EMPLOYMENT TRIBUNALS

Claimant: **Ms S Yenamala**

Respondents: **Credit Suisse International (R1)**
Atyeti Limited (R2)

Heard at: **East London Hearing Centre (via Cloud Video Platform)**

On: **30 June 2023**

Before: **Employment Judge Brewer**

Representation

Claimant: In person
Respondents: Mr A Smith, Counsel for R1
Ms R Kennedy, counsel for R2

JUDGMENT

It is the Tribunal's judgment that:

1. **the claimant was not an employee or worker for the first respondent,**

2. **the claimant was not an employee or worker for the second respondent, and**

3. **the Tribunal does not have jurisdiction to hear the claimant's claim which are accordingly dismissed.**

REASONS

Introduction

1. This preliminary hearing was arranged to consider and determine the following issues:

a. Was the claimant an employee of the second respondent within the meaning of s.230(1) and (2) Employment Rights Act 1996?

b. Was the claimant a worker of the first and/or the second respondent within the meaning of:

i. s.230(3)(b), s.43k(1)(a) or (b) Employment Rights Act 1996, and/or

ii. s.41 and/or s.82(2) Equality Act 2010?

2. At the hearing the claimant abandoned her claim that she was employed by either respondent and so the only issue before me is whether the claimant met the definition of worker in the legislation referred to above.

Issues

3. In relation to the claims under s.230(3)(b) Employment Rights Act 1996 and s.82(2) Equality Act 2010 the issues are:

a. did the claimant have a contract with either of the respondents,

b. if so, did the contract provide for the claimant to undertake to carry out personal services,

c. if so, were those personal services for the benefit of another party to the contract who was not a client or customer of the claimant's profession or business undertaking?

4. In relation to the claim under s.41 Equality Act 2010, the issue is whether the claimant was a contract worker. A contract worker is defined as an individual supplied to a principal in furtherance of a contract under which the principal:

a. made available to work an individual who was

i. employed by another person and

ii. supplied by that other person in furtherance of a contract to which the principal is a party.

5. In relation to the claim under s.43k(1)(a) Employment Rights Act 1996, an individual is a worker under (1)(a) If that individual works for a person in circumstances in which:

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

b. the terms on which he is or was a gauge to do the work are or were in practise substantially determined not by the individual, but by the person for whom he works, by the third party or by both of them.

6. In relation to the claim under s.43k(1)(b) Employment Rights Act 1996, an individual is a worker who contracts with a person, for the purposes of that

person's business, for the execution of work to be done at a place not under 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)".

Law

7. The material parts of s.230 ERA are as follows:

230 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.

8. The material parts of s.83 EqA are as follows:

83 Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) "Employment" means –

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work…

9. For an individual to lay claim to 'worker' status he or she must first show that there is an express or implied contract with the 'employer'. If the contract is express, it can be written or oral.

10. To fall within limb (b) of S.230(3) ERA (or s.83 EqA).an individual must undertake 'to do or perform *personally* any work or services for another party to the contract'. As an obligation of personal performance is also a necessary constituent of a contract of employment, decisions in that field can legitimately be mined for guidance as to what personal performance means in the case of a limb (b) worker — **Pimlico Plumbers Ltd and anor v Smith** 2018 ICR 1511, SC.

11. Determining whether a contract includes an obligation of personal performance is a matter of construction and is not necessarily dependent on what happens in practice. In **Redrow Homes (Yorkshire) Ltd v Wright** 2004 ICR 1126, CA, the Court of Appeal observed that it does not necessarily follow from the fact that work is done personally that there is an *undertaking* that it be done personally.

12. For a contract to fall within S.230(3)(b) ERA, it must be one 'whereby the individual undertakes to do or perform personally any work or services *for* another party to the contract'.

13. The last clause of limb (b) of the statutory definition makes it clear that if a person renders services or performs work on the basis that the person to or for whom he or she does so is a customer or client of his or her business or profession, he or she is not a 'worker'.

14. In **Byrne Brothers (Formwork) Ltd v Baird and ors** 2002 ICR 667, EAT, the EAT gave guidance on what it termed this 'clumsily worded exception'. It held that the intention was clearly to create an 'intermediate class of protected worker' made up of individuals who were not employees but equally could not be regarded as carrying on a business. According to the EAT, 'the essence of the intended distinction [created by the exception] must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves'.

15. The material parts of s..43k ERA are as follows:

> ***43K Extension of meaning of "worker" etc. for Part IVA.***
>
> *(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who –*
>
> *(a) works or worked for a person in circumstances in which –*
>
> *(i) he is or was introduced or supplied to do that work by a third person, and*
>
> *(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,*
>
> *(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)"…*
>
> *(2) For the purposes of this Part "employer" includes –*

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

16. Section 43K was enacted to fill what was considered to be a gap in the protection against detriment and dismissal of agency workers, freelancers and NHS staff for raising public interest disclosures.

17. The material parts of s.41 EqA are as follows:

41 Contract workers

(5) A "principal" is a person who makes work available for an individual who is –

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

Findings of fact

18. In these findings of fact, I shall refer to the first respondent as CSI and the second respondent as A. I shall refer to the claimant's company, K&K Krishnan Corporation Limited as K&K.

19. On 4 October 2018 A entered into a Master Agreement for Managed Services (the Master Agreement) with Credit Suisse Securities (USA) LLC. Broadly speaking, the Master Agreement was for A to provide services, set out in various statements of work, to Credit Suisse Securities (USA) LLC and its affiliates. CSI is one of those affiliates. The services could be provided directly by A or by what is termed its affiliates, which is essentially a reference to subcontractors of A.

20. In terms of personnel, the Master Agreement required that individuals would be specifically assigned to the services always provided that those individuals were acceptable to Credit Suisse Securities (USA) LLC.

21. On 11 August 2021 A entered into a contract for services with K&K (the Consultancy Agreement).

22. At all material times, the claimant was a director of and shareholder in K&K, a company engaged in "Management consultancy activities other than financial management". The claimant was appointed as a director of K&K on 2 January 2014. The claimant's husband, Balamurali Krishnan Swaminathan, was appointed as a director of K&K on 4 April 2017.

23. The claimant is a person with significant control of K&K, owning more than 25% but not more than 50% of the shares and voting rights in the company.

24. The claimant signed the Consultancy Agreement in her capacity as a director of K&K.

25. Under the Consultancy Agreement, K&K would provide services to A. A is described as the client and K&K as the Consultancy.

26. On 14 December 2021, A and K&K agreed written amendments to the Consultancy Agreement. Again, the claimant signed the contractual documentation in her capacity as a director of K&K.

27. The claimant and her husband were employed as directors of K&K. They drew a salary each month and also took dividends as shareholders.

28. K&K had other clients and the fees paid by all of the clients went into a single bank account of K&K's from which the director's salaries were paid and the dividends were drawn.

29. Under the Consultancy Agreement, A agreed to pay to K&K a daily rate of £625.00 (later amended to £750.00) for consultancy services which were to be performed by one or more consultant. In the event those services were provided by the claimant. Along with providing the services, K&K was required to report progress and produce a final report on completion of the work.

30. Although the Consultancy Agreement states that the consultancy shall provide at its own cost all necessary equipment, in fact the claimant used a laptop provided by A.

31. The daily fee was paid against invoices from K&K. Those invoices showed the claimant as a member of staff of K&K.

32. As is common under these agreements there is a clause dealing with the relationship between A and K&K confirming that there is no intention to create an employment relationship between A and any consultant and K&K agreed to indemnify A in the event that any person should seek to establish any liability or obligation upon A on the ground that any consultant is an employee of A.

33. The detail of the services to be provided need not concern us but it is obviously important to note that the services were being provided to CSI (as an affiliate of Credit Suisse Securities (USA) LLC) pursuant to the Master Agreement.

34. In terms of the work undertaken by the claimant, that work was to drive the efficacies of several programmes within managed service contracts. Specifically, K&K, were engaged to provide what are described as strategic solutions on the RAD project to support the RAD team and in that context, the claimant acted as Project Manager. This was a small part of the services being provided by A to both CSI specifically and Credit Suisse Securities (USA) LLC generally. The work being provided by A was being provided on a multinational basis.

35. The claimant's work was typically undertaken on a laptop and in meetings with personnel from CSI. Save for meetings, the work could be undertaken anywhere, but I accept the claimant's evidence that for the most part she worked an 8-hour working day from the premises of CSI.

36. Working as part of the RAD team included having to work under the direction of some CSI personnel and, where the claimant was part of a meeting which she did not control, operating to a schedule set by someone other than herself.

37. The unchallenged evidence of Chris Caldwell, line manager of the RAD project for A, was that the claimant's role at CSI was limited to managing scrum meetings, scheduling the goals which had to be agreed upon with George Moraitakis of CSI, which were based on "stakeholder priorities" and communicating project status with both CSI and A.

38. Ultimately the relationship between K&K and A broke down because K&K were not performing as required but the detail of that does not need to form part of my findings.

39. It is clear that CSI never had any contractual relationship with either K&K or the claimant. CSI did not pay K&K or the claimant and were not party to and had no involvement in the arrangements between A, K&K and the claimant. CSI did not therefore determine the terms that governed the relationship between A, K&K and/or the claimant.

40. CSI was not K&K's "client" whether under the Contract for Services or otherwise and was not itself a party to the Master Agreement for Managed Services or the Statement of Work relevant to the services provided by A to CSI. Both of those were agreements made between Credit Suisse Securities (USA) LLC and A.

Conclusions

CSI and s.230(3)(b) ERA and s.83(2) EqA

41. In order for the claimant to be considered a limb (b) worker for CSI, there has to have been a contract between the claimant and CSI under which she undertook to do or perform personally any work or services for another party to the contract in circumstances where that other party is not a client or customer of any profession or business undertaking carried on by the claimant.

42. The claimant's assertion is that a contract was formed between her and CSI simply on the basis that she did work for CSI.

43. In my judgement misunderstood some of the law which she has clearly read and considered. For example, the claimant said that the terms of the contract were set by because she was told what to do by an employee of CSI. The claimant referred frequently in her evidence to the fact that although under the consultancy agreement the consultant could be substituted by K&K, this was not an unfettered right and therefore that was evidence of the fact that the claimant was really a worker.

44. The claimant has confused cases involving individuals who had a direct contractual relationship with the organisation to which they were providing services and this case, where the contract to provide consultancy services is between K&K and A. In the examples the claimant referred me to, invariably the organisation receiving the services argued that the provider was self-employed

or engaged through their own service company, and the individual was arguing that, in reality, they were either employed or were contracted as a worker by the organisation receiving the services (or work) where issues of substitution are relevant. But crucially, for s.230(3)(b) to apply there has to be a contract between the parties and in this case, there is self-evidently no contract between the claimant and CSI.

45. It cannot in my view be correct that the contract can be found merely in the fact that services were provided to CSI, because that would seem to put the cart before the horse. The question is upon what basis were the services being provided, that is to say, were they being provided by someone who is purportedly self-employed or employed by a third party to provide the services but in reality, were employed or engaged by the recipient of the services. If it were sufficient to say that a contract can be found between somebody who provides services to an organisation effectively on the basis that they provide services to that organisation which to some degree that organisation directs or controls, then much of the voluminous case law in this area would not exist. In my judgment the claimant had to show that there was a contract between her and CSI in the first instance and only then would it be possible to consider whether that contract was one under which she was providing services as a self-employed person or on some other basis. The mere provision of work absent any contractual relationship between parties cannot in my view give rise to employment however widely defined.

46. Therefore, in the absence of a contract between the claimant and CSI, I find that the claimant was not a limb (b) worker whether under s.230(3)(b) Employment Rights Act 1996 or s.83(2) Equality Act 2010.

CSI and s.41 EqA

47. This argument can be dealt with quite shortly.

48. I should first note that the claimant did not lead any evidence on this point, but it is one of the matters set out for me to deal with and therefore my judgment is as follows.

49. As set out above, s.41(5), (6) and (7) EqA provide that:

> *"(5) A "principal" is a person who makes work available for an individual who is*
>
> *(a) employed by another person, and*
>
> *(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).*
>
> *(6) "Contract work" is work such as is mentioned in subsection (5).*
>
> *(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b)"*

50. Leaving aside the relationship between the claimant and A, which is of course relevant to the consideration of the application of s.41, as regards CSI, there is a fundamental difficulty for the claimant in seeking to rely on s.41 which is that even if the claimant was "supplied to" CSI, that supply has to be in furtherance of a contract to which the principal, in this case CSI, is a party and, as I have found above, and as is clear from the documentation in the bundle, CSI were not a party to any of the contracts in this case.

51. In that case the claimant cannot be a contract worker as regards CSI for the purposes of the Equality Act 2010.

CSI and s.43k ERA

52. I now turn to the claimant's argument that she can rely on the extended definition of 'worker' in section 43K(1) ERA as against CSI.

53. S.43K(1)(b) requires that the person seeking to rely on it must have been supplied by another person in furtherance of a contract to which the principal (here CSI) is a party and as I have found, none of K&K, A or the claimant entered into a contract with CSI. The claimant cannot therefore rely on this subsection.

54. In respect of s.43K(1)(a) the legal principles have been considered in a number of cases, including **Croke v Hydro Aluminium Worcester Ltd** [2007] ICR 1303, **Keppel Seghers UK Ltd v Hinds** [2014] IRLR 754 and **Day v Health Education England & ors** [2017] IRLR 623.

55. Turning first to s.43K(1)(b), this subsection requires that the claimant must have contracted with CSI for the purposes of that person's business, and, as I have already found, CSI had no involvement with the arrangements that A made with the claimant or with K&K.

56. Although s.43K(1)(a) is a little more complex, importantly, even if the claimant was a worker under this subsection, in order for CSI to be the "employer" it would have to be shown that CSI substantially determined the terms on which the claimant was engaged (by virtue of s.43K(2)(b)).

57. The claimant argued that her 'terms" were found in the work she had to do. I cannot agree. The subsection refers to substantially determining the terms on which the claimant was engaged, and I take that to mean the terms on which she was engaged to do the work. The terms are synonymous with the work she was engaged to do. It is not particularly uncommon for contracts of employment or contracts to do work include a description of the work to be done, but that is not the same as the terms upon which that work is to be done, that is to say the terms upon which the individual is engaged to do the work.

58. It cannot in my view be sufficient for a claimant to argue that by defining the work to be done, the organisation defining that work can be the employer within the meaning of this subsection because they are defining the terms of the engagement. In consultancy arrangements it would be rather odd if the ultimate recipient of the services was not the organisation which defined what services it wanted, and if it was sufficient to fix that organisation with the status of employer

merely because it defined was it required to be done, leaving aside any other terms such as pay, sickness absence, holidays and all of the other usual terms of employment, that would expand the definition of "terms" to include essentially a job or services specification *absent* any other of the usual terms on which work is contracted to be done.

59. In my judgment, looking at what took place in this case, all CSI did was to receive services provided under agreements to which it was not a party and, in the normal course of work, required the claimant to do particular work, at particular times from time to time.

60. For those reasons I conclude that CSI not the employer for the purposes of s.43K(1)(a) ERA.

61. For all of those reasons in my judgment CSI was not the employer of the claimant whether under a contract of employment or a contract personally to perform work or services however defined.

A and s.230(3)(b) ERA and s.83(2) EqA

62. I turn first to the Consultancy Agreement and the relevant terms.

63. In **Uber v Aslam** [2021] UKSC 5, the Supreme Court confirmed that in order to establish that a person is a "limb (b) worker" (under s. 230(3)(b)) a claimant must show that three elements are made out:

    a. there must be a contract whereby an individual undertakes to perform work or services for the other party,

    b. there must be an undertaking to do the work or perform the services personally, and

    c. there must be a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.

64. As set out above, the consultancy started on 25 August 2021 and the expected completion was 25 August 2022.

65. The total contract price agreed was £180,000 (including VAT).

66. The Consultancy Agreement provides for a "Pay Rate" of £625.00 per day (later increased to £750.00 per day).

67. In the Consultancy Agreement, A is referred to as "the Client" and K&K as "the Consultancy."

68. Clause 2.1 states that:

> *"The Consultancy's obligation to provide the Consultancy Services shall be performed by one or Consultants(s) of the Consultancy as the Consultancy may consider appropriate ("the Consultants(s)"), subject to*

> *the Client being reasonably satisfied that the Consultant(s) has the required skills, qualifications and resources to provide the Consultancy Services to the required standard."* (sic)

69. Clause 2.2 states that:

> *"The Consultancy has the right, at its own expense, to enlist additional or substitute Consultants in the performance of the Consultancy Services or may, sub-contract all or part of the Consultancy Services, provided that the Consultancy provides details, whenever requested to do so, of the substitute or sub-contractor ahead of the planned substitution and subject to the Client being reasonably satisfied that such additional Consultants or any such sub-contractor has the required skills, qualifications, resources and personnel to provide the Consultancy Services to the required standard."*

70. I note at this point that the claimant did not deny that there was a right of substitution but argued that it was not unfettered, which as I have pointed out somewhat missed the point.

71. Clause 5.1 requires K&K to provide a monthly "time on task" summary including a description of the time spent on certain subtasks for that month. It also requires K&K to provide a timeline of activities stating the deadlines for each month's deliverables.

72. Clause 7.4 provides that:

> *"The relationship between the parties is between independent companies acting at arm's length and nothing contained in this Agreement shall be construed as constituting or establishing any partnership or joint venture or relationship of employer and employee between the parties or their personnel."*

73. Clause 15.1 provides that:

> *"The Consultancy acknowledges to the Client that there is no intention on the part of the Consultancy, the Consultant(s) or the Client to create an employment relationship between any of those parties and that the responsibility of complying with all statutory and legal requirements relating to the Consultant(s), (including but not limited to the payment of taxation, maternity payments and statutory sick pay) shall fall upon and be discharged wholly and exclusively by the Consultancy. In the event that any person should seek to establish any liability or obligation upon the Client on the grounds that any of its Consultants are an employee of the Client, the Consultancy shall upon demand indemnify the Client and keep them indemnified in respect of any such liability or obligation and any related proper and reasonable costs expenses or other losses which the Client shall properly incur as a direct result of such liability."*

74. The Claimant signed the contract on behalf of K&K in her capacity as a director.

75. The reality of the provision of the services broadly reflected the contractual arrangements. That is to say the consultancy services were provided by K&K who assigned the claimant to do the work. There was no direct contractual relationship between A and the claimant to do the work. The claimant did point to a document in the bundle which on the face of it appears to be an offer of employment by A to the claimant, but even if that was the intention, that is not what transpired.

76. It is not of course usual to look behind a written commercial contract and to see whether that reflects the reality of the circumstances which pertained at the time. I accept that there is case law which says that in the context of employment law it is more common and more usually necessary to look behind what the contract says so that reality is not veiled by strict written terms, but that law refers really to a situation where there was a direct contract between an individual or an individual's service company and the user of the individual's or the individual's service company's services in order to see whether the reality of the situation is that the individual is providing services as an employee or a worker.

77. But in this case, there is a contract between two corporate bodies both of whom provide consultancy services to clients. K&K is not the claimant's service company through which she provides her services, it is a consultancy which provides consultants to its clients. At present the consultants are the claimant and her husband. K&K has a number of clients, but I accept that in this case the claimant only worked on the services to be provided by K&K under the Consultancy Agreement. In those circumstances it is not necessary for me to look behind the written contract. The claimant has not suggested that the Consultancy Agreement is a sham and the only point at which she said it did not reflect the reality of the circumstances in which she found herself was that she was not entirely free to do the work in any way she pleased and there was not an unfettered right of substitution. But that is a long way from the arrangement being a sham in order to hide the reality of the true arrangements between the parties.

78. On the evidence I heard and read, K&K is a jointly owned company with two employed directors providing services to clients, receiving income from those clients and distributing that income to its employed directors who also receive dividends as shareholders and that seems to me to be a very long way from cases where individual providers of services set up a company in order to benefit from preferential tax arrangements or to limit liability whereas in reality they are providing services as individuals, or from circumstances where purportedly self-employed people effectively provides services in circumstances where they are really employees or workers.

79. In this case the arrangement under the Consultancy Agreement was for K&K to provide a consultant. It did not have to provide the claimant, that was the choice made by the directors of K&K. The services were paid for by A following receipt of invoices from K&K which included VAT, and as the claimant said in evidence those fees were paid to K&K along with fees from other clients into a K&K bank account. It is unclear what K&K paid the claimant, but whatever it was there was no direct link between that and any agreement between the claimant and K&K as to her remuneration or any other terms of her employment or engagement by K&K.

80. One other matter raised by the claimant was the requirement that she fill out timesheets. I did not find this surprising, and it does not seem to me to be contrary to genuine consultancy arrangements. In the end A had contracted to pat to K&K a daily rate for the services of a consultant, and it is not surprising therefore that they wanted to ensure that the consultant was working appropriately, and one way to do that where the organisation paying the consultancy did not have day-to-day contact with the consultant is to use timesheets. Not only does that not seemed to me to be indicative of employment or worker status, arguably the opposite is true. Save in circumstances where employees are required to clock in and clock out, most employees do not fill out timesheets and are not required to account for all their time spent at work because of course their work will be managed by their employer. The fact that the claimant had to complete timesheets is evidence that she was not managed by A.

81. I am entirely satisfied looking at the contractual arrangements in this case and the reality of what took place during the consultancy arrangements that there was no contract between the claimant and A. Further, it is quite clear that A, the "other party to the contract" (the Consultancy Agreement) was a client of the business undertaking carried on by the claimant and her husband (K&K).

82. For all of those reasons my judgment is that the claimant was not a worker for A whether under s.230 ERA or s.83 EqA.

A and s.43K ERA

83. In respect of s.43K(1)(a), the questions that need to be asked in determining whether an individual is a worker within the section were summarised by Simler J (then President) in **McTigue v University Hospital Bristol NHS Foundation Trust** [2016] ICR 1155 as follows:

    a. For whom does or did the individual work?

    b. Is the individual a worker as defined by section 230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on section 43K in relation to that person. However, the fact that the individual is a section 230(3) worker in relation to one person does not prevent the individual from relying on section 43K in relation to another person, the respondent, for whom the individual also works.

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

    d. If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within section 43K(1)(a).

    e. If not, were the terms substantially determined,

        i. by the person for whom the individual works, or

        ii. by a third person, or

iii. by both of them

iv. ?

If any of these is satisfied, the individual does fall within the subsection.

f. In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.

g. There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.

h. In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

i. If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within section 43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under section 43K(2)(a).

84. It seems to me that on any natural reading of the circumstances of this case, the claimant works for K&K. That work is to provide consultancy services to clients of K&K. The fact that services are provided to a client does not make the claimant a person who works "for" that client. One difficulty in applying the **McTigue** questions to this case is that the questions were really designed for employment agency cases, but K&K is not an employment agency, it is a consultancy, and its consultants provide consulting services to clients.

85. Nothing in the contractual arrangements in this case suggests that A determined the terms on which the claimant was engaged to do the work. For example, A paid K&K a daily rate for the services of the claimant, ultimately of £750.00 per day. But there is no information about what K&K paid to the claimant who accepted she was employed as a director and received what she called a director's salary.

86. Even if the terms of engagement are to be found in whole or in part in the Consultancy Agreement, that was negotiated by the claimant as a director of K&K. In my judgment, the better analysis in the circumstances in this case are that A engaged K&K to do the work and K&K assigned (and thus engaged) the claimant to do that work on terms agreed between the claimant and K&K, which is in large part, the claimant, and thus I conclude that it was the claimant who in reality determined the terms on which she was engaged by K&K to do the work.

87. For those reasons I conclude that the claimant was not a worker for A under s43K EqA.

88. Finally, I agree with the submission of Ms Kennedy that in respect of s.43K(b), that the position with A is no different in circumstances where the words "whether personally or otherwise" are inserted.

A and s.41 EqA

89. For the sake of completeness, s.41 EqA is aimed at the liability of principals (see above) and A was not a principal within the meaning of s.41.

90. For all of those reasons in my judgment A was not the employer of the claimant whether under a contract of employment or a contract personally to perform work or services however defined and the Tribunal does not have jurisdiction to hear the claimant's claims which are therefore dismissed.

Employment Judge Brewer
Date: 30 June 2023