Appeal No. UKEAT/0086/15/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 July 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MS I B CHET — APPELLANT

CAPITA TRANSLATION AND INTERPRETING LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARK HUMPHREYS (of Counsel) Free Representation Unit
For the Respondent	MR TARIQ M SADIQ (of Counsel) Instructed by: Irwin Mitchell LLP Solicitors 2 Wellington Place Leeds LS1 4BZ

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

JURISDICTIONAL POINTS - Worker, employee or neither

The Claimant was an interpreter, who from 2007 provided services directly to Police and Courts. Then the authorities engaged interpreters through intermediaries - initially ALS, then Capita. The Claimant had no contract with the end-users of her services. She claimed holiday pay under the **Working Time Regulations 1998** ("WTR") and for discrimination under the **Equality Act 2010** ("EqA"), but in each case had to show she was a relevant worker (**WTR**) or "employee" (**EqA**). An Employment Tribunal held that she was a professional, who provided services to Capita, and so was excluded from being a worker and could not claim under the **EqA**. She appealed on two bases which had not been advanced below - first that Capita was not a client of hers, and second that she could claim under section 55 **EqA** (which governed the actions of employment service providers). In both cases, the Employment Appeal Tribunal declined to exercise its discretion to allow her to appeal: but in each case also dismissed the appeals on their merits. As to the first ground, the issue was one of fact, and there was sufficient material to entitle the Employment Tribunal to decide that Capita (and before it ALS) were professional clients of the Claimant; as to the second, though acknowledging it was *obiter*, that section 55 did not on a proper construction appear to permit the claim as it had been advanced. Appeal dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. The Employment Tribunal at Manchester (Employment Judge Holmes, Ms Hillon and Mr Flynn) considered, in a Judgment of 1 December 2014, claims brought against the Respondent (Capita) for holiday pay under the **Working Time Regulations 1998** and discrimination on the ground of nationality (**Equality Act 2010**).

2. To succeed on either claim the Claimant had to show that she was an employee within the definition adopted in each of those two statutes. Those definitions are slightly different. That in the **Working Time Regulations**, regulation 2 defines "worker", to whom the relevant right is given, 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;**
> >
> > **and any reference to a worker's contract shall be construed accordingly."**

3. In the **Equality Act** section 83(2):

> **" "Employment" means -**
>
> > **(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;**
> >
> > **…"**

4. The expression in the latter statue "contract personally to do work" does not have the qualification which is contained expressly in the **Working Time Regulations 1998**.

The Underlying Facts

5. The Claimant worked since 2007 as an interpreter. She is of Romanian origin. Initially she provided her services directly to Courts and Police Stations across the North of England. When the Police Forces outsourced their arrangements for securing interpreting services to an agency, Applied Language Solutions Ltd ("ALS"), the Claimant provided her services in part through ALS. ALS was acquired in 2011 by Capita. The claim involved consideration, therefore, of two slightly different statutory provisions and two different contracts; again, highly similar but, nonetheless slightly different. First, that between the Claimant and ALS and, secondly, that between the Claimant and Capita.

6. The Claimant argued in her ET1 that she was an agency worker under Chapter 5 section 41 of the **Equality Act 2010**. Those, indeed, were the opening words of the paragraph in which the Claimant set out the grounds of claim. She described herself as a professional interpreter and translator, specialising in the justice sector. She spoke of undertaking assignments for Capita. The Respondent in its ET3 denied that the Claimant was an agency worker and asserted that she was self-employed and, plainly intended by its pleading, to suggest that neither regulation 2 nor section 83(2) applied to confer any right to claim upon the Claimant.

7. The Tribunal's findings of fact were carefully made and cover a number of matters. It is necessary only for me to summarise the essential facts which it found. When the Claimant has been engaged directly by the Police and by the Courts she had been self-employed. She "registered" with ALS and Capita when work became harder to find. She was described by Capita in a contract with her as a "service provider". She had no direct contract with the Ministry of Justice or the Police Forces once her services were provided through ALS and Capita. In respect of any assignment, first of all, Capita had no obligation to offer her any such

assignment, nor, if offered, did she have any obligation to accept it. However, there was no right given by the contract for her to provide a substitute. The obligation to provide services was an obligation to provide them herself, i.e. personally.

8. The Tribunal considered at paragraph 36 that once substitution was no longer a factor - it had rejected arguments that it was - the Claimant "did indeed contract to provide work or services personally to the respondent". It considered at paragraph 39 that the agreement made with Capita was non-exclusive and, thus, the Claimant was free, I infer, to exercise her profession in respect of other clients. There was no control exercised by Capita in any meaningful sense over her work.

9. The Tribunal identified other features which were inconsistent with the relationship between her and Capita being, at least, one of employment in the traditional common law (though, I should note immediately, it was not suggested by the Claimant that she was an employee working under a contract of employment). If she was to be described as an employee it was under the "worker" head. Thus, the Tribunal noted that she was not provided with transport, equipment, support, training, not appraised, given no holiday pay, sick pay, redundancy entitlement or any other benefits such as one would expect of an employee, and the work was casual.

10. The grounds of appeal relate entirely to the conclusion which the Tribunal drew from those facts in the light of the law which the Tribunal stated. I shall come to the grounds in a moment but no criticism is advanced on the appeal of the way in which the Tribunal self-directed itself on the applicable law. The Judgment is a conscientious, careful and often thoughtful contribution to the field. The authorities were appropriate. They were, indeed,

recent: for instance, reference was made to the decision, made only shortly before the Tribunal gave its judgment, in the Court of Appeal of **Halawi v WDFG UK Ltd** [2014] EWCA Civ 1387.

11. There is one respect, and one respect only, in which the directions of law, which the Tribunal gave itself is complained about. It is a minor point, perhaps, to which I shall return later in this Judgment.

12. The Tribunal, against this background, had to ask whether in respect of either of the contracts the Claimant was to be classed as a worker within the meaning of the **Regulations**, or an employee within the meaning of section 83(2). It found that the Claimant was a professional. At paragraph 41 it declared itself satisfied that the Claimant met the first part of the test for personal service, that is that she had a contract with Capita to provide personal services for them, it then added:

> **"41. … the conclusion must therefore be that because the relationship was one of professional and client, she was not a worker within the meaning of s.230 of the [Employment Rights Act 1996], and hence also not under the provisions of the Working Time Regulations, and her claim in respect of holiday pay under the Original Contract must be dismissed."**

13. It came to a similar conclusion in respect of the Capita contract. As for the conclusion in respect of discrimination rights under the **Equality Act**, it concluded that the Claimant's engagement under the original ALS contract did not constitute employment for the purposes of section 83 (see paragraph 68), and, all the more clearly, it did not do so in respect of the Capita contract. The Capita contract had within it two particular provisions which added weight to the Tribunal's conclusion. The first was that Capita required the Claimant to effect a policy of insurance to indemnify it in respect of the Claimant's work. The Tribunal commented this was

a most unusual feature to find if the relationship were a usual employment relationship. Secondly, there was a sanctions policy which was not a classic disciplinary procedure.

14. The conclusion in respect of section 83(2) of the **Equality Act**, in respect of both of the original and the Capita contracts, was that there was very little difference to be drawn between the worker test, deriving from section 230 of the **Employment Rights Act 1996** and repeated in the **Regulations**, in respect of which it had already made its findings clear, and that which arose under section 83 of the **Equality Act**. It quoted to that effect from the decision of HHJ Peter Clark in the case of **Windle and Anor v Secretary of State for Justice** [2014] IRLR 914 in concluding at paragraph 51 that there was now no discernible difference between the two tests with the result that even for the purposes of the **Equality Act 2010**, where the test had been believed to be less stringent than that in the **Regulations**, its provisions would not apply to those persons whose relationship with their putative employer did not satisfy the limb (b) test, as it might be called, arising under the formulation in the **Regulations** because the relationship is that of client and professional. It quoted Judge Peter Clark as saying:

> **"31. The picture which is emerging from the cases is that a distinction must be drawn between those who market their services to the world in general and those who work in a subordinate position in circumstances where they are integrated into the business of the putative employer. …"**

15. The Tribunal went on carefully to examine whether subordination in the relevant sense - that is subordinate to the directions of the employer as opposed to being economically dependent upon the employer, as, for instance, would be the case of a supplier whose single customer was, say, a large supermarket - and having considered that and drawn an appropriate distinction, not challenged before me, concluded that there was no such subordination in the present case. Nor was there the degree of integration which might have been supposed following on from the decision in **Cotswold Developments Construction Ltd v Williams**

[2006] IRLR 181, approved in **Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005. Accordingly, the Tribunal rejected the claims on the grounds that the Claimant was neither a relevant worker nor employee.

The Appeal

16. An appeal lies only to the Appeal Tribunal on an error of law. It is not an error of law for a Tribunal Judge to fail to deal with an argument if the argument is not put before him. A Judge should heartily be condemned for drawing a conclusion contrary to one which appears to be undisputed so far as the argument goes which he is considering. Similarly, if an argument on a statute, which is not referred to and which might involve a new claim requiring amendment, is not addressed to him, he can hardly be blamed on appeal for failing to deal with it. The surprising feature of this appeal is that there are two grounds. In each respect, the point now raised on appeal was not put before the Tribunal Judge. The two points are, however, distinct and require separate consideration.

17. Ground 1 argues that the words of the regulation defining worker require the Court to ask whether the individual undertakes to do or perform personally any work or services for another party to the contract. Mr Humphreys - who appears under the auspices of the Free Representation Unit scheme, and whose submissions have been a model of clarity and care, for which the Court is very grateful - argues that the Tribunal found that much. The problem, he argued, was in its application of the law it had properly declared in respect of the remainder of the definition. It had to determine whether or not the Claimant was excluded from protection because she fell into one of the classes excluded. Namely, a client of a profession or a customer of a business undertaking which she was carrying on. She was not the latter; she was professional. So, the question was whether or not the contract under which she provided her

work or services was with a client. He argued, in effect, that it was self-evidently the case that the services were provided not to Capita but to the Police or the Courts; the end-user.

18. He submitted that in **Cotswold** [2006] IRLR 181 at paragraph 53 the Appeal Tribunal had identified as a paradigm case falling within this proviso that of a person working within one of the established professions, such as solicitor and client, barrister and client, accountant, architect, etc. He noted that in each case the client was to be read as the person or entity which received the services provided by the professional. This analysis was supported by **Westwood**. The cases showed that it was implicit that the professional client was the personal entity to whom the services were provided. Here the services were, on any view, he submitted, not provided to Capita but were provided to the Police and Courts. Thus, at paragraph 10.13 the Tribunal found that when providing the services, the Claimant was subject to the control of the Courts and Police Stations.

19. It found that Capita was an agency. The direct relationship was between the service provider and the recipient of the services and it was, therefore, inappropriate, he submitted, to regard the services as being provided to Capita. In **Bates van Winkelhof v Clyde & Co LLP** [2014] UKSC 32, [2014] IRLR 641 at paragraph 25, Baroness Hale had discussed the distinction between two different kinds of self-employed people. One kind she said:

> **"25. … are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services *for them*. …" (Emphasis added)**

20. He submitted, therefore, that if the Tribunal had appreciated it had to determine who the client was, it either would not or might not have come to the conclusion it did. His primary position was that he considered the question of who was the client to be a matter which the Tribunal should have taken into account but failed to do so, although his preferred position

would be that it would have been determinative and the Tribunal, therefore, on these facts, as it found, would have been obliged to hold that the Claimant was providing her services not to Capita but to others, and, therefore, so far as Capita was concerned, was simply providing her services personally insofar as they were services relevant to Capita but not her services of interpreting, which were her professional services which had to be provided to a client.

21. In that respect, she was in a similar position, he submitted, to the doctor whose case formed the focus of the decision in **Westwood**. He had been a GP and had given advice through a clinic on transgender issues, but he also worked for Hospital Medical Group ("HMG") engaged in services related to hair restoration. That was the only person to whom he supplied those services. However, there was no dispute before the Court that the services, insofar as they went, were provided personally to HMG and since in the view of the Employment Tribunal, which the Court of Appeal thought it was entitled to reach, the Claimant was integrated into the business of HMG. He was entitled to bring a claim and was not excluded by the exclusions in the worker provision. Similarly, in **Bates van Winkelhof v Clyde & Co** the worker concerned was a solicitor. She could not, under the arrangement with Clyde and Co, market her services to another other than the LLP for whom she worked. She was an integral part of their business and the LLP, which was her employer, was in no sense her client or customer. Accordingly, since she provided her services personally, she was entitled to succeed. Those positions were analogous with the present. If there was a client of the Claimant it was not Capita, but the Claimant did work personally for Capita, therefore, was covered by the provisions, just as Dr Westwood had been in his case.

22. The second ground of appeal raised an argument that the web of relationships described above could have and did fall within the terms of sections 55 and 56 of the **Equality Act 2010**.

A So far as relevant, section 56, an interpretation section, defines the provision of an employment service as "including" - I note in passing that that word is not a comprehensive, all-inclusive expression - (56(2)(e)) the "provision of a service for supplying employers with persons to do work". Section 55, headed "Employment service-providers", provides at paragraph 55(2) as follows:

B

> **"(2) An employment service-provider (A) must not, in relation to the provision of an employment service, discriminate against a person (B) -**
>
> **(a) as to the terms on which A provides the service to B;**
>
> C **(b) by not providing the service to B;**
>
> **(c) by terminating the provision of the service to B;**
>
> **(d) by subjecting B to any other detriment."**

D 23. It is said that although the meanings of these statutory positions were never addressed, nonetheless, permission should be given on appeal to permit the Claimant to raise them here. Mr Humphreys argues that under 56(2)(e) Capita were a service for supplying employers with persons to do work and that under 55(2) the words "in relation to the provision of an employment service" were broad words enlarging the scope of what followed, and that the "B" referred to in 55(2)(d) could be any person such as one in the position of the Claimant. Thus, he submitted, there was a clear route here for the Claimant to make a claim about discrimination which had affected her employment. This argument would not apply to the **Working Time Regulations** claims but solely to the **Equality Act** claims.

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G **Discussion**

24. I shall leave to the end of this Judgment what is, in reality, a preliminary question, whether the Appeal Tribunal should entertain either of these appeals at all since neither was raised below. It was not suggested to the Tribunal in respect of ground 1 that it ought to have focused upon whether Capita was truly the client of the Claimant. The position was rather that

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A that was accepted below, though I do think that the acceptance was more implicit than expressed as such. It certainly was not disputed. The second argument simply was not addressed at all and, indeed, in the Notice of Appeal Mr Humphreys realistically recognised that if his argument succeeded he would be seeking permission to approach the Employment Tribunal in order to seek an amendment to the ET1.

B

25. I shall deal, however, first with the merits of the first ground. I should make some preliminary observations. First, as was said in **Halawi v WDFG UK Ltd** when the matter was before the Employment Appeal Tribunal (UKEAT/0166/13), certain matters are axiomatic. At paragraph 34 of my judgment I said:

C

> **"34. … First, whether a person is an employee or a worker is essentially a question of fact, unless it is one of those cases in which there is a complete written contract; plainly, not this. That approach is not only the approach taken in domestic law but it is that taken by the Court of Justice of the EU. As was said in *Allonby* [*v Accrington & Rossendale College* [2004] ICR 1328], whether an employment relationship exists:**
>
> > **"… must be answered in each particular case, having regard to all the factors and circumstances by which the relationship between the parties is characterised." "**

D

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26. I then observe, paragraph 35, that the question whether someone was working as an employee or as an independent contractor had proved a most elusive question and that:

> **"35. … a Judge must be in this area in particular alert to the need to reflect the realities of any employment situation. …"**

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Those words were endorsed by the Court of Appeal in the judgment of Arden LJ at paragraph 32, with which Christopher Clarke LJ and Barling J agreed.

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27. Thus, the starting point here is that the decision made by the Tribunal is one of fact. In his submissions, Mr Sadiq points to what he says were the relevant findings of fact, which led to the overall conclusion that - again, one of fact - Capita was the client of the Claimant. He argued that at paragraph 39 the Tribunal had identified Capita as the client of the Claimant.

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A Those are his words in the opening sentence of that paragraph. It is supported by 39(a) in which the Tribunal said:

> **"a) the agreement is stated to be a non-exclusive one, and the claimant was free to offer her services to others"**

B It was envisaging a professional free to offer her services to others but also offering her services to Capita.

C 28. At paragraph 40 it said in the second-from-last sentence:

> **"40. … In our view, all the indications are consistent with the claimant carrying on the profession of interpreter, and the respondent, under the old contract, i.e. as ALS, being a client. We appreciate that in reality ALS may have been the claimant's major, and ultimately, her sole client, but that does not detract [from] the nature of the relationship, and there are no terms of the original contract which preclude the claimant from providing her services for any other client if she so wished."**

D It was on that basis that it expressed its view, paragraph 41, that the relationship was one of professional and client.

E 29. That, of course, dealt with the ALS contract. So far as the Capita contract was concerned, it dealt with that at paragraphs 76 and 77. In paragraph 76 it referred to the

F Claimant providing her services to the Respondent (five lines from the end) and in paragraph 77 spoke of the existence of the indemnity clauses being "entirely consistent with a professional/ client relationship".

G 30. Those are findings of fact. As such, they are only open to challenge if they can be shown to be perverse or reached on some misdirection of law. There was no misdirection of law here, unless it consists of a mischaracterisation of the facts. However, that is well within

H the scope of a Tribunal's fact-finding power to determine. Unless it can be shown on appeal that the relationship was not professional and client, or could not be, the appeal cannot,

therefore, succeed. It seems to me that there might be much to be said for Mr Humphreys' characterisation of Capita as merely being an agent taking no meaningful services as interpreter from the Claimant and, indeed, being in some difficulty in identifying, in the course of submissions, what other services he said the Claimant might have been giving to Capita.

31. However conscious as I am that in this area, in any particular case, the whole of the facts have to be considered by a Tribunal initially at first instance, in order to address the consequence of a multifactorial test in which no one feature is ever likely to be itself entirely decisive (though, in different situations the integration test or the dominant purpose test might have a useful role to play). Quite what a worker provides to an agency which markets the worker's services is a question which can legitimately be viewed in different ways.

32. In argument there was discussion about the analogy which might be drawn between the situation where services for a day or more might be analogised to a commodity if, for instance, a manufacturer of goods provided the goods it had made directly to a customer there would plainly be a relationship of business and customer. If the manufacturer were a sole person, that person would be excluded, thereby, from any prospect of being a worker within the definition because his circumstances would fit within the business and customer exclusion. If those goods were sold to or contracted to an intermediary, who, for its own profit, passed them on to the end purchaser, the relationship would nonetheless be one of customer and business. So too it might be said that would be the case where, rather than goods, services were involved as if a commodity and, rather than business, profession were involved. There are differences, perhaps, in that services may not be as clearly capable of definition as are manufactured items, but this example may indicate that it is not inherently unreasonable to speak of the intermediary receiving the services of the professional.

33. Mr Sadiq says, with some force in my view, that the contract itself was one under which the Claimant agreed to provide services as a service provider to Capita. As such, it was open, he submits, to the Tribunal to conclude that Capita and ALS before it were both clients of the Claimant. I agree with those submissions. I would add that the Claimant is not in the same position as the doctor in **Westwood**. The doctor in **Westwood** did not offer his services, so far as concerned the services he provided to HMG, to anyone other than HMG. He was part and parcel of its organisation, and integrated into it. The Tribunal's findings here in both of those two respects were different. So far as the claimant in **Bates van Winkelhof** was concerned, she too could not market her services to anyone other than the LLP. She too was an integral part of the business. Neither case, therefore, is on all fours with the present. In any event, in neither was there a developed consideration of what was necessary to establish a person as a client of a profession. Accordingly, in my view there is insufficient in this ground to vitiate the decision which the Tribunal made. That ground, it seems to me, therefore, must fail.

34. I turn to the merits of the second ground. The issue, as advanced by Mr Humphreys, is one of statutory construction. For reasons which I shall go on to explain, it will be unnecessary for me to resolve this issue in detail since, in my view, the Appeal Tribunal should not and does not exercise its discretion to permit the point to be taken, for reasons which I shall give. However, a realistic reading of section 55(2) of the **Equality Act 2010** must provide not only for a service for supplying employers with persons to do work, but also must deal with the provisions of the employment services insofar as they come within the definitions in section 56(2)(a), (b), (c), (d), (f), (g), (h) and (i). Some of those, such as vocational training and vocational guidance, are always likely to involve individuals. Others may not so readily do so.

35. As to 56(2)(e), the reference in 55(2)(a) is to A providing the service - that is the service of supplying employers with persons to do work - to B. Mr Humphreys acknowledges that B, in this context, is the employer to whom the "person to do work" is supplied. The same is true of B in 55(2)(b) and in (c). The issue, therefore, is whether B should be read in any wider sense in 55(2)(d). A natural reading would read it in precisely the same sense in respect of the same relevant service as B is to be read in (a), (b) and (c). To do otherwise would leave B as capable of being any person without limitation unless, as Mr Humphreys submits, there is an implicit limitation in the words "in relation to the provision of an employment service" in section 55(2), and the opening words. However, there is no inherent limitation in those words which I can see which would necessarily prevent B having a wide scope - one wider than it seems sensible to attribute to the intention of Parliament.

36. Mr Humphreys argues that the **Equality Act** provision is slightly wider than those in the provisions in the statutes which were replaced by it; namely the **Sex Discrimination Act 1975** and the **Race Relations Act 1976**. So far as "in relation to" is concerned, those statutes provided at **Race Relations Act** section 78, under the definition of "employment agency", the cognate expression to "employment service provider" that it meant:

> **"…a person who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers"**

The words "in relation to" provide a broader scope. The words "persons who work" is a wider expression than "workers", which has its own restrictive definition. He submits, therefore, that by parity of approach I should read the rest of section 55 more widely than might otherwise have been the case.

37. I am unable to read those words in the way for which he argues. However, I would say this: the reasons I have given have been those which have turned upon a literal approach, mindful also of the purpose of the provisions. It may be that a more developed argument will be capable of showing that without some such approach as Mr Humphreys advocates a real case of discrimination could not be brought before the Courts in situations in which the public might expect that it should be. If so, this might be a powerful argument for supposing that my initial reaction to the statute is in error and it should be noted that since, as I have already indicated, I am not going to give permission for this point to be taken, these remarks should be seen as *obiter* and later Tribunals may wish carefully to consider whether they are indeed appropriate. However, had it been left to me in the present case I would not have allowed this appeal on that ground for those reasons.

38. I turn then, finally, to the question of whether this Tribunal should permit either of these arguments to be taken. I begin with the second, because it is the more obvious. The law is set out in four cases, which are in the bundle of Familiar Authorities before the Employment Appeal Tribunal. Those of **Kumchyk v Derby City Council** [1978] ICR 1116 EAT; **Jones v Governing Body of Burdett Coutts School** [1999] ICR 38 CA; **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719 CA; and **Secretary of State for Health v Rance** [2007] IRLR 665 EAT. Mr Sadiq has added to that learning the decision of the Court of Appeal in **Leicestershire County Council v Unison** [2006] IRLR 810.

39. In that case Laws LJ at paragraph 15 endorsed the approach of the EAT in the appeal before it, which was to disallow the point to be taken. He observed that established jurisprudence was to the effect that the EAT should only allow a new point of law to be taken before it in exceptional circumstances, and that such a point is not to be taken merely because it

A seems to be, or is even shown to be a good one. There was reference there to the public interest in the finality of litigation.

B 40. In **Rance**, HHJ McMullen drew together the various authorities, most of them from superior Courts, to distil a number of propositions which remain of continuing value. The starting point is that there is a discretion to allow a new point to be argued. It covers new points and the reopening of conceded points but is only to be exercised in exceptional circumstances C (see paragraph 50 of his judgment). It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated. Where the point related to jurisdiction, it was not a trump card which mandated that the point should be taken. He D enumerated those cases in which it was said to be just for the point to be taken. They included that the EAT was in possession of all the material necessary and that there might be glaring injustice in refusing to allow it, the issue being a discreet one of pure law requiring no further E factual enquiry (see **Glennie**, paragraph 17 per Laws LJ). He gave examples of when it was not to be exercised. Amongst those were where the issue arose as a result of lack of skill by a represented party, but that was not a sufficient reason (**Jones**, at paragraph 20), and that the point was not taken below as a result of a tactical decision by a representative or party F (**Kumchyk**, at page 1123).

41. In setting out that list, Judge McMullen was not suggesting that they were the only G factors. Regard must, in my view, be had to all the circumstances of the case bearing in mind the general principle which is to look for exceptional reasons why a point not taken below should be taken here, in particular because an end to litigation is important to parties and there is a public interest that points which can be taken should be taken as early as reasonably H

possible in proceedings. It generally does not work justice for a party to advance a case on one basis and, having failed, then seek to secure success on a different one.

42. Mr Humphreys argues that here the point to be raised is one of considerable public importance. He had some support for this in the sense that when I asked Mr Sadiq if he could tell me how many interpreters Capita employed or engaged, the answer was 3,500.

43. He argues that no further findings of fact are required. He had some support in this respect, again, from Mr Sadiq's response to questioning from the bench, when he confessed he could not point specifically to any particular fact that required to be established.

44. He argues that it would be determinative of the issue before the Tribunal, which is whether the Tribunal had jurisdiction to hear the discrimination claim.

45. Amongst the circumstances which bear upon the discretion was a contention that the Claimant was unrepresented, in the sense of having no professional representation. She was represented by a Dr Windle. Dr Windle was not a professional lawyer. She was another interpreter. At the outset of the hearing there was an exchange between the Tribunal and her with a view, it is agreed between the parties, to the Tribunal ensuring that they could establish an equality of arms so far as possible. She told the Tribunal that she had had some 12 years' experience of Tribunals. In my view what the facts established was this, that her experience was not as an advocate over each and every one of those 12 years but as an interpreter. Plainly, she had a familiarity with Courts and Tribunals, she was aware of the important cases, she had herself pursued her own case and others as advocate for friends, though never for money, but to describe her as an experienced advocate would be wrong. She had had some passing assistance

from Mr Humphreys in that, when considering her own case, in respect of which he was instructed, she had on a couple of occasions asked him questions about this case and he had responded appropriately in passing. It seems to me, therefore, that the representation was not to be equated to that of a professional lawyer, though the fact of her experience and knowledge and familiarity with the Tribunal and with this general area of law is relevant and I take it into account so far as it goes.

46. The points which, as it seems to me, are unusual and tell very firmly against the Claimant, in addition to the fact that I can find here no truly exceptional reason for accepting jurisdiction, are these. First, as the Notice of Appeal itself suggests, if the Claimant were to succeed it would be so that she could apply to amend the ET1. Though an amendment may be made at any stage of proceedings, the proceedings have, by now, ended, subject only to appeal, and this amounts to restarting the case upon a basis on which it had never been advanced before. That is a feature which is not readily discernible in any of the decided authorities and is a distinction between this part of the case and the first ground of appeal.

47. However, further, in the ET1 there was a reference in the opening words, as I have said, to agency work and section 41 of the **Act**. Section 41 relates to contract workers. It is not the same as sections 55 or 56. However, the general scope of agency workers and those who are employment agents is closely linked. That claim was disputed, as I have recorded. It was not pursued. Thus, it is clear that the Claimant herself considered whether she could advance a claim as an agency worker, or, I infer, related to such a claim, and chose not to do so. This is not a case, therefore, where the Claimant, though not a legal professional and though not professionally represented, was ignorant of a point which might be made in her favour. She had the means to obtain information about it but she knew of the interaction of agency provisions

with her claim; she did not advance this claim. It seems to me now that I should not allow it to be taken for the first time on appeal. It would require a different analysis from the Tribunal and, although, in common with both counsel I can see no obvious point of fact which would have separately to be established, I cannot exclude the possibility that there might be. Accordingly, I have decided to decline to exercise my discretion to permit that point to be taken.

48. I turn back to the first ground. Here the argument is, as I have said, less clear but it is similar. The ground which is taken now is a ground which, as I read the Judgment, was simply not advanced to the Tribunal Judge. If it had been, this Judge, given the quality of the rest of his Judgment, would undoubtedly have examined it with some care. The provisions of the worker definition and the employer definition under the **Regulations** and the statute were central. The positions of Capita and before it ALS were central. The argument could have been made and should have been made. It would have involved, probably, a wider factual assessment than was undertaken. In my view, the facts are not so exceptional that I should permit this point to be taken on appeal for the first time. I do not see that the decision in this case will, in any sense, bind cases which succeed it if they are brought by other interpreters raising similar points from obtaining a proper resolution of their claims, upon whatever point they wish to advance: it is simply that in this particular case, given the way in which it was dealt with below, I decline to permit the point to be taken on appeal.

49. It follows that on the grounds that I have given in respect of both claims and both contracts, (a) I decline to allow the points to be taken as being new points of appeal, and, (b) reject the claims on their merits, though with the qualifications in particular in respect of the section 55 point, which I have expressed earlier in my Judgment. Finally, I would like to pay

tribute again to the way in which Mr Humphreys has put forward his case. I do not think realistically that his presentation could have been bettered.