Appeal No. UKEAT/0009/13/KN

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 June 2013
Judgment handed down on 26 July 2013

**Before**

## THE HONOURABLE MRS JUSTICE SLADE DBE

**(SITTING ALONE)**

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(1) CVS SOLICITORS LLP
(2) MR ANUP SHAH — APPELLANTS

MR N VAN DER BORGH — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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|---|---|
| For the Appellants | MS CHARLOTTE HADFIELD<br>(of Counsel)<br>Instructed by:<br>Berry Smith LLP<br>1 Northumberland Avenue<br>London<br>WC2N 5BW |
| For the Respondent | MS KATHERINE EDDY<br>(of Counsel)<br>Instructed by:<br>Julian Taylor Solicitors<br>Hazel Cottage Studios<br>Bicester<br>OX25 3QX |

**SUMMARY**

**RELIGION OR BELIEF DISCRIMINATION**

**AGE DISCRIMINATION**

The authorities on the alternative definition of "employee" in **Employment Equality (Religion or Belief) Regulations 2003** and **Employment Equality (Age) Regulations 2006** as a person employed "under a contract personally to do any work" establish that there is a dichotomy between independent providers of services who are not in a relationship of subordination with the person who receives the services and those who are in such a relationship and are within the scope of the Regulations. As was pointed out by Lord Clarke in **Jivraj v Hashwani** [2011] ICR 1004 these are broad questions which depend upon the circumstances of the particular case. The Employment Judge in this case did not err in failing to consider whether the Claimant was in a relationship of subordination to the Respondent as a separate issue from all the factors she took into account in determining that he was an employee within the meaning of the Regulations.

Both sets of Regulations were revoked, with transitional measures, by the **Equality Act 2010** and the subject matter of those provisions included in that Act.

Perversity challenge to the determination that the Claimant was an employee also failed.

Appeal dismissed.

**THE HONOURABLE MRS JUSTICE SLADE DBE**

1. CVS Solicitors LLP ('the Respondent') appeal from the judgment of an Employment Judge ('EJ') sent to the parties on 27 June 2012 ('the Second Judgment') by which the EJ provided further reasons for holding on a Pre-Hearing Review ('PHR'), as she had in her first judgment of 9 August 2011 ('the First Judgment'), that the Claimant was an employee of the Respondent (then the First Respondent) for the purposes of his claims of age discrimination under the **Employment Equality (Age) Regulations 2006** ('the Age Regulations') and of religious discrimination under the **Employment Equality (Religion or Belief) Regulations 2003** ('the Religion or Belief Regulations'). The Claimant is a solicitor who specialises in private client work. By an ET1 lodged on 29 December 2010 he complained that the First Respondent firm and the Second Respondent senior partner had taken adverse actions against him because of his age, he was then 68, or his religious beliefs. He has strongly held Christian beliefs. The appeal is brought by the First and Second Respondents although only the First Respondent has played an active part. The First Respondent will be referred to as "the Respondent".

2. The Second Judgment followed a successful appeal by the Respondent from the First Judgment and an order sealed 18 April 2012 by HHJ Serota QC remitting the matter to the same EJ only for the purposes of giving further reasons on three matters. The question posed by the Employment Appeal Tribunal ('EAT') giving rise to this appeal was:

> **"(3) When reviewing its conclusions in light of the Supreme Court's decision in Hashwani v Jivrai, did the Employment Tribunal consider whether the Claimant/Respondent 'perform[ed] services for and under the direction of another person in return for which he or she receive[d] 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' within the meaning of §34 of the decision in Hashwani, and what were its reasons in relation to that point?"**

In answer to Question 3 the EJ stated that "her findings of fact still demonstrated that the Tribunal had jurisdiction to hear a discrimination claim".

## The relevant statutory provisions

### Employment Equality (Religion or Belief) Regulations 2003:

> **"Regulation 2(3)**
> **In these Regulations-**
> **'employment' means employment under a contract of service or of apprenticeship or a contract personally to do any work…**
>
> **…**
>
> **Regulation 6(2)**
> **It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against that person –**
> **…**
> **(d) by dismissing him, or subjecting him to any other detriment.**
>
> **Regulation 6(3)**
> **It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to subject to harassment a person whom he employs or who has applied to him for employment."**

### Employment Equality (Age) Regulations 2006:

> **"Regulation 2(2)**
> **In these Regulations-**
> **'employment' means employment under a contract of service or apprenticeship or a contract personally to do any work, and related expressions (such as 'employee' and 'employer') shall be construed accordingly…**
>
> **…**
>
> **Regulation 7(2)**
> **It is unlawful for an employer, in relation to a person whom he employs at an establishment in Great Britain, to discriminate against that person –**
> **…**
> **(d) by dismissing him, or subjecting him to any other detriment.**
>
> **Regulation 7(3)**
> **It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to subject to harassment a person whom he employs or who has applied to him for employment."**

3. Both sets of Regulations were revoked, with transitional provisions, by the **Equality Act 2010** and the subject matter of those provisions included in that Act.

**Grounds of appeal**

4. The original grounds of appeal of 8 August 2012 from the Second Judgment contained one ground; perversity. It was summarised in paragraph 14:

> **"It is accepted that in the second PHR judgment the Employment Tribunal identified the correct legal test to be applied in deciding whether or not the Claimant was a worker for the purposes of bringing a claim for discrimination. It is submitted, however, that the Employment Tribunal's decision on the facts was perverse."**

By order of 16 November 2012 HHJ McMullen QC directed the Respondent:

> **"…to consider Clyde & Co. LLP [2012] EWCA Civ 1207 decided since the Notice of Appeal and if so advised, to submit a proposed Amended Notice of Appeal within 7 days and to serve it on Julian Taylor Solicitors who will be copied into the pleading, for information only."**

An Amended Notice of Appeal was received by the Employment Appeal Tribunal ('EAT') on 26 November 2012. The grounds of appeal were summarised as:

> **"a. Although in the second PHR judgment the Employment Tribunal correctly identified the test as being one of subordination, it fell into error in the way in which it applied the test, in that it concentrated on the question of subordination in the context of the extent to which the Claimant was integrated into the firm, rather than considering the question of whether the Claimant was in a subordinate relationship to the Respondent as an independent issue; and/or**
>
> **b. The Employment Tribunal's decision that the Claimant was a worker for the purposes of bringing discrimination claims was perverse, being one at which no reasonable Tribunal properly directed in law could have arrived."**

The only express reference to the case of **Clyde & Co. and Another v Kristen Bates van Winkelhof** [2012] IRLR 993 in the Amended Notice of Appeal were in paragraphs 14, 20 and 21. General propositions referred to by Elias LJ in that case were set out in paragraph 14. These are:

> **"a. The question of whether a putative worker markets themselves as an independent person to the world at large or is part of the principal's operation does not always provide the answer to the question of whether that person is a worker or not;**
>
> **b. The EU uses the concept of subordination in addition to the notion of dependence in determining whether a claimant is a worker within the meaning of the Regulations (paragraph 23 of the judgment);**
>
> **c. Whether the relationship is one of subordination or not depends on a careful appraisal of the facts in a particular case (paragraph 25 of the judgment);**

**d. Even if the strict statutory requirements for worker status are satisfied, the relationship must still be capable of being described as an employment relationship (paragraph 70 of the judgment) – that is, that underlying the statutory definition of worker is the notion that one party has to be in a subordinate relationship to the other (paragraph 71)."**

5. Ms Eddy, counsel on behalf of the Claimant submitted that "permission to pursue the **Clyde & Co.** Ground should be refused". She said that the amended Notice of Appeal is out of time, that unlike the instant appeal, the case of **Clyde & Co.** concerned a partner in an LLP and that it did not change the law on employee status so far as it applies to a litigant in the Claimant's position. Any points of principle could and should have been taken in the original Notice of Appeal. Ms Eddy referred to **King v Royal Bank of Canada Europe Ltd** [2012] IRLR 280, a recent application by the EAT of the principles to be applied in deciding whether to grant permission to amend a Notice of Appeal.

6. Ms Hadfield for the Respondent pointed out that consideration of amending the grounds of appeal in the light of the judgment of the Court of Appeal in **Clyde & Co.** was invited by the EAT. It was said that the amended grounds were submitted by the specified date. If an application for permission to amend were needed the position was misunderstood. If permission to amend were needed it was now sought.

7. The Respondent was expressly invited by HHJ McMullen QC to amend the Notice of Appeal in light of the judgment of the Court of Appeal in **Clyde & Co.** which was promulgated after service of the original Notice of Appeal. It was not made clear in the order of 16 November 2012 that permission to amend was needed. The Respondent was simply ordered to submit and serve an Amended Notice of Appeal. The Rules and Practice Directions of the EAT must be adhered to. However, in the circumstances this case having regard to the fact that the Claimant has had the opportunity to respond to all grounds including the amended grounds and that consideration of the points raised by amendment as they apply to this case are most

unlikely to broaden the scope of the appeal, permission was granted to amend the grounds of appeal as set out in the amended Notice of Appeal.

## Outline of relevant facts

8. The Claimant, a solicitor, had been an equity partner in the Respondent firm of solicitors from 1994 until 2006. With effect from 30 April 2006 the Claimant resigned his partnership and became a consultant on terms set out in a consultancy agreement entered into by him and another retiring partner, Giles Courtenay-Evans, with two equity partners on behalf of the firm. The material provisions were:

> **1.1. The term of the Claimant's consultancy was 5 years from 1.5.06 or such other date as agreed with partners.**
>
> **1.2 and 1.3. The consultants would receive 20% commission on new matters from their existing clients, new clients and their clients' and their introducers' introduction and on fees earned from specified sources.**
>
> **…**
>
> **1.6. The consultant would receive 33⅓% of all fees earned by him individually.**
>
> **1.7. There would have been an annual minimum guaranteed consultancy payment of £30,000 (AGCP)…**
>
> **1.8. All commission and fees earned by the consultant i.e. by way of commission under the terms of this Agreement would be credited first against 'AGCP'.**
>
> **…**
>
> **1.11. When not working from home the consultant would have a desk available for his use…Secretarial and usual back office facilities would be provided at no cost. There was no obligation on the Claimant to attend the office except for pre-arranged meetings.**
>
> **…**
>
> **1.14. The consultant was not committed to any particular number of hours in any year or other period. The amount of such earning work was at the sole discretion of the consultant.**
>
> **…**
>
> **1.16. The consultant will seek to introduce new business and also to ensure as far as possible continuity of existing clients.**

## The First Judgment

9. The EJ found that relations between the Claimant and the Senior Partner, the original Second Respondent, deteriorated badly. She held that despite this:

> **"5. The Claimant carried out fee earning work each year although the amount of work diminished in the final couple of years. He also continued to maintain relationships with his clients and introduce new business."**

The EJ held at paragraph 8:

> **"When relations deteriorated CVS contemplated starting legal proceedings against Mr Van der Borgh. In draft particulars of claim the First Respondent said that the consultancy terms, clause 1.16, meant that the Claimant was obliged 'to seek to introduce new business and also to ensure, as far as possible, continuity of existing clients'. They claim that the Claimant had failed in this obligation and had caused loss. Ironically, the Claimant tended to respond to such demands by saying that he was not obliged to do any particular level of work for the Respondent."**

10. The EJ reached the following conclusions:

> **"9. The Tribunal concludes that the Claimant was not obliged to work for the Respondent for any particular number of hours but this did not mean that he did not have an obligation to continue to introduce and maintain clients…**
>
> **10. Bearing in mind the conclusion in paragraph 9, as the Respondent concedes, the Tribunal needs to go no further. There was a contract personally to execute work. The Respondent has not sought to argue that the Claimant was a 'contractor' or in business for himself which meant that he was effectively selling his services for the Respondent. Instead, the Respondent's point has been that whilst the Claimant had a personal contract with the First Respondent there was no obligation to execute work because this was a contract which required no work to be done.**
>
> **…**
>
> **12. …The reality of the situation should be looked at in order to decide whether the dominant purpose of the contract is that the Claimant should personally execute work. …The dominant purpose was for work to be carried out by the Claimant for the benefit of both himself and the firm.**
>
> **…**
>
> **14. The above was dictated prior to the promulgation of the decision of the Supreme Court in *Jivral v Hashwani* [2011]. The Tribunal has considered its conclusions in the light of that Judgment and they remain the same."**

The EJ held that the Claimant was an employee of the Respondent for the purpose of bringing claims under the Age Regulations and the Religion or Belief Regulations.

## The Second Judgment

11. In giving further reasons for the conclusion that the Claimant was an employee, for the purpose of the Regulations, in answer to the third question posed by the EAT, the EJ stated that:

**"5. Her conclusion was that the facts in *Hashwani* and in the present case were very different and the Claimant/respondent was not an independent contractor brought in from the outside to provide a service but was integrated into the firm; he 'worked for' the firm. Of course as a senior solicitor the claimant would not expect to work under tight direction or control when carrying out work for clients but he was integrated into the firm and thus under the control of its policies and procedures, if not under the day to day control of its senior partner. As paragraph 10 says: 'The dominant purpose was for work to be carried out by the Claimant for the benefit of both himself *and the firm'*.**

**6. Other relevant findings are:**

**6.1. Paragraph 3: 'Despite the fact that the relationships…had cooled the Claimant carried out fee earning work each year although the amount of work diminished in the final couple of years. He also continued to maintain relationships with his clients and to introduce new business…'**

**6.2. Paragraph 4 which shows that when the claimant worked both he and the firm benefited from fees paid by clients to the firm: 'Under the agreement [the claimant] would always be paid a minimum of £30,000 a year. If they could do fee earning work, make introductions or maintain existing clients they would receive a commission which could bring their earnings to more than £30,000 per annum.'**

**6.3. Paragraph 5 shows that the Claimant was integrated into the firm: 'While the Claimant was working as a Consultant he was supplied with all the tools of his trade. He appeared on the "staff" contact list of CVS, he had an email address, a desk, PC and a printer; secretarial arrangements were made to allow him personally to execute the work that he did. There was never any question of him bringing in a substitute.'**

**6.4. Paragraph 7: 'The Tribunal concludes that the Claimant was not obliged to work for the Respondent for any particular number of hours but this did not mean that he did not have an obligation to continue to introduce and maintain clients. … As Mr Courtenay-Evans said he considered that the terms of the agreement expected him to ensure continuity of existing clients and this could involve work. As a result he was remunerated.'**

**Conclusion**

**7. Thus the nature of the relationship was reciprocal and integrated; Mr Van der Borgh had to work within the firm for its benefit as well as his, the two were interlinked, and that necessarily involved being under its broad direction. He was a senior solicitor nearing retirement who had been a Partner in the past so that any direction would be light touch, and indeed excessive direction was resented as the relationship deteriorated, but he was not an independent contractor. His history with the firm was long and his professional and personal life was intertwined with it, this was very different from the facts in *Hashwani*. He may not have been an employee as defined by the Employment Rights Act, but he was in employment in the extended sense of the definition as set out in *Byrne Brothers (Formwork) Ltd v Baird*."**

## The submissions of the parties

12. Ms Hadfield for the Respondent contended that none of the findings of fact cited by the EJ as supporting her conclusion that the Claimant was an employee of the Respondent did so save for the finding in paragraph 5 of the Second Judgment summarised by counsel as:

> **"(b) That he was integrated into the firm and thus under the control of its policies and procedures if not under the day to day control of its senior partner."**

The findings relied upon by the EJ said not to support such a conclusion were:

> **"a. That when the Claimant did work he worked personally for the firm (para 4 of the further reasons);**
>
> **…**
>
> **c. That the Claimant carried out fee earning work and maintained relationships with his clients (para 6.1 of the further reasons);**
>
> **d. That the Claimant benefited from fees paid by clients to the firm (para 6.2 of the further reasons);**
>
> **e. That the Claimant was supplied with the tools of his trade, appeared on the staff contact list of CVS, had an email address, a printer and a secretary (para 6.3 of the further reasons);**
>
> **f. That the Claimant was obliged to continue to introduce and maintain clients (para 6.4 of the further reasons)."**

It was submitted that save for that summarised by Ms Hadfield at (b) none of these findings support the conclusion that the Claimant was in a relationship of subordination to the Respondent. They set out his contractual obligations but do not determine the quality of his relationship with the firm.

13. As for the finding in paragraph 5, it was submitted that applying **Hahswani**, integration into an organisation is not sufficient to establish the subordination necessary to show that a person is an employee as defined under the Age Regulations or the Religion or Belief Regulations rather than an independent contractor. This requirement of subordination was also stated by Elias LJ in **Bates Van Winkelhof v Clyde & Co. LLP** [2012] IRLR 992 at paragraph 71. Elias LJ encapsulated a ground of appeal advanced against the conclusion of the EAT that the Claimant was a worker that:

> **"…underlying the statutory definition of worker is the notion that one party has to be in a subordinate relationship to the other."**

as having force in the context of an argument that the status of partner in a Limited Liability Partnership lies outside the field of employment. Ms Hadfield rightly recognised that this observation was strictly obiter. Further the Claimant had ceased to be a partner on 30 April

2006. However Ms Hadfield contended that the observation in **Clyde & Co.** reflects the approach of the Supreme Court in **Hashwani**.

14. Ms Hadfield submitted that the EJ erred in her approach to the issue of subordination by reasoning that because, on her findings, the Claimant was integrated in the Respondent organisation and was subject to its policies and procedures therefore he was subordinate to them and he was an employee for the purposes of the Age Regulations and the Religion or Belief Regulations.

15. In her oral submissions, counsel modified the contention in the Amended Grounds of Appeal and the skeleton argument that the EJ erred by:

> **"…eliding the concepts of integration and subordination, when she should have considered the concept of subordination separately and in its own right."**

Ms Hadfield rightly acknowledged that the issue of whether a person was integrated into the Respondent's organisation is relevant to the question of whether that Claimant was in a position of subordination to the Respondent. Counsel recognised that it would be possible to infer subordination from integration. However it was said that only the passage in paragraph 5 of the Second Judgment supports the conclusion that the Claimant was in a relationship of subordination to the Respondent. Integration is insufficient of itself to support a conclusion that the Claimant was in a subordinate relationship with the Respondent. As a matter of law a claimant must establish that they are in a subordinate relationship with the respondent to be within the scope of the Regulations.

16. The second ground of appeal in the Amended Notice of Appeal is that the conclusion of the EJ that the Claimant was a "worker" for the purposes of his claims was perverse. The development of that ground in the skeleton argument was:

> **"38. Further or alternatively, the Tribunal's finding that the Claimant was under the firm's 'broad direction' is:**
>
> **(a) unsupported by the factual findings made by it; and/or**
>
> **(b) entirely contrary to the evidence that the Tribunal heard including the terms of the consultancy agreement and the Claimant's own undisputed contemporaneous assertions."**

17. The first limb of the perversity appeal relied upon the findings of fact referred to in support of the first ground of appeal which are set out above.

18. It was pointed out to Ms Hadfield that the second basis for the perversity ground of appeal in the Amended Grounds asserts that the conclusion reached by the EJ that the Claimant was under the Respondent's "broad direction" was "entirely contrary to the evidence that the Tribunal heard". However no notes of the evidence heard by the EJ had been obtained nor had the witness statements been included in the bundle for the EAT. In the course of her reply counsel applied for the EJ's notes of evidence. When the EAT held that such application was far too late and would not be granted, Ms Hadfield asked the EAT to accept the evidence set out in paragraph 52 of the Claimant's skeleton argument. Counsel wished to concede that those assertions of the evidence given were correct and the EAT to consider the perversity challenge on that basis. The EAT informed counsel that this was not acceptable and would not be done.

19. Ms Hadfield recognised that the bar for perversity appeals is set very high but she submitted that in this case an overwhelming case for perversity is made out.

20. Ms Eddy for the Claimant made submissions to the effect that **Clyde & Co.** was distinguishable from this case and that the observations of Elias LJ originally relied upon by Ms Hadfield were obiter. Miss Van Winkelhof, the Claimant against Clyde & Co., was an equity partner. At the material time Mr Van der Borgh was not a partner in the Respondent firm. Ms Hadfield rightly agreed that integration of the Claimant into the organisation of the Respondent could be relied upon to support a finding of subordination.

21. Ms Eddy submitted that the contention that subordination has to be considered separately and distinctly from the issue of integration represents an unnecessary gloss on **Hashwani** paragraph 34. It would not be inappropriate to consider integration in considering whether a Claimant is an employee. She relied upon the judgment of the Court of Appeal in **Hospital Medical Group v Westwood** [2013] ICR 415 in which Maurice Kay LJ in considering whether the EAT had erred in holding the Claimant to be a "worker" within the meaning of the **Employment Rights Act 1996** ('ERA') section 230(3)(b) held at paragraph 18 that Langstaff J in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 paragraph 53 was wise to consider the "integration" test demonstrative of that status "in most cases" but not a test of universal application. So too was Elias J (as he then was) in **James v Redcats (Brands) Ltd** [2007] ICR 1006, paragraph 50 when stating that the "dominant purpose" test "may help" tribunals "in some cases". **Hashwani** was not cited or referred to in **Westwood**. **Clyde & Co.** was cited in argument but not referred to in the judgment.

22. Ms Eddy contended that the finding by the EJ that the Claimant was subject to the direction and control of the Respondent is a finding of subordination. There is no error of law in the approach of the EJ.

23. As for the second ground of appeal, Ms Eddy pointed out that the original basis for the allegation of perversity was premised on the perception of the Claimant that his relationship with the Respondent was one of an independent contractor. It was not an error for the EJ to fail to place weight on the Claimant's perception of his relationship with the Respondent. No Employment Tribunal is bound by a Claimant's subjective view of his status. Further, the Respondent's view was that the Claimant was subject to their control. They accepted that they were attempting to control him. Further, the Claimant explained the nature of his perception in his witness statement. No witness statements or notes of evidence were in the bundle for the EAT. There was documentary evidence to support the contention that the Respondent was seeking to exercise control over the Claimant. The EJ did not come to a perverse decision in finding that the Claimant was subject to the direction and control of the Respondent.

24. Ms Eddy submitted that the integration of the Claimant into the business was not the only basis upon which the EJ decided that he was an employee in the extended sense of the Regulations. He performed work for the Respondent for which he was remunerated, he was provided with the tools of his trade, he could not engage a substitute to perform his work and he was under a continuing obligation to introduce clients to the Respondent. The finding that the Claimant was subject to the direction and control of the Respondent supports the finding of subordination.

25. Ms Eddy pointed out that four witnesses gave evidence on the issue of whether the Claimant was an employee within the meaning of the Age Regulations and the Religion or Belief Regulations. The contention that the conclusion of the EJ that the Claimant was subordinate to the Respondent and was an employee in the extended sense was perverse was not properly arguable in the absence of the witness statements and notes of their evidence. The perversity argument was not made out on the material relied upon.

**Discussion and conclusion**

*First Ground of Appeal*

26. The Regulations provide an extended definition of "employee" consistent with the protection from discrimination required by European law. The definition includes both "a contract of service" and "a contract personally to do any work". It is the latter which is relevant in this case.

27. In **Hashwani** the Supreme Court considered whether the Court of Appeal had erred in holding that the appointment of an arbitrator involved a contract for the provision of services which constituted "a contract personally to do any work" satisfying the definition of "employment" in regulation 2(3) of the Religion or Belief Regulations. Lord Clarke with whom the other members of the Supreme Court agreed, Lord Mance adding his own judgment, held that since the provenance of the Religion or Belief Regulations was European Law, European authorities, including in particular **Allonby v Accrington and Rosendale College** [2004] ICR 1328 were to be considered.

28. Lord Clarke at paragraph 27 accepted counsel's submission that in the cases before them 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". In the light of **Allonby**, it would be correct to take the same approach to the near identical definition of employment in section 1(6) of the **Equal Pay Act 1970** and section 83(2) of the **Equality Act 2010** which provides "'Employment' means – (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work…" Lord Clarke continued:

> **"That definition is almost identical to the definition in regulation 2(3) of the Regulations and since it applies to equal pay issues by virtue of sections 83(4), 80(2) and 64 of the EA 2010, it must equally apply to the Regulations."**

The Regulations referred to were the Religion or Belief Regulations.

29. Lord Clarke held at paragraph 34:

> **"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. These are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties…"**

The Court held that an arbitrator is in critical respects independent of the parties. He is in no sense in a position of subordination to them. The appeal was allowed. It was held that an arbitrator was not within the scope of the Religion or Belief Regulations.

30. The statutory provision under consideration in **Westwood** was ERA section 230(3) which provides in material part:

> **"In this Act 'worker'…means an individual who has entered into or works 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 undertaken 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…"**

While the language of the definition of "employee" in ERA section 230(3) differs from that in section 83(2) of the EA 2010 and in the Age Regulations and the Religion or Belief Regulations, all include as an alternative to a person who works under a contract of employment someone who works under a contract personally to do any work. A similar alternative to an individual who works under a contract of employment appears in the definition

of "worker" for the purposes of the **Working Time Regulations 1998** regulation 2 which was considered in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 and referred to in **Westwood**. Accordingly, in my judgment, the observations in **Westwood** which in turn referred to **Cotswold Developments** are relevant to consideration of the proper approach to the alternative definition of "employee" in the Age Regulations and the Religion or Belief Regulations.

31. In the EAT in **Westwood**, HHJ Peter Clark had held at paragraph 17:

> **"Under the agreement the claimant agreed to provide his services as a hair restoration surgeon exclusively to the respondent (see clause 7). He did not offer that service to the world in general. He was recruited by the respondent to work for it as an integral part of its operations. The respondent introduced the patients who the claimant saw and treated at the respondent's Birmingham premises, using their equipment."**

In the Court of Appeal Maurice Kay LJ at paragraph 16 referred to **Cotswold Developments** in which Langstaff J said at paragraph 53:

> **"It seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) 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, will in most cases demonstrate on which side of the line a given person falls."**

Maurice Kay LJ observed:

> **"Thus, he was emphasising indicative factors such as marketing services as an independent person to the world in general and, on the other hand, integration in the business of the other party to the contract. These were advanced specifically as indications rather than principles of universal application."**

Further, Maurice Kay LJ held that Langstaff J in **Cotswold** was wise to regard the "integration" test to be demonstrative "in most cases" rather than prescriptive as was Elias J (as he then was) in **James v Redcats (Brands) Ltd** [2007] ICR 1006 at paragraph 68 when he stated that the

"dominant purpose" test "may help" tribunals "in some cases". Maurice Kay LJ held at paragraph 18:

> **"In my judgment, both were wise to eschew a more prescriptive approach which would gloss the words of the statute. In the present case, Judge Peter Clark reached his conclusion after consideration of *Cotswold* and *Redcats*. It is apparent from para 17 of his judgment that he placed particular reliance on *Cotswold*, observing that, under the contract, the claimant 'agreed to provide his services as a hair restoration surgeon exclusively' to HMG; that he did not offer that service to the world in general; and that he was recruited by HMG, 'to work for it as an integral part of its operations'. In my judgment, that was the correct approach in this case and it led to the correct conclusion that the claimant was indeed a limb (b) worker."**

32. An EJ considering whether a claimant is within the scope of the Age Regulations or the Religion or Belief Regulations must apply the statutory provisions. In this Claimant's case the material consideration was whether he fell within the alternative definition of "employee" as employed under a contract personally to do any work. The statutory definition of "employee" is not displaced by the authorities. They give guidance on the correct approach to ascertaining whether in all the circumstances of the case a claimant is an employee. They clearly establish that in the second, alternative limb of the definition that there is a dichotomy between independent providers of services who are not in a relationship of subordination with the person who receives the services and those providers of services who are in such a relationship and are within scope. As was pointed out by Lord Clarke in **Hashwani** at paragraph 34 these are broad questions which depend upon the circumstances of the particular case. Maurice Kaye LJ in paragraph 20 of **Westwood** referring to the comparable statutory provision in ERA Section 230(3) held:

> **"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."**

33. In my judgment the EJ did not err in the respect alleged in paragraph 8(a) of the Grounds of Appeal. It is not an error of law for the EJ to:

> **"…concentrate[d] on the question of subordination in the context of the extent to which the Claimant was integrated into the firm, rather than considering the question of whether the Claimant was in a subordinate relationship to the Respondent as an independent issue."**

It is not alleged that the EJ failed to consider whether the Claimant was in a subordinate relationship to the Respondent but that she found that the Claimant was subordinate because he was integrated into the firm and obliged to carry out work for it personally. In her further reasons the EJ referred to the contrast between an independent contractor and someone who was integrated into and worked for the Respondent. She referred to **Hashwani**. The EJ did not err in taking into account all the circumstances including in particular whether the Claimant was integrated into the firm in deciding that he was an employee within the meaning of the Regulations. Contrary to the premise of the first ground of appeal it would have been an error of law for the EJ to decide whether the Claimant was in a subordinate relationship to the Respondent as an independent issue without taking into account all the circumstances including whether he was integrated into the Respondent firm. The weight to be attached to integrating is fact sensitive. The EJ did not err in having regard to integration in this case.

**Second Ground of Appeal**

34. Although included under Ground (a), the First Ground of Appeal, paragraph 21 of the Amended Grounds of Appeal raises a perversity challenge to the conclusion of the EJ that on the facts found by her the Claimant was in a subordinate relationship to the Respondent. Ms Hadfield accepted that it would not have been an error of law for the EJ to infer that the Claimant was in a subordinate relationship to the Respondent. It would be an error to assume subordination from integration. Findings of fact in addition to integration were relied upon by the EJ in reaching her conclusion that the Claimant was employed under a contract with the Respondent personally to do work for them. The EJ did not rely upon integration alone. In my judgment the EJ did not reach a perverse conclusion in relying upon those findings listed by the

Respondent and set out in paragraph 12 above in concluding that the Claimant was an employee within the meaning of the alternative definition of that term in the Regulations.

35. The contention that the findings of the EJ that the Claimant was under the firm's "broad direction" was entirely contrary to the evidence "that the Tribunal heard" is not sustainable given the absence of the statements from and note of the evidence of the Claimant and the three witnesses who gave evidence to the Tribunal. As Ms Eddy rightly observed, if the Respondent sought to rely on assertions of the Claimant that he was not obliged to perform client work for the Respondent, the Respondent's view was to contrary effect. They contemplated starting legal proceedings against the Claimant, asserting breach of contract in failing to introduce new business to them and failing to ensure, as far as possible, continuity of existing clients. It cannot be said that the EJ failed to take into account the Claimant's view of the relationship. The parties' views of their relationship are set out in paragraph 8 of the First Judgment. Nor can it be said that it was perverse to conclude that the Claimant was working under the broad direction of the Respondent when the findings of fact demonstrated that they considered he was subject to their "broad direction".

36. The issue to be determined by the EJ was whether the Claimant was employed by the Respondent 'under a contract personally to do any work' within the meaning of the Religion or Belief Regulations and the Age Regulations. Ms Hadfield rightly recognised that an appellant seeking to establish that a decision of the fact finding Tribunal is perverse faces a high hurdle as explained in **Yeboah v Crofton** [2002] IRLR 634. The appellant Respondent in this case has failed to do so. The appeal is dismissed.