

Neutral Citation Number: [2026] EAT 43

Case No: EA-2025-001261-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 March 2026

Before:

HIS HONOUR JUDGE AUERBACH

Between:

MR A WHITAKER

Appellant

- and -

WHITE ROSE ACADEMIES TRUST (1)
LUMINATE EDUCATION GROUP (2)

Respondents

Emma Darlow Stearn (instructed by James and West Law LLP) for the **Appellant**
Daniel Piddington (instructed by Browne Jacobson LLP) attended for the **First Respondent**
Andrew Sugarman (instructed by Eversheds Sutherland LLP) for the **Second Respondent**

Hearing date: 27 January 2026

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant in the employment tribunal brought multiple complaints against two respondents, including detrimental treatment on the grounds of protected disclosures, unfair dismissal by reason of protected disclosures and unlawful deduction from wages.

At a preliminary hearing the employment tribunal determined that the claimant was neither an employee nor a worker of the second respondent within the meaning of section 230 **Employment Rights Act 1996**, and dismissed all of his complaints against it.

The tribunal did not err by failing to consider whether the claimant was a section 43K(1)(a) worker of the second respondent. On a fair and objective reading, that was not any part of his pleaded case; nor was this a case where, nevertheless, the fundamental duty of fairness made it necessary that this possibility should be raised and considered by the tribunal. **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA 185; [2025] ICR 1231 considered and applied.

This case was not in a category in which a point not advanced by a claimant should be considered by the tribunal “as a matter of course”. **Langston v Cranfield University** [1998] IRLR 172 considered. Applying the guiding principles summarised in **Secretary of State for Health v Rance** [2007] IRLR 665 the EAT also declined to permit the claimant to run the point for the first time at the appeal stage.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This matter is ongoing in the Leeds employment tribunal. Three claims were begun by the same claimant in the course of 2024 and 2025 raising various complaints. The respondents were White Rose Academies Trust and Luminate Education Group. I will refer to the parties as the claimant, WRAT and LEG.

2. There was a Preliminary Hearing (PH) by video before EJ Armstrong in July 2025. The tribunal’s judgment was that the claimant was not an employee of LEG and was not a worker of LEG, and that all of the complaints against LEG were dismissed. This is the claimant’s appeal against the decision that he was not a worker of LEG. He was represented by Emma Darlow Stearn, and LEG by Andrew Sugarman, both of counsel. I had skeleton arguments, and heard oral arguments, from them both. Daniel Piddington of counsel attended on behalf of WRAG, but advanced no arguments.

The Statutory Framework

3. Section 47B(1) **Employment Rights Act 1996** falls within Part V (Protection from suffering detriment in employment). It provides:

“47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”

4. Section 230 falls within Part XIV (Interpretation). It provides:

“Employees, workers etc.

(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker’s contract shall be construed accordingly.

(4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act “employment”—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and “employed” shall be construed accordingly.

(6) This section has effect subject to sections 43K, 47B(3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, “ worker ”, “ worker’s contract ” and, in relation to a worker, “ employer ”, “ employment ” and “ employed ” have the extended meaning given by section 43K.

(7) This section has effect subject to section 75K(3) and (5).”

5. Section 43K, which falls within Part IVA (Protected disclosures), is headed “Extension of meaning of ‘worker’ etc. for Part IVA” and includes, relevantly, the following provisions:

“(1) For the purposes of this Part “ worker ” includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

... ..

(2) For the purposes of this Part “ employer ” includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,”

6. Section 48(1A), within Part V (Protection from suffering detriment in employment), provides:

“A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.”

The Litigation History

7. The first claim form was presented on 23 January 2024. The claimant was represented by solicitors. The respondents were WRAG (1) and LEG (2). In box 8.1 it was identified that the claimant was claiming unlawful detriment pursuant to sections 47B(1) and 48(1A) of the **1996 Act**. A details of complaint document was attached. It began by stating that the claimant had commenced employment with WRAG in September 2016. It set out that in 2019 he was designated CEO and he was the Accounting Officer. Paras. [4] – [7] stated:

“4. The First Respondent is a member of Luminate Education Group (LEG), the Second Respondent. Throughout this document, the Second Respondent will be referred to as LEG/R2/Second Respondent. LEG is a group of education providers based in the Leeds City Region. It is a government approved multi-academy trust sponsor, responsible for setting up WRAT. Even though WRAT is a member organisation of the Second Respondent, WRAT is a separate legal entity.

5. On 30 November 2020, the Second Respondent’s Remuneration Committee held its annual review of the overall remuneration package of senior staff within its remit. This was the first stage of the LEG Pay and Performance process. As a result, it was agreed that the Claimant’s salary would increase from £140,793 to £147,793 with effect from 1 September 2020. It was further agreed that the Claimant would, in addition to his role as CEO of WRAT, assume the promoted position of ‘Deputy CEO’ of the Second Respondent. The Committee therefore supported a change in the Claimant’s title from CEO WRAT to ‘LEG Deputy CEO - Teaching and Learning and CEO WRAT’ and an increase in his salary. The Claimant also retained his AO duties for the WRAT. The WRAT Board then considered the decisions of the LEG Remuneration Committee at the 10th December 2020 WRAT Board meeting (this was the second stage of the process). This promotion, change in job title and increase in salary was subsequently approved and ratified at the LEG Board meeting held on the 14th December 2020 (the third stage of the process).

6. When the LEG Board approved the promotion of the Claimant to the role of Deputy CEO, LEG, he also became the executive leader of the teaching and learning strategy/team across LEG, which included line managing senior leaders employed by both LEG and the WRAT and managing income and expenditure budgets included in the LEG Executive Leadership Team annual budget. The Claimant was also required to retain and continue his executive leadership responsibilities as CEO of the WRAT, including his AO duties as outlined in WRAT’s Annual Financial Statements/Reports.

7. Despite this new title, promotion and increase in salary, the Claimant was never provided with any documentation to confirm this change. The Claimant asserts that there was a contractual relationship between himself and the Second Respondent as the LEG Board determined: the Claimant’s salary; his annual performance management targets; assessed whether or not the Claimant had passed his annual targets; determined his job description, including the line management and 64 performance management of members of LEG’s Senior Leadership Team, employed on LEG contracts of employment; approved all of the policies that governed his employment; included the Claimant within the LEG leadership charts; included the Claimant on LEG’s website, identifying his role as LEG Deputy CEO – Teaching & Learning, and as a member of the LEG Executive Leadership Team (ELT); his email signatures were to be changed to include both his LEG and WRAT job titles and employment status; that the Claimant undertook significant work on behalf of LEG, to offset in full the £130k annual membership fee payable by the WRAT to LEG. In addition, the Claimant attended all general meetings of the LEG Board, where he presented regular reports on LEG’s teaching and learning strategy and acted upon resolutions of the board. The Claimant also attended a vast number of LEG executive, strategic, training and management meetings throughout a typical calendar year.”

8. Para. [8] said the claimant had a “dual role” with WRAT and LEG. Para. [9] read:

“In light of this, it is clear that the Second Respondent retained a sufficient degree of control over the Claimant and therefore the Claimant asserts he is an employee of the Second Respondent and/or a worker in the alternative. The Claimant is therefore bringing claims against both Respondents.”

9. The remainder of the document set out the claimant’s factual case, what protected disclosures he claimed to have made, and the detrimental treatment to which he claimed to have been subjected, and, in each case, whether by WRAT, LEG or both of them.

10. The complaints were defended by both respondents. WRAT did not dispute that the claimant

was its employee. LEG asserted that he had never been engaged by it as an employee or a worker.

11. The second claim was presented on 1 July 2024 against both respondents. The claimant was again represented by solicitors. A details of complaint document was attached. It asserted that since presenting the first claim the claimant had suffered further protected-disclosure detriments and an unlawful deduction from wages. The factual basis for the further complaints was set out.

12. Both respondents defended the second claim. LEG asserted that the claimant had never been its employee or worker. It also asserted that all acts complained of in this claim were alleged to have been acts of WRAT and not LEG, and so this claim, as against LEG, should be struck out.

13. There was a case-management PH before EJ Brain on 20 January 2025. The claimant was represented by counsel (not Ms Darlow Stearn), WRAT by Mr Piddington and LEG by a solicitor. The judge set out the history of the two claims. It was noted that the claimant had been dismissed and intended to bring a third claim of unfair dismissal. It was noted that WRAT raised no issue about his status to pursue his claims against it. However, there was an issue raised by LEG as to the claimant's status to pursue any claim against it. It was common ground that there should be a PH to determine the claimant's status to pursue the two existing claims, and, possibly, an unfair dismissal claim, as against LEG. The minute then set out the issues, beginning with the following:

“1. Employment status

1.1 Was the claimant an employee of either of the respondents within the meaning of section 230 of the Employment Rights Act 1996? There is no issue about this for the first respondent, but it is in issue for the second respondent.

1.2 Was the claimant a worker of the respondents within the meaning of section 83 of the Equality Act 2010? There is no issue about this for the first respondent, but it is in issue for the second respondent.”

14. Case-management directions then listed the public PH to take place over three days in July 2025, following a by a case-management hearing the next day. Para. 3 of the directions included:

“The issue to be determined at the public preliminary hearing is whether the claimant has status to pursue any of the complaints raised in the two claims against the second respondent.”

15. Para. 8 required the claimant’s solicitor to send to the tribunal and the respondents’ solicitors further information on two numbered matters. Relevantly, the first was “[t]he basis on which the claimant says that he has standing to pursue any of the complaints raised in the first and second claims against the second respondent”. The PH minute was sent on 17 February 2025. In the meantime, on 28 January 2025, the claimant’s solicitors emailed the tribunal and the respondents’ solicitors. They referred to the direction to provide particulars. They stated that the second claim was pursued only against WRAT and not LEG. They also gave particulars on the second numbered matter.

16. Claim 3 was presented on 1 March 2025, against both respondents, by the claimant acting in person. The boxes were ticked for complaints of unfair dismissal, whistleblowing, holiday pay, arrears of pay and other payments. A details of complaint document was attached. This stated at [4]:

“The Second Respondent (R2) appoints all the Members of the Trust, and the Members in turn may appoint up to 10 Directors, 7 of which to be appointed by the Sponsor, the Second Respondent (R2). Therefore the Second Respondent (R2) holds a controlling interest and significant influence over the First Respondent (R1). In light of this, it is clear that the Second Respondent (R2) retained a sufficient degree of control over the Claimant and therefore the Claimant asserts he is also an employee of the Second Respondent (R2) and/or a worker in the alternative. The Claimant is therefore bringing claims against both Respondents.”

17. Para. [7] stated:

“Further, the claimant asserts that there was a contractual relationship, established, between himself and the Second Respondent (R2) as the LEG Board determined: the Claimant’s salary; his annual performance management targets; assessed whether or not the Claimant had achieved his annual targets; determined his job description, including the line management and performance management of members of LEG’s Senior Leadership Team who were employed on LEG contracts of employment; approved all of the policies that 213 governed his employment; included the Claimant within the LEG leadership charts; included the Claimant on LEGs website, identifying his role as LEG Deputy CEO – Teaching & Learning, and as a member of the LEG Executive Leadership Team (ELT); his email signatures were changed to include both his LEG, and WRAT job titles, and employment status separately, in the footer of all his emails; that the Claimant undertook significant work on behalf of LEG, to offset in full the £130k annual membership fee payable by the WRAT to LEG. In addition, the Claimant attended all general meetings of the LEG Board, where he presented regular reports on LEG’s teaching and learning strategy and acted upon resolutions of the board. The Claimant also attended a vast number of LEG executive, strategic, training, and management meetings, throughout a typical calendar year, and enjoyed a reporting line into the Vice Chair of the LEG (R2) board.”

18. The document went on to set out further complaints of being subjected to a detriment pursuant to sections 47B and 48(1A), including some conduct which it laid at the door of both respondents.

19. I was told that on 15 April 2025 EJ Brain directed that the three claims be considered together.

The Employment Tribunal's Decision

20. At the PH on 7 – 9 July 2025 the claimant appeared in person. WRAT was represented by Mr Piddington and LEG by Mr Sugarman. At [1] of the written reasons the judge identified that the matter had been listed to determine “whether the claimant was a worker or employee of the second respondent” as directed at the PH before EJ Brain. She continued:

“I repeat the thanks I gave to the claimant and second respondent’s representative for the manner in which they put their cases. They both did so clearly and concisely, such that the Tribunal was able to deal with the issue within the listed time estimate. The claimant during the hearing expressed some concern about his lack of skill in cross-examination and knowledge of the law. For the avoidance of doubt I have no concerns about the claimant’s ability to fully put his case in a skilful and clear manner. He has previously held a senior executive role with multiple high level responsibilities. His cross-examination was effective and he put all the key points. His suggested reading list was proportionate and relevant. His skeleton argument was clearly structured, and relevant to the legal and factual issues.”

21. The tribunal noted that none of the parties disputed that WRAT was the claimant’s employer. It noted that the claimant also brought claims against LEG, which was the sponsor of WRAT, and that there was a document in the bundle summarising the powers of a sponsor of a Multi-Academy Trust. It referred to a shared services agreement between WRAT and LEG of 2021, but noted that it was not disputed that they remained separate entities. It noted that the matter had been listed to determine whether the claimant was an employee and/or worker of LEG. It continued:

“11. The claimant’s position as clarified at the end of the hearing is this: he invites me to find that there was an implied contract of employment with R2 as a result of the facts of the relationship – namely the degree of control, integration and other factors which he highlights in his written submissions. His position is that this contract is separate from the employment contract between himself and R1.”

22. The tribunal recorded that it heard evidence from the claimant and, for LEG, from its CEO and Accounting Officer, Colin Booth; and it referred to the bundle and documents that were before it. As to the law the tribunal began by noting that there was a large volume of jurisprudence on the issue of employment/worker status, but that the relevant principles were clearly set out in the skeleton arguments of the claimant and LEG. It set out the text of section 230(1) – (3) and referred to a number of authorities and principles emerging from those authorities.

23. The tribunal set out its findings of fact over a number of pages. The tribunal then concluded that there was no express contract between the claimant and LEG. The tribunal continued:

“86. I have considered very carefully whether the surrounding facts, including the way in which the claimant carried out his work, and the level of control and integration, are such that they show that the reality of the relationship between the claimant and R2 was that there was an implied contract of employment or worker contract between them.

87. I am not satisfied that there was. I hope that the reasons for this are clear from my findings above, but for the avoidance of doubt:

88. Firstly, I do not consider that either the claimant, R1, or R2 thought that there was a separate contract between the claimant and R2 at any point. The possibility of putting in place a separate contract of employment with R2 was discussed and discounted. When the LEG element of the claimant’s role was suspended at the direction of R1, neither of the other two parties objected on the basis that R1 had no power to do so.

89. Secondly, all of the characteristics of an agreement between the claimant and R2 are missing. There was no remuneration by R2. There was no agreement as to what hours the claimant was working for R2 as opposed to R1. There was no ‘wage bargain’ or any discussion about the terms and benefits under which the claimant was working for R2.

90. Thirdly, there was no distinction between the elements of the role which were ‘for’ R1 and the elements which were ‘for’ R2 in any sense. This presents all of the difficulties in the case law of being employed by two employers in the same role at the same time.

91. Fourthly, I accept that the elements of the claimant’s work at and around group level – strategy development, sharing of good practice and so on – were agreed to by R1 because they perceived them to be of benefit to R1. Once R1 became sufficiently concerned that they were not a benefit, they terminated that activity.

92. Fifthly, the activities were terminated or suspended by R1 in February 2022 – this is a clear indication that they were done on the direction of R1 under a contract of employment by them.

93. Sixthly, it is not necessary to imply a contract in order to provide the claimant with the protection of employment status – this is not an Uber or Pimlico Plumbers-type case. The claimant was a highly-paid executive, who already had all of the benefits and security of a contract of employment with R1 – that is accepted by all three parties.

94. Finally, because of all the above, there is no business efficacy need for an implied contract between the claimant and R2. R2 clearly played a significant role in the claimant’s day-to-day work. That ultimately gave rise to concerns. But the fact that R2 played this role is explained by the contractual position put forward by R2 and R1 (that they were exploring closer alignment, which involved the claimant in his role as an employee of R1), not by the existence of an implied contract whether of employment or contract for service as a worker, between the claimant and R2.

95. In conclusion, the claimant was not an employee or worker of R2. All claims against R2 are dismissed.”

Moustache v Chelsea and Westminster Hospital NHS Foundation Trust [2025] EWCA 185;

[2025] ICR 1231

24. In **Moustache** Warby LJ (Elisabeth Laing and Dingemans LJJ concurring), said, in the course of discussion at [33] to [40] (I have omitted some passages in the extract below):

“33. First, proceedings in the ET are adversarial. The range of claims that may be brought and the range of substantive or procedural answers that may be raised to those claims are defined by law, principally by statute. In any given case the primary onus lies on the parties to identify, within those ranges, which claims they wish to bring and which answers they wish to advance.

34. Secondly, the issues raised by the parties are those which emerge clearly from an objective analysis of their statements of case. Identification of the issues does not involve reference to other documents which do not have the status of pleadings and come later.

... ..

35. Of course, the contents of a statement of case must be analysed in their proper context but this does not require the ET to engage in an elaborate or complex interpretative exercise. I would adopt the words of Elisabeth Laing J (as she then was) in *Adebowale v ISBAN UK Ltd* UKEAT/0068/15 at [16]:

... the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented) and by the EJ. The EJ is, of course, an expert but ... should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation ...

36. Thirdly, where a party seeks the ET’s ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction) the ET has a duty to address that issue. This is the core function of the tribunal.

... ..

37. Fourthly, however, the ET’s role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party’s case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take pro-active steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT.

38. We have been referred to the decisions of this court in *Mensah* (above) at [28] and [36] and *Muschett v HM Prison Service* [2010] EWCA Civ 25, [2010] IRLR 451 [31]. I do not consider it necessary to review those two cases in further detail. That was done in *Drysdale v Department of Transport* [2014] EWCA Civ 1083, [2014] IRLR 892 where the court subjected the relevant authorities to a detailed analysis from which Barling J (with whom Arden and Christopher Clarke LJJ agreed) derived the following general principles:

(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.

(2) What level of assistance or intervention is “appropriate” depends upon the circumstances of each particular case.

(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.

(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

(5) The determination of the appropriate level of assistance or intervention is properly a matter for

the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.

(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.

39. The following analysis seems to me correct in principle and consistent with the case law. The starting point is to consider what claims emerge from an objective analysis of the statements of case. A failure by the tribunal to identify and address those claims is liable to amount to a breach of its core duty and hence an error of law. A failure to identify and determine a claim that does not emerge from such an analysis can amount to an error of law but only in rare or exceptional circumstances of the kind outlined in *Drysdale*. It is in this overall context that the role of an agreed list of issues falls for consideration.

40. A list of issues is not a pleading but a case management tool. The main purpose of such a document is to summarise the existing pleadings not to amend them. On the other hand, as Mensah shows, a party may conduct itself in such a way as to lose the right to have the ET decide a pleaded issue, thereby reducing the scope of the tribunal's corresponding duty. An agreed list of issues is one way in which that could in principle be done. Such a list is, after all, an express agreement that the tribunal should conduct the proceedings in a particular way, and an invitation to the tribunal to do so. A tribunal will usually be entitled to confine its attention to the issues on the list. By way of exception, however, it may be necessary in the interests of justice to depart from even an agreed list. There are at least two distinct categories of situation in which that may be so. The first is where a pleaded claim has been omitted from the list in circumstances that do not amount to abandonment of the claim. The second is where the claim has not been pleaded but the fundamental duty of fairness makes it necessary (that is to say, essential) that it should be raised and considered."

The Appeal

25. The Grounds of Appeal, and Ms Darlow Stearn in argument, accept that at no point in the claimant's pleadings, in the course of the litigation, or at the PH before EJ Armstrong, was it identified or suggested that the claimant was seeking to rely (or rely in the alternative) against LEG on the proposition that he was a section 43K(1)(a) worker of LEG. Further, in his written submission at the PH itself the claimant expressly advanced the case that he was an employee, or alternatively, a worker, of LEG, satisfying the elements of the definition in section 230(3).

26. However, it is contended that the tribunal erred by not considering whether the claimant was a section 43K(1)(a) worker of LEG because, prior to that PH it had never been stated that he relied only on section 230(3), the facts pleaded supported a case that he was a section 43K(1)(a) worker, and, in all the circumstances, this was a case where the tribunal at the PH should have considered that possibility. Alternatively, it should have considered section 43K "as a matter of course".

Alternatively, the claimant should be permitted to introduce the argument as a new point on appeal.

The Pleadings Case

27. It is true that the first claim simply claimed that the claimant was either an employee or a worker of LEG, and, as to the latter, referred, expressly, *neither* to section 230(3) *nor* to section 43K(1)(a). However, I consider that, on a fair, objective reading, it advanced a case that he was section 230(3) worker, and did *not* advance an alternative case that he was a section 43K worker.

28. The concepts of employee and worker in section 230 are overlapping companions. They have a similar architecture. As the EAT put it in **Byrne Brothers (Formwork) Ltd v Baird** [2002] ICR 667 at [17], one way of looking at the difference is that the “pass-mark” for meeting the definition of “worker” in section 230 is lower. By contrast the section 43K(1)(a) definition of “worker” contains elements which are conceptually different and unique to that definition.

29. Section 43K(1) also states that it applies to an individual who is “not a worker as defined in section 230(3)”. In **Day v Lewisham and Greenwich NHS Trust** [2017] EWCA Civ 329; [2017] ICR 91 it was held that this must be read as referring to “an individual who *as against a given respondent* is not a worker as defined by section 230(3)”. However, while it is therefore possible to be, simultaneously, a section 230 worker of one employer, and a section 43K worker of a different employer (or a section 43K worker of each of two employers), it is not possible, simultaneously, to be both a section 230 worker and a section 43K worker of the *same* employer.

30. In the present case, the details of the first claim asserted that from 2020 the claimant had a dual role within WRAT and LEG. They asserted that there was a contractual relationship between the claimant and LEG, and that there was “a sufficient degree of control over the Claimant and therefore the Claimant asserts he is an employee of the Second Respondent and/or a worker in the alternative.” Other claimed features relied upon put forward a case that he was significantly integrated into LEG’s organisation, and committed to providing his services personally. All of that

bespeaks a positive case being advanced, in substance, invoking the concepts relevant to the section 230 definitions and case-law, that the claimant was an employee, or alternatively a worker of LEG, within the meanings of those concepts in section 230.

31. Claim 2 did not elaborate on the legal basis on which the further detrimental treatment complaints were pursued. But I note that this claim also included complaints of unlawful deduction from wages. Such complaints can only be pursued by an employee or a section 230(3) worker. In the event, as I have noted, it was later stated that claim 2 was not maintained against LEG. But the way in which this claim was at first advanced, was consistent with the picture presented by claim 1, that the claimant was claiming to be an employee, alternatively a section 230(3) worker, of LEG.

32. In the minute of EJ Brain's PH there was, counsel were agreed before me, an obvious error at [1.2] under "Employment Status" in the judge referring to whether the claimant was a worker for the purposes of section 83 **Equality Act 2010**. Ms Darlow Stearn properly accepted that section 83 of that Act (which, confusingly, uses the definitional term "employee") is (though not identically worded) in substance the sibling provision of section 230(3) of the **1996 Act**. (See, on this, the discussion in **Secretary of State for Justice v Windle** [2016] EWCA Civ 459; [2017] ICR 83.) In so far as Ms Darlow Stearn submitted that the fact of this error supported the argument that the list of issues needed, more generally, to be looked at again, I do not agree.

33. The natural reading of what EJ Brain meant to put, therefore, was that the issues were whether the claimant was an employee, alternatively a section 230(3) worker. That was consistent with how, as I have described, the complaints were, in substance, advanced in claims 1 and 2. I note also that there is no suggestion, anywhere in that minute, that counsel who appeared for the claimant at that hearing suggested that he contended, or sought to argue (whether on the basis of the claims as framed, or by way of application to amend) that he was, alternatively, a section 43K(1)(a) worker of LEG.

34. Although the direction for particulars given by EJ Brain referred to a requirement to send

information of the basis on which the claimant said he had standing to pursue any of the complaints in the first and second claims, as against LEG, this referred in brackets (only) to the number of the second claim. That was consistent with the fact that, in its response to the second claim, LEG had (as well as repeating that the claimant had never been its worker or employee) asserted that all of the matters complained of in that claim were alleged actions of WRAT only; and consistent with the claimant's then solicitors, following the EJ Brain PH, indicating that claim 2 was only pursued against WRAT. In any event they did not attempt to take the opportunity to assert that the claims in the first claim form were pursued against LEG on the alternative basis that the claimant was a section 43K(1)(a) worker. Nor was it raised that the EJ Brain list of issues required correction in this regard.

35. While the third claim was tabled by the claimant as a litigant in person, it followed on from the first two claims, to which he asked that it be joined, and the text of the details of claim substantially borrowed from those attached to claim 1, including the passages which, as I have indicated, substantially conveyed that the claimant was claiming to be an employee, alternatively a section 230(3) worker. I also note once again that, as well as claiming further protected-disclosure detriments and unfair dismissal, this claim form also raised wages claims against both respondents.

36. As already noted, and consistently with all the foregoing, at the hearing before EJ Armstrong the claimant expressly advanced his case on the basis that he was an employee of LEG, alternatively a worker, within section 230(1) and (3).

37. Pausing there, while it is true that, prior to the PH before EJ Armstrong, there was no express reference to either section 43K(1) or section 230(3), and that, in places, the EJ Brain minute framed the issues for the next PH simply as whether the claimant was an employee or a "worker" of LEG, I conclude that the pleaded case was, at all times, that the claimant was a section 230(3) worker, and not that he was, in the alternative, a section 43K(1)(a) worker. I therefore conclude that the Armstrong tribunal did not err by failing to identify and address a component of the claimant's pleaded case. It

did not commit the error identified in the first three sentences of para. [39] in **Moustache**.

Error by failure to identify and determine a section 43K(1) case that was not pleaded?

38. Did the tribunal err, by failing to identify and consider the section 43K(1)(a) argument, notwithstanding that reliance upon that provision was not pleaded? In the language used in **Moustache** at [39], was this a case of the exceptional kind outlined in **Drysdale**? In the language of **Moustache** at [40] was it “necessary (that is to say, essential)” that it should be raised and considered by the tribunal? Ms Darlow Stearn submitted that it was. Particularly in oral submissions, she developed her arguments in considerable fine detail. But they essentially had two broad planks.

39. First, reliance was placed on the fact that the claimant was, at the PH before EJ Armstrong representing himself. As the judge noted, he expressed a concern at the start that he lacked skill in cross-examination and knowledge of the law. Ms Darlow Stearn submitted that the fact that he was a senior executive and skilled in another profession was not relevant. Secondly, it is said that the pleadings and/or evidence and/or findings of fact made by the tribunal “overwhelmingly indicated” that the three elements of the section 43K(1)(a) test were met. It is also submitted that the fact that the tribunal concluded that there was no contract between the claimant and LEG did not matter, because, as a matter of law, it sufficed that there was a contract between him and WRAT.

40. As to the first strand of the argument, the **Drysdale** guidance, as reproduced and endorsed in **Moustache**, emphasises the wide margin of appreciation that tribunals have in deciding what assistance to provide to a litigant in the given case, and that relevant considerations are likely to include, not just whether a party is represented, but, if not, their apparent level of competence and understanding. The tribunal is also subject to the overriding requirement to be impartial.

41. In this case, while the claimant was a litigant in person representing himself at the hearing, his first claim (as well as his second claim, though later no longer maintained against LEG) had been presented by his then solicitors, and relied upon detailed, lengthy, particulars of claim. He was also

represented by counsel at the case-management hearing before EJ Brain. His third claim drew on the pleadings in the first claim and relied on the same historic background facts and analysis. This was not a case where the claimant was appearing at a hearing without having had the benefit of any professional input to help him formulate the legal and factual basis of his complaints.

42. Further, while the judge referred to the claimant expressing concern about his lack of skill in cross-examination and knowledge of the law, her conclusion was that she had no concerns about his ability to fully put his case in a skilful and clear manner. She said specifically that his skeleton argument was clearly structured and relevant to the legal and factual issues. I note that it indeed referred to section 230(1) and (3), set out what he regarded as the relevant facts, his analysis of how the law should be applied to the facts, and referred to authorities that are pertinent to section 230.

43. Turning to the second plank of this argument, in Moustache Warby LJ considered a number of other authorities, including this at [42]:

“In *McLeary v One Housing Group Ltd* UKEAT/0124/18 the EAT held that the ET had erred in law by overlooking a claim that discrimination during employment had contributed to the employee's constructive dismissal. At [63] HHJ Auerbach identified as his starting point the question of “whether the claim form, read or not with other relevant documents, should have been treated as advancing a claim of constructive dismissal pursuant to section 39 EqA.” He found that although such a claim was not expressly identified it was “plainly being asserted” and “shouted out” from the particulars of claim which “should have been treated as including” such a claim. In my view the ratio decidendi of the case is that on an objective reading of the statements of case in their proper context the employee was claiming that her constructive dismissal flowed from acts of discrimination. The judge did say, further and alternatively, that the issue “should at least have been raised and clarified by the tribunal at the initial case management hearing”. In reaching that conclusion the judge referred to *Drysdale* and made clear that he regarded his conclusions as consistent with the principles there identified. I therefore read this alternative ground of decision as a finding that if (contrary to the judge's primary conclusion) the discrimination claim was not clearly pleaded then, on the facts of the case, the claim was so obvious that it was perverse of the tribunal not to identify it.”

44. I observe that in McLeary all of the precise necessary legal and factual ingredients of a constructive discriminatory dismissal claim had been pleaded, because the claimant had pleaded incidents of discriminatory treatment during employment, *and* (for the stated purpose of an unfair constructive dismissal complaint) that that *same* treatment amounted to a fundamental breach which had not been waived and had materially influenced his decision to resign. The precise legal and factual elements of those two complaints, taken together, without more, provided the precise legal

and factual elements of the putative constructive discriminatory dismissal complaint.

45. The present case is not like that. Firstly, the legal ingredients of the section 43K(1)(a) definition of worker are not the same as those of the section 230(3) definition. They are materially different. The very point of section 43K is that it enables someone who is not, in fact and law, a section 230(3) worker, to claim that the facts do, however, fulfil the elements of one or other of the different definitions of worker in section 43K(1). Secondly, while Ms Darlow Stearn contended that the facts of this case would have been a natural fit for section 43K(1)(a), and could have been found to satisfy all of its components, she indicated in oral argument that she did not press the contention that it would actually have been perverse (had the tribunal considered it) for the tribunal to have concluded other than that the facts found showed that section 43K(1)(a) was satisfied.

46. I agree with Mr Sugarman that determination of whether the claimant was a section 43K(1)(a) worker of LEG would have required the tribunal to determine some issues to which it was not inevitable that there was only one answer, which would have called for an evaluative judgment and which may in some respects have required further findings of fact. These included whether the claimant worked “for” LEG in the section 43K(1)(a) sense. Although at [65], [68] and [90] the tribunal used the word “for”, it placed it in inverted commas, and referred at [90] to working “for” LEG “in any sense”. Further, at [76] and [82] it found that he did some work “for or with” LEG, which was of benefit to WRAT. The section 43K(1)(a) context would require further findings.

47. Similarly, the tribunal would have needed to say more than it did, in order to provide an answer to whether the correct analysis was that the claimant was “introduced or supplied” to work for LEG by WRAT, given, for example, its opening findings that the wider context was that LEG was the sponsor of WRAT, and the powers which, as such, LEG had over WRAT.

48. The tribunal would also have had to determine whether the terms on which the claimant was engaged to do the work were in practice *substantially determined* by LEG. **McTigue v University**

Hospital Bristol NHS Trust [2016] ICR 1155 (EAT) holds that this can, in a given case, be simultaneously true of both the person for whom a claimant works, and the person who introduced or supplied them to do the work. Nevertheless, the findings that the tribunal made, for example, as to the claimant's job including some LEG targets, or his being managed by Mr Booth (who sat on the boards of both companies) or his having line management responsibilities for some LEG employees as well as some WRAT employees, were not bound, without further findings, to point to the conclusion that "terms on which he is or was engaged" were "substantially determined" by LEG.

49. I conclude that this is not a case where the section 43K(1)(a) argument and analysis was one which "shouted out" in the **McLeary** sense, nor that it was for any other reason one in which, in **Moustache** terms, the fundamental duty of fairness meant that it was "necessary (that is to say, essential)" that the tribunal raise and consider it. The tribunal did not err by failing to do so.

50. I have noted that there was a further doctrinal disagreement as to whether, for the section 43K(1)(a) definition to be fulfilled, there must be a contract with the putative employer. Mr Sugarman contended that **Sharpe v The Bishop of Worcester** [2015] EWCA Civ 399; [2015] ICR 1241 so decides. Ms Darlow Stearn contended that this was not the *ratio* of **Sharpe**, which had been properly distinguished by the EAT in **W v Highways England** [2025] EAT 18, and that it was sufficient that there was a contract with the putative introducer or supplier. She sought to draw support from passages in **McTigue** and **Day** and argued that it cannot have been Parliament's intention that there must be a contract with the putative section 43K(2)(a) employer, as, were that right, section 43K would not extend the protection in the paradigm tripartite case in which the end user was not an employer, on the basis that there was no necessity to imply a contract with it. This is an important legal issue, but, in the event, not one on which I need to opine in order to determine this appeal.

Should the tribunal have considered section 43K(1)(a) as a matter of course?

51. Ms Darlow Stearn advanced the alternative submissions that the present tribunal should have

considered section 43K as a matter of course, at least on the facts of this particular case, or, alternatively, that “tribunals ought to consider the extended definition as a matter of course when considering employment status in whistleblowing claims”, in line with the protective purpose of section 43K to extend whistleblowing protection to a wider category of claimants. In oral submissions she narrowed the latter submission to cases involving two putative “employers”.

52. In **Langston v Cranfield University** [1998] IRLR 172 the EAT discussed at [21] that there are certain types of case where “a principle is so well-established that an Industrial Tribunal may be expected to consider it as a matter of course”. The well-known examples from earlier authorities, to which it referred, relate to the determination of whether a dismissal by reason of conduct, or redundancy, is fair or unfair, and basic or core heads of loss which will ordinarily need to be considered when an unfair dismissal claim has succeeded. For a recent discussion, in a case concerning the approach to be taken when considering the fairness of a dismissal by reason of the employee’s absence record, see **Bugden v Royal Mail Group Limited** [2024] EAT 80.

53. Ms Darlow Stearn also cited **Small v Shrewsbury and Telford Hospitals NHS Trust** [2017] EWCA Civ 882; [2017] IRLR 889 in which the Court of Appeal concluded that the tribunal had erred by not considering, when determining remedy for the “dismissal” of a worker contrary to section 47B, whether he had what was referred to as a *Chagger* or stigma loss claim, even though he had not specifically raised the argument.

54. The categories of issue to which the general “matter of course” approach has been said, over the decades, to apply, are limited and few. In **Remploy Ltd v Abbott** UKEAT/0405/14 misgivings were expressed even about **Langston**, which was described as a high-water mark, and some of the practical difficulties which may arise from such an approach were canvassed. All of the established categories of which I am aware concern the approach to the application of a specific single particular statutory test, such as section 98(4) or section 123(1) of the **1996 Act**.

55. **Small** does not take matters any further. It was concerned with the heads of loss falling under the umbrella of compensation for a contravention of section 47B. Further, Underhill LJ (Lloyd Jones LJ concurring) held at [14] that the *Chagger* or stigma head of loss should have been considered by the tribunal in that case “on the basis of the particular material before it”. Although Underhill LJ added the words “as a matter of course”, he also expressly stated that he was not saying that it would always be so, only that it was so in that case. I therefore do not think this authority in fact adds anything to the general jurisprudence on the general categories of “matter of course” case.

56. I conclude that none of the established examples involves a tribunal being required as a matter of course to consider separate provisions of the statute which the party concerned has not in fact relied upon, and which set out a distinct legal test from that which the case presented to the tribunal requires it to apply. I consider that the EAT should be very circumspect before extending the list beyond those long-established and familiar categories in which the point in question is to be regarded as being ordinarily a sub-strand of the issues falling under the umbrella of the particular statutory provision which the tribunal is applying in the given case. I decline to do so. The alternative contention that the present tribunal should have done so as a matter of course in the particular circumstances of this case does not add anything in substance to the arguments about why the tribunal should have done so in those particular circumstances, that I have already considered and rejected.

Should the claimant be permitted to run the section 43K argument as a new point in the EAT?

57. In **Secretary of State for Health v Rance** [2007] IRLR 665, the EAT reviewed a line of authorities including a number of decisions of the Court of Appeal, which had considered the approach to be taken when a party seeks to run a point for the first time at the appeal stage. At [50] the EAT drew out the following principles from the authorities:

“(1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities; Jones paragraph 20.

(2) The discretion covers new points and the re-opening of conceded points; ibid.

- (3) The discretion is exercised only in exceptional circumstances; *ibid*.
- (4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated; *ibid*.
- (5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken; *Barber v Thames Television plc* [1991] IRLR 236 EAT Knox J and members at paragraph 38; approved in *Jones*. It remains discretionary.
- (6) The discretion may be exercised in any of the following circumstances which are given as examples:
- (a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant that the point was not taken below: *Kumchyk v Derby City Council* [1978] ICR 1116 EAT Arnold J and members at 1123
- (b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. *Wilson v Liverpool Corporation* [1971] 1 WLR 302, 307, per Widgery LJ.
- (c) The new point enables the EAT plainly to say from existing material that the Employment Tribunal judgment was a nullity, for that is a consideration of overwhelming strength; *House v Emerson Electric Industrial Controls* [1980] ICR 795 at 800, EAT Talbot J and members, followed and applied in *Barber* at paragraph 38. In such a case it is the EAT's duty to put right the law on the facts available to the EAT; *Glennie* paragraph 12 citing *House*.
- (d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the Employment Tribunal; *Glennie* paragraph 15.
- (e) The EAT can see an obvious knock-out point; *Glennie*, paragraph 16.
- (f) The issue is a discrete one of pure law requiring no further factual enquiry; *Glennie* para 17 per Laws LJ.
- (g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist Tribunal is required; Laws LJ in *Leicestershire* para 21
- (7) The discretion is not to be exercised where by way of example;
- (a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence; *Barber* para 20 as interpreted in *Glennie* para 15.
- (b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason; *Jones* para 20.
- (c) The point was not taken below as a result of a tactical decision by a representative or a party; *Kumchyk* at page 1123, approved in *Glennie* at para 15.
- (d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of the law to it by the specialist first instance Tribunal; *Leicestershire* para 21.
- (e) A represented party has fought and lost a jurisdictional issue and now seeks a new hearing; *Glennie* para 15. That applies whether the jurisdictional issue is the same as that originally canvassed (normal retiring age as in *Barber*) or is a different way of establishing jurisdiction from that originally canvassed (associated employers and transfer of undertakings as in *Russell v Elmdon Freight Terminal Ltd* [1989] ICR 629 EAT Knox J and members). See the analysis in *Glennie* at paras 13 and 14 of these two cases.
- (f) What is relied upon is the high value of the case; *Leicestershire* para 21.”

58. This is a case where determination of the section 43K(1)(a) issue would, as I have set out, at least have required further evaluative conclusions and determinations by the tribunal, which the EAT is not in a position to do in the same way that the tribunal could, and, potentially, further fact finding, which the EAT could not do at all. I do not consider that the EAT is in possession of all the material that would enable it fairly to dispose of the issue. For reasons I have set out I do not accept that the section 43K(1)(a) analysis was, over and above being arguable and one that might succeed, so obviously very strong as to be “an obvious knock-out” point.

59. This is also not a case where the point should be allowed to be advanced to avoid a glaring injustice to an unrepresented party. Although the claimant was a litigant in person when he tabled his third claim, and at the hearing in question, he had had the benefit of professional advice when the basis on which his claims were advanced was formulated and first set out, and the relevant issues had been considered by the tribunal at an earlier hearing at which the claimant was professionally represented. The fact that, with the benefit of the advice of a different legal team after the tribunal’s decision rejecting the claims advanced in that way, he wishes now, by this appeal, to have the chance to advance his case in a different way is not a good or sufficient reason to permit him to do so.

Outcome

60. The appeal is dismissed.