EMPLOYMENT TRIBUNALS

Claimant: Mr M Bell

Respondent: Sky UK Limited

Heard at: Leeds (by video) **On:** 1 November 2022

Before: Employment Judge Knowles

Representation
Claimant: In person
Respondent: Ms B Davies, Counsel

RESERVED JUDGMENT UPON PRELIMINARY ISSUES

1. The Claimant was not an employee nor was he employed by the Respondent for the purposes of Section 230(3)(a) of the Employment Rights Act 1996. The Claimant's claims of unfair dismissal and unlawful detriment for making protected disclosures as an employee are dismissed.

2. The Claimant was not a worker nor was he employed by the Respondent for the purposes of Section 230(3)(b) of the Employment Rights Act 1996. The Claimant's claims of unlawful detriment for making protected disclosures as a worker are dismissed.

3. The Claimant was a worker and was employed by the Respondent for the purposes of Section 43K of the Employment Rights Act 1996. The Claimant's claims of unlawful detriment for making protected disclosures as a worker under this extended definition shall continue to further case management.

4. Upon the Claimant's withdrawal of his application to amend his claim to include a complaint of a breach of the right to be accompanied, no order is made.

5. The Respondent's application for a strike out of, or deposit order in respect of, the Claimant's remaining claim is refused.

RESERVED REASONS

Issues

1. The issues for determination today were set down when this preliminary was listed at a preliminary hearing for case management on 22 June 2022 before Employment Judge Jones.

2. The order made on that date needs to read as a whole because although it contains a list of 3 issues, when read as a whole, there were clearly 5 listed to be heard.

3. These are:

    a. Was the Claimant an employee of the Respondent within the meaning of section 230 of the ERA?
    b. Was the Claimant a worker of the Respondent within the meaning of section 230 of the ERA?
    c. Was the Claimant a worker within the extended meaning of in section 43K of the ERA?
    d. To determine the Claimant's application to amend his complaint to add a complaint of a breach of the right to be accompanied.
    e. Whether any claim should be struck out or a deposit required as a condition of allowing any complaint to be pursued on the ground it has no or little reasonable prospects of success respectively.

4. I note also that, for the purposes of considering employment status in a claim of breach of the right to be accompanied, the relevant definition of a worker is that set out in section 13 of the Employment Relations Act 1999 rather than that set out in section 230 of the ERA.

5. These matters were clarified and agreed with the parties at the beginning of today's hearing.

6. Issue 3.d. above was removed from the list of issues to be determined today because the Claimant withdrew his application to amend his claim to add a complaint of a breach of the right to be accompanied.

7. The Claimant's withdrawal of that came after I asked the Claimant what the Respondent had done which was said to breach the right to be accompanied. I needed to clarify this because I could see no reference to how this right had been breached in the Claimant's claim form (5-23) or in the email concerning amendment (38) or in his further information (48-54).

8. The only mention of this is "*Further, I wish to make an application to amend my claim to include "Breach of right to be accompanied" pursuant to s.11(3), Employment Relations Act 1999, due to it naturally arising from the facts* " on page 38. The particular "facts" are not identified. Essentially, it appeared to me to be an unparticularised application to amend the claim.

9. I read to the Claimant Section 10 of the Employment Relations Act 1999 and asked how the Respondent had breached that provision.

10. After listening to the wording of the provision the Claimant accepted that he had never requested to be accompanied for the purposes of Section 10(1)(b). He accepted that the right was a right to request, rather than a duty to offer representation. He then advised that he wished to withdraw the application to amend.

Evidence

11. This hearing was undertaken by video using HMCTS's cloud video platform.

12. The parties produced a bundle of documents, 299 pages. References in this Judgment to numbers in brackets are, unless otherwise stated, reference to page numbers in the bundle of documents.

13. I heard evidence under oath from the Claimant, who produced a written witness statement.

14. On behalf of the Respondent, I heard evidence under oath from Mr S Allen who is a former employee of Manpower Group, working on a contract between one of their companies, Experis Limited, upon their agreement with the Respondent.

15. No other documents were submitted. In questioning the Claimant referred to a document that was not in the bundle which was not produced. He read the email out and the contents were not the subject of any dispute.

16. Evidence was heard from both parties in the morning along with the Respondent's submissions. The Claimant then raised that he had not been expecting to deal with the application to strike the matter out or order a deposit.

17. We broke for an hour and a half to allow the Claimant some time to prepare his answer to the Respondent's submissions on those issues. This was the despite the Claimant wishing to proceed with his submissions without any break to allow him to reflect and prepare an answer to the Respondent's submissions.

18. The Claimant confirmed in the afternoon that he was ready to proceed and did not require any further time, which I made clear he could take if required.

19. After hearing the Claimant's submissions, the matter was adjourned for deliberations and I reserved judgment.

20. After the hearing on 1 November 2022, the Claimant wrote to the Tribunal on 3 November 2022 complaining that he only had 24 hours' notice that the Respondent had instructed a barrister to represent him at the hearing on 1 November 2022.

21. The Claimant also suggested that he had not been aware that the strike out application would be dealt with at the hearing on 1 November 2022.

22. Despite noting these matters, the Claimant did not make an application or ask the Tribunal to do something.

23. The Respondent replied on the same day noting that they are not obliged to advise the Claimant that they have instructed Counsel and did so out of courtesy

only.

24. They also made representations that Employment Judge Jones had made it clear on the day of the earlier preliminary hearing, and made it clear in his order, that strike out and deposit orders would be considered at the hearing on 1 November 2022.

25. The Claimant responded complaining about the time he had to prepare to answer the Respondent's application for strike out or a deposit order. He made representations about the duty to advise a change in representation, which are simply incorrect given that the Respondent was simply instructing Counsel to provide advocacy at the hearing rather than advising of a change of representation. The Respondent's representatives on record did not change.

26. The matter was referred back to me on 9 November 2022 and I asked the Tribunal to write to the parties stating

"*In the light of the Claimant's representations concerning time and being taken by surprise, the Claimant may send further written representations to the Employment Tribunal Office (and copy to the Respondent) to add any matters that he wishes to be taken into account on or before 23 November 2022.*

Judgment and reasons on the issues (i.e. all of the issues listed at the beginning of the hearing and set out in the Respondent's email 3 November 2022) will be deferred to allow the Claimant to make these further written representations if he wishes to do so".

27. The Claimant wrote again to the Tribunal 9 November 2022 asking for a transcript of the hearing but a response was sent to him advising that the Tribunal does not record proceedings and no transcript is taken.

28. On 22 November 2022 the Claimant sent further submissions to the Tribunal. This is a six-page document entitled "further statement" and produced further documentation. On 23 November 2022 the Claimant produced a further document by email.

29. The Claimant's further submissions have been fully considered before reaching a Judgment upon this case.

30. The parties have had to wait a period of 7 weeks for this reserved Judgment and I apologies for that wait. I have not been able to set aside a day for deliberating and judgment writing until 9 January 2022 and as will be evident from this reserved Judgment with Reasons, the parties had produced a considerable amount of evidence and matters to be considered which could not be done without setting aside sufficient time.

Findings of fact

31. The Claimant describes himself as a software developer with significant experience working with the React framework which is a system which he says is in demand in the computer industry.

32. On 13 July 2021 (137) the Claimant was contacted by email by a recruitment firm, Oliver Bernard Limited ("OB") stating "*I have had a new 6 month contract role*

come available with Sky. This role with be Inside IR35, paying £535/day and fully remote. They are looking for a talented React Developer – please find the spec attached. Could you be interested at all?"

33. The Claimant notes that the document is on the Respondent's headed paper. It also describes the role as "Javascript, Leeds Dock, Contract" (197).

34. On 18 July 2021 the Claimant responded expressing interest stating "*the contract looks interesting*" (138) and attaching his CV.

35. OB were acting as a second-tier agency for a contract that they had been contacted about by Experis Ltd (part of the Manpower Group) ("Experis").

36. Experis had received instructions from the Respondent concerning the contract and had no suitable candidates so were subcontracting the search to its suppliers.

37. OB sent the Claimant's CV to Experis who sent it to the Respondent.

38. On Friday 23 July 2021 OB emailed the Claimant (141) advising "*I have received positive feedback from Sky on your profile, in which they would like to arrange a 30min video interview with you early next week if possible? Please let me know when works best for you.*"

39. The Claimant was interviewed by people employed by the Respondent on 2 August 2022 (142).

40. After the interview, on 6 August 2021, OB contact the Claimant (145) as follows:

> *To confirm, please find the confirmation of the offer from Sky below. They are really hoping that you will accept and see you as a great addition to the project.*
>
> | | |
> |---|---|
> | *Client:* | *Sky* |
> | *Job Title:* | *Developer* |
> | *Candidate Name:* | *Michael Bell* |
> | *Start Date:* | *ASAP* |
> | *End Date:* | *6 months* |
> | *Pay Rate:* | *£535/day* |
> | *IR35 Status:* | *Inside* |
> | *Location:* | *Fully Remote* |
>
> *Please see below and attached what I will need from you in order to start the onboarding process:*
>
> • *Right to work*
> • *Signed NDA (attached)*
> • *1 Proof of address – Utility bill dated within the last 3 months or current council tax bill or personal bank statement dated within the last 3 months or HMRC letter or drivers licence*
> • *Proof of NI – NI card or HMRC document or P45 or P60*
> • *Address history for past 5 years*
> • *Mothers maiden name (needed for DBS they will put in process)*

• Reference details covering 2 years of employment (any gaps over 3 months must be covered by a character reference (the referee must have known them for longer than 2 years).
• If they have any other names they have been known by In the past except for birth & current name

Congrats again on the offer!

41. The Claimant refers me to the Offer Acceptance and Feedback form (149) and the fact that is ends "*congratulations on your new role!*". The Claimant sent his documents to OB 9 August 2021 (147), and accepted the offer the same day (148).

42. In the documentation within the bundle there is little concerning how the arrangement then developed in relation to the Claimant's engagement of Sapphire DNP Limited ("Sapphire"). Indeed the Claimant made no mention of this in his claim form.

43. Sapphire are an umbrella company. The Claimant had clearly contacted them by 9 August 2021 (150) and went on to register with them for the purposes of his work for the Respondent. The Claimant's witness reminds me that he was paid by Sapphire and not by the Respondent.

44. On 13 August 2021 the Claimant signed an employment contract with Sapphire (106-113). There is no other way to describe this contract other than an all-encompassing contract of service. Page 106 is a key information summary which reads as follows:

Becoming employed by a third-party intermediary Company like Sapphire can be very daunting, especially if doing so for the first time. At Sapphire, we pride ourselves on being transparent in everything that we do so you encounter no surprises at any time throughout your employment with us.

We have therefore prepared a summary of Key Information that you should be aware of before joining our employment:

1. You will become an employee of Sapphire DNP Limited. The Recruitment Agency and End Client are not your employer.

2. The rate of pay agreed with the Recruitment Agency (often referred to as an Assignment Rate/Limited Rate of pay) is Sapphire's Company Income which will be generated by your work on the assignment.

3. From this Company Income, Sapphire will retain statutory employment costs associated with employing you. These include:

a. Employer's National Insurance (13.8% of earnings over the Primary Threshold)
b. Apprenticeship Levy (0.5%)
c. Employer's Pension Contributions (3% of earnings over the Lower Earnings Limit, if/when applicable)

4. The agreed Assignment Rate also includes your holiday pay, which is 28 days per annum pro-rata. This will be paid to you on a period by period basis

unless you choose for us to accrue this (hold this back) and pay to you as and when you take annual leave or leave our employment.

5. Sapphire will, at all times, ensure you are paid at least the current National Minimum/Living Wage for any hours you work. This will clearly indicated on your payslip each period but only makes up one element of your payment.

6. Sapphire retain a small margin from the income it receives each period, which would have been discussed during our initial call with you. This margin is subject to change without prior notice.

7. You were offered a financial illustration based on a scenario you gave us, and the assumptions noted, to give you an approximate idea of your take home pay each period.

8. By joining our employment, you will be opted out of the Conduct of Employment Agencies and Employment Businesses Regulations 2003. You do have the option to remain within the scope of the regulations, you will just need to let us know in writing. If you are ever working with vulnerable people, which includes people under 18, the opt out does not apply to you.

9. You must provide us with UK bank details, we cannot pay your wages into an international bank account.

10. You are employed on a PAYE basis. All your personal Income Tax and National Insurance is deducted in accordance with PAYE and NICs regulations and paid to HMRC.

I hereby declare that I have read and understood the Key Information above and have read and signed the Employment Contract fully understanding how Sapphire will pay me for my temporary assignments.

45. The employment contract which follows covers all manner of matters that you would ordinarily see in a contract of services; duration, notice, job title and duties, hours of work, remuneration, warranties, annual leave, pension, incapacity, summary termination, confidential information, intellectual property, post-termination restrictions, disciplinary and grievance procedure, GDPR, entire agreement, health and safety, regulatory issues, agency worker regulations, jurisdiction etc.

46. On 24 August 2021 Sapphire and OB reached entered an agreement for Sapphire to provide the Claimant to work for the Respondent (117-128). Sapphire are described as a Contractor, the Respondent as a the Client, OB as the "employment business", and the Claimant as the "Contractor Staff".

47. It is therefore clear that whilst the original offer envisaged at page 145 that the role would be inside IR35, at some point between 6 and 9 August 2021 there was an agreement reached that the Claimant would provide his services to OB through an umbrella company, taking the arrangements outside IR35.

48. Taking a step back to reflect on these arrangements, the Respondent has an agreement with Experis, who have an agreement with OB, who have an agreement with Sapphire, who have an agreement the Claimant, through which the Claimant

will undertake his work for the Respondent.

49. There are 4 tiers of agreement through which one has to wade to understand the "on paper" contractual arrangements through which the Claimant will work for the Respondent.

50. These arrangements are complicated. The Claimant was engaging with them, in terms of the relevant engagement with the Respondent, he states for the first time other than having worked for temping agencies during his student years.

51. The Claimant's case is that in effect these arrangements are a sham and that he has a direct employment relationship with the Respondent. The Respondent's case is that he has not.

52. There are legal issues engaged in the Claimant's claims concerning other aspects of employment status, as a worker under either definition contained in Sections 230 and 43K of the ERA.

53. I will turn to the issues of fact each party have highlighted in their evidence about their relationship. It is important to concentrate here on facts and separate them from their opinions.

54. It should be highlighted that if we separate facts from opinion, there are few if any disputes between the parties. No questions were put to the Claimant in cross examination. Few questions were put to the Respondent's witness by Claimant. There is, broadly, no great dispute in fact between the parties. Their dispute concerns more their opinions on what the relationships really amount to, and what legal definitions are met.

55. The Claimant's witness statement is also heavily annotated with quotations from case law. I ignore those quotations at this stage because I need to focus upon the facts.

56. I nonetheless set out the core areas which were referred to in evidence because the parties wish these to be taken into account by me in reaching my Judgment.

57. The Claimant's witness statement is 7 pages long.

58. Paragraph 1.1 contains references to case law and makes no statements as to fact. Paragraphs 1.1 to 1.8 cover the establishment arrangements that I have set out above.

59. Paragraphs 2.1 to 2.2 of the Claimant's witness statement make no material advancement of the facts as are already set out above. He refers to the terminology "registration forms" provided by Sapphire. I make no material finding here – clearly the Claimant was registering with an umbrella company, no matter what he feels were the implications of doing so. I note that the arrangements were that the Claimant would be paid by the umbrella company Sapphire and not by the Respondent.

60. At 2.3 the Claimant says he was not genuinely employed by Sapphire. He notes that he was free to switch umbrella company. He states that he did so, to Mindshare Worldwide but I am unsure of the relevance of that given that the

agreements concerning Mindshare that the Claimant has referred me to (243-248) are dated November 2021, which is after the Claimant's relationship with the Respondent had ended and presumably relate to another engagement of the Claimant's which he undertook afterwards.

61. The Claimant goes on to say that Sapphire did not undertake the pre-work screening, that was undertaken by the Respondent via Experis. Those matters are not in dispute. The Claimant states that the commitment and obligation was from the Respondent not Sapphire to provide him with work.

62. I can see that would be the case in relation to the engagement with the Respondent i.e. the Claimant would provide his work or services to the Respondent because it was them who was asking him to. The Claimant states that there was no other communication between him and Sapphire other than them providing fee paid services. That does not appear to be in dispute.

63. At paragraph 2.4 the Claimant comments upon the Respondent's inclusion of screen shots from Sapphire's website taken 12 August 2022 (129-136). These simply set out the services provided by this umbrella company.

64. The Claimant disputes that these are representative of their content at the time he entered a relationship with them. However, the Claimant does not set out in any respect how the content is not representative of the services provided by Sapphire at the time be entered into a contract with them.

65. These are Sapphire's front pages setting out their services to someone navigating their website and seem broadly indicative of the type of arrangements that the Claimant has himself evidenced through the production of his particular documentation.

66. At paragraphs 2.4.1 and 2.4.1.1. the Claimant makes submissions about the task facing the tribunal, without reference to the facts.

67. The Claimant at paragraph 3 refers me to the Respondent's assessment that the Claimant's role fell within the IR35 regime (page 77).

68. I acknowledge that the document refers to the role of Developed being assessed as inside IR35 by the Respondent in 2019 and states that there is no ability to provide a substitute without the Respondent's prior approval, that the Respondent is obliged to provide work and the individual is obliged to accept it and that the Respondent exercises a level of control over how, what or where the individual will work.

69. I did during the hearing explain to the Claimant that the IR35 status determination statement in 2019 was nothing more than generic and that his arrangements may be outside IR35 simply because he was not engaged through a personal service company. I don't believe that the Claimant appreciates that point, even having had it explained to him.

70. The Claimant's witness statement at paragraph 3 goes on to refer me to what he submits is a proper status declaration from KPMG (242) which he says refers to his arrangements with Mindshare. II conclude that these post-date the Claimant's engagement by the Respondent and are not therefore relevant.

71. At paragraph 3.3 the Claimant highlights to me that he was under the Respondent's supervision through referring to the Respondent's contract with Experis (93). He refers me to clause 11.2 which states that "Temporary Workers and the Employed Consultants supplied by the Agency pursuant to this SOW are engaged under a contract of employment but are deemed to be under the supervision and direction of Sky for the duration of the Assignment".

72. The Claimant refers me to provisions concerning the provision of equipment by the Respondent (97) and to references to this in other documentation (152-153, 206, 185). It is not in dispute that the Claimant was provided with a laptop computed by the Respondent and allocated one of the Respondent's email accounts.

73. At paragraph 3.4 the Claimant refers me to the agreement between Experis and OB which also records that agency workers are under the supervision and control of the client (250).

74. The Claimant describes himself as fully integrated within the Respondent's business at paragraph 3.5. He refers to an email 26 August 2021 which was a Welcome to Sky email which confirmed his team and scrum master (154). He refers to being provided with a Sky email address (156). He refers to his nomination for a Sky Stars Award being recognised for being collaborative and inclusive (196). He refers to his inclusion in team communications (162).

75. The Claimant also, at paragraph 3.5.5 refers to contract termination correspondence made directly between the Claimant and the Respondent (160-161 and 165-167). I note that the Claimant describes himself there as a contractor and states that he must end his contract with the Respondent (163).

76. I also note that despite engaging with the Respondent over his notice, the Claimant had first engaged with his agency OB and his umbrella company Sapphire (166, and more specifically 173) about giving 4 weeks' notice of termination of his contract with the Respondent.

77. Paragraphs 4.1 to 4.6 in the Claimant's witness statement make submissions as to Status Determination Statements for the purposes of IR35 but make no factual advancement on the position set out above.

78. In evidence at the hearing I asked the Claimant who asked him to engage an umbrella company and the Claimant answered that it was the recruitment executive who covered the Respondent at OB. He stated that he was asked verbally and there are no documents within the bundle which set out that request. The Claimant stated that he decided to find his own umbrella company rather than use one recommended by OB.

79. On behalf of the Respondent, Mr Stephen Allen gave evidence. Mr Allen previously worked upon the Experis agreement with the Respondent as an Account Manager.

80. It is not necessary to fully recount Mr Allen's employment history set out in the first 7 paragraphs of his witness statement save to say that he appears competent to give evidence about the Respondent's contingent staffing arrangements given his experience in working on their accounts for a number of years.

81. In his statement, Mr Allen confirms that the Respondent engaged Experis to provide temporary and indirect contractors, who might look to second tier agents such as OB, and that Experis mandated that contractors were provided through umbrella companies to ensure that there were no IR35 risks as umbrella companies manage all PAYE deductions. He states that this arrangement meant that the arrangements were outside of IR35 and therefore not status determination statement had to be made prior to particular assignments.

82. Mr Allen records that agreements between each tier to the agreements in place charged more to the one above in order to recover their own charges. Mr Allen gives evidence concerning the Respondent's contractual rights to terminate the arrangements on no notice to Experis. Mr Allen refers to post termination issues concerning the recovery of the Respondent's equipment from the Claimant being managed through Experis and OB, not directly with the Claimant.

83. Other than matters that are agreed between the parties and are recorded earlier in these findings of fact Mr Allen makes no material addition to the factual matrix concerning the Claimant's engagement and work for the Respondent.

84. In questioning concerning grievances Mr Allen stated initially that the documentation in the bundle did not cover grievance procedures. In re-examination Mr Allen acknowledged that Experis were responsible for ensuring that contractors complied with the Respondent's disciplinary and grievance procedures (9.4 on 63), and that Sapphire had a disciplinary and grievance procedure covering the Claimant. The Claimant made the point that the Sapphire policies were non-contractual, although that was not posed as a question for Mr Allen.

85. Whilst the Claimant's further representations dated 22 November 2022 are headed "further statement" there are no material statements of fact set out in that statement which had not already been made and the document appears to contain submissions as opposed to additional evidence.

86. The Claimant's further email 23 November 2022 concerns status determination statements and there being no contractual requirement for the Claimant to provide his services through an umbrella company. I have already noted above that the Claimant said the instruction came verbally from OB and there was no earlier suggestion that this was set out in any documentation. Again this does not appear to be a matter in dispute.

Submissions

As to status

87. The Respondent's submissions concerning employee status were that there is no express contract between the Claimant and the Respondent and the case concerns implied terms. It was submitted that agency workers were a special case (***James v Greenwich***). In summary the Respondent's case is that an employment contract will only be implied where it is necessary to do business reality to the situation. If the situation is genuinely and accurately represented, it is not necessary to imply a contract of employment. The Respondent referred to the following circumstances:

a. That the Claimant was employed by Sapphire and enjoys employment protection from them – he chose to engage them.

b. The agreements with both Experis and Sapphire both expressly state there is no intention that the Claimant will become an employee of anyone other than Sapphire (pages 64 and 120).

c. The Claimant's first involvement is an approach from OB, not the Respondent (137-140).

d. OB provides the rate of pay (137). The Respondent does not control the slices taken at each stage, only the initial bill rate. The Respondent does not control the final rate paid to the Claimant.

e. The Claimant's interview is arranged through OB and Experis, not the Respondent (142).

f. OB make the offer, not the Respondent (145).

g. The Claimant's accepts OB's offer, and OB request the references (145, 281).

h. At 120, there is a contract between OB and Sapphire, which shows that contractors are not workers or employees.

i. The Claimant has a contract of employment with Sapphire which is a full employment contract. He is not just being paid them. Here we have a chain, each person taking a cut.

j. The Respondent is not named on the Claimant's payslips (186).

k. Sapphire retain the right to retain a margin in the agreement with the Claimant at Clause 6 (106).

l. In his breakdown of the relationship, in his grounds of claim at page 18, paragraphs 2.8 and 2.9, the Claimant goes to OB to ask to be moved, not to the R.

m. At page 173, the Claimant first gives notice to his agency at 6:30 15 October 2022 – "terminating the contract". The Claimant only writes to the Respondent after OB, see page 160.

n. That day, on "Slack", the Claimant refers to himself as a contractor (163).

o. In terms of notice, the Respondent gives Expiris notice, not the Claimant.

p. Expiris contact OB not the Claimant.

q. The Respondent requests OB obtain from the Claimant consent to give information concerning return of information (176-178).

r. From inception this is plainly, genuinely a relationship of agency.

s. As Mr Allen states an introductory email is a common courtesy, and

the laptop and Sky email address were required for work.

t. There were communications concerning termination (160-173) but we can see that ultimately the Respondent is replying to the Claimant.

u. At 165-167 the Respondent is relaying conversations with the Claimant's agency.

v. The Claimant is very distinct from employees, he has no pension, sick pay or holiday entitlement - see employment contract p103 benefits are provided from Sapphire, namely pensions, holiday pay, continuous service etc. Under Clause 14 at page 111 the Claimant is subject to Sapphire's disciplinary and grievance procedures.

w. The Respondent's rights to terminate are with Experis.

x. This is distinct from generic level of control. There will be control over data policies and the manner of work. But the lack of application of the Respondent disciplinary and grievance procedures is very different from employees.

y. There is nothing inconsistent with agency (***Dacas***).

z. It is not inconsistent to have some control (***Tilson v Alstom Transport*** [2011] IRLR 169, CA). This does not defeat the agency relationship. There is nothing suggesting the relationship is not genuine and nothing inconsistent with an agency relationship. The IR35 – SDS issues are a non-point as put forward by Mr Allen, page 27, the regime simply doesn't apply. The fact that the role could have fallen under IR35 doesn't mean it did. But in any event, the need for an status declaration statement does not advance the Claimant's case.

88. The Respondent's submissions concerning limb B worker status were that there must be a contract between the Claimant and the Respondent but there is not. There are 3 entities between the Claimant and the Respondent. If the Government intended these types of arrangements to be covered in the Employment Rights Act 1996, they would have used the broader wording which is set out in the Equality Act 2010, but they did not.

89. The Respondent's submissions concerning the extended definition under Section 43K of the Employment Rights Act 1996 were that ***McTigue v University Hospital*** sets out the questions to ask. If the limb B worker threshold is not met, were they introduced by a 3rd person. If they are, were the terms determined by the person for whom they work or by a party supplying them. The Respondent accepts we have a worker supplied to Respondent but the identity of the supplier has to be Experis. Under the framework agreement Experis are at the beginning and end of Claimant being supplied. He is subcontracted, Experis organises interviews. There is no supply between Sapphire or OB to the Respondent, there is no contract between them. Have the terms been substantially been determined by the Respondent or by Experis or both? The Respondent submits not pay. In terms of control, the Respondent doesn't know or set what he gets paid. The Respondent only knows first part. In terms of notice, the Respondent can provide immediate notice, page 90 clause 4.2. This is mirrored in the contract with OB at

clause 5.6, page 258. This is different to the Claimant's notice provisions with Sapphire (107) and those between Sapphire and OB, at page 117 and clause 9.4 at page 125. In relation to pension the obligation is only on Sapphire, as is holiday pay, the minimum work guarantee, and disciplinary and grievance. None are controlled by the Respondent. The Claimant must fail on 43k because it isn't the relevant parties who determine the terms.

90. The Claimant's submissions concerning employment status were:

a. That this was his first contract as a software developer.

b. At page 202 there is government advice on fixed term employment contracts. The Respondent cannot rely on their contract, it was inside IR35.

c. It is the reality of working relationships that matters.

d. His role was inside IR35 which means they are deemed employees for tax purposes. For today we face largely the same test.

e. All evidence should be considered ***(Cable and Wireless plc v Muscat***).

f. There was an implied contract. The Respondent offered the role, see witness statement paragraph 1.7, and p145, the offer confirmation from the Respondent.

g. He responded verbally and by email 147-148. He had an interview with the Respondent and job description from them, and he had feedback from OB, and there was no reference to Experis. If the Respondent had not offered and I had not accepted the arrangements wouldn't have existed.

h. The interview and offer from the Respondent is relevant. It does provide the terms of the engagement, the salary, duration, the role, and the Respondent's logo on job description. There had to be an implied contact between me and the end user.

i. In terms of grievances, the Sapphire contract says that it is not contractual. he was placed in the Respondent's team, given a scrum manager, he had a line manager, a work email, and was nominated for a Sky stars award. The Respondent paid for the referencing and security checks. This indicates employment.

j. The Claimant received direct feedback from both line managers when he mentioned resignation. He received direct resignation confirmation from Joanna at the Respondent.

k. Sapphire's payroll services do not mean there was no employment with the Respondent (***Cable and Wireless plc v Muscat***).

l. More than one employer might exercise the functions of an employer (***Dacas v Brook Street Bureau (UK) Ltd***).

m. The Claimant just registered with Sapphire for payroll. There was no

master and servant relationship (***Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance***). Sapphire was an entity exercising the function of payroll only. The Respondent was the employer

n. Nurses are sourced through agencies, and the same can be alleged to me.

o. Regulation 43K and the agency workers regulations clearly show that it is the end user that is considered responsible for any claims.

91. The Claimant's further written submissions dated 23 November 2023 make several points which repeat his earlier submissions. I summarise below those that make a different or additional point:

a. The assignment rate set by the Respondent dictated the remuneration, holiday pay and pensions paid by Sapphire.

b. The Respondent had a contractual duty to issue a status declaration statement to Experis (65).

c. There was no agreement between the Respondent and Experis that an umbrella company would be used. This is unlawful as it prevents the fundamental right of workers to challenge a status determination.

d. The Claimant only registered with Sapphire after the offer had been made by the Respondent.

e. An implied/inferred contract was agreed between the Claimant and Respondent from the outset which was necessary to give business reality to the relationships.

f. The Claimant was never sourced as an agency worker as he was, at that point, not registered with an umbrella company.

g. The contracts between the intermediaries including the Umbrella company were materially subservient and bound by the Respondent. Any claim that the intermediaries acted under their own terms of engagement is clearly a sham. See page 64, "9.7.3 the Supplier will not do any act or omission which could or could be expected to imply an employment relationship between Sky, its Affiliates and/or any Service Recipient and such Employees, Supplier Personnel, Temporary Workers".

h. The Claimant was induced to accept the role offered by the Respondent on the basis it would be a React Developer position. However, the Claimant was not given any work using React and instead was required to learn a fundamentally different technology named Svelte. This required the Claimant to undergo extensive on the job training in order to learn Svelte whilst working for the Respondent which is evidence of employment. Agency workers on the other hand such as Office Clerks or Professional Nurses are expected to be fully trained and able to work independently from the start of any assignment.

As to strike out / deposit orders

92. The Respondent submitted that the Claimant's case should be taken at its highest. Submissions were made concerning the Claimant's draft list of issues, in which he sets out his disclosures and the alleged detriments (49) as follows:

a. 1A1 – there needs to be a disclosure, not merely an opinion. The Claimant's concern is his opinion, he is posturing a view of what other people might think.

b. 1A2 – this opinion not information.

c. 1A4 – is a question clarifying an operational instruction.

d. 1A5 – we have the screenshots, but the disclosure is not particularised.

e. 1B1 – this is a complaint not a disclosure.

f. 1B2 – this is an expression that the Claimant is not happy.

g. 1B3 – is the same

h. None of these are disclosures of information for the purposes of 43B.

93. The Respondent submitted that the Claimant has not made clear any detriment. They referred me to the detriments listed in the Claimant's list of issues (52):

a. 5.1 - The Claimant complains about the use of the word "weird" but the Claimant is using the word weird, see the full message at page 162.
b. 5.2- Mr Tennison shuts the work down – it is a stretch to say detriment.
c. 5.3 He was told to do the work, to perform his role, this is not a detriment.
d. 5.4 This is the same. See the full message at page 162. The Claimant is saying something had been done outside internal policies; this is not a detriment.
e. 5.5 Is merely a reference to constructive unfair dismissal claim. The Claimant needs to articulate the breaches.
f. 5.6 The Claimant resigned.
g. 5.7 Concerns post termination feelings, which are not a detriment; this is a remedy point.

94. The Respondent submitted that there is no reasonable prospect of the claims succeeding, or in the alternative there is little reasonable prospect of the claims succeeding and the Claimant should be required to pay a deposit for each part of the claim that continues. The Claimant has not had leave to amend to include a breach of contract point (53-54). In any event Regulation 7 refers to employees not workers.

95. The Claimant's submissions concerning strike out and deposit orders were that the breach of contract claim requires a determination of employment status first. The bar for striking out a whistleblowing claim is high. He stated that he had

provide all of the details requested. He did reference discrimination (162). The question requires determination by a three-party Tribunal.

96. In the Claimant's further written representations dated 23 November 2022 the Claimant added:

a. The Respondent had every opportunity to make a strike-out application in writing prior to the hearing on 1st November 2022, yet chose not to.

b. The evidence provided by the Claimant for the 1st November 2022 was for the Tribunal's consideration of employment status only. Further evidence supporting the Claimant's whistleblowing claims was not included in the hearing bundle as no specific strike-out application had been made by the Respondent prior to the hearing.

c. The Claimant is entitled to submit further evidence (which have been attached to the enclosing email) upon any strike-out application and within any final hearing bundle.

d. The Respondent did not specify at the hearing which claim they were applying to strike out.

e. It would be unfair to accept any strike out any claim before a determination of employment status has been made by the Tribunal, as each of the whistleblowing claims have different bars of difficulty for to succeed as was the advice given by Employment Judge D N Jones during the Preliminary hearing held on 22 June 2022.

f. The strike-out application by the Respondent was not made in writing and without a tribunal transcription it is unreasonable to expect the Claimant to recall each and every point raised by the Respondent at that hearing. However, the Claimant contends that the Respondent attempted to quote evidence out of context (and without all the evidence at hand). When the Slack messages are read as a whole (including the additional evidence) and in sequence it should be clear that the Claimant had made genuine protected disclosures in the public interest summarized with the following logic.

g. It was accepted by the Respondent that they were providing a poor user experience to customers sharing a computer (multi-user systems) compared to customers who do not share a computer (single-user systems).

h. The Claimant showed he had a reasonable belief that the majority of customers sharing a computer would be persons with protected characteristics.

i. The Claimant provided examples, the main one being that asian customers who are an ethic minority in the UK are more likely to live in larger households (see attached screen-shot of publicly available youtube video) and therefore more likely to share a computer.

j. The Claimant stated unequivocally that it was discriminatory to not provide an equal experience to customers sharing a computer.

k. The Claimants whistleblowing claims are well-founded as provided in the

l. submitted Particulars (bundle pages 48-52).

m. There is a very high bar for any whistleblowing strike out application and the Tribunal should consider the number of UK households who are signed up to Sky's services who the Claimant contends are adversely impacted with respect to the public interest.

The Law

Status generally

97. I make some basic and general points concerning employment status to being with.

98. Firstly, for there to exist any type of contract at all, there must be an offer and an acceptance of that offer, there must be some consideration for the work done, there must be intent to create legal relations and the terms must be sufficiently clear and certain so as to be enforceable.

99. The Claimant has referred to IR35 and to Status Determination Statements which are relevant to tax laws.

100. It is important to note that the tax and national insurance legislation has no relevance here. The law contains different definitions of and types of relationship for different purposes. It is important to view each in its own right and not to regard one meaning as the same for other purposes in other legislation.

101. That is not to say that there might be overlap in terms of what factors might be taken into account in assessing status under different legislation.

102. But any suggestion that a person who is regarded as an employee of a particular business for tax and national insurance purposes should be regarded as an employee of that business for other purposes, such as the right not to be unfairly dismissed, would be an error in law.

103. I also note that the Claimant relies on the Respondent's assessment that his role would fall within IR35 as determinative of his employment status.

104. I will quote to the Claimant the position outline in Government guidance which states that "*If you are employed by an umbrella company, the tax rules on agency workers and off-payroll working (IR35) will not apply to you*."

105. IR35 therefore bites in relation to agency workers supplying their services through a personal service company which they own or control. IR35 does not bite where you instead work through an umbrella company which you do not own or control.

106. IR35 has no relevance to this claim at all. There is no personal service company involved her at all. The Claimant is claiming employee status directly with the end user. That question falls to be considered in its own right. If that claim succeeded, IR35 would still be irrelevant, as the Claimant would fall not within IR35

but within the ordinary position for tax and national insurance for employees employed directly and in their own right.

Employment status

107. Section 230 of the Employment Rights Act 1996 sets out the definition of an employee. It states:

(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.

108. Much of the case law concerning purported agency workers concerns circumstances in which they claim to be an employee of the agency itself. This case is not about that. Here the Claimant claims to be an employee of the end-user, the Respondent.

109. The Claimant in this case has quoted ***Dacas v Brook Street Bureau (UK) Ltd*** [2004] ICR 1437 CA. This case involved a claimant claiming that she was an employee of the agency, and the Court of Appeal held that in the absence of any obligation to offer or to do work, and in the absence of any day-to-day control, the provision of some services which an employer would normally do such as payroll was not enough. This was the case even though the employee had worked through the agency for one end-user for several years. The case was remitted back to the Tribunal to determine whether or not there was an implied contract of service with the end-user. The Court of Appeal did not, therefore, determine that question in this case but that is the question that this Tribunal faces in this case.

110. Generally claims to be an employee of an employment agency have failed due to the absence of mutual obligation and control, as opposed to other requirements in establishing a contract of employment such as personal service, integration and not carrying out the work as part of your own business.

111. Case law has established that you must look beyond the terms of the written contracts where they do not represent the true agreement between the parties (***Autoclenz Ltd v Belcher and ors*** [2011] ICR 1157 SC). That authority has been followed many times, but principally in determining whether a person was an employee or, as their agreements stated, self-employed. However the essential principles could equally be applied to relationships established via agencies.

112. The absence of any express agreement between a person coming to an end-user via an agency worker presents an issue for any agency worker claiming to be an employee of an end-user simply because there is, generally, no agreement directly between them at all because the agency sits in the middle and each party is contracting with the agency not with each other.

113. These cases frequently involve more simple arrangements which are described as triangular agreements. In this particular case we have the more complicated shape of arrangements which more reflect a pentagon.

114. A series of cases appeared to improve a claimant's prospects of establishing employment with an end-user:

a. ***Franks v Reuters Ltd and anor*** [2003] ICR 1166, CA supported a view that dealings between an agency worker and an end-user over a period of years were capable of generating an implied contractual relationship, and that the length of the relationship between the worker and the end-user could be a relevant factor.
b. ***Dacas v Brook Street Bureau (UK) Ltd*** in which the Court of Appeal expressed the obiter view that employment tribunals must consider the possibility of an implied contract of service needing to be inferred between the worker and the end-user even where there is no express contract between them.
c. ***Cable and Wireless plc v Muscat*** 2006 ICR 975, CA, in which it was held necessary to imply a contract between a contractor and an end-user in order to give it 'business reality', given that the contractor worked under the direction of the end-user's managers, arranged his holidays to suit the end-user, and was described as an 'employee' in company documentation.

115. However, as the Respondent has pointed out, those cases have been followed by the case of ***James v Greenwich London Borough Council*** 2007 ICR 577, EAT. This case set out a test which has subsequently been approved when the case was appealed to the Court of Appeal. In effect, ***Dacas*** and ***Cable and Wireless*** were found to be matters to be taken into account, but not determinative. The test in the James case, which is the one this tribunal should follow, is as follows:

- *the key issue is whether the way in which the contract is performed is consistent with the agency arrangements, or whether it is only consistent with an implied contract of employment between the worker and the end-user*

- *the key feature in agency arrangements is not just the fact that the end-user is not paying the wages, but that it cannot insist on the agency providing the particular worker at all*

- *it will not be necessary to imply a contract between the worker and the end-user when agency arrangements are genuine and accurately represent the relationship between the parties, even if such a contract would also not be inconsistent with the relationship*

- *it will be rare for an employment contract to be implied where agency arrangements are genuine and, when implemented, accurately represent the actual relationship between the parties. If any such contract is to be implied there must have been, subsequent to the relationship commencing, some words or conduct that entitle the tribunal to conclude that the agency arrangements no longer adequately reflect how the work is actually being performed*

- *the mere fact that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the two*

- *it will be more readily open to a tribunal to imply a contract where, as in Cable and Wireless plc v Muscat (above), the agency arrangements are superimposed on an existing contractual relationship between the worker and the end-user.*

116. When the case came before the Court of Appeal the Court agreed with the EAT's approach and confirmed that a tribunal will only be entitled to imply an employment contract between an agency worker and an end-user where it is necessary to do so to give business reality to the situation. In the Court's view, there will be no such necessity where agency arrangements are genuine and accurately represent the relationship between the parties.

117. The development of case law to the stage we now have reflects ordinary common law for implied terms, namely that they generally will only be implied where necessary and will not be necessary where there is already an express term covering the situation which is in issue between the parties. It is a high threshold to meet.

Worker status under limb B

118. Section 230 also contains the definition of a worker. It states:

(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.

119. Subsection (b) is therefore where the term "limb b" worker derives.

120. As is the case with many of the cases concerning employee status, many authorities about worker status are concerned with cases involving direct agreements between a person and a business perhaps where the person cannot meet the definition of an employee because there is no contract of employment but is instead a contract for services and the person is purportedly self-employed.

121. Many cases in which someone coming to an end-user through an agency claims to be a worker will again fail because there is no agreement directly between them, they each contract with the agency not with each other.

122. Again the Tribunal will be required to look beyond the written agreement, as is the case in relation to employee status.

123. I will not set out the law concerning the establishment of the worker status per se because the issue between the parties is whether or not there is an implied

contract between the Respondent and the Claimant, despite their being three contracting parties sitting in between them in the written contractual documentation.

124. That question of implicit contract is to be approached in the same way as the position concerning agency workers and end-users set out above in relation to employee status.

125. If there is no implicit contract between the Respondent and the Claimant, then there is no contract for the purposes of limb b. The Respondent must be a "party to the contract".

126. Only if the Respondent is a party to the contract with the Claimant will the Tribunal go on to consider issues such as personal service or the exclusion for clients or customers of any profession or business undertaking carried out by the Claimant.

Worker status for the purposes of whistleblowing detriments

127. Section 43K of the Employment Rights Act 1996 contains special provisions about the definition of a work for the purposes of Part IVA of that Act. Part IVA is

Extension of meaning of "worker" etc. for Part IVA.

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

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

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

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

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

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

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

128. It is important therefore to note that there is a statutory basis which extends the meaning of worker here beyond that provided in Section 230(3) to include people introduced or by a third party where the terms of the work are determined by the end-user, the third party, or by both of them.

129. These provisions are ordinarily interpreted to be intended to include agency

workers.

130. Case law authorities have already made the leap outside triangular agreements, specifically 4-party arrangements where there is a personal service company in between the individual and the agency that supplies the individual to the end-user (***Croke v Hydro Aluminium Worcester Ltd*** [2007] ICR 1303, EAT). The key question in that case was said to be whether or not the agency introduced the claimant to the end-user as the individual to do the work, regardless of whether or not the claimant did so through his company. In that case, despite the contractual arrangements in place, the claimant was the consultant named in the contract schedule as the employer of the service provider with whom the agency was agreeing would provide the services.

131. Further, in ***Keppel Seghers UK Ltd v Hinds*** [2014] ICR 1105 EAT it was found that the protection afforded by S.43K extends to relationships where, although there is no contract between the two protagonists, contracts exist between each of them and other parties that impact (if not govern) the relationship between them. It was held to be inevitable that the Tribunal would inevitably look at what happened in practice rather than simply examine the terms of the relevant contracts. It was found that the Tribunal had been entitled consider that the ongoing control exercised by KS Ltd extended to setting Hinds' working hours and determining his shift arrangements, and the tribunal was entitled to take account of these matters in finding that KS Ltd substantially determined the terms of the engagement.

132. The point is further highlighted in the case of ***McTigue v University Hospital Bristol NHS Foundation Trust*** [2016] ICR 1155 EAT in which Mrs Justice Simler held that subsection (1)(a)(ii) expressly envisages that there may be two persons who substantially determine the terms on which the individual is engaged to do the work (i.e. the person who supplies the individual and the person for whom he or she works) and that the same must inevitably be true in relation to S.43K(2)(a), which defines the 'employer' for these purposes as the person who substantially determines or determined those terms. Since as a matter of ordinary statutory interpretation the singular includes the plural, if both the supplier of the individual and the person for whom the individual works substantially determine the terms on which the individual is engaged to do the work, then both are the 'employer' of the worker for the purposes of the subsection. Turning to who substantially determined the terms of the engagement, it was held that, where two parties (other than the individual) have between them determined the terms on which the individual worked but have done so to different extents, each might be held to have substantially determined the terms. That was so in this case. Nobody was contending that McTigue herself had determined the terms of the contracts under which she worked. Moreover, this was a case where the claimant had at least two sets of contractual terms and two parties had determined the terms of the written contracts under which she worked. Although in practice each might have done so to a different extent, that extent was plainly capable of being 'substantial' in both cases. This possibility had not been recognised by the employment judge, who had erroneously focused on who determined the substantial terms when he should have focused on whether the Trust and the agency both substantially determined the terms on which M was engaged to do the work. The approach was subsequently approved by the Court of Appeal (***Day v Lewisham and Greenwich NHS Trust and anor (Public Concern at Work intervening)*** 2017 ICR 917 CA).

133. In ***McTigue***, the relevant questions were set out as follows:

- for whom does or did the individual work?

- is the individual a worker as defined by S.230(3) ERA (the standard definition of 'worker') in relation to a person or persons for whom the individual works or worked? If so, there is no need to rely on S.43K in relation to that person for the purpose of whistleblowing protection. However, the fact that the individual is a S.230(3) worker in relation to one person does not prevent the individual from relying on S.43K in relation to another person for whom the individual also works and citing that person as a respondent in tribunal proceedings.

- if the individual is not a S.230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?

- if so, were the terms on which the individual was engaged to do the work determined by the individual? (If the answer is 'yes', the individual is not a worker within S43K(1)(a)).

- if the answer to the above is 'no', were the terms substantially determined (i) by the person for whom the individual works or worked, (ii) by a third person, or (iii) by both of them? (If any of these is satisfied, the individual is a worker for the purposes of the subsection.) In answering this question, the starting point is the contract (or contracts), the terms of which are being considered. There may be a contract between the individual and the agency, the individual and the end-user and/or the agency and the end-user that will have to be considered. In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

- if the respondent alone (or with another person) substantially determines (or determined) the terms on which the individual works or worked in practice (whether alone or with another person who is not the individual), then the respondent is the 'employer' as defined by S.43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes.

Strike out

134. Rule 37 of the Employment Tribunals Rules of Procedure 2013 sets out the Tribunal's right to strike out a claim or response.

135. This provides

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

136. In Mbuisa v Cygnet Healthcare Ltd EAT 0119/18, a case involving an

unrepresented Claimant, the EAT found that although a poorly pleaded case presents difficulties for the tribunal, striking out the claim is rarely the answer. The proper course of action would be to record how the case was being put, ensure that the original pleading was formally amended so as to pin that case down, and make a deposit order if appropriate.

137. Also in relation to unrepresented Claimant's, in ***Cox v Adecco and ors*** [2021] ICR 1307 the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are: "*Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is*".

138. In ***Anyanwu and anor v South Bank Student Union and anor*** [2001] ICR 391the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

139. Whilst this is not a discrimination claim, it is a protected disclosure claim, similar observations may be made about this type of claim.

140. In ***Ezsias v North Glamorgan NHS Trust*** [2007] EWCA Civ 330 the Court of Appeal upheld a decision of the EAT (Elias J, sitting alone) which had allowed a claimant's appeal against an order of an Employment Tribunal striking out his unfair dismissal claim. Maurice Kay LJ said at paragraph 29:

"*It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.*"

On deposit orders

141. Rule 39 contains the right to make a deposit order. This provides that

> 39.— (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

142. This is a less rigorous hurdle than that for strike out but the Tribunal nonetheless needs a proper basis for making an order. The observations in ***Anyanwu*** about fact-sensitive cases which require full examination apply in relation to deposit orders, indeed in that case the HL quashed the deposit order.

Conclusions

Was the Claimant an employee of the Respondent within the meaning of Section 230 of the ERA?

143. Clearly, under pentagon of contractual arrangements between the Respondent, Experis, OB, Sapphire and the Claimant, there is no express written contract between the Claimant and the Respondent, in any form whether that be one of a contract of employment or another type of contract.

144. The question for me to determine with whether the way in which the contract is performed is consistent with the agency arrangements, or whether it is only consistent with an implied contract of employment between the Claimant and the Respondent.

145. The parties accept that the Respondent is not paying the Claimant's wages. It is clear from the contractual suite and from the payslips that the only money that the Claimant received is from Sapphire, his umbrella company.

146. The Claimant has referred me to the job description which was supplied for the role at page 197 but I do not find that particularly helpful as any indication of employee status. The work is described as "contract". It sets out the key responsibilities, expectations of the work and the key skills required but nothing more than that.

147. The Claimant invites me to attach weight to the fact that the original offer communicated from OB is stated to be an offer "from Sky". That is not an indicator either way. The Respondent could make an offer which could either be one of employment or involving another type of arrangement. The Respondent is in fact described as a client in that offer. The offer merely confirms some core elements to the contract, that the client is the Respondent, the job title is Developer, the Claimant is the candidate, the start date is a.s.a.p., the end date is 6 months, the pay rate is £535 per day, it would be (subsequently changed) inside IR35 and the location is fully remote.

148. Those core basic terms are not greatly indicative of the type of arrangement being entered but the reference to the Respondent as the client and to IR35 status lean the communication towards one being more consistent with a contract engagement through an agency rather than one of employment.

149. There is no evidence before me that the Respondent fixed the Claimant's specific daily rate.

150. The offer was communicated by OB and OB set out their requirements concerning onboarding, fulfilling their contractual obligations to Experis.

151. I take into account the Claimant's submission that this was his first contract appointment. But I note that he has not suggested that he did not understand, when accepting the offer of contract work for the Respondent, that he was taking fixed term contract work as opposed to employment. The Claimant has not suggested that he ever thought at the inception of these arrangements that the position would be under a contract of employment.

152. I also note that the Claimant has actively engaged in the contracting

arrangements. When between 6 and 9 August 2021 he was contacted by OB and advised that the work must be undertaken through an umbrella company, the Claimant researched those arrangements himself and chose his own provider rather than utilising OB's support. This indicates that the Claimant had knowledge of the type of arrangements he was entering and did so with his eyes open.

153. The Claimant signed a fully fledged employment contract with the umbrella company. Sapphire do not appear merely a payroll provider, the agreement they reached is a full contract of employment.

154. Sapphire controlled pay and statutory deductions, together with deductions for pension. They account to HMRC. They and they alone are named as the employer on the Claimant's payslips. The payslips make clear that Sapphire has receive £535 per day, but has deducted for private pension, apprenticeship levy, employer's NI and Sapphire's margin before payments of wage, holiday pay and additional taxable pay are made and then statutory and private pension fee deductions are made.

155. I take into account that the Claimant was interview by members of the Respondent. I note also that the interview was arranged via Experis and OB, not directly between the Claimant and the Respondent.

156. None of the contracts apart from the Claimant's contract with Sapphire provide that he will become an employee of any of the parties. The contracts between the Respondent and Experis, Experis and OB and OB and Sapphire all provide that he will not become an employee of OB, Experis or the Respondent.

157. The Claimant appears to have operated the substance of the formation and termination of his contract through his umbrella company and OB, not directly with the Respondent. He clearly notifies the Respondent of his decision to end his assignment with them (during which he describes himself as a contractor not as an employee) but materially and primarily fulfils the contractual arrangements that he has with his umbrella company and with OB.

158. The Respondent overrides the Claimant's 4 weeks notice (which he was required to give to Sapphire) with immediate termination, through Experis, executing their terms with Experis. There has been no suggestion in this case that any of the express terms between the Respondent, Experis, OB, Sapphire, or the Claimant have been breached in relation to notice.

159. Although the Claimant was under a degree of day-to-day control, in that the Respondent detailed the work to be done, and managed the Claimant in performing his tasks, included him in the team communication systems, Sky Stars awards and provided laptop and email address, these matters could be consistent with either work as an employee or with work as a contractor through an agency.

160. The Respondent's reference to the role falling within IR35 has relevance only to if the Claimant provided services to the Respondent through a personal services company, which he did not.

161. I take into account the Claimant's reference to the disciplinary and grievance policy that he agreed with Sapphire being non-contractual. But that is matter governing Sapphires rights to change it without breaching the Claimant's contract with them. There is no evidence of the application of the Respondent's disciplinary

and grievance policy or any evidence that they might have been applicable in any circumstances whatsoever.

162. Rather, when the Respondent became unhappy with the Claimant's conduct (specifically his communications to the team on Slack) they do not attempt to invoke the disciplinary process, they exercise their right to terminate the arrangement immediately with Experis.

163. I do not find that any of these factors which the parties have drawn to my attention are exclusive indicators of employee status with the Respondent.

164. All of the evidence before me, looked at in isolation, is not inconsistent with an agency engagement with a third party.

165. Save for the Claimant's contract with Sapphire, no evidence has been presented to me that there is any mutuality of obligation between any parties for the Claimant to be provided for services.

166. Looking at the situation in the round, taking into account all of the evidence and the submissions of both parties, in my conclusion the contract between each of the five parties are genuine and accurately represent the relationship between the parties.

167. There has been nothing subsequent to the entering of these contractual arrangements, written, by word or by conduct, which indicate that there has been any change to the relationship to that originally contracted between the 5 parties.

168. This is not a case involving a lengthy assignment, the Claimant worked for less than 7 weeks.

169. There was no former relationship between the Claimant and the Respondent upon which the above arrangements were superimposed.

170. I can see no necessity at all for a contract to be implied between the Claimant and the Respondent.

171. The relationships have clear and material contractual reality in my view.

172. The Claimant may now regret them, but they are genuine and accurate arrangements.

173. The Claimant had no contract with the Respondent, express or implied.

174. The Claimant therefore was not an employee of the Respondent within the meaning of Section 230 of the Employment Rights Act 1996 because he did not work under an express or implied contract of employment or service.

175. The Claimant's claim of unfair dismissal for making a protected disclosure is dismissed.

Was the Claimant a worker of the Respondent within the meaning of Section 230 of the ERA?

176. The findings made above in relation to Section 230 also determine the

Claimant's claim to be worker for the Respondent.

177. In the absence of any contract with the Respondent, express or implied, the Respondent cannot be found to be "party to the contract" for the purposes of Section 230(3)(b) and is therefore not a limb b worker.

178. The Claimant's claims of unlawful detriment for having made a protected disclosure as a worker under Section 230 of the Employment Rights Act 1996 are dismissed.

Was the Claimant a worker within the extended meaning of Section 43K of the ERA?

179. The Claimant clearly worked for the Respondent as a Developer.

180. But, as set out above, he was not worker for the purposes of Section 230(3) because there was no contract between them, express or implied.

181. It appears to me clear that the Claimant was both introduced and supplied to the Respondent through Experis, OB and Sapphire. If I read the above authorities correctly, particularly ***McTigue***, it does not matter that there is more than one supplier, and the three tiers of supplying agencies may be regarded as a third person for the purposes of Section 43K(1)(a)(i).

182. I do not consider that the terms on which the Claimant was engaged to do the work were determined by the Claimant for the purposes of Section 43K(1)(a)(ii). I can see little influence that the Claimant has exercised over the terms of his engagement. At most, I can see that the Claimant exercised some freedom over the choice of Sapphire as his umbrella company and therefore the degree of fees he had deducted from their income before he was paid by them. Those amounted to £20 per week, or £4 per day, from his agreed daily rate of £535. This element which was more directly the Claimant's determination appears to me to be quite insubstantial in the context of the overall arrangements that were in place.

183. The next question for me to determine is were the Claimant's terms substantially determined (i) by the person for whom the individual works or worked, (ii) by a third person, or (iii) by both of them? If any of these is satisfied, the individual is a worker for the purposes of the subsection. I remind myself of my earlier observation that third person may be interpreted as third persons in the plural.

184. What is clear in this matter is that the Respondent sets the work required and the duties, together with the skill set they require. They choose who is engaged through direct interview. They subcontract issues such as right to work checks.

185. They direct the fee which will be paid to the next party in the chain, Experis. The arrangements between Experis and OB, and OB and Sapphire, then appear a matter of standard terms i.e. the level of fee paid to Sapphire is driven by the initial fee set by the Respondent. Mr Allen gave evidence that each party takes a cut from Sky's fee in the chain of agreements. It is only the minor intervention to the fee rate in the Claimant's selection of umbrella company that he directly influences.

186. The Respondent provides the Claimant with his equipment to use, a company

laptop, email address and messaging facilities as one of their contractors.

187. They govern his work, his input to their development work is managed by them as can be seen from the messages between him and his scrum master and other team members.

188. The Claimant is registered to their Beeline system from which it is clear that the £535 daily fee is presented based on an hourly rate and is based upon working 40 hours per week.

189. OB required, between 6 and 9 August 2021, that the Claimant registered with an umbrella company. Mr Allen stated that Experis would have required that of OB, and it was standard practice, albeit that is not recorded in any of the contracts between those parties.

190. Once OB communicated the requirement that the Claimant contracted through an umbrella company, the Claimant faced a choice of providers but there are many. To a degree, by exercising that choice the Claimant influenced the terms of his resultant employment with the umbrella company. However, I do not consider that influence material or substantial.

191. In my conclusion, the terms on which the Claimant was engaged to do the work were in practice substantially determined not by the Claimant but by the Respondent, Experis, OB and Sapphire, rigidly so given the binding contractual arrangements between each of them. They, Experis, OB and Sapphire are the third person for the purposes of Section 43K(1)(a)(i) and (ii) and the Respondent in practice substantially determined the terms on which the Claimant did the work with that third person.

192. In my conclusion the Claimant's engagement by the Respondent through the intermediaries is sufficient to trigger the provisions of Section 43K(1)(a), the Claimant is a worker for the purposes of that particular provision and the and the Respondent is, for the purposes of Section 43K(2)(a) the Claimant's employer.

193. The Claimant's claims of unlawful detriment for having made a protected disclosure as a worker under Section 43K shall proceed to the further determination below concerning strike out or deposit order.

Whether any claim should be struck out or a deposit required as a condition of allowing any complaint to be pursued on the ground it has no or little reasonable prospects of success respectively.

194. I have considerable reluctance in proceeding to make either order in this matter.

195. I note that whilst the Respondent conceded that the Claimant may add the heading of unlawful detriment for having made a protected disclosure as a worker under Section 43K, the detriment claims were at that stage incompletely particularised.

196. At the hearing on 22 June 2022, the Claimant was required to set out, by 13 July 2022, a list of each detriment to which he was subject, taken from the content of the claim form, with the date or approximate date of the incident, stating who was involved or responsible, what happened and how it affected him.

197. The Claimant provided this further information on 12 July 2022. It is contained in the bundle at page 48 and is headed "4. The Issues: Claimant's Third Draft of Particulars".

198. The disclosures are described as an "initial draft".

199. They are long list of things that the Claimant wrote on 12-15 October 2021. But the Claimant has not specifically identified the particular parts of what he wrote that he says are disclosures.

200. The issues remain unclear, I conclude, in terms of the asserted disclosures.

201. The Claimant has addressed what he contends are detriments, and they appear to be acts of shutting down his discussion, humiliating him by instructing him to implement discriminatory requirements and suggesting he had breached the Respondent's policy, through those actions causing the Claimant to terminate his contract on notice and subsequently the Respondent terminating his engagement without notice.

202. The Claimant is a litigant in person and has done what was asked of him. He has listed the detriments.

203. Those appear reasonably arguable points. That is not to say that they will succeed. However they are not plainly wrong arguments.

204. But more importantly, whether

205. r one considers the disclosures or the detriments I do not consider that the issues are by any measure settled.

206. The issues need to be more particularly settled and until that takes place, it is impossible to consider a strike out order or deposit order.

207. This claim requires further case management, and until we know more exactly what the claim is an order for strike out or deposit cannot be made.

208. Although the Respondent has accepted that the Claimant may put a heading of unlawful detriment for having made a protected disclosure as a Section 43K worker on his claim, the further information which he has provided has not received Judicial consideration from the perspective of whether or not his additional information was part of his original claim, or whether or not the claim will require amendment.

209. The case should be listed for a further case management hearing to determine what are the issues and whether or not the Claimant will need leave to amend to include any of the points he has provided by way of further information.

210. My reading of the Claim Form and attached Grounds of Complaint (17), compared to the Third Draft of Particulars (48), is that they list different issues in relation to both what the protected disclosures are and what the detriments suffered as a consequence were. In the absence of Judicial determination on the issue of amendment it would not be appropriate to consider orders of strike out or deposit until the issue of amendment is addressed fully and subject to Judicial

determination.

211. Under separate cover, I will make orders concerning next steps.

Employment Judge Knowles

Date: 17 January 2023