Claimant: Mr W Matthaus

Respondents:
1. Huntswood CTC Limited
2. Mr K Stone
3. Lloyds Bank PLC

Heard at: Manchester (hybrid) **On:** 12 and 13 September 2024 and in chambers on 1 October 2024.

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: In person
1st and 2nd Respondents: Miss B Balmelli (Counsel)
3rd Respondent: Mr A Weiss (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant withdrew his complaint that he was unfairly dismissed by the First or Third Respondent. That unfair dismissal complaint is dismissed on withdrawal.

2. On the issue of whether the claimant was an employee of the First and/or Third Respondent for the purposes of s.83(2) of the Equality Act 2010:

    2.1. He <u>was</u> an employee of the First Respondent for those purposes
    2.2. He was <u>not</u> an employee of the Third Respondent for those purposes.

3. The claimant's complaints of direct discrimination in breach of s.13 of the Equality Act 2010 were not presented within the applicable time limit. It is not just and equitable to extend the time limit.

4. The claimant's complaint that he was directly discriminated against because of sex in breach of under ss.13 and 39(2) Equality Act 2010 by being paid a lower day rate than female colleagues for the same work fails. By 70(1), s.39(2) has

no effect where a sex equality clause applies or would apply but for section 69 or Part 2 of schedule 7 of the Equality Act 2010.

5. The claimant's claims against all 3 respondents are dismissed for the reasons given above.

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REASONS

Introduction

1. On 12 and 13 September 2024, I conducted a public preliminary hearing. It had been listed by Employment Judge McCarthy following a case management preliminary hearing on 21 March 2024.

2. By a claim form filed on 25 September 2023 the claimant brought complaints of unfair dismissal and of sex, race and religion or belief discrimination against the 3 respondents.

3. The claimant's case is that he was an employee or worker of the first and/or third respondent between 24 November 2014 and 14 September 2015. He accepted he resigned in September 2015 but says he was forced to do so, i.e. that he was constructively dismissed.

4. The first respondent contracts to provide its clients with consultancy and outsourcing services. It recruits and supplies consultants to work on projects with high volume customer demand, e.g. processing PPI complaints. Its case is that those consultants are engaged as contractors on a self-employed basis rather than as employees or workers. It accepts that it engaged the claimant on that self-employed basis. In this judgment I refer to the first respondent as "Huntswood".

5. The second respondent is employed by the first respondent as a Principal Resourcing Consultant. In this judgment I refer to him as "Mr Stone". It is not suggested that he was the claimant's employer, but the claimant does allege that he directly discriminated against the claimant.

6. The third respondent was a client of Huntswood under a Framework Agreement for consultancy and other services. It is accepted that the claimant was engaged on projects under that agreement. The third respondent denies that there was any contract between it and the claimant. It rejects his claim that he was its employee or a worker for it. In this judgment I refer to it as "Lloyds".

7. The claimant says he was directly discriminated against because he is male; because of his religion (he is a Muslim) and/or because of his race (he is British of South Asian heritage). In this judgment I have used the term "BAME staff" to refer to non-white staff because that is the term used by the claimant in his claim form and in his evidence.

8. The claimant alleges there were 3 acts of discrimination. In summary, he says he was:

8.1. paid less than his comparators for doing the same work in 2014-2015. The claimant was initially engaged as a Case Handler at £145 per day but then "demoted" to a Data Gatherer/Admin role at £95 per day from 24 November 2014. He says others doing that Admin role were paid £145 ("the Pay allegation");

8.2. effectively "blacklisted" by not being offered any further work or projects by Huntswood from 14 September 2015 until 2020 when he did undertake another project for it ("the Blacklisting allegation"); and

8.3. required to work his 30 days' notice in 2015 when Helena Brooks was not ("the Notice allegation").

9. The Notice allegation was not included in the claim form. The claimant applied at this hearing to add it by way of amendment.

10. The Pay allegation names 4 actual comparators. Helena Brooks, Mr Blything, Chris Mathers and Heather Tremarco. During the hearing I raised the point that a complaint of not being paid the same for equal work as the 2 female comparators because of sex properly fell within the equality of terms provisions at ss.64-71 of the Equality Act 2010 rather than as a direct sex discrimination complaint. S.70(1) provides that S.39(2), prohibiting discrimination in terms of employment, has no effect in relation to a term that is modified or included by virtue of a sex equality clause, or that would be so modified were it not for a successful 'material factor' defence under S.69 of the Act. The claimant applied to amend his claim to "re-label" his complaint about being paid less because of his sex as a complaint under the Equality of Terms provisions ("the Equal Pay complaint").

11. The hearing was a hybrid hearing. The claimant represented himself. Huntswood and Mr Stone were represented by Miss Balmelli of counsel. Lloyds was represented by Mr Weiss of counsel.

12. I heard oral evidence from the claimant and from his witnesses, Farhan Patel ("Mr Patel") and Richard Blything ("Mr Blything"). I heard evidence from Mr Stone on behalf of himself and Huntwsood. I heard evidence from Rhys Jenkins ("Mr Jenkins") for Lloyds. There was a written witness statement for each. The claimant and Mr Stone gave evidence in person. Mr Patel, Mr Blything and Mr Jenkins gave evidence remotely by CVP.

13. There was a preliminary hearing bundle of 332 pages ("the Bundle"). References in this judgment to page numbers are to pages in the Bundle.

14. During the hearing, reference was made to other Tribunal cases brought by the claimant. Copies of the judgments in those cases were provided and I have taken them into account where relevant in reaching my decision. They were:

14.1. A reserved judgment on liability dated 14 October 2021 in case no.161710/2018 brought by the claimant against (1) MBNA Ltd and (2)

Paymaster (1836) Ltd t/a Equiniti Hazell Carr ("the 1st Hazell Carr case"). That case related to a period in June-August 2018 when the claimant was engaged through a similar arrangement to that in this case. His claim succeeded in part. A remedy hearing was listed but in February 2023 the parties agreed settlement via ACAS. The claimant relies on the Tribunal's conclusion at para 21 of that judgment that he was a worker of both the respondents in that case as supporting his case that he was a worker or employee of Huntswood and Lloyds.

14.2. A reserved judgment dated 5 March 2024 in case no.1602201/2023 brought by the claimant against (1) Paymaster (1836) Ltd t/a Hazell Carr (2) Bank of America Merrill Lynch and others ("the 2nd Hazell Carr case"). That case related to a period in April to October 2011 when the claimant was engaged through a similar arrangement to that in this case. That claim was dismissed because the various complaints in it were all issued on 20 September 2023 some 11 years out of time and the Tribunal was not satisfied there were grounds for extending time.

14.3. Written reasons dated 4 July 2024 following oral judgment given at a hearing on 28 February 2024 in case no.2409680/2023 brought by the claimant against (1) Equiniti Solutions Limited (2) Shop Direct Finance Company Limited and others ("the Shop Direct case"). That case related to a period in November 2015 to September 2016 when the claimant was engaged through a similar arrangement to that in this case. That claim was dismissed because the various complaints in it were issued in October 2023 almost 7 years out of time and the Tribunal was not satisfied there were grounds for extending time.

15. It was not disputed that in 2018 Mr Blything brought a Tribunal claim against Huntswood. That case was settled through ACAS so there was no Tribunal judgment relating to it.

16. I heard brief oral submissions from the parties on the key issues. I reserved my decision. Because there had been limited time to hear oral submissions, I ordered that the parties provide written submissions by 23 September 2024 and any submissions in reply by 30 September 2024. All parties provided written submissions. The claimant provided replies to the respondents' submissions. Lloyds provided a reply to the claimant's submissions.

17. I considered the case in chambers without the parties on 1 October 2024. I apologise to the parties that other judicial work and my absence from the Tribunal for various reasons including ill-health have resulted in a delay in finalising this judgment.

Withdrawal of the claimant's unfair dismissal complaint

18. On 9 May 2024 the claimant emailed the Tribunal to confirm he would not be proceeding with his unfair dismissal complaint and that he accepted that he did not have 2 years' length of service with either the first or the third respondent. However, his email was unclear. It seemed to suggest he <u>was</u> claiming that he was constructively dismissed and that that dismissal was automatically unfair.

Employment Judge Holmes ordered that the claimant clarify by 26 June 2024 whether he was alleging his dismissal was for an automatically unfair reason and, if so, what that reason was.

19. The claimant did not clarify his position until 31 July 2024. He confirmed he was saying he had been automatically unfairly dismissed because of whistleblowing and asserting a statutory right.

20. The claimant accepts that he resigned in September 2015. I explained to the claimant that to bring a complaint of unfair dismissal he would first have to satisfy the Tribunal that his resignation was a constructive dismissal. In order to do that, he would need to clarify what term of the contract he said had been breached; to establish that that breach was a fundamental breach; and to show that he had resigned as a result of it. During the break while I read the papers in the case I gave the claimant the opportunity to consider whether he wanted to apply to amend his claim to add a complaint of automatically unfair dismissal. When we returned after the break the claimant confirmed that he did not wish to do so.

21. I have confirmed in my judgment that the claimant's unfair dismissal complaint is dismissed on withdrawal.

The Early Conciliation Certificate issue in relation to the claim against Lloyds

22. The claimant began ACAS early conciliation in relation to Lloyds on 11 September 2023. The relevant Early Conciliation Certificate ("the Lloyds ECC") was issued on 6 October 2023. The claim against Lloyds was filed at the Tribunal on 25 September 2024 before the Lloyds ECC was issued. The early conciliation number used in relation to Lloyds in the claim form is that relating to Mr Stone.

23. Lloyds applied to strike out the claim against it on the basis that it should have been rejected by the Tribunal for failure to comply with the requirements of s.18A of the Employment Tribunals Act 1996 ("the Lloyds ECC strike out application").

Issues to be decided

24. Employment Judge McCarthy had identified 5 issues to be decided at this hearing. The first 2 related to the unfair dismissal complaint. They no longer needed to be decided after the withdrawal of that complaint. That left 3 issues identified by Employment Judge McCarthy relating to the discrimination complaints which were (using the numbering in their case management order):

> "3) It is not disputed that the discrimination complaints were presented outside the time limit set out in section 123 of the Equality Act 2010. Would it be just and equitable to extend the time limit for presenting the complaints of sex discrimination, race discrimination and religion or belief discrimination? ("the time limit point")
>
> 4) Was the claimant an employee of any of the respondents as defined in the Equality Act 2010, i.e:
> (a) were they employed under a contract of employment; or

(b) were they employed under a contract to perform the work personally? ("the employment status point")

5) Should the second Respondent be removed from the proceedings? ("Mr Stone's removal")"

25. I also needed to decide the applications made at the hearing referred to above.

26. That meant the full list of issues to be decided was:

26.1. the time limit point (in relation to the Pay allegation and the Blacklisting allegation);

26.2. the employment status point;

26.3. Mr Stone's removal;

26.4. the Notice allegation amendment application;

26.5. the Equal Pay complaint amendment application; and

26.6. The Lloyds ECC strike out application.

27. It was agreed at the hearing that I would decide the amendment applications on a reserved basis alongside the other issues. That was because the parties' submissions and my findings relating to the time limit point and employment status point were potentially relevant in determining those applications (or in determining whether they arose for decision).

28. The decision whether to remove Mr Stone (26.3) and the amendment applications (26.4 and 26.5) are case management decisions so I have set out my decisions on them in my case management order of today's date. To avoid duplication I have not repeated matters set out in that judgment in my case management order so the 2 documents should be read together.

29. I refused the amendment applications relating to the Notice allegation and Equal Pay. I have explained my reasons for doing so in my case management order of today's date.

30. The issue of removing Mr Stone as a party did not arise for determination because I have decided the claim was brought out of time.

Findings of Fact

31. In this section I have set out my findings of fact relevant to all the issues I needed to decide. In making those findings I have taken into account the evidence I heard and read and the parties' submissions on that evidence. I have not set out those submissions in full but refer to them where relevant in explaining my findings.

32. Miss Balmelli submitted that the claimant, Mr Blything and Mr Patel were not credible witnesses and that their evidence was not reliable. I have explained below

why I accept that submission in relation to the claimant and Mr Blything. When it came to Mr Patel, Miss Balmelli submitted that he clearly had an "axe to grind" against the respondents. I accept that submission. His witness statement included allegations of drug use, discrimination and harassment by Huntswood contractors and managers which had nothing to do with the issues I was deciding. In his evidence he described working for Huntswood as akin to slavery. I did not find him a credible witness nor his evidence reliable.

33. I start with my findings relevant to the employment status point. They provide a context for my findings about the specific allegations made by the claimant and his explanation for his claim being brought out of time.

Findings of fact on the employment status point

Contractual documentation between Lloyds and Huntswood

34. Huntswood provided services to Lloyds under a written Framework Agreement dated 29 March 2006 (pp.57-105). Under clause 2.1 of that agreement, Huntswood contracted to provide Lloyds with "Services" and "Deliverables" to be set out in Work Orders. Under clause 2.5, Huntswood contracted to provide the personnel identified in a Work Order, referred to as "the Supplier Personnel".

35. By clause 2.9, Huntswood warranted and undertook to ensure that it and all the Service Personnel complied with all Lloyds policies and procedures (including health and safety and internal staff requirements) and lawful directions. An amendment to the agreement in 2010 added clause 2.9.9 by which Huntswood warranted and undertook that Service Personnel had undergone vetting in accordance with Lloyds' stringent Referencing and Vetting Requirements. A further amendment in 2013 added clause 2.9.10 requiring compliance with Lloyds Pre-employment Vetting Policy.

36. Clause 2.10 provided that Huntswood "shall only provide Supplier personnel that are employees of the Supplier" unless Lloyds consented to the use of any subcontractors under clause 25 of the Framework Agreement.

37. Clause 2.11.1 provided that Huntswood would provide additional Supplier Personnel for a Work Order at Lloyds' request. Huntswood could not remove any Service Personnel without Lloyds' consent unless they had left Huntswood's employment, died or become unfit due to disability or illness (2.11.2). Lloyds could require the immediate removal of any Supplier Personnel if not satisfied with their performance (2.11.3) and could, on giving 15 days' notice, require that any such personnel no longer provide the Services (2.11.4).

38. All proposed Service Personnel were subject to approval by Lloyds (2.12.1) and Huntswood was required to provide a CV for the relevant individual, and ensure they were available for interview (2.12.2). Any such individual was required to execute any documents relating to title, proprietary rights and confidential information required by Lloyds (2.12.3). If Lloyds did not approve an individual, Huntswood had to propose and alternative individual (2.12.4).

39. Clause 24.1 was headed “Supplier Personnel Issues”. It provided that nothing in the Agreement entitled Huntswood or any Supplier Personnel to receive any benefits received by Lloyds’ employees or to require Lloyds or to pay any income tax or social security related contributions.

40. Under clause 24.2, Huntswood agreed to indemnify Lloyds against losses arising in connection with 24.1 or any claim against Lloyds by any Supplier Personnel based on an alleged contract of employment (whether express or implied) between the Supplier Personnel and Lloyds.

41. Other clauses in the Framework Agreement required Huntswood and Supplier Personnel to comply with Lloyds’ security procedures and requirements (22) and regulations relating to its premises (23).

42. Work Order 53 (“WO53”) (pp.106-131) related to the supply by Huntswood of a large number of Supplier Personnel to deal with complaints to Lloyds about PPI. When carrying out that work the Supplier Personnel were based at Lloyds offices at various locations across Wales, Scotland and England (4.5). For the Lloyds contract, the claimant, Mr Patel and Mr Blything were based at the Chester office.

43. WO53 provided that Huntswood would be accountable for “supplying…managing and supervising all Supplier Personnel, compliance with the Service Levels, allocation of Complaints, Production Management, Capacity Planning, Resource Management, Quality, Risk Management, Change management, and on-going continuous improvement” (5.1.4). It also set out a list of “Bank Policies” which Huntswood had to comply with and procure that its employees and sub-contractors complied with (5.1.6). They included Lloyds’ policies relating to Health Safety and Fire, Complaint Handling, Whistleblowing, Pre-employment as well as others relating to data privacy and prevention of fraud, bribery and corruption. The list did not include Lloyds’ Disciplinary and Grievance Policy.

44. Huntswood was responsible for quality control of the Supplier Personnel including on the job support training (5.1.12). It was required to provide their names to Lloyds within 10 working days of the start date and to ensure they met Lloyds minimum standards (5.1.10).

45. Much of WO53 was made up of a detailed specification of the service levels expected of Supplier Personnel and the procedures for managing the service delivery. It did not specify the number of Supplier Personnel required which was to be agreed on a monthly basis between Lloyds and Huntswood. It did set ratios for the management structure including defining a “team” as 12 complaint handlers to 1 Team Manager.

46. Clause 13.1 set out the charging rates for Supplier Personnel. Complaint Handlers were to be charged to Lloyds at £215 per day and Admin at £100 per day.

Engagement by Huntswood and the related contractual documentation

47. When it come to finding candidates to resource contracts like the one it had with Lloyds, I find that Huntswood did so by external advertisement. It would then hold assessment centres at which 60-70 candidates per day were interviewed. I

accept Mr Stone's evidence that it was made clear to candidates that they are expected commit for the full period of the engagement. I find that Huntswood engaged successful candidates on its standard terms. It required that the contractors provided their services through limited companies. That could either be the candidates' own limited company (a personal service company or "PSC") or through an umbrella company.

48. The claimant attended an Assessment Centre on 6 August 2014 (p.281). He signed a confidentiality agreement with Huntswood on that date to enable Huntswood to disclose confidential information to him (pp.182). He also signed a Lloyds Bank confidentiality undertaking on that date, the parties to which were the claimant and Lloyds (pp.183-184). The Assessment Centre was run by Huntswood.

49. On 5 September 2014 Mr Stone emailed the claimant to confirm his start date of 22 September 2014 (p.295-296). The email confirmed that the claimant would be working on the evening shift (15;00 to 23:00) on completion of the training course. It specified that the Dress Code was "Business Dress".

50. It is not in dispute that between 22 September 2014 and 14 September 2015, Huntswood engaged the claimant to do work on the Lloyds contract. It did so through a contract with a PSC company called Knightley & Anderson Limited dated 19 September 2014. The claimant signed that contract on behalf of Knightley & Anderson Limited (pp.185-195). It does not appear from Companies House records that he was a director of that company. The contract referred to the claimant as "the Contractor" and said that Knightley & Anderson Limited contracted to provide his services for the Lloyds assignment.

51. The contract was in 2 parts. The first was the Confirmation Letter (pp.185-187) which set out details of the assignment. That included:

51.1. The assignment details, with the Huntswood client identified by a project code: HBOS 4495

51.2. confirmation of the Chester location,

51.3. the start and estimated end dates (22 September 2014 and 31 December 2015)

51.4. the role the contractor was to carry out ("Compliance and Audit Consultant").

51.5. the agreed day rate of £145 with a requirement to submit timesheets on Huntswood's online portal. Payment was to be made against a "self-bill invoice" which Huntswood would generate at the end of each calendar month based on the timesheets. Knightley & Anderson agreed not to submit invoices but to accept the self-bill invoices on its behalf.

51.6. a notice period from either party was 20 working days.

52. The second part of the contract was Huntswood's standard "Personal Service Company Terms and Conditions" (pp.188-195). There was no suggestion that the

claimant had any opportunity to negotiate changes to those standard terms. I find he had to accept them if he wanted the assignment. Of relevance to the issues I am deciding, it provided that:

52.1. The PSC was to procure that the contractor complied with all of Huntswood's rules, regulation policies and lawful instructions and to "observe and comply with any rules, regulations, procedures and policies of Huntswood's Client to the extent that such rules, regulations, procedures and policies apply to you whilst working at their premises". Those rules applied, without limitation, to any Client security requirements, quality requirements and health and safety procedures (2.1.3)

52.2. The PSC would procure that the contractor would raise any concerns or queries regarding the Contractor Services with Huntswood or with its Senior Delivery Manager as appropriate (2.1.5)

52.3. If as a result of illness, injury or other reason the Contractor was unable to perform the Contractor Services the Contractor should report that fact to Huntswood and Huntswood's Client as soon as possible and no later than 9 am of the day on which such incapacity commenced (the second of two clauses numbered 2.2.4)

52.4. That the PSC might appoint such persons as it considered appropriate as the Contractor and to replace such individuals subject to first obtaining Huntswood's prior written approval (3.1).

52.5. In order to obtain approval, the PSC must submit "the Contractor Information as set out in the Confirmation Letter in respect of such an individual" (3.1).

52.6. "Subject to the contents of such Contractor information meeting Huntswood's requirements and a satisfactory credit check being obtained for such individual, approval will be granted" (3.1).

52.7. The "Contractor Information" set out in the Confirmation Letter was:

- Certificates of qualifications where requested by Huntswood;
- Those documents contained within the Registration Pack which are required to be signed by the Contractor;
- Proof of identity and the Contractor's right to work in the UK as required under the Asylum and Immigration Act 1996 (e.g. P45, a National Insurance card or a P60; a passport describing the holder as a British citizen or as having the right of abode or an entitlement to readmission to the United Kingdom; or a birth certificate issued in the UK or Republic of Ireland etc.); and
- Any other documentation specifically required by Huntswood or the Huntswood Client in respect of the Assignment (e.g. Disclosure and Barring Service Checks (formally known as CRB checks)).

52.8. The PSC was engaged under a contract for services and there was no employment relationship between it or the Contractor and Huntswood (3.3 and 19)

52.9. The PSC was responsible for accounting to the appropriate authorities for any tax (including VAT), national insurance contributions and social security levies payable in respect of sums paid by it to the Contractor and for ensuring that the Contractor also accounted to such authorities (3.5)

52.10. The PSC would "subject to working towards meeting the Huntswood's Client's objectives determine generally how the Contracted Services should be supplied" and that the parties acknowledged that the Contractor would perform their services as an independent contractor (3.9)

52.11. The Contractor's timesheets had to be signed off by Huntswood and/or approved by an authorised representative of Huntswood's client. That included for a day when the contractor was "absent on annual leave or otherwise unable to provide the Contracted Services" (5.1-5.3)

52.12. The contractor was not entitled to expenses (6.1 and the Confirmation Letter)

52.13. The PSC was required to maintain public liability insurance, employer's liability insurance, professional indemnity insurance (of not less than £1 million) and property insurance throughout the engagement and for 2 years after termination of the contract (7.1-7.2).

52.14. Under "Holidays", that the PSC was not entitled to payment for any days when the Contractor was not working on the assignment and that the PSC must (and procure that the Contractor) advise Huntswood of any planned leave proposed by the Contractor in writing at least 20 working days in advance (8.1-8.2).

52.15. The PSC "may" arrange a substitute contractor to perform the services during any such holiday (8.2).

52.16. Huntswood was entitled to terminate the contract with immediate effect in the event of serious misconduct or gross negligence by the Contractor. Serious misconduct was defined as including breaches of Huntswood or Lloyds policies or procedures including security and heath and safety, failing to provide notice or the required notice of holiday or other unavailability and failure to achieve and maintain the required competency standards (10.1).

52.17. Any disputes were to be submitted to meditation through CEDR if informal resolution was not possible (21).

53. Other clauses dealt with data protection, bribery and protection of confidential information. The terms imposed post-termination restrictions on the PSC and the Contractor restricting them from supplying services to Huntswood clients for whom they had provided services.

54. On 9 October 2014, Knightley & Anderson Limited was replaced by Lemongrass Consultants Limited. A fresh Confirmation Letter was issued. Other than the PSC changing, the other terms remained the same. Companies House records show Mr Patel was a director of Lemongrass Consultants Limited, but the claimant was not. However, he signed the contract amendment document on behalf of Lemongrass Consultants Limited on 9 October 2014 (p.218-220). The standard terms remained the same.

55. With effect from 21 November 2014 the contract relating to the claimant was amended. From that date he was engaged as a "Data Gatherer Consultant" at a day rate of £95. The PSC was still Lemongrass Consultants Limited and the claimant signed the contract amendment document on its behalf on 29 December 2014 (p.197).

56. From 1 March 2015 a new contract was entered into between Matthaus Limited and Huntswood (pp.198-208). It was still at a day rate of £95 but the role was defined as "Administration Consultant". The claimant was a director of Matthaus Limited and signed the contract on its behalf on 4 March 2015. The version of Huntswood's standard terms attached to the Confirmation Letter was the same as that for the contract with Anderson & Knightley Limited and Lemongrass Consultants Limited.

The claimant and Lloyds

57. The claimant accepted there was no express contractual relationship between him and Lloyds.

Findings of fact about working arrangements and practices

58. I make the following findings of fact about the working arrangements and practices. I will use "contractors" to refer to the claimant and those providing services to Huntswood because that is the term used in the documentation.

Provision of services through limited companies

59. The claimant provided his services to Huntswood via limited companies. He was able to choose whether to do so via an umbrella company or via his own limited company (the PSC). He was able to choose which limited company to use if using his own company. The PSC company was referred to in the contractual documentation as the "Personal Service Company".

60. The claimant could not choose to contract directly with Huntswood in his own name. Huntswood required that the claimant provide his services through an umbrella company or his PSC. It was not concerned if that PSC was changed mid-assignment.

61. The claimant was required to provide the Companies House certificate for any PSC. He was not required to provide proof that he was a director or other officer of the PSC. If using his own company, the claimant was required to provide proof that the company had a bank account, a VAT certificate and proof of Professional Indemnity Insurance (p.297). The claimant provided these for his PSC.

62. Payment was not made to the claimant directly. Instead, it was paid to the business bank account of the relevant PSC he was using. There was no evidence that the payment process was any different to that envisaged in the contract with Huntswood, i.e. that Huntswood generated self-billing invoices based against which it paid the PSC. The invoices were based on the claimant's timesheets.

63. The records maintained by Huntswood (e.g. those recording manager's comments on his leaving an assignment e.g. at p.274) were by reference to the claimant rather than the PSCs. They record, e.g. whether the manger would "re-engage" the claimant.

Premises and location

64. The claimant worked at Premier House in Chester. Those premises were Lloyds' premises. The claimant was required to comply with security and health and safety requirements relating to use of that building. Contractors were given ID cards which were needed to enter and exit the building.

65. Lloyds provided the computer and office equipment used by the contractors at the premises. The contractors had access to Lloyds' systems to enable them to access customer data to carry out the PPI work.

66. The claimant could not choose to work from home. The shift he worked (the evening shift from 15:00 to 23:00) was set by Huntswood (p.295). He needed advance permission from his manager to get into the building early or outside normal working hours.

67. Some Lloyds' employees worked based at the premises. Others would work from there on an ad hoc basis. Mr Jenkins did so, but only very intermittently (he estimated 5 occasions in 6-7 years). Lloyds employees were involved in managing the premises but not in supervising the work done by the claimant and other Huntswood contractors. The majority of those working at the premises were Huntswood contractors rather than people directly employed by Lloyds.

Management structure, supervision and day to day working practices

68. I accept Mr Stone's evidence that once a candidate has been recruited for a particular engagement for a client, the resourcing team of which he is part had no involvement in managing them on a day-to-day basis. Those recruited would undergo 2 weeks' training before starting work. That was training by Huntswood Contractors. The initial 2 week induction/training was on the Lloyds "Manual" on how to deal with PPI complaints. The contractors were required to pass an "exam" to show they had reached the standard of knowledge required by Lloyds. They were also required to meet weekly targets.

69. I find that the claimant's team was managed by a Huntswood contractor. I accept Mr Stone's evidence that Huntswood directly employed Steve Maybanks to be in overall charge of the Lloyds contract but that the managers below his level of seniority were Huntswood contractors. Mr Weiss in his written submissions referred to Huntswood as providing a "manged service". I find that is an accurate description. I find that reality reflected the terms of the contract with Lloyds, which required

provision of "Supplier Personnel" including Team Leaders, Quality Checkers, Senior Complaint Handlers and Operations Managers. What Huntswood provided was in effect a standalone department dealing with PPI which was managed and run by Huntswood contractors rather than the contractors being integrated into Lloyds' management structure.

70. Contractors had to submit timesheets which were signed off on a weekly basis by their managers/team leaders who were Huntswood contractors.

71. Although not directly supervised by Lloyds personnel, the claimant and other contractors had to closely follow the approach to their work prescribed by Lloyds. That included a script of what to say when calling customers, formats for letters, quality control standards and targets for the amount of work to be done. They were given Lloyds email addresses, signed letters as if from Lloyds and represented themselves to customers as being from Lloyds.

72. There was no suggestion that decisions about which contractors did which work was directly supervised by Lloyds. A contractor's line manager could make decisions about which work was done by a contractor and at what level. The context for the Pay allegation is the claimant being moved from one team to another by his manager and being "demoted" from Case Handler to Admin. Mr Patel was also moved to the Loans Team by his manager. Those managers could also dictate what work the contractors did on a day to day basis. I find those managers were Huntswood contractors rather than Lloyds employees.

73. The contractors were required to abide by a number of Lloyds' policies including those relating to data privacy, bribery and whistleblowing. I find that the contractors were therefore subject to some of the same policies as direct Lloyds employees. They were not subject to all of the same policies. They were not subject to Lloyds' disciplinary and grievance policy. Any grievance would be raised to Huntswood management not direct to Lloyds.

74. I accept the submissions for the respondents that the financial sector is a highly regulated industry and the work done involved access to customers' personal data.

75. I accept Miss Balmelli's submission that the claimant's evidence about holiday was confused. In cross examination evidence he said he could not remember whether he had asked for time off for holidays but then said he was "sure he did". Mr Patel's evidence was that he had to ask if he wanted time off. On balance, I find that contractors did have to ask their managers for permission to take holiday. I find that contractors were not paid holiday pay.

Substitution

76. As I have said, the written contract terms between the PSC and Huntswood included a right of substitution. Clause 3.1 required Huntswood's prior written consent to any such substitution. Although the contract provided that substitution was allowed, there was no evidence that it had actually occurred. Mr Blything's evidence was that he had asked to send a substitute and been refused. However, he

accepted that was a verbal request made to a manager in passing. There was no suggestion that he had followed that up with a request for approval under clause 3.1.

77. Mr Stone's evidence was that he was not aware of any occasion when a substitute had been sent. He accepted that for a substitute to be acceptable they would have had to have undergone the same vetting and training/induction as the contractor they were substituting for.

Freedom to choose which work to do

78. Miss Balmelli submitted that the claimant could choose which work he did and contracted with a number of different agencies. The claimant accepted that he had worked for other firms, such as Hazell Carr. He also accepted that to some extent he had a choice about which project or assignment to work on. I find that he was, in effect, "registered" with a number of firms who would alert him to projects or assignments for which their clients needed contractors. He could choose not to go ahead with a contract, e.g. in March 2011 he decided not to go ahead with a role in Speke with Huntswood because the start date had been delayed for 3 months. He instead took a role through Hazell Carr.

79. However, I find that once engaged on an assignment the claimant generally worked only on that assignment. More specifically, he did not, when working on the Lloyds assignment, work on another assignment for a different agency. I also find that once he had signed a contract for an assignment with Huntswood, it was not happy if he left before the assignment term had ended. The contract provided for the claimant to be able to give notice to terminate the assignment but in practice the expectation was that the contractor would work for the whole of the contracted assignment. Leaving before the end could result in a note on Huntswood's system that the contractor should not be used again (a "DNU"). That happened to the claimant in 2011.

80. The position was similar if the claimant sought to move assignments mid-contract. On 9 February 2015, the claimant asked Mr Stone for a transfer to a different project for a different client based in Warrington (p.280). Mr Stone told him that this was "an absolute no" and that he expected the claimant to honour his contract. I accept Mr Stone's evidence that Huntswood needed to provide reliability and consistency to its clients so would always push back on any contractor looking to move between assignments before the end of their current contract.

Findings of Fact on time Limits

Findings of fact relevant to the Pay allegation

81. The Pay allegation relates to the claimant's role with Huntswood on the Lloyds assignment. That ended on 15 September 2015. To be within the 3-month time limit, the claim relating to it should have been issued by late 2015/early 2016. It was not issued until 25 September 2023, nearly 8 years out of time.

82. The claimant's explanation for the delay is that it was not until August 2023 that he became aware of the fact that he and Mr Ahmed were paid at a lower rate than the comparators. He says he and Mr Ahmed were the only BAME staff in the

team. He says Mr Blything disclosed that fact to him during a phone phone call at the end of August 2023 (neither he nor Mr Blything were able to be more precise about the date).

83. Mr Blything's evidence was that towards the end of August 2023 he phoned the claimant for advice about a new role he was considering. He said it was during that conversation that he told the claimant that to his knowledge the rest of the admin team were on £145 per day and that they did not have a pay reduction when they moved to the admin team. He said he also told the claimant that he only knew of him and Mr Ahmed (the only other Muslim and BAME member of the team) who were on £95 a day.

84. The respondents' submission was that neither Mr Blything nor the claimant are credible witnesses and that their evidence about the conversation in August 2023 was not reliable. Miss Balmelli in her written submissions referred to the alleged conversation in August 2023 as a fabrication. The respondents suggested that the real reason for the claimant submitting his claim when he did was his success in the 1st Hazell Carr case and the subsequent settlement of that case via ACAS in February 2023. The 2nd Hazell Carr case, the Shop Direct case and this case were all issued later in 2023 despite all relating to events alleged to have happened a number of years' earlier.

85. I do not accept the claimant and Mr Blything's version of events. Specifically, I do not accept that Mr Blything told the claimant for the first time in August 2023 about the pay disparity between him and Mr Ahmed and their colleagues. I accept the respondents' submissions about the reliability of their evidence.

86. I accept Miss Balmelli's submission that the relationship between the claimant and Mr Blything was closer than they sought to portray in their evidence. Mr Blything said that the claimant was just an acquaintance. I find he spoke to the claimant regularly (at least once a quarter) to take advice about and discuss the industry in which they both worked. I find they discussed opportunities arising in that industry. They also had a history of working together. They joined Huntswood in the same intake in 2014 and worked together until the claimant resigned in 2015. They worked together again in Summer 2018. It is clear from the findings of fact in the 1st Hazell Carr case that the claimant and Mr Blything attended meetings together to raise concerns about working practices and conditions, including their impact on Mr Blything as a person living with dyslexia. In July 2021 Mr Blything was willing to give evidence for the claimant in the 1st Hazell Carr case (the claimant was denied permission to introduce his witness statement at the start of the final hearing of that case).

87. The fact that Mr Blything and the claimant are more than acquaintances does not in itself undermine the reliability of their evidence. However, the fact that they underplayed the closeness of their relationship in their evidence does. I also find that the extent of their relationship makes it less plausible that Mr Blything did not mention the apparently blatant pay discrimination at Huntswood in 2014-2015 until 2023. The reasons he gave for not doing so were inconsistent and unconvincing.

88. Mr Blything's evidence was that he was aware of the pay disparity and its apparently discriminatory basis from 2014-2015. He said that he did not mention it at

the time because he was afraid of his contract with Huntswood being terminated. In his written witness statement, his evidence was that he only mentioned the pay disparity because the claimant told him about the SAR request he had made. However, in his oral evidence he said he had told the claimant about the discrimination because he felt strongly about it as a matter of principle. I accept Miss Balmelli's submission that his evidence about what he said during the conversation and how he came to say it was inconsistent.

89. Mr Blything was not able to give a convincing answer about why he waited until 2023 to disclose the discrimination if he felt so strongly about it. The claimant submitted that Mr Blything was constrained by his fear for his future employment by Huntswood and in the industry more generally. Mr Blything accepted that he had stopped working for Huntswood by around 2018 and brought a Tribunal claim against it in 2018. As I have already noted, he was by July 2021 willing to provide evidence at a public hearing in support of the claimant in the 1st Hazell Carr case. It seems to me that any impediment to him disclosing the pay differential to the claimant would have disappeared at the latest by 2021 (particularly given what he asserted in his evidence about the importance to him of the principle involved). It seems particularly implausible that Mr Blything would not have raised the issue with the claimant in 2021 in the context of the 1st Hazell Carr case which itself involved allegations of race and religious discrimination.

90. When it comes to any earlier disclosure, I do find that Huntswood frowned on discussions about pay amongst contractors. However, I find such discussions did in practice take place. Mr Blything's evidence was that he knew that the comparators named by the claimant were on the higher day rate of £145. Even if Huntswood frowned on discussion of pay it is clear that in practice contractors knew what others were earning.

91. Mr Blything in his oral evidence also confirmed that Gareth Tucker (his manager in the admin team) had disclosed Mr Blything's pay to Javed Ahmed in or around March or April 2016 when Mr Ahmed had challenged Mr Tucker about his pay. Mr Tucker was not dismissed for that disclosure. Given that, I do not accept the claimant's evidence that Mr Tucker would have actively concealed from him that he was on a different rate of pay from his comparators had he asked him. He did not do so when Mr Ahmed asked him.

92. Even if I am wrong about that, and Mr Tucker would not have told the claimant he was on a different rate of pay if asked, I find that the claimant would have known in 2014-2015 that the pay rate only appeared to be an issue for him and Mr Ahmed. They were the only contractors raising an issue about it in the team post November 2014. They were also, on the claimant's case, the only Muslima and BAME staff on the team.

93. I accept that the claimant had left the project by the time Mr Tucker disclosed Mr Blything's pay to Mr Ahmed but Mr Blything confirmed in evidence that "tittle tattle" about pay did spread to everyone in the office. I find it wholly implausible that Mr Blything would not have discussed such industry "tittle tattle" with the claimant either at the time, when they worked together in 2018 or at the latest in the lead up to the final hearing in the 1st Hazell Carr case in 2021. That is particularly the case

given that the claimant and Mr Ahmed had raised during team meetings in 2015 that they were struggling on the £95 day rate so Mr Blything knew that his daily rate at Huntswood was an issue for the claimant.

94. This was not the final hearing of the case so I heard limited evidence about the substance the case. However, Miss Balmelli drew my attention to the entries form Huntswood's computer system in the Bundle. They included a CRM system called "Itris" which Huntswood used to record engagements and interactions between it and candidates/contractors ("the Itris Records").

95. The Itris Records show that Mr Blything was a Case Handler paid at £145 (p.323). Miss Balmelli put it to him in cross examination that the difference between his daily rate and that of the claimant after November 2014 was simply because they were carrying out different roles. Mr Blything asserted that although recorded on Itris as doing different roles he and the claimant were carrying out the same work, i.e. that they were both doing an Admin/Data gathering role. He accepted that meant he was being charged to Lloyds as a Case Handler when he was not doing work at that level. He accepted Miss Balmelli's suggestion that that meant that Huntswood were defrauding Lloyds. The claimant in his cross examination evidence agreed with that proposition. The allegation that Huntswood was defrauding Lloyds emerged only during oral evidence, further undermining Mr Blything and claimant's credibility as witnesses. Neither was able to explain why, if it was intent on defrauding Lloyds, Huntswood would not also have charged the claimant and Mr Ahmed as case handlers, given the profit to Huntswood in doing so would have been greater.

96. The Itris records showed that Mr Patel was paid as a Case Handler at £145 per day. He was not working in the same team as the claimant after November 2014.

Findings of fact relevant to the Blacklisting allegation

97. The claimant's explanation for not bringing a claim about the Blacklisting allegation until September 2023 was that he did not know the relevant facts necessary to found that claim until he obtained the results of the SAR he made on August 2023. His complaint was that he had been "blacklisted" because of race and/or religion until 2020. His claim about that was around 3 years out of time.

98. The Itris records show that:

98.1. the claimant was marked as "DNU" (Do Not use) by Huntswood in March 2011 because he "did not show up and could not be contacted" (p.249).

98.2. on 6 February 2012 the claimant contacted Huntswood and spoke to Mr Stone asking about work at Chester or Manchester. Mr Stone told him there was no work available at either location. He did not tell the claimant there was a DNU on his file because "no point in having an argument". Mr Stone's entry notes that the claimant had "gone missing" and never called in on a previous occasion and that Huntswood "do not want to be working with [the claimant]. Shame as prev was a good candidate" (p.281).

98.3. on 5 April 2012, Sagar Gandehsa of Huntswood told the claimant he was a DNU and recorded that the claimant had "said he didnt meant to stich us up, said he is extremely sorry, wants to speak to KP (Keith Peters) or Stone. I told him its highly unlikely we will use him again." (p.281)

98.4. on 27 April 2012, Mr Peters spoke to the claimant and advised him that they would not offer him work at that time but that if that changes they would let him know (p.281).

98.5. on 4 August 2014 Joanne Partridge of Huntswood changed the claimant's status to active, having spoken to Mr Peters, who decided to give the claimant a "second chance" (p.281). That led to his engagement on the Lloyds project which gives rise to this claim.

99. Mr Stone in his evidence suggested that it was he who had decided to give the claimant a second chance in 2014 but I find that the Itris Records suggest it was Mr Peters ("KP").

100. I find that the claimant knew in 2012 that he had been subject to a DNU in 2011.

101. The claimant suggested that after he gave notice on the Lloyds assignment for Huntswood in 2015, Mr Stone had "blacklisted him". He said that having obtained the SAR in August 2023 it became clear to him that Mr Stone made sure that every time the claimant rang up, he was referred to him.

102. In cross examination the claimant suggested that there was a secret "do not use list" on which he had been placed by Mr Stone. He also suggested that there was a "secret note" on the system which had been removed or hidden which caused Emily Pearce of Huntswood to speak to Mr Stone when the claimant rang up on 8 October 2015. He said there had long been "gossip" among contractors about such a secret list.

103. The Itris Record entry for that date notes that the claimant called asking for work and that Ms Pearce had checked with Mr Stone who had confirmed that he would not look to re-engage the claimant because he had "broke contract". Mr Stone's explanation for why Ms Pearce would have checked with him was that he was sitting next to her. I accept his evidence on that point. I do not accept the claimant's suggestion that there was a "secret" do not use list is a plausible one. There was no need for one because on 8 October 2015 Huntswood had (via Ms Pearce) been transparent with the claimant that they would not use him again. She had also been transparent about the reason, i.e. that he had "broke contract" on the Lloyds assignment (by giving notice before the contract was due to end). The claimant accepted that explanation was given by Ms Pearce during that conversation.

104. I find that the claimant knew by October 2015 that Huntswood had decided not to use him again. He was not able to clearly articulate at the hearing what further evidence he needed to bring a claim if he believed that "blacklisting" was due to his race or religion. He did not point to new evidence in the SAR, e.g. relating to a comparator. I accept Miss Balmelli's submission that Itris records show that

Huntswood did in fact continue to contact the claimant about opportunities from 2016 onwards (p.270-272). There was no evidence in those records that the claimant was always referred to Mr Stone when he contacted Huntswood. They record him being in contact with a number of different Huntswood recruiting staff with very few entries involving Mr Stone. I accept Mr Stone's evidence that he did not require all calls from the claimant to be passed to him.

105. The claimant in his oral evidence asserted that an entry in the ITRIS records on 19 Feb 2019 (p.272) "ITRIS + DSX File Cleansed" supported the existence of a secret DNU list. He suggested "cleansed" referred to a process of hiding the secret DNU list. He accepted in submissions that was a mistake on his part. I find it was a wholly implausible reading of the entry when read in context. The entry for 30 January 2019 make it clear that the "cleansing" was part of a periodical cleansing of data to comply with GDPR requirements.

Findings of Fact relevant to the Notice allegation

106. The claimant alleged that he was required to work his full 30 day notice period but Helena Brooks was not. The Itris records (p.280) notes the claimant "handed his notice and finished at Chester on 14 September [2015]". The previous entry on 20 August 2015 records the claimant contacting Mr Stone wanting to leave or transfer. It is not clear from the records at what point after 20 August the claimant gave notice. Even if he gave it immediately after speaking to Mr Stone on 20 August, the Itris Record records him as having worked 25 days after that rather than the "full 30 days' notice" he says he was required to work.

107. The claimant's evidence was that he was not aware of Helena Brooks not being required to work her notice until Mr Blything told him about it during their conversation in August 2023. I have explained above why I do not accept Mr Blything and the claimant's version of that conversation. I find that if Mr Blything told the claimant about Ms Brooks not being required to work her full notice he would have done so sooner than 2023 and at the latest by 2021.

Findings of fact about forensic prejudice

108. In deciding the time limit issue and the amendment applications I need to take into account the impact of the passage of time on the evidence relevant to the complaints.

109. I find that Huntswood retains some documentary evidence relevant to the allegations the claimant makes about his period working on the Lloyds project. Aside from the contractual documentation, Huntswood retains at least some of the Itris records relating to the claimant and at least some of the comparators. One example is the record showing Mr Blything was engaged as a Case Handler (p.232). I find that some records have been deleted through periodic data cleansing to comply with GDPR.

110. I find that the claimant was himself uncertain about the identity of the manager who (on his case) decided to pay him less than colleagues doing the same work. Although Gareth Tucker was the claimant's manager in the team, the claimant did not suggest he had made that decision.

111. I accept Mr Stone's evidence that Mr Tucker would also be a contractor rather than a permanent employee of Huntswood. That would also apply to the comparators and the managers/team leaders named by the claimant.

112. The claimant alleged that it was Mr Stone who "blacklisted" him. I accept Mr Stone's evidence that the narrative of events in his witness statement was based on the Itris records rather than his being able to directly recall interactions with the claimant from 2014 onwards. The confusion as to whether it was Mr Stone or Mr Peters who decided to give the claimant a "second chance" in 2014 seems to me to reinforce that point. I find that is entirely understandable given the number of contractors Mr Stone would have interacted with over the years.

113. When it comes to Lloyds, I accept Mr Jenkins's evidence about Lloyds' approach to data retention. He asserted in his evidence that Lloyds had neither the written records nor the personnel who were in place at the time to address the allegations made in the claim. I accept that is true because even on the claimant's case, none of the alleged discriminatory decisions were taken by Lloyds employees so there is no reason why Lloyds would have records of those matters.

Relevant Law

114. In this section I set out the relevant legislative provisions and principal case authorities relevant to the issues I need to decide. Each of the parties referred me to relevant case-law in their submissions and (in the case of the respondents) in the position statements filed before the hearing. I have not recorded all the authorities they cited in this judgment but have taken them into account in reaching my decision.

115. When it came to the issue of employment status, the claimant in his submissions relied on the Tribunal's decision in the 1st Hazell Carr case as supporting his case that the contractual arrangements in this case were a "sham" and that the reality was that he was a worker of both Huntswood and Lloyds. That decision is not binding on me. It turned on the interpretation and findings of fact about a different set of working arrangements between different parties and the claimant. The similarity of arrangements in that case to those in this case does not mean I have to reach the same conclusion about employment status.

<u>Time limits under the Equality Act 2010 – non equal pay complaints</u>

116. The time limit for bringing a claim (other than an equal pay claim) under the Equality Act 2010 appears in section 123 as follows:-

> **"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> (b) **such other period as the Employment Tribunal thinks just and equitable**.
>
> **(2) …**

> **(3) for the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it."**

Just and equitable extension of time

117. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) of the 2010 Act, 'there is no presumption that they should do so…a tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended. In **Chief Constable of Lincolnshire Police v Caston [2009] IRLR 327**, the Court of Appeal said that **Robertson** emphasises the wide discretion which the Tribunal has and that there is no principle of law which dictates how generously or sparing the power to enlarge time is to be exercised.

118. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

119. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly.

120. In **Adedeji v University Hospitals Birmingham NHS [2021] EWCA Civ 23** the Court of Appeal approved what was said by the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**. At paragraph 25 of that Judgment the Court of Appeal stressed that:

> "Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:
>
> The length of and the reasons for the delay; and
>
> Whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh."

121. The Court of Appeal in **Morgan** also made clear that there was no justification for reading into section 123 a requirement that the Tribunal had to be satisfied there was good reason for the delay, let alone that time could not be extended absent an explanation from the employee. However, the reason for the delay is a relevant matter to which the Tribunal can have regard.

122. In **Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132** the EAT confirmed that the potential merits of a proposed complaint, which is not plainly so weak that it would fall to be struck out, are not necessarily an irrelevant consideration when deciding whether it is just and equitable to extend time, or whether to grant an application to amend. However, if the Tribunal weighs in the balance against the claimant its assessment of the merits formed at a preliminary hearing, that assessment must have been properly reached by reference to identifiable factors that are apparent at the preliminary hearing, and taking proper account, particularly where the claim is one of discrimination, of the fact that the tribunal does not have all the evidence before it, and is not conducting the trial.

123. The claimant in his written submissions referred to a number of cases relating to "ignorance of crucial facts" (paras 51-55). I accept that the date upon which the claimant became aware of the facts giving rise to the claim may be relevant to the discretion to extend time. In **Jones v Secretary of State for Health & Social Care [2024] EWCA Civ 1568** the Court of Appeal said that in many cases it will be highly relevant if the claimant knew all the facts necessary to establish a discrimination claim but then failed without good reason to act promptly. However, it said that it was much less persuaded that suspicion, or a firmly held belief based on suspicion, was a relevant factor.

Time limits under the Equality Act 2010 – equal pay complaints

124. The time limit for bringing a claim of a breach of an equality clause ("an equal pay claim") is set out in s.129 of the Equality Act 2010 which provides that.

> **"(2) Proceedings on the complaint or application may not be brought in an employment tribunal after the end of the qualifying period."**

125. The relevant "qualifying period" is defined in s.129(3) and depends on the kind of case it is. The claimant says that his case is a "concealment case". He does not suggest it is also an incapacity case. That means the "qualifying period" is "the period of 6 months beginning with the day on which the worker discovered (or could with reasonable diligence have discovered) the qualifying fact".

126. A "concealment case" is defined in s.130(4) as:

> **"4. .. a case where—**
>
> **(a) the responsible person deliberately concealed a qualifying fact from the worker, and**
>
> **(b) the worker did not discover (or could not with reasonable diligence have discovered) the qualifying fact until after the relevant day."**

127. S.130(6) defines a "qualifying fact" for the purposes of s.130(4) as a fact—

> **"(a) which is relevant to the complaint, and**
>
> **(b) without knowledge of which the worker or member could not reasonably have been expected to bring the proceedings."**

128. The "relevant day" is defined in s.130(10) as:

> **"(a) the last day of the employment or appointment, or**
>
> **(b) the day on which the stable working relationship between the worker and the responsible person ended"**

129. There is no provision for extension of the time limit beyond those set out in s.129.

130. Mr Weiss, in the written submissions for Lloyds referred me to case law on the interpretation of similarly worded provision of s.32(1)(b) Limitation Act 1980. It provides for postponement of limitation period where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant".

131. Mr Weiss submitted that the authorities on that provision show that something is "concealed" if it is "hidden from view" (**Giles v Rhind [2008] EWCA Civ 118**) and that s.32(1)(b) applies if the defendant either "takes active steps to conceal his own breach of duty after he has become aware of it" or, in some cases, withholds relevant information with the intention of concealing the facts in question (**Cave v Robinson Jarvis and Rolf (A Firm) [2002] UKHL 18**). Concealment must be the intended result: the "defendant must have considered whether to inform the claimant of the fact and decided not to" (**Williams v Fanshaw Porter & Hazelhurst [2004] EWCA Civ 1757, [at 14]**").

<u>The Interaction of the direct discrimination provisions and equality of terms provisions in the Equality Act 2010</u>

132. S.70 Equality Act 2010 is headed "Exclusion of sex discrimination provisions". It provides:

> **"(1) The relevant sex discrimination provision has no effect in relation to a term of A's that -**
>
> **(a) is modified by, or included by virtue of, a sex equality clause or rule, or**
>
> **(b) would be so modified or included but for section 69 or Part 2 of Schedule 7 .**
>
> **(2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision -**
>
> **(a) the inclusion in A's terms of a term that is less favourable as referred to in section 66(2)(a) ;**

> **(b) the failure to include in A's terms a corresponding term as referred to in section 66 (2)(b) ."**

133. Subsection (3) identifies the "relevant sex discrimination provision" in relation to "Employment" as being s.39(2) Equality Act 2010 .

134. S.71 Equality Act 2010 is headed "Sex discrimination in relation to contractual pay ". It provides:

> **"(1) This section applies in relation to a term of the person's work -**
>
> **(a) that relates to pay, but**
>
> **(b) in relation to which a sex equality clause or rule has no effect.**
>
> **(2) The relevant sex discrimination provision (as defined by section 70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of section 13 or 14 ."**

135. The EAT in **BMC Software Ltd v Shaikh 2017 IRLR 1074, EAT** confirmed that S.71(2) only applies where the sex equality clause has no effect because there is no actual comparator and therefore no 'corresponding term' for the purposes of S.66. It confirmed that, put broadly s.70 has the effect that even though a breach of an equality clause in the form of a failure to pay a man the same as a woman for like work is plainly a form of sex discrimination, a complainant cannot succeed in both an equal pay claim and a sex discrimination claim in respect of that breach.

Employment Status

136. The claimant's complaints are brought under the Equality Act 2010. S.83(4) of says that references to "employee" in the relevant part of that act is to be read with s.83(2). S.83(2) provides that:

> "(a) **"employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"**

137. Case-law has equated that extended definition of "employee" with the definition of a "worker" in s.230(3) of the Employment Rights Act 1996 ("the ERA") (**Pimlico Plumbers Ltd and another v Smith [2018] ICR 1511, Lord Wilson [13-15]).**

138. S.230(3) ERA says that "worker" means:

> **"an individual who has entered into or works under (or, where the employment has ceased, worked under)—**
>
> **(a) a contract of employment, or**
>
> **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**

139. Employment law distinguishes between 3 types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self- employed but do not fall within the second class (**Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32, para 31**). The first and third types are "workers" for the purposes of the ERA and "employees" for the purposes of the Equality Act 2010.

140. The requirements for a contract of employment were summarised in **Ready Mixed Concrete (South East) Limited v Ministry of Pensions and National Insurance [1968] 2 QB 497**:

> **"The contract of service exists if these three conditions are fulfilled:**
>
> **(1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.**
>
> **(2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.**
>
> **(3) The other provisions of the contract are consistent with it being a contract of service."**

141. In **Carmichael v National Power Plc [1999] ICR 1226** the House of Lords confirmed that there is an "irreducible minimum of mutual obligation necessary to create a contract of service". Broadly, in order for a worker to be an employee there must be some obligation on her to attend work, and there must be some obligation on the organisation to provide work.

142. In **Hall (HM Inspector of Taxes) v Lorimer [1994] IRLR 171 CA** the Court of Appeal confirmed that in order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informed, considered, qualitative appreciation of the whole.

143. On the issue of control, Mr Weiss referred to **Troutbeck SA v White [2013] EWCA Civ 1171** in which the Court of Appeal emphasised that what is required is the "ultimate" ability of the employer to control the manner in which work is carried out. It is not necessary that the employee is subject to detailed factual control on a day-to day basis.

144. Determining whether a person is a "worker" is primarily an exercise in statutory interpretation rather than an analysis of what the parties agreed to in the written contract (**Autoclenz Ltd v Belcher [2011] ICR 1157** and **Uber BV & Others v Aslam & Others [2021] ICR 657, SC.** At para 87 of **Uber**, Lord Leggatt said that:

> "In determining whether an individual is a "worker", there can, as Baroness Hale said in the **Bates van Winkelhof** case at para 39, "be no substitute for

> applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract"."

145. The Tribunal's is required to identify the "true agreement" between the parties. That will often have to be gleaned from all the circumstances of the case of which the written agreement is only a part (**Autoclenz** para 35). It will involve making findings of fact about what in fact happened. It is too narrow an approach to say that the Tribunal may only disregard the written term as not part of the true agreement between the parties if it is show to be "sham" in the sense that the parties had a common intention that the term should not create the legal rights and obligations which it gives the appearance of creating (**Autoclenz** para 28).

146. It would be inconsistent with the purpose of the legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within definition of a "worker" (**Uber** para.76). That does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it (**Uber** para 85).

147. Any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded. That does not mean that the terms of any written agreement should be ignored (**Uber** para 85).

148. The definition of a "limb (b)" worker requires that the person has undertaken to "perform personally" work or services. An obligation of personal performance is also a necessary element of a contract of employment.

149. The concept of substitution is particularly relevant to the question of whether an agreement is for personal service. In **Pimlico Plumbers Ltd v Smith (CA) [2017] ICR 1511** Sir Terence Etherton MR considered a number of examples of substitution:

> "84. I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute

> another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

150. Those examples may assist the Tribunal's analysis but they are not legal tests. It is unhelpful to trying to shoehorn the facts of a case into one of the "categories" in the examples or analyse the facts of the case by reference to those examples. It is more appropriate to focus on the real issue, that is whether the nature and degree of any fetter on the right or ability to appoint a substitute to determine whether that is inconsistent with any obligation of personal performance (**Stuart Delivery Ltd v Augustine [2022] ICR 511**).

151. If a contractual right to substitute exists, it does not matter that it is not used. It does not follow from the fact it is not used that it is not part of the agreement (**Autoclenz** para 19). However, such a fact must at least be highly relevant to whether it reflects the true agreement (**Manning v Walker Crisps Investment Management Limited [2023] EAT 79 para 69**).

152. In **Autoclenz** Lord Clarke of Stone-cum-Ebony (at paras 26, 29) expressly approved the approach of Elias J, President of the Employment Appeal Tribunal, in **Consistent Group Ltd v Kalwak [2007] IRLR 560** where Elias J emphasised (at paras 58-59) that in this area of the law the Tribunal should be alert to look at the reality of any obligations:

> "In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
>
> …Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance …".

153. The fact that an individual is entirely free to work or not and owes no contractual obligation to the person for whom the work is performed when not working does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working. However, where an individual only works intermittently or on a casual basis for another person that may, depending on the facts, tend to indicate a degree of independence or lack of

subordination in the relationship while at work which is incompatible with worker status (**Uber** para 91).

154. Mr Weiss's submissions referred to **Halawi v WDFG UK Ltd (trading as World Duty Free) [2015] 3 All ER 543, CA**. However, as was noted at para 31 of **Pimlico Plumbers** in the Supreme Court, the so-called power of substitution in that case was not a contractual right at all and it is of no assistance in perceiving the boundaries of a right to substitute consistent with personal performance.

155. If there is a contract by which a person undertakes to do or perform work or services personally it is necessary to consider whether that person is excluded from being a worker because they carry on a profession or business undertaking of which the putative employer is a client or customer. While not themselves legal tests, the concepts of "integration", "control" and/or "subordination" may assist in these tasks (**Sejpal v Rodericks Dental [2022] EAT 91**, para 33). The greater the degree of control exercised by the putative employer over the work or services performed by the individual concerned, the stronger the case for classifying the individual as a "worker" (**Uber** para 87).

156. In **Lee Ting Sang v Chung Chi-Keung [1990] IRLR 236** the Privy Council said the best expression of the test for deciding whether someone was engaged under a contract of service or under a contract for services was "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is 'Yes'. then the contract is a contract for services. If the answer is 'No', then the contract is a contract of service.

157. The "client or customer" element of the definition is a crucial part of the definition. A person is not excluded from the definition of "worker" because they are genuinely self-employed or in business on their own account if the "client or customer" element is not present (**Hospital Medical Group v Westwood [2012] ICR 415** at para 19, cited in **Sejpal** at para 35).

158. In **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181** (para 53) the EAT said that in assessing whether someone is a "client or customer", "… a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

<u>Contracts with the "end user"</u>

159. The claimant's cases is that he was a worker or employee of Huntswood and/or Lloyds.

160. The courts have accepted that in some circumstances, regard to how the work is actually carried out (rather than a focus on the express contractual terms) may provide material from which it is possible to imply a contract between the worker and the end user, notwithstanding the absence of any express contract between them (**Dacas v Brooke Street Bureau (UK) Limited [2004] IRLR 358**).

161. However, it is not legitimate to imply a contract merely because it is considered desirable to do so, or because it would be so implied in the absence of the express contracts. The fundamental question is whether it is necessary to imply the contract to give business reality to what is actually happening. Such a necessity arises only if there is conduct which is inconsistent with there not being such a contract: (**Dacas** and **Cable & Wireless PLC v Muscat [2006] IRLR 354**).

162. It will be legitimate to imply a contract where the formal written contracts are a sham, in the sense that they are deliberately intended to mislead third parties or the Court as to the true nature of the relationship. However, even absent a sham, it will be appropriate to imply a contract if in fact the express contracts no longer adequately reflect what is actually happening, and it is necessary to imply a contract to provide a proper explanation: **James v London Borough of Greenwich [2007] IRLR 168** para 58.

163. Case-law suggests that a person having two different employers in relation to the same work is "problematic" (**Cairns v Visteon UK Limited [2007] ICR 616** at para 13). One reason for that is that there does not seem to be any business necessity to imply a contract with the end user in triangular relationship where the claimant has entered into a contract of service with an employment agency (**Cairns** para 18). Nor is there a good policy reason for requiring statutory protections for a worker to be extended to a second employer if they already exist in relation to an employer (**Cairns** para 15).

164. Many of the same difficulties about dual employment under two contracts of employment would arise equally in relation to dual worker contracts or of dual employment with one employer as a worker and the other as an employee (**United Taxis Limits v Comolly and anor [2023] EAT 93** at para 46).

165. When it comes to the contract with the end user (Lloyds in this case) the Tribunal in the 1st Hazell Carr case took into account a submission by the claimant and the second respondent in that case that it was possible for it to find that the claimant was a worker for both respondents in that case following **McTigue v University Hospital NHS Foundation Trust [2016] IRLR 742** (para 12.2.3 of the 1st Hazell Carr case judgment). **McTigue** was a case about the extended definition of "worker" and "employer" for the purposes of the whistleblowing provisions (S.43K(1)(a)). That extended definition applies where someone is not a worker for the purposes of s.230(3) of the ERA. It was relevant to the 1st Hazell Carr case where the Tribunal was considering complaints by the claimant that he was subjected to a detriment and dismissed for making protected disclosures. That extended s.43K definition does not apply in this case which is about the Equality Act 2010 and the definition of an "employee" in that act.

166. **McTigue** did not consider the position when it comes to a s.230(3) worker having 2 employers for the same role because it was not deciding that issue. When it comes to that issue, I find the relevant authority is **James**.

<u>Striking out for failure to comply with Early Conciliation requirements</u>

167. The position when a Tribunal claim was started without complying with the Early conciliation requirements was considered in **Pryce v Baxterstorey Ltd [2022]**

EAT 61. It held that the failure to comply with the ACAS Early Conciliation scheme meant the claim was a nullity. However, in **Abel Estate Agent Ltd and others v Reynolds [2025] EAT 6**, the EAT held that the decision in **Pryce** was manifestly incorrect.

168. In summary, **Reynolds** held that a failure to comply with the EC scheme does not render a claim a nullity. If a Tribunal accepts a claim when there has been a failure to comply with the scheme, the correct approach is that set out by the Court of Appeal in **Clark v Sainsbury's Supermarket Ltd [2023] ICR 1169**. The respondent's remedy in such circumstances is to raise any points about non-compliance and to seek dismissal of the claim under [rule 28 of the 2024 Rules] or apply for it to be struck out under [rule 38 of the 2024 Rules]. When considering such an application, what in Clark was described as the Tribunal's "very wide power" in what is now rule 6 of the 2024 Rules to waive non-compliance with the Tribunal Rules applies.

Submissions and decisions

Decision on the time limit point (in relation to the Pay allegation and the Blacklisting allegation

The Pay Allegation

169. The claimant accepted that the Pay allegation was brought nearly 8 years out of time. I have explained in my findings of fact that I do not accept the claimant's explanation for that delay. I found that he would be aware of the disparity in pay at the latest by 2021.

170. The claimant had been involved in Tribunal proceedings before. I accept he was represented in the 1st Hazell Carr case. However, there was no suggestion that the reason for the delay was due to his being unaware of Tribunal time limits and procedure or that he could not have reasonably be expected to have taken steps to establish them.

171. I find there is no adequate explanation for why the claimant did not bring the claim in relation to the Pay allegation before September 2023.

172. The lack of an adequate explanation is a relevant factor but does not automatically mean I should refuse to extend time. It is also relevant to consider whether the delay has prejudiced the respondent(s), for example by preventing or inhibiting them from investigating the claim while matters were fresh. I do find that there is significant such prejudice in this case.

173. I accept the claimant's submission that a Tribunal should not unquestioningly accept a respondent's assertion that the passage of time has prejudiced it because witnesses' memories will inevitably have faded. Whether there is such prejudice turns on the circumstances of the particular case. I also accept the claimant's submission that there are at least some relevant documents or records available to Huntswood covering the relevant period. Itris records from 2014-2105 (and earlier) were included in the Bundle. I find that does reduce the prejudice to Huntswood, but only to a small degree.

174. The reason for that is that when it comes to the Pay allegation, the claimant's case is that the documentation (including the Itris records) does not reflect the reality of the situation. The documents in the Bundle show him being contracted as a Data Gatherer/Admin from November 2014 and Mr Blything being contracted as a Case handler. That, Huntswood says, is the reason they were paid differently, not unlawful discrimination.

175. For the claimant's Pay allegation to succeed he would first have to show that he and his comparators were in the same material circumstances, i.e. actually carrying out the same work despite what the Itris and other records say about the difference in their roles. Since the claimant's case is that the respondent's documentation deliberately obscured that, the Tribunal would be reliant in making its findings primarily on witness evidence about work actually done. By the time of the final hearing, witnesses would be being asked to recall day to day matters which happened 10 years or more before they were giving evidence. I accept Huntswood's submissions that their memories about those matters would inevitably have faded. I also accept the submission that since the comparators, the team leaders and managers involved were all contractors rather than permanent employees there is prejudice to Huntswood in having to track them down even if that proves possible.

176. If the claimant could establish he was carrying out the same work as the comparators but being paid less for doing so, he would then need to establish facts from which the Tribunal could conclude that the reason for that difference in pay was his race and/or religion and/or his sex. Evidence would be needed from the person who decided what the claimant should be paid when he moved teams because the primary issue would be why they made that decision.

177. The claimant submitted that Steven Maybanks (who retired from Huntswood as of late 2022) would be contactable to give evidence. Mr Stone confirmed that Mr Maybanks had been directly employed by Huntswood. It might be possible to contact him. The difficulty for the claimant is that he did not suggest that Mr Maybanks made the decision about his pay (or was in any way involved in the alleged blacklisting). He was based in Huntswood's head office rather than the Chester premises. The claimant did not suggest he was involved in day-to day management of the team.

178. The claimant himself was not clear who made that decision. At one point during the hearing he suggested it was Mr Stone, but later accepted it was not. He suggested the decision was made by the manager who "demoted" him but was unsure of the details of that manager. It seems to me on the claimant's own case they would have been a contractor engaged by Huntswood. There is clearly prejudice to the respondent in defending the case where the claimant cannot identify the person who made the allegedly discriminatory decision. If they could be identified, they would be being asked about one decision among many they made 10 years ago. There was no suggestion that the claimant raised any complaint at the time of his "demotion" which gave rise to a paper trial about the decision.

179. I find there is clear prejudice to Huntswood in defending the complaint because of the delay in bringing the claim.

180. I accept there is prejudice to a claimant whose complaint is not allowed to proceed. That is balanced by the prejudice to a respondent in having to face an out of time complaint.

181. When it comes to the complaint against Huntswood, Miss Balmelli submitted that the merits of the Pay allegation were also relevant to my decision. She submitted (at para 30 of her submission) that it had no reasonable prospect of success. Alternatively, it was weak in the **Kumari** sense. I do accept that aspects of the claimant's case are inconsistent with the documents and undisputed evidence, e.g. the Itris records which show the claimant and Mr Blything fulfilling different roles and the fact that Mr Patel, who is also a BAME contractor and who was moved at the same time as the claimant, was paid at the higher day rate. On the face of it, the respondent has an apparently non-discriminatory explanation for the difference in pay, which is the claimant's change in role from November 2024.

182. However, I bear in mind that I have not heard all the evidence at this stage. It seems to me I also need to take the claimant's case at its highest. It is accepted there was a difference in pay between the claimant and his comparator. The claimant's case is that at a final hearing a Tribunal would need to look behind the documentary evidence to see what he says was the reality, i.e. that Huntswood were paying him less than colleagues doing the same work because of his race or religion. That, it seems to me, merely underlines the extent to which witness evidence would be central to deciding the case and the prejudice to Huntswood caused by the claim being brought so long after the events to which it relates.

183. When it comes to the Pay allegation against Huntswood, I have decided that I cannot say that it has no reasonable prospects of success. That is not the same as saying it has merit. Had I allowed the case to proceed I would have considered making a deposit order on the basis that the allegation had little reasonable prospect of success. However, as I understand it, **Kumari** requires more than the "little reasonable prospects of success" required for a deposit order.

184. In deciding whether it is just and equitable to extend time for the Pay allegation against Huntswood, I have not taken into account the merits of the complaint. Given the lack of the adequate explanation for the delay in bringing the claim and the very clear prejudice to the respondent in defending the complaint because of that delay I have decided it is not just and equitable to extend time. That complaint against Huntswood is dismissed.

185. When it comes to the Pay allegation as a complaint against Mr Stone, the factors relating to delay and forensic prejudice applying to Huntswood also apply to him and I refuse to extend time for the Pay allegation against him for those same reasons. In addition, on the claimant's won case

186. That means it is not strictly necessary to consider the submissions about the merits of this complaint against Mr Stone. Had it been necessary to do so I would have found there was no reasonable prospect of the Pay allegation succeeding against Mr Stone. There was no evidence to suggest he had anything to do with the decision about what work the claimant did or what he was paid after he was "demoted". The claimant accepted that was the case. The finding that there was no

reasonable prospect of success reinforces my decision that it is not just and equitable to extend time in relation to the Pay allegation complaint against Mr Stone.

187. When it comes to the Pay allegation as a complaint against Lloyds, the factors relating to delay and forensic prejudice applying to Huntswood also apply to it. I would have refused to extend time for the Pay allegation against Lloyds for the same reasons as those given for refusing to do so against Huntswood.

188. That means it is not strictly necessary to consider the submissions about the merits of this complaint against Lloyds. However, for completeness I confirm that I accept Mr Weiss's submission that on the claimant's own case, there was no direct involvement by Lloyds in the decision about his pay. On the claimant's own case, the decision was made by an (unidentified) manager/team leader who was a Huntswood contractor rather than a permanent Lloyds employee. On the claimant's case, as asserted in his and Mr Blything's oral evidence, that involved Huntswood defrauding Lloyds by charging contractors out at a higher rate than their work warranted.

189. Given my conclusion that the claimant was not an employee of Lloyds for the purposes of the Equality Act 2010 I accept Mr Weiss's submission that even on the claimant's own case, there is no discriminatory act for which Lloyds could be liable. I find there was no reasonable prospect of the Pay allegation succeeding against Lloyds. That finding reinforces my decision that it is not just and equitable to extend time in relation to the Pay allegation complaint against Lloyds.

The Blacklisting allegation

190. When it comes to the backlisting allegation, I found that the claimant knew by the time he left the Lloyds assignment in 2015 that he had earlier been subject to a DNU because he had been told so in 2012. I found he had also been told by Mr Pearce in October 2015 that Huntswood would not re-engage him because he had broken contract. I accept Miss Balmelli's submission that the claimant was unable to explain what fresh information appeared for the first time in the SAR result in August 2023 which was the missing "relevant fact" without which he could not bring his complaint. There is no adequate explanation for the delay in bringing the complaint.

191. There is forensic prejudice to the respondent. The position is different to the Pay allegation because the claimant was clear about the alleged discriminator, i.e. Mr Stone. Mr Stone is still employed by Huntswood and would be able to give evidence at the final hearing. I do find there is prejudice to him in being asked to give evidence about events 5-9 years ago. I accepted his evidence that his witness statement was based on the Itris records rather than his own recollection of events.

192. The claimant's case as set out in his reply to Miss Balmelli's written submission was that there was "something in the system" which prevented him from getting placed on projects (para 27.3.4). He accepted there was nothing in the documents in the Bundle which supported that. His case is that there was a "pop up" prompt telling agents either not to employ him or to transfer him to Mr Stone (para 27.2.3). He said that had since been removed.

193. I accept Miss Blamelli's submission that that means that the Huntswood employees who are shown on Itris as having dealt with the claimant between 2015

and 2020 would have had to have colluded in that "secret blacklisting". At least some of them would potentially need to give evidence. Given the passage of time, it is not clear how many still work for Huntswood. If they do, they would be being asked to give evidence about (in some cases) one off interactions that happened 5-9 years previously. I accept Miss Balmelli's submission that causes a prejudice to Huntswood in defending the complaint. That is not reduced by the existence of the Itris records from the time because the claimant's case is based on what is hidden (or has been removed) from those records.

194. I also accept Miss Balmelli's submission that this complaint is very weak. I remind myself that for the claimant to succeed he would first have to prove that the alleged less favourable treatment had happened. That alleged treatment consists of there bring a "secret" do not use list or a "marker" on his file that he was always to be referred to Mr Stone. The claimant relied on "gossip" amongst contractors about there being such a list. He relied on entries in the Itris records as pointing to the deletion of such a list. He accepted in evidence (and I find) that those entries clearly related to cleansing of records for data protection purposes. I find it was not because of some nefarious attempt to "hide" a secret DNU list. He relied on the fact that he had not received any new projects until 2016 as meaning there must be a reason and that the reason must be "blacklisting" initiated by Mr Stone.

195. There was no need for any such "secret blacklist", however. The respondent had in October 2015 made it clear to the claimant why they would not use him again – i.e. he had broken contract. He had done so for a second time, having been given a "second chance" in 2014 after having been marked as DNU. Despite that, the Itris records show him being contacted about other roles from 2016 onwards. Those records show he was dealing with a number of different Huntswood employees when he got in touch. He had no explanation why any "secret blacklist" would have ceased to have effect (at the latest) in 2020 when he was against given an assignment by Huntswood. Mr Stone was still employed by Huntswood in a recruiting role at that point.

196. The claimant did not identify an actual comparator for this allegation. For his complaint to succeed he would need to establish that if there were any less favourable treatment, it was because of race or religion. His submissions appeared to rely on the fact of the treatment and the fact of his race and religion being enough to pass the burden of proof to the respondents. That is not the case. The law requires that the claimant prove facts from which the Tribunal could conclude that discrimination had occurred. A difference in treatment and a difference in protected characteristic is not sufficient. In this case, the claimant did not point to anyone who did not share his race or religion who were treated differently when they twice failed to fulfil their contract with Huntswood.

197. I do find that this complaint is weak in the "**Kumari**" sense. I find that there is no adequate explanation for the delay in bringing the complaint and that the passage of time means there is a prejudice to Huntswood in defending the claim. It is not just and equitable to extend time for this complaint against Huntswood. The same applies to the blacklisting complaint against Mr Stone and I also refuse to extend time for this complaint against him.

198. When it comes to the Blacklisting allegation as a complaint against Lloyds, the factors relating to delay and forensic prejudice applying to Huntswood also apply to it. More fundamentally, there is no suggestion that any Lloyds employee was involved in the alleged discriminatory act. If there was a "blacklist" it was within Huntswood's recruitment team. The claimant did not suggest that Lloyds instructed Huntswood to put him on any such list. There was no suggestion that Mr Stone was an employee of Lloyds. I find there was no reasonable prospect of the Blacklisting allegation succeeding against Lloyds. Taken with the delay and forensic prejudice, I find that means it is not just and equitable to extend time in relation to the Blacklisting allegation complaint against Lloyds.

Decision on the employment status point

Whether the claimant is an employee of Huntswood for the purposes of the Equality Act 2010?

199. In deciding this issue, I bear in mind that the parties in this case did not have equal bargaining power. The claimant contracted on Huntswood's written standard terms. The statements in those terms about the status of the claimant being that of an independent contractor and the contract being a "business to business" one must be disregarded to the extent they seek to exclude or limit statutory protections. I need to identify the "true agreement" between the parties, taking into account the written terms and the reality of the situation.

200. Huntswood submitted that there was no contract between it and the claimant. Its contract was with the PSC. The claimant submitted that in reality the contract was with him as an individual. The PSC was a device insisted on by Huntswood. Other than being the mechanism through which he was paid, he submitted, the PSC dropped out of the picture for all practical purposes as soon as the Lloyds assignment was underway.

201. I prefer the claimant's submission on this point. The use of the PSC was mandated by Huntswood. The claimant had no choice in the matter – he would not have been allowed to take on the assignments if he had not used a PSC or an umbrella company. The contractual arrangement with the PSC was a matter of form. In substance, the contract was with the claimant. That does not necessarily mean it was a contract requiring personal service. That is a different issue which I deal with below.

202. When it comes to mutuality of obligation, the claimant submitted that the fact that he was supplying his services on an assignment by assignment basis did not prevent him being a worker or employee for the periods when he was working on an assignment. He pointed to Mr Stone's evidence that a contractor was expected to honour their contract once entered into.

203. The respondents submitted that there was no mutuality of obligation. The claimant could choose which assignments to take on. Mr Weiss pointed to the claimant's decision not to take up the assignment in Speke in 2011 as evidence that he was not obliged to take on work offered by Huntswood. Mr Weiss submitted that Mr Stone's "expectation" that a contractor honour their commitment was not the same as an obligation to perform work.

204. I prefer the claimant's submissions on this point. I accept that there was no obligation on the claimant to take up any assignment offered to him by Huntswood. There was no "umbrella contract" which applied between assignments. However, I find that there was mutuality of obligation once the claimant had committed to the Lloyds assignment. The claimant could not choose not to attend work once the assignment was underway. When he did give notice before the end of the Lloyds assignment, Huntswood's position (as reported to him by Ms Pearce) was that he had "broke contract". When he had done so in 2011 he had been marked as "DNU". This was more than an "expectation" that the contract would be fulfilled. I find that the reality was that the claimant was under an obligation to perform the work offered to him by Huntswood during the Lloyds assignment. I also accept the claimant's submission that Huntswood was obliged to provide him with work for the duration of the assignment (subject only to either party terminating by 20 days' notice). There was no suggestion from Huntswood that it was not so obliged.

205. For the claimant to be an employee for the purposes of the Equality Act 2010 he would have to be working under a contract of service or a contract personally to personally to do work. The respondents submitted that that was not the case. Specifically, they submitted that the requirement for personal service was undermined by the existence of the substitution clause in the contract between Huntswood and the claimant/his PSC.

206. The claimant's position, in summary, was that the right to substitution was a "sham". In practice, Huntswood would never have allowed the claimant to send a substitute. He submitted that this was a case falling within the fifth category of cases identified by Sir Terence Etherton MR, i.e. one where there was "a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent". That was consistent with a requirement for personal performance.

207. Although the written terms (clause 3.1) said that approval for a substitute would be given subject to certain conditions being met, the claimant submitted there was in reality "no stop" on Huntswood's right to reject any substitution. He pointed to the fact that Mr Stone's evidence was that he was not aware of any such substitution having taken place in practice. He also submitted that Huntswood's requirements for granting approval were not adequately defined. As I understand it, his submission on that point was that the wording of 3.1 and the "Contractor Information" about what information or documentation was required was, ultimately, within the unrestricted discretion of Huntswood. The same applied to the decision whether the contents of the information provided "[met] Huntswood's requirements" for the purposes of clause 3.1.

208. For Huntswood, Miss Balmelli submitted that the fact that the substitution clause had never been exercised in practice did not prevent it from being a genuine substitution clause. There was no evidence that the claimant or any of his witnesses had sought to exercise it in accordance with the contract terms (i.e. by requesting written approval). That meant there was no evidence of such a request being refused.

209. In summary, the respondents' submission was that this was a case falling within the fourth category identified by Sir Terence Etherton MR, i.e. where there was a "right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure". Such a case was "subject to any exceptional facts", inconsistent with personal performance.

210. Taken at face value, the written contract terms do not limit the circumstances in which the claimant could apply to Huntswood for written approval to provide a substitute. Clause 3.1 does not, for example, limit those circumstances to cases where the contractor is unable to carry out work due to illness or other incapacity. Clause 8.1 provides that a contractor "may" provide a substitute during holiday absence but does not limit the right to that absence.

211. Again, taken at face value, the written contract terms provide that written approval "will" be given if certain conditions are met. There is, on the face of it, no unfettered discretion on the part of Huntswood to refuse any substitute if the conditions are met. I accept that there is something in the claimant's submission that the conditions to be met do provide a significant amount of discretion to Huntswood. The "Contractor's Information" includes "Any other documentation specifically required by Huntswood in respect of the assignment". Although there is an example given, the "any" is not qualified by any requirement of reasonableness. Whether the documentation requested met Huntswood's requirements is also not qualified by a requirement of reasonableness. That gave Huntswood wide scope to refuse a substitute.

212. More fundamentally, however, it seems to me that this was a **Kalwak** case where the reality of the situation was that no one seriously expected that the claimant would seek to provide a substitute. Miss Balmelli submitted that just because an individual needed to be vetted and trained before they could be accepted as a substitute does not mean that there was no genuine right of substitution. I accept that the existence of a "particular procedure" for seeking approval does not necessarily take matters outside the fourth Etherton category. In this case, however, the reality is that any substitute would not only have to undergo the extensive vetting required but undergo training (2 weeks induction plus ongoing training) in order to carry out the work on the Lloyds assignment. They would need to complete and sign up to the confidentiality undertakings required by Huntswood and Lloyds and the other documents in the "Registration Pack". In practice, that would require a significant lead-in time before any substitute could start work, assuming they met the vetting criteria and met the required standards during training. The alternative would be someone who had already been vetted and trained for the Lloyds assignment. That was likely to provide a very limited pool of potential substitutes given that, by definition, the majority would not be available to act as substitute because they would already be engaged on the assignment.

213. Based on the evidence, I find that in reality, any substitute would also need to meet Huntswood's own criteria for engagement. It seems to me unrealistic to suggest, for example, that Huntswood would accept as a substitute someone who they had marked as DNU or as being someone they were unwilling to re-engage.

214. It seems to me that in this case the lack of any examples of substitution reflects the reality that neither the claimant nor Huntswood seriously expected the claimant to seek to provide a substitute. The expectation was that a contractor would see out their contract. I accept the claimant's submission that there was no genuine right to substitution in this case.

215. I find that supports the claimant's case that the contract between him and Huntswood did require personal performance. I find that the Itris Records support that with its focus on the claimant and his performance as an individual. I do find that the contract with Huntswood required personal performance.

216. I also accept the claimant's submission that he was subject to significant control in carrying out his work. I accept Miss Balmelli's submission that some of that control was simply a result of the fact that the claimant was working at a third-party controlled premises which meant he had to abide by Health and Safety rules and rules about security, e.g. having ID. I accept those rules would apply to any independent contractor working at a customer's premises.

217. I find, however, that the extent of control in this case went further than that. There was control about when, where and how the claimant worked. That extended to levels of day-to day details such as scripts to be used in speaking to callers and formats for letters. The amount of work done in a day was dictated by targets rather than the claimant's own discretion. Huntswood decided which team the claimant worked in and could move him from team to team. It also decided the role he carried out and the shifts he worked.

218. Mr Weiss in his written submissions accepted that the evidence disclosed a "high degree of prescription over how work was carried out". He submitted that was consistent with "the regulated environment" in which the claimant was operating. I accept that the financial services industry is a highly regulated one. It seems to me, however, that the degree of control over day to day activity went beyond that derived from regulatory requirements. It also reflected the way Lloyds wanted contractors to present themselves to the public and the targets Huntswood wanted to meet to fulfil its contract with Lloyds.

219. The extent of control in this case points towards the claimant being employed under a contract of service with Huntswood. However, there are other factors which point in the opposite direction. The claimant was not subject to Huntswood's disciplinary or grievance procedures. I do not accept the claimant's submission that clause 21 of the contract with Huntswood is in effect a disciplinary policy. It clearly is not. The claimant was not entitled to benefits such as sick pay or pension. The claimant was VAT registered and maintained professional indemnity insurance. He was not taxed as an employee.

220. On balance I find those factors are inconsistent with the claimant being employed under a contract of service. However, I do find that the claimant was employed under a contract for services. That means he is a "worker" for the purposes of s.230(3)(b) of the ERA unless Huntswood was a "client or customer of any profession or business undertaking" he carried on. Mr Weiss submitted that the claimant was in business on his own account. He pointed to the fact that the claimant

was paid through a business account. Those payments were made in relation to invoices which were "full blown VAT invoices".

221. The claimant submitted that the invoices were self-bill invoices which Huntswood generated. Payment was reliant on completion of timesheets which had to be signed off by the claimant's manager. I accept that is the case. Under the contract with Huntswood, the claimant agreed not to levy their own invoices. The levying of invoices was a mechanism set up by Huntswood to seek to reinforce that the arrangement was a business to business one. I prefer the claimant's submission that in reality the invoices were the equivalent of his payslips, being generated by Huntswood based on timesheets he submitted. They do not indicate that Huntswood was his "client or customer".

222. Applying the test in **Cotswold Developments**, I also find the reality was that this was not a case where the claimant actively marketed his services as an independent person to the world in general. Instead, he was recruited by Huntswood to work for it.

223. I find that the claimant was a "worker" of Huntswood for the purposes of s.230(3)(b) and so its "employee" for the purposes of the Equality Act 2010.

Whether the claimant is an employee of Lloyds for the purposes of the Equality Act 2010?

224. The claimant accepted that there was no express contract between him and Lloyds. He submitted that the Framework Agreement did not exclude the possibility of a contract arising between him and Lloyds. He referred to the indemnity clause 24.2 of the Framework Agreement as contemplating that an implied contract might arise. I accept Mr Weiss's submission that the existence of that indemnity clause is very far from meaning an agreement has to be implied.

225. The claimant's argument that he was a worker or employee of Lloyds relied on 3 main submissions.

226. The first was the extent to which he was physically integrated into Lloyds' organisation, working alongside Lloyds employees at the Chester premises. I found, however, that although some Lloyds' employees worked at the premises, they did not manage the claimant nor was he integrated into Lloyds' organisation. He may have worked alongside Lloyds' employees but I find he did not work with them.

227. The second submission was the extent to which the claimant was subject to Lloyds's policies and rules. I accept that the claimant was required to abide by a number of such policies. I do not accept his submission that he was subject to Lloyds' disciplinary and grievance policy.

228. The third submission was the extent to which the claimant was integrated into Lloyds's business. I accept that the claimant had a Lloyds email, signed letters on behalf of Lloyds and spoke on the phone as a representative of Lloyds. I do not accept he was integrated into Lloyds' business. He was managed by Huntswod contractors rather than Lloyds' managers. It was Huntswood who made the decisions about his work (including those he complains about) not Lloyds.

229. The issues of control and integration only become relevant, however, if it is necessary to imply a contract between the claimant and Lloyds. I accept Mr Weiss's submission that there is no necessity to imply a contract between the claimant and Lloyds in order to give effect to the reality of the situation. I have found that the reality was that the claimant was an employee of Huntswood (in the Equality Act 2010 sense). There is no necessity to imply a contract so that he was also an employee of Lloyds. To do so would be to give rise to the problems identified in **Cairns**.

230. There is no policy reason for implying a contract. I have found that the claimant was an employee (in the Equality Act 2010 sense) of Huntswood while working on the Lloyds assignment. If his claim were in time, the claimant would have a potential right of redress against Huntswood under the Equality Act 2010. There is no need to imply a contract with Lloyds to ensure the claimant could enforce his rights.

231. The claimant has not identified any employee or agent of Lloyds as having discriminated against him. Had he done so, he would (subject to amending his claim) have a potential right of redress against Lloyds under the contract worker provisions in s.41 of the Equality Act 2010. It would not be necessary to imply a contract between Lloyds and the claimant for those provisions to apply.

232. I find that there is no necessity to imply a contract between the claimant and Lloyds. In the absence of any such contract, the claimant cannot be an employee of Lloyds for the purposes of the Equality Act 2010. That is because the definition in s.83 of the Equality Act 2010 requires there to be a contract (either of service or to personally do work). The claimant was not an employee of Lloyds for the purposes of the Equality Act 2010.

The Equal Pay complaint

233. I refused the Equal Pay Claim amendment application.

234. That means that the claimant's complaint of being paid at a lower day rate than his female colleagues doing the same work because of sex remains one brought as a direct sex discrimination complaint under s.13 and s.39(2) of the Equality Act 2010. Given the EAT's judgment in **Shaikh**, I find that s.39(2) has no effect in relation to such a complaint. It should have been brought as a complaint under the equality of terms provisions in the Equality Act 2010. That complaint is bound to fail and I have dismissed it in my judgment.

235. For the avoidance of doubt, if I am wrong about that, and the claimant could bring the complaint as one of direct sex discrimination, I would have found that it was brought out of time. I would have found it was not just and equitable to extend time for the same reasons given above in relation to the Pay allegations based on the claimant's race and religion.

The Lloyds ECC strike out application

236. Given my decision on the other issues in this case this issue no longer arises.

Summary

237. My decisions mean that the claims against all 3 respondents are dismissed.

Approved by Employment Judge McDonald

Date: 21 March 2025

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 March 2025

FOR THE TRIBUNAL OFFICE

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