



EMPLOYMENT TRIBUNALS

Claimant: Ms R Moon

Respondent: Lancashire and South Cumbria NHS Foundation Trust

PRELIMINARY HEARING

Heard at: Manchester (remote public hearing via CVP)

On: 5 April 2022

Before: Judge Brian Doyle

Appearances

For the claimant: In person

For the respondent: Dr E Morgan, Queen's Counsel

RESERVED JUDGMENT

In relation to the respondent the claimant is a “worker” for the purposes of section 43K(1)(a) and/or section 230(3)(b) of the Employment Rights Act 1996 in respect of her complaint under section 47B of that Act and is also in employment under a contract personally to do work for the purposes of section 83(2)(a) of the Equality Act 2010 in respect of her complaint under sections 27 and 39 of that Act. Her claim may now proceed to a final hearing as listed.

WRITTEN REASONS

The claim and the preliminary issue

1. The claimant complains of public interest disclosure detriment contrary to section 47B of the Employment Rights Act 1996 and of victimisation contrary to sections 27 and 39 of the Equality Act 2010.

2. The claimant accepts that she is not an employee of the Trust in the sense that she accepts that she is not employed under a contract of employment by it. Her claim proceeds only on the basis that she asserts her status as a worker as defined in sections 43K(1) and 230(3) and (6) of the Employment Rights Act 1996; and on the basis that she is in employment under a contract personally to do work as defined in section 83(2)(a) of the Equality Act 2010. That status is not conceded by the respondent.
3. The determination of her employment status is the preliminary issue before this Tribunal. This results from a case management hearing on 18 January 2022 conducted by Employment Judge Shotter.

The respondent's position

4. The respondent's pleaded position is that the claimant was engaged by the respondent as an Associate Hospital Manager (AHM) on 8 August 2016. The respondent engages around 30 Associate Hospital Managers (AHMs). AHMs are formally appointed by the Trust Board to act on its behalf. They have an important statutory function in the discharge of patients who have been detained or made subject to community powers under the Mental Health Act 1983 (MHA). AHMs are independent of and are in no sense employees or officers of the respondent. They are not paid a salary. They receive a sessional fee and travel expenses for the sessions they attend. They are independent of the respondent Trust. Section 23(6) of the MHA expressly prohibits employees or executive officers of the respondent from performing the functions of an AHM. The respondent does not accept that the claimant is a "contracted worker with workers' rights". The appointment as an AHM necessitates independence from the respondent Trust.

The evidence

5. The Tribunal heard witness evidence from Dr David Fearnley on behalf of the Trust. He is a Consultant Forensic Psychiatrist. He is employed by the Trust as the Chief Medical Officer (an Executive Director position). He joined the Trust in October 2020, having previously been the Executive Medical Director at Betsi Cadwaladr University Health Board (2019) and Mersey Care NHS Foundation Trust (2005). He gave evidence via a witness statement. His evidence was designed to provide information on the position of Associate Hospital Manager ("AHM") within this Trust and his understanding of the relevant statutory framework for the role. His evidence was unchallenged.
6. The claimant did not give evidence, but relied upon her written submissions.
7. The Tribunal also had the advantage of an electronic bundle of documents to which reference is made in square brackets below. The bundle contained 432 pages plus index.

Findings of fact

8. It appears to be common ground as follows.

9. The claimant is a qualified solicitor. She pursued a career in private practice and then with a local authority. She secured several independent roles within the mental health sector [321 onwards]. These included appointment as Mental Health Act Manager and Associate Hospital Manager (AHM) [321].
10. The respondent is a specialist Mental Health Foundation Trust. It is concerned in the provision of in-patient assessment and treatment. In line with the statutory framework applicable to the NHS, a Foundation Trust is a corporate entity. The respondent operates at several sites [308].
11. The health and related care services provided by the respondent extend to those who are detained under the Mental Health Act. Pursuant to Article 5 of the European Convention on Human Rights, the decision to detain a patient must be capable of review. The conduct of such a review is undertaken by a “Managers Panel”. The statutory regime makes express reference to eligibility to participate in such a panel and/or the persons to whom the powers under the Mental Health Act may be delegated for this purpose. These include the AHM.
12. Foundation Trusts are required to facilitate the conduct of the patient review by means of the Managers Panel and the designation of AHM. The Managers Panel comprises no fewer than 3 members. It is by means of this panel that the statutory powers are to be given effect. Each is required to conform to the MHA Code of Practice [Chapter 38 at 117 onwards]. These AHM are entrusted with statutory powers and under obligations which are personal to them [125]. The respondent draws upon a cohort of independent AHMs.
13. From a clinical governance perspective, it has been necessary to record the core obligations of the AHM and the character of the relationship between the AHM and the respondent. Several such documents are included within the hearing bundle: (i) job descriptions [126, 132 and 185]; (ii) person specification [130]; (iii) Hospital Managers Handbook [136]; (iv) reviews [182-194]; and (v) policy statements [197]. The respondent’s position is that each of the core documents confirm the legislative reality: an employee and/or officer of the respondent cannot discharge the powers of an AHM.
14. The claimant applied for the role of AHM [317]. At that time, the claimant recognised the duties of the AHM to involve participation within management panel determinations, requiring delegation for this purpose, pursuant to section 23(6) of the Mental Health Act [100]. The claimant was appointed for participation in the AHM panel [329]. She discharged the responsibilities and statutory powers of an AHM [5]. She has been exercising those powers since 13 July 2016. The documents issued by the respondent confirm that the relationship between the respondent and the AHM is one of statutory delegation [297].
15. The position of an AHM is statutory and is regulated by section 23(6) of the Mental Health Act and its Code of Conduct. It is on this account that the primary activity is participation in determinations by means of review which requires an evidential assessment by the AHMs who together comprise a panel [214-287 and 365]. The claimant’s participation in the conduct of review proceedings generates a sitting

fee. The fee is fixed. The claimant has been paid in accordance with this arrangement [421 onwards].

16. It also appears from the respondent's unchallenged witness evidence as follows.
17. The responsibility for the execution of all duties or acts carried out by staff of the Trust in relation to the Mental Health Act 1983 (the "Act") is retained by the Hospital Managers. This includes the assurance that, as far as reasonably practicable, the grounds for detaining patients are valid and legal. Under the Mental Health Act, Hospital Managers are those with Mental Health Act responsibilities, such as the Chairman and other Non-Executive Directors of the Trust Board.
18. Under the Act, certain duties can be delegated. In particular, the power to discharge patients rests with Non-Executive Directors on the Trust Board. However, section 23(6) of the Act confirms that the power to discharge may be delegated to a sub-committee of three or more members known as Associate Managers. These are known within the Trust as "AHMs" and have previously been known in the Trust as "Associate Managers". Many Trusts call them "Mental Health Act Managers". Employees of the Trust and Executive Directors are expressly barred from performing the duties set out in section 23 of the Act [101]. This arrangement upholds the five sets of guiding principles of the Act: particularly in determining the least restrictive option and maximising independence; and supporting empowerment and involvement. The Trust's policy on Hospital Managers confirms that, as per the Trust Board's delegation document, a review panel may be formed from any combination of Chairman, Non-Executive Directors or AHMs [203].
19. An AHM is neither an officer of the Trust nor a member of the Trust Board. They are members of the committee or sub-committee established by the Trust who are appointed solely for the purpose of reviewing the cases of patients who are detained under the Act to determine whether they are suitable for discharge. The Act does not define specific criteria to be applied by the AHMs in making their decision. However, the yardstick is whether the grounds for admission or continued detention are satisfied [202]. All patients under the care of the Trust have the right to request their case be reviewed by the AHMs, except those patients detained under sections 5, 35, 36, and 38 of the Act [201].
20. The recruitment of AHMs at the Trust is via NHS Jobs. This is a centralised website on which most roles (including Non-Executive Directors) are advertised and through which applications are submitted and processed. Short-listed applicants will be invited to an interview and, if successful, they will be appointed. The appointment letter sent out to Trust AHMs will confirm the role. To date the Trust has used an "honorary contract" for the appointment. The honorary contract should confirm that the role is for a fixed term of 3 years. Payment is made on a per session basis.
21. The Trust has undertaken a review of its AHMs. Going forward the Trust should shortly be implementing new appointment arrangements for AHMs, to avoid some of the confusion that honorary contracts can create. The last review of the remuneration for AHMs, which stood at £55 per half day session, was undertaken

in 2019. A scoping exercise was carried out and the remuneration of 10 local NHS Trusts and private providers was considered. It was noted that the fees ranged from £45 to £100 per half day session. Some of those organisations making higher payments had removed the right to claim travel expenses, and the average payment across the board was £70 per half day session. The Trust Remuneration Committee therefore felt that the half-day session fee for AHMs at the Trust should be increased by £15 per session. Currently, the remuneration is £70 per half-day session (which can include up to two hearings) plus standard travel expenses. The AHMs have the benefit of a cancellation policy paying the full sum where a session is cancelled anytime on the working day prior.

22. The Trust's AHMs are expected to attend at least one AHM forum per year, and since 2021-22 the forum is held quarterly. The AHMs are also expected to attend one out of three relevant training sessions each year, and to undergo self-appraisal and mandatory peer appraisal every 3 years. The minimum expectation for patient reviews is 12 per year. An AHM is subject to a 3 yearly re-appointment process. Following independent reviews of the Mental Health Law Administrators and AHMs an action plan was approved by the Trust board in 2021, which introduces changes to the AHM appraisal process, diversity of AHMs, and planning of hearings. These changes are being introduced in 2022-23 in collaboration with the AHMs and Mental Health Law Administrators.
23. The Trust's AHMs are directly responsible to the Trust Board and in their day-to-day role the AHMs are supported by the Trust's Mental Health Law Administrators (the "MHLAs").
24. A request for a review may be made in writing or verbally by a patient to clinical staff or the MHLAs, or by an individual authorised to act on the patient's behalf. A review can also be triggered by the Responsible Clinician when a section has been renewed or a Community Treatment Order has been extended or on receipt of the Responsible Clinician's barring order preventing discharge by the nearest relative [203 onwards].
25. Following receipt of the request, the MHLAs will request various reports (Responsible Clinician's report; Social Circumstances report; Nursing report; and the patient's views). The MHLA will then fix a date and venue for the hearing [204 onwards]. As part of this, it is expected that the MHLA will contact the AHMs by email and ask if they are able to sit on the panel. From those who confirm that they are available, a panel of at least three is chosen by the MHLA before a hearing date is finalised. Attempts will be made to have a mix of male and female panel members where possible. If there are more than 3 AHMs available, then those who sat least recently on the panel will be chosen.
26. The Trust has adopted specific timescales for the holding of the AHM reviews which are: within 5 working days of receipt for a patient detained under section 2; within 15 working days of receipt for all other applicable sections; and prior to expiry of the current detention for renewals of detention [205].
27. Once chosen for the panel, the three AHMs will receive the reports along with the patient's legal representative (if applicable) and the patient [206]. To ensure

sufficient time is available for the patient (and their representative) and the panel to prepare for the hearing, the reports will be requested as follows: due 3 working days from request for a patient detained under section 2; due 10 working days from request for all other applicable sections; and due 2 weeks before expiry of the current section for renewals of detention [206]. Where the reports are not submitted or hearings are not held within the timeframes set out above, an incident will be reported on the Trust's risk management system, Datix [206].

28. On the day of the hearing, the panel assembles at least half an hour before the start and agree between themselves who will act as the chairperson for that hearing. The MHLA will ensure that panel members are reminded of their powers under section 23 of the Act prior to commencement of the hearing [207]. The Trust's policy is that, while recognising the review as a formal Mental Health Act duty, the hearing should be conducted as informally as possible [207]. During the hearing, the Responsible Clinician and other professionals are invited to give their views on whether the continued detention of the patient is justified, the factors on which those views are based, current treatment and care, and the plan for future care. The patient will be provided the opportunity to speak privately with the panel, unless the level of risk suggests that this would be inappropriate [208].
29. While the Responsible Clinician and other professionals will give their views, it is for the AHM panel to decide whether continued detention is needed. After hearing the evidence, the panel will adjourn and dismiss all parties from the room to discuss their decision in private [210]. In all unrestricted cases, AHMs have a discretion to discharge patients even if the criteria for continued detention or CTO are met. A patient will be discharged if the panel makes a unanimous decision to do so [209-210].
30. Once a decision has been reached, the MHLA will confirm this in writing to the patient, the nearest relative (unless the patient withholds their consent) and the relevant professionals. If appropriate, the MHLA will undertake to refer the patient to the Mental Health Tribunal where section 68 of the Act applies [211]. The AHMs may wish to add recommendations or comments to their decision, be that to discharge or not. These recommendations are not legally binding, but they may be useful to the care team in planning the patient's care [210].
31. The Trust Board has a named Non-Executive Director who oversees the AHMs, keeping their management separate from the Executive Director with responsibility for the MHLA. The MHLA provides administration in relation to the Mental Health Act and a Mental Health Law Sub-committee meets quarterly, chaired by the Chief Medical Officer. This sub-committee reports to the Quality Assurance Committee of the Trust board, chaired by a Non-Executive Director (who is also the Lead Non-Executive Director for overseeing the AHMs). The MHLA provides guidance and support to the AHMs to ensure the proper functioning of the Mental Health Act. AHMs can report issues or concerns to the MHLA and Chief Medical Officer, and these will be discussed with the Non-Executive Director, acknowledging that the Executive Director is not in a line manager role to the AHMs.
32. The AHM forum met twice a year until 2021, when there was an agreement to meet quarterly in view of changes to the MHLA, the adjustments for the pandemic (for

example, virtual hearings from July 2020), and the independent reviews of the MHLA and AHMs that were approved by the Trust Board in July 2021. The forum offers an opportunity for AHMs to raise issues, undergo training, and to share feedback from hearings that are of interest to the group. In 2021 a representative AHM was identified to help support the AHMs and this representative meets the Interim Head of Mental Health Law and the Chief Medical Officer on a regular basis. This individual also attends the Mental Health Law Subcommittee.

33. Between April 2021 and February 2022 there were 794 hearings planned, and 114 hearings were subsequently cancelled. In 2021/22, an average of 2% of all hearings resulted in discharge. There are 28 AHMs who take part in reviews and a further 13 were interviewed in January 2022 (the first recruitment for three years) and are waiting to start induction.

Relevant law

34. Section 23 of the Mental Health Act 1983, as amended (in particular, by the Mental Health Act 2007), addresses the discharge of patients and the appointment of AMHs. As pertinent to the present case, section 23(6) of this Act provides that the powers conferred by section 23 on any NHS foundation trust may be exercised by any three or more persons authorised by the board of the trust in that behalf each of whom is neither an executive director of the board nor an employee of the trust. See [100-102].
35. See also the relevant extracts from the Mental Health Act Code of Practice [103-125]. See paragraphs 37.7-37.11, 38.6 and 38.8-38.10 of the Code.
36. The claimant's complaint of detriment arising because of having made a public interest disclosure (the ingredients of which complaint are yet to be established) derives from section 47B of the Employment Rights Act 1996. Protection under section 47B is afforded to a "worker".
37. As relevant to this hearing, section 230(3) provides that a "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.
38. Section 230(6) provides, so far as presently relevant, that this section has effect subject to section 43K and 47B(3); and for the purposes of section 47B, "worker", "worker's contract" and, in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by section 43K.
39. Section 43K(1) provides that for the purposes of Part IVA (protected disclosures) "worker" includes an individual who is not a worker as defined by section 230(3), but who meets other alternative conditions set out in the section. Any reference to

a worker's contract, to employment or to a worker being “employed” shall be construed accordingly. Section 43K(2) identifies the “employer” for these purposes.

40. First, they are an individual who 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 (section 43K(1)(a)).
41. Second, an individual who 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)” (section 43K(1)(b)).
42. Third, an individual who works or worked as a person performing services under a contract entered into by him with a Primary Care Trust under section 83(2), 84, 92, 100, 107, 115(4), 117 or 134 of, or Schedule 12 to, the National Health Service Act 2006 or with a Local Health Board under section 41(2)(b), 42, 50, 57, 64 or 92 of, or Schedule 7 to, the National Health Service (Wales) Act 2006 (section 43K(1)(ba)).
43. Fourth, an individual who works or worked as a person providing services under a contract entered into by him with a Health Board under section 17J or 17Q of the National Health Service (Scotland) Act 1978 (section 43K(1)(bb)).
44. Fifth, an individual who works or worked as a person providing services in accordance with arrangements made (i) by the National Health Service Commissioning Board or Local Health Board under section 71 or 80 of the National Health Service (Wales) Act 2006, or (ii) by a Health Board under section 2C, 17AA, 17C, 25, 26 or 27 of the National Health Service (Scotland) Act 1978 (section 43K(1)(c)).
45. Sixth, an individual who is or was provided with work experience provided pursuant to a course of education or training approved by, or under arrangements with, the Nursing and Midwifery Order 2001 (SI 2002/253) (section 43K(1)(cb)).
46. Finally, an individual who is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than (i) under a contract of employment, or (ii) by an educational establishment on a course run by that establishment (section 43K(1)(d)).
47. So far as the victimisation complaint under sections 27 and 39 of the Equality Act 2010 is concerned, the claimant must be able to bring herself within the broader definition of “employment” afforded by section 83(2)(a) of that Act. “Employment” means employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.
48. The Tribunal had before it and considered the following case law authorities: *Alemi v Mitchell and Anor* [2021] IRLR 262; *Day v Health Education England* [2017]

EWCA Civ 329; *Ghaidon v Mendoza* [2004] UKHL 30; *Gilham v Ministry of Justice* [2019] UKSC 44; *Hashwani v Jivraj* [2011] UKSC 40; *National Union of Professional Foster Carers v Certification Officer* [2021] IRLR 588; *NMC v Somerville* [2022] EWCA Civ 229; *O'Brien v Ministry of Justice* [2013] UKSC 6; *Pimlico Plumbers v Smith* [2018] UKSC 29; *Preston (Formerly Moore) v President of the Methodist Church* [2013] AC 163; *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399; *South Staffordshire and Shropshire NHS Foundation Trust v The Hospital Managers of St George's Hospital* [2016] EWHC 1196 (Admin); *Uber BV v Aslam* [2021] UKSC 5; *W v Essex CC* [1998] 3 All ER 111; and *Wisely v John Fulton (Plumbers) Ltd, Wadey v Surrey CC* [2000] 2 All ER 545.

49. The following narrative draws upon the headnotes in the IRLR and ICR law reports of the relevant cases, and/or upon the commentaries in the *IDS Employment Law Handbooks* and in *Harvey on Employment Law and Industrial Relations*.
50. The authorities establish that the definition of “employee” under the Equality Act 2010 is not, despite the difference in wording, broader, to any significant degree, than that of a limb (b) “worker” under the Employment Rights Act 1996. People who were genuinely in business on their own account and worked for their own clients or customers were excluded from the definition of “employee” in the extended sense for the purposes of the 2010 Act, just as they were from the definition of limb (b) “worker” for the purposes of the 1996 Act. See *Alemi*.
51. *Uber* sets out the up-to-date approach to the determination of employment status. The written agreements in that case did not provide the appropriate starting point in applying the statutory definition of a “worker”. *Autoclenz* made it clear that whether a contract is a “worker’s contract” within the meaning of the legislation designed to protect employees and other “workers” is not to be determined by applying ordinary principles of contract law. The task for the tribunals and the courts was to determine whether the claimants fell within the definition of a “worker” in the relevant statutory provisions to qualify for the rights irrespective of what had been contractually agreed.
52. In short, in *Uber*, the primary question was one of statutory interpretation (that is, of the employment statute in question), not contractual interpretation. The modern approach to statutory interpretation was to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gave effect to that purpose. The general purpose of the employment legislation was to protect vulnerable workers from being paid too little for the work they did, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing). Accordingly, it would have been inconsistent with that purpose to treat the terms of a written contract as the starting point in determining whether an individual fell within the definition of a “worker”. To do so would have reinstated the mischief which the legislation was enacted to prevent. It was the very fact that an employer was often able to dictate such contract terms and that the individual performing the work had little or no ability to influence those terms that gave rise to the need for statutory protection in the first place. The efficacy of such protection would have been seriously undermined if the putative employer could by the way in which the relationship was characterised in the written contract determine, even *prima facie*, whether the other

party was to be classified as a worker or not. Such an approach was further justified by the fact that all the relevant statutes or statutory regulations conferring rights on workers contained prohibitions against contracting out. Those provisions applied to any provision in an agreement which could be seen, on an objective consideration of the facts, to have as its object excluding or limiting the operation of the legislation.

53. In *Autoclenz* it was said that the true agreement would often have to be gleaned from all the circumstances of the case, of which the written agreement was only a part. That did not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence might show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there was no legal presumption that a contractual document contained the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represented the parties' true agreement just because an individual signed it. Furthermore, any terms which purported to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract were of no effect and had to be disregarded.
54. In *Bates van Winkelhof* it was said that, in determining whether an individual was a "worker", there could be no substitute for applying the words of the statute to the facts of the individual case. At the same time, in applying the statutory language, it was necessary both to view the facts realistically and to keep in mind the purpose of the legislation. The vulnerabilities of workers which created the need for statutory protection were subordination to and dependence upon another person in relation to the work done. A touchstone of such subordination and dependence was the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who was employed under a "worker's contract".
55. Some degree of mutual obligation is necessary for any contractual relationship, but a long-running question in employment law has been whether, in keeping with contracts of employment, a worker's contract under the Employment Rights Act 1996 requires an "irreducible minimum of obligation": namely, an obligation on a putative worker to accept and perform some minimum amount of work for the putative employer, which in turn is obliged to offer some work and/or pay for the same.
56. This question was considered by the Court of Appeal in *Pimlico Plumbers Ltd v Smith* [2017] ICR 657 CA — an appeal from an employment tribunal's finding that a self-employed plumber was both a limb (b) worker under the Employment Rights Act 1996 and an employee in the extended sense under section 83(2)(a) Equality Act 2010. Two separate circumstances were distinguished in which the issue of whether a putative employee/worker is engaged on a casual basis might arise. The first is where the substantive claim directly depends on their enjoying employee/worker status in respect of his or her periods of work (for example, because the claim concerns their pay or some discriminatory treatment in the

workplace). In such cases, the question whether the engagement is casual is relevant, but only on the basis that it may shed light on the nature of the relationship while the work in question is being done.

57. But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly provided that there was no legal obligation either way in between the periods of work.
58. The second situation is where the claim directly depends on the claimant's status during periods of non-work, either because he or she has to establish continuity of employment or because the claim itself relates to treatment during that period. In such a case, mutuality of legal obligations is essential.
59. Like the Court of Appeal, the Supreme Court upheld the tribunal's finding that the plumber was a limb (b) worker and an employee in the extended sense — *Pimlico Plumbers Ltd v Smith* [2018] ICR 1511 SC. However, given its conclusion that the tribunal had been entitled to find that there was an umbrella contract between the parties (that is, that there was mutuality of obligation between assignments), the Supreme Court did not need to determine the relevance to limb (b) status of a finding that contractual obligations subsisted only during assignments.
60. The claimant in the present case places reliance on the Court of Appeal's recent revisiting of this question in *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229 CA. This concerned the employment status of a fee-paid panel member on the NMC's Fitness to Practise Committee. He was originally appointed in 2012 for a four-year term and then re-appointed in 2016. His work was governed by a services agreement, which stated that he had the status of an independent contractor and that nothing in the agreement created a relationship of employer and employee. The NMC was not obliged to offer him a minimum number of sitting dates and he was free to withdraw from dates he had accepted. An employment tribunal found that he was not an "employee", since there was no irreducible minimum of obligation, but that he was a "worker", because there was a series of individual contracts that arose each time that he agreed to sit on a hearing and also an overarching contract in relation to his provision of his services. The EAT upheld the tribunal's decision on appeal.
61. At the Court of Appeal, the NMC argued that there must be an irreducible minimum of obligation – that is, an obligation on the part of the putative worker to perform a minimum amount of work – in order for there to be a worker's contract. The Court rejected this argument and upheld the tribunal's decision. It observed that the services agreement which governed his appointment stopped short of requiring him to do or personally perform any work or services. However, each time the NMC offered a hearing date, and he accepted it, an individual contract arose whereby he agreed to attend the hearing and the NMC agreed to pay a fee. The tribunal had found that under each individual contract, he had agreed to provide his services personally, and that the NMC was not the client or customer of a profession or

business carried on by him. These findings were sufficient to entitle the tribunal to conclude that he was a worker.

62. In the Court's view, there was no need to introduce, and no purpose served in introducing, the concept of an "irreducible minimum of obligation" in the way defined by the NMC. The fact that he could withdraw from the agreement to attend a hearing even after he had accepted did not alter matters. The statutory definition of "worker" did not indicate that there must be some distinct, superadded obligation to provide services independent from the provision of the services on a particular occasion. Furthermore, the fact that the parties are not obliged to offer, or accept, any future work is irrelevant. The Court also considered that this conclusion was consistent with the Supreme Court's decision in *Uber* (above).
63. Alternatively, the claimant also relies upon *Gilham v Ministry of Justice* [2019] ICR 1655 SC. The Supreme Court held that a District Judge was able to bring a whistleblowing claim under section 47B of the Employment Rights Act, despite not meeting the literal definition of "worker" in section 230(3) of the Act because she did not work under a contract. It considered that section 230(3) had to be interpreted purposively to avoid a breach of Article 14 of the European Convention on Human Rights, which prohibits discrimination on several grounds – including "other status" – provided that the facts "fall within the ambit" of one of the Convention rights, and subject to a "reasonable justification" defence.
64. In the Court's view, Article 14 was clearly breached. The facts fell squarely within the ambit of the right to freedom of expression under Article 10. The judge had been treated less favourably than others in an analogous situation. An occupation classification was obviously capable of being a "status" for the purposes of Article 14. No legitimate aim had been put forward for excluding judges from whistleblowing protection.
65. The Court went on to hold that the appropriate remedy was for section 230(3) to be interpreted purposively to include judicial office-holders, relying on the Court's obligation under section 3 of the Human Rights Act 1998. The Court noted that it had already established in *O'Brien v Ministry of Justice* [2013] ICR 499 SC that it was possible to interpret the identical definition of "worker" in the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 to include judicial office-holders when required to do so by EU law. It considered that a similar interpretation exercise was appropriate in this case.
66. There are, of course, exceptional cases. *Hashwani* establishes that when determining whether a person was employed for the purposes of provisions such as those now contained in the Equality Act 2010, the essential questions were whether the person concerned performed services for and under the direction of another person in return for which she received remuneration or whether she was an independent provider of services who was not in a relationship of subordination with the person who received the services. Those were broad questions which depended upon the circumstances of the case and upon a detailed consideration of the relationship between the parties. Dominant purpose could not be the sole test, although it might well be relevant in arriving at the correct conclusion on the facts of a particular case.

67. Applying that approach to a contract between the parties to an arbitration and the arbitrator, it was plain that the arbitrator's role was not one of employment under a contract personally to do work. Although an arbitrator might be providing services and he received fees for his work, and although he rendered personal services which he could not delegate, he did not perform those services or earn his fees for and under the direction of the parties. He was in the category of an independent provider of services who was not in a relationship of subordination with the parties who received his services. He was, in effect, a quasi-judicial adjudicator. In so far as dominant purpose was relevant, the dominant purpose of appointing an arbitrator or arbitrators was the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.
68. So far as section 43K of the 1996 Act is concerned, the commentary in *Harvey on Industrial Relations and Employment Law* notes that as it is clearly Parliament's intent in this section to extend the protection of the whistleblowing provisions, a court or tribunal in interpreting and applying it should, in a case of ambiguity, seek a solution applying that extension rather than limiting it: *Hinds v Keppel Seghers UK Ltd* [2014] IRLR 754 EAT. However, where a doctor in training came neither within the general definition of "worker" in section 230 nor within any of the specific categories in section 43K(1), it was held that this was a deliberate choice by Parliament and that the section could not be stretched by a purposive interpretation in the light of article 10 of the European Convention on Human Rights: *Day v Lewisham & Greenwich NHS Trust* [2016] IRLR 415, EAT.
69. Section 43K(1) is designed to apply to an individual who is not a worker in relation to the person sought to be established as the employer under this section. The worker's claim is not defeated by the existence of an employment relationship with someone else: *McTigne v University Hospital Bristol NHS Foundation Trust* [2016] IRLR 742 EAT. This point arose again in *Day v Health Education England* [2017] IRLR 623 CA where it was held that this passage should be read as "who as against a given respondent is not a worker as defined in section 230(3)".
70. In the context of section 43K(1)(a)(i), this deliberately extended definition is to be interpreted widely and purposively. It can apply to a person introduced or supplied by an agency, even where that person is himself operating through his own service company and there is no direct contractual nexus: *Croke v Hydro Aluminium Worcester Ltd* [2007] ICR 1303 EAT. The reference to "terms" in section 43K(1)(a)(ii) means contractual terms. This provision cannot be used to extend the legislation to cases where there is no contract: *Sharp v Bishop of Worcester* [2015] IRLR 663 CA. However, once there is such a contract, it may be necessary to take a broad view, not restricted to contractual terms: *Day v Health Education England* [2017] IRLR 623 CA.
71. Where an agency worker is employed by the agency, he or she can still come within this section in relation to the end user if that end user sets at least some of the terms of engagement. It is not a question of which of the agency and end user

sets most: *McTigne v University Hospital Bristol NHS Foundation Trust* [2016] IRLR 742 EAT, applied in *Day v Health Education England* [2017] IRLR 623 (both hospital and training body could substantially determine terms for a doctor in training).

Claimant's submissions

72. The claimant presented written submissions, which she supplemented orally. She submitted that she is a worker for the purposes of her claim to the Employment Tribunal, and that she was therefore entitled to the protections enjoyed by workers, as set out in her ET1 claim. She accepted that as an Associate Hospital Manager (AHM), she is not an employee of the respondent trust.
73. The claimant referred the Tribunal to the terms of her "employment" as a AHM as set out in her "contract" with the Trust [329-333]. She asserted that all AHMs must enter this contract to act as AHMs for the Trust and that the terms of this trust's contract with its AHMs is specific to this trust. There is no set letter of appointment which covers the appointment of AHMs nationwide. Each trust and private hospital group "employs" its AHMs by similar contracts, but each with differing terms and conditions.
74. The claimant submitted that her "contract" with the respondent sets out specifically: her remuneration fee for each hearing; the mandatory training that she must attend; her duties and responsibilities; her duty of confidentiality; her duty to be bound to comply with the trust policies and procedures; her duty to follow standards of conduct; and that acts of misconduct of AHMs will be investigated by the trust and lead to action under the trust's disciplinary procedure. She is referred to throughout her contract as "an employee" and "an honorary member of the trust".
75. The claimant referred the Tribunal to the Job Description, which accompanied the post application and contract [126-129]. She contended that this also specifies mandatory terms for all AHMs in this trust. These mandatory terms are specific to this trust. As a AHM for this trust, she highlights, she is required to attend mandatory training throughout each year of her "employment"; to undertake a minimum of 12 hearings per year; to attend a minimum of AHM forum meetings per year; to read the twice-yearly update newsletter; to attend 3 training sessions prior to commencing the role; and to carry out 3 observations of hearings prior to commencing the role.
76. She continued that as an AHM for this trust, it is mandatory for her to undergo and pass one appraisal by an appraiser of the trust in the first year of her "employment". Thereafter, she must undergo and pass one appraisal every 3 years. Those AHMs who do not "pass" the appraisal do not have their contracts renewed. Those AHMs who do not carry out the minimum of 12 hearings per year have their contracts terminated. A record is maintained by the trust of the number of hearings attended by each AHM and the number of hearings chaired by each AHM. This is shared periodically with the Associate Manager Group at forum committee meetings.

77. The claimant further explained that as an AHM, she is not required to obtain public liability insurance. This trust indemnifies the AHMs in the execution of their functions. This is not the case in self-employed roles. Moreover, AHMs are not permitted to travel to and from trust venues unless and until proof of car insurance details covering such business is provided to the trust. The Car Insurance Details Form [335-336] specifically refers to the use of “private vehicles for use on official journeys during the course of ... employment with the trust” and that the “vehicle will be maintained at all times in a roadworthy condition.... while being used on official business”. This requirement of AHMs is specific to this trust.
78. She explained further that remuneration for attending hearings, forum committee meetings and training is set at a specific rate by this trust. This rate is specific to this trust, with other trusts and hospitals setting different and separate rates of remuneration. Periodically, there are increases in the rate of pay agreed by the trust. Additionally, specific to this trust, there is a verbal agreement between the trust and the AHMs that cancellation of a hearing within 24 hours will result in payment in full. This is a condition which is specific to this trust and varies from trust to trust. AHMs are paid by this trust via PAYE, with tax and NI deducted at source. All AHMs were provided with a £50 voucher in 2021 in recognition of all the trust’s employees’ efforts throughout Covid pandemic.
79. Further points advanced by the claimant included that all AHMs were informed in writing in January 2022 that they are required to “be vaccinated against Covid 19 to continue your role with the trust”. The Job Description annexed to the application form for the role of AHM specifically states that AHMs are “members of a sub-committee” of the trust.
80. As part of the mandatory appraisal, this trust sets out competency framework standards, which the AHM must meet. This is specific to this trust. There is no requirement in law that states that such terms must be met to carry out the role of AHM. This is specific to this trust, who have chosen to make appraisals mandatory for their AHMs. Prior to taking on the role of AHM, this trust insists on mandatory introductory training, which must be completed prior to the role of AHM being commenced. Other trusts and hospitals do not have this requirement. If similar training has been provided to a AHM elsewhere, the respondent trust will continue to insist that its own mandatory training must be completed. The mandatory training is of a style and choice specific to this trust. Prior to commencing the role of AHM, three observations of hearings must be undertaken by the AHM. This is a requirement specific to this respondent trust. Other trusts make their own arrangements for training, etc.
81. The claimant argued that the Associate Managers Group meets 2-4 times per year and that attendance is mandatory. As an AHM, she must perform the work/services personally for the trust. She cannot make her own arrangements to send a replacement person to carry out her role. If she is unavailable for a hearing that she is arranged to attend, she must contact the mental health law administrators to arrange a replacement AHM to attend in her place.
82. As an AHM, she must agree to the trust’s particular terms and conditions, set out in the contract, the job description and verbally, to be appointed and to continue in the

role of AHM. There is a verbal “agreement” that AHMs must chair one in three hearings and that any less is unsatisfactory. On attendance at each face-to-face hearing (prior to the commencement of virtual hearings, required during the pandemic) each AHM would sign a contract with the trust for attendance and payment for that hearing. This included the AHM’s name, address, hearing specifics such as venue, and date. This formed the basis for payment for services provided on that date.

83. The claimant submitted that because of the terms and conditions which the AHMs must accept – including mandatory appraisals, mandatory training, mandatory minimum of attending 12 hearings per year – the AHMs are under the supervision and control of the trust. As an AHM, she is a “limb (b)” worker. She works under a contract whereby she undertakes to do or personally perform 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 that she is undertaking.
84. Her contention is that her work as a AHM is performed pursuant to a contract with the respondent trust, the recipient of that work or services. It is not performed pursuant to some different legal arrangement. While the role of AHM is a requirement of statute, the terms on which she carries out this role for the respondent trust is set out in their contract with her. None of the terms of her service are dictated by statute – but by the employing trust. It is clear from the manner of engagement, the terms and conditions of the specific job description, contract and mandatory requirements set out by this trust that the essential components of the relationship are not derived from statute. It is easy to recognise the trust as her “employer”, it is argued. Every trust and private hospital employing AHMs has its own arrangements and terms of employment for those AHMs, and these differ considerably from hospital to hospital.
85. The claimant submitted that the trust intended to enter a contractual relationship with its AHMs, defined to a great extent by the terms of the contract, job description, and policies and procedures referred to therein. The trust did not envisage some other legal relationship, defined solely by the terms of statute. The source of the terms of engagement of the respondent trust’s AHMs is the contract and not statute. The manner of appointment of the AHMs is at the discretion of the trust. It is not laid down by statute. It is an individual matter for each trust and hospital group. No criteria are laid down by statute to be applied to the process of appointment and “employment”. Following appointment, a contract is provided from the respondent trust to the AHM, which must be signed before commencement of the role. The essential components of the relationship between the AHM and the trust are not derived from statute but from the specific contract entered when accepting the role. The removal of an AHM from the role is a matter for the trust, not a matter set out in statute.
86. The claimant’s submission is that her case is on all fours with the case of *Nursing and Midwifery Council v Somerville* (2022) EWCA Civ 229. The salient points of *Somerville* are said to be as follows.
87. Mr Somerville was one of a pool of appointed persons maintained by the regulator of nurses and midwives to sit as lay panel members of Fitness to Practice

Committees (FTPC). The NMC's functions are governed by the Nursing and Midwifery Order 2001. The Council has a statutory duty to maintain standards of conduct and performance for nurses and midwives. The process of appointment to the FTPC is overseen by an appointments board. The Nursing and Midwifery Order 2001 sets out at Schedule 1, Part 1, paragraph 15(3) that: "The Council may not employ any member of the Council or its committees, or sub-committees".

88. Mr Sommerville's appointment was subject to written terms of agreement. As in the case of AHMs, he agreed to sit on panel hearings on days, as he so chose. He was free to refuse to accept hearings. He provided his services personally and fell within the definition of "worker" when carrying out his role. Each time he accepted an offer to sit on a hearing, for which the NMC agreed to pay him a fee, a contract existed. There were legal obligations on each side sufficient to create the necessary contractual status.
89. The claimant submitted that the Court of Appeal in *Sommerville* agreed that there was a contract between the parties at all material times and it related to the provision of Mr Sommerville's services as a panel member. As in the case of AHMs, each time the Council offered a hearing date, and Mr Sommerville accepted it, he agreed to attend that hearing and the Council agreed to pay him a fee. This is sufficient to conclude that he was a worker in that he entered (and had worked under) a contract whereby he undertook to perform services personally for the Council and the Council was not a client of his business or professional undertaking. The fact that he could withdraw from the agreement to attend a hearing after he had accepted it did not alter matters. The contract existed until terminated. If it was not terminated, and he attended a hearing, he would have worked under a contract personally to perform services.
90. The claimant then turned to the possibility that this Tribunal might not find that the claimant is a worker, but that she is nevertheless an "office-holder". She asked that consideration be given to the case of *Gilham v Ministry of Justice* (2019) UKSC 44. The claimant's contention is that if she is excluded from whistle-blowing protection on the grounds of not having achieved worker status, she is in the same position as District Judge Gilham. She would face a violation of her rights to freedom of expression under Article 10 of the European Convention on Human Rights. The failure to protect her as a whistle-blower would also be in breach of Article 14 of the ECHR, which states that the rights enjoyed under ECHR, such as freedom of expression, should be protected without discrimination.
91. In reliance upon the judgment in *Gilham v MOJ* the claimant refers to the following salient points. If this Tribunal does not accept that her role satisfies the definition of "worker", she would be entitled to protection on the same grounds as District Judge Gilham. The judgment raised four questions: (1) do the facts fall within the ambit of the Convention rights; (2) has the applicant been treated less favourably than others in an analogous situation; (3) is the reason for that less favourable treatment one of the listed grounds or some "other status"; and (iv) is that difference without reasonable justification – is it a proportionate means of achieving a legitimate aim?
92. The claimant argues that the answer to question (1) is Yes. The facts of her case fall within the ambit of the right to freedom of expression protected by Article 10.

The answer to question (2) is also Yes. If she is denied protection, she is denied the protection which is available to other employees and workers who make responsible public interest disclosures within the 1996 Act. She would be denied the protection from detriment and of bringing proceedings before the Employment Tribunal. She is denied the right to seek compensation for injury to feelings and to injury her health. This is undoubtedly less favourable treatment than “limb (b)” workers and employees who make the same disclosures. She would be treated less favourably than others in relation to the exercise or enjoyment of the Convention right to freedom of expression.

93. The claimant further contended that the answer to (3) is Yes. An occupational classification is capable of being a status within Article 14. If she is not classed as a “worker” by the Tribunal, it is as a direct result of her being defined as a non-contractual office-holder, which removes her from the protection enjoyed by employees and limb (b) workers. The answer to (4) is also Yes. Denying AHMs this protection is like denying judges such protection. Exclusion of both is not a proportionate means of achieving a legitimate aim. Lady Hale ruled that the point of whistle-blowing protection is to give people confidence to raise concerns going on in any organisation, including law courts. She went on to say that the protection should also extend to all office-holders, not just judges. The Supreme Court could have specifically restricted the application of this judgment to District Judges, but it did not. The claimant argues that, if she is to be refused protection on the grounds of not meeting the definition of worker, her ECHR rights have been breached in relation to her “other status”.

94. Finally, the claimant submits that it would be perverse and dangerous to deny AHMs whistleblowing protection. As an AHM, she sees first-hand vulnerable patients and service users. She witnesses first-hand their accommodation, appearance, and treatment. She witnesses first-hand what their views are, and how they present, and she is in an excellent position to alert the appropriate bodies to concerns and wrongdoing. While her function as an AHM may be to consider whether the criteria for detention are met, her role allows her to be a significant safeguard for patients who may not have the capacity to raise concerns themselves. This aspect of the role should be encouraged as an invaluable resource in the protection of vulnerable people and in the public interest.

Respondent’s submissions

95. For the respondent, Dr Morgan QC also presented written submissions, which he supplemented orally. Counsel began by drawing the Tribunal’s attention to judicial guidance upon the relevant statutory provisions.

96. So far as the Employment Rights Act 1996 section 230(3) is concerned, the most recent guidance is in *Pimlico Plumbers v Smith* [2018] UKSC 29 and *Uber BV v Aslam* [2021] UKSC. In the formulation of both decisions, the courts draw upon familiar authorities such as *Autoclenz Ltd v Belcher* [2012] UKSC 4 and *Carmichael v National Power Ltd* [2000] IRLR 43. In doing so, they attest to the need to identify a contractual relationship between the parties and only thereafter consider to what extent the relationship is consistent with worker status. It follows that if and to the extent that the Tribunal is satisfied that the relationship in question is not in the

nature of a contract and/or is not other than by means of a profession (that is, the statutory carve out), the inquiry as to worker status can proceed no further.

97. In respect of section 43K, counsel submitted that the statutory extension is also predicated upon the basis that there is a contractual relationship between the putative worker and the respondent. It follows (it is said) that the determination of this question requires the Tribunal to focus not upon the work that is being undertaken, but rather the terms pursuant to which such work is being provided. The statutory provision does not admit of any alternative interpretation (it is argued). Section 43K does not have its origins in EU Law. However, counsel contends that upon a proper reading of the provision, it imports and is dependent upon common law principles of contractual formation and obligation. There is nothing within the section to suggest that conventional contractual interpretation is to be discarded.

98. Counsel referred the Tribunal to the passage of Lord Hope's in *Wisely v John Fulton (Plumbers) Ltd, Wadey v Surrey County Council* [2000] 2 All ER 545 (at 548):

"As a general rule Parliament must be taken to have legislated against the background of the general principles of the common law. It may be found on an examination of the statute that Parliament has decided not to follow the common law. In that situation the common law must give way to the provisions of the statute. But an accurate appreciation of the relevant common law principles is nevertheless a necessary part of the exercise of construing the statute."

99. Consequently, it is submitted, the exercise of statutory interpretation must seek to give effect to the relevant common law principles and be consistent with them. A corollary to this, is the requirement that the existing law is a legitimate and necessary component to interpreting the provision in question. In short, the importation of common law concept renders the statute dependent upon common law principle for its legitimate application.

100. Counsel assumed that the Tribunal would be familiar with the decision of the Court of Appeal in *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399 in which it was affirmed that there must be a contractual relationship of some kind as between the putative worker and the putative respondent.

101. In *Day v Health Education England* [2017] EWCA Civ 329 Elias LJ observed (at 11):

"I would make two preliminary observations about these definitions. The first is that if the terms on which the individual is engaged are substantially determined by the individual himself, he cannot bring himself within this extended definition of "worker". That is so even if the end-user and/or introducer can also be said substantially to determine the terms of engagement. The second is that if the terms of engagement are not substantially determined by the individual, his employer is the person who does substantially determine them."

102. It was for this reason that Elias LJ continued (at 29):

“However, even if it be the case that some of the terms of engagement must be contractual (on the assumption that the relationship needs to be contractual) I do not accept that it follows that a tribunal should limit itself to focusing solely on the contractual terms, although no doubt the terms will be overwhelmingly contractual. The section requires the tribunal to focus on what happens in practice and I do not think that Parliament will have envisaged fine arguments on whether a term is contractual or not before it can be taken into account. In my judgment when determining who substantially determines the terms of engagement, a tribunal should make the assessment on a relatively broad brush basis having regard to all the factors bearing upon the terms on which the worker was engaged to do the work.”

103. In formulating this analysis, the Court of Appeal drew upon the judgment in *McTigue v University Hospital Bristol NHS Foundation Trust* (Simler J as she then was). She observed (at 33-34):

“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 ... 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.”

104. Simler J continued (at 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...”

105. At the preliminary hearing before Employment Judge Shotter, reference was made to the Supreme Court decision in *Gilham v Ministry of Justice* [2019] UKSC 44. Counsel submitted that the claimant (a district judge) in that case did not contend that she enjoyed employment status for the purpose of section 230(1) or 230(3)(a) ERA. However, she did assert that she was to be considered a worker for the purposes of section 230(3)(b) ERA. Significantly, Lady Hale SCJ acknowledged that a claimant may have different status depending upon whether the cause of action relied upon derived from domestic or European law (at 9). For the first time in the Court of Appeal it was argued that the claim engaged Art 14 ECHR. Before the Supreme Court reliance was also placed upon the notion of “crown employment”: (section 191 ERA). The need for the existence of a contract has been recently affirmed by the Court of Appeal in *NMC v Somerville* [2022] EWCA Civ 229.

106. In respect of the Equality Act section 83, counsel acknowledged that on account of its provenance in an EU Directive, the Equality Act provisions must be subjected to a purposive interpretation. However, as noted by Lord Clarke in *Allonby v Accrington and Rossendale College* [2004] IRLR 224 (at 67 and 68):

“For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration see, in relation to free movement of workers, in particular *Lawrie-Blum* ... para 17, and *Martinez Sala*, para 32. ... It is clear from that definition that the authors of the Treaty did not intend that the term “worker”, within the meaning of article 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, [*Meeusen v Hoofddirectie van de Informatie Beheer Groep* (C-337/97 [1999] ECR I-3289, 3311, para 15]).”

107. Counsel acknowledged that the Tribunal would be aware that there have been multiple decisions (not always synoptic) on the reach of the definition of employment in the context of discrimination law. However, he contended, it now appears to be recognised that section 83 goes no further than requiring the elements to be found in section 230(3)(b) (“the limb (b)” test).

108. Counsel cited *O'Brien v Ministry of Justice* [2013] UKSC 6 [2013] IRLR 315 in which the Supreme Court was concerned with the concept of “worker” in the context of part-time statutory office-holders. The Court again focused (at 38 and 42) upon the terms and conditions of appointment:

“The Court does not accept that the terms and conditions laid down by the Lord Chancellor for recorders do not give a true picture of the reality of the work...The reality is that recorders are expected to observe the terms and conditions of their appointment and they be disciplined if they fail to do so.... For these reasons the court holds recorders are in an employment relationship within the meaning of clause 2.1 of the Framework Agreement on part time work and that, as the result to be achieved by the PTWD is binding on the United Kingdom, they must be treated as workers for the purposes of the 2000 Regulations...”

109. However, counsel contends that *O'Brien* cannot be taken as affirmation that all office holders will be so classified. In *Hashwani v Jivraj* [2011] UKSC 40 [2012] 1 All ER 629, the Court was concerned with the provision for appointment of an arbitrator. The Claimant contended that the eligibility criteria provided for by the parties (that is, membership of the Ismaili Community) was discriminatory and contrary to the Religion and Belief Regulations 2003. Of particular concern to the Supreme Court was the absence of direction or control of the appointee. In delivering judgment, Lord Clarke SCJ observed (at 27):

“On the basis of those materials I would accept Mr Rhodri Davies QC’s submission that the Court of Justice draws a clear distinction between those who are, in substance, employed and those who are ‘independent providers of services which are not in a relationship of subordination with the person who receives the services’. I see no reason why the same distinction should not be drawn for the purposes of the 2003 Regulations...”

110. He continued (at 34):

“As I read *Percy’s* case, it sought to apply the principles identified by the Court of Justice, as indeed did this court in *O'Brien v Ministry of Justice*. The essential questions in each case are therefore identified in paras 67 and 68 of *Allonby’s* case ...namely whether, on the one hand the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration, or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. These are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties....”

111. More recently, in *Alemi v Mitchell and Anor* [2021] IRLR 262 the EAT was required to engage with the status of a locum doctor. The doctor in question was implicated in allegations of harassment by an employee of the practice at which he performed clinical duties. The issue concerned whether the locum practitioner was to be considered an employee of the GP practice for the purposes of the Equality Act. Having considered the categories of those enjoying legal protection, HHJ Tayler observed (at 23 and 25):

“The authorities establish that the definition of ‘employee’ under the Equality Act 2010 is not, despite the difference in wording, broader to any significant degree, than of a limb (b) worker.... People who are genuinely in business on their own account and work for their own clients or customers are excluded from the definition of employee in the extended sense for the purposes of the Equality Act 2010, just as they are from the definition of limb (b) worker for the purposes of the Employment Rights Act 1996...”

112. Turning then to his central submissions on behalf of the respondent, counsel submitted that the starting point is the recognition of the AHM discharging a function pursuant to statute. Moreover, it is task specific and narrowly confined. It is not anticipated that the responsibilities of the AHM will be the subject of dispute before the Tribunal. Given this position, the Tribunal will be familiar the judicial assessment detailed in *National Union of Professional Foster Carers v Certification Officer* [2021] IRLR 588 (albeit formulated in the context of trade union recognition) and the decision of the Court of Appeal in *W v Essex CC* [1998] 3 All ER 111 upon which it is based.
113. In keeping with the detailed consideration advocated by Lord Clarke SCJ in *Hashwani*, certain matters specific to this case must necessarily inform the Tribunal’s determination of the status question. When properly accommodated, these matters militate against the finding of worker status arising from appointment of AHM. The factors comprise the following.
114. The Statutory Prohibition: section 23(6) of the Mental Health Act prohibits the appointment of any officer or employee of the relevant trust to the position of AHM. Parliament may be taken to have considered with considerable care the demands of impartiality and independence required of the AHM. The respondent relies upon the following points.
115. Parliament has resolved to achieve and safeguard this independence by means of a prohibition. A proper reading of the statutory provision can admit of no other conclusion. This is entirely consistent with the obligation of the Tribunal to interpret the text of the enactment and arrive at its proper legal meaning; thereby giving effect to the legislative intention: Bennion paras 10.8 and 10.9. The overarching duty of the Court or Tribunal is to give effect to that intention; drawing upon matters of legislative and social context for this purpose: Bennion para 11.2 and *R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Home Ltd* [2001] 2 AC 349 at 396.
116. It is also incumbent upon the Court or Tribunal to have regard to the consequences of the given interpretation. This is not a case of contracting out by the parties to the relationship, but rather, a statutory prohibition on contracting in. This is hardly surprising: the mischief to which the statutory provision is directed is the prohibition of patient detention review by those who are under control of the Trust in question. Expressed from a convention rights perspective, it is aimed at combatting the potential for determinations which are lacking in impartiality and independence. Without this provision, the State would inter alia be failing in its convention obligations under Art 5 ECHR. As to the influence of the mischief rule, see: Bennion paras 12.1 et seq and (given the context) *Ghaidon v Mendoza* [2004]

UKHL 30. Further, to classify the relationship in disregard of these realities would be illegal and contrary to public policy and prohibited and enforceable by statute: Chitty paras 18-189 and *Ashmore, Benson, Pease & Co Ltd v A V Dawson Ltd* [1973] WLR 826; *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267.

117. The Absence of Terms: It is not (and cannot be) suggested that the AHM is subject to terms and condition imposed by the Trust. Nor is there a relationship of subordination. Indeed, the law recognises that the AHM is a participant upon a deliberate body which is separate and independent from Hospital or Trust from which patient case reviews may emanate: (1) *South Staffordshire and Shropshire NHS Foundation Trust* (2) *Dr Whitworth v The Hospital Managers of St George's Hospital* [2016] EWHC 1196 (Admin). To conclude otherwise would undermine the purpose of the Tribunal of which the AHM is member and its ability to serve the needs of patients in accordance with Art 5 ECHR.
118. Intention of the Parties: There is not and cannot be any suggestion that there was an intention to create legal relations between the parties to this case. Further, there was not – and given the statutory prohibition could not be – any intention to enter a contract which placed the claimant under the control of the respondent, or at all. The respondent relies upon the following points.
119. There is no definitive list of the cases or circumstances in which the issue of intention to create legal relations may be raised: Chitty para 4-254. The absence of any intention to create legal relations: Chitty para 4-206; *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274. The requirement that the issue of intention must be objectively assessed: Chitty para 4-201; *Baird* (supra). Properly viewed, the documentation issued between the parties attests to the fact that there was (whether expressly or impliedly) a negation of any such intention: Chitty para 4-214 and *Rose & Frank Co v JR Crompton & Bros Ltd* [1925] AC 445.
120. The Nature of the Function: As noted in *Gilham* an officer-holder does not necessary hold office pursuant to a contract: see *McMillan v Guest* [1942] AC 561 and *Percy v National Mission of the Church of Scotland* [2005] UKHL 75 [2006] 2 AC 28. But whether, a contract may be considered to exist is itself dependent upon the intention of the parties: *Preston (formerly Moore) v President of the Methodist Conference* [2013] 2 AC 163. This is of particular significance where, as here, the core elements of the relationship are derived from statute [see Lady Hale SCJ in *Gilham* at 18]. It was on account of this analysis that *Gilham* could not be classified as a worker and was dependent upon breach of her convention rights under Art 10 and 14 ECHR.
121. Counsel concluded his submissions by contending that, in these circumstances, while accepting that the matter is for determination by the Employment Tribunal, it is submitted that C is unable to bring herself within the statutory definition to advance either the detriment or victimisation claims.

Discussion

122. The Tribunal has been well served by the quality of the legal submissions made by both parties and which accordingly have been set out fully above. Although the

preliminary hearing was a relatively short one, the issue was comparatively novel and sufficiently taxing to warrant judgment being reserved. Nevertheless, because of what is set out in some detail above, it should be possible to set out the Tribunal's reasoning and conclusion with appropriate economy.

123. Section 23 of the Mental Health Act 1983, as amended (in particular, by the Mental Health Act 2007), addresses the discharge of patients and the appointment of AMHs. Section 23(6) of this Act provides that the powers conferred by section 23 on any NHS foundation trust may be exercised by any three or more persons authorised by the board of the trust in that behalf *each of whom is neither an executive director of the board nor an employee of the trust*. See also the relevant extracts from the Mental Health Act Code of Practice.

124. In the Tribunal's analysis, this means that the respondent trust could not appoint as an AHM an individual who was already an executor director of its board or an existing "employee" of the trust. It must also mean that once appointed, an AHM does not thereby become an executive director of the board or an "employee" of the trust. It is not possible to be simultaneously an AHM and an "employee" of the trust.

125. However, in the Tribunal's assessment, this does not mean that an AHM is inevitably without employment rights or employment protection. First, there is no definition of "employee" for the purpose of section 23(6). It might be assumed that Parliament intended to apply the narrower definition of an "employee" contained within the existing Employment Rights Act 1996 (a limb (a) employee) if it directed its mind to the question at all. There is no express provision in the Mental Health Act, as amended, that points to an intention to exclude the possibility that an AHM could be found to be a "worker" or someone who falls within the broader definition of "employee" contained within the Equality Act 2010. Second, there is no indication one way or the other that Parliament intended that an AHM should enjoy no employment rights or employment protection at all. Accordingly, the Tribunal does not consider that section 23(6) of the Mental Health Act is dispositive of the claimant's claim before the Employment Tribunal.

126. The claimant does not seek to establish that she is a limb (a) employee under section 230 of the 1996 Act or an employee in the narrower sense under section 83 of the 2010. She is right to take that position, not only in the face of section 23(6) of the Mental Health Act, but also because she faces evidential and legal difficulties in establishing that she is an "employee" of the trust in the narrow sense. Instead, she seeks to establish that she is "employed" under a contract personally to do work (as the Equality Act puts it) or 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 (as the Employment Rights Act puts it).

127. The starting point is whether the claimant has established a contractual relationship with the respondent trust at common law. Although the application for the position of AHM was made via NHS Jobs (Application Form (NHS Jobs) [317-

328]), there is no suggestion that NHS Jobs is the actual employer or that she is an agency worker supplied by NHS Jobs (as an agent) to the trust (as a principal). Whatever the actual legal relationship, it is clearly one between the claimant and the trust. See the various documents that evidence that relationship, including the Job Descriptions and Person Specifications [126-135, 185-193]; the Hospital Manager's Handbook [136-184]; the respondent's Policy on Section 23 Review [194-287 and 288-314]; the "Honorary Contract" for a fixed term contract [329-333]; the letter of appointment [334]; the Training Record [337-344]; the appraisals documents [413-419]; the requirement of vaccination as condition of deployment [420]; and the claimant's wage slips [421-432]

128. The Tribunal is satisfied that an agreement existed between the claimant and the trust, via a process of offer and acceptance, for the engagement of the claimant as an AHM. That agreement was supported by consideration (the payment of fees in return for the carrying out of panel work and associated duties or requirements). The terms of that agreement were certain and understood.

129. However, the respondent argues that there is no intention to create legal relations (see leading counsel's submissions above). The Tribunal cannot accept that argument. The exclusion of an intention to create legal relations is usually expressly reserved and made plain on the face of any agreement or the process for reaching one. That is not the case here. An absence of an intention to create legal relations might be inferred from the context or from another source. The Tribunal does not consider that section 23(6) of the Mental Health Act is fit for that purpose. The documentation already referred to points strongly in the direction of an implicit intention to create legal relations, although what legal relationship thereby resulted remains to be determined.

130. The Tribunal is satisfied that the claimant's appointment as an AHM is a contractual appointment and not simply a matter of appointment to an office or under statute (as was the case in *Gilham*). Again, section 23(6) of the Mental Health Act does not disturb that conclusion, in the Tribunal's judgement. The documentary evidence and the practice of the parties post-appointment points strongly to there being a contractual relationship. But what sort of contractual relationship is it?

131. As *Alemi* reminds us, the authorities establish that the definition of "employee" under the Equality Act 2010 is not broader than that of a limb (b) "worker" under the Employment Rights Act 1996. The claimant in providing her service to the trust as an AHM is not someone who is genuinely in business on her own account or who worked for her own clients or customers. The fact that she has a portfolio of similar appointments does not disturb that impression or conclusion.

132. The *Uber* decision sets out the up-to-date approach to the determination of employment status. The written agreements here may be an appropriate starting point as they tend to point towards the claimant being a "worker" (or an "employee" in the broader sense). The Tribunal reminds itself that *Autoclenz* made it clear that whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and other "workers" is not to be determined by applying ordinary principles of contract law. The task for the Tribunals is to

determine whether the claimant falls within the definition of a “worker” in the relevant statutory provisions to qualify for the rights therein.

133. It is worth setting out again that, in *Uber*, the primary question was one of statutory interpretation, not contractual interpretation. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. The purpose of section 47B of the 1996 Act and section 27 of the 2010 Act is to protect an individual such as the claimant from being subjected to unfair treatment (such as being victimised or suffering detriment for whistleblowing). Any terms (such as the use here of the phrase “honorary contract”) which purported to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract were of no effect and had to be disregarded.
134. As *Bates van Winkelhof* establishes, the vulnerabilities of workers which created the need for statutory protection were subordination to and dependence upon another person in relation to the work done. A touchstone of such subordination and dependence was the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a “worker” who was employed under a “worker's contract”.
135. Turning to that question, some degree of mutual obligation is necessary for any contractual relationship. That is present here in this case, both in the overarching contract between the parties and the individual contracts that arise on each occasion that the respondent trust offers the claimant a “sitting” and she accepts it. As noted above, the question is whether a worker's contract requires an “irreducible minimum of obligation”.
136. The present case is in many ways like the inquiry necessary in *Pimlico Plumbers Ltd v Smith* [2017] ICR 657 CA, although otherwise the two cases are not on all fours with each other. The tribunal in *Pimlico* found that a self-employed plumber was both a limb (b) worker under the Employment Rights Act 1996 and an employee in the extended sense under section 83(2)(a) Equality Act 2010. Where the substantive claim directly depends on the claimant enjoying employee/worker status in respect of his or her periods of work, the question whether the engagement is casual is relevant, but only on the basis that it may shed light on the nature of the relationship while the work in question is being done. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had worker status, even if the contract clearly provided that there was no legal obligation either way in between the periods of work. Where the claim directly depends on the claimant's status during periods of non-work, either because he or she must establish continuity of employment or because the claim itself relates to treatment during that period, in such a case, mutuality of legal obligations is essential.

137. As in *Pimlico*, the present Tribunal is satisfied that there are mutual obligations on both parties in the present case. Those mutual obligations are especially well expressed in the claimant's submissions above. The claimant was expected to make herself available for a minimum number of sittings, otherwise she would not be reappointed. In practice the respondent provided her with those opportunities and, although entitled to decline in the individual case, she accepted those opportunities, and the respondent was then obliged to pay her. She also had secondary obligations to the respondent, such as in respect of training, appraisal, and so on. The Tribunal is satisfied that she is both a limb (b) worker and an employee in the extended sense. The Tribunal also finds her engagement to be the subject of an umbrella contract between the parties (that is, that there was mutuality of obligation between assignments).
138. The claimant in the present case also places reliance on *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229 CA. The factual basis is very similar, although not identical. What is particularly noticeable (but absent in the present case) is that in *Somerville* the written agreement expressly stated that he had the status of an independent contractor and that nothing in the agreement created a relationship of employer and employee. As in the present case, the NMC was not obliged to offer him a minimum number of sitting dates and he was free to withdraw from dates he had accepted. The tribunal found that he was a "worker" because there was a series of individual contracts that arose each time that he agreed to sit on a hearing and an overarching contract in relation to his provision of his services. The EAT and the Court of Appeal upheld the tribunal's decision on appeal.
139. At the Court of Appeal, what was important was that the services agreement which governed his appointment stopped short of requiring him to do or personally perform any work or services. However, each time the NMC offered a hearing date, and he accepted it, an individual contract arose whereby he agreed to attend the hearing and the NMC agreed to pay a fee. The tribunal had found that under each individual contract, he had agreed to provide his services personally, and that the NMC was not the client or customer of a profession or business carried on by him. These findings were sufficient to entitle the tribunal to conclude that he was a worker. The present Tribunal in the case before it gleans assistance from that reasoning.
140. There is also the assistance afforded by the extended definition of employment in section 43K of the 1996 Act. Although the Tribunal has set out above all the provisions in the section that furnish an extended definition, it does not appear to it that the claimant falls squarely within those extensions that apply to NHS employment more widely. However, it is possible that, if section 230 does not assist the claimant, and the Tribunal is wrong about that, then section 43K(1)(a) might do so. It is possible that the claimant might be viewed as an individual who works or worked for a person (the respondent trust) in circumstances in which (i) she is or was introduced or supplied to do that work by a third person (NHS Jobs), and (ii) the terms on which she is or was engaged to do the work are or were in practice substantially determined not by her but by the person for whom she works or worked (the respondent), by the third person (NHS Jobs) or by both of them (section 43K(1)(a)).

141. So far as section 43K of the 1996 Act is concerned, as noted above, this section extends the protection of the whistleblowing provisions. The Tribunal in interpreting and applying it should, in a case of ambiguity, seek a solution applying that extension rather than limiting it.
142. Section 43K(1)(a) is designed to apply to an individual who is not otherwise a worker in relation to the person sought to be established as the employer under this section. This deliberately extended definition is to be interpreted widely and purposively. It can apply to a person introduced or supplied by an agency, even where that person is himself operating through his own service company and there is no direct contractual nexus. That is not the position here. The reference to “terms” in section 43K(1)(a)(ii) means contractual terms and this provision cannot be used to extend the legislation to cases where there is no contract. Again, that is not the position here, as this Tribunal has found there to be a contract between the claimant and the respondent trust. Once there is such a contract, the Tribunal takes a broad view, not restricted to contractual terms.
143. The Tribunal takes the view that the claimant is a limb (b) worker falling within section 230 of the 1996 Act; but were it necessary to do so, it would also find her to be covered by the extended definition in section 43K(1)(a).
144. Alternatively, the claimant also relies upon *Gilham v Ministry of Justice* [2019] ICR 1655 SC. This is not obviously an analogous case, not least because the Tribunal has found there to be a contract, and because her appointment is not solely a creature of statute, as a District Judge was. Nevertheless, if the Tribunal is wrong about that, it would follow *Gilham* in allowing the claimant to bring a whistleblowing claim under section 47B of the Employment Rights Act, despite not meeting the literal definition of “worker” in section 230(3) of the Act, if that were so, because she did not work under a contract (which is, of course, not the Tribunal’s primary finding). Section 230(3) had to be interpreted purposively to avoid a breach of Article 14 of the European Convention on Human Rights, which prohibits discrimination on several grounds – including “other status”. The section is to be interpreted purposively to include someone in the claimant’s position, relying on the Tribunal’s obligation under section 3 of the Human Rights Act 1998.
145. The Tribunal does not consider this to be an exceptional case, such as is illustrated by *Hashwani*. The claimant’s circumstances are quite different from an arbitrator who was an independent provider of services and who was not in a relationship of subordination with the person who received the services. The claimant’s role was one of employment under a contract personally to do work. She provided services and she received fees for her work. She rendered personal services which she could not delegate. To a degree she performed those services and earned her fees for and under the direction of the respondent, as the documentation and practice of the parties referred to above demonstrates. Although she was an independent decision-maker, whom the respondent could not direct or control at the point of decision-making, she was not an independent provider of services who was not subject to the control of the respondent as to when and how she carried out her otherwise independent role.

146. For completeness, the Tribunal will address the four key points made by Dr Morgan QC on behalf of the respondent.
147. First, while the Tribunal accepts that section 23(6) of the Mental Health Act prohibits the appointment of any officer or employee of the relevant trust to the position of AHM, it does not do so for all purposes of employment rights and employment protection. See the Tribunal's reasoning above. The AHM's independence is safeguarded by the prohibition on employment as an employee in the narrow sense. That independence is not undermined by affording the claimant employment rights or employment protection as a worker or as an employee in the Equality Act broader sense.
148. Second, the Tribunal does not accept that the AHM is not subject to terms and condition imposed by the Trust. Nor that there a relationship lacking subordination or control. This does not undermine the purpose of the panel of which the AHM is member and its ability to serve the needs of patients in accordance with Art 5 ECHR.
149. Third, in the Tribunal's analysis there was an intention to create legal relations between the parties to this case. The statutory prohibition in section 23(6) alone did not serve to negate any intention to enter a contract which placed the claimant under the control of the respondent, or at all. Intention to create legal relations could have been expressly excluded, but it was not – other than a rather milk and water attempt to describe a quite detailed legal relationship as being an “honorary contract”. The reality was quite different, as the evidence shows.
150. Fourth, there is nothing inherent in the nature of the function that the claimant carried out that puts her on all fours with a judicial officer-holder who does not necessarily hold office pursuant to a contract. Whether a contract may be considered to exist is dependent upon the intention of the parties, but that intention may be gleaned from the circumstances, as the Tribunal has found.
151. In summary, the Tribunal accepts and prefers the claimant's submissions.

Conclusion

152. The Tribunal concludes that in relation to the respondent the claimant is a “worker” for the purposes of section 43K(1)(a) and/or section 230(3)(b) of the Employment Rights Act 1996 in relation to her complaint under section 47B of that Act and is also in employment under a contract personally to do work for the purposes of section 83(2)(a) of the Equality Act 2010 in relation to her complaint under sections 27 and 39 of that Act. Her claim may now proceed to a final hearing as listed.

Rule 50

153. An application under rule 50 was not pursued further, the claimant accepting that she does not make allegations of sexual offences or sexual misconduct against any individuals.

Judge Brian Doyle
Date: 19 April 2022

Sent to the parties on:

21 April 2022

For the Tribunal Office:

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