EMPLOYMENT TRIBUNALS

Claimants: Mr Mortimer

Respondent: 360GLOBALNET LTD

OPEN PRELIMINARY HEARING

HELD AT: London South (by CVP) **ON:** 22 March 2023

BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: Representing himself
Respondent: Ms Glenn (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. At all material times, the claimant was not an employee of the respondent.

2. From 8 October 2020, the claimant was a worker of the respondent, under section 230(3)(b) of the Employment Rights Act 1996.

3. The claimant's claims for ordinary unfair dismissal under section 98 of the Employment Rights Act 1996 and automatic unfair dismissal for making a protected disclosure under section 103A of the Employment Rights Act 1996 are struck out, due to the tribunal having no jurisdiction to consider them.

4. The claimant's claim for detriment on the grounds that he had made a protected disclosure under section 47B of the Employment Rights Act 1996, is to be determined at the final hearing commencing on 28 June 2023, in accordance with the case management orders issued at the preliminary hearings on 23 August 2022 and 22 March 2023.

REASONS

The hearing

1. This is a claim arising out of the termination of the claimant's contract on 13 January 2021. He claims ordinary unfair dismissal and automatic unfair dismissal and / or detriment because of a protected disclosure (whistleblowing). The preliminary issue to be decided is whether the tribunal has jurisdiction to consider the claims, it being alleged by the respondent that the claimant was at all times an independent contractor on business on his own account and not an employee or worker of the respondent.

2. The parties and their witnesses attended a hearing on 22 March 2023 by CVP. They are all thanked for their assistance and representation during the hearing.

3. It was confirmed at the outset of the hearing that no reasonable adjustments were required by either party.

4. I was provided with a joint agreed hearing bundle of 277 pages, the references to page numbers in this judgment are to the pages in this bundle. I was also provided with written witnesses statements by both parties.

5. The claimant gave evidence on his own behalf. Mr Chris Pease (Account Manager) gave evidence on behalf of the respondent. I assisted the claimant, a litigant in person, in adducing his own evidence and formulating questions for cross-examination.

6. On completion of the evidence the respondent provided written and oral submissions. At the beginning of the hearing, Ms Glenn, the respondent's representative, was specifically alerted to the need to address me in closing on the extended definition of worker under section 43K of the Employment Rights Act 1996 (ERA 1996), since this had not been referred to in the Notice of Hearing and therefore was not addressed her written submissions. Ms Glenn did so with reference to the cases of Day v Lewisham and Greenwich NHS Trust [2017] ICR 917 (CA); Keppel Seghers UK Ltd v Hinds [2014] ICR 1105 (EAT), McTigue v University Hospital Bristol NHS Trust [2016] ICR 1155, and a useful summary provided in the first instance case of Aukett & Another v Sentimental Care Ltd (2021) (case no 3201600/2020).

7. The claimant was informed that he was not expected to make oral or written submissions on the law, since the respondent's counsel was aware of her duty to the court when dealing with a litigant in person (and I can confirm that this was complied with). Further, it was also my overriding duty to deal with cases fairly and justly and ensure that the parties were on an equal footing. I confirmed that I would be taking into account the whole of his evidence. The claimant accepted this and made only a couple of points orally. Judgment was reserved.

Claims and Issues

8. The parties confirmed that the claims were as follows:
   8.1 ordinary unfair dismissal under section 98 of the ERA 1996;
   8.2 automatic unfair dismissal under section 103A of the ERA 1996; and
   8.3 detriment under section 47B of the ERA 1996.

   I confirmed with the parties that the claimant can only bring a claim for unfair dismissal if he was an employee of the respondent, and could only bring a claim for ordinary unfair dismissal if he had 2 years' continuous service.

9. The parties agreed at the outset that the issues to be determined were:
   9.1 Was the claimant an 'employee' of the respondent under section 230(1) of the ERA 1996?
   9.2 If yes, from what date?
   9.3 Was the claimant a 'worker' of the respondent under section 230(3)(b) of the ERA 1996 (referred to as 'worker')?
   9.4 Was the claimant a 'worker' of the respondent under the extended definition of section 43K(1) of the ERA 1996 (referred to as 'extended worker')?

   In relation to issues 9.3 and 9.4 it is not necessary for me to determine whether the claimant was a worker or extended worker prior to 8 October 2020, since no claim will turn on this status.

Factual findings

10. I have only made findings of fact in relation to those matters relevant to the issues to be determined at this hearing. Where there were facts in dispute I have made findings on the balance of probabilities.

11. The respondent is a company providing technology and outsourcing services to its customers. It has developed an App called 'With you in 5' (WYi5), which is described as '*a comprehensive web-based enterprise outsourcing application that enables management and control of a disparate set of remote workers via a smartphone/tablet/PC device'* (pg 184).

12. On 1 August 2014 the claimant commenced work for Claven Holdings Ltd (Claven), an 'external network service' providing a self-employed network of workers. I have not been provided with a copy of the contract that the claimant entered into with Claven, and Claven is not a party to these proceedings. He was initially employed by Claven as a 'field agent' to gather information for financial services companies whose customers had fallen into debt. He did similar work for three other companies: NCI Resources, XL Counselling and Ascent. The claimant did not have his own business, or business identity, he did not have a business card or logo, he obtained his work by reputation but did not market himself. He described himself as a 'self-employed sole trader' for tax purposes. The claimant considered himself to be self-employed because he could pick and choose what jobs he did and when he would work.

13. In 2014 the respondent entered into a contract with Direct Line Group (DLG), and insurance company, to use the WYi5 App to gather claims information from policyholders. On 1 December 2014 the respondent subcontracted the information collection part of its service to Claven (pg 184-201). The relevant provisions in this contract were as follows:
    13.1 Claven agreed '*to recruit, train and provide such number of Operatives as the respondent may require to provide its Services*' (clause 3.2.1);
    13.2 Operatives were defined as '*workers to be sourced by Claven to carry out the Services*' (clause 1.1);
    13.3 The service to be provided was set out in Schedule 2, which included prescribed time periods, and expected service level and key performance indicators;
    13.4 Claven were required to ensure that the workers provided were suitably trained and qualified and that an adequate number of personnel were provided to provide the services (clause 11.1);
    13.5 Claven also agreed to replace personnel that the respondent reasonably decided had failed to carry out their duties with reasonable skill and care (clause 11.2), and to use its best endeavours to ensure continuity of personnel (clause 11.4);
    13.6 The respondent would pay Claven a fixed fee for every job as set out in Schedule 3. [Claven in turn would pay the Operative in accordance with its own contract with those operatives];
    13.7 Schedule 11 provides a WYi5 personal specification including the minimum experience and standards required when conducting the work including a dress code.

14. Claven provided the respondent with approximately 120 Operatives who were called 'field agents', including the claimant. He was paid by Claven a flat fee of £25 per job.

15. The respondent provided the claimant and the other field agents with an iPad and Mobile phone sim card containing the WYi5 App and provided training as to how the App was to be used. The claimant would be allocated a DLG job via the App. He was under no obligation to accept the work offered, but if the job was accepted he was required to contact the DLG policyholder to arrange a physical visit. He would then visit the policyholder, and using the App gather such information as was required. The App was in effect a digital template, guiding the field agent through a number of steps using a combination of tick boxes, drop down menus, free text questions and the uploading of evidence (photos, sketches and videos). The accompanying WYi5 Agent Guide provided guidance on use of the App (pages 62-84). Within the parameters of the App, the claimant could determine how he conducted his enquiries, what evidence to gather and the length of time he spent on the premises.

16. The claimant would introduce himself to the policy holder as acting on behalf of DLG. He was provided with a Claven photo ID which he would use. He did not have any signage on his car, uniform, business card, identifying either himself or the respondent. Other than the mobile phone and sim card, the claimant was responsible for providing his own equipment, and for his own expenses.

17. The WYi5 App initially had an available / unavailable button, which provided the claimant with the ability to indicate when he was available to work. This was removed in 2019 during an upgrade, and work was allocated in accordance with a list on a spreadsheet. From this date the respondent operated on the assumption that the field agent was available unless s/he informed the respondent to the contrary. A field agent was not however required to accept any particular job, nor was s/he required to do a certain number of jobs within any specified time, and s/he faced no penalty for refusing to do jobs. I accept the evidence of Mr Pease (Account Manager) that there were agents on the respondent's books who had not worked for many months. However if the agent accepted the job they were required to perform the work personally, and had no power of substitution.

18. In March 2020, the country went into lockdown due to COVID-19. By this date the claimant had already stopped working for NCI Resources and XL Counselling. He estimated that he was spending 70% of his time working for Ascent and only 30% for Claven, of which 20% was WYi5 work for the respondent. Therefore prior to COVID-19 only a small proportion of the claimant's working time was as a field agent for the respondent; this however changed in March 2020 since this was the only work available to him.

19. Following lockdown, DLG agreed that the respondent would continue to deliver the claim information gathering service via a virtual version of WYi5 called 'Digital Assisted Video Experience' (D.A.V.E.). DLG requested that the same WYi5 agents be used to undertake the virtual visits as had undertaken the in-person visits. The respondent asked Claven to select the field agents to do the work, and Claven selected the claimant and 12 others.

20. On 24 April 2020, the respondent provided the claimant with training on D.A.V.E. over MS Teams. The claimant was unimpressed by this training but that is not relevant to the issue of employment status. In order to access the D.A.V.E system the field agents were required to use their own home computers or laptops (not the mobile phone that the respondent had provided). This had practical consequences for the claimant in that he did not have a laptop and therefore this meant he had to be home based in order to pick up work. I accept Mr Pease's evidence that this was not at the behest of the respondent, and that it was the claimant's choice as to where he worked. In theory the work itself should not have changed with the move to a virtual system, however I do accept the claimant's evidence that using D.A.V.E. brought with it considerable practical and technical problems, in terms of connectivity and the ability of policyholders to provide the information required.

21. Over the Summer of 2020, with the lifting of the COVID restrictions, field agents were given the choice of returning to in-person visits or continue to use D.A.V.E. The claimant chose to continue to use D.A.V.E. for personal reasons.

22. On 22 September 2020 the respondent informed the claimant and the other field agents that it was to terminate the contract with Claven and they were offered the option of contracting directly with the respondent as a 'self-employed field agent' (pg 202-203). The claimant accepted this offer the same day (pg 162). He also informed Mr Pease that he had holiday booked in October;

although I accept Mr Pease's evidence that he was not required to do so by the respondent. I also note that Mr Pease in his statement said that an agent's unavailability would be marked on the spreadsheet used by the respondent to allocate work to ensure that offers of work were not made during any period of unavailability. This is consistent with the respondent's assumption that an agent was available unless otherwise notified.

23. On 29 September 2020 the respondent provided the claimant with the following contractual documents (pg 165): Services Agreement (pg 84-86), Service Sheet (pg 87), Charge Sheet (pg 88) and Personal Details Form (pg 89-90), together with a number of company policies. I find that these were standard respondent documents.

24. The Services Agreement provided that (pg 84-86):
    - 24.1 the respondent was the 'customer' and the claimant as the 'supplier';
    - 24.2 the 'Supplier's Responsibilities', included to '*provide the Services and the Deliverables in accordance with the Service Sheet*' (clause 3.1.1), to perform the service with the highest level of care (clause 3.1.2), to provide a valid DBS certificate at the supplier's expense (clause 3.1.3), to maintain all necessary licences and consents (clause 3.1.4) and to observe health and safety rules and regulations (clause 3.1.5);
    - 24.3 'time was of the essence' in relation to 'milestones' set for the supplier (clause 3.2); this is a reference to the timescales set out in the Service Sheet;
    - 24.4 the customer could '*change the scope or execution of the Services at its sole discretion*' (clause 4);
    - 24.5 charges were calculated by the customer in accordance with the charge sheet and the supplier would be paid on the last working day in the month following the month in which the service was complete (clause 5);
    - 24.6 the supplier was required to indemnify the customer in full against all liabilities, cost, expenses, damages and losses and to take out public liability insurance (clause 6);
    - 24.7 '*either party may terminate this agreement with immediate effect by giving written notice to the other' (clause 11);* and
    - 24.8 it was an 'entire agreement' (clause 17).

    As part of his contract the claimant was required to comply with the following respondent policies: Mobile Device Policy for WYi5 Agents using iPads (pg 119-123), Treating Customers Fairly Policy (pg 124-128); Social Media Policy (pg 129-134); Health and Safety Policy (pg 135-140); Anti-Bribery and Corruption Policy (pg 154-169); and Privacy Notice for Employees, Workers and Contractors (pg 141-153).

25. The Service Sheet stated that (pg 87):
    - 25.1 the service to be provided was either a Virtual Visit or a Physical Visit;
    - 25.2 '*contact with the policyholder should be made wherever possible within 2 hours of receiving the claim*' (referred to as a milestone);
    - 25.3 '*a Virtual Visit should be completed wherever possible within 2 working days';* and

25.4 'a Physical Visit should be undertaken within 3 working days'.

26. In respect to these timescales, Mr Pease accepted in evidence that whilst non-compliance would not automatically terminate an agent's contract and that the respondent would seek to have a conversation with the agent concerned, nevertheless the respondent had power to terminate the contract for non-compliance if it wished.

27. The charge sheet set out a fixed price for a completed virtual or physical visit of £25 per claim and £10 for a withdrawn claim. This was set by the respondent and was non-negotiable. It was the same fee that the claimant had been paid by Claven. The claimant did not receive any other benefits such as holiday pay, sick pay, travelling expenses or pension enrolment. The claimant was paid monthly in arrears for the jobs done. The claimant was responsible for his own tax and NI.

28. The claimant signed the respondent's Services Agreement on 6 October 2020 (pg 208). On being asked how he characterised the relationship the claimant answered that he '*did not give it any thought*'. On being asked if he considered the respondent to be his customer the claimant responded '*they were supplying work for me… I did not put labels on anything. They were coming to me to get the job done and I did the job*'.

29. On 7 October 2020 the respondent terminated the contract with Claven.

30. On 8 October 2020 the claimant commenced working for the respondent directly. The service to be delivered by the field agents did not change with the change in the contract and the claimant continued to work as before. The only difference identified by Mr Pease in his evidence was that the claimant was now supported by the respondent's in-house help desk and not one provided by Claven. I note that the respondent employed Ms Saunders, a Field Agent Manager, that the claimant could contact if he needed assistance or if he wanted to mark himself as unavailable for work. I was not informed when Ms Saunders was recruited to this position, but even if she was in post prior to 8 October 2020, I infer that it is likely that there was a more direct relationship between Ms Saunders and the field agents, with the removal of Claven as the third-party supplier.

31. Separately to his contract with the respondent, the claimant continued to work for Claven in relation to non-WYi5 work, although Claven work was limited over this period.

32. Between October and December 2020, following an investigation, Mr Pease and Ms Saunders had informal discussions with the claimant as to how he was carrying out the evidence gathering process using D.A.V.E. In a letter to the claimant dated 22 January 2022, the respondent set out its concerns at that time as being that the claimant had developed *"a process that does not accord with our training material, the training that you have received or the service we call D.A.V.E.*" The claimant was asked to "*revert to the process required of the job and desist from alternatives that you had determined yourself*" (pg 258).

33. On 10 December 2020 the claimant attended what looks like a more formal meeting with Mr Pease and Ms Saunders, which concluded with the claimant undertaking "*to follow the established processes for D.A.V.E in the future*" (pg 258).

34. On 13 January 2021 the respondent terminated the claimant's contract with immediate effect under clause 11. The reason given for the termination was the claimant's continued failure to adopt the correct working processes when undertaking D.A.V.E. jobs (pg 169).

35. On 23 February 2021 the claimant commenced ACAS Early Conciliation. This was completed on 6 April 2021. The claim form was presented on 28 April 2021.

The Law

Jurisdiction

36. An employee with 2 years' continuous service is entitled to claim ordinary unfair dismissal under section 98 of the ERA 1996.

37. An employee is entitled to claim automatic unfair dismissal under section 103A of the ERA 1996, on the grounds that the principal reason for dismissal is that the employee had made a protected disclosure. There is no requirement on the employee to have had 2 years' continuous service to bring a claim.

38. A worker is entitled to bring a claim for detriment under section 47B of the ERA 1996, on the grounds that they have made a protected disclosure. Therefore whilst an individual who is not an employee but who comes within the definition of 'worker' or 'extended worker' cannot claim unfair dismissal, s/he can complain that the termination of employment by reason of having made a protected disclosure constitutes a 'detriment'.

39. Therefore what, if any, claim the claimant is entitled to bring depends on his employment status.

Employee status

40. An 'Employee' is defined under section 230(1) and (2) as someone who works or worked under a 'contract of employment', meaning a contract of service or apprenticeship, whether express or implied and whether oral or in writing.

41. The common starting point for determining whether an individual is an employee are the following three factors set out in the decision of **Ready Mixed Concrete South East Ltd v Minister of Pensions** [1968] 2 QB 497L (HC):
    a) Whether the individual agreed that in consideration of remuneration s/he will provide their own work and skill in the performance of some service for putative employer ('mutuality of obligation' 'personal service')
    b) Whether the individual agreed expressly or impliedly that in the performance of that service s/he will be subject to the other's control in sufficient degree to make that other the employer ('control')

c) The other provisions of the contract are consistent with it being a contract of service ('other factors').

42. Without mutuality of obligations a contract can not exist at all. In the employment sphere, this is the agreement by an individual to provide work in return for a wage or other renumeration. An assignment can give rise to a contract of employment for the duration of that assignment: **McMeechan v Secretary of State for Employment** [1997] ICR 549 (CA). However, where the work is casual or intermittent, there will usually be no mutuality of obligations when the contract is not being performed (i.e. in between assignments): **Carmichael and Another v National Power plc** [1999] 1226 (HL). This is because there is no expectation on the employer to provide work or on the employee to accept work. If there is some continuing obligation then depending on the extent of that obligation it may give rise to a 'global' or 'umbrella' contract for the non-working periods. This can occur where the relationship is over a number of years and is such as to give rise to a mutual expectation that work will continue to be provided: **Nethermere (St Neots) Ltd v Gardiner** [1984] ICR 612 (CA).

43. In addition to the requirement for mutuality of obligation, the individual must agree to provide a 'personal service'. If the individual has the right to provide a substitute then this would be inconsistent with employee status: **Express & Echo Publications Ltd v Tanton** [1999] IRLR 367.

44. In relation to the requirement of control, the amount of day-to-day control that the employer has over the individual will vary depending on the nature of the work involved. In some areas of work an employer has little or no practical control over how the work is done since it requires individual judgement e.g. a referee during a football match: **Commissioners for her Majesty's Revenue and Customs v Professional Game Match Officials** [2021] EWCA Civ 1370 (CA). On the other hand sub postmasters and mistresses who were subjected to substantial control by the Post Office in relation to the selection of staff and compliance with post office standards, were still not employees despite the considerable level of control: **Commissioners of Inland Revenue and Ors v Post Office Ltd** [2003] ICR 546 (EAT). Therefore the level of control is relevant but not necessarily determinative.

45. Even if both mutuality of obligation and control are present, this does not lead to a presumption of employee status; the tribunal's task is to consider all the relevant factors both consistent and inconsistent with a contract of employment: **Kickabout Productions Ltd v Revenue and Customs Commissioners** [2022] EWCA Civ 502 (CA). Factors can include, but are not restricted to, financial and liability considerations (i.e. who carries the risk), how the individual is paid, who provides the equipment, whether the individual receives any employment benefits such as holiday, sick pay or pension, tax and NI, the extent of any integration into the organisation, and last but not least, the terms of the contract and the stated intentions of the parties.

Worker under section 230(3)

46. *A* 'worker' is defined under section 230(3) '*as an individual who has entered into or works under (or, where the employment has ceased, has worked under):*
(a) a contract of employment; or
(b) any other contract, whether express or implied, and (if 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.'

Therefore all employees will also be workers, but not all workers will be employees. An individual who is neither an employee nor a worker is often referred to as an 'independent contractor'.

47. Baroness Hale in **Bates van Winkelhof v Clyde & Co. LLP** [2014] ICR 730 (SC) described the three categories of relationship provided for under section 230(3) as follows:
'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.'*

48. **Uber BV v Aslam & Others** [2021] ICR 657 (SC) at para 41, identified that there are three elements to consider whether determining whether an individual is a worker under section 230(3):
48.1 First whether there is a contract at all whereby the individual undertakes to perform work or services for the other party.
48.2 Second, whether the individual concerned undertakes to do that work or perform the service personally.
48.3 Third, whether the status of the party for whom the individual worked was that of a client or customer of any profession or business carried on by the individual.

49. In relation to the second element, if the individual has an unfettered right to provide a substitute, then this could be inconsistent with worker status. In **Pimlico Plumbers Ltd v Smith** [2018] ICR 1511 (CA), to which the respondent

refers, there was limited right on the worker to substitute with another worker on the company's list. Lord Wilson stated at para 34 that this '*was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done'.*

50. In relation to the third element, Langstaff J in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 (EAT) at para 53 distinguished between an individual who *'actively markets his services as an independent person to the world in general (a person who will thus have a client or customer)'* and an individual who is *'recruited by the principal to work for that principal as an integral part of the principal's operations'.* This is sometimes referred to as the 'integration test'. Whilst this may a useful distinction in many cases, there will be cases where the business in question does not market their services at all because for example they supply a single supermarket: see comments of Elias J in **James v Redcats (Brands) Ltd** [2007] ICR 1006 (EAT).

51. The respondent has also referred me to **Hashwani v Jivraj** [2011] 1 WLR 1872 (SC), where it was stated that the essential question in each case was *'whether, on the one hand, the person concerned performed services for and under the direction of another person in return for which he or she received renumeration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. These are broad questions which depends on the circumstances of the particular case. They depend on a detailed consideration of the relationship between the parties*' (para 35). Again it provides a useful distinction, and the arbitrator who was not in a relationship of subordination to the parties for whom he arbitrated is such an example. However some small businesses may be economically dependent and subordinate to their supermarket customer: see comments of Elias J in **Redcats**. On the other hand, a hospital consultant with a high degree of autonomy over the work he performed and with three separate businesses on his own account, was nevertheless so integrated into the other party's operation as to convey on him the status of worker: **Westwood**.

52. As Baroness Hale concluded in **Bates van Winkelhof**, at para 39, following a review of the caselaw and with reference to similar words by Maurice Kay LJ in **Westwood**: '*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….. 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'.*

53. In relation to intermittent and casual work, there is no requirement to find mutuality of obligation for the periods in between assignments: **Nursing and Midwifery Council v Somerville** [2022] ICR 755 (CA). Therefore a fee paid panel member who entered into an overarching service agreement, was a worker despite there being no obligation on the NMC to offer him work or for him to accept the work offered. It was sufficient that he had agreed to provide his services personally and that the NMC was not a client or customer of the claimant's business or profession. The fact that the panel member could withdraw from a hearing after accepting it did not alter matters.

Extended definition of worker under section 43K

54. For whistleblowing claims the definition of 'worker' is further extended under section 43K(1), to include individuals who are '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"

Section 43K(1)(b) only applies in a case where an individual is deemed not to be a worker under section 230(3)(b) because of the requirement for personal service. It therefore does not assist the claimant because he does not fall foul of the requirement for personal service (for the reasons set out below). The other provisions under this section are sector or job specific and do not apply on the facts of this case.

55. Under section 43K(2)(a) 'employer' includes '*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'*.

56. In relation to a particular respondent, a section 230(3) worker cannot also be an extended worker under section 43K and vice versa: **Day v Lewisham and Greenwich NHS Trust** [2017] ICR 917 (CA).

57. What is notable about section 43K(1)(a) is that there is no requirement on a tribunal to consider whether or not the claimant provided a personal service nor whether the respondent was a client or customer of any profession or business undertaking carried on by the individual. Thus the courts have held that this provision applies even if the individual is employed through their own service company: **Keppel Seghers UK Ltd v Hinds** [2014] ICR 1105 (EAT). Therefore those who may be considered an 'independent contractor' under section 230(3)(b), may nevertheless be an 'extended worker' under section 34K(1)(a).

58. It should be noted that section 43K(1)(a) does not apply if the terms upon which the individual is engaged are substantially determined by the individual him or herself. However, if the terms of engagement are not substantially determined by the individual, his or her employer is the person who does substantially determine them: **Day** para 11. Simler J (President) in **McTigue v University Hospital Bristol NHS Trust** [2016] ICR 1155 (EAT) has given guidance to tribunals of the questions to be addressed at para 38.

'(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).'

59. Elias LJ in **Day** at para 29 suggested (obiter) that when making an assessment of who substantially determines the terms of engagement a tribunal should do so on a broad-brush basis having regards to all the factors bearing upon the terms on which the worker was engaged to do the work and not just the contractual terms.

60. The purpose of the extended definition under 43K(1)(a) was to provide cover to agency workers who would not otherwise have a contractual relationship with an end user, but it is not limited to agency workers: **Day** para 10. In construing these provisions tribunals should 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: **Keppel** para 18.

<u>The significance of the contract</u>

61. In determining employment status the tribunal has to consider what is what true agreement between the parties taking into account all the circumstances: **Autoclenz v Belcher** [2011] ICR 1157; **Uber BV v Aslam & Others** [2021] ICR 657; **Ter-berg v Simply Smile Manor House Ltd & Others** [2023] EAT 2. A number of principles emerge from these authorities:

61.1 Employment status is a statutory concept not a contractual one, and therefore should not be determined by reference to ordinary contractual principles: **Uber** para 69**; Ter-berg** para 38.

61.2 The starting point is the wording of the statute: **Ter-berg** para 44

61.3 Where employment status is in issue, the written terms of contract must not be treated as the beginning and end of the inquiry: **Autoclenz** para 35; **Ter-berg** para 46.

61.4 This is because unlike commercial contractual agreements, employment contracts often involve unequal bargaining powers of the parties: **Autoclenz** para 35.

61.5 In applying the statutory language it is necessary to view the facts realistically: **Uber** para 87.

61.6 It is also necessary to keep in mind the purpose of the legislation; that it is to provide protection to vulnerable individuals who are in a subordinate and dependent position in relation to a party who exercises control over their work: **Uber** para 87.

61.7 Any terms which exclude or limit such statutory protections by preventing the contract being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded: **Uber** para 85.

61.8 However, in determining this issue, tribunals should not ignore the terms of any written contract: **Uber** para 85; **Ter-berg** para 43-44.

61.9 **Autoclenz** and **Uber** '*does not mean that it is no longer possible for parties to a contract to genuinely and in an informed way agree that they want to form a relationship which is neither one of employee or worker nor does it mean that a written agreement might not in a given case truly reflect everything that the parties have in fact agreed*': **Ter-berg** para 45.

Ultimately the task of the tribunal is to determine the true nature of the agreement from all the circumstances of the case, applying the relevant statutory provisions.

Tripartite Contractual Relations

62. Where an individual enters into a contract with a third party (an employment business or agency) to provide work or services for an end user, then there is usually no contractual relationship between the individual and the end user. The contract that the individual has is with the employment business / agency, and it is the employment business / agency that contracts with the end user. The courts have been reluctant to imply a contract between the individual and end user, unless it is 'necessary' to do so to make the contract work: **James v Greenwich London Borough Council** [2007] ICR 577 (EAT). It will not be necessary to imply a contract where the performance of the work or service is consistent with the agency arrangement. For example the mere fact that an end user has some control over the work that the individual does, or the individual has worked for an end user for a considerable period of time, does not justify implying a contract between the two.

63. In relation to the contract between the individual and the employment business / agency, there is usually no obligation on the agency to provide work to the individual or on the individual to accept work. Therefore there is no mutuality of obligation outside a specific assignment. Whilst mutuality of obligations may arise in relation to a specific assignment, the relationship between the parties is unlikely to be that of employer: employee because the agency rarely has any day-to-day control over the individual or their work; the control usually being exercised by the end user: **Montgomery v Johnson Underwood Ltd** [2001] ICR 819 (CA); **Ducas v Brook Street Bureau (UK) Ltd** [2004] ICR 1437 (CA).

Discussion and Conclusions

Whether the claimant was an employee of the respondent prior to 8 October 2020?

64. The claimant can only be an employee of the respondent prior to 8 October 2020, if there is an express or implied contract between them. I remind myself that where there is no express contract, a contract may only be implied if it is contractually 'necessary' to do so: **James**.

65. It is not in dispute that prior to October 2020, the claimant's express contract was with Claven, and that it was Claven who supplied his services to the respondent. I consider this to be a typical tripartite contractual arrangement with Claven being the employment business / agency and the respondent being the end user. Therefore there is no need to imply a contract between the claimant and the respondent, in order to make the relationship work. Prior to October 2020, the claimant's primary relationship was with Claven. The claimant commenced work with Claven before he worked for the respondent, and prior to March 2020 the majority of the work he did for Claven was not for the respondent. It was Claven who offered the claimant WYi5 work and D.A.V.E. work, and Claven that paid him. According to the contract between Claven and the respondent, Claven was responsible for selection and training of field agents and maintaining the standards of service specified under that contract.

66. The claimant argues that the move to the virtual D.A.V.E. system after March 2020 changed his employment status to that of employee of the respondent because he was now required to use a computer at his own expense rather than the mobile phone provided by the respondent. It also meant that he had to remain at home if he wanted to work, since he did not have a laptop. I do not accept that this created an implied contract between the claimant and the respondent. The work was substantially the same, and there was no change to the claimant's contractual relationship with Claven. The work that the claimant did for the respondent continued to be governed by the tri-partite relationship of agent / agency / end-user. If anything, having to purchase his own computer equipment rather than being provided with equipment by the respondent points away from the claimant being an employee of the respondent. Further, the reasons why the claimant worked from home after March 2020 was (a) due to Government imposed lockdown restrictions, (b) that he did not have a laptop that would have enabled him to be more mobile, and (c) that he did not wish to be more mobile for perfectly understandable personal

reasons. However, none of these were as a result of any requirement imposed on the claimant by the respondent, and therefore it is not necessary to imply a contract between them merely because the claimant now worked virtually from home using his own equipment.

67. In the absence of any express or implied contract between the claimant and the respondent prior to October 2020, I find that the claimant was not an employee of the respondent prior to October 2020.

Whether the claimant was an employee of the respondent from 8 October 2020?

68. From the 8 October 2020 it is not in dispute that there was an express contract between the claimant and the respondent. The next issue for me to consider is whether that was a contract of employment. The respondent argues that nothing changed, and I accept that may have been the case in relation to the work that the claimant was asked to do. However, there is now a contractual relationship between the parties which had not existed before, and it is the nature of that relationship that I have to determine.

Mutuality of obligation

69. I have no difficulty finding that there was sufficient mutuality of obligations in relation to the performance of each assignment. Once the claimant had accepted a job, he was required to perform the work in accordance with his contract and having done so the respondent was required to pay him for that work. This is a classic work / wage bargain. I accept that the claimant could change his mind and return the job, but there was still an agreement that when he performed the job he would be paid, and he would also be paid a withdrawal rate if the policy holder cancelled.

70. The real issue is whether there was an overarching contract covering the period in between jobs. I note that there was no obligation on the respondent to offer the claimant WYi5 or D.A.V.E. jobs and there was no obligation on the claimant to accept any job allocated to him. Further, there was no adverse consequence if the claimant refused to take on any job or requirement on him to do a fixed number of jobs. Even after agreeing to take on a job the claimant could cancel without repercussion. In such circumstances I do not consider that there was any mutuality of obligation in between jobs. The mere fact that the respondent assumed the claimant would be available for work, and that the claimant would be expected to comply with some of the respondent's policies, on for example social media and privacy, does not in my view give rise on the facts of this case to mutuality of obligation for the periods in between jobs.

Personal service

71. In relation to personal service, once the claimant had accepted a job, he was required under his contract to perform the work personally. The contract did not provide the claimant with an express right to ask someone else to do the work on his behalf. This was confirmed by Mr Pease in evidence. There may have been practical reasons for this, given that the respondent used specialist technology that required training and the respondent needed to maintain a

certain standard in the services provided to DLG. However the fact remains that the contract with the claimant provided no right of substitution.

72. The respondent has sought to argue that the claimant was not required to render personal service, since if he refused a job it would be passed on to another agent. I accept that is what occurred, but that is not the point since this part of the test is addressing whether the claimant when accepting a particular job was undertaking to perform it personally, which he was.

Control

73. The respondent submitted that it had no control over the service that the claimant provided. I accept that the claimant controlled his days and hours of work and could choose whether to conduct the visits physically or virtually. However once a job was accepted, in my view the claimant was subject to control by the respondent.

74. In particular, the claimant could not choose to depart from the use of the WYi5 and D.A.V.E. processes provided by the respondent, and he was required to comply with their training and guidance. This is evidenced by the fact that when he did depart from the respondent's processes he was spoken to both informally and then formally and when he continued to fail to comply his contract was terminated. It may well be that compliance was required in order to fulfill the terms of the contract between the respondent and DLG and to comply with stringent industry norms and standards, nevertheless the respondent not the claimant determined the process for arranging and conducting visits. I note that the whole purpose of the technology developed by the respondent was '*to manage and control a disparate set of remote workers*'. It did that by guiding the user through a series of steps on a digital template; whilst the claimant could determine which order to complete the steps and even what questions to ask or what information to gather, nevertheless this was to be done within the overall parameters set by the respondent.

75. Further once a job was allocated to the claimant, the respondent largely controlled the timescale within which a physical or virtual visit was to be arranged and completed. The initial contact with the policy holder was to be made within 2 hours and a virtual or physical visit to be completed within 2 or 3 days respectively. The respondent points out that the contractual provision on timescales was only 'wherever possible'. However, the contract specifically stated that 'time was of the essence' in relation to the initial contact 'milestone' set out in the service sheet. Further, if timescales were not complied with the field agent would be spoken to and the contract could be terminated.

76. Therefore, I conclude that once a job was accepted by the claimant the respondent had considerable control over how the job was done.

Other factors

77. Finally I consider whether there are any other factors that are consistent or inconsistent with employment status.

78. First I note that the intentions of the parties was inconsistent with the claimant being an employee. Under the written contract the parties do not refer to themselves as employer and employee. Whilst I must take into account the unequal bargaining powers of the parties and that this is not a case where it could be said with any certainty that the claimant was sufficiently informed as to the employment status that he was agreeing to, he was nevertheless clear in evidence that he considered himself to be self-employed rather than employed. This does not alone determine his employment status but neither do I ignore it and it is a factor that I take into account.

79. I also consider it to be inconsistent with employee status that the claimant has not suggested at any point that he was an employee of Claven, or that there was any significant change in the true nature of his relationship on transfer to the respondent on 8 October 2020.

80. I consider the casual and intermittent nature of the relationship between the parties to be a significant factor pointing away from employee status. Whilst the amount of work done for the respondent increased after March 2020, it was still irregular and uncertain.

81. The financial arrangements were also inconsistent with the claimant being an employee. The claimant was paid gross and was responsible for his own tax affairs. He was also responsible for providing his own equipment (with the exception of the iPad and mobile phone to use with WYi5), paying for DBS checks and insurance, and indemnifying the respondent against liabilities, cost, expenses, damages or losses. Other than the flat rate, he received no financial benefits such as travel expenses, holiday or sick pay or pension.

82. Also inconsistent with employee status was the limited extent to which the claimant was integrated into the respondent business. In particular, but not limited to, was the fact that:

    82.1 he was required to use his own personal phone number and email address;
    82.2 he did not use the respondent's business cards and did not introduce himself to policyholders as acting on behalf of the respondent;
    82.3 he did not wear a uniform or have any other feature that identified that he was working on behalf of the respondent;
    82.4 he was not provided with an ID badge by the respondent, although I note that Claven had provided him with ID. I also note that from October 2020 the claimant had no need for an ID card since he was using the D.A.V.E. virtual system. Also there is no evidence that the claimant ever used his own ID;
    82.5 although he was required to comply with some of the same policies and procedures as applied to employees, there were other employee policies that he was not required to comply with;
    82.6 he worked from home or in the field and was rarely, if at all, required to visit the respondent's premises; and
    82.7 he was not invited to respondent events, for example Christmas parties.

83. Whilst the fact that the respondent provided in-house training in relation to the use of WYi5 and D.A.V.E. is potentially consistent with employee status, I note that this was the only training provided and is equally consistent with the limited nature of the relationship between the parties.

84. Potentially more consistent with employee status was the use of the respondent's helpdesk and the employment of a field agent manager to whom the claimant could report. However, in my view the relationship was still one at arms-length, and there was no evidence put before me that anything significantly changed on 8 October 2020.

85. In conclusion, I recognise that there are some features that point towards employee status, in particular that there was mutuality of obligation in relation to each assignment, personal service and a level of control by the respondent over the work done. However there are also features that point away from employee status. Taking into account all the circumstances, particularly the intermittent and casual nature of the relationship, the fact that the claimant has complete control over what, if any, work he did for the respondent, the financial considerations, the limited integration into the respondent's business, and the stated intentions of the parties, it is my view that on balance the true relationship was not that of employer/ employee.

Worker status under section 230

86. I move on to consider whether the claimant was a worker under section 230(3)(b). This is a separate test and following the advice of Baroness Hale in **Bates van Winkelhof** and Maurice Kay LJ **Westwood**, I will focus on the statutory wording.

87. First, it is not disputed that from 8 October 2020 there was an express contract between the claimant and the respondent.

88. Second, I have found above that the claimant was required under the terms of his contract to provide services personally and had no right of substitution. The facts are more clear-cut than in the **Pimlico Plumbers** case, where there was at least a limited right to substitute with another worker on the employer's list, yet the restriction on the right was still considered to be such as to fulfil the test of personal service. Personal service is however only part of the test to be applied under section 230(3)(b).

89. Third, the real issue in this case is whether the respondent was a customer or client of the claimant's profession or business undertaking. In order to determine this issue I have to consider the true relationship between the parties taking into account all the circumstances: **Autoclenz**.

90. The express contract describes the claimant as the 'service provider' and the respondent as his 'customer'. This description does not in my view reflect the reality of the relationship between the parties.

91. The respondent submits that the claimant described himself in evidence as a service provider, providing a service to customers which included the

respondent. I consider that his evidence on this issue was unclear and confused. He described himself as a 'self-employed sole trader' for tax purposes, however when asked if the respondent was his customer he responded that 'they were supplying work for me', this is fact suggests that the respondent not the claimant was the supplier. He then went on to state that he 'did not put a label on it', as far as he was concerned the respondent asked him to do a job which he did. There is no suggestion in this response of the claimant viewing the respondent as his customer or client.

92. In any event, when considering the true relationship between the parties I must consider not just the label that the parties use but what in fact occurred. The fact that an individual is self-employed does not prevent them being a worker, indeed as Baroness Hale made clear in **Bates**, workers are by definition persons who are self-employed. What I have to determine is what type of self-employed person they are.

93. The respondent further submits that the relationship did not change on 8 October 2020 and that the claimant continued to do the same work as he had done before. I accept that the work that the claimant did for the respondent did not change but that does not resolve the question as to whether or not he was a worker. The difficulty for the respondent in this argument is that there clearly was a change in contractual status, since the respondent now had a contractual relationship with the claimant that did not exist prior to 8 October 2020. Further, implicit in the respondent's submissions is an assumption that the claimant's relationship with Claven was not one of worker, but there has been no evidence adduced as to what the claimant's true relationship with Claven was, therefore I cannot assume that the fact there was no change in the work that the claimant did means that he was not a worker of the respondent from 8 October 2020.

94. If the 'integration' test is applied then it is clear that the claimant falls into the worker category as opposed to the independent contractor category. The claimant has no identifiable business, he does not have a business name, logo, cards and does not market his services to the world in general, or at all. He did not invoice the respondent for his services but was paid monthly in arrears for any jobs he did for them. Although he was not 'integrated' to the extent that he would have been if he were an employee for the reasons set out above, nevertheless he was integral to their business. The respondent could not have delivered the information gathering services to their client, DLG, without the services of the claimant and other field agents who they engaged. The claimant was using the respondent's products not his own, and he was required to adhere to the respondent's policies and processes not his own. He may not have introduced himself to policyholders as working for the respondent, but neither was he introducing himself as working for himself. He was introducing himself in effect as acting for DLG, who were the clients of the respondent not the claimant. Finally he was certainly not free to offer WYi5 or D.A.V.E work independently of the respondent, therefore contrary to the submissions of the respondent, he was tied to the respondent in relation to this work.

95. The fact that the claimant did other work for Claven and for other employment businesses / agency does not in my view mean that he is not a worker in relation to the work he did for the respondent. I suspect that the reality of most casual

piece work is that individuals often sign on with more than one business. Although I have found that the intermittent nature of the work that the claimant did for the respondent counted against his status as employee, it is of less significance when considering the status of worker.

96. If the subordination test is considered then it is also clear that the claimant falls into the worker category since the claimant was working for, and under the direction of, the respondent. Facts which support this include, but are not limited to, the following:
    96.1 the respondent dictated the terms of the relationship through their contract;
    96.2 the respondent determined what services were to be provided;
    96.3 the respondent could change the scope or execution of the services to be provided at 'its sole discretion';
    96.4 the respondent determined the rate to be paid and this was non-negotiable;
    96.5 the respondent determined how much work the claimant would be provided with; the claimant had the right to refuse but did not have the right to be given more work;
    96.6 the work was allocated in accordance with a system devised by the respondent; and
    96.7 the respondent directed, through its technology, how the work would be carried out.

97. The respondent further submits that the claimant was not a worker because there was no mutuality of obligations. As is clear for the case of **Somerville**, that is not a necessary requirement. I have found that there is mutuality of obligation in relation to each job but accept that there is insufficient mutuality of obligation for the period in between jobs such as to create an umbrella employee contract. However the service that the claimant provided was governed by a service agreement which sets out the mutual responsibilities of the respondent and the claimant when a job is offered and accepted, that is sufficient to confer worker status as long as the respondent was not the claimant's client of customer.

98. Taking all the above into account I consider that the claimant was a worker because he undertook to perform the work that he did personally, and it cannot be said that the respondent was a client or customer of the claimant. Therefore the wording of the Services Agreement does not reflect the true relationship between the parties, on a realistic assessment of the facts in this case. In so concluding I take into account that this was a standard contract over which the claimant had unequal bargaining power and that the claimant was in a sub-ordinate position (for the reasons set out above). Finally, this is not a case where I can conclude that the claimant had a 'genuine and informed' intention to enter into a contractual relationship with the respondent that was neither that of employee nor worker.

Extended definition of worker under section 43K(1)

99. If the claimant is a section 230(3)(b) worker then he cannot also be a 43K(1) worker. However, in case he does fall the wrong side of the line, I have gone on to consider whether he was a section 43K(1) worker.

100. There are two parts to this definition: first whether he was supplied or introduced by a third party, and the second whether the claimant was engaged to do work on terms substantially determined by the respondent or the third party or both. It is not in dispute that the work that he did was for the respondent.

101. Prior to October 2020 the claimant was supplied by Claven to the respondent to carry out the work of a field agent. After 8 October 2020, the claimant was no longer supplied by Claven because the respondent had terminated its contract with Claven. However on a natural meaning of the words, the claimant had still been introduced to the respondent by Claven. All that changed was that the respondent was stepping into Claven's shoes to directly employ him and the other field agents. The claimant was not engaged as a result of an approach by the claimant to the respondent, nor was there a recruitment or tendering process. The reason why the respondent entered into a relationship with the claimant was as a result of an introduction by Claven, a third party, and therefore the first part of the definition is complied with.

102. On 6 October 2020 the claimant signed a contract whose terms were substantially determined by the respondent and not the claimant. It was the respondent's standard contract, and required the claimant to comply with its standard terms and policies. The respondent determined the work that the claimant was to do, the timescales and the rate of pay. The claimant had no say over these terms, and whilst I accept he did not try, in my view it is unrealistic to suggest that he would have been able to substantially alter any of the key terms. The respondent accepted that he was not able to negotiate over the rate of pay. In any event the statutory test is that the terms were in practice 'not substantially determined' by the claimant and no-one has suggested that they were.

103. I also take into account the need to adopt a purposive approach when determining entitlement to statutory protection such as the right not to be victimised for whistleblowing. Therefore if there was any doubt as to whether the claimant was introduced to the respondent or who substantially determined the terms of the contract, which there is not in this case, I would be required to construe the provisions in favour of the claimant.

104. Therefore, if the claimant is not a worker under section 230(3) then he would be an extended worker under section 43K(1)(a).

Final conclusion

105. The claimant was a worker of the respondent from 8 October 2020, he is therefore entitled to bring a claim for detriment because of a protected disclosure under section 47B of the ERA 1996.

106. Since the claimant was not an employee of the respondent the tribunal has no jurisdiction to consider his claims for ordinary unfair dismissal and automatic unfair dismissal. Accordingly these claims are struck out.

107. The parties are reminded that this judgment relates to employment status only and is not an indication either way as to the merits of the claim for detriment, which is still to be determined.

108. Case management orders following this judgment to be issued separately.

Employment Judge Hart
Date: **17 April 2023**

JUDGMENT and SUMMARY SENT to the PARTIES ON
21 April 2023

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FOR THE TRIBUNAL OFFICE

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