Appeal No. UKEAT/0166/13/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 October 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MRS N HALAWI — APPELLANT

(1) WDFG UK LTD T/A WORLD DUTY FREE
(2) CAROLINE SOUTH ASSOCIATES — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL DIAMOND (of Counsel) Instructed by: Andrews Law Solicitor Stargate Business Centre Faraday Drive Bridgnorth WV15 5BA
For the First Respondent	MS DIYA SEN GUPTA (of Counsel) Instructed by: Lewis Silkin LLP Solicitors Southgate House Wood Street Cardiff CF10 1EW
For the Second Respondent	MS IJEOMA OMAMBALA (of Counsel) Instructed by: Brooks & Partners Solicitors Lyons House Station Road Frimley GU16 7JA

SUMMARY

CONTRACT OF EMPLOYMENT – Whether established

The Claimant worked in a World Duty Free outlet at an airport, selling Shiseido cosmetic products airside. Her security clearance to do so was withdrawn by R1, and she claimed that she had thereby been unfairly dismissed and discriminated against. To claim this she had to show that she was an employee or worker, to do which required her to show that she had a contract with R1, or with R2 if employed by them, by which she undertook to work personally for that party. The Employment Tribunal found she could not do so, because she provided her services through a limited company which she had incorporated for the purpose (and her relationship with that company need to be, but never was, established in evidence). They were provided to R2 whose role was in effect that of an agent supplying workers to a third party (Shiseido) to work in retail space controlled by R1. There was thus no contract between C and either R1 or R2. The ET found that the arrangements were such that C was not required to work personally at her job, but could get another person to substitute for her: a power which was not merely theoretical, since she had in fact exercised it. It might appear to a member of the public passing through the airport that she appeared to be working exactly as any employee would, and for that reason the appeal had been permitted to proceed to a full hearing. However, it was held that on existing appellate authority, which was unaffected by European law, she could not have had a contract of employment with either R1 or R2, since she had a contract with neither; nor could she be a "worker" since that too required (i) a contract, under which (ii) she agreed to work personally.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. In Reasons delivered on 20 June 2012 Employment Judge Lewis at the Reading Employment Tribunal held on a preliminary hearing that the Claimant was not an employee within the meaning of section 230 of the **Employment Rights Act 1996** (ERA), that she was not a worker within the meaning of Regulation 2(1) of the **Working Time Regulations 1998**, that she was not an employee within the meaning of section 83 of the **Equality Act 2010** (EqA), nor was she a contract worker within the meaning of section 41 of the **EqA 2010**. It is only the third of those findings that is now subject to any outstanding challenge on appeal.

The facts

2. In brief, the facts are these. The Claimant worked as a uniformed beauty consultant at Heathrow airside at Terminal 3 for a number of years, beginning in 2001. The First Respondent withdrew her store approval, which meant that she was unable to work airside again. It is claimed in these proceedings that they did so for reasons that were discriminatory, and for the purposes of these proceedings that must be taken as so, although it is of course denied. She had no written contract of employment. She worked as a result of a web of relationships. She formed a company called Nohad Ltd, Nohad being one of her names. That company invoiced the Second Respondent, whom I shall call CSA, each month for her work at Terminal 3. She did so at an hourly rate set by CSA. CSA's role was as a management agent or arranger with a cosmetics firm, Shiseido. CSA provided a management service to Shiseido, which included the staffing of Shiseido's space at the airport. Shiseido, whose uniform the Claimant wore whilst at work and whose products she worked to sell in the duty-free outlet known as "World Duty Free", were permitted space within the premises occupied by the First Respondent, whom I shall call WDF, at the terminal. WDF bought the cosmetic products from Shiseido, they took

the profit from sales, and they managed the outlet as a whole. They provided, for example, the IT and till system for making and recording sales from the different retailers within the outlet. They arranged for the Claimant to have an airside pass, and they provided a set of working rules for those who occupied the selling space under their banner.

3. The Judge had to determine whether in the light of those arrangements and the evidence, some of which he took as read, some of which he heard, the Claimant was an employee or worker under the headings I have outlined already.

The Judgment

4. The Judge made a number of important findings of fact. At paragraph 14.10 he found that the Claimant could change shifts or withdraw from shifts and could send a substitute for a shift. This was not, he found (paragraph 14.12), merely a theoretical right but it was acted upon in practice. He found that the Claimant did not get paid if she did not work and accepted that she had no entitlement either to sick pay or holiday pay, or, for that matter, at a time when Heathrow was closed due to the Icelandic ash cloud, she received no money, though others working there did, and raised no complaint. He concluded (paragraphs 14.14-14.15) that the role of WDF was to give the Claimant store approval and that they facilitated the employment of but did not employ the Claimant. At 14.16 he found that it was not Shiseido that provided work for the Claimant, though they provided training, uniform and equipment. As for CSA, it had made the attendance arrangements as part of a management service. But at 14.18 he said this:

> **"It was common ground that CSA was under no obligation to provide work to the Claimant, and common ground that the Claimant was at all times free to refuse an assignment or shift or to send a substitute, subject to what is stated above. I find that CSA was not under an obligation to provide the Claimant with work, and the Claimant was free to refuse work if offered it."**

5. Between paragraphs 14.19 and 14.21 he identified a number of features he thought were inconsistent with the arrangements, if they were contractual, being a contract of employment. He dealt separately with those findings of fact and the conclusions he drew from them. At paragraph 15 he drew those conclusions under the heading of "Employment relationships". As to the First Respondent, WDF, he concluded that there was no contract of any kind between WDF and the Claimant, that she did not undertake to provide personal service to WDF in any event given the right to substitute, and that the features of their relationship showed that it was not an employment one. As to CSA, he said this:

> **"23. I find the case and the issues relating to CSA somewhat more complex. The first issue for me to consider was as to the relevance of the involvement of Nohad Ltd. Ms Omambala** [Counsel for CSA below, as she has been before me] **submitted that as all CSA's arrangements since 2002 had been with Nohad Ltd, there was quite simply no contract between the Claimant as an individual and CSA and that therefore the claim failed in its entirety. Mr Diamond** [Counsel for the Claimant below, as he has been before me today] **in effect invited me to treat the Claimant and Nohad Ltd as one and the same person.**
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> **24. In my consideration of this point, I place on record the difficulty that arose with this issue. The Claimant had given plainly inadequate disclosure in relation to the affairs and management of Nohad Ltd. I had no documentation relating to its business, annual accounts, or other matters, nor did I have its tax returns, nor those of the Claimant. The Claimant's evidence about the operation of Nohad Ltd was that she simply did what the accountant told her, and signed what the accountant told her to sign, and while that may be true, that bare statement, unsupported by access to many years of documentation, could not be an adequate or proper basis for an adjudication. I find that CSA had for many years had a relationship with Nohad Ltd, and no separate relationship with the Claimant. That being so, the Claimant's claims fail.**
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> **25. However, if I have to examine the relationship between the Claimant as an individual and CSA, I find that there was no mutuality of obligation between them, that CSA did not have control over the Claimant or her work, and that there was unremitting inconsistency with an employment relationship in that in their relationship of ten years, there was a total absence of any employment related incidents, notably the substitution arrangements, or any requests for holiday or suchlike."**

6. If, therefore, approached in the way familiar to lawyers applying section 230 of the ERA, there is no doubt that the case for the Claimant would seem to be unpromising. In **Carmichael v National Power Plc** [1999] ICR 1226 at 1230G-H, Lord Irvine of Lairg, Lord Chancellor, adopted words spoken earlier by Stephenson LJ in **Nethermere (St Neots) Ltd v Gardiner** [1984] ICR 612 that there must "in my judgement be an irreducible minimum obligation on

each side to create a contract of service". The necessary elements of a contract of employment therefore can be stated as a contract by which (1) the employee is *obliged* to perform at least some work (a) personally and (b) in return for pay or some other promise by the employer; (2) the employee agrees that the employer has authority to exercise control over his work; and (3) there are no sufficient contra-indications from the contract itself.

7. Lord Clarke of Stone-cum-Ebony in **Autoclenz v Belcher** [2011] UKSC 41 restated those elements and at paragraph 19 added three further propositions that he thought uncontentious: (1) that there must be "an irreducible minimum obligation in each side to create a contract of service"; (2) that if a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status; and (3) that a contractual right to substitute existed. It did not matter if it was not in fact used; a term was a term of an agreement even if not enforced.

8. The Judge's conclusion, therefore, that there was no contract of employment as such under section 230 of the ERA was inevitable given the Judge's findings of fact, for on each of the core requirements the Claimant had not succeeded. However, section 83 of the **EqA 2010** is not in precisely the same terms as is the **ERA 1996**, and, despite what might be thought unpromising beginnings, Mr Diamond points out, and Ms Omambala and Ms Sen Gupta, who appears for the First Respondent, WDF – again, as she did below – agree, must be read subject to the European law that underpins the rights that it is designed to support. Section 83 of the **EqA 2010** is in these terms:

> **"(1) 'Employment' means—**
>
> **(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work; […]."**

9. A contract of employment is excluded here, as I have indicated. A contract of apprenticeship is not in issue. The question raised by these proceedings is whether on those findings of fact and taking the approach he did the Judge erred in law in concluding there was not here a contract personally to do work.

The submissions

10. The simple answer, as it might appear, to the question thus posed that on the findings of fact that I have described – that there was no contract which was relevant, and secondly that if there was a contract, it was, given the effectively unfettered right of substitution, not a contract "personally" to do work - would not do justice to the way in which Mr Diamond developed his submissions. He accepted, as was common ground, that there was no challenge to the findings of fact. He did not argue that there was any failure sufficiently to set out the Judge's Reasons. But he argued that the Judge took the wrong approach to section 83. Under the principles identified in **Marleasing SA v La Comercial Internacional de Alimentacion SA** [1990] C-106/89 and cases such as **Lister v Forth Dry Dock** [1988] UKHL 10, he argued that the court had a duty to interpret a provision that implemented fundamental principles of EU law in the domestic jurisdiction in a way that purposively facilitated the rights to which they related. He did not argue, and in terms eschewed, any argument that the underlying provisions should be given direct effect. His argument was purely an interpretative one. It was based upon the fact, as it is agreed to be, that section 83 of the **EqA 2010** implements in English law the provisions of EC Directive 2000/78/EC of 27 November 2000, which established a general framework for equal treatment in employment and occupation. He summarises pithily the substance of his appeal in his skeleton argument in these terms:

> **"The issue raised by this Appeal is whether Directive 2000/78 protects a self-employed person (de jure, not de facto) in i) the workplace (WDF) ii) from a discriminatory act iii) which effectively ends livelihood (removal of Airside Pass) in circumstances where the [alleged]**

discriminator iv) secures profit from the labour of the person and v) is in a position of superiority over the victim analogous to an employment relationship."

11. Central to his submissions in answer to the issue he poses is the decision of the European Court of Justice in **Allonby v Accrington and Rossendale College and Ors** [2004] ICR 1328. That was a case in which neither the question of contract nor the issue of personal service was in issue. However, the Court considered the meaning of the term "worker" used in Article 141 in relation to equal pay and said this:

"67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration (see in relation to free movement of workers in particular [*Lawrie Blum v Land Baden-Württemberg*, C-66/85, [1987] ICR 483, 488], paragraph 17, and *Martinez Sala* [*v Freistaat Bayern* [1988] C-85/96], paragraph 32).

68. Pursuant to the first paragraph of Article 141(2) EC, for the purpose of that article 'pay' means the ordinary, basic or minimum wage or salary and any other consideration, whether in cash or kind, which the worker receives directly or indirectly in respect of his employment from his employer. It is clear from that definition that the authors of the treaty did not intend that the term 'worker' within the meaning of Article 141(1) EC should include independent providers of services who are not in a relationship of subordination with the person who receives the services […].

69. The question of 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.

70. Provided that a person is a worker within the meaning of Article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in relation to the application of that article […].

71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article."

12. Much of Mr Diamond's submissions sought to argue that the web of relationships here were a disguise for what was in truth an employment relationship. He noted the emphasis in **Allonby** on the fact that the definition of "worker" was in the context of anti-discrimination provisions to be given a wide scope.

13. In **Danosa v LKB Lizings SIA** C 232-09, reported at [2011] 2 CMLR 2, the Court considered the question of a sole member of the board of directors of a Latvian public limited company. She had no contract of employment but received money for the work that she did. She was dismissed from her position after six months and claimed that this was because she had fallen pregnant. In dealing with the question referred to the Court, which included whether the members of the directorial body of a capital company were to be regarded as covered by the concept of "worker" within the meaning of Community law, the Court noted (paragraph 39) that the concept of "worker" for these purposes could not simply be left to differential interpretation according to national domestic law but had a Community-wide meaning to be defined in accordance with objective criteria distinguishing the employment relationship by reference to the rights and duties of the person concerned:

> **"The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which he receives remuneration."**

14. The Court regarded **Allonby** as an analogy. It then said this:

> **"40. The *sui generis* nature of the employment relationship under national law is of no consequence as regards whether or not a person is a worker for the purposes of EU law […]. Provided that a person meets the conditions specified in paragraph 39 above, the nature of that person's legal relationship with the other party to the employment relationship has no bearing on the application of Directive 92/85 […].**
>
> **41. Similarly, formal categorisation as a self-employed person** [in argument, Mr Diamond went so far as to add these words: 'or business, dare I say'] **under national law does not exclude the possibility that a person may have to be treated as a worker for the purposes of Directive 92/85 if that person's independence is merely notional, thereby disguising an employment relationship within the meaning of that directive […]."**

15. At paragraph 46 the Court regarded the answer to the question whether a relationship of subordination existed within the meaning of the above definition of the concept of worker to in each particular case "be arrived at on the basis of all the factors and circumstances characterising the relationship between the parties". At paragraph 47 they went on:

> **"The fact that Ms Danosa was a member of the Board of Directors of a capital company is not enough in itself to rule out the possibility that she was in a relationship of subordination to that company. It is necessary to consider the circumstances in which the board member was recruited, the nature of the duties entrusted to that person, the context in which those duties were performed, the scope of the person's powers, and the extent to which he or she was supervised within the company and the circumstances under which the person could be removed."**

16. Thus Mr Diamond argued that whereas the domestic focus might be on establishing a contract as the passport to claiming about discrimination in the relationship created under the contract, the focus in EU law, applying the words of **Allonby** and **Danosa** and being scrupulous not to be diverted by any disguised employment relationship, was on the employment relationship itself, a wider phrase to be purposively understood. He opened his submissions, therefore, by arguing that this case was entirely about the requirement for personal service. Neither Respondent accepted that that was the entirety of the argument; both submitted that contract was necessary too.

17. The European authorities central to the argument as thus far I have described it fell for consideration before the Supreme Court in the case of **Hashwani v Jivraj** [2011] UKSC 40. The question before the Court, summarising, was whether there could be a complaint about the appointment of an arbitrator to arbitrate between the parties on the basis that the appointment was discriminatory. That gave rise to the question of whether, given the terms of Directive 2000/78 and the relevant provision in that case in the **Employment Equality (Religion or Belief) Regulations 2003**, materially in the same terms as the relevant provisions before me, were to be interpreted. It is common ground between the advocates that the test propounded by their Lordships in the Judgment of Lord Clarke of Stone-cum-Ebony JSC, with which Lord Phillips of Worth Matravers, Lord Walker of Gestingthorpe and Lord Dyson JJSC agreed specifically and Lord Mance JSC said that he had read and agreed with entirely, was this:

> **"34. The essential questions in each case are […] those identified in paras 67 and 68 of *Allonby* […] 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."**

18. The reference to Baroness Hale was a reference to her earlier Judgment in the case of **Percy v Board of National Mission of the Church of Scotland** [2006] AC 28, to which I now turn. That, like **Hashwani**, was a case in which discrimination was alleged. The question of whether the claimant got off first base by being a person who could complain of discrimination toward her was answered by provisions materially the same as those before me. She had been appointed by the Board of National Mission of the Church of Scotland to a position as associate minister in a Church of Scotland parish for a period of five years on terms that included the provision of a stipend and a manse. The Court of Session, Inner House, dismissed the appeal of the applicant from earlier dismissals of her complaint by the Employment Tribunal and the Appeal Tribunal on the ground that she did not have a contract and accordingly was not in employment. The appeal was allowed. It was accepted by Ms Percy that she did not enter into a contract of service (see paragraph 13). The question was thus whether she entered a contract personally to execute any work or labour.

19. The issues considered in the speech of Lord Nicholls examined those cases that had looked specifically at the position of a person employed as a minister of religion in various churches. He observed that in none of those cases had the issue been whether a contract of service existed. He dealt with the particular position of office-holders and employees and what he identified, as a further strand in the authorities (see paragraph 23), whether there had been intent to create legal relations, and, from paragraphs 27-28, the question of the identity of the

parties to the contract. Mr Diamond points out that in the last two sentences of paragraph 28 Lord Nicholls emphasised that the fragmentation of functions within one umbrella organisation should not be permitted to stand in the way of otherwise well-founded claims in an area such as this. He regarded the documents as showing that Ms Percy had indeed entered into a contract to provide services.

20. The observations by Baroness Hale that fell for comment in **Hashwani** occur at paragraph 141. She said this:

> **"Familiar concepts of common law are of limited help in construing modern employment legislation. As the learned authors of *Harvey on Industrial Relations and Employment Law* point out at para A.1.2:**
>
> > **'At common law the expressions "employer" and "employee" have no precise meaning in law apart from their context. The common law understands the expression "master and servant" and "employer and employee" is frequently used as a modern translation thereof … However, whereas "master and servant" has a precise connotation, "employee" may be, and often is, used in a sense wider than that of "servant" and "employer", than that of "master".'**
>
> **Hence careful attention has to be paid to the definition section of the relevant statute, because these draw some quite deliberate distinctions. The definition of 'employment' with which we are concerned is of course wider than that covered by a contract of service between master and servant because it encompasses 'any contract personally to execute any work or labour'. So the authorities on what did or did not fall within the common law's understanding of the master/servant relationship will not give us much help. In *Harvey* the view is taken at para A.1.4 that 'the distinction is between those who work for themselves and those who work for others, regardless of the nature of the contract under which they are employed'."**

21. At paragraph 146 she noted that she had illustrated in her speech how the essential distinction was between the employed and the self-employed. Without wishing to depart from the submissions of Mr Diamond, but whilst considering **Percy**, it was Ms Sen Gupta's argument that it was important to have regard to the way Lord Hope in his speech approached the matter at paragraph 113:

> **"We are not looking to see whether there was a contract of service here but whether this was a contract under which the Appellant undertook personally to execute any work or labour. To fall within this definition there first needs to be a contract of some sort. The agreement must be looked at as a whole and, if the contract is not one of service, the obligation by a contracting party must be an obligation personally to carry out work or labour."**

22. Mr Diamond in his submissions in respect of **Hashwani** argued that that was a practical example of the application of the approach in **Allonby** to its particular facts. He indicated that it was not in the slightest surprising that a person in the position of arbitrator should not be regarded as in such an employment relationship as to be providing services personally under a contract to do so for the purposes of section 83, because there was here no relationship of subordination. He drew attention to Lord Clarke's speech at paragraph 36, where he noted that the cases had not previously focused on the fact that employment must be employment under a contract of employment or a contract personally to do work, and his observation that the EU perspective and decisions made in respect of it showed that it was not sufficient to ask simply whether the contract was a contract personally to do work; they also show the dominant purpose was not the test, or at any rate not the sole test. He thought (paragraph 40) that an arbitrator was rather in the category of an independent provider of services who was not in a relationship of subordination with the parties who received his services; at paragraph 41, that he was in critical respects independent of the parties and in no sense in a position of subordination to them but rather the contrary; at paragraph 42, that once appointed the parties effectively had no control over him; and at paragraph 45, that there was no basis upon which it could properly be held that the arbitrators agreed to work under the direction of the parties as contemplated in paragraph 67 of **Allonby**, adding:

> **"Further, in so far as dominant purpose is relevant, I would hold that the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of a dispute between the parties in accordance with the terms of the agreement, and although the contract between the parties and the arbitrators would be a contract for the provision of personal services they were not personal services under the direction of the parties."**

23. At 46 he added this:

> **"In reaching this conclusion, it is not necessary to speculate upon what the position might be in other factual contexts. […] [The Regulations might perhaps apply to] the case of the**

plumber, solicitor, accountant or doctor referred to by the Court of Appeal in para 16. As already stated, all will depend upon the application of the principles in *Allonby* to the particular case. As I see it, the problem with the approach adopted by the Court of Appeal is that it focuses only on the question of whether there is a contract to do work personally whereas it is necessary to ask the more nuanced questions identified in *Allonby*."

24. I would observe at this stage that it is important not to over-read those last few words. If asking whether there was a contract to do work personally, it might be thought, and the Court of Appeal thought, that an arbitrator was under a contract – plainly, he would be – to do work personally – it could be done by no other – and therefore within the definition of "worker". But the more nuanced questions identified in **Allonby** would have the result that he would not be a worker within the meaning of what is now section 83.

25. The argument that Mr Diamond therefore adopted was that the Judge was wrong to ask whether there was a contract here (that was unnecessary, because the precise relationship, given the passages from **Allonby** and **Danosa**, did not matter and a purposive approach was necessary); and secondly, that personal service was not itself a requirement, and the focus had to be on the question of subordination or, as he put it, dependency. When I asked him to say whether he thought that subordination was the flipside of the employer's right to control, he refused to accept that it was an exact mirror image; it was wider, and it extended to encompass economic dependency, of which there is no obvious reverse view from the employer's perspective. Here, in his summary, he argued that the Claimant was in a position of dependency.

26. HHJ David Richardson, in a Judgment to which I would wish to pay tribute, stated, as a reason for giving permission to appeal on this ground, despite his hesitations, his doubts whether ordinary people, asked if Ms Halawi was in business on her own account when she worked airside at Heathrow, would say that she was; rather, they would say she was a

uniformed shop assistant in a relationship of subordination. It was true, he noted, that authority over her was divided between WDF, CSA and Shiseido but difficult to escape the argument that she was in a relationship of subordination at work, and he thought it arguable that the reach of equality law in the employment field should extend to such persons.

27. Before turning to the Respondent's submissions, I should say that Mr Diamond's submissions on paper and to some extent orally took the court further into much of the desirability of eliminating discrimination throughout the EU, which the decisions of the ECJ and CJEU had emphasised, and argued that it may well be that the European Union Charter of Fundamental Rights, now part of the corpus of EU law following the Lisbon Treaty, might have added further emphasis to this in taking the approach that it did to fundamental rights otherwise guaranteed by the European Convention on Human rights and Fundamental Freedoms. Those submissions were not responded to by either Respondent, nor do I consider that they needed to be. They are, as I see it, by way of emphasising the need for a court to take a purposive approach in dealing with anti-discrimination provisions. It was plain from the submissions in particular of Ms Sen Gupta that that approach is not in question between the parties.

The Respondents' submissions

28. The Respondents instead both argued that the findings of fact were such that the decision reached by the Judge could have been no other than it was. Both also argued that although the Judge made no express reference to European Union jurisprudence as such, nor did he refer to what has been before me the central authority, that of **Hashwani**, nonetheless his approach was entirely that advocated by that and the other domestic decisions reflecting European jurisprudence. Thus Ms Sen Gupta identified from **Hashwani** and **Percy** that in applying

section 83 one could not avoid the words that it actually contains. It requires a contract personally to do work. That there must be a contract was, she submitted, evident from **Percy** (see, in particular, Lord Hope) and had been adopted in **Hashwani**. Here, there was no contract between the Claimant and WDF, whom she represents. The guidelines it laid down for behaviour in its premises airside were found specifically not to constitute a contract (see paragraph 15). Even if it were a contract, it was not a contract of employment nor could it be a contract personally to work for WDF.

29. She emphasised that at paragraph 14.1 there had been a reference by the Judge to the guidelines for behaviour in which a distinction was drawn between WDF employees and their "business partners". The Claimant could not have been unaware of that (the word "unaware" is agreed to be the right word; it is expressed without the "un" in front of the word "aware" in the paragraph as it stands). She notes that at paragraph 14.14 the Claimant had agreed that WDF had no obligation to provide her with work and the Judge so found. They had no obligation to pay her. Thus, if there were a contract, it could not have been a contract of employment that involves work in return for pay or the promise of work.

30. As for the question of subordination and personal service, she emphasised that the Judge had as a matter of fact found that the Claimant was at all times free to refuse an assignment or shift and, as I have pointed out, found that she had indeed done so. There was no finding that WDF controlled the work. The power of substitution that existed meant that there could be no personal service, for, as recognised logically but as I have already recorded by Lord Clarke in **Autoclenz**, it is the necessary consequence of a generally unfettered power of substitution that there is no obligation to provide personal service. Accordingly, this could not be either a contract nor, if a contract, could be for personal service. In any event, she argued, this was not

a case of work that, if one focussed upon the approach looking for work in a subordinate capacity, had been done as such. She argued that the Claimant had been held (paragraph 14.11) to be free to take leave at peak times such as Christmas even if that was not what CSA, Shiseido and WDF would have wanted, a right that she regarded not as theoretical but as one that had been acted upon in practice (paragraph 14.12).

31. Her relationship thus could not here be seen truly as one of dependence or subordination. She argued that subordination was the flipside of control. Frequently throughout his Judgment the Judge had been at pains to show that WDF did not control the Claimant in any sense in which an employer or principal might control an employee or someone in the position of a worker. The approach that the Judge took, she argued, demonstrated that he had rightly adopted a wide approach. He began by referring to the wider setting within which he was placing his findings of fact (paragraph 30), had examined all the facts and circumstances as required by both domestic and European authority to do, had done so carefully and had reached conclusions that he was entitled to reach. He applied the correct approach, considered the necessary matters, reached permissible conclusions, and thus the Judge's findings were fatal to the success of this appeal.

32. For the second Respondent, Ms Omambala again founded herself centrally upon the Judge's findings of fact. The Employment Judge had found no contract between the Claimant and CSA in any relevant respect. The reason that he did not do so was because of the way in which he examined matters at paragraphs 23 and 24. Nohad had made the arrangements with CSA. He could not say, because the evidence was insufficient, whether that meant, in effect, that the Claimant had made the arrangements with CSA. It was the Claimant's responsibility to prove her case; if in contract with Nohad and not with the Claimant, there was no contract

between the Claimant and CSA. Even if that were wrong and that was his finding of fact at paragraph 24, he examined the relationship between the Claimant as an individual and CSA. He was thus taking the approach encouraged by European authority. He found in the words in paragraph 25 that there was no employment relationship properly so called.

33. The European authorities call for a rigorous examination of the circumstances. That is what the Judge had done here under separate headings; between paragraphs 13.10 and beyond he had identified attendance, substitution arrangements, working arrangements and arrangements for payment. Before him in the bundle of authorities had been the case of **Hashwani**, even though he did not make reference to it specifically in his Judgment. Mr Diamond had, she said, referred to it in his closing submissions.

Discussion and conclusions

34. I am invited to consider whether there is an error of law in the Judge's conclusions. These matters, it seems to me, are axiomatic. First, whether a person is an employee or a worker is essentially a question of fact, unless it is one of those cases in which there is a complete written contract; plainly, not this. That approach is not only the approach taken in domestic law but it is that taken by the Court of Justice of the EU. As was said in **Allonby**, whether an employment relationship exists:

> **"[…] must be answered in each particular case, having regard to all the factors and circumstances by which the relationship between the parties is characterised."**

35. It may rightly have been said that the question of whether someone was working as an employee or as an independent contractor, using the domestic phrases is one that has proved a most elusive question (see Lord Griffiths in **Lee Ting Sang v Chung Chi-Kyeung** [1990] 2

AC 374 and that, in a case that was cited to me, of **Hospital Medical Group v Westwood** [2013] ICR 415, in which it was recognised that there is no single test that can ultimately decide the issue). It seems that the same is true of the European landscape as it is the domestic, because different factors are bound in different contexts to have different weight and different considerations are always liable to be of greatest relevance. Secondly, that said, a Judge must be in this area in particular alert to the need to reflect the realities of any employment situation. It would be a tragedy if employment was too readily "disguised" in the sense identified by **Allonby** and referred to by Mr Diamond. Here, I note that the Judge made no findings as to the motivation of WDF, CSA, Shiseido and Nohad as to the arrangements into which they entered, save that Nohad did so freely of the Claimant's own volition.

36. Thirdly, I note that although "worker" does not have a single meaning for the purposes of EU law, it does have a meaning, which I take to be settled, subject to further developments, as Mr Diamond points out, in the cases of **Allonby**, **Danosa** and **Coleman v Attridge Law** [2008] 3 CMLR 27. What governs me, I accept, is the way in which those cases and that law have been considered by the Supreme Court in **Hashwani**. None of the cases that fed into **Hashwani** were cases in which the question of whether there was a contract in the sense of there being any relations that might be contractual was central unless one regards **Percy** as such, and in no case was there a specific consideration of the requirement of personal service. But I accept Ms Sen Gupta's submissions that the statute requires there to be a contract personally to do work. An employment relationship under which one party is paid by another, directly or indirectly, will ultimately involve contractual questions if analysed through English eyes. I see here no reason under the **Marleasing** principle to interpret the words "contract personally to do work" as if the word "contract" and the word "personally" were not present.

37. That might be thought a sufficient answer to this case, but if I were wrong on that, the question would be whether the Judge in any event was bound on the findings of fact he made to come to the conclusion that an employment relationship, albeit non-contractual, was one here of subordination. His job would by the principles established in **Hashwani** and in **Allonby** have been to ask whether a person performed services for and under the direction of another person, looking therefore to control the flipside of which in large part is subordination, and would have to do so by having regard to all the factors and circumstances. The Judge here cannot be criticised for a failure to have regard to all the facts and circumstances; plainly, he did. His conclusion was that the relationship was not one that created a relationship under which the Claimant personally would do her work for either of the Respondents. The absence of control over the Claimant feeds into the issue of subordination. There was no evidence directly of economic dependence, whereas I share strongly the suspicion of Judge Richardson as to the way in which the ordinary person passing through Heathrow might see a person in the uniform that the Claimant wore. The fact that she might be seen working there in that role does not answer the questions posed either under domestic law or by the European approach in a way that would permit her to succeed on this claim.

38. The uneasy feeling that I have and share with Judge Richardson that the arrangements here were such that the Claimant could have been the victim of discrimination and yet have no right to complain to a Tribunal about it is in principle no different from those cases that have involved agency arrangements in various areas of the labour market, in respect of which the courts have been clear that the legal tests must be satisfied as necessary prerequisites for a claim. Here, despite the sustained arguments of Mr Diamond, I am bound by the findings of fact to conclude that if the Judge had taken a wrong approach by failing to direct himself specifically in respect of **Hashwani**, nevertheless on those findings of fact he came to the right

conclusion, but, second, I accept, having been persuaded to this view by Ms Sen Gupta and Ms Omambala, that he did approach those questions, though without specific reference to **Hashwani**, nonetheless in the way in which that case required him as a matter of English law to do.

39. It follows that this appeal must be, and is, dismissed. I cannot, however, finish without recording my gratitude to counsel, as I did at the conclusion of the argument, for the way in which they put their submissions, which has made my task all the easier.

Costs

40. There is an application by CSA for costs. Costs may be awarded only if by rule 34A of the **Employment Appeal Tribunal Rules 1993** it appears to this Tribunal that any proceedings brought were unnecessary, improper, vexatious or misconceived, or that there has been unreasonable delay or other unreasonable conduct in the bringing or conducting of proceedings by the paying party. The words "unreasonable conduct" have to be read in the light of their predecessors, otherwise there would be no need to spell out "unnecessary, improper, vexatious or misconceived" in the Rule. Therefore, one is looking for a high hurdle. In my judgment, it is rare that proceedings can be said to be unreasonable or misconceived where they are brought against two parties, either of whom might be liable, and where permission to appeal was given in respect of both by a Judge, in particular after such a careful Judgment as Judge Richardson's. I note that, as far as the Employment Judge is concerned, and his is the Judgment centrally under consideration, he found the relationship of the Claimant with CSA rather more difficult to resolve than he did with WDF. Taking all those matters into account, I cannot regard this continuation of the appeal against both Respondents as being unreasonable conduct within the meaning of the Rule, and I refuse the application.