EMPLOYMENT TRIBUNALS

Claimant: **Mr S Cresswell**
Respondent:
(1) High Speed Two (HS2) Limited
(2) Talascend Limited
(3) AtkinsRealis UK Limited

PRELIMINARY HEARING

Heard at London South: by CVP **On:** 23 November 2023

Before: **Employment Judge Truscott KC (sitting alone)**

Appearances:

For the Claimant: **Ms R Owusu-Agyei barrister**
For the First Respondent: **Ms R Thomas barrister**
For the Second Respondent: **Ms L Flynn solicitor**
For the Third Respondent: **Ms J Hale solicitor**

JUDGMENT on PRELIMINARY HEARING

The claimant is a worker of the first, second and third respondents in terms of section 43K(1)(a) of the Employment Rights Act 1996.

REASONS

Preliminary

1. The claimant asked the Tribunal to:
(a) find that he was a worker of the respondents under section 43K of the Employment Rights Act 1996 ("ERA");
(b) make the case management orders suggested in the claimant's agenda for the existing final hearing listed in July 2024.

2. In relation to the second matter, the Tribunal has made the necessary case management Orders in a separate document.

3. In relation to this hearing, on 3 July 2023, EJ Khalil stated that today's preliminary hearing is listed:
"to determine the Claimant's employment status and subject to that, case management as required." [50]

4. No case management Orders were made for this hearing which was listed on 27 June 2023 [48-49]. In preparation for this hearing, the claimant's solicitors wrote to each of the respondents' solicitors to suggest dates by which a bundle could be agreed and witness statements exchanged. None of them responded. On 3 November 2023, as proposed, the claimant's solicitor disclosed the documents on which the claimant relies in his bundle and proposed the exchange of witness statements on 17 November 2023. Solicitors for the third respondent suggested an alternative timetable for disclosure, a bundle and witness statements but did not disclose any documents or send a witness statement on the proposed date. Solicitors for the first and second respondents did not respond. On 15 November 2023, the claimant's solicitor sent an updated bundle for the preliminary hearing to the respondents. The following day, solicitors for the first and third respondents suggested they were taking instructions but did not disclose any documents or state whether they would be relying on witness statements and/or documents. On 20 November 2023, the claimant's solicitor asked the respondents to advise whether they will be disclosing any documents or relying on witness statements, and, in the absence of a response, the claimant will be submitting his bundle and witness statement to the tribunal on 21 November 2023. None of the respondents responded. The claimant's solicitor sent the bundle and the claimant's witness statement to the tribunal at 8.23am on 21 November 2023. Having not indicated that they would be relying on witness evidence, and after having had sight of the claimant's witness statement, at 5.02pm on 21 November 2023, solicitors for the third respondent submitted a witness statement and documents not previously disclosed to the claimant. On 22 November 2023 at 2.44pm, solicitors for the second respondent sent a witness statement to the claimant. The statement refers to documents that have not been disclosed. The second respondent also relied on its application to strike out, dated 7 November 2023.

5. The Tribunal sought to ascertain whether any party had been prejudiced by what had taken place, particularly the claimant. The claimant wished the hearing to go ahead and the other parties did not object.

6. The Tribunal heard evidence from the claimant, Mr David Robertson, managing director of the second respondent and Mr Paul Miller, practice director for risk management services of the third respondent who also had a part-time role with the first respondent as a Central Team Adviser.

7. There was a bundle of documents provided by the claimant to which the third respondent added some emails regarding the claimant's appointment to third respondent.

Findings

1. The claimant is a leading Project Risk Management practitioner, which includes performing Quantitative Cost Risk Analysis and Quantitative Schedule Risk Assessment. He is also an experienced Value Management practitioner. Value Management ("VM") is focussed on attaining a desirable and efficient balance between the needs and wants of a wide range of stakeholders and the resources needed to satisfy them. VM activities include project option generation and selection and option development, including "value engineering", which are incremental changes that enhance benefits and/ or optimise resource use.

2. In 2008, the claimant incorporated a limited company called Into Risk Limited, of which he is the sole director and employee. Into Risk Limited provides project, operations and strategic planning, value management, workshop facilitation and business training.

3. The first respondent ("HS2") is the non-departmental public body responsible for developing and promoting the High Speed Two rail programme. The company is a party to a Development Agreement made with the Secretary of State for Transport. HS2 is described as the largest infrastructure project in Europe. It represents approximately 50% of the financial value of projects in the Government Major Projects Portfolio..

4. The second respondent is a company which provides outsourced payroll services to clients and payroll services to freelance professionals. The second respondent was engaged by the third respondent.

5. In July 2020, the third respondent was successful in securing the Commercial Delivery and Controls Professional Services Framework (known as the CDC framework) with HS2. This included a range of services of which risk management was only one. HS2 is required to access temporary resources through the CDC framework. Within that framework HS2 can ask it to supply appropriately qualified personnel to work on the HS2 project. The personnel that it supplies can work on what is known as 'task and finish activities' or 'business as usual activities'. In either circumstance, anyone appointed by HS2 through the CDC framework is appointed on a six-month contract, after which either the appointment is ended or extended. Under the terms of the CDC framework, HS2 is required to provide the third respondent with adequate notice if it decides that it no longer needs the services of anyone that is supplied by it under the CDC framework.

6. As part of the Sir David Higgins Review of HS2, the claimant provided a Quantitative Schedule Risk Assessment of alternate schedule scenarios for the project and High- level Cost Risk Analysis that included the modelling of interdependencies. This engagement commenced on 13 January 2014, and the final deliverable was sent on 10 March 2014. The engagement with the Higgins Review was via Turner and Towsend, a large consultancy which was project managing the review and team.

7. Prior to 2020, the claimant's typical pattern would consist of a single large time-based contract and multiple smaller assignments contracted as a business. During 2020, the consulting work was impacted by the Covid-19 pandemic as there was a large component that was workshop based and/ or international.

8. The claimant was engaged on a part-time basis between late 2018 and 2020 via framework agreements between HS2 and T&T and HKA Global. Tasks were principally cost and schedule risk analyses.

9. In 2021, HS2 asked the third respondent to approach the claimant, as he had worked with it before and his work was well known. The additional emails provided by the third respondent were sent at this stage. Ray Sloane (Project & Programme Risk Manager) of Faithful & Gould ("F&G") which had been acquired by the third respondent

in 1996 approached the claimant. In the course of the discussions, on 10 February 2021, Ray Sloane of F&G forwarded to the claimant an exchange of emails that had passed between him and his colleagues at F&G and the third respondent [50A-F]:

> "Apologies for being pedantic - but IR35 is a potential issue with HS2…For the avoidance of doubt all resource proposed to HS2 must be proposed as inside IR35 without exception.."

10. The claimant's engagement was to start at two days per week but would move to four days per week. There are also related text messages between the claimant and Ray Sloane of F&G: " Sorry to ask but I'm getting hassled", "getting follow ups every couple of hours", "HS2 are expecting you on 1 March" [51-59].

11. The second respondent's E Shrader set out three options for payment to the claimant [68], it was for the claimant to determine which basis suited him. As the claimant wished to retain the involvement of his service company, the "deemed" route which was suggested as the more appropriate by the second respondent, was selected by the claimant. On 15 March 2021, Rebecca Mason of the second respondent (trading as MyPay+) sent the claimant a contract [64-76]. The terms of the contract of this, the third engagement, were on the standard terms supplied by the second respondent, but incorporated specific terms in a schedule to the contract. The contract was deemed to be within the scope of IR 35 despite containing references to "off payroll" not applying. The amount of work required the claimant to allocate himself to the project on a full-time basis.

12. On 19 March 2021, Into Risk Limited entered into the contract with the second respondent (trading as MyPay+) where the claimant signed as a director, whereby the claimant would provide his services to the third respondent. The contract was for a fixed term, due to expire on 31 December 2021 [67] The claimant's services were to provide project risk management services, including supporting revisions and updates to the exercises previously undertaken between November 2018 and December 2020.

13. The second respondent agreed to provide Into Risk Limited with payroll services in relation to provision of his services. The second respondent requested:

> 1. evidence that any individuals providing the Services were legally entitled to work in the UK ("Proof of ID");
> 2. a declaration from any individuals providing the Services as to whether they have any unspent criminal convictions ("Criminal Record Declaration"); and
> 3. a reference for any individuals providing the Services ("Reference Request");

14. What remained to the third respondent was to confirm if the claimant was being asked to remain for any additional time or to confirm if he was not going to be used by HS2 anymore.

15. On or around 15 November 2021, at the request of the third respondent, the second respondent issued to the claimant's company an update to the agreement, confirming that the anticipated termination date for provision of the services was to be extended to 31 July 2022 [85-89]. This time, the contract correctly stated that "Off Payroll" applies (i.e. that the contract was within IR35) [86].Invoices submitted to the second respondent show tax deductions were made from March 2021 onwards [99A-105].

16. On 12 September 2022, the second respondent extended his engagement at the request of the third respondent to 31 December 2022 [98-99] although his engagement actually ended on 30 September 2022. Again, the contract stated that "Off Payroll" applies [98].

17. Clause 1 of the contract states that nothing shall constitute the relationship of employer and employee or any partnership [68]. It also states that the claimant could sub-contract his services. This did not happen and would not have been permitted by HS2 as they required his expertise.

18. The claimant started work in late March/April 2021. This was later than HS2 wanted, but the claimant had other commitments and he also carried out research and consulted with his accountant on the implications of working inside IR35 which included matters such as taxation, insurance and pension contributions. This caused the claimant to seek a higher rate than usual. HS2 did agree to take some contractors on what were known as 'starred rates', which were outside the rates that HS2 set in the CDC framework. The claimant was on a starred rate. His engagement with HS2 from 2021 onwards was negotiated purely on the basis of hours and rate. The third respondent acted as the 'go between' in the negotiation, but ultimately it was HS2's decision to proceed on the basis of the final agreed rate.

19. When HS2 decided to use the claimant and the claimant agreed to do the work for HS2, he went through the Resource Approval Process (RAP) which was run and operated by HS2. This took about two to three weeks. The third respondent provided the claimant with an onboarding pack, which outlined the HS2 project. At some point, the claimant was required to complete some mandatory training for the third respondent/F&G and SNC Lavalin, the parent company of the third respondent. F&G had to send him links to be able to do that as he did not have access to any third respondent systems [81-84 and 90-91].

20. The way the contractual arrangement worked was that the claimant would work for HS2, he would complete weekly time sheets that were provided by the second respondent (through its trading name of MyPay). On 29 March 2021, MyPay+ emailed the claimant to inform him that all contractors must have expenses pre-approved by the end client, HS2 [79-80]. The third respondent got confirmation that the timesheets were approved, the second respondent then sent the third respondent an invoice for the work that had been approved by HS2 each week and the third respondent sent HS2 a corresponding invoice each month.

21. The claimant had a line manager at HS2 and he reported matters such as sickness and leave to them. HS2 was responsible for controlling the claimant and his work overall and on a day-to-day basis. If it had any issues with the claimant, HS2 would deal with them.

22. The claimant was to work on HS2 sites in London/Birmingham [67]. He was supplied with an HS2 laptop and email/ IT account [77-78] by HS2. This included provision of licences for Palisade @Risk, a specialist software package for risk analysis. However, the HS2 IT department could not get the software to work so the claimant relied on his own copy of the software and his own IT to undertake cost risk

analysis. It took around one year for the IT issues with the software to be resolved. The claimant was also given licences for Oracle Primavera Risk Analysis - another specialist project schedule software package.

23. The claimant submitted timesheets on a monthly basis, from which the second respondent created invoices and made payments to him, less deductions pursuant to IR35 [99A-105].

24. Although the written terms and conditions of engagement in the second respondent's contract were similar to those in earlier contracts that applied before 2021, the working practices were different, the claimant had much less discretion and autonomy, with more direction and control by HS2.

25. Formally his reporting line was into Rebecca Gabriel, HS2 Director of Risk. The Director of Risk was within the Project Management Office. The role of the central risk function, a part of the Project Management Office, was to provide human resources, access to infrastructure, standardised processes, training, guidance and also look after or strategic risk management. The claimant worked on a number of different exercises assigned to him by the Risk Director so, on a day-to-day basis, he would report in to whichever HS2 manager required the outputs of the analyses or exercise being undertaken. One exception to this was the authoring of the Assumptions Management Process, where the responsible Manager was Rebecca Gabriel. Another exception was the Phase 2a Cost Risk Analysis when Rebecca Gabriel gave specific instructions on a numerical parameter to be used in the modelling, she explained that she was passing on a request from Michael Bradley, the Chief Financial Officer.

26. By the end of the assignments, the claimant was using HS2's standard approaches and tools to undertake cost risk analysis (which he had partly helped to develop).

27. The claimant provided a detailed list of the work he carried out for the first respondent at paragraph 29 of his witness statement which was not challenged and is not repeated here.

28. Throughout his assignment to HS2, written deliverables (such as reports and presentations) were either unbranded or HS2 branded having the HS2 logo and fonts etc. HS2 had final editorial control over formal documents to be passed to the Department for Transport, for example, analysis reports used for governance and final sign-off responsibility was with HS2. Formal documents were prepared with an HS2 template, that on the cover would have an author, a reviewer and an approver. The approver would be HS2 staff. Following their approval, these documents would then be 'controlled documents' with a document reference number. The claimant would be asked to make changes to the documents as required by the HS2 approver. This is in contrast to his practice when he contracts with other organisations as an independent consultant, when he either uses his own Into Risk branded templates for documents and presentation or uses unbranded templates. The branding differentiates between internal and external content and ownership.

29. The claimant was required to attend the HS2 Risk Team meetings and "All Staff" events. All Staff events were typically teleconferences about the progress made

on the project and other matters. Mark Thurston, the then CEO, would typically be the key presenter, with other segments by Human Resources and other senior managers.

30. There was a roster to present a "Values" moment at the monthly HS2 Risk Team meeting. When it was the claimant's turn to present, in early 2022, he chose the HS2 "Leadership" value. he gave a presentation outlining the inaccuracies of Qualitative Risk Assessment with 5 point "very low" to "very high" scales as was used by HS2 for corporate risk reporting.

31. The Chief Financial Officer of HS2, Michael Bradley, ran a Value Awards Programme. In April 2022, the Phase 2a Project Controls Team (including the claimant) was nominated for a Values award for "Integrity", and later won the award [92-94j. The other members of the team were Shah Ahmed, Jamie Macfarlane, Colin McDonald and Graham Ramsden. Shah Ahmed and Colin McDonald were employees of HS2; Graham Ramsden had been seconded to HS2 by his employer, Equib Limited; The claimant was sent a certificate through the post, signed by Shira Johnson HR Director [95], along with a matching tie pin. He was also sent by email an HS2 branded background for use in online meetings [97J]. There was a planned lunch with Mark Thurston in Birmingham, though this was later downgraded to an online event.

Submissions

32. The Tribunal heard oral submissions from all parties with written submissions from the claimant and first respondent.

Law

33. PIDA 1998 deliberately extended the scope of its protection beyond employees, applying to 'workers' instead. As the Act operated by reading its provisions into the ERA 1996 (particularly as Part IVA) this adopted the general definition of 'worker' in the ERA 1996 s 230(3). The claimant in particular and the other parties were in agreement that the claimant was not a worker under these provisions.

34. Section 43K of the Employment Rights Act 1996 ("ERA") states:

> 43K.— Extension of meaning of "worker" etc. for Part IVA.
>
> (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,
>
> (b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",
>
> …
>
> (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, ...

35. In **Croke v. Hydro Aluminium Worcester Ltd** [2007] ICR 1303 EAT, the Employment Appeal Tribunal held that the introduction or supply of an individual for the purpose of section 43K can include an individual introduced or supplied by an agency even where that person is operating through their own service company.

36. In **Keppel Seghers UK Ltd v. Hinds** [2014] ICR 1105 EAT, the Employment Appeal Tribunal also considered the extended definition in the context of a personal service company. The EAT held that the protection afforded by section 43K extends to relationships where, although there is no contract between the two protagonists, contracts exist between each of them and other parties that impact (if not govern) the relationship between them. What matters is whether the 'worker' had been introduced or supplied to the 'employer' who decided the terms of the engagement. It said at paragraph 59:

> "The protection extends to relationships where there is no contract in existence between the parties (see Cox J in Sharpe at paragraph 237) and to cases where there might be no direct contract between the complainant and the user of her services but contracts between each of them and other parties, impacting upon (if not governing) their relationship. This might include a contract between the complainant and an employment agency where the complainant is engaged through her own service company (see Croke)."

37. In **McTigue v. University Hospital Bristol NHS Foundation Trust** [2016] IRLR 742, EAT, Simler J (as she then was) set out the relevant questions the tribunal should ask when assessing whether a claimant falls within the protection of section 43K(1) at paragraph 38. These questions are addressed later.

38. The provision was also considered by the Court of Appeal in **Day v. Health Education England & Anr** [2017] ICR 917 CA, the Court of Appeal held that it is an error of law for a tribunal to approach the issue of who in practice substantially determines the terms on which an individual is engaged to do work for a third party as though it is necessary to identify a single body primarily responsible for such determination. It is open to tribunals to find that both the introducer/supplier of the individual's services and the end-user of those services both jointly 'substantially determined' the terms of the claimant's engagement.

DISCUSSION and DECISION

39. This issue arises in considering the third engagement by HS2 of the claimant which commenced on 1 March 2021. In relation to the first respondent:
(a) It insisted that the claimant could only be engaged on the basis that he was to be "inside IR35" [50A]. he tribunal took from this that had there not been the intermediaries of the second and third respondents, the claimant would likely have been an employee of the first respondent.
(b) It determined the contractual arrangements by which the claimant would be engaged. It required the claimant to be engaged via its "*approved umbrella company*" First [50A] (of which the second respondent is a subsidiary [61];

(c) It determined the number of days a week the claimant would work.
(d) It determined what work he would do and where he would do it.
(e) It supplied the claimant with a work laptop, email account, IT account and software [77- 78]
(f) It trained the claimant and required the claimant to report to its employees.
(g) It required pre-approval of expenses [79-80]
(h) It controlled the claimant's work.

40. During the exercise with Land and Property, he found that the risk data was out-of-date because the capture of information during reviews was highly inefficient. To remedy this and try to bring the Land and Property risk information up to date as quickly as possible, he started to use my own tool that he had optimised for efficient use in workshops and meetings. On seeing this, one of the other risk managers escalated a complaint to management about the use of tools and templates that were not HS2's prescribed format. Rebecca Gabriel insisted that he stop using the tool, and also raised the matter with Tenia Chatzinikoli who he was reporting into for the L&P assignment. The claimant says he was severely admonished and the overall tone was that of a disciplinary. Rebecca Gabriel did not discuss this with him and there is a screen shot of the Teams conversation with Damian Mortimer [94A]. The Tribunal is doubtful that this was disciplinary.

41. The first respondent substantially determined the terms on which the claimant was engaged to do the work.

42. The second respondent supplied the claimant to the third respondent. The second respondent says in its ET3 at paragraph 21 that "[it] did not decide upon the specific terms (such as the nature of the Services, the location, the start or end dates or the fee" which is correct. The second respondent points to the third respondent. Whilst this is correct as far as it goes, the second respondent provided the written terms on which the claimant was supplied to the third respondent [67-69; 86-89; 98-99] which are far beyond what is necessary for a payroll function. As the Tribunal did not see any contact conditions between the second and third respondents, it cannot make a finding as to why these terms were imposed by the second respondent on the claimant. The second respondent required the claimant to provide proof of his identity, his ability to work in the UK and references [72-76]. The claimant was required to send timesheets to the second respondent. The second respondent paid the claimant (through his personal service company) and made deductions for national insurance contributions and employment taxes at source [99A-105]. The claimant selected the "deemed" basis of employment. The second respondent undertook to pay the claimant regardless of whether or not it was put in funds by the client. It said [69]:

> " Since MyPay+ are a sub brand of First Recruitment Group, we do not rely on funds from an agency before making payments to you, therefore being paid through MyPay+ will mean that everything you need will be under one roof from recruitment through to payment…"

43. The second respondent substantially determined the terms on which the claimant was engaged to do the work.

44. The third respondent both introduced and supplied the claimant to the first respondent. The first and third respondent's contractual terms have not been

disclosed. Nevertheless, there must have been an agreement between them whereby the third respondent sources workers for the first respondent. The first respondent accepts this in its grounds of resistance [25, paragraph 5-7]. There may have been other terms of the contract. The claimant negotiated his rate of pay with the third respondent's employee (through the third respondent's subsidiary, Faithful + Gould) [51-59]. It instructed the claimant to enter into contractual relations with the second respondent in order to perform work for the first respondent [56-59]. The claimant was required to take training as directed by the third respondent [90-91]. The second respondent identified other features of the contract (set out at paragraph 42) for which the third respondent was responsible.

45. The third respondent was not simply responsible for the introduction of the claimant, it substantially determined the terms on which the claimant was engaged to do the work by negotiating his rate of pay and how quickly he would move to full-time working and by insisting the second respondent was contracted.

46. The evidence is that each of the three respondents substantially determined the terms on which the claimant was engaged to do the work in the respects set out in the factual findings. The claimant did not substantially determine the terms of his engagement. He negotiated his pay and hours within the requirements set by HS2.

47. However, nuanced the relationship is between a whistleblower and the end-user employer, the Tribunal understood that there must be some form of contractual regulation of that relationship, whether express or implied. The absence of any type of contract at all will be fatal, according to **Sharpe v. Worcester Diocesan Board of Finance Ltd and anor** [2015] ICR 1241 CA**.** The same point was expressly recognised in **McTigue**. There are *obiter* remarks made by Elias LJ in **Day** which suggest that in determining whether the relationship is founded on some form of contract an employment tribunal is not limited to focusing solely on the contractual terms, the section expressly requires it to focus on what happens in practice. Parliament would not have envisaged fine arguments on whether a term is contractual before it can be taken into account. 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 that have a bearing on the terms on which the putative worker was engaged to do the work.

48. It should be noted that in **Keppel Seghers UK Ltd**, it was *o*bserved that: 'The protection [provided by section 43K(1)(a) extends to relationships where there is no contract in existence between the parties … and to cases where there might be no direct contract between the complainant and the user of her services but contracts between each of them and other parties, impacting upon (if not governing) their relationship'. While the second part of this statement remains good law (and was the principal basis on which the claimant in that case was found to be a worker within the terms of the extended definition), the first part of the statement may no longer be sound in light of **Sharpe**.

49. The Tribunal sought to apply the guidance in **McTigue**.

(a) For whom does or did the individual work?
Each of the three respondents for the reasons set out earlier.

(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.
It was accepted by all parties that section 230 did not apply.

(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?
Yes, the third respondent.

(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)
No.

.

(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.
Each of the three respondents for the reasons given earlier.

(f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.
The written contract between the claimant's company and the second respondent was considered along with the evidence of the contractual relationships between the respondents.

(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.
The contracts between the respondents which plainly existed under the Framework agreement were not disclosed. There was no contract between the claimant either directly or through his company and the first respondent. Further there was no contract between the second respondent and the first respondent. The Tribunal took an overall view of the contractual arrangements to make its findings.

(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.
The reality of the situation is that each respondent made a substantial contribution to the terms under which the claimant worked.

(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) .

There are three employers in this case which may seem counterintuitive but, because of the contractual arrangements in this case, it is the finding of the Tribunal.

_____

Employment Judge Truscott KC
11 December 2023

Sent to the parties on:
18 January 2024
…….
For the Tribunal:

……..