Appeal No. UKEAT/0354/15/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 June 2016
Handed down 21 July 2016

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

APPELLANT

MS M McTIGUE

UNIVERSITY HOSPITAL BRISTOL NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

WHISTLEBLOWING

The Tribunal erred in its approach to whether the Claimant (a nurse supplied by an agency to work at an end user) is a worker within the meaning of s.43K(1)(a)(ii) of the ERA 1996. The Claimant is not precluded from relying on s.43K by her employment status under s.230(3) in relation to the agency, Tascor. Whether or not she is a worker under s.43K(1)(a) depends upon whether the Respondent end user (and not the Claimant) substantially determined the terms on which the Claimant was engaged to carry out work at the Respondent's medical centre. It is not necessary for the Claimant to show that the Respondent determined any such terms to the same or a greater extent than Tascor did; merely that the Respondent substantially determined the terms on which she was engaged to do the work at the centre. If both the agency and the end user substantially determined the terms of her engagement, the fact that the Respondent substantially determined the terms of her engagement means that the Respondent is her 'employer' for the purposes of s.43K(2)(a) ERA.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is an Appeal from a Judgment (with reasons promulgated on 3 August 2015) of Employment Judge Owen, striking out claims of protected disclosure victimisation against the University Hospitals Bristol NHS Foundation Trust for want of jurisdiction because he held that the Appellant was not the Respondent's worker within the meaning of s.43K(1)(a) of the Employment Rights Act 1996 ("ERA 1996").

2. In brief, the Appellant was an employee of an agency now known as Tascor Medical Services Limited ("Tascor"). The role she was engaged for required her to work as a Forensic Nurse Examiner providing medical examinations and related services to victims of sexual assault at the Bridge Sexual Assault Referral Centre ("the Bridge") which was operated by the Respondent (among others). She was removed from this engagement in December 2013 and brought claims based on protected disclosures made to the Respondent, alleging that she was subjected to detriments (including her removal from the Bridge) by the Respondent.

3. I refer to the parties as they were before the Tribunal. The Claimant is represented by Mr England and the Respondent by Ms Fraser Butlin, both of whom appeared below.

4. The following grounds are raised on the appeal, the amended Respondent's notice and the contingent cross-appeal:

(a) Whether the Tribunal erred in its interpretation of what has to be established for a claimant to bring him or herself within s. 43K (1)(a)(ii).

(b) Whether the extended meaning of worker in s.43K(1)(a) only applies where a person is not otherwise a worker under s.230(3) ERA 1996.

(c) Whether the finding at paragraph 31 that the Claimant is not a person who had no other organisation to pursue (having discontinued against Tascor) so that her claim did not

need to be considered "purposively" infected the Tribunal's reasoning and renders the decision flawed by error of law.

(d) Whether the failure by the Employment Judge expressly to refer to 'contractual terms' when addressing the Claimant's terms of engagement discloses an error of law by the Tribunal.

The Facts

5. The factual background can be summarised shortly by reference to the Employment Judge's findings. The Claimant was employed under a contract of employment as a Forensic Nurse Examiner by Tascor from 12 September 2011 until 27 February 2014. Tascor had entered into an arrangement to supply forensic nursing staff (with the Respondent and Avon and Somerset Constabulary) to work at the Bridge which was a medical centre operated by the Respondent. I infer that there was a contract between Tascor and the Respondent, but neither the Tribunal nor the parties have referred to it. It is at least possible that it contained terms that are relevant to the way individuals supplied by Tascor worked at the Bridge.

6. The Claimant had a written contract of employment with Tascor's predecessor (dated 5 July 2012) dealing (inter alia) with remuneration, entitlement to paid holiday, sick pay and maternity leave, pensions, company disciplinary and grievance procedures and notice to terminate. It appears to be a contract on their agency standard terms. It was in practice applied to the Claimant, and the Tribunal found that it painted a picture of a normal contractual arrangement as between employer and employee: see paragraph 15.

7. The Claimant was also issued with an Honorary Appointment or contract by the Respondent (the version available to the Tribunal was in sample, unsigned form only, but there was no dispute that she was issued with such a contract). The Honorary contract is also a standard form contract. It authorised her to carry out the duties of and practise (I infer from its

terms) as a Forensic Nurse Examiner at the Bridge. It identified the named supervisor or professional practitioner who she would work under the supervision of at the Bridge, requiring her to inform the named supervisor of any absence by 9am on the first day of absence. It required her to cooperate with the Respondent (among other things) in relation to issues of health and safety, clinical governance, and working time. Significantly, it reserved the Respondent's right to terminate the Honorary contract in case of any reason or cause for concern that might jeopardise the continuity of quality of care offered to patients.

8. It is common ground, although the Tribunal made no reference to it, that the Respondent substantially determined the terms of the Honorary contract. At paragraph 17 the Tribunal found in relation to the Honorary contract:

> **"I find that the document was provided for any person who had to undertake work at Trust premises, if he or she was not a member of their staff. In my view it was simply directing such persons (who were employed by others) that they were expected to meet certain standards of behaviour whilst on hospital premises. It was appropriate also (for example) to ensure that non-staff did not improperly disclose any patient information that might be provided to them. I do not conclude that it indicates that the Trust was managing any such visiting party. It was a small measure of control exerted by the Trust – but not as employers but as providers of accommodation."**

9. The Tribunal made other findings about how the Claimant's work was managed and organised. The Claimant's evidence that she was part of the team at the Bridge and invited to team and other meetings, showed a degree of cooperation between the two bodies that worked together (paragraph 18). The Employment Judge found that Tascor and the Respondent agreed uniform requirements and that the Claimant would wear a name badge quoting her place of work as "the Bridge" indicating that the Respondent wished to hold her out as part of the team. There was cooperation between Tascor and the Respondent over holiday and time off arrangements and the Tribunal found that in this context terms were a matter for cooperation between the Respondent and Tascor (paragraph 22). The Respondent also played a part in the decision to remove the Claimant from the contract (paragraph 28).

10. Unsurprisingly, the Tribunal found that Tascor operated the disciplinary and grievance procedures applicable and was liable for all remuneration due to the Claimant. It was Tascor that authorised or required overtime.

The relevant legal framework

11. The statutory protection available to whistleblowers applies to a 'worker' who makes a 'protected disclosure' within the meaning of Part IVA ERA 1996 and has been subjected to detriment by any act or deliberate failure to act by his 'employer' on the ground that the worker made a protected disclosure.

12. Section 43K (as its sub-heading expressly states) provides an extended meaning of 'worker' (and associated terms) for the purposes of Part IVA, beyond that otherwise found in s.230 ERA 1996. So far as relevant to this appeal it provides:

> "(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,
>
> …"

As for "employer", s.43K(2) (a) provides:

> "(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,
>
> …"

Section 230 ERA defines employees and workers for the purposes of ERA 1996 as follows:

> "(1) In this Act "employee" means an individual who has entered into or works 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"…means an individual who has entered into or works under…
(a) a contract of employment, or
(b) any other contract whether, express or implied and… whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
and any reference to a worker's contract shall be construed accordingly.

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

(5) In this Act "employment" –
(a) in relation to an employee, means… employment under a contract of employment and
(b) in relation to a worker, means employment under his contract;
and "employed" shall be construed accordingly.

(6) This section has effect subject to sections 43K, 47(B)(3)…and in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by s.43K.

The decision of the Employment Tribunal

13. There appears to have been no dispute between the parties before the Tribunal (nor was there any issue raised on appeal) that the Claimant satisfied the terms of s.43K(1)(a)(i) because she worked for the Respondent in circumstances where she was supplied to do that work by a third person (Tascor). The dispute centred on the meaning and proper application of subsection (a)(ii).

14. The Employment Judge, faced with competing constructions of the words "substantially determined" in s.43K (1) (a), concluded at paragraph 10:

> **"10. In my view the words should be given their normal meaning. I therefore prefer the interpretation offered by Ms Fraser-Butlin. For a party to "substantially determine terms" must require and mean that it decides the majority of the terms or the more significant ones. But it must still be the case that I need to examine the documentation in this matter to decide whether it reflects the reality of the relationships here (paragraph 50 of Keppel Seghers). I should also examine whether both the Trust and another party substantially determined terms."**

A At paragraph 13, having recognised that the Claimant was an employee of Tascor and could have continued to pursue a claim against Tascor relying upon that status but had discontinued that claim, the Employment Judge held:

> **"13. To sum up therefore, the burden on this Claimant is to satisfy me on the balance of probability that (notwithstanding the contractual arrangement between her and Tascor) the terms on which she worked for Tascor were in practice substantially determined by the Trust. I have been referred by both advocates to considerable amount of detail about the way that the Trust and what I might call its partners in the venture operated. Where there is conflict I will make a finding of fact".**

C 15. The Tribunal set out the essential reasons for its decision at paragraphs 30 and 31 as follows:

> **"30. Having reached a decision on what I consider to be the key factors in this case, I have to revisit the question of whether the Trust "substantially determined" the terms on which Ms McTigue was engaged to work. I have indicated the areas in which the Trust determined matters, particularly with reference to the removal of Ms McTigue from the contract. Mr England on behalf of the Claimant put before the Tribunal a substantial number of areas in which he submitted the terms were "substantially determined" by the Trust. I have indicated above where I agree with him and where I differ. In others he has overstated their significance. My conclusion is that this Respondent emphatically did not "substantially determine" terms. The Trust did not contribute or determine more than a minority of them. The Claimant has fallen far short of the necessary threshold. Accordingly, the complaint herein is dismissed as there are no other complaints, there will be judgment for the Respondent".**
>
> **"31. I need to record also that Ms McTigue is not a person who had no other organisation to pursue and whose claim should be considered "purposively". As I noted earlier she had Tascor "in her sights" as a respondent but for some reason discontinued her claim."**

The issues and contentions of the parties

F 16. Against that background, the principal issues that arise from the grounds of appeal, Respondent's notice and contingent cross-appeal, as developed in argument are (i) what is the proper interpretation of s.43K(1)(a) ERA 1996; and (ii) whether the application of the statutory provision by the Tribunal to the facts was in error of law.

G

17. The Claimant contends that the Judge erred in law in holding that to substantially determine the terms on which the Claimant was engaged, the Respondent would have to

H determine the majority of the terms or the more significant ones. Given that s.43K(1)(a)(ii) expressly recognises that there can be more than one party who substantially determines the

terms, a definition based on who determined "the majority of the terms" cannot be correct. Moreover the language of the statute does not require focus on a qualitative assessment of the terms but focuses on whether or not they were determined by the party in question and the extent to which they were so determined. The proper approach is to ask whether the terms of employment were "in large part" (see Day v Lewisham and Greenwich NHS Trust and another [2016] IRLR 415) determined by the party in question, focusing on the act of determining the terms and entailing questions of fact and degree as to whether the influence of the party is sufficient to mean that party substantially determined the terms. Having adopted an erroneous construction, the Tribunal erred in its application of the statutory provision to the facts found through a prism of erroneous statutory interpretation. Further, the Tribunal was wrong to say that a purposive approach was unnecessary here because the Claimant could have brought a claim against Tascor. The Tribunal was wrong to conclude that the Claimant could have brought a claim against Tascor in the circumstances of this case given that her claim is directed at acts or omissions of the Respondent's employee (Mrs Burunou nee Hewlett), for whom Tascor had no vicarious (or other) liability. Moreover, the facts of Day that led to the interpretation of s.43K(1) (at paragraph 37 of the judgment) relied on by the Respondent as a knockout blow are distinguishable and do not support the Respondent's argument and/or to the extent that Day is read as making a point of wider application, it is wrong in principle and would exclude from protection agency workers in the Claimant's position so should not be followed.

18. The Respondent agrees that the words "substantially determined" mean "in large part" following Day. Although these are not the words used by the Tribunal in interpreting this provision, the Tribunal was dealing with an argument advanced by the Claimant that "substantially" meant simply more than minor or trivial. It was in response to that suggested

(but erroneous) approach that the Tribunal searched for the majority of or the most significant terms. Properly understood, the Tribunal applied the test as set out in Day. There was no contract, either on paper or in fact, between the Claimant and the Respondent that meant that the Respondent substantially determined the terms of the Claimant's engagement. The Respondent accepts that a purposive approach to the protected disclosure provisions in the ERA 1996 should be taken. That does not, however, allow an interpretation beyond the clear words of the statute. Moreover such an approach is only to be applied where the purpose of the legislation would otherwise not be fulfilled. In this case, there was no lacuna. The Claimant is protected by the legislation without adopting a purposive interpretation because she was employed by Tascor against whom she could and did bring a claim. The Tribunal rightly recognised the relevance of this point at paragraph 31. In any event, the Respondent contends that there is a further legal argument that amounts to a knockout blow in this case. The opening words of s. 43K(1) make it clear that the extended meaning of worker (provided by s.43K) only applies where someone is not otherwise a worker under s.230(3) ERA 1996. Since the Claimant was an employee of Tascor within the meaning of s.230(3) she cannot also bring herself within the extended definition of worker in section 43K(1): see Day at paragraph 37 and 38.

I. The proper interpretation of s.43K(1)(a)

19. Section 43K provides an extended meaning of 'worker' and 'employer' for the purposes of Part IVA ERA 1996 only and has no wider application. It was enacted primarily to protect agency workers provided to an end user in circumstances where the worker could not fulfil the stricter 'limb (b)' requirements of s.230(3) by virtue of the absence of a sufficient contractual relationship with the end user. Its introduction was also specifically designed to secure whistleblowing protection for workers in health services in England, Scotland and Wales where

A the NHS has contractual arrangements in place that mean such workers otherwise fall outside the s.230(3) definition of 'worker' for these purposes. The extended protection afforded in this regard is carefully identified and delineated (see s. 43K(1)(ba)(cb)). This appeal concerns the agency extension.

B

20. Once it is established that an individual has been supplied by a third party to work for another person, a comparison must be made between the extent to which on the one hand the

C individual determines his or her terms of engagement to do the work, and on the other hand, somebody else determines those terms in order to ascertain whether the terms of the worker extension in s.43K(1)(a)(ii) are fulfilled. If the individual substantially determines his or her

D terms in comparison with the others, they are not a worker under this provision. If the other person or persons substantially determine the terms, the individual is a worker for these purposes. The provision is focused on identifying who, as between the individual on the one

E hand and the other persons identified on the other, substantially determines the terms on which he or she is engaged to do the work. The question is answered by considering the situation as between the individual and the supplier, or the individual and the end user, or the individual and both the supplier and end user. A comparison between the supplier and the end user is not

F invited by the provision.

21. Since subsection (a)(ii) expressly envisages that there may be two persons who

G substantially determine the terms on which the individual is engaged to do the work (the person who supplies the individual and the person for whom he or she works) the same must inevitably be true in relation to s.43K(2)(a) which defines the 'employer' for these purposes. This

H provision defines employer as the 'person' (which, by this stage, cannot be the individual) 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 this subsection.

22. Moreover, since both the supplier and the end user can substantially determine the terms and the subsection does not invite any comparison between how substantially the supplier of the individual determines the terms compared with how substantially the end user does so, there is no room for an interpretation of s.43K(1)(a)(ii) based on who determined "the majority of the terms" or "the most significant terms" as between the agency supplier and the end user. Where two parties (other than the individual) have between them determined the terms upon which an individual worked but have done so to different extents, each might nevertheless have substantially determined the terms.

23. In Day, in the context of protected disclosure victimisation claims by Mr Day against Health Education England ('HEE') (who supplied him to work at his employer, the NHS Trust) and against the NHS Trust, HEE applied to strike out the claim against it on various grounds. It was common ground that the terms on which he was engaged to do the work at the NHS Trust were not substantially determined by him. A tribunal found that there was no factual basis for his assertion that the terms of his engagement to work at the NHS Trust were in practice substantially determined by HEE. The Appeal Tribunal held that there was no error of law in that finding. In that context, the Employment Appeal Tribunal (Langstaff J) held at paragraphs 37 and 38 as follows:

> **"37. One feature, however, does cover all: that is that they cannot be a worker as defined by s.230(3). Mr Milsom had no satisfactory explanation for the presence of those words. The list that follows in 43K(1)(a)-(d) is subject to those introductory words. His submission that the words might be included as mere introductory expression or to provide 'belt and braces' does not suffice, for if a person is within 43K(1)(a) and is also an employee or a limb (b) worker, there is no need to extend the meaning to include him. If the section had been intended to add**

a category of employer against whom a person might act in addition to others who were his employer, there would be no need for the works 'who is not a worker as defined by section 230(3)'. They were intended to have a meaning. They have no additional force if construed as Mr Milsom would wish. Construed as Mr Siddall suggests, they apply a policy to the effect that those who are workers within s.230(3) should adopt the route of complaint set out in ss.43C-43H but had no, and need no, additional protection against those who are more peripheral to their employment. There is no reason in policy to include those who are tangential to the work which is relevant.

38. Accepting these submissions, as I do, does no violence to the principle of purposive construction. The purpose of this part of the Act is to extend the meaning of worker to a limited category of other relationships. It is, plainly, to give them a route to remedy which they might not otherwise have (the agency worker, for instance, is likely to be neither an employee nor worker in respect of the end user under whose control the work would normally be performed). That purpose is fulfilled. It does not need the relevant introductory words to be written out."

24. The Respondent relies on that reasoning to submit that the opening words of s.43 K(1) ' "worker" includes an individual who <u>is not</u> a worker as defined by section 230(3) <u>but who</u>…' mean that the extended protection only applies where someone is not otherwise a worker under s. 230(3) irrespective of the identity of the respondent and the identity of the person with whom the worker has a s.230(3) worker relationship. In other words, if an agency worker has a s.230(3) 'limb (b)' worker contract with the agency, the agency worker is excluded from the extended protection available under s.43K(1)(a) vis à vis all others, including the end user. The agency may be insolvent and the end user vicariously liable for the detriments done to the individual in the course of working at the end user by its employees because of the protected disclosures, but no remedy is available. Ms Fraser Butlin accepts that this interpretation substantially reduces the protection the provision appears to have been intended to afford but submits that Parliament has specifically delineated the extended protection afforded and further submits that for purposes of clarity and certainty it is important that a worker knows who their employer is for the purposes of making a protected disclosure.

25. I do not accept this submission and do not consider that this is what the Employment Appeal Tribunal intended by paragraphs 37 and 38.

A

26. I accept that the opening words in s.43K(1) mean that the provision is only engaged where an individual is not a worker within s.230(3) in relation to the respondent in question. If he or she is such a worker there is no need to extend the meaning of worker to afford protection against that respondent.

B

27. However, an important purpose of s.43K is to extend cover to agency workers in relation to victimisation for protected disclosures made while working at the end user. This case exemplifies that situation. Although an employee of Tascor, the Claimant was supplied to work at the Respondent's Bridge centre with the Respondent's employees who were thus in a position to subject her to detriments after she made protected disclosures. It is against that treatment (if it is established) that she requires protection. The extended definition of worker in s.43K(1)(a) potentially provides it in respect of her claim against the Respondent. The fact that she has worker status in relation to the agency, Tascor, under s.230 and cannot accordingly rely on s.43K in relation to Tascor (and does not need to do so in any event so far as Tascor is concerned) is irrelevant in relation to her claim against the Respondent. She is not a s.230(3) worker in relation to the Respondent. The extended definition of worker provides a potential route to a remedy the Claimant would not otherwise have had as an agency worker who is neither an employee nor a limb (b) worker in respect of the Respondent end user for whom she carries out the work.

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28. Moreover, this construction gives meaning to the introductory words of s.43K(1) which apply to all categories of worker identified at subsections (a) to (d) and is entirely consistent with the stated purpose of the provision. There is no resulting uncertainty or lack of clarity. An agency worker may complain to both the end user and the agency about matters of concern, as the Claimant did here, as both are potential employers for protected disclosure purposes.

H

29. This construction of s.43K(1) gives effect to Parliament's intentions as evidenced by the language of the provision having regard to the statutory and social context. It is unnecessary to resort to a purposive construction that would give an extended meaning of 'worker' beyond the legitimate reach of the subsection (whether because it is thought that the broad objective of the statute would be better effected by that approach or on some other basis).

II. The application of the statutory provision by the Tribunal to the facts as found

30. In light of the conclusions I have set out above as to the proper construction of s.43K, and having regard to the way in which the Employment Tribunal applied the statutory provision to the facts in this case, I consider that the Employment Tribunal erred in law for the following reasons.

31. The starting point in addressing whether the Claimant or the agency (Tascor), the end user (the Respondent) or both substantially determined the terms on which she was engaged, should have been the terms of the engagement itself. As the Court of Appeal held in Sharpe v Worcester Diocesan Board of Finance Ltd [2015] ICR 1241, there must be a contract whose terms have been determined. The contract may be in writing or oral and terms may be implied. Further, there may be more than one relevant contract, and in relation to any express agreements it may be necessary to consider whether the terms reflect the reality of the engagement.

32. Here, contrary to the submission of Ms Fraser Butlin, there were at least two written contracts: one between the Claimant and Tascor and the other between the Claimant and the Respondent. There was almost certainly a contract between Tascor and the Respondent as well.

But rather than examine the extent to which the terms of the Honorary contract (and/or any other terms agreed) were determined by the Claimant or the Respondent, and the extent to which such terms applied to the Claimant's engagement in practice, the Tribunal appears to have disregarded the Honorary contract as something which gave only a small measure of control to the Respondent, and this as "providers of accommodation" rather than as employers. This betrays a misunderstanding of the exercise the Tribunal was undertaking.

33. The Tribunal's misunderstanding emerges first at paragraph 13 where the Tribunal summed up the question to be addressed as follows:

> **"… the burden on this Claimant is to satisfy me on the balance of probability that (notwithstanding the contractual arrangement between her and Tascor) the terms on which she worked for Tascor were in practice substantially determined by the Trust."**

That is not the correct question. It was not for the Tribunal to determine whether the terms on which the Claimant worked for Tascor were substantially determined by the Respondent, but to consider the terms on which the Claimant was engaged to do the work at the Bridge and whether or not the Claimant or Respondent had any role and if so to what extent in determining those terms.

34. Secondly, looking at the Tribunal's findings and reasons that follow as a whole, the Tribunal erroneously looked to see which entity (other than the Claimant) had principally determined the terms by seeking to make a comparison between how substantially Tascor determined the terms as compared with how substantially the Respondent did so. Nobody in this case suggested that the Claimant determined the terms of the contracts under which she worked. Moreover, this is 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 the Claimant

worked. Although in practice each might have done so to a different extent, that extent was plainly capable of being substantial in both cases nonetheless.

35. Thirdly, despite recognising that both the Respondent and another party could substantially determine the terms and that this possibility should also be examined (see paragraph 10) and despite finding that there was cooperation between the two bodies that worked together (paragraph 18) and that certain terms were a matter for cooperation between the Respondent and Tascor (paragraph 22) the Tribunal did not address this possibility in reaching its decision. Rather, at paragraph 30 it concluded that the Respondent determined no more than a minority of the terms but did so having made a false comparison between the Respondent and Tascor that sought to make a qualitative assessment of the terms in issue, attributing greater importance to some and disregarding other terms that ought not to have been disregarded. The Tribunal erroneously focused on who determined the substantial terms when it should have been focused on whether the Respondent and Tascor both substantially determined the terms on which the Claimant was engaged to do the work (even if to different extents).

36. Finally, in identifying both at paragraph 11 and 31 the fact that the Claimant had a route to remedy against Tascor but had discontinued that claim so that she was not a person who had no other organisation to pursue, the Tribunal had regard to an irrelevant consideration. Tascor and the Respondent are separate persons. Whether the Claimant had a claim against Tascor or not is irrelevant to the question whether she has a separate claim against the Respondent. In any event, as Mr England submits, Tascor had no vicarious liability for the detrimental acts or omissions of the Respondent's employees whilst she was working at the Bridge (s.47 B(1) ERA 1996), and it is unlikely on the facts of this case that those acts or omissions would be treated as

done by the Respondent's employees as workers or agents of Tascor under s.47B(1A)(a) and (b) ERA 1996 (as amended by the Enterprise and Regulatory Reform Act 2013 with effect from 25 June 2013).

37. In light of these conclusions it is unnecessary to address separately the contingent cross appeal.

38. In conclusion in the hope that it will assist tribunals dealing with these issues, it seems to me that in determining whether an individual is a worker within s. 43K(1)(a) the following questions should be addressed:

(a) For whom does or did the individual work?

(b) Is the individual a worker as defined by s.230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on s.43K in relation to that person. 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, the respondent, for whom the individual also works.

(c) 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?

(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 s.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? 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 s.43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under s. 43K(2)(a) ERA 1996.

39. For all of the reasons given above, I agree with Mr England that the Employment Judge erred in law in his approach to the question of extended worker status under s.43K(1)(a) and its application to the facts of this case. The appeal must accordingly be allowed, and the decision set aside.

Disposal

40. The Claimant does not contend that the Appeal Tribunal should substitute its own conclusion for that of the Tribunal in the event that this appeal succeeds. Rather, Mr England submits that the issue should be remitted to a fresh employment tribunal because the findings of fact made by the Tribunal were made through a prism of erroneous statutory interpretation. The Respondent contends that the facts are fairly analysed by the Tribunal and any remission should be to the same Tribunal.

41. Whether to remit to the same or to a different tribunal is a matter for the discretion of the Employment Appeal Tribunal, exercised in accordance with criteria laid down in Sinclair Roche & Temperley v Heard [2004] IRLR 763. Having regard to these criteria, I have concluded that the most satisfactory course to adopt is to remit this case to a different tribunal to be heard afresh for the reasons given by Mr England. The Tribunal misunderstood the exercise it was required to undertake and the facts found were obtained on the basis of that erroneous approach. The exercise will have to be undertaken again. It may be possible for the parties to reach agreement in relation to undisputed facts but it is possible that further evidence and additional findings of fact will be necessary. It is unlikely in the circumstances that remitting the case to a fresh tribunal will add significantly to the time that would have been required for a hearing before the same Tribunal.

42. The appeal is accordingly allowed. The Tribunal erred in its approach to whether the Claimant is a worker within the meaning of s.43K(1)(a)(ii). The Claimant is not precluded from relying on s. 43K by her employment status under s.230(3) in relation to Tascor. Whether or not she is a worker under s.43K(1)(a) depends upon whether the Respondent (and not the Claimant) substantially determined the terms on which the Claimant was engaged to carry out work at the Bridge. It is not necessary for the Claimant to show that the Respondent determined any such terms to the same or a greater extent than Tascor did; merely that the Respondent substantially determined the terms on which she was engaged to do the work at the Bridge. If both Tascor and the Respondent substantially determined the terms of her engagement, the fact that the Respondent substantially determined the terms of her engagement means that the Respondent is her 'employer' for the purposes of s.43K(2)(a) ERA.

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43. The case is remitted to a fresh tribunal for reconsideration in accordance with this judgment.

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