Appeal No. UKEAT/0339/13/RN
UKEAT/0340/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 July 2014
Judgment handed down on 16 September 2014

Before

HIS HONOUR JUDGE PETER CLARK

BARONESS DRAKE OF SHENE

MR J MALLENDER

UKEAT/0339/13/RN

DR Z WINDLE — APPELLANT

1) MR F ARADA
2) SECRETARY OF STATE FOR JUSTICE — RESPONDENTS

UKEAT/0340/13/RN

MR F ARADA — APPELLANT

1) DR Z WINDLE
2) SECRETARY OF STATE FOR JUSTICE — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Dr Z Windle and Mr F Arada	MR MARK HUMPHREYS (of Counsel) Appearing through the Free Representation Unit
For the Secretary of State for Justice	MR CLIVE SHELDON QC (One of Her Majesty's Counsel) Instructed by: Treasury Solicitors One Kemble Street London WC2B 4TS

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

Whether the Claimants, when providing their services to the Respondent as interpreters, were employees within the meaning of s.83(2)(a) **Equality Act 2010**, and in particular whether, when providing those services they were employed under a contract personally to do work.

In finding that they were not, the Employment Tribunal took into account an irrelevant factor, namely the absence of mutuality of obligations between assignments (cf. **Quashie**, paragraph 12; per Elias LJ, concerned with the contract of service question). Appeal by the Claimants allowed.

Case remitted to the same Employment Tribunal for reconsideration in light of the Employment Appeal Tribunal judgment.

HIS HONOUR JUDGE PETER CLARK

1. The issue in these appeals, brought by Dr Windle and Mr Arada, Claimants before the Leeds ET, against the reserved Judgment of a full Tribunal (EJ Starr, Ms Dass and Mr Lyons) promulgated with Reasons on 3 August 2013 following a three-day Pre-Hearing Review, is whether they were employees of the relevant Respondent, the Secretary of State for Justice, in respect of interpreter services provided to HMCTS, for which the Respondent is the Minister responsible, within the meaning of s.83(2) **Equality Act 2010**. We are not now concerned with a separate claim against West Yorkshire Police. That claim was struck out by the ET on an additional ground. There is no appeal against that finding, nor in respect of the Claimants' claim against the Secretary of State based on the "Framework Agreement" (see Reasons paragraph 172). That is common ground between Counsel.

Outline

2. The question of employee/worker or neither status has troubled courts and Tribunals for many years. The distinctions are central to the level of employee protection afforded to individuals and their "employers". In this Judgment we shall take the following course. First, to "drink from the pure waters of the statute" by identifying the statutory distinctions in relation to the three categories mentioned and to examine the different levels of protection dependent on the individual's status. Secondly, to analyse the interpretation placed on those provisions by the courts, particularly at the highest domestic level with the benefit of guidance from the Court of Justice of the European Union in relation to European law. Thirdly, to summarise the relevant factual matrix as found by the Employment Tribunal. This is a highly fact-sensitive area. Fourthly, we shall consider the Employment Tribunal's reasoning. Fifthly, to discuss the legal arguments presented by Mr Mark Humphreys, who appears pro bono on behalf of the

Claimants before us (they having presented their case in person with conspicuous ability, judging by their written submissions, below) and Mr Clive Sheldon QC, who has represented the Secretary of State throughout. Sixthly, to explain our conclusions and finally to determine the proper disposal of these appeals.

The Statutory Regime

3. We begin with the **Employment Rights Act** (ERA). S.230 **ERA** is headed 'Employees, workers etc." We are not concerned with contracts of apprenticeship (s.230(2)).

4. By s.230(1) **ERA** "employee" means an individual who has entered into or works under a contract of employment and contract of employment means (s.230(2)) a contract of service (the **ERA** employee).

5. By s.230(3) "worker" includes, under limb (a) a s.230(1) employee and, under limb (b), an individual who works under any other contract 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 client or customer of any profession or business undertaking carried on by the individual (the limb (b) worker).

6. Pausing there, we make the following observations. The requirement of a contract between the individual and his employer applies to both **ERA** employees and limb (b) workers. Secondly, the critical distinction is between a contract of service and a contract for services. Thirdly, even where a contract for services exists, an individual falls outside the limb (b) worker status if the relevant relationship is one of client or customer.

7. The importance of the employee/limb (b) worker distinction lies in the level of statutory protection afforded to the individual. The employee is entitled to the full range of **ERA** protection. The limb (b) worker is not. To take but one stark example, a limb (b) worker, as extended by s.230(6), may bring a complaint of detrimental treatment (short of dismissal) on the ground of his having made a protected disclosure (the "whistle-blowing" protection) under s.47B; however, only an employee may bring a complaint of dismissal by reason of having made a protected disclosure under s.103A **ERA**.

8. So far as secondary legislation is concerned, the limb (b) worker or equivalent definition is routinely adopted; see, eg the **National Minimum Wage Act 1998** (and **1998 NMW Regulations** made thereunder), **Working Time Regulations 1998** (WTR) and the **Part-time Workers, etc Regulations 2000** (PTWR) referred to by Baroness Hale in **Clyde & Co LLP v Bates van Winkelhof** [2014] UKSC 32, paragraph 4. The **PTWR** were considered by the Court of Justice of the European Union and the Supreme Court in **Ministry of Justice v O'Brien** (see [2013] ICR 499) to which we shall return. It is relevant to note that the **PTWR** are derived from EU Directive 97/81 (**PTWD**) and are designed to implement that Directive into domestic law under the UK's Treaty obligations. Similarly, the **WTR** are derived from the EU WT Directive.

9. Since 1975 there has been a steady increase in mainly EU inspired anti-discrimination in employment legislation in the UK, starting with the coming into effect of the **Equal Pay Act 1970** and the **Sex Discrimination Act 1975**, followed by the **Race Relations Act 1976** and subsequent protection against disability, religion and belief, sexual orientation and age discrimination in employment (to include agency workers).

10. That piecemeal accumulation of rights has now been codified in the **Equality Act 2010** (Eq A). What has been consistent throughout, without material distinction, is the extended meaning of "employee" in the discrimination legislation, both primary and secondary, now contained in s.83(2) **Eq A**.

11. Whereas, as has been seen, the **ERA** draws a clear distinction between employees and limb (b) workers, the s.83(2) **Eq A** definition of "Employment" combines the two thus:

> **"'Employment' means –**
>
> **(a) employment under a contract of employment...or a contract personally to do work..."**

12. In short, the definition covers both contracts of service and contracts for services. Again, the existence of a contract is an absolute requirement.

13. How these definitions under the **ERA** and **Eq A** apply in practice has been the subject of extensive judicial consideration to which we must now turn.

Judicial interpretation

14. In seeking to draw relevant principles from the welter of authority on this topic it is important to identify the particular issue under consideration in any particular case.

15. Beginning with the **ERA** employee, one of the irreducible minima of a contract of service is mutuality of obligation: see **Carmichael v National Power plc** [1999] ICR 1226 (HL), approving the approach of the Court of Appeal in the case of the bank nurse in **Clark v Oxfordshire Health Authority** [1998] IRLR 125. **O'Kelly v Trusthouse Forte plc** [1983] ICR 728, to which we are referred, is another example of the casual worker. In each case the

absence of any obligation on the employer to provide work to the casual or for him to do the work when offered was fatal to a contract of service.

16. A more nuanced approach appeared to be taken by Elias J, as he then was, in **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471, at paragraphs 11-14. He there considered the case of a casual worker who works intermittently for an employer in circumstances where it can be said that there is an "umbrella" or overarching contract of employment which covers the period when no work is being done, assuming that there is a contract when work is being done. Elias LJ revised that opinion to a degree, on reflection, in his Judgment in **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 99; see paragraphs 13-14.

17. The point, for our purposes, is that the issue in each of the cases just mentioned is that the Claimants wished to bring claims for unfair dismissal for which employee status was a pre-requirement. Further, in cases of "ordinary" unfair dismissal under s.98 **ERA** a period of continuous employment is also required: see s.108(1) **ERA**. Hence it may be necessary for a Claimant to overcome gaps in the working arrangements in order to meet the continuity threshold. That may be done by establishing an umbrella contract or by reference to the deemed continuity provisions of s.212(3) **ERA**; see by way of example **Prater v Cornwall CC** [2006] ICR 731.

18. However, the same problems, it seems to us, do not arise in the case of limb (b) workers under the **ERA**, nor "category (b)" employees under s.83(2) **Eq A** (persons employed under a contract personally to do work). Once a contract (which, as a matter of general law, requires mutual obligations) is established, albeit in relation to one or more assignments for the employer involving personal service, then subject to the further exception to which we shall

come, the statutory definition is fulfilled. There is no need to fill the gap between assignments in order to show a contract of service nor continuity of service.

19. Turning next to the limb (b) worker definition under the **ERA** a person who can show a contract with his putative employee to provide personal service is nonetheless subject to the profession or business exception.

20. In **Clyde & Co LLP v Bates van Winkelhof**: see now [2014] UKSC 32, a case determined in the Supreme Court after the present case was concluded in the ET, the Claimant was a salaried partner in the Respondent firm of solicitors. An Employment Judge held that she fell foul of the professional exclusion and was not a limb (b) worker. On appeal I took a different view and held that she was a worker under limb (b) for the purpose of bringing a s.47B protected disclosure detriment claim. On further appeal the Respondent took, with permission, a new point based on s.4(4) of the **Limited Liability Partnerships Act 2000**. On that ground the Court of Appeal held that she was not a limb (b) worker and thus the ET had no jurisdiction to entertain her claim under s.47B.

21. In the Supreme Court the court rejected the partnership point relied on, by a majority of 4-1 (Lord Clarke dissenting). However, subject to that qualification, the court unanimously held that she was a limb (b) worker.

22. In giving the leading Judgment Lady Hale (with whom Lord Neuberger and Lord Wilson agreed) considered, amongst other cases, the Supreme Court decision in **Hashwani v Jivraj** [2011] UKSC 40 and the Court of Appeal decision in **Hospital Medical Group Ltd v Westwood** [2012] IRLR 834, both cases to which the Sheffield ET were referred.

23. **Hashwani** is a significant decision for present purposes, as the ET recognised in its reasoning, because it was concerned with the predecessor to s.83(2) **Eq A** to be found in the then **Religion or Belief Regulations 2003**. The factual context is also important. The relevant question was whether a proposed arbitrator, a retired Commercial Court Judge who was not a member of the Ismaili Community (a requirement for appointment as arbitrator under the relevant arbitration agreement) would, if appointed, be employed by the parties to the agreement under a contract personally to do any work (the definition in Reg 2(3) of the 2003 Regulations).

24. The trial judge held that the arbitrator was not an employee under the Regulations. The Court of Appeal reached a different conclusion, holding that the appointment of an arbitrator involved a contract for the provision of services which constituted "a contract personally to do any work" (see paragraph 16; per Lord Clarke).

25. The Supreme Court restored the first instance decision. In considering the question Lord Clarke drew on the European jurisprudence (the relevant discrimination protection being derived from EC Directive 2000/78) and the House of Lords decision in **Percy v Church of Scotland** [2006] ICR 134, a case concerned with employee status under the **Sex Discrimination Act 1975**.

26. As to the European jurisprudence Lord Clarke drew particular attention to the approach of the Court of Justice of the European Union in **Allonby v Accrington and Rossendale College** [2004] ICR 1328 and, in particular, paragraphs 67-68; see **Hashwani**, paragraphs 26 and 34. Further, in considering the domestic jurisprudence, in addition to the discrimination cases which considered the equivalent to s.82(3) **Eq A**, he also referred to the **ERA** limb (b)

case of **Byrne Bros (Formwork) Ltd v Baird & Ors** [2002] ICR 667 (EAT, Mr Recorder Underhill QC presiding) cited by Elias J in **James v Redcats (Brands) Ltd** [2007] ICR 1006.

27. That citation in **James** underlines, it seems to us, the cross-over between the limb (b) worker under the **ERA** and the category (b) **Eq A** employee. That is not entirely surprising, given the use of the term "worker" in the European Directives, and its significance, we think, is that although the profession or business undertaking in s.230(2)(b) **ERA** is not, in terms, reproduced in s.83(2) **Eq A**, in reality, as Mr Sheldon firmly submitted to us, there is no material difference between the two.

28. That is borne out by **Hashwani** itself. At paragraph 44 Lord Clarke observed that although the precise status of a judge in **O'Brien (No 1)** in the House of Lords was left open pending a reference to the Court of Justice of the European Union (the position has now been resolved and we shall return to it), Lord Clarke drew on the decision of the Northern Ireland Court of Appeal in **Perceval-Price & Ors v Department of Economic Development** [2000] IRLR 380, where it was held that Ms Price and her judicial colleagues were workers, notwithstanding the independent judicial functions which they performed, in distinguishing the position of the arbitrator in **Hashwani**. Whilst in **Price** the judicial officers were subject to direction under their terms of service with the Department, the arbitrator did not work under the direction of the parties with whom he contracted (see paragraph 45).

29. Mr Dermod O'Brien QC was and remained in independent practice at the English Bar at a time when he also sat as a part-time Recorder. Following termination of his appointment as Recorder in 2005 he claimed entitlement to a judicial pension, pro-rated for his actual service as

a Recorder, under the **Part-Time Workers, etc Regulations 2000**, implementing **Council Directive 97/81**.

30. The question arose as to whether he was a worker for the purposes of the Regulations (see Regulation 1(2)). The Court of Appeal held that he was not. On appeal the Supreme Court referred the question to the Court of Justice of the European Union. When the case returned, the court reversed the earlier Court of Appeal ruling [2013] ICR 2013. In so doing the court drew a distinction between the self-employed nature of his practice at the Bar and the direction under which he served as a Recorder.

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. A useful rule of thumb is to be found in the distinction drawn by Langstaff J in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181, paragraph 53, considered by Maurice Kay LJ in **Hospital Medical Group Ltd v Westwood** [2012] IRLR 834, see paragraphs 16-18. However, that approach is not, and does not purport to be, a test of universal application.

32. In **Westwood** the Claimant, a medical practitioner, carried on as his main profession a GP practice. He also provided advice on transgender issues to an independent medical organisation, the Albany Clinic. Thirdly, he provided hair restoration procedures to patients on behalf of the Respondent, HMG, under the terms of a written contract which described him as a self-employed contractor. He provided those services exclusively to HMG. An Employment Tribunal found that he was in business on his own account but that HMG was not his client or

customer. He was a limb (b) worker for the purposes of his claims under the **ERA**. On appeal I upheld that decision, as did the Court of Appeal on further appeal [2012] IRLR 834. Permission to appeal to the Supreme Court was refused, and my approach in that case was approved by Lady Hale in **Clyde & Co**; see paragraphs 38 and 40. His exclusive tie with HMG in hair restoration work was similar to the exclusive provision of her services by the Claimant in **Clyde & Co**.

33. Finally we return to **Percy.** There the Claimant was an associate minister in the Church of Scotland. She wished to bring a sex discrimination before the ET under the **Sex Discrimination Act**. Having failed to show that she was an employee up to and including the Court of Session, she appealed successfully to the House of Lords. The House held (Lord Hoffmann dissenting) that she was employed under a contract personally to execute work within the definition of s.82(1) **Sex Discrimination Act**, now s.83(2) **Eq A**.

34. Ms Percy was able to bring her complaint of sex discrimination as a category (b) worker under the definition presently under consideration. However, a minister in the Methodist Church was held by the Supreme Court not to be employed under a contract of service for the purposes of bringing a claim of unfair dismissal under the ERA, contrary to the earlier rulings of both the EAT, Underhill P, and the Court of Appeal; see **President of the Methodist Conference v Preston (formerly Moore)** [2013] IRLR 646. These two cases illustrate the distinction between a category (a) and (b) employee: the difference between a contract of service and a contract for services.

The Facts

35. HMCTS, and in turn the Respondent, is responsible for the Courts and Tribunals Service in England and Wales. The Article 6 right of litigants to a fair hearing includes, it seems to us, the right to understand and be understood in court proceedings. That poses a problem for litigants and witnesses for whom English is not their first language. Consequently the Service provides interpreters where necessary.

36. Interpreters were drawn from a register of qualified persons, the National Register of Public Service Interpreters (NRPSI). Both Claimants were on the register.

37. Dr Windle is a Czech national, interpreting between Czech and Slovak and English. Mr Arada was born in Algeria and speaks Arabic, French, Algerian and certain dialects.

38. Both Claimants worked for a range of work providers. In addition to her work for the Courts Service Dr Windle also provided her services to West Yorkshire Police (the First Respondent below). Between January 2003 and August 2012 she performed around 1,000 assignments for HMCTS and about 1,660 assignments for West Yorkshire Police and the CPS. She also worked for the NHS, local defence solicitors and other local bodies. Mr Arada spent about 80% of his working time for the Tribunals Service and the remainder for the Magistrates' Court and the CPS.

39. The Claimants' interpreting services for HMCTS were governed by written terms and conditions of service. There was no guarantee of work, nor obligation on the Claimants to accept work when offered (no mutuality of obligation in the **Carmichael** sense). No provision

was made for holiday pay, sick pay or pension. They considered themselves as self-employed and were so treated for tax purposes by HMRC.

40. A Handbook for Freelance Interpreters was issued by HMRC. It made clear that an interpreter was not permitted to send a substitute on an assignment once accepted; indeed, to do so is a criminal offence. The Handbook described approved interpreters as self-employed. They were required to be impartial in their work and were obliged to wait at court until released. A dress code for court appearances was laid down. They were issued with a badge bearing the legend "Tribunal Service Interpreter" with a logo, a photograph of the interpreter and a Badge Number. The badge was part of the security arrangements and to show that the interpreter was recognised by the Service.

41. The interpreters were not subject to a performance management or appraisal system. Rates of pay were fixed by the Service.

The Employment Tribunal Decision

42. The Employment Tribunal accepted that each time a Claimant accepted an assignment offered by the Respondent they entered into a contract. That was a contract personally to do work (substitution being positively prohibited). Between engagements there was no mutuality of obligation. They were not employed under a contract of employment during their service.

43. The relevant complaint of race discrimination relates to the Claimant's alleged less favourable treatment than British Sign Language Interpreters in relation to their comparative terms and conditions of service which was said to be on racial grounds.

44. As to whether the Claimants were employees under s.83(2) the Employment Tribunal considered a number of the authorities (paragraphs 90-114) and identified, from **Hashwani**, the question as to whether the Claimants were in a position of subordination when providing their contractual personal services to HMCTS. In answer to the question whether the Claimants were employees under s.83(2) the Employment Tribunal set out a number of factors drawn from their findings of fact (paragraphs 124-166) and concluded, in the case of Dr Windle (paragraph 168), that she was a self-employed professional, not employed under any contract of the kind listed in s.83(2)(a). They reached a similar conclusion in the case of Mr Arada (paragraph 169). They were not in a subordinate relationship with the Respondent (paragraph 170). At paragraph 166 the ET observed:

> **"We see force in an argument that Dr Windle and Mr Arada were integral to the operations of [HMCTS]."**

The Appeals

45. In advancing these appeals Mr Humphreys contends that in relation to the critical question, were the Claimants employed under contracts personally to do work (as opposed to employed under contracts of employment) within the meaning of s.83(2)(a) **Eq A** the Employment Tribunal misdirected itself in law in taking into account an irrelevant factor, namely the absence of mutuality of obligation between assignments (paragraph 164). Whilst relevant to the contract of employment question he submits that it is irrelevant to the separate question of employment under a contract personally to do work. The focus here must be on the occasions when these Claimants were on assignment for HMCTS. Were they then in a subordinate position? Were they integrated into the organisation? That error of approach, he argues, undermines their ultimate conclusion that the Claimants were not category (b) employees under s.83(2).

46. In response Mr Sheldon submits that the employee question is essentially one of fact for the Employment Tribunal. He contends that the Employment Tribunal looked with great care at all the relevant factors and reached a permissible conclusion. He argues that, in looking at the absence of mutuality between assignments, for this purpose the Employment Tribunal did not fall into error, as he submitted below in his final written submissions (paragraph 3), drawing on an observation in **Quashie** by Elias LJ, applying the Court of Appeal's approach in **O'Kelly**.

47. At paragraph 12 Elias LJ said:

> **"However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee."**

He then goes on to consider **O'Kelly**.

48. We think that the Employment Tribunal adopted that submission by Mr Sheldon when they referred to **Quashie** at paragraph 163, immediately before paragraph 164, the focus of the Claimants' appeal.

Discussion

49. We acknowledge that this is a difficult area of the law, as illustrated by the number of occasions on which the House of Lords/Supreme Court has taken a different view from the lower courts and Tribunals (see **Percy**; **O'Brien**; **Hashwani**; **Clyde & Co** and **Preston**).

50. What we think is essential in the present s.83(2) **Eq A** exercise is to draw a distinction between the category (a) employee, employed under a contract of employment, and the

category (b) employee, employed under a contract personally to do work, just as a distinction has to be made between an employee and a limb (b) worker under s.230(3) **ERA**.

51. The single question in both **O'Kelly** and **Quashie** was whether the Claimants were employed under a contract of employment for the purposes of bringing a complaint of unfair dismissal under the **ERA**.

52. Putting paragraph 12 of **Quashie** into context, Elias LJ was there considering whether the parties shared "an irreducible minimum of obligation" which continued during breaks in work engagements (see **Nethermere (St Neots Ltd) v Gardiner & Anr** [1984] IRLR 240, 245, per Stephenson LJ, approved by the House of Lords in **Carmichael**) such as to give rise to a contract of employment. Otherwise, when actually carrying out engagements, the worker is providing services as an independent contractor.

53. That analysis is, with respect, plainly correct when considering the contract of employment question. It does not purport to answer the separate, and irrelevant, question in both **O'Kelly** and **Quashie**, was the contract such as to bring the individual into the definition of a limb (b) worker under the **ERA** or a category (b) employee, as we have termed it, under s.83(2)(a) **Eq A**?

54. In the course of argument Mr Sheldon maintained his position that a lack of mutuality between engagements was relevant not only to the contract of employment question but also the separate question of employment under a contract personally to do work. We disagree. In our judgment that lack of mutuality is relevant to the former and not to the latter. In rejecting Mr Sheldon's submission we have concluded that the Employment Tribunal fell into error,

taking into account, at paragraph 164, an irrelevant factor when considering the category (b) employee question. It was relevant to the contract of employment question, as to which the Employment Tribunal correctly found that these Claimants were not employed under contracts of employment.

55. That is not to say, on a separate point, that what the Claimants did when not working for the Respondent is irrelevant to the category (b) question. It is for the Employment Tribunal to determine whether these Claimants provided their services under a position of subordination to the Respondent or whether they were truly independent providers of services to the world at large and the Respondent was but one of their professional clients. As to that, Mr Sheldon rightly points to the Employment Tribunal's findings at paragraph 128, noting that they did not provide their services to the Respondent with the exclusivity with which Dr Westwood provided his hair restoration services to HMG. However, a lack of exclusivity is not of itself determinative. It is for the ET to consider all relevant factors to determine the question of subordination identified by the Supreme Court in **Hashwani** and considered by the Employment Tribunal at paragraph 170. It will also be necessary to make a clear finding as to whether, when carrying out assignments for the Respondent, the Claimants were integrated into the HMCTS organisation (cf Reasons, paragraph 166). The fact that they exercised their own professional judgment (subject to directions contained in the HMCTS Handbook) is not fatal to category (b) employee status. Dr Westwood was not told what advice he should give his patients in order to restore a full head of hair; nor were Mr O'Brien and Ms Price told how to decide the cases which came in front of them, for the purposes of determining whether they were "workers" other than employees under a contract of employment.

Disposal

56. Having identified an error of law by the Employment Tribunal the final question is what now happens to these cases.

57. Unsurprisingly, Mr Humphreys submits that the decision of the Employment Tribunal was plainly and unarguably wrong (see **Dobie v Burns International Security Services** [1984] ICR 812) and we should reverse it; with equal conviction Mr Sheldon contends that, notwithstanding the error of law as we have characterised it, the decision was plainly and unarguably correct. We reject both submissions.

58. We have taken account of the recent Court of Appeal guidance in **Jafri v Lincoln College** [2014] EWCA Civ 449, further considered in **Burrell v Micheldever Tyre Services Ltd** [2014] EWCA Civ 716. In light of that guidance we conclude that the proper course is to remit the case, to the same Employment Tribunal as Counsel agree, for further consideration. For that purpose we would make the following observations:

(1) The Claimants were not employed by this Respondent under contracts of employment.

(2) The absence of mutuality of obligations between these parties is irrelevant to the separate question, were they employed under a contract personally to do work?

(3) As to that question, it will be necessary to decide, among other things:

  (a) whether they provided their services in a position of subordination; and

  (b) whether, on those occasions, they were integrated into the HMCTS organisation; or

  (c) whether they provided those services to HMCTS as their client or customer as part of an independent business undertaking (see **Cotswold Developments**, paragraph 53)

(4) In answering those questions it is necessary to look purposively and not restrictively at the protection against discrimination which the Claimants seek to invoke; see **Allonby** paragraph 66, cited in **Hashwani**, paragraph 26.

59. Accordingly these appeals are allowed. The cases are remitted to EJ Starr's Tribunal for further consideration in the light of our Judgment.