. That is consistent with the *dicta* of Elias LJ in Day at [11]:

> **'I would make two preliminary observations about these definitions. The first is that, if the terms on which the individual is engaged are substantially determined by the individual himself, he cannot bring himself within this extended definition of "worker". That is so even if the end user and/or introducer can also be said substantially to determine the terms of engagement […]'**

102. Dealing firstly with pay, the fees charged by BMS for work done by the Claimants represent the financial terms on which the Claimants were engaged to do work for R1. I have already found that Mr Aukett and Miss Saunders took important decisions together, and that they both had input into the overall level of fees charged to R1. There was remarkably little evidence of Mr Ellis pushing back against those fees. I have found that there was negotiation from time to time in relation to the overall level of fees, but the Claimants themselves decided how much they should charge for specific work, such as visits to the care homes, with little or no oversight from Mr Ellis: see above at paras 40-43. I accept Mr Kemp's submission that these are instances of the Claimants setting the terms of engagement.

103. Aside from the financial question, I have concluded that the Claimants determined their own terms in other respects which are significant enough to be described as 'substantial'.

104. With the exception of Mr Aukett's role as registered individual, and tasks which only he could perform as a chartered accountant, the Claimants themselves determined which of them should perform which of the operational services, with little or no intervention by Mr Ellis. It was also they who determined which of the services they would delegate to other employees of BMS; Mr Ellis had no input into those decisions.

105. They also determined when a particular piece of work should be done, and they determined their own working hours. It was they who determined that, with the exception of visits to the care homes, their place of work would be their offices in Eastbourne. Mr Ellis had little or no input into any of these decisions.

106. I have also found that the Claimants were largely free to decide when to take their holidays. I accept their evidence that there was an expectation that they

would not take holiday at the same time as Mr Ellis, but that was only a partial limitation on their freedom. Perhaps more significantly, I heard no evidence that Mr Ellis had any influence over the amount of holiday they took.

107. I find that the appointment of Mr Aukett as registered individual was by agreement between him and Mr Ellis. All the contemporaneous evidence suggests that, on matters such as these, and before their relationship broke down, Mr Ellis and Mr Aukett (on his and Miss Saunders' behalf) worked collaboratively. Similarly, in relation to the appointment of the Claimants as directors of R1, I am satisfied that this was by agreement between them and Mr Ellis. I consider that the Claimants' input into these decisions amounted to substantial determination of terms by them.

108. Mr Ellis retained a power of veto, as sole shareholder, which he exercised from time to time. I accept Mr Milsom submissions that it was Mr Ellis who decided that the Claimants should not be partners or shareholders in R1, and should not go on the payroll. However, because the exercise is not a comparative one, the extent to which Mr Ellis substantially determined the terms of engagement is a question which only arises if I am satisfied that the Claimants did *not* substantially determine the terms of engagement. For the reasons I have given above, I have concluded that they did.

109. Even if I am wrong about the other matters, in my judgement, the fact that they determined their place and hours of work, the division of work between themselves, and the extent of delegation to other employees of BMS would, in themselves, be sufficient to amount to substantial determination of terms.

110. Consequently, I have concluded that the Claimants were not workers within the extended definition in s.43K ERA.

Conclusion: the *Gilham* argument

111. Having decided that the Claimants did not enjoy whistleblowing protection on an ordinary application of s.230(3)(b) ERA or s.43K ERA, I go on to consider whether a conforming construction of either provision is necessary, pursuant to s.3 HRA 1998 and the Claimants' Convention rights under Articles 10 and 14 ECHR, on principles approved by the Supreme Court in *Gilham*.

112. I remind myself of the four questions set out by Baroness Hale in *Gilham*, which must be addressed:

    1. do the facts fall within the ambit of one of the Convention rights?

    2. Have the Claimants been treated less favourably than others in an analogous situation?

    3. Is the reason for that less favourable treatment one of the listed grounds, or some 'other status'?

    4. Is that difference without reasonable justification—put the other way round, is it a proportionate means of achieving a legitimate aim?

113. Both parties accept that whistleblowing protection falls within the ambit of Article 10 ECHR; and that unjustified curbing of such protection on the

grounds of a relevant status is a violation of Article 14 ECHR. Question 1, therefore, does not arise.

114. Question 2 arises in part: although there was less favourable treatment (the Claimants did not enjoy protection as potential whistleblowers), an issue arises as to whether they were 'in an analogous situation' to workers, who did enjoy that protection.

115. As for Question 3, the Claimants rely on the following statuses, which the Respondents accept in principle fall within the scope of Article 14:

115.1. 'that of an individual working other than under a contract for service or services;

115.2. that of a statutory director.'

116. In answering Question 3, I must decide whether the denial of whistleblowing protection was by reason of either, or both, of these statuses?

117. I reminded myself that in *Gilham* (at [12]), a number of matters were not in issue:

> **'It is not in dispute that a judge undertakes personally to perform work or services and that the recipient of that work or services is not a client or customer of the judge.'**

118. Thus, but for the fact that she did not work pursuant to a contract with the recipient (i.e. the difference in her status), Judge Gilham was in an analogous position to limb (b) workers. Accordingly, Question 2 could be answered in the affirmative. Further, when it came to remedy, Baroness Hale identified (at [43]) how s.230(3)(b) ERA could be interpreted so as to extend whistleblowing protection to judicial office-holders:

> **'It would not be difficult to include within limb (b) an individual who works or worked by virtue of appointment to an office whereby the office-holder undertakes to do or perform personally any work or services otherwise than for persons who are clients or customers of a profession or business carried on by the office-holder.'**

119. That formulation departs from the statutory wording only by replacing references to a contract with the reference to office-holder status; the requirements for personal performance and the lack of a client/customer relationship remain, notwithstanding the purposive construction given to the statutory language.

120. For a conforming interpretation to be permissible, I conclude that I must find that the Claimants satisfied the tests in s.230(3)(b) and/or in s.43K ERA in all respects, but for the differences in status. Only then will they be 'in an analogous situation' for the purposes of Question 2.

121. Mr Kemp analyses the position differently, by reference to Question 3 ('is the reason for that less favourable treatment one of the listed grounds or "some other status"?'). He contends that the reason why the Claimants fall outside the scope of s.230(3)(b) ERA is that they did not undertake to provide the services personally, and the status of R1 was that of a client or customer of a business undertaking carried on by them; and he contends that they fall

outside the scope of s.43K ERA, because they substantially determined the terms on which they were engaged to do the work. In neither case, he argues, was the difference in status the reason for the difference in treatment.

The position in relation to s.43K ERA

122. Dealing firstly with s.43K ERA, I consider that the position is relatively straightforward. The Claimants fail at Question 2: they were not in an analogous situation to workers covered by s.43K ERA because they substantially determined the terms of their engagement.

123. On Mr Kemp's analysis, by reference to Question 3, the outcome is the same: the reason for the treatment was not their status (working without a direct contract/being statutory directors) but the fact that they substantially determined the terms of their engagement.

124. It is difficult to see how the absence of a direct contract between the Claimants and an end-user (such as R1) could ever be the reason for exclusion from protection under s.43K ERA, given that the provisions are specifically designed to extend protection to individuals in that position. As for a statutory director, s/he too is not excluded from the protection under s.43K ERA, provided s/he has not substantially determined his/her own terms of engagement.

The position in relation to s.230(3)(b) ERA

125. Turning to s.230(3)(b) ERA, I must determine whether, but for the absence of a contract between them and R1 and/or their status as statutory directors, they satisfy the statutory test: did they undertake to do or perform any work or services personally for R1; and was R1's status other than that of a client or customer of any profession or business undertaking carried on by them? If the Claimants do not satisfy both tests, they are not in an analogous situation to limb (b) workers, and Question 2 must be answered negatively.

126. In fact, the matter is settled, in my opinion, by an analysis of the client/customer issue.

Was R1's status that of a client or customer of any profession or business undertaking carried on by the individual?

127. The question of client/customer status often gives rise to a difficult exercise, particularly when the language of clients and customers does not sit naturally with the kind of work being considered. The appellate courts have, over the years, given guidance, designed to assist Tribunals in determining on which side of the line (client/employer) a particular respondent falls. However, I remind myself that all the authorities emphasise that there can be no substitute for applying the words of the statute to the facts of the individual case (Baroness Hale in *Bates van Winkelhof* at [39]; Lord Leggatt in *Uber* at [87]).

128. In addressing me on this element of the test, both Counsel focused, in particular, on the guidance given by Langstaff J in *Cotswold Developments* at [53]:

> **'a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.'**

129. Needless to say, they urged on me diametrically opposing conclusions. However, Langstaff J's 'integration' test, and indeed Elias J's 'subordination' and 'dominant purpose' tests, are litmus tests only. In my opinion, this is a case, when the statutory language provides the answer without recourse to any judicial gloss.

130. There is no dispute that the Claimants carried on a business undertaking, indeed several business undertakings, of which BMS was the most important for these purposes: they were its joint directors and shareholders. I have already found that BMS was not a mere shell company, or payment vehicle; it was an active company, with its own premises, and employees, including, but not limited to, the Claimants. It is their own evidence that they provided their services to R1 through BMS, including their services as directors, for which BMS charged R1, by way of monthly invoices.

131. BMS had numerous clients: some were individuals, who were longstanding clients. In his witness statement at para 123, Mr Aukett stated:

> 'SCL [R1] was BMS' main client.'

He continued at para 127:

> 'If BMS did not have SCL as a client, our turnover would have barely been sufficient to maintain my post, let alone Val's as well. We depended upon SCL.'

132. The conjunction of the fact that BMS was a business undertaking carried on by the Claimants, and Mr Aukett's own evidence that R1 was BMS's main client, provides a complete, and straightforward, answer to the issue of the Respondent's status.

133. Even though I consider that the bare statutory language is sufficient, by itself, to dispose of this question, I will briefly consider the judicial guidance.

134. Dealing with Langstaff J's 'integration' test, I have already rejected the Claimants' evidence that they did not market their services to the world. Even if I am wrong about that, it would not be determinative of the issue. It is clear from Elias J's *dicta* in *James v Redcats* that a person who does not market themselves at all may still be an independent contractor.

135. I remind myself that Langstaff J's purpose, in contrasting a person who actively markets his/her services to the world with a person recruited to work as an integral part of the principle's operation, was spelt out in his own parenthesis: it is to establish whether s/he is 'a person who will thus have a client or customer'. It is the Claimants' own evidence that they were people with clients, one of which was R1; there is no need to apply the 'marketing' test to establish that.

136. I accept Mr Milsom's submission that there was a high degree of integration: the Claimants effectively ran the business on a day-to-day basis on Mr Ellis's behalf and, in many respects, held themselves out to the world at large (with Mr Ellis's agreement) as being integrated into it. Mr Aukett observed at several points in his statement that it probably would not have occurred to people outside the business that they were consultants. However, the fact that the Claimants and/or Mr Ellis gave the impression that they were workers (or even employees) of R1 is not determinative of the issue. In order to find that R1's status was not that of a client of a business undertaking carried on by the Claimants, I would have to disregard the sworn evidence of Mr Aukett that it was. A high degree of integration may be uncommon in a relationship between independent contractor and principal, but it is not, of necessity, incompatible with it.

137. Nor is it determinative that the majority of BMS's clients were individuals, from whom BMS derived a relatively small income, while its revenue from R1 generated by far the largest proportion of its turnover (and thus its ability to pay the Claimants' salaries). As Elias J observed in *James v Redcats*:

> **'The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer.'**

Baroness Hale in *Bates van Winkelhof* gave the example of 'those small factories making goods exclusively for the "St Michael" brand in the past'. I accept that BMS was economically subordinate to R1; but that does not alter the fact that it was a business undertaking carried on by the Claimants, and that R1 was its client.

138. As for what Elias J refers to as 'substantive subordination', there are indicators pointing both ways: on the one hand, the Claimants had an unusual degree of freedom in terms of how they provided their services from one day to the next; moreover, they were highly influential in terms of the way the business was run. On the other hand, Mr Ellis had ultimate authority: as sole shareholder, he could and did set strategy from time to time, and require the Claimants to work to that strategy; he had the power to terminate the relationship. But, again, none of this alters the fundamental position, that R1 was BMS's client.

139. As for the 'dominant purpose' test, I remind myself of Elias J's observation that 'its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way'. There can be no doubt that the Claimants were 'in business on their own account', and not 'in a small way'.

140. In short, I accept Mr Kemp's characterisation of this relationship, in his supplementary submissions, as 'a commercial enterprise between two businesses for the provision of services by two individuals'. Accordingly, the difference in treatment in relation to whistleblowing protection, was because the Claimants were not in an analogous situation to other limb (b) workers; alternatively, the reason for the less favourable treatment was not the statuses relied on by the Claimants, rather it was R1's status as BMS's client.

Conclusion

141. For the reasons set out above, the Claimants' exclusion from whistleblowing protection under s.230(3)(b) ERA and s.43K ERA is not in breach of their Convention rights, and there is no requirement for a conforming construction of either provision.

142. Consequently, the Tribunal lacks jurisdiction in relation to the Claimants' claims of detriment and automatically unfair dismissal on the grounds of making a protected disclosure, contrary to ss.47B(1) and 103(A) ERA, and the claims are dismissed.

Employment Judge Massarella
Date: 6 May 2021

APPENDIX: AGREED LIST OF ISSUES

1. The Claimants aver that they were "workers" of the First Respondent (SCL) whether pursuant to s230(3)(b) or s43K(1)(a) Employment Rights Act 1996 (ERA 1996). The Claimants no longer contend that they were engaged by the First Respondent via a contract of employment pursuant to s230(3)(a) ERA 1996 and the claims of ordinary unfair dismissal and notice pay are, therefore, dismissed upon withdrawal.
2. The parties agree that the Claimants were employees of BMS Sussex Limited (BMS) at all material times.
3. The parties agree that there was no written contract between BMS and SCL or between SCL and the Claimants. There were written terms between SCL and Aukett and Co but this cannot now be located by the parties.

Section 230(3)(b) ERA 1996

4. Did each/either Claimant work pursuant to an express (oral) contract or an implied contract whereby they contracted to do or perform personally any work or services for SCL whose status was not by virtue of the contract that of a client or customer of any undertaking carried out by the Claimant?

Section 43K(1)(a) ERA 1996

5. In the event that the ET determines that each/either Claimant was not a worker as defined by s230(3)(b) vis-à-vis SCL:
    i. Was each/either Claimant introduced or supplied to do the work by a third person (BMS)?
    ii. Were the terms on which each/either Claimant was engaged in practice substantially determined not by him/her but by SCL, BMS or both?

6. The parties accept that following *Day v Lewisham and Greenwich NHS Trust (Public Concern at Work Intervening)* [2017] ICR 917 and *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] ICR 115:

   i. Where the terms are determined by the individual they are not a s43K worker;

   ii. An individual may be employed by two employers;

   iii. The exercise is not a comparative one. The fact that one employer determines the greater number of terms does not preclude the other from being within the scope of s43K ERA 1996;

   iv. When determining who substantially determines the terms, an ET should make the assessment on a broad-brush basis which is not confined to *contractual* terms: [29] in *Day.*

Additional Considerations

7. To what extent (if at all) is the application of ss230(3)(b) and/or s43K(1)(a) ERA 1996 informed by the following:

   i. The obligations owed by both Claimants as directors whether at common law or pursuant to the Companies Act 2006?

   ii. The obligations owed by the First Claimant as a Responsible Individual of Morgannwg House?

   iii. The wider regulatory obligations owed by the First Respondent as a registered care home provider?

   iv. The extent to which SCL would be vicariously liable for the actions of the Claimants in their dealings with others (staff, residents, regulators, Local Authorities and/or external contractors)?

Articles 10 and 14 ECHR

The application of ECHR only applies to the extent that the ET concludes that each/either of the Claimants is not a worker on ordinary domestic construction of ss230(3)(b) and/or s43K(1) ERA 1996.

8. Following *Gilham v MoJ (Protect Intervening)* [2019] 1 WLR 5905 it is accepted that whistleblowing protection is within the material ambit of Article 10 ECHR and that unjustified curbing of such protection on the grounds of a relevant status is a violation of Article 14 ECHR.

9. Were the ET to conclude that the Claimants did not enjoy whistleblowing protection on ordinary application of ss43K and/or s230(3)(b) ERA 1996 would this constitute discrimination on the grounds of an "other status?" The Claimants rely upon the following statuses which the Respondents accept in principle fall within the scope of Article 14.

   i. Working in the absence of a contract of service and/or services;

   ii. A director as defined by Companies Act 2006.

   Is the denial of whistleblowing protection on the grounds of either/both of these statuses?

10. Is any such discrimination justified?

    i. The Claimants contend that following *Gilham* the ET can be satisfied that there is no scope for a justification of discriminatory enjoyment of whistleblowing protection in the present case;

    ii. The Respondents contend that the ratio of *Gilham* is not determinative to the present case and that in the event the ET determines there is an Article 14 ECHR breach consideration must be given to the joinder of the Secretary of State. The Respondents do not seek to advance a legitimate aim themselves.

11. If not, does s3 Human Rights Act 1998 (HRA 1998) permit the ET to construe ERA 1996 in such a way as to extend protection? Is such a construction "possible" in accordance with s3 HRA 1998? The Claimants suggest the following:

    i. "Substantial" in s43K(1)(a) ERA 1996 in respect of a putative employer's determination of terms should be construed broadly so as to mean "more than minor or trivial;"

    ii. The requirement for personal performance in section 230(3)(b) ERA 1996 should be deemed to be satisfied by discharge of the functions of a statutory director.