Neutral Citation Number: [2025] EAT 18

Case No: EA-2022-001411-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 February 2025

Before :

THE HON. LORD FAIRLEY (PRESIDENT)

- -

Between :

W **Appellant**

- and -

1) HIGHWAYS ENGLAND

2) FAY JUDGE

3) JASON BEDFORD

4) KPMG

5) VANESSA HOWLISON

6) TRACEY GATES

7) TONY MALONE and

8) NICK MERRY

Respondents

- -
- -

W, the **Appellant**, in person
Mr Julian Allsop, of Counsel (instructed by Government Legal Department) for the **1st – 3rd and & 5th – 8th Respondents**
Mr Grahame Anderson, of Counsel (instructed by KPMG LLP) for the **4th Respondent**

Hearing dates: 4 and 5 February 2025

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JUDGMENT

SUMMARY

Whistleblowing and protected disclosures; sex discrimination; victimisation.

The appellant was employed by the first respondent, Highways England, from March 2018. In early 2019, Highways England entered into a contract for management consultancy services with the fourth respondent, KPMG. It was intended that the appellant would form part of a team of Highways England employees who would engage with KPMG in its performance of that contract.

The appellant subsequently presented claim forms to the employment tribunal in which she made complaints against KPMG of being subjected to detriments on the ground of having made protected disclosures (section 47B of the **Employment Rights Act, 1996** ("ERA"); direct sex discrimination (section 13 of the **Equality Act, 2010** ("EqA"); and victimisation (section 26 EqA). KPMG resisted all three claims on the basis that it had never been the appellant's employer. It requested a preliminary determination of that issue and also applied for the claims against it to be struck out on the basis they had no reasonable prospect of success. In the alternative, it sought a deposit order. The appellant accepted that she had no express contract with KPMG, but submitted that she had an implied contract either of employment or as a worker. In relation to her whistleblowing claim she submitted that, in any event, KPMG was her employer under the extended definitions of "worker" and "employer" in section 43K ERA. Alternatively, she submitted that, in its dealings with her, KPMG and / or KPMG's employees acted as agents of Highways England such that KPMG was liable under section 47B(1A)(b) ERA and sections 109 and 110 EqA. Finally, she submitted that KPMG had instructed caused, induced or aided Highways England to commit basic contraventions against her such as to engage sections 111 and 112 EqA.

A preliminary hearing was fixed to determine the substantive issue of whether or not the appellant had an implied contract with KPMG and to consider the applications for strike-out / deposit order. Having heard evidence on the substantive issue, the tribunal concluded that the appellant had failed to establish the existence of any implied contract between her and KPMG. It struck out her complaints against KPMG under section 47B ERA and 13, 26 and 112 EqA on the basis that they had no reasonable prospect of success. The tribunal's reasons referred to the section 111 complaint, but no reference was made in its judgment to the complaint under that section.

Held: The employment tribunal was correct to conclude that the appellant had failed to establish any implied contract between her and KPMG. It had erred, however, in striking out her compliants under section 47B ERA and sections 13 and 26 and 112 EqA. KPMG could potentially be liable under those sections without having any direct contractual relationship with the appellant. Potential grounds for such liability included the argument that KPMG was acting at the material time as an agent of Highways England and, in respect of the section 47B ERA complaint, that KPMG fell within the extended definition of "employer" in section 43K ERA. The section 112 complaint might also be established on the basis that KPMG had "knowingly helped" Highways England to commit a basic contravention against the appellant. All of these issues were fact sensitive and could not properly be determined in the context of an application for strike-out. The employment tribunal should, however, have struck out the complaint under section 111 EqA having regard to the terms of section 111(7) EqA.

The judgment of the employment tribunal was, therefore, set aside. A determination in fact and law was substituted that there was no implied contract between the appellant and KPMG at any time to which the appellant's claims against KPMG relate. The complaint against KPMG under section 111 EqA was struck out, and the case was thereafter remitted to the employment tribunal.

THE HON. LORD FAIRLEY (PRESIDENT)

Introduction

1. This is an appeal against a judgment dated 15 November 2022 of an employment tribunal sitting at Birmingham (EJ Wedderspoon). The judgment was issued after a three day preliminary hearing between 31 August and 2 September 2022.

2. The claims have a protracted procedural history. The appellant plainly feels very strongly about the merits of her complaints. Identifying with any clarity the factual and legal grounds for those complaints has, however, proved to be difficult. Prior to the hearing which resulted in the judgment now under appeal, the employment tribunal made extensive efforts to do so between 2019 and 2021. The normal principles of written pleading were largely abandoned. Instead, the complaints were particularised in notes produced by judges after lengthy in-person case management hearings. One of these – in November 2020 before EJ Camp – took 2 days. Another – in November 2021 before EJ Flood – took 3 days. The latter resulted in a substantial hearing note and a case management order dated 17 December 2021 which contained, amongst other matters, a list of the issues for the preliminary hearing which has led to this appeal .

3. The appellant's proposed grounds of appeal as presented to the EAT extended to 69 pages, comprising 129 numbered paragraphs, appendices of evidence and hyperlinks to authorities. Understandably, having regard to the terms of the EAT Practice Direction, these were not permitted to proceed to a full hearing. Instead, a preliminary hearing was held on 29 February 2023 at which HHJ Shanks heard from the appellant in person. At that hearing, the grounds of appeal were substantially amended and were limited to six numbered paragraphs. These were then recorded by HHJ Shanks in an Order dated 29 February 2023 and permitted to proceed to a full hearing.

4. The full hearing of the appeal eventually took place before me over two days on 4 and 5 February 2025. The appellant represented herself. The respondents were represented by counsel. At the start of the appeal, I reminded the appellant that the scope of the appeal was limited to the six grounds which had been allowed to proceed at sift. As the appeal progressed, however, it became clear that the appellant's understanding of her grounds

was, in some respects, different to mine. That being so, I considered all points that the appellant sought to advance and applied a broad interpretation to the permitted grounds of appeal.

Overview of facts and summary of claims

5. The appellant commenced employment with Highways England in March 2018 in the role of Solution Architect (ET § 24). In early 2019, Highways England engaged the fourth respondent, KPMG, as a contractor to provide management consultancy services (ET § 24). KPMG's role under its contract with Highways England included the provision of advice on how processes might be improved and a review of a system known as Oracle Fusion on which the appellant worked (ET § 24-26). It was intended that the appellant would form part of a team of Highways England employees who would engage with KPMG to understand what worked best for Highways England and how efficiencies might be achieved (ET § 27).

6. The appellant became very unhappy in her dealings and interactions with certain of KPMG's staff. She believes that because she is a woman, and because she had made certain public interest disclosures and complained about discrimination, she was demoted and ultimately forced out of her job. In July and September 2019, she presented ET1 claim forms to the employment tribunal directed against Highways England, various individuals employed by Highways England and KPMG. This appeal concerns only the appellant's cases against KPMG. Those were complaints of:

    (a) being subjected to detriments on the ground of having made protected disclosures (section 47B of the **Employment Rights Act, 1996** ("ERA");

    (b) direct sex discrimination (section 13 of the **Equality Act, 2010** ("EqA"); and

    (c) victimisation (section 26 EqA)

7. KPMG resisted all three claims on the basis that it was not, and had never been, the appellant's employer. It requested a preliminary determination of that issue. It also applied for the claims against it to be struck out on the basis they had no reasonable prospect of success. In the alternative, it sought a deposit order.

8. The appellant accepted that she had no express contract with KPMG. She submitted, however, that she had an implied contract either of employment or as a worker. In relation to her whistleblowing claim she submitted that, in any event, KPMG was her employer when the extended definitions of "worker" and "employer" in section 43K ERA were applied. Alternatively, she submitted that KPMG and / or its employees were acting as agents of Highways England in their dealings with her such that KPMG was liable under section 47B(1A)(b) ERA and sections 109 and 110 EqA. Finally, she submitted that KPMG had instructed, caused, induced or aided Highways England to commit basic contraventions against her so as to engage sections 111 and 112 EqA.

Issues for the preliminary hearing

9. Following the case management hearing in November 2021, EJ Flood issued a case management order dated 17 December 2021. In terms of that order, the issues to be determined at the preliminary hearing were defined as follows:

> "**Substantive Preliminary Issue**
>
> 1. Was there an implied contract of any form between the claimant and KPMG?
>
> **Consideration of making a strike out / deposit order**
>
> 2. Should all or part of the claim against KPMG be struck out under rule 37 (or an allegation or argument be made subject to one or more deposit orders under rule 39 and if so for how much) because the following arguments of the claimant have little or no prospect of success:
>
> 2.1 If there was an implied contract, the claimant fell within the extended definition of worker set out in section 43K of the ERA;
> 2.2 Alternatively, if there was an implied contract she fell within the conventional definition of worker set out in ERA section 230(3);
> 2.3 If there was an implied contract, the claimant was in KPMG's "employment" within the definition set out in section 83(2) of the EqA;
> 2.4 If there was no implied contract the claimant was nevertheless KPMG's worker / in KPMG's employment under any other provision of the ERA / EqA;
> 2.5 KPMG is liable for its employees' acts of discrimination / victimisation in respect of the claimant under section 109 EqA (the claimant relies on the decision of the Employment Appeal Tribunal in **London**

Borough of Hackney v. Sivanandan & others UKEAT 0622 03 1811, in particular comments at paragraph 21);

2.6 KPMG is liable for acts of discrimination / victimisation in respect of the claimant under section 110(1) EqA;

2.7 KPMG is liable for acts of detriment in respect of claimant under section 47B(1A)(a) ERA;

2.8 KPMG is liable for acts of detriment in respect of the claimant under section 47B(1A)(b) ERA;

2.9 KPMG is liable for instructing causing or inducing acts of discrimination / victimisation in respect of the claimant under section 111(1) – (3) EqA;

2.10 KPMG is liable for knowingly helping acts of discrimination / victimisation in respect of the claimant under section 112(1) EqA;

10. Throughout the case management of her complaints, the appellant has repeatedly complained about the issue of disclosure. That issue was raised again at the case management hearing before EJ Flood who, in the case management note from the November 2021 hearing, stated:

> **"Whilst an order for disclosure has already been made in November 2020 requiring the respondent to disclose 'all documents relevant to the preliminary issues' it must be remembered that the preliminary issues are (other than the question of whether there is an implied contract between KPMG and the claimant) questions of whether the claim or part of it or any allegation or argument has no or little reasonable prospects of success. To decide this question a Tribunal must make a summary assessment of the available material and is not required to hold a mini trial of the issues. It would not be usual for evidence to be considered at this summary assessment stage. There is clearly going to be some crossover in this particular matter, as the preliminary hearing will also determine a substantive point, namely whether there was an implied contract between KPMG and the claimant. This may well touch on some of the arguments on agency and other matters. For that reason I consider that a further order for specific disclosure on the agency issue should be made as set out below."**

11. The disclosure order of 17 December 2021 stated:

> **"By 11 February 2022 the respondent must send the claimant copies of all documents relevant to the issue identified at paragraphs 2.6 and 2.8 of the list of issues namely whether KPMG was acting as an agent of highways England with the authority of highways England."**

12. Various other case management orders were also made in relation to preparations for the preliminary hearing.

13. On 7 July 2022, the solicitor for KPMG wrote to the appellant to summarise the disclosure to her by that date. This was said to include:

    a) all emails sent and received between the appellant and any KPMG e-mail address over the period January to September 2019;
    b) other emails directly referencing the appellant's role and the extent of her involvement with KPMG;
    c) relevant emails covering the period October 2018 to December 2019 between KPMG's e-mail address and any e-mail addresses of individuals identified by the appellant as relevant and which included reference to the appellant's forename and / or surname; and
    d) emails sent by the appellant to KPMG for inclusion in the bundles for previous preliminary hearings in the case.

14. With reference to the further disclosure order made on 17 December 2021, KPMG recorded that it had reviewed every e-mail between a KPMG e-mail address and Highways England e-mail addresses from November 2018 to the beginning of April 2019 and had disclosed to the appellant all documents falling within the terms of the order together with a list of them. This was described by KPMG's in-house solicitor as "a vast exercise".

15. A bundle of documents was produced for the preliminary hearing which extended to more than 4000 pages.

The preliminary hearing

16. On the substantive issue of whether or not there was an implied contract of any kind between the appellant and KPMG, the tribunal heard evidence from the appellant and from witnesses led by KPMG. All of that evidence was tested by cross examination.

17. The tribunal made findings of fact that the appellant had a contract of employment with Highways England from whom she received her wages (ET § 56). She did not receive any wages from KPMG (ET § 56). KPMG had a contract with Highways England to provide consultancy services (ET § 25). In that capacity, KPMG had access to employees of Highways England and could make requests for assistance to such employees, but had no authority to issue instructions to employees of Highways England, or require them to

carry out any work (ET § 69). KPMG also had no authority to reprimand or discipline employees of Highways England (ET § 69). At all material times the appellant was under the direction of Highways England. When she attended meetings with KPMG, that was only to assist KPMG in fulfilling its contract with Highways England, and KPMG had no right to insist upon her attendance (ET § 70). In the time that KPMG was contractually involved with Highways England, the appellant had two meetings with KPMG (ET § 52). The appellant was unable to identify in her evidence any specific work she carried out for KPMG (ET § 52) or any terms and conditions of the implied contract the existence of which she claimed (ET § 56).

18. The tribunal expressly rejected evidence from the appellant about inferences she claimed could be drawn from various items of e mail correspondence about KPMG's role in its dealings with her. These included suggestions that she "got grief" from KPMG when she did not attend meetings; that KPMG was "in the driving seat" over who was invited to meetings; and that she was "demoted" by KPMG (ET § 39 and 45). Rather, the tribunal found that the correspondence to which it was referred showed that Highways England and KPMG were separate entities who worked together, with KPMG having a specific advisory role to perform pursuant to the contract between them.

19. The tribunal directed itself, in accordance with **Baird Textiles Holdings Limited v. Marks and Spencer plc** (2001) EWCA Civ 274, that a contract will only be implied from the conduct of the parties if it is necessary to do so, and only then where there was also an intention to create legal relations, and where the essentials of the contract were sufficiently certain.

20. On the issue of necessity, it found that the appellant had not shown any need to imply a contract between her and KPMG. She was employed and paid directly by Highways England for all work she did. KPMG had a parallel contract with Highways England to provide consultancy advice. In her role with Highways England, and by reason of her expertise, the appellant assisted KPMG to a limited extent by providing information about Highways England processes. In that context, her involvement with KPMG was explained by the fact that she was an employee of Highways England. For that reason alone, her submission that there was an implied contract with KPMG was not established on the facts (ET § 71).

21. The tribunal also found, however, that there was no intention to create legal relations between the appellant and KPMG (ET § 71). This could be seen *inter alia* from evidence which the tribunal accepted as credible and reliable that the appellant decided when she would (and when she would not) speak to KPMG and from a statement by the appellant in correspondence dated 29 March 2019 which suggested that she regarded KPMG as "an external team" (ET § 70). On the issue of certainty of terms, the tribunal noted that when asked, the appellant was unable to identify or provide any evidence of the terms and conditions of any contract she said existed between her and KPMG (ET § 56 and 74).

22. The tribunal accordingly concluded that there was no implied contract of any kind between the appellant and KPMG.

The strike out application

23. Turning to the application for strike out, the tribunal noted that this was made in terms of rule 37 of the Employment Tribunal Rules of 2013 under the specific ground of "no reasonable prospects of success". That test required to be considered in light of the guidance given in **Mechkarov v. Citibank NA** [2016] ICR 1121 that (a) only in the clearest case should a discrimination or whistleblowing claim be struck out; (b) the claimant's case must ordinarily be taken at its highest; (c) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; (d) where there are core issues of fact that turn, to any extent, on oral evidence, they should not be decided without hearing oral evidence; and (e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts.

24. The tribunal concluded that, in the absence of any contract between the appellant and KPMG, there was no reasonable prospect of her establishing that she was a "worker" who should be treated as an employee of KPMG under the extended definitions of "worker" and "employer" in section 43K(1) and (2) ERA. It reached that conclusion on the basis of **Sharpe v. Bishop of Worcester** [2015] ICR 1241. In **Sharpe**, an ordained minister of the church failed in his whistleblowing complaint because he had no contract,

express or implied, with either of the respondents against whom the complaint was directed. In the Court of Appeal, Arden LJ observed (at para 115) that "[i]t must inevitably follow from the statutory reference to 'term on which he is or was engaged to do work' that there must be a contract."

25. On the issue of agency, the tribunal noted that the terms "agency" and "agent" in the ERA and EqA bore their normal meanings. It noted that agency is a fiduciary relationship which exists between two persons, one of whom expressly or impliedly gives permission to the other to act on his behalf and to affect his legal relations with third parties. It is not appropriate to describe someone employed by a contractor as an agent simply because they performed work for the benefit of a third-party employer (**Kemeh v. Ministry of Defence** [2014] IRLR 377 per Elias LJ). Accordingly, the mere fact that KPMG was employed as a contractor by Highways England did not of itself give rise to any reasonable prospect of showing that KPMG (or any of KPMG's employees) was, as a result, an agent of Highways England. The contract between Highways England and KPMG made clear that KPMG was merely providing a consultancy service, and clause 50.1 of that contract stated that nothing in its terms should be taken as creating the relationship of principal and agent between the parties, or as authorising either party to make representations or enter into any commitments for or on behalf of the other.

26. In these circumstances, the tribunal considered that there was no reasonable prospect of the appellant establishing liability against KPMG on the basis that it or any of its employees was an agent of Highways England either under section 47B(1A)(b) of the ERA in relation to the whistleblowing complaint or under sections 109 and 110 EqA in relation to the EqA complaints.

27. Finally, the tribunal concluded that there was no reasonable prospect of the appellant establishing liability under sections 111 or 112 of the EqA. The tribunal noted in relation to section 111(7) EqA, that liability of KPMG could only ever arise if it was in a position to commit a basic infringement against Highways England, which was impossible as Highways England was not a natural person. In any event, and taking the appellant's case at its highest, the appellant did not identify what KPMG had done to assist Highways England to discriminate, and had not established such assistance on the evidence.

28. On the basis of these cumulative conclusions, the tribunal dismissed KPMG as a party from the proceedings.

The grounds of appeal

29. Six grounds of appeal were allowed to proceed to this full appeal hearing. HHJ Shanks noted that these encapsulated the appellant's only grounds of appeal and that she did not want to pursue any other grounds. Given the way that matters developed at the hearing before me, however, it is appropriate that I set out in full the grounds for which permission was given. They were:

> (1) In deciding that there was no implied contract between the claimant and KPMG for the purposes of section 83 EqA 2010 or section 230 ERA 1996 (or that there was no reasonable prospect of her establishing one: it is not clear which test the EJ applied) the EJ failed to take into account relevant facts and evidence and / or reached a perverse conclusion; in particular, there was no proper consideration of the impact on the issue of interactions between KPMG and the claimant, in particular KPMG's role in her demotion / removal / dismissal, and there had been no proper disclosure of documents relating thereto.
>
> (2) The EJ was wrong to decide that there was no reasonable prospect of establishing that the claimant was KPMG's worker for the purposes of section 43K(1)(a) ERA 1996: there was no requirement for a finding of a contract for these purposes as the EJ states at para. 75 of the reasons.
>
> (3) In considering whether there were reasonable prospects of the claimant establishing that KPMG was acting as agent for Highways England and liable on that basis for whistleblowing detriment pursuant to section 47B(1A) ERA or discrimination pursuant to sections 109 and 110 EqA, 2010, the EJ erred in paragraphs 77 and 78 of the reasons in concentrating solely on the terms of the written contract between KPMG and Highways England and failing to have regard to those specific statutory provisions and other facts and evidence including interactions between KPMG and the claimant which were potentially relevant.
>
> (4) The EJ erred in rejecting a possible case against KPMG based on sections 111 or 112 of the Equality Act 2010; In particular:
>
> a) she was wrong to suggest at paragraph 81 that the relationship between KPMG and Highways England did not come within section 111(7);
> b) she was wrong in paragraph 82 to have regard to whether a case under section 111 or 112 was established evidentially when the

issue was whether there was a reasonable prospect of establishing such a case;

c) she was wrong in paragraph 82 to suggest that the claimant had not indicated what she alleged KPMG had done by way of instructing, causing or helping Highways England to discriminate against her: she had done so at some length.

(5) If any of the above grounds of appeal are correct, the EJ was wrong to dismiss KPMG from the case altogether and should have allowed the case to proceed to a full hearing with KPMG a party at which the facts could be fully investigated and KPMG's liability (if any) established.

(6) At paragraph 79 of the reasons the EJ appears to find that there was no reasonable prospect of the claimant establishing that KPMG staff themselves were acting as agents of highways England: she should not have made such a finding as this was not part of the issues before her and Highways England was not a party to the PH.

Relevant statutory provisions

30. Section 47B ERA states:

> **47B Protected disclosures.**
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority,
>
> on the ground that W has made a protected disclosure.

31. Under section 230 ERA, an "employee" is "an individual who has entered into or works under …a contract of employment". An "employer" is "the person by whom the employee or worker is …employed". For the purposes of section 47B, however, section 43K(2) contains an extended definition of the term "employer" to include, in the case of a worker introduced or supplied by a third party, "the person who substantially determines or determined the terms on which he is or was engaged"

32. So far as material, section 39 EqA is in the following terms:

> **39 Employees and applicants**
>
> **…**
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.
>
> …
>
> (4) An employer (A) must not victimise an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.

33. For these purposes, "employment" means "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work", and "employer" and "employee" are construed accordingly (EqA, section 83).

34. Sections 109 to 112 EqA state:

> **109 Liability of employers and principals**
>
> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
>
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
>
> **110 Liability of employees and agents**
>
> (1) A person (A) contravenes this section if—
>
> (a) A is an employee or agent,
>
> (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
>
> (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

> **111 Instructing, causing or inducing contraventions**
>
> (1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).
>
> (2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.
>
> (3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.
>
> (4) For the purposes of subsection (3), inducement may be direct or indirect.
>
> …
>
> (7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.
>
> **112 Aiding contraventions**
>
> (1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

The appeal hearing

35. I had the benefit of full and detailed skeleton arguments on behalf of all parties. I also heard oral submissions over two days. In the interests of brevity, I will not attempt to summarise all of that material. Instead, I will explain in the analysis and decision which follows why I reached the conclusions I did on the grounds of appeal and why certain submissions were accepted or rejected.

Analysis and decision

General

36. The preliminary hearing in August and September 2022 was intended to serve two distinct purposes. First, there was to be a preliminary determination, on the basis of evidence, of whether or not an implied contract existed between the appellant and KPMG at any material time to which the claims against KPMG related. Secondly the tribunal required to consider KPMG's application for strike out / a deposit order and, in particular, the issue of "reasonable prospects".

37. The substantive issue of whether or not there was an implied contract was relevant to the appellant's entitlement to bring claims against KPMG under sections 47B(1) and 47B(1A)(a) ERA and section 39 EqA as her "employer" in terms of the definitions in section 230 ERA and section 83 EqA respectively.

38. The strike out application was concerned with whether or not the appellant had reasonable prospects of establishing any of the following propositions:

    (a) that KPMG was her "employer" in terms of the extended definition of that term in section 43K(2)(a) ERA (being a person who substantially determined the terms on which she, as a worker was engaged);
    (b) that KPMG was an agent of her employer and subjected her to detriment with her employer's authority (section 47B(1A)(b));
    (c) that the acts of discrimination / victimisation relied upon, if done, were done by KPMG as an agent of her employer (section 110 EqA); or
    (d) that KPMG had instructed, caused or induced (section 111 EqA) or aided (section 112 EqA) a basic contravention by Highways England.

39. The principle that discrimination and whistleblowing cases should not be struck out except in the clearest of circumstances is well established (**Anyanwu v. South Bank Students' Union** [2001] ICR 391; **Ezsias v. North Glamorgan NHS Trust** [2007] ICR 1126; **Chandok v. Tirkey** [2015] ICR 527). **Tayside Public Transport Company v. Reilly** [2012] IRLR 755 and **Mechkarov v. Citibank** [2016] ICR 1121 each recognised the inherent limitations of the procedure where fact-sensitive issues are in dispute. As the tribunal correctly recognised in this case, it is not generally open to the tribunal which is considering an application for strike out to conduct an impromptu trial of the facts. There may, of course, be cases where the central facts in the case are undisputed or where it is instantly demonstrable that a claimant's averments in the pleadings are untrue. There may also be cases where the claim is plainly irrelevant or incompetent as a matter of law. Other than in such cases, however, it will usually be an error of law for a tribunal to pre-empt the determination of a full hearing by striking out a claim in which disputed issues of fact arise.

Ground 1

40. At common law, the test for implication of a contract is whether or not that is necessary to explain the actions of the parties (**The Aramis** [1989] Lloyds Rep. 213). In the employment context, cases on implication of contracts have often related to tri-partite relationships involving agency workers, employment agencies and end users of services, but the general principles on implication are not confined to such situations. In **James v. Greenwich London Borough Council** [2008] ICR 545 the Court of Appeal upheld the decision of the EAT (Elias J) that, in the context of an arrangement involving a worker, an agency, and an end user of the worker's services, it was not necessary to imply a contract between the worker and the end user. The relationship was fully explained by the express contracts between the worker and the agency on the one hand and the agency and the end user on the other.

41. The tribunal in this case correctly identified the applicable principles of law in relation to implication of a contract (albeit under reference to **Baird Textiles** rather than **James**) and considered the evidence about that issue per the terms of the case management order of 17 December 2021. It concluded (at § ET 74) that the appellant had failed to establish the existence of any implied contract between her and KPMG *inter alia* because she had failed to show that it was necessary to imply such a contract. That conclusion was inevitable given the findings of fact which the tribunal made. The tribunal's conclusion was straightforward and legally correct. It can be summarised in the following way:

    (i) the appellant had a contract of employment with Highways England, from whom she received her wages;
    (ii) separately, Highways England had a consultancy contract with KPMG.
    (iii) the appellant's interactions with KPMG were explicable by reference to those two contracts; and
    (iv) it was not, therefore, necessary to imply a third contract between the appellant and KPMG.

42. It became apparent in the course of oral submissions on this first ground of appeal that the appellant mistakenly sought to rely upon cases which had no relevance to the issue of implication of the existence of a contract. These included where the issue in dispute was as to the appropriate classification of a contract – often as to whether the contract in

question was one of service or merely one for services. She drew my attention, in particular, to **McMeechan v Secretary of State for Employment** [1997] ICR 549 and **Ferguson v. John Dawson and Partners** [1976] 1 WLR 1213. Other cases on this same issue referred to in her skeleton argument included **Drake v. Ipsos Mori UK Limited** [2012] IRLR 973 and **Troutbeck SA v. White and another** [2013] EWCA Civ 1171. I will refer to those authorities, for ease of reference, as "classification" cases. I also understood the appellant to rely, to some extent, upon certain *dicta* in **Ferguson** and in **Liverpool City Council v. Irwin** [1976] 2 WLR 562 about the circumstances in which terms will be implied into contracts (appellant's skeleton argument at § 102) and upon the principle of vicarious liability (appellant's skeleton argument at § 103).

43. The authorities on classification, implication of terms and vicarious liability are of no material assistance where the disputed issue is whether or not the existence of a contract should be implied. The evidence which will be relevant in such cases is also materially different. As was noted in **James**, where the disputed issue is the implication of the existence of a contract it is generally unhelpful to focus on the multiple factors which may demonstrate the existence of the irreducible minimum of mutual obligation. Rather, the issue is whether the way in which parties conducted themselves was consistent **only** with an implied contract between them, and thus wholly inconsistent with there being no such contract.

44. The appellant's reliance on authorties about classification, implication of terms and vicarious liability explains why she considered that the tribunal's had ignored relevant evidence and / or reached a perverse conclusion on the facts found by it. She suggested, for example, that the tribunal had ignored relevant evidence that KPMG was able to influence Highways England in having her removed from her role. She suggested also that there had been some evidence of her working, at times, under the direction and control of representatives of KPMG. The tribunal, of course, did not accept that evidence. Even if it had done, however, none of it was helpful to the question of whether or not it was necessary to imply a contract between the appellant and KPMG. For these reasons, both perversity criticisms in this ground of appeal are misconceived.

45. In the course of oral submissions, the appellant also sought to suggest that the contract between KPMG and Highways England should have been regarded as a sham (per

Autoclenz v. Belcher and others [2011] ICR 1157) and thus as an exception to the necessity test in **James**. No such argument was made by the appellant in her ET1 or mentioned in the voluminous case management notes or orders which preceded the preliminary hearing in 2022. The first time that the issue seems to have been raised was in a skeleton argument lodged by the appellant shortly before the preliminary hearing in 2022. She also referred to it in her proposed grounds of appeal, but the issue did not feature in the final grounds for which permission was given.

46. Having regard, however, to the fact that the appellant is a litigant in person, I allowed her to make submissions as to why she said that the contact between KPMG and Highways England was a sham. Based on those submissions, I understood the high point of this argument to be a suggestion that KPMG had, at times, acted as an agent of Highways England notwithstanding what was stated at clause 50.1 of the KPMG / Highways England contract. Even assuming that to be correct (and the question of agency is the subject of the third ground of appeal to which I will turn shortly), this issue relates only to the correct classification of the relationship between KPMG and Highways England. As Denning LJ pointed out in **Facchini v. Bryson** [1952] 1 TLR 1385, that is not an issue of sham. It is simply a matter of identifying the true relationship of the parties. That is determined by the court and not by the label which the parties choose to put on it.

47. More fundamentally, however, the appellant does not suggest that her contract of employment with Highways England was a sham. Any finding that the relationship between Highways England and KPMG was (or was at times) truly one of principal and agent would lead, at best for the appellant, only to a conclusion that KPMG engaged with her as an agent for Highways England. On that hypothesis it would still not be necessary (per **James**) to imply a contract of any kind between the appellant and KPMG.

48. The second limb of ground of appeal 1 is a suggestion that, by the date of the preliminary hearing in August and September 2022, the appellant had not received adequate disclosure. As I have noted, this was a matter that was extensively discussed in case management hearings including the case management hearing which led to the orders of 17 December 2021. The issue of disclosure was raised again by the appellant at the start of the hearing before the tribunal on 31 August 2022. The tribunal considered it as a preliminary matter (ET § 15) and revisited it following submissions (ET § 65).

49. This aspect of the first ground of appeal is expressed in very general terms and does not identify any undisclosed document or class of documents that would (or might) have assisted the appellant's case in relation to the implied contract issue. That is consistent with the tribunal's impression (expressed at ET § 65) that the appellant was unclear about what was in the bundle of documents lodged for the preliminary hearing.

50. More significantly, however, and as became clear in oral submissions in the appeal, the disclosure argument was based upon the same mistaken approach to the principles that are relevant to the implication of a contract. Reference was made, for example, to the possible existence of documents showing the influence that KPMG exercised over Highways England in having the appellant removed from her role. Again, however, once it is recognised that the relevant legal principle is that of necessity (per **Baird Textiles** and **James)** and that cases such as **McMeechan** and **Ferguson** relate to the different legal issue of classification, none of that material wiuld have been helpful or relevant to the issue that wwas before the tribunal. The tribunal's conclusion that there had been no failure to disclose relevant documents was both correct and unsurprising given the limited factual inquiry that was necessary to determine the substantive issue before it.

51. The first ground of appeal accordingly fails. The only error made by the tribunal on this implied contract issue was a technical one. Instead of expressing its judgment as a preliminary determination of fact and law, it did so instead by reference to the test for strike-out (judgment, § 1.2). As I have already noted, however, the conclusion that there was no implied contract was inevitable on the evidence. I will therefore set aside paragraph 1.2 of the tribunal's judgment and substitute a determination that there was no implied contract between the appellant and KPMG at any time to which her claims relate.

Ground 2

52. This ground concerns the extended definition of "worker" and "employer" in section 43K ERA. The way in which this issue was defined for the preliminary hearing focussed on the issue of worker status. The more pertinent question, however, was whether or not the terms of the extended definition of "employer" in section 43K could be applied to

KPMG such that it could potentially be liable as the appellant's employer for the purposes of section 47B ERA.

53. The tribunal concluded that because there was no implied contract of any kind between the appellant and KPMG, the extended definition of employer in section 43K could not apply to KPMG. That was, perhaps, an understandable conclusion given the way that issue 2.1 was framed, and in light of the observations of the Court of Appeal in **Sharpe v. Bishop of Worcester** [2015] ICR 1241. In **Sharpe**, however, the facts showed that the claimant had no contract of any kind with anyone. On different facts, the decision of the EAT in **McTigue v University of Bristol NHS Foundation Trust** [2016] ICR 1155 (in particular at para. 38), supports the appellant's submission there did not need to be any contract between her and KPMG. The existence of a contract between her and Highways England was, in principle, sufficient to engage section 43K ERA. The extended definitions of "worker" and "employer" are capable of applying even where there is no contract of any kind between the worker and the person who substantially determines the terms on which the worker is or was engaged.

54. Since the tribunal did not fully consider that issue before striking out the claim but concluded, erroneously, that the absence of a contract between the appellant and KPMG was determinative, this ground of appeal succeeds.

Ground 3

55. In considering the applicability of the agency provisions of sections 47B(1A)(b) ERA and section 110 EqA, the tribunal plainly had regard to the terms of the contract between Highways England and KPMG. It was entitled to do so. It noted that para 50.1 of that agreement expressly disavowed any intention to create the relationship of principal and agent between Highways England and KPMG.

56. In oral submissions, the appellant was at pains to stress that her claim on the basis of agency comprises two distinct limbs. The first is that KPMG was an agent of Highways England for the purposes of section 110 EqA. The second is that, in their dealings with her, employees of KPMG for whom KPMG is responsible under section 109 were acting as agents for Highways England for the purposes of section 110. Whilst, in the particular

circumstances of this case, that may be a distinction without a difference, it does highlight one important point. The issue for the tribunal was not whether the appellant had reasonable prospects of establishing that, as a generality, KPMG acted as an agent for Highways England. Rather, the issue was whether KPMG and / or its employees could be said to have done so expressly or by necessary implication on any of the particular occasions when the contraventions of the relevant legislation are said to have occurred. That issue is highly fact-sensitive and was not one that could usually be resolved in the context of an application for strike out.

57. Counsel for KPMG recognised this but submitted that there was sufficient overlap between the tribunal's factual findings on the implied contract issue and the issue of agency to entitle it to use evidence about the former to instruct its conclusions on the latter. Thus, he submitted, the only possible conclusion on the evidence was that there was no reasonable prospect of the appellant establishing that KPMG or its employees had ever acted as agents of Highways England in their dealings with her. By contrast to the position in **Tayside**, that there was no chance that the evidence on this issue might change at a full hearing.

58. I disagree. Even accepting, for these purposes, that it might be legitimate for some findings of fact made by the tribunal on the implied contract point to be read across into the strike out application on agency, the issue of whether or not individual KPMG employees acted as agents of Highways England in relation to particular acts or omissions of alleged discrimination, victimisation or protected disclosure detriment involves a different and wider factual matrix than the implied contract issue. Those facts could only be properly explored at a full hearing. There is also a consideration of procedural fairness. The agency point was only ever expected to be considered in the context of a strike out application rather than by a full examination of the facts or a mini trial of evidence. The tribunal was also not in a position to know precisely what other evidence on this issue might have have emerged at a full hearing on the merits of the complaints.

59. I do not, therefore, consider that a strike out application was the appropriate procedural vehicle for these fact-sensitive issues to have been determined. The agency issue falls

squarely within **Tayside**. It could not have been resolved without a full inquiry into the facts. This third ground of appeal also, therefore, succeeds.

Ground 4(a)

60. The tribunal was correct to conclude (ET § 81) that section 111(7) is a bar to the complaint against KPMG under section 111 EqA. As counsel for KPMG submitted, in the scenario envisaged in the subsection, "A" is KPMG and "B" is Highways England. For section 111 to apply, KPMG must, therefore, be in a position to commit a basic contravention in relation to Highways England (**Sami v. Avellan** [2022] IRLR 656). As the editors of *Harvey on Industrial Relations and Employment Law* explain (Division L, paragraph [522]):

> **"… the prohibition contained in section 111 only applies if the person instructing, causing or inducing the basic contravention (A) has a relationship with the person they are seeking to influence (B) which is such that A could commit a basic contravention against B. So, in the most likely example, B would be an employee of A, and since that would mean that A could commit discrimination against B contrary to the Equality Act 2010 section 39, section 111 would apply so that A would be acting unlawfully if it were to instruct B to act in a discriminatory way. This is a roundabout way of ensuring that liability for instructing, causing or inducing only applies if the person seeking to influence the other has some kind of relationship with the other from which the influence could stem."**

61. Since Highways England does not have any of the protected characteristics, it could not have been discriminated against by KPMG. The tribunal was correct, therefore, to conclude in its reasons, that the appellant had no reasonable prospect of establishing a claim against KPMG in terms of section 111 EqA.

62. The only error made by the tribunal in relation to the section 111 complaint is that whilst it mentions section 111 in its reasons (at ET § 81 and 82), it does not do so anywhere in its judgment. I will return to this below under the issue of disposal of the appeal.

Grounds 4(b) and (c)

63. The position in relation to the section 112 EqA complaint is different. Section 112 does not have an equivalent limiting provision to sub-section 111(7). The issue for the purposes of section 112 is whether KPMG (or any employee for whom KPMG is responsible under section 109) "knowingly helped" Highways England to commit a basic contravention. As with the issue of agency, that is an issue which is likely to be highly fact specific. Again, therefore, I do not consider that a strike out application was the appropriate procedure for such issues to be considered and resolved. Grounds 4(b) and (c) also, therefore, succeed in relation to the complaint against KPMG based upon section 112 EqA.

Ground 5

64. As noted above, ground 5 is not a free-standing ground of appeal but relates to the issue of disposal to which I will return below.

Ground 6

65. Ground 6 suggests that the tribunal ought not to have made any determination about the appellant's prospects of establishing that employees of KPMG acted as agents for Highways England. As one of the routes to liability relied upon by the appellant is based squarely upon that hypothesis, this criticism of the tribunal's reasons is, on the face of matters, surprising.

66. I interpret this ground, however, as merely an aspect of the same submission advanced under ground 3 to the effect that fact-sensitive issues relating to agency were not matters that ought to have been resolved in the context of a strike out application. As I have already indicated in dealing with ground 3, I agree with that proposition. Although, therefore, this ground is correct, it has no practical effect upon the appeal as no employee of KPMG is a respondent to these proceedings, and no part of the tribunal's judgment relates to anything other than KPMG's status as a respondent.

Summary of conclusions and disposal

67. For these reasons, grounds 1 and 4(a) do not succeed and are dismissed. In terms of the remaining grounds (2, 3, 4(b) and (c), 5 and 6), I will:

    (a) set aside the judgment of the tribunal dated 15 November 2022;
    (b) substitute a finding in fact and in law that there was no implied contract between the appellant and KPMG at any time to which the appellant's claims against KPMG relate;
    (c) strike out the claim made against KPMG under and in terms of section 111 of the Equality Act, 2010; and, in all other respects
    (d) remit the appellant's claims to the employment tribunal.

68. There is no requirement for the remit to the employment tribunal to be to the same employment judge. Applying the principles of **Sinclair Roche and Temperley v Heard** 2004 IRLR 763, there is no reason, however, why the same employment judge could not continue to be involved with the case as it progresses from this point onwards.

69. Finally, whilst the question of the appropriate steps to resolve the outstanding issues in these claims is not a matter for me, I would remind all parties and the employment tribunal of the observations that I have made about the limitations of the strike out procedure, having regard to the general principles expressed in **Tayside**.