

The reach of whistleblowing protection and definition of ‘worker’

By [Joseph England](#), Barrister

Introduction

In *Day*, the CoA held that a junior doctor can rely on ‘whistleblowing’ protection against Health Education England despite a separate employment relationship with an NHS Trust, bolstering protection for 54,000 junior doctors and agency workers nationwide.

Worker status

Dr Day had entered into a training contract with, effectively, HEE. This was not a contract of employment. As part of his training, he entered into an additional contract of employment with a Trust. He claimed that after raising protected disclosures (PIDs), he was subject to detriments by HEE because of those PIDs. The issue was whether Dr Day was a worker of HEE such that he was entitled to bring a claim against them.

He was not an ‘ordinary’ worker of HEE under s.230 ERA 1996 and therefore sought to rely upon the “extension of meaning of worker” at s.43K ERA, which:

‘includes an individual who is not a worker as defined by section 230(3) but who—
(a) works or worked for a person in circumstances in which—
(i) he is or was introduced or supplied to do that work by a third person, and
(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them...’

As the CoA noted, ‘the principal set of relationships caught by this definition is agency relationships, but the section is not limited to them’ (para. 10). The CoA considered the definition of worker under s.43K in respect of two questions:

- s.43K ‘includes an individual who is not a worker as defined by section 230(3)’. Did the fact Dr Day was a s.230(3) worker of the Trust prevent him from being a s.43K worker of HEE?
- If Dr Day could be a s.43K worker, were his terms ‘substantially determined’ by HEE?

s.230 worker status vs s.43K worker status

The CoA disagreed with the position of Langstaff J at the EAT and held that Dr Day's s.230 relationship with the Trust did not prevent him from relying upon s.43K in respect of his relationship with HEE. Contrary to appellate guidance that often finds, 'the statute says what it says it says', the CoA instead held of s.43K, 'there must be some limitation on the words of the section. They cannot be read literally' (para.16). When provided with potential words to insert by Counsel, the CoA preferred the words suggested by Dr Day's Counsel that s.43K applies to, 'an individual who *as against a given respondent* is not a worker as defined by section 230(3)'. This would allow the individual to rely upon the protection of s.43K against the end-user or introducer in an agency relationship even if there was a s.230 relationship with one of them.

Explaining his reasoning, Elias LJ firstly highlighted, 'the whistleblowing legislation should be given a purposive construction' (para.18). Demonstrating the subjectivity of a purposive construction, Langstaff J had likewise accepted that a purposive construction was needed but arrived at a different answer. The need for a purposive construction is clearly relevant to PID cases beyond the narrow focus of this case on worker status and this follows a number of cases that have emphasised the same point (see *Croke*, *Elstone* and *Woodward*). As with earlier cases though, Elias J was careful to emphasise the limitations of a purposive construction and that, 'a court cannot simply ignore the language of the statute to achieve what it conceives to be a desirable policy objective' (para. 18).

Elias LJ's second reason was that a whistleblower needs protection from both the introducer (HEE) and the end-user (the Trust) and was 'reinforced' (para. 22) in his conclusions by the EAT's judgment in a case in which I recently appeared: *McTigue*. Heard shortly after *Day* but by the new EAT President, *McTigue* involved the opposite situation to *Day*, in which the Claimant nurse was seeking to come within s.43K for a claim against the end-user rather than the introducer, a situation that "exemplifies" the need for an agency worker to have such potential protection, as Simler J observed.

Thirdly, Elias LJ highlighted that s.43K(1)(a)(ii) allows a worker to be employed by both end-user and introducer, so to say that a worker employed by one of them under a s.230 relationship could not be employed by the other because of that relationship would cause a contradiction. It would place someone who was not a s.230 worker in a better position to rely upon s.43K than someone who was a s.230 worker, which cannot a correct interpretation of a section expressly stated to provide an 'extended' definition of worker.

Substantially determined

In assessing the second question for the appeal, the CoA accepted that the ET had erred in applying a comparative test between HEE and the Trust as to which played ‘the greater role’ (para.24) in substantially determining the terms of Dr’s engagement, overlooking the possibility for both to substantially determine. A similar issue arose in *McTigue* in which the ET had erred in comparing who determined ‘the majority of the terms or the more significant ones’ (para. 17), whereas, ‘a comparison between the supplier and end-user is not invited by the provision’ (para. 20).

A further issue that arose in submissions in *Day* (para. 29) was the extent to which the terms of engagement must be contractual terms, ignoring ‘other matters which might affect the way in which the work is carried out but are not contractual in nature’. This arose from the earlier CoA decision in *Sharpe* that held there must be ‘at least a contract of some sort with the putative employer’ for s.43K to apply. Elias LJ did not accept that this meant that the terms in s.43K must all be contractual, ‘although no doubt the terms will be overwhelmingly contractual’. He continued by directing that tribunals should not focus on ‘fine arguments’ of whether a term is contractual or not but when assessing who substantially determines the terms of engagement, ‘focus on what happens in practice... 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’.

Protection extended

In *Day*, the Court of Appeal has reinforced why s.43K is headed ‘extension of meaning of worker’ and follows a line of cases that have provided rather than restricted protection for PID claims. The principles highlight the need to prevent victimisation on both sides of an agency agreement.

The shift away from contractual terms supports the protection of agency workers, for whom the introducer may well determine most if not all of their contractual terms. The focus on an assessment of the practical reality also follows the emphasis of cases in other contexts, such as *Autoclenz* and the SC’s guidance on determining employment status based on reality and not simply a written contract. Further, the focus on how the performance of work is determined rather than on the terms themselves also supports the language of the statute itself. As I submitted in *McTigue*, ‘s.43K(1)(a)(ii) concerns whether a party “substantially determined” terms, not whether there was determination of “substantial terms”’.

For Dr Day, the question of whether his terms of engagement were substantially determined by HEE was remitted to a fresh ET.

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Key

Day v Health Education England & Ors. [2017] EWCA Civ 329

Croke v Hydro Aluminium Worcester Limited [2007] ICR 1303

BP PLC v Elstone [2010] IRLR 558

Woodward v Abbey National plc [2006] ICR 1436

McTigue v University Hospital Bristol NHS Trust [2016] ICR 1156

Sharpe v Bishop of Worcester [2015] ICR 1421

Autoclenz v Belcher & Ors. [2011] UKSC 41