



# EMPLOYMENT TRIBUNALS

## BETWEEN

**Claimant**

**AND**

**Respondents**

Ayokunle Ayodele

The Fremaux Delorme Company  
Limited (1) Harrods Limited (2)

**Heard at:** London Central Employment Tribunal

**On:** 14 and 15 October 2024

**Before:** Employment Judge Coen

## Representations

**For the Claimant:**

In person

**For the First Respondent:**

K. Sonaike, Counsel

**For the Second Respondent:**

A. Greenley, Counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

- (i) the claimant is not a worker in respect of the second respondent for the purposes of section 230(3)(b) of the Employment Rights Act 1996;
- (ii) the claimant is not a worker in respect of the second respondent for the purposes of section 83(2)(a) of the Equality Act 2010;

- (iii) the claimant is a worker in respect of the second respondent under the extended definition in sections 43K(1)(a) and 43K(2)(a) of the Employment Rights Act 1996;
- (iv) the claimant's four applications to amend his claim are refused.

# WRITTEN REASONS

## Introduction and Issues

1. The claimant was employed by the first respondent between 11 October 2021 and 1 June 2023. The first respondent operates a concession in the second respondent's department store.
2. The claimant has brought claims against the first respondent and the second respondent for automatic unfair dismissal (section 103A of the Employment Rights Act 1996 and section 100 of the Employment Rights Act 1996), discriminatory dismissal (section 39 of the Equality Act 2010), direct sex discrimination (section 13 of the Equality Act 2010), direct sexual orientation discrimination (section 13 of the Equality Act 2010), harassment based on sex and sexual orientation (section 26 of the Equality Act 2010), victimisation (section 27 of the Equality Act 2010), detriment as a whistleblower (section 47B of the Employment Rights Act 1996) and detriment on health and safety grounds (section 44 of the Employment Rights Act 1996).
3. This was the third hearing in the case, following two earlier case management hearings held in private (before Employment Judge Sutton KC on 22 January 2024 and Employment Judge Smart on 29 June 2024). This hearing was listed to deal with: the issue of status; four applications for amendment made by the claimant; the listing of a separate hearing to deal with an application for strike out by the respondents; and case management to a final hearing.
4. The second respondent has accepted that the claimant is a contract worker pursuant to section 41 of the Equality Act 2010.
5. The issues to be decided are:
  - (i) whether the claimant is a worker pursuant to section 83(2)(a) of the Equality Act 2010. This is relevant to his claim for discriminatory dismissal under section 39 of the Equality Act 2010;
  - (ii) whether the claimant is a worker pursuant to section 230(3)(b) of the Employment Rights Act 1996. This is relevant to his claims for whistleblowing detriment under section

47B of the Employment Rights Act 1996 and health and safety detriment under section 44 of the Employment Rights Act 1996;

(iii) if not, whether the claimant falls under the extension provisions set out at section 43K of the ERA 1996;

(iv) four separate amendment applications made by the claimant.

6. The hearing was held by Cloud Video Platform over two days. The claimant appeared in person. The first and second respondents were represented by Counsel. In light of the fact that the claimant appeared in person I sought to explain relevant procedure to him, allowed him to be cross-examined before he himself cross-examined the second respondent's witness, and allowed him additional time to prepare oral submissions.

7. The claimant gave evidence, as did Nicola Blake, the Employee Relations manager of the second respondent.

8. The claimant withdrew his claims for automatic unfair dismissal (whistleblowing) pursuant to section 103A ERA 1996 and automatic unfair dismissal (health and safety) pursuant to section 100 ERA 1996 against the second respondent on the basis that he accepted that he was not an employee of the second respondent. I will arrange for a judgment on withdrawal to be issued separately.

9. The claimant raised two issues in respect of disclosure at the beginning of the hearing. The first issue related to his status claim, and he referred to notes of an internal Zoom meeting in respect of a grievance which he said were a critical component of the status arguments as they would contain further context around the environment that the department manager of the second respondent created. I decided that the issue of status could be decided without reference to the notes of the internal meeting, as relevant sections from the grievance investigation itself were referred to in the claimant's witness statement. The grievance investigation report was not contained in the bundle but was provided in the course of the hearing. The first respondent also provided minutes of the internal Zoom meeting during the course of the hearing. I did not consider them as they were received following my decision that they did not need to be disclosed.

10. The second issue related to the claimant's application to amend his claim to add a claim for discrimination on the basis of perceived disability. The claimant was concerned that a document which collated feedback given by email from staff members about him had been tampered with as the metadata for the document showed that amendments had been made to it over a period of forty minutes. The claimant was also of the view that one particular section (which contained an extract of an email from an employee of the first respondent) had been amended as it would not have been possible for that employee to have provided an account at the time in question as she was away on holiday. In the circumstances, the first respondent sent the original email from the employee in question to the claimant in the course of the hearing and the first respondent's counsel confirmed that the email was identical to the wording in the document collating all the feedback.

11. In finding facts, I have sought to restrict the facts to those issues which are relevant to the issues to be determined and have not dealt with peripheral issues. The claimant was cross examined by the first and second respondent on his evidence in respect of his application to amend his claims. I have not found facts on this evidence as the submissions of both parties dealt with the relevant issues and I am able to determine the application based on the undisputed facts and evidence.

## Facts

### ***Contractual Background***

12. The claimant was employed as a sales assistant by the first respondent on 11 October 2021. He initially worked in the first respondent's shop on Walton Street, London and was moved the first respondent's bedlinen and textiles concession within the Bed and Bath department of the second respondent's store on 6 May 2022.

13. The second respondent operates a large department store with a number of different staff, including concession staff, independent contractors and employees.

14. An employment contract was entered into between the claimant and the first respondent on 10 June 2022 following the claimant's move to the second respondent's store. It provided: *'Your employment with the Company began on 6 May 2022. Your previous employment with The Framaux Delorme Company counts as part of your period of continuous employment, which therefore began on 9 November 2022'*. I have assumed that the reference to 9 November 2022 ought to have been to 9 November 2021.

15. In respect of Place of Employment it provided: *'Your normal place of work is Yves Delorme Bed and Bath Department – Harrods Knights. The Company reserves the right to change your place of work on a permanent or temporary basis. There may be times when you are required to work in other departments operated by the Company either within your store or at other stores within a reasonable travelling distance from your base.'*

16. The contract contained additional provisions relating to salary, hours of work, overtime, holiday, and pension contributions.

17. The claimant was entitled to participate in the first respondent's commission scheme. The contract provided in respect of benefits: *'In addition to any set out elsewhere in this statement, you are entitled to receive the following benefits from the Company provided you meet any qualifying conditions: Staff discount. The above benefits are non-contractual.'*

18. Provisions in respect of dress and appearance stated: *'The image that the Company presents to its customers is important. Accordingly, you are required to dress smartly during working hours and to wear clothing which is appropriate to your job role. Open toe shoes or trainers are not permitted. Should you turn up for work dressed inappropriately, the Company reserves the right to send you home without pay.'*

19. A clause entitled 'Third party agreement' provided '*Your employment with the Company may in some circumstances be conditional on the approval of third parties at whose premises you work or visit. If the third party withdraws permission for you to be on its site, the Company will investigate the incident thoroughly and where appropriate consider all alternative arrangements which can be made in order to maintain your continued employment by the Company. If, however, in the sole opinion of the Company, no alternative arrangements can be made, or if the complaint from the third party is upheld, the Company reserves the right to terminate your employment.*'

20. The contract referred to an Employee Handbook containing details of disciplinary and grievance procedures. The Handbook did not form part of the bundle.

21. I am satisfied on the evidence provided that the second respondent was not involved in the negotiation of the claimant's contract of employment and did not have information on the detail of its contractual terms, for example, in respect of working hours, salary, holiday or pension provisions.

### **Concessionaire agreement**

22. A concessionaire agreement was entered into between the first respondent and the second respondent on 22 May 2018.

23. Clause 9 referred to Concessionaire Employees. I have included the wording below:

*The Concessionaire will ensure that:*

- (a) The departments are adequately staffed by Concessionaire Employees and is never left unattended from at least 30 minutes before Store opening and thereafter at all times that the Store is open to Customers;*
- (b) At least one Concessionaire Employee shall attend Harrods' daily staff briefing each morning; and*
- (c) The Concessionaire Employees are suitably qualified for the purposes of this Agreement.*

*The Concessionaire warrants and agrees that the Concessionaire shall be responsible for all Concessionaire Employees (who are and shall remain at all times employed by the Concessionaire and not by Harrods) and will ensure that the Concessionaire Employees have the right to be lawfully employed in the UK at all times and the Concessionaire will be fully responsible for paying all Employment Costs in respect of the Concessionaire Employees' employment or engagement (whether contractual payments or otherwise) or its termination including without limitation any Employment Losses incurred in connection with any claim by a Concessionaire Employee.*

*If requested by Harrods, the Concessionaire will supply to Harrods' Human Resources Department name and address details of Concessionaire Employees who work in the Departments together, as requested, with a copy of the applicable terms and conditions of employment and/or documents confirming Concessionaire Employees' right to be lawfully employed in the UK. The Concessionaire will notify Harrods Human Resources Department in writing as soon as reasonably practicable of any change in the Concessionaire Employees' terms of employment where this will or could have a material impact on Harrods or its rights under this Agreement. The Concessionaire will provide upon request names and contact details for senior management and human resources of the Concessionaire whether they work within the Departments or otherwise.*

*The Concessionaire Employees will be subject to Harrods Store Approval requirements as set out in the Manuals (the "Store Approval Criteria") prior to commencing work at Harrods and at all times thereafter. If a Concessionaire Employee does not meet the Store Approval Criteria, he/she will not be permitted to work within the Store.*

*The Concessionaire will ensure that all Concessionaire Employees attend Harrods' induction and that all Concessionaire Employees attend such additional training sessions as Harrods may from time to time require at Harrods' cost. ... In addition, the Concessionaire shall ensure that all of the Concessionaire Employees comply with the Manuals and all applicable policies, procedures, other rules of Harrods and statutory requirements in effect from time to time, to maintain the standard expected of all Harrods workers. Notification of additions and changes to such policies, procedures and rules shall be made to the Concessionaire Employees via the weekly Harrods Staff Bulletin. The Concessionaire undertakes that it will conduct such additional training at its expense as may be required in order for the Concessionaire Employees to comply with the standard expected of Harrods workers including compliance with the Manuals and all applicable policies and procedures and statutory requirements including without limitation health and safety training including lifting training in respect of the Goods. The Concessionaire Employees may also, subject to availability and at the Concessionaire's expense, attend additional training made available by Harrods from time to time. The Concessionaire shall ensure that all Concessionaire Employees wear Harrods badges and conform with the Harrods dress code and are well groomed at all times while in the Store and that they swipe in and out of the Store and use appropriate entrances and exits in accordance with Harrods rules. The Concessionaire shall ensure that all Concessionaire Employees supply to Harrods such information as Harrods may from time to time reasonably require in order to comply with this clause.*

*The Concessionaire agrees that it (and not Harrods) is responsible for employing the Concessionaire Employees and therefore is responsible for providing and fairly administering any necessary disciplinary or grievance procedure (the 'Dispute Resolution Procedure(s)'). The Concessionaire warrants that the Dispute Resolution Procedure(s)*

*complies at all times with current statutory requirements. The Concessionaire agrees that Harrods may bring a Concessionaire Employee's conduct or capability to the attention of the Concessionaire and request that the Concessionaire initiate its Dispute Resolution Procedure in respect of that Concessionaire Employee. The Concessionaire further agrees that in the event of any proceedings under the Dispute Resolution Procedure(s) initiated at the request of Harrods that it will seek to agree the position with Harrods' Human Resources Departments before delivering its decision to the Concessionaire Employee.*

*Harrods may also at its absolute discretion at any time (including during any Dispute Resolution Procedure) object to the presence of any Concessionaire Employee, person, visitor, contract or delivery person working or visiting any of the Departments or the Store. Harrods shall notify the Concessionaire of its objection (in the case of a Concessionaire Employee, by reference to the Store Approval Criteria) and upon receipt of such notice the Concessionaire shall forthwith procure that such person stays away from the Store. The Concessionaire warrants that the terms of employment of the Concessionaire Employees and any contracts with contractors are such as to permit the Concessionaire to require such person to stay away from the Store if Harrods objects to them and that accordingly no such objection by Harrods shall constitute any inducement or incitement to the Concessionaire to breach of contract. If Harrods request that a Concessionaire Employee stays away from the Store, the Concessionaire shall promptly replace such individual with an alternative satisfactory to Harrods and the Concessionaire will immediately provide the required information as provided in clause 9.3 in respect of that individual.*

### **Store Approval Policy**

24. The second respondent operates a company policy known as 'Managing and Withdrawing Harrods Approval'. I have set out below relevant sections of the policy. The policy provided as follows:

*Harrods operates a People Management Policy and Procedure for its own employees, which sets out the procedure for dealing with concerns about conduct and behaviour, performance and capability, etc. The People Management Policy and Procedure applies only to employees of Harrods Ltd.*

*Harrods is not the employer of consultants, concession employees, agency employees, or other similar workers and therefore Harrods is not responsible for providing and administering any disciplinary or grievance procedures (or other procedures for employees) which may be required by law.*

*All workers at Harrods who are employed by another company or person (e.g. employees of a consultancy company, concession company, or employment agency) should refer to the disciplinary procedure and grievance procedure provided by their own employer.*

*Where there are issues relating to a worker's conduct, behaviour, performance or capability at Harrods, we expect all consultancy companies, concession companies, employment agencies and other employers of workers to consult with Harrods (in particular, the Human Resources Department) when carrying out any disciplinary or grievance procedure.*

*This Procedure for Managing and Withdrawing Harrods Approval applies to those workers who are covered by the Harrods Approval procedure and who are not employed by Harrods.*

25. The policy went on to provide:

*If a worker's conduct, behaviour, performance or capability does not meet Harrods' standards (as set out in Harrods' policies and procedures), Harrods will first try to resolve the issue informally by discussing the concerns with the worker, or a representative of their company.*

*If an informal discussion has not resolved an issue concerning conduct, behaviour, performance or capability, or an issue is sufficiently serious to require formal action, the issue will usually be referred to and discussed with the worker's employer – i.e. the Concession Company or employment agency.*

*In some cases, this may lead to the worker's employer taking action against that worker under their own disciplinary procedure. Harrods hopes that appropriate action would always be taken in consultation with Harrods to ensure that the procedure and outcome is considered suitable by both the employer and Harrods.*

*If a worker receives a formal warning from their own employer under a disciplinary procedure (or similar procedure or action to be taken against an employee), Harrods requires the employer (consultancy companies, concession companies, employment agencies and other employers of workers) to notify Harrods in writing of the outcome of any formal procedure without delay.*

*In cases where the action taken by the worker's employer is not considered suitable by Harrods, Harrods may select one of the following stages of the Managing and Withdrawing Harrods Approval Procedure which Harrods has the right to commence at any stage depending on the severity of the circumstances.*

26. Those stages are described in the policy and are: a written warning, final written warning, suspension of Harrods approval (in the event that serious issues need to be investigated a worker's Harrods Approval will be suspended while the matter is referred



to the worker's employer to investigate) and Withdrawal of Harrods Approval (Harrods Approval may be withdrawn after one or more formal warnings have been given, or where the action taken by the worker's employer is not considered suitable by Harrods).

27. The policy continued:

*In the event of serious issues of conduct, Harrods may decide to suspend a worker's Harrods Approval. This means that the worker will no longer be able to work at Harrods whilst their Harrods Approval is suspended, and the matter will be referred to the worker's employer to investigate and take appropriate action. Please refer to Harrods People Management Policy, Part A – Conduct for examples of behaviour that Harrods considers to be gross misconduct. During this suspension, the worker should not come to Harrods, and should not contact any colleagues or customers. Harrods expects that the worker will continue to receive salary as normal from his/her employer during any period of suspension, unless their employer takes independent action, ending the policy.*

28. Nicola Blake, for the second respondent, gave evidence around the Store Approval process. Her evidence was that the second respondent would check all incoming concession staff to establish if store approval had previously been removed for that person (whether as a former employee or as a customer). This process required details of the individual in question and also required the individual to complete, prior to commencement of employment, a 'Values Assessment', being an online exercise to ensure alignment with the standards required in the second respondent's store.

29. Nicola Blake indicated that concerns with a concession employee's conduct could come to the second respondent's attention either through the first respondent informing the second respondent or the second respondent's staff reporting concerns to the second respondent. Her evidence was also that, generally, a concession would not inform the second respondent of an investigation unless the second respondent was required to assist with the gathering of evidence or if the individual was suspended during the period of investigation. The second respondent would not routinely be aware of more minor sanctions (for example written warnings) being given to concession employees. If the second respondent was informed of the suspension of a concession employee, it would suspend the store approval process pending confirmation of the outcome of the concession's investigation. She also stated that second respondent did not make decisions about concession staff, that it cooperated with requests for evidence from the concession (for example if an employee of the second respondent gave witness evidence or through the provision of CCTV footage), that the second respondent did not consult with concessions on their investigation or proposed sanction, and that the second respondent did not have any insight into the processes the concession followed.

30. In cross examination Nicola Blake's evidence was that the meaning of the word 'consultation' in the Store Approval Policy varied depending on the matter in question, for example minor issues, such as lateness, or more serious issues which might have a greater impact on the second respondent. She said that 'consult' indicated an expectation

that the concession would let the second respondent know about the matter. She distinguished between matters about which the second respondent would not be expected to be informed (staff being off sick or late) but that more serious matters might require CCTV footage or a witness statement.

31. Nicola Blake's further evidence was that in rare circumstances (twice in the period of nine months for which she had worked for the second respondent) the second respondent might disagree with the concession's decision. In those circumstances, the second respondent would not object to the concession's decision but may choose to withdraw store approval for the individual in accordance with the Store Approval Policy and the concessionaire agreement.

32. The claimant asserted that it was possible for an employee's employment to be terminated in circumstances where his store approval was removed and where it was not possible to redeploy him to work at another location. I accept that, on the face of the contractual documentation, this would be possible.

### ***Miscellaneous Facts***

33. The first respondent's concession was within the Bed and Bath department of the second respondent's store. The claimant said that if there were no staff on adjoining tills he served customers within the Bed and Bath department. He also said that he assisted customers with non-concession matters, for example retrieving stock and answering general customer queries. He also said that he had at times assisted customers of the Bed and Bath department by carrying bags for them.

34. The claimant was provided with a Harrods ID card, was required to wear a Harrods name badge displaying the Harrods logo and required to adhere to a dress code.

35. The claimant attended, alongside employees of the second respondent, daily briefings provided by managers of the second respondent.

36. The claimant received a store-wide discount from the second respondent. There was no evidence around whether there was any contractual obligation to provide the discount or whether it was discretionary. Neither was there evidence that the discount was accompanied by any obligation, including an obligation to provide services.

37. The second respondent offered incentive awards to individuals working in the store and ran staff competitions. The claimant stated that he won an incentive award from the second respondent.

38. The claimant's evidence was that the second respondent's staff assumed managerial responsibilities over the claimant due to frequent absences of the first respondent's concession manager. The claimant's further evidence was that because of these absences he had to report to the second respondent's staff on matters that would

ordinarily have needed a concession manager's approval (for example, in respect of the return of goods by a customer).

39. The claimant's evidence was that managers of the second respondent frequently emphasised the second respondent's values statement including the words 'We are One'. An email from a manager at the second respondent dated 21 February 2023 referred to a request for information on the claimant's relationship with 'the team'. Having read the email, I take the reference to 'the team' to be to the team of people employed by the second respondent (who were the subject matter of the request).

40. A departmental manager of the second respondent asked the claimant to assist on one occasion in September 2022 when the claimant had arrived at the department early to study for an upcoming exam (using a table in the corner of the room) before his shift started. The claimant did not initially wish to help but acquiesced. The claimant was of the view that this incident was repeatedly used to influence disciplinary actions against him.

41. The claimant brought a grievance and on 8 February 2023 a grievance meeting was held with him.

42. On 20 February 2023, the same departmental manager of the second respondent was asked by the first respondent for information to assist it in investigating a grievance by one of its employees. The information requested was whether any complaints or issues had been raised by the second respondent in relation to the claimant. The manager responded on 21 February 2023 confirming that she was unable to be involved in the grievance investigation, as this was an internal investigation within the concession brand, but that she was happy to support with any information. The manager relayed concerns regarding the claimant's conduct and gave an example of the claimant 'not being a team player, that he had come in early, had refused to help, after a lot of fuss he did eventually help, but that his attitude was not appreciated'.

43. The claimant's grievance was upheld in part.

44. The claimant was suspended on 21 April 2023.

45. On the evening of 23 April 2023, the same departmental manager at the second respondent wrote to a member of the HR team at the second respondent asking him to remove the claimant's staff approval/discount and further stated that the concession area manager had suspended the claimant from the store due to internal investigations. HR responded on the morning of 24 April 2023 asking the departmental manager to confirm if this was a permanent removal or temporary suspension so that it could be actioned accordingly. On the morning of 24 April 2023, a member of the staff of the first respondent also emailed the departmental manager 'following on from our conversation on Friday last week' asking her to remove store access for the claimant. Later that morning the departmental manager replied to the member of staff, copying in HR at the second respondent, so that the request be actioned. On 25 April 2023 the departmental manager at the second respondent wrote to the first respondent saying that the claimant's access

had been suspended but that she would not remove any approval until an update had been received from the first respondent.

46. I accept from the above facts that the departmental manager at the second respondent contacted HR at the second respondent to request removal of the store approval. I also accept that the first respondent's staff contacted the departmental manager by email the following morning. To the extent that it is relevant, I do not believe that the correspondence indicates that the departmental manager at the second respondent took decisive steps in respect of the claimant's suspension because the claimant had been suspended a number of days previously on 21 April 2023 by his own employer and it is clear from the correspondence that the first respondent's staff had discussed the matter with the departmental manager prior to emailing her to request the removal of the approval.

47. A disciplinary meeting was held on 26 May 2023 and the claimant was dismissed with effect from 1 June 2023. Following dismissal, the first respondent confirmed to the second respondent that the claimant's employment had been terminated and his store approval was removed. On 1 June 2023 an employee of the first respondent confirmed that the claimant would be removed from the second respondent's systems as his employment had been terminated.

48. The claimant corresponded with HR at the second respondent following his dismissal. An email from the Head of HR at the second respondent to the claimant dated 27 July 2023 stated that 'Harrods employees who wish to raise a grievance should do so under our Grievance Policy, and any concession employees who wish to raise a grievance should do so under their own employer's policy, as the responsibility for investigating a grievance lies with the employer of the person who has raised it. Harrods will co-operate with any requests from concession employers to help facilitate their grievance investigation, and would likewise expect co-operation from a concession in relation to any grievance investigations undertaken by Harrods.'

## Law

### ***Contract worker***

49. Section 41 of the Equality Act 2010 prohibits discrimination against contract workers by the end user of their services (referred to in the Act as a 'principal'). Section 41(5) defines a 'principal' as a person who makes work available for an individual who is (a) employed by another person and (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it). Section 41(7) goes on to define a 'contract worker' as an individual supplied to a principal in furtherance of a contract to which the principal is a party.

50. The statutory purpose of section 41 is to proscribe discrimination in the context of 'the principal-worker relationship' where access to work is not the responsibility of the employer but of a third party (**Boohene and ors v The Royal Parks Ltd [2024] EWCA Civ 583, CA**)

51. **Harrods v Remick [1998] ICR 156 CA** concluded that certain licensees (working in a Sheaffer pen concession at Harrods) were contract workers for the purposes of section 7 of the Race Relations Act 1976 (now section 41 of the Equality Act 2010). The court held that the real test was whether the employer was under a contractual obligation to supply individuals to do work that could properly be described as work for the principal.

52. The Court of Appeal was of the view that the individuals were working 'for Harrods' which was the principal on the basis that 'It was work done in Harrods store for the benefit of Harrods and ultimately under Harrods' control, as Harrods may grant, refuse or withdraw store approval for the worker to do the work available. The fact that the applicants, as employees, also worked for their employer does not prevent the work which they did from being work 'for' Harrods within the meaning of section 7. It was work from which Harrods derived direct benefit without themselves having to employ a person to do the work available'.

### **Worker**

53. A worker is defined under section 230(3)(b) of the Employment Rights Act 1996 as: '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'. This definition of worker is often referred to as the 'limb (b) definition'.

54. The Equality Act 2010 uses the term 'employee' rather than 'worker' to identify those who are entitled to protection from discrimination, victimisation and harassment at work. Section 83(2)(a) of the Equality Act 2010 provides that employment means 'employment under (i) a contract of employment, (ii) a contract of apprenticeship or (iii) a contract personally to do work'.

55. The limb (b) definition is treated as having the same meaning as the definition at section 83(2)(a) of the Equality Act 2010. (**Pimlico Plumbers [2018] UKSC 29 paragraphs 13-15** and **Bates van Winkelhof v Clyde & Co. LLP [2014] UKSC 32**)

### **Worker – assessment**

56. In order to decide whether an individual falls within the definition of worker, **Uber BV and others v Aslam and others [2021] UKSC 5** clarifies that: there must be a contract (whether express or implied, and, if express, it must be written or oral) whereby an individual undertakes to perform work or services for the other party; there must be an undertaking to do the work or perform the services personally; and those services must be for the benefit of another party to the contract who must not be a client or customer of the individual's profession or business undertaking.

57. In construing the contractual arrangement, it is possible for a Tribunal to take into account factors outside the strict paperwork. The **Uber** judgment stated that there is 'no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it'.

58. Therefore, for an individual to claim worker status, it is necessary to show an express or implied contract with the other party. Under general contractual principles, in order for a contract to exist, there must be an agreement made between two or more people, there must be an intention to create legal relations and the agreement must be supported by consideration such that something of benefit must pass from each party to the other. In addition, the terms of a contract must be sufficiently certain for the courts to be able to give them meaning.

### ***Mutuality of Obligation***

59. There must be an irreducible minimum of mutuality of obligation for a contract of employment to exist. Mutuality of obligation in a contract of employment usually takes the form of an obligation on the employer to pay for the work and an obligation on the employee to carry out the work provided.

60. In order for a contract to exist the parties must be under some element of obligation to each other. In **Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99**, the claimant was a lap dancer at a nightclub on a rota basis. There was no obligation on the nightclub to pay her and she negotiated her own fees with clients. It was held by the Court of Appeal that there was no relationship of employer/employee.

61. It is accepted that mutuality of obligation is a necessary part of a limb (b) worker contract (**Byrne Brothers (Formwork) Ltd v Baird and ors [2002] ICR 667**, **Bamford and ors v Persimmon Homes NW Ltd EAT 0049/04** and **Younis v Trans Global Projects Ltd and anor EAT 0504/05**).

62. However, questions have been raised as to how mutuality of obligation operates in the context of umbrella contracts and particularly whether mutuality of obligation is a stand-alone requirement in establishing whether there is a contract or is just an element of the obligation to perform personal service. This has been relevant to cases where a claimant has an umbrella contract with overarching terms and conditions and where the obligation to work is only triggered at certain junctures, with resulting queries around whether the individual is a worker between assignments. The Employment Appeal Tribunal in **Nursing and Midwifery Council v Somerville [2021] ICR 1448** noted that mutuality of obligation has been used in two ways in case law – firstly to signify the exchange of promises necessary to create any form of bilateral contract and secondly to refer to an obligation on an individual to accept and perform some work for a putative employer who is obliged to offer some work and pay for the same.

63. In **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181 EAT**, the EAT concluded that a claimant need not show a requirement to provide or pay for work and a corresponding obligation to do the work to fall within the limb(b) definition. The EAT was of the view that the real question in deciding whether a claimant is a worker is whether there is a minimum amount of work that he or she is obliged to perform personally. The fact that the individual exercises a choice to refuse work is not critical.

64. In **Nursing and Midwifery Council v Somerville [2022] ICR 755 CA**, the Court of Appeal considered whether a fee-paid panel member on the Fitness to Practice Committee was a worker. He was not guaranteed a minimum number of sitting dates and was free to cancel the dates he accepted. The Court held that there was no need for there to be an obligation on the part of the putative worker to perform a minimum amount of work (the irreducible minimum of obligation) in order for the individual to be a limb (b) worker in that case. The umbrella agreement did not require the individual to do any work or provide any services but each time the individual accepted a sitting day, an individual contract arose. The statutory definition of 'worker' did not indicate that there must be some distinct, superadded obligation on a putative employer to provide work or on an individual to accept work or provide services independent from the provision of the services on the particular occasion.

65. In **Sejpal v Rodericks Dental Ltd 2022 ICR 1339** the Employment Appeal Tribunal stated that the concept of mutuality of obligation goes principally to the issue of whether there is a relevant agreement or agreements and that there must be mutuality of an obligation for there to be a contract at all.

66. In **Singh v Members of the Management Committee of the Bristol Sikh Temple and ors EAT 0429/11**, it was decided that mutuality of obligation was a criterion for determining whether there was a contract in existence. The case concerned a priest at a Sikh temple who received donations and accommodation. The Employment Appeal Tribunal stated that a lower level of mutuality of obligation is required under a worker's contract than under a contract of employment. In a contract of employment there is an obligation to provide or pay for work and to perform that work, but in a worker situation, the test is whether there is an irreducible minimum of obligation to found a contract at all.

67. In **Groom v Maritime and Coastguard Agency [2024] EAT 71**, a volunteer in the Coastal Rescue Service was deemed a worker with a contract coming into existence when he carried out an activity for which he had a right to reimbursement of expenses.

### ***Performance of work personally***

68. One of the criteria set out in the limb (b) test is that a worker must undertake to do or perform work personally.

69. Much of the discussion in the context of the performance of work personally relates to the power to appoint a substitute and consideration of whether the terms in respect of the appointment of a substitute operated to exclude an obligation of personal performance.

(see, for example **Pimlico Plumbers Ltd and anor v Smith** and **Manning v Walker Crips Investment Management Ltd [2023] EAT 79**)

***Work must be for employer***

70. For a worker to fall within the limb (b) test the work done must be for another party to the contract.

***Client or Customer Exception***

71. The last part of the limb (b) test clarifies that if a person performs work for a customer or client of his/her profession or business, then the test cannot be fulfilled. The issues of control and integration within a business are often considered in this context, as a higher level of control over a claimant may point to the fact that the individual is not acting on his or her own account but is subordinate to and dependent on the provider of work. Similarly, if a claimant is required to integrate himself with a business, this can point to the fact that he is not dealing with the business as a client or customer, but is a worker. These issues have been considered extensively in cases relating to workers in the 'gig economy', including in recent cases such as **Pimlico Plumbers Ltd v Smith [2018] UKSC 29** (where tight control was exercised over the claimant, pointing away from him being an independent contractor) and **Uber BV v Aslam [2021] ICR 657** (where the practical realities precluded the claimants from being seen as independent contractors).

***Extension - worker***

72. Section 43K(1) of the Employment Rights Act 1996 extends whistleblowing protection to certain individuals who do not fall within the limb (b) definition of worker. An important purpose of section 43K is to extend cover to workers who are working at an end user.

73. Section 43K(1) provides as follows: (1) For the purposes of Part IVA of the Employment Rights Act 1996 'worker' includes an individual who is not a worker as defined by section 230(3) but who (a) works or worked for a person in circumstances in which (i) he is or was introduced or supplied to do that work by a third person, and (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.

74. Section 43K(2)(a) provides that for the purposes of Part IVA of the Employment Rights Act 1996 'employer' includes in relation to a worker falling with paragraph (a) of subsection (1) the person who substantially determines or determined the terms on which he is or was engaged.

75. In **Croke v Hydro Aluminium Worcester Ltd, EAT/0238/05**, the Employment Appeal Tribunal noted that tribunals should adopt a purposive construction when considering these cases in order to provide protection rather than deny it.



76. **Day v Lewisham & Greenwich NHS Trust and anor (Public Concern at Work intervening) [2017] ICR 917, CA** confirmed that the second limb of section 43K(1)(a) envisaged that both the person for whom an individual worked and the person who supplied him could substantially determine the individual's terms, either jointly or to differing extents.

77. In **McTigue v University Hospital Bristol NHS Foundation Trust EAT/0354/15** the provisions of section 43K(1)(a) were considered in detail. The claimant was employed by an agency under a contract of employment to work at a medical centre operated by the respondent trust. She contended that she had been subjected to a detriment by her employer for making a protected disclosure to the trust relating to breaches of legal obligations. The contract between the employer and the claimant painted a picture of a normal contractual arrangement as between employer and employee. The claimant was also issued with an honorary appointment or contract by the respondent trust authorising her to carry out her duties as a forensic nurse examiner, identifying the named supervisor, requiring her to cooperate with the respondent in relation to issues of health and safety, clinical governance and working time. It reserved the respondent's right to terminate the honorary contract in case of any reason or cause for concern that might jeopardise the continuity of quality of care offered to patients.

78. It is worth quoting from the judgment.

*A comparison must be made between the extent to which on the one hand the individual determines his or her terms of engagement to do the work and, on the other hand, somebody else determines those terms. If the individual substantially determines his or her terms in comparison with the others, they are not a worker under this provision. If the other person or persons substantially determines the terms, the individual is a worker for these purposes.*

*Since subsection (1)(a)(ii) expressly envisages that there may be two persons who substantially determine the terms on which the individual is engaged to do the work (the person who supplies the individual and the person for whom he or she works) the same must inevitably be true in relation to section 43K(2)(a) which defines the 'employer' for these purposes. This provision defines employer as the 'person' (which, by this stage, cannot be the individual) who substantially determines or determined those terms. Since as a matter of ordinary statutory interpretation the singular includes the plural, if both the supplier of the individual and the person for whom the individual works substantially determine the terms on which the individual is engaged to do the work then both are the 'employer' of the worker for the purposes of this subsection.*

79. The Employment Appeal Tribunal set out the questions to be addressed.

- (a) For whom does or did the individual work?
- (b) Is the individual a worker as defined by section 230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on section

43K in relation to that person. However, the fact that the individual is a section 230(3) worker in relation to one person does not prevent the individual from relying on section 43K in relation to another person, the respondent, for whom the individual also works.

- (c) If the individual is not a section 230(3) worker in relation to the respondent from whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?
- (d) If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within section 43K(1)(a).
- (e) If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them? If any of these is satisfied, the individual does fall within the subsection.
- (f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.
- (g) There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.
- (h) In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.
- (i) If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within section 43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under section 43K(2)(a).

### ***Amendment***

80. The Tribunal is required to consider an application to amend a claim in light of its duty under the overriding objective to deal with cases fairly and justly.

81. In determining whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all the relevant factors. In **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** it was held that regard should be had to all the circumstances of the case and that the Tribunal should consider any injustice or hardship which may be caused to any of the parties if the proposed amendment were allowed or refused.

82. The test in **Cocking** was approved in **Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore [1996] IRLR 661** which held that, when faced with an application to amend, a tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the

requirements of 'reason, justice and fairness inherent in all judicial discretions'. In that case, the Employment Appeal Tribunal considered that the relevant circumstances would include the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

83. In **Vaughan v Modality Partnership UKEAT/0147/20** the Employment Appeal Tribunal held that the **Selkent** test should not be treated as a checklist to be ticked off to determine the application, but that regard should be had to the real, practical consequences of refusing or allowing the amendment.

84. In **Chaudhry v Cerberus Security and Monitoring Services Ltd [2022] EAT 172**, the Employment Appeal Tribunal suggested a two-point checklist for a tribunal when considering applications to amend. They are as follows: First, identify the amendment or amendments sought, which should be in writing. Second, balance the injustice and/or hardship of allowing or refusing the amendment or amendments, taking account of all the relevant factors, including those referred to in **Selkent**.

85. It is clear that the list in **Selkent** is not an exhaustive list and that additional considerations, insofar as relevant, may be taken into account.

86. In **MacFarlane v Commissioner of Police of the Metropolis [2023] EAT 111**, the Employment Appeal Tribunal held that, when balancing the hardship to the parties, the judge was entitled to have regard to whether the claim which the claimant was seeking to add had reasonable prospects of success.

87. The Presidential Guidance issued by the President of the Employment Tribunals in England and Wales states that a tribunal needs to draw a distinction between amendments that seek to add or substitute a new claim arising out of the same facts as the original claim; and those that add a new claim entirely unconnected with the original claim.

## Legal Analysis

### **Status**

88. There is no dispute as to the fact that the claimant was an employee of the first respondent. The second respondent has, at an earlier stage in the management of this case accepted that the claimant is a contract worker in respect of it. The Tribunal has not, therefore, been asked to decide this latter issue, but I mention it above and in this analysis so that the entire statutory backdrop can be understood.

89. The claimant's status as a contract worker flows from previous consideration of the issue of a Harrods concession worker by the Court of Appeal in **Harrods v Remick [1997] IRLR 583, CA** where the contractual arrangements between Harrods and its licensees required the licensees to ensure that the department was adequately staffed with suitably qualified employees. The court found that a Harrods licensee whose employees work at

the Harrods department is supplying them under its contract with Harrods. The judgment further clarified that the expression 'any work for a person' goes wider than the work done by an employee for an employer and that in the circumstances in question it amounted to work done in Harrods store for the benefit of Harrods and ultimately under Harrods' control as Harrods may grant, refuse or withdraw store approval for the worker to do the work available. The fact that the applicants also worked for their employer does not prevent the work which they did from being work 'for' Harrods within the meaning of section 7. To that extent, the court decided that the claimant fell within the definition of a contract worker. It is as a result of that decision that the second respondent has determined that the claimant is a contract worker for the purposes of this litigation.

90. In this case, I am required to decide whether the claimant is additionally a limb(b) worker and a worker within the meaning of section 83(2)(a) of the Equality Act 2010 in relation to the second respondent.

91. In order to establish whether the claimant is a limb (b) worker (and, therefore, a section 83(2) worker) it is necessary to establish whether there is a contract between the claimant and the second respondent and whether that contract required personal service by the claimant.

92. The contractual matrix in this case involved a contract of employment between the claimant and the first respondent and a concessionaire agreement between the first respondent and the second respondent. The concessionaire agreement required the first respondent to staff the concession appropriately and did not require personal service from the claimant to the second respondent. In the circumstances, therefore, there was no express contract between the claimant and the second respondent requiring any personal service from the claimant to the second respondent.

93. In the absence of an express contract, it is necessary to examine the conduct between the parties to establish whether there is an implied contract. The existence of a contract requires establishing some terms which both parties perform, an element of consideration and an intention to create legal relations. There must also be a level of certainty about the terms of the contract.

94. The claimant's assertion is that the act of helping out in Harrods store beyond direct work carried out in the first respondent's concession rendered him a limb (b) worker. The claimant says that this work involved operating adjoining tills when staff of the second respondent were not available, carrying bags and parcels for customers of the store, and assisting customers of the store generally in the Bed and Bath section. The claimant also asserts that worker status is additionally demonstrated by the control that the second respondent exercised over him, both in relation to day-to-day matters (the wearing of name badge and attendance at a daily briefing) and disciplinary matters (the store approval process and the fact that he believes that the second respondent's staff initiated sanctions against him). He further references the availability of a store discount and the second respondent's values statement which said 'We are One'.

95. My view is that the circumstances described by the claimant lack sufficient clarity to be capable of forming the basis of an implied contract requiring personal service by the claimant. I have explained the basis of this reasoning below.

96. The tasks in question are not sufficiently clearly defined to the extent that it is possible to ascertain the nature of the obligations on the claimant. The instances of helping out are neither defined nor definable in time or number. In addition, there was no evidence that the second respondent had an awareness of the tasks which were performed, and when and where they were taking place. Further, there is no evidence of any obligation on the claimant to do anything personally. Much is dependent on his availability on the department floor at the time in question. A request to help out in the context of the claimant's workplace is, to my mind, insufficient to create an obligation to provide personal services.

97. Importantly, there is no arrangement in respect of remuneration. There is no direct payment for any services provided by the claimant. Neither am I in a position to find that the store discount was provided in consideration for the provision of any services by the claimant to the second respondent.

98. I have considered the question of mutuality of obligation in these circumstances. Mutuality of obligation exists at a wider contractual level as part of the creation of a contract. The case law also considers circumstances where there was an 'umbrella' agreement containing potential separate obligations of personal service giving rise to the question of whether an individual is obliged to work in periods between assignments.

99. In the current circumstances, my view is that there is no mutuality of obligation at a wider contractual level (i.e. that the second respondent did not contract with the claimant to provide services in exchange for remuneration). Neither is the issue of mutuality of obligation relevant at a narrower level because there is no generic arrangement for the claimant to provide services to the second respondent within which individual acts of service can be identified. It appears that there were occasions when the claimant was asked to help out and he obliged. There are likely to have been other occasions when he was asked to help but was unable to oblige, as a result, for example, of being busy with other tasks. My view is that it would not be right to consider in these circumstances what was done by the claimant as fulfilling the narrower mutuality of obligation test.

100. I have considered the case law relating to volunteers and office holders. In the case of **Singh**, the claimant was a priest who performed a role from which he received donations and accommodation. In **Green**, coast guard volunteers were paid expenses in respect of duties carried out and the case established that the coastguard volunteers were workers when they performed assignments. I do not consider the claimant's circumstances to fall within those considered in this line of cases. This is predominantly because in **Singh** and **Green** there were identifiable duties which the individual was required to carry out and there was remuneration (or some form of material benefit) which flowed from the carrying out of those duties. In the current case, there is no clarity on either the required duties or the remuneration.

101. The claimant has asserted that the second respondent exercised a number of controls over him, by requiring him to wear a name badge, by its store approval process and by asking him to work outside contractual hours (when he was studying for an exam in the store prior to commencement of his shift). The claimant has sought to demonstrate that these controls form part and parcel of a contract to provide services in that they evidence an obligation on the claimant to comply with the directions of the second respondent.

102. My view is that the controls to which the claimant is subject flow, not from any services that he is providing personally to the second respondent, but from the wider circumstances where the claimant is an employee of a concession within a department store. The concessionaire agreement between the first respondent and the second respondent provides, for example, for the second respondent to have a level of control, through the store approval policy, over the persons in its store and to require compliance with dress requirements. The fact that it is possible for the second respondent to require the claimant to leave the store, in circumstances, where as a result the claimant's employment might be terminated does not mean that claimant is providing personal services to the second respondent as a limb (b) worker, but is more analogous to a situation where a third party approval is required to work.

103. The claimant has asserted that being asked by a member of staff of the second respondent to help out in the store outside of the claimant's working hours demonstrated an obligation to provide personal service. He referred in his evidence to one particular occasion in September 2022 when he was studying for an exam outside working hours. The claimant also asserted that he was subsequently penalised for not showing sufficient willingness to assist. I do not consider that this request to help out was sufficient to constitute an obligation to provide personal service. In the circumstances, it is clear that the adverse comments were made in different circumstances six months later when comments on the claimant were requested by the first respondent in connection with a grievance. To that extent, I am not of the view that the staff of the second respondent were taking unilateral action in response to the claimant's perceived unwillingness to assist, but were providing comments in a different context following a request from his employer.

104. The claimant also asserts that the second respondent operated a united front, for example, by emphasising 'we are one' and blurring the boundaries between the concession staff and its own employees. I do not consider that this supports the view that the claimant was a worker for the purposes of the limb (b) test. It is worth noting again the background circumstances in this case. The second respondent's store comprises its own products and concession products. The individuals working in the store comprise concession workers but also the second respondent's own employees who are required to work alongside each other. An emphasis on unity and collaboration among all the individuals in the store is not to my mind sufficient to demonstrate that those individuals are providing personal service to the second respondent itself.

105. I have not considered the final part of the test. It is clear that the claimant is not in business on his own account and that the second respondent is not his client or customer. No evidence has been put forward on these points. In any event, it is not necessary for me to consider it as I have found the requirement to provide personal service to be absent.

106. To my mind, therefore, the circumstances described by the claimant do not operate to create a contract for personal service between the claimant and the second respondent. This is because it is not possible to imply a contractual relationship into the circumstances which existed. The claimant does not therefore fall within the limb (b) definition of worker.

**Status – section 83 of the Equality Act 2010**

107. The test under section 83 of the Equality Act 2010 is the same test as that for a limb (b) worker. To that extent, the claimant does not fall within section 83 of the Equality Act 2010.

**Extended definition of worker**

108. The claimant considered himself to fall within the extended definition on the basis of a perceived unfairness in not being able to bring a whistleblowing claim against the second respondent in his circumstances. Counsel for the second respondent considered, in her skeleton argument, that the provisions of section 43K(1)(a)(i) were met (i.e. that the claimant worked for a person in circumstances in which he is or was introduced or supplied to do that work by a third person) but that the provisions of section 43K(1)(a)(ii) were not met (because the terms of the claimant's employment were determined solely by the first respondent, the second respondent did not have sight of those terms and, a decision to terminate the claimant's employment could only be taken by the first respondent, as employer).

109. The first issue for consideration is whether the claimant works for a person in circumstances in which he was supplied or introduced to do the work by a third person and, if so, by whom.

110. I accept that there is an apparent inconsistency in concluding that the claimant is not a limb (b) worker in respect of the second respondent because he is not providing personal service and at the same time accepting the proposition that the claimant was *working for* the second respondent. The issue is, to my mind, resolved by noting that section 47K(1) is only applicable if the limb (b) worker test is not satisfied, so the reference to 'work for' does not hold the same meaning as 'worker' in the limb (b) definition. Further, the second respondent has accepted that the claimant was a contract worker in its store doing work for the benefit of the second respondent. This is on the basis of **Harrods v Remick** which clarified that, in similar circumstances, the claimants in the case were supplied to and doing work for Harrods. The Court of Appeal stated that the individuals were working 'for Harrods' because it was work done in Harrods store for the benefit of Harrods and ultimately under Harrods' control. I agree with the second respondent that section 47K(1)(a)(i) is satisfied.

111. It is accepted that the terms on which the claimant was engaged to do the work were not determined by the claimant himself. The next question to be determined is whether the terms on which the claimant was engaged to do the work were in practice substantially determined by the person for whom he works or worked, by the third person or by both of them. To my mind, the terms on which the claimant was engaged were substantially determined by both the first and the second respondents.

112. The claimant had an employment contract with the first respondent which set out general provisions including as to salary, holiday, and pension. The claimant's employment contract stated that his employment was conditional on the approval of third parties and provided that if the third party withdrew permission for the claimant to be on its site the first respondent would investigate and consider alternative arrangements. However, if no alternative arrangements could be made or if the complaint from the third party is upheld, the contract provided that the first respondent reserved the right to terminate the claimant's employment.

113. The concessionaire agreement entered into between the first respondent and the second respondent required the first respondent to ensure that the department was adequately staffed with individuals who were suitably qualified. It also required the first respondent to ensure that its staff were legally entitled to work in the UK and to supply their details on request. The concessionaire agreement stated that the first respondent's staff were subject to the second respondent's store approval policy. It also provided that they attend induction training and such additional training as the second respondent might require at the second respondent's cost. Further, the agreement required the first respondent to ensure compliance with the manuals and all applicable policies, procedures, other rules of Harrods and statutory requirement in effect from time to time to maintain the standard expected of all Harrods workers. Finally, the provisions on conduct allowed the second respondent to bring the conduct of a concession employee to the attention of the first respondent and request that the first respondent initiate its dispute resolution procedure in respect of that employee. The first respondent agreed to seek to agree the position with the second respondent before delivering its decision to the concession employee. Finally, the agreement allowed the second respondent to object to the presence of any concession employee in the store and to ask that person to stay away from the store.

114. The Store Approval Policy anticipated that disciplinary and grievance procedures would be dealt with by the first respondent, but reserved a right to the second respondent to remove store access from a concession employee where there were serious issues of conduct.

115. My view is that the terms on which the claimant was engaged were not determined by the first respondent alone. The fact that terms relating to third party approvals were included in the claimant's contract of employment is not in itself sufficient to demonstrate that those terms were determined by the first respondent alone. Neither is the fact that the first respondent terminated the claimant's employment. In the circumstances, there are significant aspects of the terms on which the claimant was engaged which flowed



from the requirements of the second respondent as set out in the concessionaire agreement and the Store Approval Policy. An individual's employment with a concession is conditional on the second respondent's consent to the extent that an employee who was previously excluded from the store in his capacity as a customer or an employee of another concession would not satisfy the store approval process. The second respondent also has discretion under the concessionaire agreement to remove store access for concession employees. While I accept that this is not in practice exercised lightly, it could operate to terminate an individual's employment were it not possible to redeploy that individual to another site.

116. I accept that disciplinary and grievance matters are dealt with in the claimant's employment contract with the first respondent. That said, the evidence has shown a role for the second respondent in that process, with the concessionaire agreement anticipating that the first respondent will 'seek to agree' the position around concession staff with the second respondent in the context of disciplinary and grievance procedures. No evidence was provided around these words, but on their ordinary meaning they would appear to permit a level of involvement by the second respondent beyond mere notification. The Store Approval Policy refers to 'consultation' between the first and second respondents. While the evidence indicated that this was cooperative rather than controlling on the part of the second respondent, there was certainly a role for the second respondent in that process. In addition, the evidence from Nicola Blake was that, in rare circumstances, the second respondent had exercised a unilateral right to remove a concession employee from the store.

117. The second respondent has also imposed certain requirements in respect of training, dress and name badges, as well as a requirement to attend staff briefings.

118. To my mind, therefore, the terms on which the claimant was engaged were not determined by the first respondent alone. This is demonstrated in the contractual paperwork but also reflects the nature of the second respondent's business and the fact that the claimant was working on the second respondent's premises. The terms of the claimant's employment would have been different had he worked for the first respondent in a store controlled entirely by the first respondent. In practice, therefore, the terms of the claimant's engagement were substantially determined by the first and second respondents meaning that the claimant was a worker for the purposes of section 43K(1)(a).

119. Applying the reasoning in **McTigue**, there are two persons who substantially determined the terms on which the claimant was engaged. As both persons substantially determined the terms on which the claimant was engaged, then both are the 'employer' of the claimant for the purposes of section 43K(1)(a). To that extent, the claimant falls within section 43K(1)(a) in respect of the second respondent.

### ***Amendment Applications***

120. The claimant's Form ET1 (presented on 21 September 2023) was accompanied by a lengthy Schedule of Claims and Protected Acts listing his claims by nature of the claim, a description and date. The document did not, therefore, take the form of a chronological narrative but listed his complaints by way of allegations set out in tabular format. The Schedule of Claims and Protected Acts runs to approximately sixteen pages. Following the preliminary hearing before EJ Sutton KC on 22 January 2024 the Claimant submitted a 'Summary of Unlawful Contraventions' and 'Incidents of Unfavourable/Detrimental/Unlawful Treatment'.

121. More than a year has passed since the claim was presented, there have been two preliminary hearings for case management and a List of Issues has not been agreed. It is, to my mind, crucial that the claimant's claims are clarified as soon as possible.

122. The case has been described in previous case management orders and by the respondents' representatives as being complex and intricate. To my mind, the case has also been rendered complex because of the fact that there is, as yet, no List of Issues, which makes it difficult to progress to a disclosure exercise and consequently a final hearing

123. The amendment applications were all submitted separately, with the first application having been submitted on 26 February 2024, the second application on 8 April 2024, the third application on 29 April 2024, and the fourth application on 10 July 2024. Broadly speaking, the amendment applications were lengthy and were not in a form whereby they were cross-referenced to the Schedule of Claims and Protected Acts or could be easily inserted or integrated into it. I accept that the claimant, as a litigant in person, may not have been able to submit all his amendments at the same time. That said, the piecemeal nature of the applications and the length of each application does make them more cumbersome to deal with in the context of the litigation as a whole. I am aware, therefore, that the need to filter the additional information contained in the amendment applications could well give rise to further delay and complexity.

124. In making a decision on all of the amendment applications, it is important to emphasise that I have taken account of the fact that the current claims run to many pages, that limited progress has been made in clarifying the existing claims, and that judicial commentary at the previous case management hearings has urged the parties to clarify the claims including so as to avoid the case 'descending into a mess'.

### ***First amendment application***

125. The claimant wishes to add new causes of action, being harassment and discrimination in respect of a perceived disability against both the first and second respondents.

126. The claimant's application was made on 26 February 2023. The application was based on comments in a document provided to the claimant on 4 January 2023 which set out feedback from colleagues about the claimant. At one point in the document, it was stated by a colleague that the claimant had 'serious mental issues' and it mentioned other

staff feeling as though they had been patronised by the claimant. The claimant's view was that the comment took account of the views of other colleagues thereby representing a shared perception that the claimant had a serious mental impairment.

127. There are both time limit issues and delay in connection with the application. The claimant accepted that he was provided with the comments on 4 January 2023 and that he had them for over a year before making an application to amend. He also accepted that he gave information about the issue of perceived disability in a discrimination pre action questionnaire dated 16 August 2023 and that he sent himself a reminder note about disability discrimination based on perceived disability in an email dated 28 October 2023. His evidence was that he did not raise the issue of perceived disability at the first preliminary hearing on 22 January 2024 as he was not aware of his rights to present in that forum and that he did not say everything that he wanted to say. At the hearing, the claimant also acknowledged that the person who had made the comments was an employee of the first respondent and that the amendment may, therefore, relate only to the first respondent.

128. The nature of amendment is to add a new cause of action. The claimant's existing discrimination claims encompass sex and sexual orientation discrimination claims, but this is the only reference to disability. The claimant's application to amend is based on the words in the document dated 4 January 2023 and he has not identified other treatment which falls within this cause of action. There is a lack of clarity as to whether the new claim is being made against the first respondent and the second respondent, or just the first respondent and whether, if made against the first respondent, it will, in time, require a further amendment to add the second respondent.

129. I have considered the hardship to the parties which would flow from allowing or refusing the amendment. Were the amendment to be allowed, it would put the first respondent to additional work in seeking evidence from employees and seeking to establish whether other employees' views are shared by the claimant's colleague in circumstances where there is a lack of clarity as to the role they played and considerable time has passed since the original comment was made. This process could involve a further application to amend to add the second respondent as a party to the claim, on the basis that staff of the second respondent were also implicated. I say all this is against the backdrop that the claimant knew about the issue well before he brought his original claim, but did not include it in his original claim. While I accept that the claimant may have felt nervous and unsure as a litigant in person, he has been able to produce large amounts of detailed information about his claim throughout these proceedings.

130. I have considered the hardship to the claimant of not being allowed to pursue the amendment. The application to amend is based on one comment in a document, which may not be capable of further substantiation, and to that extent there is no guarantee that this evidence would enable the claimant to satisfy the burden of proof in respect of a new cause of action. I am not, therefore, convinced that the claimant will suffer hardship as a result of not being able to bring it and I am of the view that, in light of my comments above,

any hardship to the respondents would be greater. On balance, therefore, I am of the view that it is not in the interests of justice to allow the amendment.

***Second amendment application***

131. This application was made on 8 April 2024 in a lengthy document and relates to both the first and second respondents.

132. The claimant's existing whistleblowing claim flows from a grievance made on 18 January 2023 where he identified various health and safety issues and breaches of legal obligations. My understanding is that claimant wished to add to this whistleblowing claim allegations of time theft (being lateness which the claimant considered to be fraudulent) against a member of staff of the first respondent with the time theft amounting a protected disclosure.

133. The claimant accepted that he submitted the original grievance on 18 January 2023 and that it referenced the issue of time theft. The respondents argued that, at the time of presenting his claim, the claimant was likely to have known the complaints against management and that he could have raised the issues in respect of time theft at that stage. I agree with this and am of the view that this matter could have been included when the claimant presented his claim. There are, therefore, issues of delay relating to this amendment.

134. Further, I am not satisfied that the issue of time theft properly amounts to a protected disclosure and, if so, whether the disclosure would be deemed to be in the public interest.

135. Were the amendment to be allowed, it would put both parties to work in identifying whether the issue of time theft constitutes a protected disclosure, whether it satisfies the public interest and falls within the other criteria stipulated in the legislation. This would amount to additional work where there is no guarantee that the issue in question amounts to a protected disclosure. This additional work would also be required at a time when the key aspects of the claim have not yet been clarified in the form of a List of Issues.

136. Taking into account all of the above factors, I consider the balance of hardship to the respondents (in seeking to establish the nature of the claim) to outweigh the hardship to the claimant (of not being able to bring a claim which may not fulfil the statutory criteria for a claim of its nature). I do not, therefore, consider it to be in the interests of justice to allow the amendment.

***Third amendment application***

137. This application was made on 29 April 2024 and relates to both the first and second respondents. The claimant asserted that employees of the first and second respondents had conspired to effect his unfair dismissal and had harassed him. Examples included conducting sham investigations, delaying the provision of grievance outcomes, and sharing malicious complaints. The amendment application spanned nine pages and it is

difficult to establish whether the content amounted to evidence in the claimant's other claims or whether he was seeking to bring a new claim of conspiracy.

138. I am refusing the amendment because there is considerable lack of clarity as to how the amendment intersects with the claimant's existing claims and whether the amendments concern a new cause of action or are simply additional information about existing causes of action. Were the amendment to be allowed, this lack of clarity is likely to give rise to delay and confusion in the future disposal of the proceedings.

139. Conspiracy is not a cause of action over which the Tribunal has jurisdiction. Further, the claimant accepted that he does not have an ordinary unfair dismissal claim (not having two years' service) against the first respondent. The issues complained of by the claimant may be relevant evidentially to the fairness of any dismissal were he to have had an ordinary unfair dismissal. I cannot immediately see that they are relevant to his automatic unfair dismissal claims.

#### ***Fourth amendment application***

140. This application was made on 10 July 2024 and relates to both the first and second respondents.

141. The claimant stated that the amendment sought to add additional context to support a whistleblowing disclosure and raised the issue of spoliation of CCTV evidence following allegations against the claimant. The claimant also cited conspiracy by the respondents aimed at exacting vengeance on the claimant. Most importantly the amendment sought to add nine new individual respondents (being employees of the first and second respondents) to the litigation.

142. The claimant has cited conspiracy as a cause of action and this falls outside the Tribunal's jurisdiction. The claimant also asserts spoliation of CCTV footage but it was not clear to which claim this was applicable. The claimant has sought to add nine new individual respondents to the claim. These individuals are referred to in the claimant's Particulars of Claims and Protected Acts and to that extent it is clear that the claimant would have known at the time of bringing his claim that he had complaints against those nine individuals. It was not clear from the claimant's application which claims were being brought against the nine individuals and, therefore, from the perspective of those individuals, it is not clear as to the claims they need to answer.

143. Were I to allow this application it would cause considerable hardship to the respondents and the nine individuals because a detailed exercise would need to be undertaken to establish what exactly was being alleged against each new respondent. This could result in further amendment applications and is likely to lengthen the time to a final hearing. The hardship to the claimant in these circumstances is far less as the respondents are vicariously liable for the acts of their employees. Given the limited progress which has been made in this case to date, I do not consider it to be in the interests of justice to add additional respondents in these circumstances.

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Employment Judge Coen

Dated: 16 November 2024

Judgment and Reasons sent to the parties on:

22 November 2024

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For the Tribunal Office: