Appeal No. UKEAT/0495/12/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 May 2013 and 24 October 2013
Judgment handed down on 21 November 2014

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

---

(1) PIMLICO PLUMBERS LTD
(2) MR C MULLINS — APPELLANTS

MR G SMITH — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR AKASH NAWBATT (of Counsel) Instructed by: Mischon de Reya Solicitors Summit House 12 Red Lion Square London WC1R 4QD
For the Respondent	MR DAVID STEPHENSON (of Counsel) Instructed by: TMP Solicitors LLP 29th Floor One Canada Square Canary Wharf London E14 5DY

SUMMARY

CONTRACT OF EMPLOYMENT – Whether established

WORKING TIME REGULATIONS – Worker

Pimlico is a full service plumbing and maintenance company with 75 office staff and 125 "contractors" including the Claimant.

The Claimant and other operatives were held out to the public by Pimlico as being an integral part of its work force.

Operatives were required to wear Pimlico uniforms, to drive vans with the Pimlico logo and could only be contacted by customers through Pimlico.

Contracts and estimates were issued in the name of Pimlico and payment was made to Pimlico. Pimlico monitored the movements of operatives through a GPS system on their vans. The terms of the agreement between the Claimant and Pimlico as found by the Employment Tribunal, included the following;

1. The Claimant was a self employed operative described as an independent contractor of the Company, in business on your own account. Nothing in this Agreement shall render you an employee, agent or partner of the Company and liable to account for his income tax and value added tax and social security contributions.

2. He was required to provide all his own tools, equipment, materials and other items required.

3. The Claimant accepted personal liability for work undertaken by him.

4. The Claimant was required to provide insurance.

5. Normal Working Hours consisted of a 5 day week, with a minimum of 40 hours.

6. There was no express provision permitting the Claimant to provide a substitute in respect of services he had agreed to provide.

As a matter of practice Pimlico permitted operatives to transfer work to other operatives but there was no unfettered right to substitute another operative.

The EAT considered that in order to present the case, that contrary to appearances, its operatives were in business on their own account, Pimlico Plumbers arranged a carefully choreographed set of procedures and contractual documents designed to negate the appearance given to the public at large and its customers and to present its operatives as self employed in business on their own account.

The Claimant presented claims for unfair dismissal, wrongful dismissal, entitlement to pay during the period of a medical suspension and failure to provide particulars of employment.

His entitlement to present for these claims was dependent on his being an employee of Pimlico properly so called; The Employment Tribunal held that he was not an employee so it had no jurisdiction to entertain these claims. It considered all the circumstances including the fact that the Claimant took advantage of his self employed status, that there was insufficient obligation to provide work or pay and undertook the financial risk of non payment by the client for this relationship to be one of employer and employee. This part of the decision was upheld by the EAT which dismissed the claimant's cross appeal in this regard.

He also made claims of direct disability discrimination, discrimination arising out of failure to make reasonable adjustments, holiday pay and claims for unauthorised deductions which are more widely available; under e.g. S230 3 (b) ERA1996 for a 'limb' b' worker. Provisions with similar criteria are to be found in S 83(2) of the Equality Act 2010 and Regulation 2 of the Working Time Regulations 1998. The ET held that the claimant was a limb b worker and it accordingly had jurisdiction to entertain the claims. The Employment Tribunal considered that they had an obligation to provide his services personally and that there was no unfettered right to provide a substitute. The EAT dismissed Pimlico's appeal in this regard;

Bates Van Winkelhof v Clyde & Co [2014] 1 WLR 2047, **Hashwami v Jivraj** [2011] ICR 1004 are **Ready Mixed Concrete v Minister of Pensions and National Insurance** [1968] 2 QB 497 and **Market Investigations v Minister of Social Security** [1969] 2 QB 173 applied.

The Employment Appeal Tribunal derived the following principles from the authorities;
In considering whether a person is a limb (b) worker the starting point must be the words of the statute and that there is no one formula or characteristic than can be said to be determinative.

1. The Court or Tribunal must take a holistic approach and may take account of matters such as the degree of subordination of the worker to the 'employer' and the degree of his integration into the 'employer's' business and also whether the contract between employer and 'worker' was in essence a contract between two independent business undertakings; the extent to which the 'worker' carried out work other than for the 'employer' and his right to do so.

2. The employer of a person integrated into the employer's workforce and carrying out work for that employer is in no sense his customer or client.

3. If a ‘worker’ carries out work for more than one ‘employer’ he can nonetheless be a limb (b) worker of one or more such employers if the statutory criteria are met.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the First Respondent, Pimlico Plumbers, from a Decision of the Employment Tribunal at London (South), Employment Judge Corrigan, who sat alone at a Pre-Hearing Review. The Decision was entered into the Register and sent to the parties on 17 April 2012.

2. The Employment Tribunal held that the Claimant was a worker within the meaning of section 230(3)(b) of the **Employment Rights Act 1996** and that his relationship with the Respondent was one of "employment" under section 83 (2) of the **Equality Act 2010**. The Employment Judge held that the Employment Tribunal did not have jurisdiction to consider claims for unfair dismissal, wrongful dismissal, entitlement to pay during the period of a medical suspension and failure to provide particulars of employment. The Employment Judge held, however, that the Employment Tribunal had jurisdiction to consider complaints of direct disability discrimination, discrimination by reason of failure to make reasonable adjustments, and in respect of holiday pay as well as in respect of unauthorised deductions from wages.

3. On 10 May 2012 HHJ Clark disposed of the Respondent's appeal pursuant to Rule 3(7) of the **Employment Appeal Tribunal Rules of Procedure**. On 15 March 2013 Langstaff J, after a hearing under Rule 3(10), referred the Respondent's appeal to the Full Hearing.

4. On 11 October 2012 HHJ Hand disposed of the Claimant's cross-appeal under Rule 3(10), on 8 January 2013 HHJ McMullen QC disposed of the Claimants cross appeal under r 3(10) but on 18 March 2013 Langstaff J referred this to a Full Hearing.

The Factual Background

5. I take this largely from the decision of the Employment Tribunal.

6. The Claimant is a plumber and carried out plumbing work for the Respondent between 25 August 2005 and 28 April 2011. Prior to his relationship with the Respondent the Claimant had worked as a plumbing and heating engineer but had never done so as a self-employed person.

7. The Respondent is a full service plumbing and maintenance company with 75 office staff and 125 "contractors" including the Claimant.

8. The Employment Tribunal found that the contractual relationship between the parties was governed by a document dated 25 August 2005, to which it is convenient to refer now. The contract is a standard form prepared by the Respondent with blanks completed in manuscript. The document is described in manuscript as an "agreement" between the Respondent and the Claimant, described as "contracted employee". The template provided that the Claimant agreed to undertake work "solely for by Pimlico Plumbers in the capacity of plumbing/heating". The words "solely" and "by" were deleted so that the agreement read that the Claimant had agreed to undertake work for Pimlico Plumbers. The terms of the agreement were detailed in the Company Procedures and Working Practice Manual, which the Claimant was obliged to read and to comply with. The Claimant agreed to accept the terms and conditions laid out in the Working Practice Manual and accepted that this formed part of his agreement and signed accordingly.

9. This agreement was replaced by a longer and more detailed agreement dated 21 September 2010 (see page 103). The Claimant was now referred to as a "self-employed operative". Paragraph 1.2 is an unremarkable provision, providing that either party might terminate the agreement immediately by notice in writing if the other committed any material breach of any term of the agreement or entered into liquidation or had an administrator or receiver or other encumbrancer appointed or becomes bankrupt or insolvent. The Respondent was entitled to terminate the agreement if the Claimant was convicted of a criminal offence other than a road traffic offence for which a custodial sentence was not imposed and did not prevent the Claimant from driving legally or if the Claimant were to commit an act of gross misconduct:

> **"...or do anything which brings or may bring the Company into disrepute or, after notice in writing, wilfully neglect [sic] to provide or if you fail to remedy any fault in providing the Services or if, in the Company's opinion, your work is of poor quality or you do not perform the Services to a satisfactory standard."**

10. By virtue of paragraph 2.2 the Claimant was obliged to provide:

> **"...the Services for such periods as may be agreed with the company from time to time. The actual days on which you will provide the Services will be agreed between you and the Company from time to time. For the avoidance of doubt, the Company shall be under no obligation to offer you work and you shall be under no obligation to accept such work from the Company. However, you agree to notify the Company in good time of days on which you will be unavailable for work."**

11. Under Clause 2.4 the Claimant warranted and undertook that he was competent to perform the work he agreed to carry out and that he would:

> **"...promptly correct, free of charge, any errors in your work which are notified to you by the Company or, at the Company's option, repay to the Company the cost of correcting such errors."**

12. Paragraph 2.5 provides:

> **"If you are unable to work due to illness or injury on any day on which it was agreed that you would provide the Services, you shall notify the Company as soon as reasonably practicable stating the reason for your unavailability and the anticipated duration and (as soon as you know) the date on which you will be available for work."**

13. Clause 2.6 provides as follows:

> **"You acknowledge that you will represent the Company in the provision of the Services and that a high standard of conduct and appearance is required at all times. While providing the services, you also agree to comply with all reasonable rules and policies of the Company from time to time and as notified to you, including those contained in the Company Manual."**

14. I observe that the provision at 1.2, (the right of termination if the Claimant were to bring the company into disrepute,) is more consistent with the status of the Claimant as an employee or worker, rather than independent contractor.

15. Fees and expenses are dealt with in paragraph 3. The Claimant was entitled to receive a fee in respect of one half of the services in relation to labour content only:

> **"...provided that the Company shall have received clear funds from the client, and there are no outstanding complaints relating to the Services performed by you."**

16. The Claimant was to be paid only against receipt of an invoice. He was liable to account himself for his income tax and value added tax and social security contributions. Clause 3.5 required the Claimant to provide all his own tools, equipment, materials and other items required for performance of the Services unless it had been agreed that those should be provided through the Company. If the Claimant provided his own materials, he would be entitled to

> **"...up to 20 percent trade mark-up...on such materials provided the cost of such materials used it at least £3,000."**

Where the cost of the used materials was less than £3,000, the Claimant was entitled to a trade mark-up of 12.5 percent.

17. Clause 3.9 provides that the Claimant would have personal liability for the "consequences of your services to the Company" and would maintain suitable professional indemnity cover in respect of any liability incurred in the provision of his services. Clause 4 is headed

"Restrictions". The Claimant was obliged to inform the Respondent of his other activities which could give rise to a direct or indirect conflict of interest to the interests of the company:

> **"...provided that, without limiting this clause..., you shall not be permitted at any time to provide services to any Customer or Prospective Customer...other than under this Agreement".**

18. Paragraph 4.2 provides as follows:

> **"You have no authority (and shall not hold yourself out as having authority) to bind the Company save in so far as your specifically authorised to do so by the Company in writing to the extent necessary for the provision of the Services."**

19. There seems to be some tension between this provision and paragraph 2.6 in which the Claimant acknowledged he would "represent the Company in the provision of the Services". Clause 4.4 contains restrictive covenants (commonly found in employment contracts) which run for some one-and-a-half pages. Paragraph 5.4 precludes the Claimant in any circumstances from providing a customer with his contact details save in relation to the Respondent's office number. The Claimant is precluded from providing his Company mobile telephone number. Clause 6.1 provides:

> **"You are an independent contractor of the Company, in business on your own account. Nothing in this Agreement shall render you an employee, agent or partner of the Company and the termination of this Agreement (for whatever reason) shall not constitute a dismissal for any purpose."**

Clause 6.2 is a non-variation clause:

> **"No variation of this Agreement shall be effective unless made in writing."**

20. Paragraph 6.3 is of some importance. It is an entire agreement clause:

> **"This Agreement contains the entire agreement between the parties, and is in substitution for any previous agreement or arrangement, whether written or oral, between you and the Company relating to the provision of services or otherwise, which shall be deemed to have been terminated by mutual consent as from the commencement of this Agreement."**

21. I note (paragraph 6.3 is relevant in this regard) that there is no express provision permitting the Claimant to provide a substitute in respect of services he had agreed to provide.

22. Although there is no express provision requiring the Claimant to carry out the work personally, that appears to be the purpose of the agreement. Thus in paragraph 1.2 there is reference to the failure to remedy any fault in "providing the Services" and a reference to "your work" which the Respondent might consider to be of poor quality. There is a reference to "you do not perform the Services to a satisfactory standard". Clause 2.1 says as follows "You shall provide...services as are within your skills". Clause 2.2 again refers to "You shall provide ...services (there are two references in this paragraph to "you"). Clause 2.3 again refers to "You shall provide the Services". At Clause 2.4 "You warrant and undertake". Again, "you will be competent to perform the work you agree to carry out"; "you will promptly correct...". Clause 2.6: "You acknowledge that you will represent the Company in the provision of the Services. While providing the services you also agree to comply with all reasonable rules and policies..." There is a reference in paragraph 3.1 to "the Services performed by you".

23. At this point in time I refer to the relevant provisions of the Company Manual, to the terms of which the Claimant was required to work by virtue of paragraph 2.6. The Respondent imposed a strict dress code.

> **"After performance you and the Company are judged on your appearance which must be clean and smart at all times.**
>
> **1. The Company logo'ed uniform must always be clean and worn at all times."**

There follows a list of matters not acceptable under any circumstances. At page 117, under the rubric "Working times", one finds:

> **"Normal Working Hours consist of a 5 day week, in which you should complete a minimum of 40 hours."**

There is a reference to time off and annual leave/holidays:

> **"Adequate notice must be given to Control Room for any annual leave required, time off or period of unavailability. Any leave or time off must be taken in full days."**

24. There is an "on-call rota" and on-call operatives would always receive preferential jobs during normal working hours whenever possible and given preference for overtime/better jobs and newer vans. At page 119 one finds "Operatives Telephone Procedure". Operatives were required to telephone the control room fairly frequently. All customer contact, appointments and scheduling was required to be made through the control room. I refer to paragraph 8:

> **"If you are not able to attend work that day or you wish to start late or finish early, please telephone the Control Room and inform Controller."**

25. Again, it is noticeable that there is no reference to any substitution. There are detailed requirements as to timesheet procedures and invoice procedures as well as estimate procedures. At page 123 one finds procedures in relation to additional labour charges:

> **"Any Operative requiring assistance on any Job must inform the customer of the additional charges involved... and obtain the customer's approval for such charges."**

There are five categories: qualified operatives, labourer, apprentice/trainee, management staff and independent specialist/professional services, who are to be charged for at cost. At page 124, under the rubric, "unpaid invoices", it is provided:

> **"No payment will be made to the Operative until payment in full has been received by the office. If any payment fails to be honoured a deduction will be made from the Operative who has already been paid.**
>
> 1. **A 50% deduction will be made from the Operative's percentage if payment is received by the office later than 1 month from the job date.**
> 2. **Invoices which remain unpaid after six months from the date of the job will be written off."**

Operatives were to be issued with a mobile telephone system and could select the preferred tariff. Mobile telephone charges plus VAT "will be deducted from wages on a monthly basis".

There are provisions relating to collecting and purchasing materials. The operative is required to collect and order the materials for jobs and charge the customer at cost plus 20% trade mark-up plus VAT. At page 127 it is provided that individuals undertaking private work for or as a result of contacts gained during the working week and contravening the signed contract will be dismissed immediately. Operatives who failed to observe the rules would be given a warning and may thereafter be subject to instant dismissal:

> **"Wherever possible the Company will give reasonable notice of termination of contract. Operatives are required to give reasonable notice of leaving and complete [various] formalities."**

26. At page 128, under the rubric "Wages", it is provided that wages would be paid directly into the operative's designated bank or building society account and wage slips might be collected at paying-in or sent by post. Charges are made not only for telephones but also for the use of vans, which operatives were required to hire from the Respondent. Vans were marked with the Respondent's logo. Under "Van rental charges" one finds the following:

> **"The following standard rate of Van Rental Charges, payable monthly in advance, allows Operatives to work on a Self-employed basis." (paragraph 129)**

At page 134 details are given as to "Working practice and customer relations".

27. The details set out at page 134 clearly envisage the operative will be carrying out work personally. The guidelines all relate to such matters as a requirement to arrive punctually, keep "your working area" clean and tidy, test all installations thoroughly and leave in safe working order, never to leave the job uncompleted without informing the customer of the reason. I feel bound to say that my overall impression is that the Claimant was very closely controlled as the Respondent monitored the whereabouts of it's "operatives" through use of GPS trackers fixed to all the vans.

28. My clear impression is that operatives such as the Claimant were held out to the public by the Respondent as being an integral part of the Respondent's workforce, despite protestations that he was merely an independent contractor.

29. I return to the Judgment of the Employment Tribunal. Mr Mullins, the Second Respondent, was the founder and owner of the Respondent.

30. The Employment Tribunal resolved an issue that I need not investigate as to whether the agreement to which have I referred had manuscript alterations when signed or whether these were added later. The Employment Tribunal accepted the evidence of the Respondent's witnesses that the document to which I have referred was that actually made between the parties.

31. The Employment Tribunal characterised the agreement as one "with the Claimant personally to undertake plumbing/heating work for the... Respondent." At paragraph 13 they said this:

> **"The Claimant accepted that whilst working with the First Respondent he believed the arrangement was one of a self employed person and he embraced the tax advantages of being self employed. He was registered with the Construction Industry Scheme. He engaged an accountant to prepare income and expenditure accounts throughout the period of his relationship with the First Respondent and filed tax returns on the basis that he was self employed. He has continued to file a return on that basis for this financial year, after he has asserted he is an employee in this tribunal. He was VAT registered and elected to be on the 'materials deal' whereby he could get the 20% mark up available on materials."**

The Employment Tribunal examined the Claimant's income and expenditure accounts, which demonstrated that he had to cover substantial costs of materials himself. In his last full year he paid £52, 887 on materials. He provided his own protective clothing and paid his wife £4,680 per year for minimal secretarial duties and claimed the sum of £520 per year to reflect the use of a room in his home as his office. He set off sums for accountancy charges, insurance,

telephone and internet, tools and equipment hire, and motor vehicle expenses. Out of the sum of £130,753 the Claimant set off expenses totalling £82,754. I note, however, that, although the Claimant was responsible for purchasing materials, he was of course entitled to be repaid together with trade mark-up.

32. The Claimant was also VAT-registered. The Employment Tribunal noted that the Respondent had accepted that operatives had to agree to the Respondent's terms in order to work for the Respondent and that these were non-negotiable. At paragraph 23 the Employment Tribunal found that in practice the Claimant solely worked for the Respondent, although other colleagues did at times do private work and did by arrangement leave for a period to do other jobs and then return. The Claimant could reject particular jobs, taking into account for example the nature of the job and how far he would have to travel. He could also make a decision about when to go home on a working day. He did decide his own working hours. The Claimant agreed that the Respondent had no obligation to provide him with work on any particular day. If there was not enough, the Respondent did not have to provide him with work and he would not be paid.

33. It is perhaps helpful to interpolate reference at this point in time to the Claimant's Grounds of Claim:

> **"I worked set hours 8am-6pm Monday to Friday. To get work I called the control room where the jobs were allocated.....I very rarely refused a job. There was an unwritten rule that if work was refused you would be 'parked up' meaning no work allocated for a period of time, which reinforced the rule that engineers could not refuse jobs."**

At page 54 (page 4 of the Grounds) one finds this:

> **"There was no genuine and unfettered right entitling me to substitute someone else to do my work. R1 only permitted substitution internally i.e. Pimlico contractors working for each other. R1 did not permit substitution of external contractors. I did not have any freedom to choose my own personnel or working hours. There was never any intention that any such substitution clause would operate. My job was strictly controlled down to my appearance so any substitution had to be another Pimlico contractor.**

I did not have any real economic interest in the way in which the work was organised, other than the fact that the more work I did, the more I earned. The pricing structure was determined by R1. If I had to quote within that fee structure. R1 provided the terms of business to the customers. R1 provided the guarantee to the customers."

At paragraph 24 the Employment Tribunal described the manner in which the Claimant could exercise discretion in relation to the work needed for a customer:

"The contractual documents do not give him an unfettered right to provide a substitute."

The Employment Tribunal record that the Claimant accepted he could use external contractors if they were specialists in trade, which the Respondent did not provide either to assist him or to do a specialist job. Where some of the work was delegated, the work would be paid for by the Respondent but come out of the Claimant's share of the labour costs rather than the First Respondent's share of the labour costs:

"Although the... Respondent relies on a number of invoices to establish a wider right to substitute I do not accept that they establish anything more than the degree of substitution accepted by the Claimant (internal to other of the...Respondent's operatives and to external specialists). They are not evidence of an unfettered right to substitute at will."

34. The Employment Tribunal (para 25) then went on to consider contracts issued by the Respondent after the Claimant had ceased working with them. The Employment Tribunal considered this reflected what the Respondent said was the reality:

" 'I [the operative] reserve[s] the right to assign or subcontract any or all of my duties under this Agreement, subject to the prior consent of the company and providing always that I agree to remain responsible and liable for the acts or omissions of such assignee or subcontractor.

2.9 I will ensure that the duties under this agreement are performed. I will either perform the duties personally or engage another Pimlico contractor to do it for me at my own expense. I will remain responsible and liable for the acts or omissions of such person...'

In my view this clarifies that the Claimant was contracted to provide work personally with, at most, only a limited power to substitute either to other internal operatives or with the prior consent of the First Respondent."

Employment Judge Corrigan (para 27) noted that HMRC had taken the view, on the information it had, that the operatives were not employees for the purposes of tax "because the degree of financial risk is inconsistent with that". HMRC did however consider that:

> **"...the irreducible minimum of obligation had been met and there was a sufficient degree of control as required for the relationship to be one of employer/employee. It was found that there was conflicting evidence on the issue of substitution".**

The Judgment of the Employment Tribunal

35. The Employment Tribunal set out the facts largely as I have set them out above. It then directed itself as to the law, in particular to the definition of employee in section 230(1) of the **Employment Rights Act 1996**. In relation to the requirement for a contract to be a contract of employment, the Employment Tribunal directed itself by reference to **Ready Mixed Concrete v Minister of Pensions and National Insurance** [1968] 2 QB 497 and in respect of an irreducible minimum of obligation, **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 Langstaff J in the EAT. The Employment Tribunal noted that unfettered freedom to delegate the performance of the service to another is inconsistent with a contract of employment; even if the right is not used (**Autoclenz v Belcher & Ors** [2011] UKSC 41). The Employment Tribunal referred to **Market Investigations Ltd v Minister of Social Security** [1969] 2 QB 173 as authority for the proposition that, if an individual performs services as a person in business on his own account, he would not be an employee. Reference was also made to **Consistent Group Ltd v Kalwak** [2007] IRLR 560 and **Autoclenz** for the principle that Tribunals should be alive to the risk that lawyers have drafted substitution clauses and "no obligation" clauses as a matter of form that do not reflect the reality of the relationship. In relation to whether the Claimant was a "worker", the Employment Tribunal referred to section 230(3) of the **Employment Rights Act** and Regulation 2 of the **Working Time Regulations 1998**. The Employment Judge referred to **Community Dental Centres Ltd v Dr Sultan-Darmon** (UKEAT/0532/09/DA, 2 July 2010) as authority for the proposition

that an unfettered right to appoint a substitute was inconsistent with being a worker but a limited power to appoint substitutes was not inconsistent with an obligation for personal service. The Employment Tribunal noted that the distinction is

> **"...between a worker who was not an employee but who could not, in some narrower sense, be regarded as carrying on a business, whose degree of dependence was essentially the same as that of employees and a contractor who have a sufficiently independent position to be treated as being able to look after themselves.",**

by reference to **Byrne Bros (Formwork) Ltd v Baird** [2002] ICR 667. The Employment Tribunal also referred to the Judgment of Elias J in the EAT in **Cotswold Developments Construction Limited v Williams** [2006] IRLR 181 as authority for the proposition that the focus should be on whether the purported worker actively marketed his services as an independent person to the world in general, on the one hand, or whether he was recruited by a principal to work for that principal as an integral part of the principal's operation. Reference was also made to section 83(2)(a) of the **Equality Act 2010** and the decision of the Supreme Court in **Hashwani v Jivraj** [2011] ICR 1004, in which the Employment Tribunal noted the distinction drawn between those who were in substance employed, performing services for and under the direction of another person in return for remuneration or those who were independent providers of services not in a relationship of subordination with the person receiving the services. The Employment Tribunal went on to consider firstly whether the Claimant was an employee of the First Respondent. The decision of the Employment Tribunal in this regard is set out at paragraphs 39 to 45:

> **"39. In my view the Claimant was not an employee. The irreducible minimum obligation on the First Respondent was missing. The first contract was silent about the obligations on the First Respondent. However I have accepted that the Claimant signed the second contract which states that there is no legal obligation on the First Respondent to provide work. In any event the Claimant accepted in evidence that that did reflect the reality of the obligations between the parties.**
>
> **40. Secondly there was more than one circumstance when, under the agreement, the First Respondent had no obligation to pay the Claimant for the work done. Firstly, when a customer's invoice had been outstanding for more than six months (even if the customer then paid the First Respondent for the work). Secondly, where the Claimant had an obligation in the agreement to rectify problems with his own work at his own cost. The Claimant agreed that these clauses reflected reality.**

41. Although the obligation on the employer can vary I consider that there was insufficient obligation to provide work or pay for this relationship to be one of employer and employee.

42. I also find this consistent with what the parties themselves thought during the duration of the contract as it was the clear and ongoing intention of the parties that the Claimant was self employed rather than an employee. The Claimant employed an accountant and sought to make full use of the tax advantages of being self employed.

43. Moreover, the Claimant was VAT registered and elected to take advantage of the 20% mark up available on materials as it was financially beneficial for him to do so. This applies to the self-employed but not to employees. I therefore find this inconsistent with an employment contract.

44. I also find the financial risk borne by the Claimant, which included the payment for materials in advance, the risk that he might have to work without payment in the two circumstances outlined at paragraph 40 above, as well as the risk of the work taking longer than estimated and therefore being less lucrative than expected, are all inconsistent with there being a contract of employment.

45. For all the reasons set out above I find the Claimant was not an employee."

36. The Employment Tribunal then went on to consider whether or not the Claimant was a "worker" and concluded that the agreement was to personally provide work for the Respondent, and that was the main purpose of the agreement.

37. At paragraph 47 the Employment Judge found that:

"The Respondent's Company Procedures and Working Practices obliged the Claimant to work a normal week of 40 hours, even if that was not enforced. That was part of the Claimant's original contract and neither party suggested the procedures no longer reflected the reality of the obligations between them. Alternatively, even if the 40 hour clause was no longer part of the Claimant's contract, Mr Mullins accepted in evidence there was a minimum obligation to work about 36 hours a week. In any event the Claimant's contract required him to provide work on the days agreed with the Respondent."

38. The Employment Judge accepted that the Claimant was:

"...free to choose the particular hours he worked, whether he took a particular job, and what time he left to go home on a particular working day. He also accepted that by arrangement for the engineer to take an extended break from working with the First Respondent to pursue other work. Although there was flexibility the Respondent expected engineers to discuss their working hours with the Respondent and agree them. I find that the Claimant clearly had sufficient obligation to provide his work personally to be a worker". (see paragraph 48).

39. The Employment Judge then turned her attention to the issue of substitution:

"49. The emphasis of the First Respondent was that the Claimant could choose to substitute to another operative if he had a more lucrative job with the First Respondent or get an operative to help him to do a job more quickly. He might also require the assistance of external tradesmen.

> **50. I accept that in practice engineers with the First Respondent swapped jobs around between each other, particularly where they had more than one job available. They also used each other to provide additional help where more than one person was required for the job or to do a job more quickly. That is not a right to substitute but a means of work distribution amongst the First Respondent's engineers. Even if the Claimant could choose to give a job to another operative on a day he preferred not to work that is still not an unfettered right to substitute at will, but more akin to swapping a shift between workers."**

The Employment Judge did not consider that the evidence in relation to the use of external contractors was evidence of an unfettered right to substitute at will. There was no evidence of a plumbing engineer substituting work to an external plumber of his choice on a day when he preferred not to work or to conduct work independently to the Respondent. There was merely evidence in support of the Claimant's evidence that external contractors were sometimes required to assist on a job because of the need for further assistance or to conduct specialist work. She noted that that the Respondent's current documentation made clear that the Respondent was required to give approval before work was done by an external contractor:

> **"...which would suggest there is not an unfettered right to substitute. None of this negates the fact that the Claimant was under an obligation to provide work personally for a minimum number of hours per week or on days agreed with the... Respondent."**

The Employment Judge noted that the Claimant had autonomy in relation to estimates and work done but the Respondent:

> **"...exercised very tight control in most other respects...This included a high degree of restriction on the Claimant's ability to work in a competitive situation which would suggest he was not in business on his own account and is certainly inconsistent with the... Respondent being a customer or client of any such business."**

She did not accept that the restriction clauses did not reflect reality. She concluded that the document was drafted for the Respondent and the restrictions reflected the nature of the work. They appeared to have been drafted to protect the Respondent's interests. It may be that they have not been enforced to date but this did not prevent them being terms deliberately drafted with the intention that they could be enforced.

40. The Employment Judge then concluded:

> **"53. The First Respondent could not be considered to be a client or customer of the Claimant's business but is clearly better regarded as a principal and the Claimant was an integral part of the First Respondent's operations and subordinate to the First Respondent. The Claimant did not work for anyone other than the First Respondent and there is no evidence he sought to do so or marketed his services. I do not consider he was in business on his own account.**
>
> **53. In my view this relationship falls squarely within the employer/worker relationship the law is designed to cover as set out at paragraph 54 above.**
>
> **54. Having found the Claimant is a worker the relationship meets the definition of employment in the Equality Act 2010."**

41. It is helpful at this point to examine how a contract for plumbing work by Pimlico Plumbers appeared to the world at large and to its customers.

(a) A customer seeking, for example to have a leaking pipe repaired would contact Pimlico Plumbers.

(b) In due course the customer would be visited by a plumber in a van with Pimlico Plumbers' logo and wearing its uniform.

(c) The customer would then receive an estimate from Pimlico Plumbers

(d) On completion of the work the customer would receive an invoice from Pimlico Plumbers, which doubtless provided for payment of VAT to Pimlico Plumbers.

(e) The customer would make payment directly to Pimlico Plumbers.

(f) If the customer wished to contact the plumber carrying out the work he was only able to do so by contacting him at or through Pimlico Plumbers.

42. So far as the customer was concerned the plumber was part of Pimlico Plumbers' work force; this was the appearance that Pimlico Plumbers doubtless wished to present to the public. There was nothing to suggest to customer that the operative with whom they dealt was a self employed plumber in business on his own account, and customers would doubtless have been surprised to hear that this was the case.

43. In order to present the case, that contrary to appearances, its operatives were in business on their own account, Pimlico Plumbers arranged a carefully choreographed set of procedures and contractual documents designed to negate the appearance given to the public at large and its customers and to present its operatives as self employed in business on their own account. In any event it is clear on the authorities that Pimlico Plumbers was not the Claimant's customer, nor was Pimlico Plumbers' own customer. The operative was carrying out work for Pimlico Plumbers to enable Pimlico Plumbers to meet its obligations towards those customers.

44. All arrangements including the giving of estimates and recommendations as to what work was required were given by the operative acting on behalf of Pimlico Plumbers.

45. I was in the course of correcting the first draft of my judgment when the Supreme Court delivered its judgment in **Bates van Winkelhof v Clyde & Co LLP** 2014 1 WLR 1047.The case concerned an equity partner in Clyde and Co who brought claims that as a 'worker' within the meaning of section 230(3) of the 1996 **Employment Rights Act**, she was entitled to the protection of section 47B of the Act for having suffered a detriment by reason of 'whistle blowing'. The judgment seemed to me to have direct relevance to my decision in this case and I asked for further written submissions from the parties. Although the parties drew my attention to the case the parties initially did not consider that the decision would affect my judgment and that further submissions were not necessary, however I took the view that the decision was very much in point and that I would be assisted by further submissions and the parties both provided further submissions in writing which I shall consider shortly. The decision of the Supreme Court was principally directed to the question whether the Claimant was a limb (b) worker rather than an employee I have referred to the case when considering the Respondent's appeal on that question.

46. It may be thought that having regard to the reasoning in that case it would not be necessary for me to make much reference to a number of authorities considered in Bates van Winkelhof. However as these authorities were integral to the decision of the Employment Judge and the parties' submissions I have set out my consideration of those cases.

The parties' submissions

47. It is convenient to deal with the issue of whether the Claimant was an employee before deciding if he was a 'worker' and thus consider the cross-appeal by the Claimant before the appeal of the Respondent.

48. I propose, therefore to deal the submissions in the following order:

(a) The Claimant's submissions in the cross appeal to the effect that the Claimant should have been found to be an employee.

(b) The Respondent's submissions in the cross appeal;

(c) The Respondent's submissions in the appeal that the Claimant was not a 'worker'

(d) The Claimant's submissions in the Respondent's appeal.

49. As I have said, in my opinion **Bates van Winkelhof** was principally directed to relate to the question whether the Claimant was a limb (b) worker and I shall deal with that case in considering the Respondent's appeal to the effect that the Claimant was not a limb (b) worker. However although the Supreme Court did touch on whether Ms Bates van Winkelhof was an employee, I do not consider that the case offered any support for the Claimant's cross appeal.

The Claimant's submissions in the cross appeal; the Claimant was an 'employee'

50. Mr Stephenson drew attention to what is said to be an inconsistency between paragraph 41, in which the Employment Judge considered there was insufficient obligation to provide work or pay for this relationship to be one of employer and employee, and paragraph 23, in which the Employment Judge found that the Claimant and Respondent had agreed there was no obligation to provide him with work on any particular day and, if there was not enough work, the Respondent would not have to provide him with work. At paragraph 39 the Employment Judge considered that "The irreducible minimum obligation on the... Respondent was missing" and accepted that the reality of the obligations between the parties was that there was no legal obligation on the Respondent to provide work. It was submitted by Mr Stephenson that the Employment Judge fell into error in considering whether or not the Claimant was an employee, properly so called, because the irreducible minimum obligation was missing. The Employment Tribunal, at paragraph 47, had concluded that the Respondent's procedures and working practices were part of the Claimant's contract and obliged the Claimant to work a normal week of 40 hours. The Claimant was obliged to work on days he agreed with the Respondent and was clearly obliged to provide his work personally. The Tribunal found, at paragraph 51, that the Claimant was under an obligation to provide work personally for a minimum number of hours per week or on days agreed with the Respondent. These were the factors the Employment Tribunal was obliged to consider both in relation to deciding whether the Claimant was an employee or a worker.

51. It was argued that I should have regard **Autoclenz v Belcher 2011 ICR 1157** to support the submission by Mr Stephenson that the relevant bargaining power of the Claimant and Respondent had to be taken into account in determining whether the terms of the written agreement truly represent what had been agreed. By reason of the principles set out in

Autoclenz, the Employment Tribunal was entitled to conclude (paragraph 50) that the swapping of jobs by engineers was not evidence of a right to substitute but a means of work distribution among the Respondent's engineers. Mr Stephenson reminded me that the Judgment of HHJ Clark in **Consistent Group v Kalwak** 2007 IRLR 560, approved in **Autoclenz**, spoke as to the need for Employment Tribunals to be alive to lawyers drafting terms permitting substitution as a matter of form even if that did not reflect the reality of the party's agreement. Mr Stephenson submitted that there was no contractual entitlement for the Claimant to provide a substitute worker and that any entitlement as there may have been was certainly not unfettered.

52. Mr Stephenson relied upon **Stephenson v Delphi Systems** [2003] ICR 471 as authority for the proposition that there was sufficient mutuality by reason of the obligations to provide and accept work and the mutuality of the provisions in the agreement. If the Claimant was obliged to work 40 hours per work, then there must be a corresponding obligation to provide that work. The written terms provided an overarching or umbrella agreement within which the individual assignments fell. The finding in paragraph 41 that there was insufficient obligation to provide work or pay for the relationship to be one of employer and employee, and the finding that the irreducible minimum obligation was missing, is inconsistent with other evidence and the totality of the evidence pointed to the Claimant being an employee.

The Respondent's submissions on whether the Claimant was an employee

53. Mr Nawbatt submitted that the Claimant, in its cross-appeal, was only challenging the finding by Employment Judge Corrigan on the irreducible minimum of obligation and did not seek to challenge the other free-standing reasons for the conclusion that the Claimant was an employee. The findings in relation to the irreducible minimum were findings of fact and raised

no issue of law. The Employment Tribunal was entitled to find that such mutual obligations as subsisted between the parties were not such to create a contract of employment. They were not consistent with a contract of service but consistent with a business relationship; he referred to **Mixed Concrete v Minister of Pensions** 1968 2GB 497 and also to the case of **Stringfellow Restaurants v Quashie** 2013 IRLR 99 case, to which I shall not refer further. This was a case in which a lapdancer would not receive payment unless the Respondent received payment from the client.

54. Mr Nawbatt characterised the cross-appeal as being a perversity challenge and accordingly the Claimant would have to cross the very high threshold set out in **Yeboah v Crofton** [2002] IRLR 634. Mr Nawbatt noted that the Claimant had challenged the finding at paragraph 39 that the irreducible minimum obligation on the First Respondent was missing but, did not challenge the findings at paragraph 40 in relation to the relevance of circumstances under the agreement where the Respondent had no obligation to pay the Claimant for work done, and at paragraph 44, the financial risk borne by the Claimant including payment for materials, the risk he might have to work without payment, as well as the risk of the work taking longer than estimated and therefore being less lucrative, being inconsistent with there being a contract of employment. Even if the Claimant were to succeed in his appeal insofar as paragraph 39 was concerned, the appeal must still fail because the findings of the Employment Tribunal at paragraphs 41 and 44 were fatal to the submission that there was a contract of employment, whether overarching or in individual cases. The matters that were relevant in relation to whether the Claimant was a worker also impacted on the question of whether he was an employee.

55. Mr Nawbatt drew attention to the findings by the Employment Tribunal, again which pointed against the relationship between the parties being that of employer and employee: (a) the findings as to the circumstances in which the Claimant would not be entitled to payment; (b) the parties' believing and acting on the basis that the Claimant was self-employed rather than an employee; (c) the Claimant being VAT-registered; (d) the financial risk borne by the Claimant including payment from materials in advance, the risk he might have to work without payment, as well as the risk of work taking longer than estimated. Mr Nawbatt also pointed to the findings of the Employment Tribunal in relation to the Claimant's obligation to provide tools and as to the cost of materials. He also pointed to the Claimant's autonomy in relation to giving of estimates and the extent of work to be done.

56. Mr Nawbatt drew attention to **Hashwani v Jivraj** 2011 ICR 1014 in which the Supreme Court commented on the decision in **Allonby v Accrington and Rossendale** College 2004 ICR 1328, a decision of the European Court of Justice [2004] ICR 1328, construing 1(6) of the **Equal Pay Act 1970**, similar in language to section 83(2) of the Equality Act. He submitted that there was an important and critical distinction between those who were in substance employed and those who were "independent providers of services who were not in a relationship of subordination with the person who receives the services". Mr Nawbatt reminded me that the case is authority for the need to take all factors and circumstances into account in determining whether a Claimant is a "worker", "employee" or neither of these.

Notice of Appeal

Respondent's submissions and whether the Claimant was a worker

57. In his submissions Mr Nawbatt took grounds (i), (iv) and (v) together. It is said that the Employment Tribunal failed to apply the statutory test to determine the issue, misdirected itself,

and erred in law in concluding that there was an obligation on the Claimant to personally provide work. It is then said that the Employment Tribunal failed to consider if there was one overarching contract or a series of successive separate contracts in circumstances where it had found there was no mutuality of obligation and the alleged discrimination had occurred during periods when the Claimant was not carrying out assignments. It is said that there were inconsistent findings made by the Employment Tribunal as to whether the Claimant was required to work a minimum number of hours, 36 or 40, each week.

58. It is said that the Employment Tribunal wrongly substituted the test of there being "an unfettered right of substitution at will" for the words of the statute and compounded that error by requiring any such term to be in writing. Mr Nawbatt relied on the fact that the Claimant also contracted to carry out work that might require assistance from external trades.

59. He submitted that the Claimant's entitlement to carry out work with the assistance of other trades was not consistent with an obligation to perform works personally. He stressed on a number of occasions that an unqualified right to substitute was inconsistent with personal service.

60. Mr Nawbatt drew attention to the ability of the Claimant to engage others to assist him, including specialist subcontractors, payable from his share of the fee.

61. He criticised the finding by the Employment Tribunal that what had taken place was not so much substitution as "shift-swapping". He criticised the approach of the Employment Tribunal to the question of whether the Claimant was obliged personally to carry out jobs. He submitted that the Employment Tribunal did not carry out a careful and detailed balancing exercise having

taken into account all relevant considerations; he relied upon the decision of the European Court of Justice in **Allonby** and the Supreme Court in **Hashwani** and **James v Redcats (Brands) Ltd** [2007] IRLR 296 as well as on **Byrne Brothers v Baird** 2001 ICR 667.

62. Mr Nawbatt pointed to a number of matters; the fact that the Claimant did not undertake to work a given number of hours but to complete an assignment, the method of payment and the risk borne by the Claimant in the event of non-payment by the customer, his obligation to remedy defective work, the requirement that the Claimant supplied equipment. These matters needed to have been explicitly taken account of but were not. Limitations on the persons to whom the work could be substituted did not render the right to substitute as being "fettered"; reliance was placed upon **Premier Groundworks v Jozsa** UKEAT/0494/08 For a restriction on the right to substitute to be a fetter, he submitted that it must relate to when one can substitute, the circumstances in which one can substitute and to, rather than to whom you may substitute. The analogy of shift-swapping was flawed because it did not reflect the facts found by the Employment Tribunal. This was not a case of shift-swapping but of substitution.

63. The Employment Tribunal was wrong to conclude that the obligation to perform the work personally was the main purpose of the agreement. No reasons were given, and the conclusion was perverse. It was submitted that the dominant purpose was the particular outcome or objective, and any intention to provide personal services was incidental or secondary. This point was not addressed by the Employment Tribunal. It is said that this conclusion was reached without the Employment Tribunal taking into consideration the fact that the Claimant could reject jobs and could exercise his discretion in relation to work needed, whether to negotiate on price, and being unsupervised in relation to the work itself. He was free to subcontract all or any part of the job. He was obliged to rectify defective work free of charge or

to pay the cost of correcting errors and was personally liable for the consequences of his services and required to maintain suitable professional indemnity cover and to provide all tools, equipment and materials. It was submitted that the Employment Tribunal did not carry out the careful and detailed balancing exercise, taking into account all relevant considerations by the European Court of Justice in **Allonby**, the Supreme Court in **Hashwani** and in **James v Redcats Brands 2007 ICR 1006**, and also the question of subordination because one party might be economically dependent on the other.

64. The Employment Tribunal had applied the narrow test set out in **Cotswold** rather than the approach identified in **Hashwani**. Mr Nawbatt pointed to the evidence that, in a measured 12-week period in late 2010, the Claimant had worked 20 hours per week and less in the ten days preceding 28 April 2011 (the last day he made himself available for work). This submission, in my opinion ignores the facts that, if there was no work available, the Claimant could not be obliged to work and that for some time, as a result of his heart attack in January 2011, and disability, he was unable to work a full week. Mr Nawbatt returned to the issue of whether the Employment Tribunal was entitled to conclude that the Claimant was not carrying on business and the Respondent was not his client or customer; no reasons were given, and the conclusion was perverse. It was important to determine the essence of the relationship following **Redcats**; the essence of the relationship of a worker to the employer had to be that of someone who was employed albeit in a small way in a business undertaking. He also referred to the decision of Langstaff J in **Cotswold Developments v Williams** 2006 IRLR 281, Langstaff J suggested that the focus should be on "whether the purported worker actively markets his services as an independent person to a world in general..., or whether he is recruited by a principal to work for that principal as an integral part of the principal's operation". The Claimant was employed albeit in a small way in a business undertaking as described in **Redcats**. The business was

created by the contract with the Respondent, and it was sufficient to constitute being in business on his own. There was no restriction on who the Claimant could work for save in relation to the Respondent's customers or contacts. The Employment Tribunal did not concentrate on the contractual right but rather on the fact that this right had never been exercised, and even if the Claimant did not exercise the right to work for other people, other operatives did, as found by the Employment Tribunal.

65. Mr Nawbatt submitted that the Employment Judge had ignored various indicia of independent working as suggested in **Market Investigations**. The Claimant provided his own equipment, hired his own help, took on substantial financial risk, was responsible for his own tax, VAT and expenses, had obligations to rectify defective work, and, insofar as concerned the suggestion that he was subordinate to the Respondent, the Employment Tribunal ignored his autonomy.

66. Mr Nawbatt then submitted that the lack of mutuality between the parties prevented there being an overarching contract. He relied upon **Stephenson v Delphi Diesel Systems** [2003] ICR 471 for the proposition that the absence or presence of mutuality determines if a contract is in existence at all. If there were no mutual obligations, there was no contract. There could not be a contractual obligation to work 36 hours per week if the employer was not legally obliged to offer any work at all.

67. The Employment Tribunal was wrong to have regard to post-termination restrictions as being indicative of "worker" status. Such restrictions are commonly found in commercial agreements, and the Claimant was entitled to carry out work for others where he had not come into contact with the customers through the Respondent. The Employment Judge had failed to

consider if there was one contract or a series of successive separate contracts in circumstances where it had found no mutuality of obligation and the alleged discrimination was said to have occurred when the Claimant was not carrying out an assignment.

68. Mr Nawbatt submitted that the Employment Tribunal's conclusion in paragraphs 52 and 53 had been reached without any of the required analysis. He suggested that the Employment Judge should have approached the conclusion in three stages. Firstly, she should have asked whether there was an obligation to provide personal services and whether that obligation was the dominant purpose. If she found that it was, she then needed to consider whether the Claimant operated under the direction of the Respondent or was subordinate to the Respondent. She then needed to approach these matters from the circumstances of the case, having regard to the degree of control, subordination and integration.

69. Mr Nawbatt submitted that the decision of the Supreme Court in **Bates van Winkelhof** supported his grounds of appeal. He submitted that the Supreme Court had endorsed passages from **Redcats** upon which he had relied and that Lady Hale in her judgement had made clear that "subordination" was "not a freestanding and universal characteristic of being a limb (b) worker.

70. The Employment Judge had compounded her other errors of law by focussing on the existence of the post-termination restrictive covenants and the fact that Mr Smith did not in practice exercise his contractual right to work for other clients by her reliance on her finding of "subordination" instead of carrying out the necessary balancing exercise taking into account all relevant considerations.

71. Mr Nawbatt did observe that I had invited Counsel to address the impact of **Bates van Winkelhof** but that Mr Stephenson had also addressed the case of **Hospital Medical Group Ltd v Westwood** in some detail. I am uncertain as to whether he was objecting to my entertaining Mr Stephenson's submissions but if he was I would not entertain the objection because **Hospital Medical Group** was referred to in some detail in **Bates van Winkelhof** and the approach taken by Maurice Kay LJ in that case approved. I would also be unhappy about deciding the appeal while ignoring a relevant authority; I will refer to **Bates van Winkelhof** and its reference to **Hospital Medical Group** shortly.

72. Mr Nawbatt submitted that Hospital Medical Group was decided on its own facts which distinguished it from the instant case. Mr Nawbat submitted that the case was of no assistance in the instant appeal because of the factual differences to which he drew attention

Claimant's submissions on whether the Claimant was a worker

73. Mr Stephenson was, of course, happy to rely upon the reasoning of the Employment Judge. He submitted that her conclusions that the Claimant was a worker were well-reasoned, thorough and balanced. It was inappropriate to go through her Decision sentence by sentence. She had referred to all the relevant statutory provisions and authorities when considering whether the Claimant was a worker within the meaning of section 230(3) of the **Employment Rights Act** and it could not be said, therefore, that she had failed to apply the statutory test. She had correctly applied the facts to the law, she had addressed the relevant law and then made clear findings of fact with adequate reasons.

74. The finding that the Claimant was obliged to provide work personally was clearly correct on the factual findings she had made and also her construction of the contractual provisions.

Insofar as the Respondent sought to challenge the findings of fact, the Respondent did not meet the high threshold for raising a perversity appeal.

75. Mr Stephenson answered the Respondent's case that internal substitution was permitted. He referred to the terms of the agreement and manual (which I have set out earlier in detail) and specifically to the various phrases addressed to the Claimant "you will", for example Clauses 2.1, 2.2, 2.4, 2.5. Mr Stephenson drew attention to the absence of any reference to substitution, or the right to substitute. In Clause 6.1 the Claimant was described as an independent contractor. This was not effective and did not represent therefore intention of the parties by reason of the principles set out in **Autoclenz** because the parties clearly did not believe this was the position; this might be described also as a labelling point. Mr Stephenson pointed to the absence of any express agreement entitling the Claimant to substitute and that the Respondent had not argued that there was any implied custom or practice. The position was no more than that the Respondent was aware operatives would transfer work from one to another, not, as one would expect if the Claimant had been in business on his own, where he might be able to substitute work to someone outside the Respondent's own pool.

76. Mr Stephenson drew attention to the Employment Judge's conclusion at paragraph 24 of her Decision that the invoices relied upon by the Respondent as establishing a wider right to substitution was not evidence of an unfettered right to substitute at will. Further, her conclusion at paragraph 48, where she declined to accept that there was an unfettered right to substitute at will is clearly correct.

77. Insofar as the Respondent sought to argue that relevant matters among the relevant circumstances were not considered, Mr Stephenson pointed to paragraphs 13, 14, 19 and 20 of

the Decision, which showed that the Employment Tribunal clearly had in mind, for example, that the Claimant paid his own tax, expenses and labour costs. Similarly it did have regard to the views of HMRC; he referred to paragraph 27 of the Decision. He referred to **Market Investigations** for the indicia of a person being in business on his own, which the Employment Tribunal had in mind.

78. In relation to whether it was necessary to show that the dominant purpose of the contract between the Claimant and the Respondent was to provide personal services, he referred to **Hashwani** at paragraphs 38 and 39 to support the proposition that the dominant purpose was not the sole test. The Employment Tribunal was entitled to find, and indeed correct to find, at paragraph 53a that the Respondent could not be considered to be a client or customer of the claimant's business but was "clearly better regarded as a principal and the Claimant was an integral part of the First Respondent's operations and subordinate to the First Respondent..." The Employment Judge was entitled to find he was not in business on his own account and had earlier (paragraph 12) concluded that his agreement with the Respondent required him to undertake work personally. Mr Stephenson drew attention to various matters such as the conditions of work relating to the Claimant's personal appearance, wearing of uniforms, working hours, restrictions on leave, restrictions of use of telephone, restrictions on the manner in which he could give estimates, threat of dismissal for undertaking private work as a result of contacts gained during the working week, and the restrictions on the use of his own transport. The findings of the Employment Tribunal at paragraphs 23 and 24 as well as those at 39 to 44 should be read into the reasoning of the Employment Tribunal including the degree of financial risk undertaken by the Claimant, his investment, his autonomy, and the fact that he had conducted himself as though he was self-employed and profited in so doing. The Employment

Tribunal took these matters into account and was nonetheless entitled to reach the conclusion at paragraph 53a and b.

79. Insofar as adequacy of readings are concerned, it was apparent, reading the Judgment as a whole, that the Respondent knew perfectly well why it had lost.

80. Mr. Stephenson submitted that the decision in **Bates van Winkelhof** supported his contention that the Respondent's appeal should be dismissed.

81. He relied in particular upon Lady Hales' judgement approving Maurice Kay L in **Hospital Medical Group** that there could be no substitute for applying the words of the statute to the facts of the individual case and submitted that Employment Judge Corrigan did have regard to all relevant factors, including whether the Claimant marketed himself to the world at large as an independent person consider or whether he was integrated into the Respondent's business.

82. Mr Stephenson drew attention to factual similarities between that case and the instant case. I do not derive great assistance to this point because the Supreme Court clearly approved the holistic approach adopted by Kay LJ.

83. He pointed to findings the Employment Judge was entitled to make:

(a) The agreement to personally provide work [which was the main purpose of the agreement]

(b) The minimum hours he was required to work,[accepted by Mr Mullins]of 36 hours per week

(c) The absence of an unfettered right to substitute at will

(d) The tight control exercised by the Respondent including the high degree of restriction to work in a competitive situation which pointed to the fact that he was not in business on his own and that the Respondent was neither his customer nor client.

84. Subordination was only one of many factors she took into account.

85. Consistently with **Bates van Winkelhof** and **Hospital Medical Group** the Employment Judge was entitled to conclude that the Claimant was a limb (b) worker.

86. In reply Mr Nawbatt repeated his submission that the balancing exercise carried out by the Employment Tribunal was flawed. Its decision in relation to the significance of restrictive covenants as tending to suggest that the Claimant was not in business on its own, was flawed because it was at best neutral and one could not rule out the possibility that the error played a significant part in the Decision.

87. He repeated that the fact that the Claimant only worked for the Respondent and did not market his services was not the point. The key question was whether the Claimant had the right to work for others even if he did not exercise it and, in this regard, referred to **Autoclenz**. This provision was not a sham because other colleagues of his did undertake work for others. Mr Nawbatt referred again to the Decision of Elias J in **Redcats** in which he stressed that the question was not whether the "employee" did market services, whether he was able or permitted to do so.

88. Mr Nawbatt reiterated his submission that an unfettered right to substitute is inconsistent with personal service in that any restriction on substitution, in order to amount to a fetter on the right, had to relate only to when substitution was permissible not to whom.

89. The finding by the Employment Tribunal criticised the finding of the Employment Tribunal that what took place amounted to "job-swapping" not amounting to substitution as being a semantic argument.

The relevant law

90. I firstly refer to the various statutory provisions. Section 230 of the **Employment Rights Act** provides as follows:

> **"(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means 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.**
>
> **(4) In this Act 'employer', in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.**
>
> **(5) In this Act 'employment'—**
>
> **(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and**
>
> **(b) in relation to a worker, means employment under his contract; and 'employed' shall be construed accordingly."**

Persons falling within S.230(3)(b) re sometimes referred to as limb 'b' workers.

It is to be noted that a contract of employment means, *inter alia*, "a contract of service" but there is no statutory definition of "contract of service".

91. Regulation 2 of the **Working Time Regulations 1998** provides:

> **"2 Interpretation**
>
> **In these Regulations—**
>
> **'employer', in relation to a worker, means the person by whom the worker is (or, where the employment has ceased, was) employed**
>
> **'employment', in relation to a worker, means employment under his contract, and 'employed' shall be construed accordingly;**
>
> **'worker' means 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;"**

92. The third relevant provision is section 83(2) of the **Equality Act 2010**, which provides as follows:

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

It will be noted that the definition of 'employee' in the **Equality Act** although it refers to a contract personally to do work, does not include an express exception for those in business on their account who work for their clients or customers as do S.230 of the **Employment Rights Act** and Regulation 2 of the **Working Time Regulations 1998**. However, as was pointed out in the recent decision of the Supreme Court in **Bates Van Winkelhof v Clyde & Co** [2014] 1 WLR 2047 a similar qualification has been introduced by a different route. The court held, at para 67, following **Lawrie-Blum v Land Baden-Württemberg** (Case 66/85) [1987] ICR

483; [1986] ECR 2121 that the definition of the term 'worker' in discrimination legislation did not include independent providers of services who are not in a relationship of subordination with the person who receives the services.

Certain of the Claimant's claims are only available to an employee such as unfair dismissal and wrongful dismissal and claims for entitlement to pay during medical suspension and in respect of failure to provide particulars of employment. Other claims are available also to workers including those for direct disability discrimination, discrimination arising out of failure to make reasonable adjustments, holiday pay and claims for unauthorised deductions.

93. It is convenient firstly to consider the law when determining whether a relationship is that of employer/employee, properly so called, under a contract of employment (in current parlance rather than the somewhat Victorian language of "master and servant" under a "contract of service)".

94. In many cases it has not proved easy to distinguish between the contract of employment and other relationships, in particular those where the "employee" is or purports to be an independent contractor. In this regard I note the dictum of Denning LJ in **Stevenson Jordan & Harrison v MacDonald & Evans** [1952] 1 TLR 101 at page 111:

> **"It is almost impossible to give a precise definition … It is often easy to recognise a contract of [employment] when you see it, but difficult to say wherein the difference lies"**

The number of cases referred to in this judgment reflects the difficulty of the experienced in recognising who is an employees or "worker".

The most frequently cited authorities are **Ready Mixed Concrete v Minister of Pensions and National Insurance** [1968] 2 QB 497 and **Market Investigations v Minister of Social Security** [1969] 2 QB 173. Both these authorities were considered by the Employment Judge.

95. In **Ready Mixed Concrete**, Mackenna J at 515 observed that

> **"a contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.' Mackenna J considered he need say little about (i) and (ii) but went on to observe as to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be"**

96. At 515C, Mackenna J in relation to whether the other provisions of the contract are consistent with its being a contract of service, picked out the case of the "employee" providing the necessary equipment and materials at his expense; that was not a contract of employment. Whereas if the labourer worked for a builder providing some tools but who accepted the control of the builder, it would still be a contract of employment.

97. I finally draw attention to what he said at 517:

> **"An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract [a task like that of distinguishing a contract of sale from one of work and labour]. He may, in performing it, take into account other matters besides control."**

98. In **Market Investigations** Cooke J observed at page 184:

> **"The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes,' then the contract is a contract for services. If the answer is 'no,' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole**

determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself to perform services for another may well be an independent contractor even though he has not entered into the contract in the course of an existing business carried on by him."

99. The court must give appropriate weight to how the parties categorise their relationship. The relevant authorities in that regards were considered by **Elias J** in **Stringfellow Restaurants Ltd v Quashie** [2013] IRLR 99 but I do not need to refer further to them.

100. The relevant authorities in determining whether a person was an employee or worker including those of **Ready Mixed Concrete** and **Market Investigations** were considered in the Supreme Court by Lord Clarke in **Autoclenz** [2011] ICR 1157. At paragraph 19 Lord Clarke stated:

"Three further propositions are not I think contentious:

i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner* **[1984] ICR 612, 623,**

> **'There must … be an irreducible minimum of obligation on each side to create a contract of service'.**

ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express & Echo Publications Ltd v Tanton* **('***Tanton***') [1999] ICR 693, per Peter Gibson LJ at p 699G.**

iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg *Tanton* **at p 697G.**

The essential question in each case is what were the terms of the agreement."

101. I turn to the cases on the determination of whether someone is a "worker". It is necessary to bear in mind one can only qualify as a "worker" if there is a requirement for the provision of services personally by the "worker" to his principal. Secondly, an unqualified or unfettered right to provide a substitute to carry out the work is inconsistent with the concept of an individual undertaking to perform the work personally.

102. In other cases courts had sought, in determining whether a person was a "worker", to ascertain what was the principal purpose of the contract. This is now regarded as being a relevant but not a decisive consideration. The relevant authorities are all referred to in the decision of the Supreme Court in **Hashwami v Jivraj** [2011] ICR 1004. In that case, Sir Anthony Colman had been appointed to arbitrate a dispute between members of the Ismaili but the trial Judge found that he was not employed under a contract personally to do any work within the **Employment Equality (Religion or Belief) Regulations 2003**. Those Regulations proscribe discrimination on the grounds of religion or belief in respect of an "employment under a contract of service or of apprenticeship or a contract to personally do any work". Three Lord Justices in the Court of Appeal unanimously held to the contrary. The five Justices of the Supreme Court found unanimously on this point that Sir Anthony Colman was not employed under a contract personally to do any work. The Judgment of Lord Clarke contained an exhaustive analysis of earlier authorities including those from the European Court of Justice. Lord Clarke considered the decision of the European Court of Justice in **Allonby v Accrington and Rossendale College** [2004] ICR 1328. This case concerned an equal pay claim by a college lecturer and the ECJ had to consider Article 141(1) of the EC Treaty and drew a clear distinction between "workers" and "independent suppliers of services". Lord Clarke cited paragraphs 67-69 of the decision. He continued with paragraph 69:

> **"69 The question whether such a 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."**

Lord Clarke went on to consider other authorities including **O'Brien v Ministry of Justice** [2010] UKSC 34 and **Percy v Board of National Mission of the Church of Scotland** [2006] ICR 134:

> **"On the basis of those materials I would accept Mr Davies' submission that the Court of Justice draws a clear distinction between those who are, in substance, employed and those who are 'independent providers of services who are not in a relationship of subordination with the person who receives the services". I see no reason why the same distinction should not be**

drawn for the purposes of the Regulations between those who are employed and those who are not notionally but genuinely self-employed. In the light of *Allonby*, there can be no doubt that that would be the correct approach to the near identical definition in section 1(6) of the Equal Pay Act 1970 and must remain the correct approach to the definition of employment in section 83(2) of the Equality Act."

103. Lord Clarke then went on to consider those cases that had identified the question needed to be determined was whether or not the purpose of the contract was the execution of personal work or labour and went on to say at paragraph 34:

"As I read *Percy*, it sought to apply the principles identified by the Court of Justice, as indeed did this court in *O'Brien* [2010] 4 All ER 62. The essential questions in each case are therefore those identified in paras 67 and 68 of *Allonby* [2004] ICR 1328, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties. As I see it, that is what Baroness Hale meant when she said that the essential difference is between the employed and the self-employed. The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case..."

Lord Clarke at paragraphs 36 and 37 went on to hold that it was not sufficient to ask simply whether the contract was a contract personally to do work and that the dominant purpose was not the test or the sole test:

"36. In particular, the cases did not focus on the fact that the 'employment' must be *employment under* a contract of employment, a contract of apprenticeship or a contract personally to do work. (My emphasis). Given the importance of the EC perspective in construing the legislation, including the Regulations, the cases must now be read in the light of those decisions. They show that it is not sufficient to ask simply whether the contract was a contract personally to do work. They also show that dominant purpose is not the test, or at any rate not the sole test.

37. That is not to say that the question of purpose is irrelevant but the focus is on the contract and relationship between the parties rather than exclusively on purpose. Elias J, sitting as President of the Employment Appeal Tribunal, recognised some of the difficulties in *James v Redcats (Brands) Ltd* [2007] ICR 1006. He discussed the relevance of dominant purpose in this context by reference to the cases at paras 53 to 68. At para 59, after quoting from the judgment of Balcombe LJ in *Gunning* [1986] 1 WLR 546, he said that the dominant purpose test is really an attempt to identify the essential nature of the contract. In the context of the case he was considering he posed the question whether it was in essence to be located in the field of dependent work relationships or whether it was in essence a contract between two independent business undertakings.

104. Before leaving **Hashwani** it is helpful to remind myself of a further passage from the Judgment of Elias J cited by Lord Clarke:

> **"What the Courts must essentially try to do here, it seems to me, is to determine whether the essence of the relationship is that of a worker or somebody who is employed, albeit in a small way, in a business undertaking."**

Elias J had also cited with approval the dictum of Langstaff J in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 281 at paragraph 53. Langstaff J had suggested that the focus was upon "whether the purported worker actively markets his services as an independent person to the world in general...or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations". Elias J continued at paragraph 50, in a passage particularly apposite to this appeal:

> **"50 .I would agree that this will often assist in providing the answer, but the difficult cases are where, as in this case, the putative worker does not in fact market his services at all, nor act for any other customer even although Mrs James is not barred by her contract from so doing. In some cases the business is effectively created by the contract."**

Elias J went on to consider the relevance of the "dominant purpose" test. His dicta have been overtaken by the Judgment of Lord Clarke in **Hashwani**.

105. There is a helpful passage in the Judgment of Mr Recorder Underhill, as he then was, in **Byrne Brothers v Baird** [2001] ICR 667. The case involved the **Working Time Regulations** where the definition of "worker" is identical to that in section 230(3) of the **Employment Rights Act 1996**. Mr Recorder Underhill suggested that the purpose of that legislation must have been to recognise that there are persons who work for an employer and who are not employees but who are economically and substantively in the same position as employees. The degree of dependence is critical, he observed, and continued (paragraph 17(5)):

> **"Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers."**

106. In construing contracts similar to that in the instant case, I bear in mind the principles set out in **Autoclenz v Belcher** [2011] ICR 1157. The Supreme Court approved the Judgment of Elias J in **Consistent Group v Kalwak** [2007] IRLR 560 in which Elias J said this, at paragraph 57:

> **"The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697):**
>
> > **'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham, it will want to say so.'**

In the Supreme Court the Judgment of Smith LJ in **Firthglow Ltd (t/a Protectacoat) v Szilagyi** [2009] ICR 835 was approved. Smith LJ made clear, having regard to earlier authorities, that the court had to consider whether or not the words of the written contract represented the true intentions or expectations, not only at the inception of the contract but, if appropriate, as time goes by.

107. She continued at paragraph 52:

> **"52. I regret that that short paragraph [ie para 51] requires some clarification in that my reference to 'as time goes by' is capable of misunderstanding. What I wished to say was that the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.**
>
> **53. In my judgment the true position, consistent with** *Tanton*, *Kalwak* **and** ***Szilagyi*****, is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right."**

108. I need to refer to the decision of the Supreme Court in **Bates van Winkelhof v Clyde & Co LLP** [2014] 1 WLR 2057. The claimant was a member of a Limited Liability Partnership. She claimed be entitled to the protection afforded to whistle-blowers under the Employment Rights Act 1996. For that purpose she needed to establish that she was a 'limb (b) worker'.

109. The Supreme Court has rather altered the emphasis to be placed on various criteria that have been used to determine whether someone was a limb (b) worker.

110. Baroness Hale at 25:

> **"the law now draws a distinction between two different kinds of self-employed people. One kind 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. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else."**

111. She continued at 30:

> **"it is necessary to consider the "more subtle" analysis addressed in the Court of Appeal, at para 71, that "underlying the statutory definition of 'worker' is the notion that one party has to be in a subordinate relationship to the other.**
>
> **At para 31 employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class."**

112. She then pointed to the absence of language in discrimination law of an express exception for those in business on their account who work for their clients or customers as is to be found in s230 of the **Employment Rights Act** but in the passage I cited earlier noted that the a similar qualification had been introduced by the decision of the European Court in **Allonby**.

113. She noted that the concept of subordination had been introduced by the ECJ in order to distinguish the intermediate class from people who were dealing with clients or customers on

their own account and that concept was applied for the same purpose in the discrimination case of **Hashwani v Jivraj** to which I have referred.

114. Baroness Hale then considered a number of cases in the Employment Appeal Tribunal to which I have referred in which the Judges 'attempted to capture the essential distinction in a variety of ways.' These cases included:

> **Byrne Brothers** in which Mr Recorder Underhill QC (as he then was) considered that the intent of S230 (3) (b) was to afford protection to employees and workers who needed protection because their subordinate and dependent position vis-à-vis their employers. Such workers were to be distinguished from contractors who had a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.
>
> **Cotswold** in which Langstaff J laid stress on whether the purported worker actively markets his services as an independent person to the world in general on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations.
>
> **Redcats** in which Elias J, as he then was, looked beyond the degree of dependence and integration and subordination in favour of identifying the dominant purpose of the contract or its essence; was it in essence to be located in the field of dependent work relationships, or was it in essence a contract between two independent business undertakings? The purpose was to distinguish between the concept of worker and the

independent contractor who is on business in his own account, even if only in a small way.

Baroness Hale then referred to the decision of the Court of Appeal in **Hospital Medical Group Ltd v Westwood** [2013] ICR 415, a case decided before the decision in the instant case and handed down on 24 July 2012; the decision of the Court of Appeal in **Bates van Winkelhof** handed down on 26 September 2012; Mr Nawbatt says that neither Counsel considered it to be relevant as it was decided on its own fact; and accordingly neither case was cited to the Employment Judge. The judgment in the instant case was sent to the parties on 17 April 2012.

In **Hospital Medical Group Ltd v Westwood** the claimant was engaged in practice as a GP for the NHS but also provided services to a private clinic for which he carried out transgender work and also for the Respondent for whom he performed hair restoration surgery. The Court of Appeal held that insofar as his relationship with the Respondent was concerned he was a limb (b) worker.

115. I quote from Baroness Hale at 38:

> **"Maurice Kay LJ pointed out, at para 18, that neither the Cotswold "integration" test nor the *Redcats* "dominant purpose" test purported to lay down a test of general application. In his view they were wise "to eschew a more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the appeal tribunal had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the court might give some guidance as to a more uniform approach: "I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his 'integration' test will often be appropriate as it is here".**
>
> **39 I agree with Maurice Kay LJ that there is not "a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem**

have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in the *Redcats* case [2007] ICR 1006, a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer ……..as Maurice Kay LJ recognised in *Westwood*'s case [2013] ICR 415, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.

The appellant falls within the express words of section 230(3)(b). Judge Peter Clark held that she was a worker for essentially the same reasons that he held Dr Westwood to be a worker, that she could not market her services as a solicitor to anyone other than the LLP and was an integral part of their business. They were in no sense her client or customer. I agree."

116. I derive the following from **Bates van Winkelhof**:

1. In considering whether a person is a limb (b) worker the starting point must be the words of the statute and that there is no one formula or characteristic that can be said to be determinative.
2. The Court or Tribunal must take a holistic approach and may take account of matters such as the degree of subordination of the worker to the 'employer' and the degree of his integration into the 'employer's' business and also whether the contract between employer and 'worker' was in essence a contract between two independent business undertakings; the extent to which the 'worker' carried out work other than for the 'employer' and his right to do so.
3. The employer of a person integrated into the 'employer's workforce and carrying out work for that employer is in no sense his customer or client
4. If a 'worker' carries out work for more than one 'employer' he can nonetheless be a limb (b) worker of one or more such employers if the statutory criteria are met

117. I now consider the significance of a right to provide a substitute by a "worker" in a contract to provide services. It is clear from authorities I will refer to that an unfettered right to provide a substitute means that there cannot be an obligation personally to do work. However, certain restrictions on the right to substitute do not necessarily negate the obligation to provide personal services. The authorities suggest that to amount to a fetter on the right to substitute, the restriction should be as to "when" substitution can occur rather than to whom. In **Premier Groundworks v Jozsa** (17 March 2009 EAT/0494/08) Silber J held at paragraph 25:

> **"In conclusion, we consider that where a party has an unfettered right for any reason not to personally perform the contractual obligations under a contract but can delegate them to someone else, he cannot be a '*worker*' within the meaning of the WTR even though the person actually performing the contractual obligations has to meet certain conditions. The position would be different if the right not to perform the contractual obligation depended on some other event such as where that party was '*unable*' to perform his or her obligations [or I would add unable to perform by reason of eg illness]**

I note that **Premier Groundworks** concerned a "worker" – not an employee.

This decision was followed by HHJ McMullen in **UK Mail Ltd v Creasey** (November 2012 UKEAT 0195/12) and by the EAT in **Yorkshire Window Company v Parkes** UKEAT 0484/09. In my opinion the principle should not be stated too widely and would not include a case in which prior permission was required to substitute. It must follow that if permission to substitute may be refused the right to substitute was either qualified or did not exist.

118. I have already referred to the principle that one of the necessary conditions for there to be a contract of employment is that the employee will provide his own work and skill in the performance of some service for his employer and that freedom to do a job either by one's own hands or by another's is inconsistent with a contract of employment 'though a limited or occasional power of delegation may not be'; as put by Mackenna J in his judgement, **in Ready Mixed Concrete**. It seems to that 'the limited power or occasional power of delegation,' may

now be interpreted more generously than heretofore and there are nice distinctions to be made between a restriction as to when or in what circumstances a substitution or delegation is permitted and a general permission to delegate; in the former case the limited restriction does not necessarily negate the obligation to provide services personally but in the latter case it does and thus the contract will not be a contract of employment. A restriction as to the persons to whom the work may be delegated does not necessarily negate the obligation to provide services personally, the absence of a restriction as to whom work may be delegated does negate the obligation.

119. An example of a case in which there was a limited power to delegate to persons on an approved register is **MacFarlane and Another v Glasgow City Council** [2001] IRLR 7. In that case the Employment Appeal Tribunal held that gymnastic instructors, who worked at sports centres operated by Glasgow City Council under conditions that if they were unable to take a class, they would arrange for a replacement from a register of coaches maintained by the council might nonetheless be regarded as employees. They continued to have an obligation to personally perform their work. The Employment Appeal Tribunal remitted the case for further consideration to the Employment Tribunal.

120. I apprehend that in this regard the position of putative employees and limb (b) workers is similar; **Premier Groundworks** was a case involving limb (b) workers rather than employees. Even if the Respondent could establish that the Claimant had a contractual ***right*** to delegate his work or to provide a substitute the Claimant would still be considered to be a limb (worker) because his right was not unfettered.

121. Before leaving a consideration of the law, I need to remind myself of the importance of establishing mutuality of obligation, in particular in a case such as this where, if the Claimant is to succeed in his claims that it arose in periods when he was not carrying out assignments, it is necessary to establish that there was an overarching contract both in relation to the question of his employment and as to whether he was a "worker". This matter was considered by Elias J in the EAT in **Stephenson v Delphi Diesel Systems** [2003] ICR 471:

> **"11.The issue of whether there is a contract at all arises most frequently in situations where a person works for an employer, but only on a casual basis from time to time. It is often necessary then to show that the contract continues to exist in the gaps between the periods of employment. Cases frequently have had to decide whether there is an over-arching contract or what is sometimes called an 'umbrella contract' which remains in existence even when the individual concerned is not working. It is in that context in particular that courts have emphasised the need to demonstrate some mutuality of obligation between the parties but, as I have indicated, all that is being done is to say that there must be something from which a contract can properly be inferred. Without some mutuality, amounting to what is sometimes called the 'irreducible minimum of obligation', no contract exists.**
>
> **...**
>
> **13 The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.**
>
> **14. The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not.**
>
> **15. We note that in the case of Montgomery v Johnson Underwood at paragraph 40 Buckley J, in an obiter statement said this:**
>
> > **40 'For my part I would accept that an offer of work by an agency, even at another's workplace, accepted by the individual for remuneration to be paid by the agency, could satisfy the requirement of mutual obligation. I put it no higher because it would be necessary to look at the circumstances carefully and realistically. It may, for example, be more difficult to find that necessary mutuality in a very short assignment as opposed to one which was or had become more permanent.'**
>
> **16. With due respect to those observations, it seems to us that in fact however short the assignment there will be the necessary mutuality of obligation so as to establish the existence of a contract with someone, when work is accepted and the obligation to pay arises. But in any event we are satisfied that in this case, where the relationship between Delphi and the Appellant continued for many months, there would in principle be a mutuality of obligation, at least between Select and the employee, during the period when he was actually working, for the benefit of Delphi."**

122. There is no issue, therefore, that when the Claimant was undertaking an assignment, there was clearly mutuality of obligation. The question remains, however, whether there was an

overarching contract, as described by Elias J, for the periods when the Claimant was not working. I consider that on the basis of the findings of the Employment Judge and in particular the finding that the Claimant was required to work 36 hours each week and that the Respondent was obliged to offer work if available, all 'assignments' were subject to the agreements of 25 August 2005 and 21 September 2010 and to the Company Procedures and Working Practice Manual which constituted an umbrella agreement under which all jobs were performed and which governed the relationship between the claimant and Respondent.

Discussion and Conclusions

123. It is important to bear in mind that the Respondent saw that it was in its best commercial interests for its operatives to be treated as self-employed and in business on their own account for the purposes of its relations with HMRC and in relation to legal proceedings. At the same time it wished to present its operatives to the public as part of its workforce. There was a tension between the two objectives, in particular because of the very close control that the Respondent wished to maintain over its operatives. This is perhaps reflected in the contracts that came into effect after the relationship between the Claimant and Respondent had ceased. It is apparent from paragraph 23 of the Decision of the Employment Tribunal that the operative reserved the right to assign or subcontract any or all of its duties "subject to the prior consent of the company...". The agreement then provides that the operative would:

> **"...either perform the duties personally or engage another Pimlico contractor to do it for me at my own expense. I will remain responsible and liable for the acts and omissions of such person..."**

If an operative engaged another Pimlico contractor to do the work that the operative had contracted to perform at the expense of the operative, this is not a substitution so much as a subcontracting of the work, which could only be undertaken with the prior consent of the Respondent.

From the Respondent's perspective, it was advantageous to set up an operating system whereby it was free of obligations in respect of PAYE and NIC and was (hopefully) able to avoid the obligations and protections made available to employees and workers under employment and equality law. This is not to say that at the same time the operating system did not appear to have advantages to operatives.

124. The various agreements propounded by the Respondent, which were not open to negotiation on the findings of the Employment Tribunal, have clearly been professionally drafted and placed obligations on the Claimant designed to create the impression, whether correct or not, with HMRC and courts and Tribunals that the operatives were in business on their own account while at the same time presenting a picture to the world at large that the operatives were an integral part of the Respondent's workforce. It is clear that the Employment Tribunal was required to consider the substance of the relationship and the parties' true intentions and expectations in determining what the working practice actually was.

Was the Claimant an employee or not?

125. I note the findings of the Employment Tribunal at paragraph 39 to the effect that "the irreducible minimum" on the Respondent was missing. The first contract was silent about the obligations of the Respondent. However, the Employment Judge accepted that the Claimant signed the second contract which stated there was no legal obligation on the Respondent to provide work, and she accepted that reflected the reality of the obligations between the parties.

126. I do not consider that the Employment Judge has made clear what she meant because it is apparent from other parts of the Judgment that the Claimant was required to work a normal week of 40 hours (see paragraph 47). The Employment Judge can only have meant that the

Respondent was under no obligation to provide work to the Claimant if there was no work available. That was accepted by the Claimant in his evidence. Clearly, having regard to the later findings of the Employment Judge, although the Claimant was entitled to accept or reject any particular assignment, he was nonetheless required to undertake a sufficient number of assignments so that he worked a 40-hour week. The obligation to work a 40-hour week is completely inconsistent with the Respondent being entitled to offer him no work, even if assignments were available. Further, in determining whether or not the Claimant was an employee, the Employment Judge had regard to the various factors set out in **Ready Mixed Concrete** and **Market Investigations**.

127. The Employment Judge was entitled to have regard to the financial risks undertaken by the Claimant, in particular the circumstances when he might not be entitled to payment or when he had underestimated the cost of carrying out any assignment, and the degree of autonomy he had in relation to quotations, the manner in which he carried out work, that there were limits on the Claimant's ability to refuse to undertake work by reason of his obligation to work a minimum number of hours. It was also a matter of significance that both parties acted as though the Claimant was self-employed and, as the Employment Judge put it, he embraced his status as self-employed with some enthusiasm. In my opinion, the conclusions of the Employment Tribunal at paragraphs 41, 42, and 44 are proper conclusions based on the evidence and I do not see an inconsistency between paragraph 23, the Claimant agreeing that the Respondent had no obligation to provide him with work on any particular day and, if there was not enough work, the Respondent would not have to provide him with work, and paragraph 47 in which the Employment Judge found that the Claimant was required to work a normal week of 40 hours. The Employment Judge was entitled not only to have regard to the written terms but also,

following **Autoclenz**, to determine the true effect of the agreement between the parties based on what actually took place and was therefore presumably what the parties intended.

128. The fact that the Claimant was only required to work when work was available was irrelevant to his employment status (see **Wilson v Circular Distributors** [2006] lRLR 38). However, neither party addressed me on the relevance of this case. Accordingly I have not relied upon its reasoning in this Judgment.

129. At the end of the day I have stood back and looked at the facts as found by the Employment Judge as a whole. I have walked round them, so to speak, and the relationship simply does not look anything like a contract of employment and the Employment Judge was correct in finding that the Claimant was not an employee.

Was the Claimant a worker?

130. The arguments in relation to this issue largely, but not entirely, resolved around the issue as to whether the Claimant had an obligation to provide works personally. It was in relation to this that the question of the right of the Claimant to provide a substitute was thrown into sharp focus because an unqualified right to provide a substitute negates the essential obligation to provide services personally required if the Claimant is to be classified as a "worker".

131. Earlier in this Judgment I set out extracts from the contractual terms and manual. The cumulative effect of these extracts is to show quite clearly that there was clearly envisaged by the parties that the Claimant would be providing his services personally. I noted the repeated references to "you will" and to the threat of "dismissal" in case of breach.

132. The real difficulty, in my opinion, faced by Mr Nawbatt in his submissions is that there is no evidence of any right not to provide the work personally. The terms of the written agreement make no reference to any right of substitution, and the agreement was subject to an "entire agreement" clause. At most the Respondent was willing to tolerate a form of job-sharing or shift swapping without any legal obligation to do so. That would not be sufficient to amount to an unfettered right of providing services through a substitute. That in itself is sufficient to determine the Respondent's appeal. In the absence of any right to substitute the Employment Tribunal was, on the facts, entitled to conclude that although in practice operatives would swap jobs around, they did so as a means of work distribution among the Respondent's operatives and shift-swapping. At most the Respondent was willing to tolerate this practice but without any legal obligation to do so.

133. It is of interest that, if there was a real right to substitute, it is extremely surprising that there is no reference to a right or duty to provide a substitute where one might expect to find it, in Clause 2.5, "Responsibilities of operative when unable to work through illness or injury". I have seen in other cases a number of contracts in which circumstances the "worker" is obliged to provide a substitute. It makes obvious commercial sense for a worker to arrange a substitute in those circumstances.

134. The authorities do suggest that a right to provide a substitute is not limited or fettered simply because of the limitation of the class of permitted substitutes, and for that to amount to a restriction on the right to substitute, the restriction must relate to the circumstances in which substitution can take place; eg illness or some other inability. I am not satisfied that this is the only example of a restriction on a right to substitute that does not impair the obligation to

provide services personally. Where prior consent to a substitution is required the right to substitute cannot be regarded as unfettered. The "employer" can refuse consent.

135. In relation to the suggestion that the Employment Tribunal was in error in paragraph 53 in focusing on the fact that the Claimant did not work for others, rather than whether he had legal entitlement to do so. The fact that a "worker" has a legal right which he does not exercise is not decisive and can be taken into account, in my opinion, in deciding whether a "worker" is indeed in business on his own account as opposed to having an entitlement to do so. Further, the evidence as found by the Employment Judge suggests that other of the Respondent's operatives only carried out work for other persons by arrangement with the Respondent. I would also observe that the fact that the Claimant never did in fact carry out work for other persons than with the Respondent may suggest, following **Autoclenz**, that it was not intended he should in fact do so. Indeed the terms and conditions imposed by the Respondent would have made it very difficult for him to do so. He would have any difficulty in contacting any customers outside the hours when he worked for the Respondent, would not be able to use his van, and his connection with the customer would have to be entirely outside his relationship with the Respondent.

136. So far as the relevance of the restrictive covenants, the Employment Judge was entitled to find that those covenants limiting the right to work to the extent they did would also be inconsistent with the Claimant being in business on his own account.

137. I am unable to accept that the Employment Tribunal in some way substituted a consideration of the right to provide a substitute for the words of the statute. The Employment Judge was clearly bound to address the issues as detailed in the vigorous

submissions by the Respondent that to be a worker the Claimant was required to provide services personally. The unrestricted right to substitute which the Respondent contended for negated any such requirement. The reference to the absence of a written clause must be understood in the context of there being no express term in the contractual documentation permitting substitution, the presence of an entire clause, (that would by definition exclude a right to substitute that was not set out in the agreement) and the Respondent attempting to assert that such a right arose by reason of practice alone.

138. It is clear as I have noted earlier that the proper approach to be adopted when determining whether someone is a limb (b) worker is to start with the words of the statutory provision and consider holistically all relevant circumstances, none of which can determine the outcome in every case.

139. Employment Judge Corrigan may have expressed herself differently had she the benefit of being referred to **Hospital Medical Group v Westwood** and **Bates van Winkelhof** which were handed down after she had delivered judgment. However, I am satisfied that her judgement and the findings that she made, show that she took all relevant

140. considerations into account and carried out the appropriate balancing exercise, even if she did not say specifically and in terms that she approached the case on the basis that there was no single key with which to unlock the words of the statute in every case, and that all relevant circumstances needed to be taken into account.

141. I am not able to accept Mr Nawbatt's submissions that **Hospital Medical Group** is not of assistance. The Supreme Court expressly endorsed the judgment of Maurice Kay LJ that that

there is not a single key with which to unlock the words of the statute in every case, and that there could be no substitute for applying the words of the statute to the facts of the individual case and that the Courts should eschew a more prescriptive approach which would gloss the words of the statute.

142. In the circumstances the Employment Tribunal took all the relevant matters into account, correctly directed itself by reference to the relevant statutory provisions and authorities, and its conclusions that the Claimant was not an employee but was a "worker" were conclusions to which it was entitled to come. In those circumstances the cross-appeal of the Claimant must be dismissed as must the appeal of the Respondent.

143. In the light of my finding that although Employment Judge Corrigan did not express herself in the language approved in **Bates van Winkelhof** she had taken all relevant factors into account in determining that the Claimant was a limb (b) worker. In those circumstances it is not necessary for the case to be remitted to the Employment Tribunal and both appeal and cross appeal stand dismissed.

144. It only remains for me to thank Mr Nawbatt and Mr Stephenson for their helpful oral and written submissions.