Appeal No. UKEAT/0303/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 April 2017

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MR G BADARA — APPELLANT

PULSE HEALTHCARE LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ANYA PROOPS (One of Her Majesty's Counsel) Bar Pro Bono Scheme
For the Respondent	MR ANDREW MIDGLEY (of Counsel) Instructed by: Messrs Longmores Solicitors 24 Castle Street Hertford SG14 1HP

SUMMARY

JURISDICTIONAL POINTS - Worker, employee or neither

JURISDICTIONAL POINTS - Continuity of employment

Although the Employment Judge had referred himself to **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 and seems likely to have had in mind the judgment of the Supreme Court in **Autoclenz Ltd v Belcher & Others** [2011] UKSC 41, [2011] ICR 1157, in concluding that the agreements were not "shams" and that the Appellant had changed his status from employee to that of a self employed director of an independent contractor, the Tribunal had misdirected itself as to law, reached conclusions not supported by the evidence, reached conclusions that were perverse and had not given adequate reasons, but that answer was not so clear as to enable this Tribunal to come a conclusion and the issue was remitted to a differently constituted Employment Tribunal for reconsideration.

The second issue of continuity depended upon the Appellant's immigration status and his right to work. It being conceded that the Employment Tribunal had erred in law in concluding that the Appellant had no right to work and that discrimination claims should not have been struck out, the appeal was allowed and that issue was remitted to be considered by the same Employment Tribunal to which the first issue had been remitted.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the Judgment and Written Reasons of an Employment Tribunal, comprising Employment Judge Owen, sitting at Bristol on 12 October 2015. The written decision comprising the Judgment and Written Reasons was sent to the parties on 29 October 2015.

2. Employment Judge Owen concluded on a Preliminary Hearing that the Appellant, who was the Claimant below, was not an employee as defined by section 230 of the **Employment Rights Act 1996** (as amended), and consequently, did not have the status to make an unlawful deduction from wages claim. He also refused to permit an amendment to the ET1 form to make a claim in respect of unpaid holiday pay. That refusal was because of the Appellant's lack of status (i.e. that he was not an employee) and on the basis that the claim was out of time and that time should not be extended because it had been reasonably practicable to bring the claim within the time limited for doing so. It also seems to have been part of his reasoning that the claim was un-particularised. Finally, he struck out claims of direct and indirect race discrimination and victimisation brought under the terms of the **Equality Act 2010**, on the basis that they had no reasonable prospect of success.

The Concession

3. All aspects of that Judgment are under appeal, save for the victimisation claim, but this morning there has been a further development. The Respondent represented, as it was below, by Mr Midgley of counsel, has made a written concession in these terms: (1) the Respondent concedes that the Tribunal erred in law at paragraph 34 of the Judgment, dated 24 October

2015, in stating that "It would have been unlawful for the [Appellant] to work without a permit"; (2) consequent to the Appellant's status as the husband of an EEA national, and as clarified in **Okuoimose v City Facilities Management (UK) Ltd** UKEAT/0192/11/DA, the Appellant did have the right to work in the United Kingdom as at 20 January 2015; (3) the Respondent, therefore, agrees that the claims of direct race discrimination and indirect race discrimination relating to the period 20 January 2015 to 29 April 2015 should be remitted to the Bristol Employment Tribunal for determination at a Full Hearing.

4. The precise way in which I should dispose of the case in the light of that concession is perhaps still open for further debate and I will need to discuss that further with counsel but the nature of the concession is crystal clear and bearing in mind that this a concession that leads inevitably to an aspect of the appeal succeeding, I discussed the terms of paragraph 18 of the **Practice Direction (EAT - Procedure) 2013** with counsel at the start of the hearing. I concluded that there is a good reason for accepting the concession. I understand that paragraph 18.3 of the **Practice Direction** is really about an agreement to allow an appeal by consent, but it seems to me that I should pay attention to it when a concession of this kind is made.

5. Ms Proops, of leading counsel, appears on behalf of the Appellant. She did not appear below and now appears under the auspices of the Bar Pro Bono Unit. I am grateful to both counsel for their careful submissions and comprehensive skeleton arguments.

The Background Facts

6. The Appellant is of Nigerian ethnic origin and nationality. He started working for the Respondent and his work title seems to have varied between that of Healthcare Support Worker and Healthcare Support Manager, but it is clear that he commenced employment (i.e. his

contractual relationship with the Respondent at the outset was pursuant to a contract of service) on 15 February 2013. Although this is not made clear in the Employment Tribunal's Judgment, as a result of discussions with counsel today, my understanding is that the Appellant in fact provided the care for one particular person, and only for that person, throughout the period under consideration, irrespective as to the particular contractual arrangement said to be in force at any particular time.

7. In April he was sent another contract by the Respondent and he appears to have signed it on 18 April 2013. This was a contract between the Respondent and a limited liability company. It was a *pro forma* "limited company contractors agreement" (see pages 159 to 160). As I say, the Appellant signed it on the 18 April 2013 (see page 160) but he never sent it back. It does not identify the limited company with whom the Respondent was contracting and given that it was never sent back and given that it was signed by the Appellant, who was not, at that stage, as I understand it, acting on behalf of any limited company, it might be said that it is a somewhat meaningless document. The Appellant signed another copy of the *pro forma* limited company contractors agreement on 1 July 2013 and sent this one back to the Respondent.

8. At some stage the Appellant entered into what is described as a contract of employment (see pages 156 to 158 of the bundle). He appears to have signed that document on 1 May 2013. I do not know whether any better quality of document was put before the Employment Tribunal than was put before me, but, as I said at an early stage in the hearing, I found it impossible to read all of this document (and some others). Parts of this document, however, are legible. It is clear that it purports to be a contract of employment between the Appellant and Titan Solutions, a limited liability company. Titan Solutions was an agency supplying labour to the Respondent. There does not appear in the appeal bundle very much more information about the relationship

between the Appellant and Titan, and Titan and the Respondent save that Titan may be associated with the Respondent. I use the expression "associated" in its technical sense; Titan may be an associated company of the Respondent.

9. In October 2013 it is common ground that the Appellant became the sole shareholder and probably, given the provisions of the **Companies Act 2006** and that a company must have a director, the sole director of Stallion Ventures Ltd. My understanding is that the Stallion Ventures agreement replaced all previous agreements and represented the only agreement from October 2013, under which the Appellant was providing his services to clients of the Respondent.

10. It is said that the Appellant had some hand in the formation of Stallion Ventures Ltd and was assisted in that by the Respondent. From October 2013 onwards, as the sole shareholder and director of the Stallion company, the Appellant continued to care for the particular person that he had cared for whilst operating under the tripartite arrangement in which he was an employee of Titan, and Titan provided his services to the Respondent, and the Respondent directed him to care for the client; the same existing client, if I have understood it correctly, for whom he had always provided care since he had started working for the Respondent as an employee.

11. The Stallion Ventures Ltd agreement with the Appellant does not appear in the appeal bundle. It is not entirely clear to me as to whether it was before Employment Judge Owen. He made some findings at paragraphs 7 and 8, which it is worth repeating. At paragraph 7 he recorded the situation as at the time the Appellant signed the *pro forma* contract on 18 April 2013. He recorded that this contract was "still with Pulse" and he referred to the terms of the

pro forma contract, which must have been easier for him to read than they have been for me. He sets out that the contractor is described as a "Limited company engaged by Us to provide the services of the employee to our Client". Later in paragraph 7 he identifies that company as Titan and then says this in the last sentence: "That was later replaced by another similar company Stallion Ventures Ltd".

12. Having referred at paragraph 8 to the intermediate contract of 1 July, another *pro forma* contract, he says this in the Reasons at paragraph 9:

> **"9. The Respondent's case is that the new contractual arrangement was initially requested and welcomed by the Claimant. They say that Pulse set up the new arrangement so that Mr Badara could form his own limited company, which would supply services to Pulse. There were two companies, Titan and later Stallion who were, in turn, to invoice the Respondent for work undertaken by the Claimant as an employee of Titan or Stallion. Mr Badara was the sole proprietor and shareholder of each company."**

As Ms Proops pointed out early in her submissions, that is factually inaccurate. There is no evidence that the Appellant ever had any shareholding or other form of ownership, if there is any other form of ownership of a limited liability company, in relation to Titan. Also, it might be said that there is, perhaps, another oversight by Employment Judge Owen at paragraph 9 when he describes the Claimant as an employee of Titan or Stallion. It is not clear to me what the evidence is of him ever having been an employee of Stallion. There is evidence that he was an employee of Titan in the form of the agreements I have described, but I cannot see any evidence that he was an employee of Stallion. Indeed, if he was an employee of Stallion that would seem to me to negate some of what were perceived to be the advantages of self-employed status.

13. The perceived advantage accruing to the Appellant in respect of these arrangements is said by Employment Judge Owen to have been a financial advantage to him arising out of the change in status from employee to self-employed. In paragraph 29.4 of the Respondent's

skeleton argument there is a reference to a financial advantage in these terms. The reason that the Claimant entered the limited company contract is evident; it provided for additional remuneration of approximately £2.00 an hour; amounting to an extra £121.00 income per week or £484.00 per month. This should be judged against his net monthly income as an employee of approximately £250.00 a week on average. That is an increase of nearly 50%.

14. It is no doubt on that basis that the Employment Tribunal concluded that this change in status was financially advantageous to the Appellant. I would read that paragraph as being an indication that the increase of nearly 50% arose at the stage when the Appellant came "off the books" of the Respondent in May 2013, but I am not entirely clear that I can be confident that is the time being referred to in paragraph 29.4 of the Respondent's skeleton argument. That seems to me to be the most evidence that one has of the financial position. Employment Judge Owen said of the position from May 2013 onwards at paragraph 10 of the Reasons that the Appellant's remuneration was "substantially increased; and he was now providing services through his limited company". I reiterate that cannot be an accurate statement of the position when the Titan arrangement was in place.

The Reasons

15. The terms of the new contracts were found by Employment Judge Owen as providing "that he was no longer an employee" and that Titan/Stallion would be:

> **"… solely responsible for the holiday pay and leave arrangements of the Employee and is not entitled to any period of absence or any payment for any period during which the services are not provided."**

That is a quotation from clause 15.1 of the *pro forma* terms and conditions at page 159 of the appeal bundle. At paragraph 11 of the Reasons, Employment Judge Owen says this:

> **"11. … The respondents say that this contract duly identifies the intentions and real status of the Claimant. Amongst other consequences Mr Badara was disentitled to pursue any claim for holiday pay."**

16. At paragraphs 12 and 13 of the Reasons, Employment Judge Owen records the competing contentions and summarises the evidence which he heard. As Ms Proops has emphasised he in fact heard only two witnesses: the Appellant and a Ms Rickards, who was the Respondent's Quality Assurance Manager. The significant thing, Ms Proops submitted, about Ms Rickards' evidence was that she was not personally involved in any of the events that I have just described above, nor does she give much, if any, second-hand evidence from those who were involved. There is, perhaps, an element of that in her witness statement, but Ms Proops submitted that there is really not even a hearsay account of what had happened.

17. The Appellant is said by Mr Midgley to have raised at a very late stage the contention that he had been pressurised and even bullied into signing the agreements. Employment Judge Owen rejected that evidence and he did so in very trenchant terms, such as "totally incredible" and "thoroughly dishonest" (see paragraph 15 of the Reasons), something which Ms Proops submitted had to be justified by some objective evidence from which those conclusions could be made, which objective evidence she suggested was markedly absent. She, with all the licence available to leading counsel, reiterated that criticism whenever such remarks appeared in the Reasons and emphasised this dislocation between the forceful language adopted by Employment Judge Owen and the evidential basis for it several times during the course of her submissions.

18. Having rejected the Appellant's evidence that he had been pressurised into signing, the Employment Judge turned to analyse, from paragraph 16 onwards, the issue of the status of the Appellant. He did so in these terms, first stating the issue to be:

> **"16. … Was he, as the documents indicate and the Respondent's [sic] contend a self employed contractor or was he, as Mr Badara now says, in reality, an employee. In short was the agency contract a sham? The answer may determine whether the claimant can be awarded any holiday pay but there is still an out of time issue here."**

19. He goes on at paragraph 17 to refer to several authorities; the one that he named was **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181. He accepted in the last sentence at paragraph 17 that in that analysis he needed to consider the status and bargaining position of the parties. It is, therefore, obvious that he must have had cited to him and/or had in mind the judgment of the Supreme Court in **Autoclenz Ltd v Belcher & Others** [2011] UKSC 41, [2011] ICR 1157.

20. Employment Judge Owen's analysis is to be found at paragraphs 18 to 26 and his conclusion on this issue is at paragraph 27 of the Reasons. He found that the Appellant had welcomed the arrangement (see paragraph 18 of the Reasons). It is not clear to what extent he separated out the issue which he had described in paragraph 16 as "was the agency contract a sham?" from the other issues that he discusses, which plainly relate to the factual matrix.

21. In **Autoclenz Ltd v Belcher** the issue before the Supreme Court was whether a written agreement must be taken to be the agreement or whether the Court could look more broadly outside the rubric of the document to a consideration of the factual matrix and, in particular, to a consideration of whether when that factual matrix was examined the written agreement or some other agreement represented the real or true agreement between the parties. I am not confident that paragraph 17 of the Reasons in this case, where Employment Judge Owen refers to the authorities and to the status and bargaining position of the parties, really reflects the above brief summary, which I hope is accurate, of the import of the Supreme Court's decision in **Autoclenz Ltd v Belcher**. The issue here is whether the Reasons really grapple with the task

of deciding whether the written agreement(s) represented the real and true agreement between the parties?

22. The strong terms in which Employment Judge Owen rejected the points raised by the Appellant are continued at paragraph 19. He certainly did not mince words. He said that the assertion by the Appellant that if he did not sign the new contract because he believed he would not be offered work in the future was a "laughably, unbelievable allegation". Whether it is in support of that or just a general observation, the last sentence of paragraph 19 seems to have been part of his reasoning process, namely that he could, if he wanted to, go back to being an employee. He also refers to the fact that the Appellant must have understood what he was doing when he entered into these arrangements, that he had played a part in setting up the company, something I have mentioned before; that this had all provoked by his own unhappiness at the level of remuneration he was earning as an employee; and that all had proceeded smoothly until difficulties had arisen about the Appellant's right to work in January 2015.

23. His analysis at paragraph 21 of the Reasons is expressed in, to my mind, somewhat strangely. He said that the Claimant's submission that "the arrangement was in reality an employment agreement wrapped up (my words not his) to appear to be an agency agreement" was "a very unattractive argument". He stated the reason for that to be that there was a substantial net financial benefit from the revised arrangement. What he went on to emphasise, however, at paragraph 21 is that far from there being a unilateral requirement of the employee to accept non-employee status as a condition of being offered or continuing in work he found that the Appellant had sought out the arrangement because of its advantages to him. This suggests that there was positive evidence about the state of affairs. But Mr Midgley accepted

A that there had been an exchange in the course of cross-examination in which it had been put that the Appellant was happy with the state of affairs, something which he rejected. It is difficult to understand if that was the complete evidence supporting the finding of proactivity on the part of the Appellant. It should be recognised, of course, that the Appellant signed the document. But, of itself, that it is not necessarily an indication that the Appellant was consenting to the alteration in status. Signature, or at least acknowledgment of the terms, was certainly not regarded by the Supreme Court in **Autoclenz v Belcher** as conclusive.

24. Employment Judge Owen looked at what he described as the three **Cotswold** factors. These appear to have been to his mind: mutuality of obligation, which he dealt with at paragraph 23 by finding that the contract did not provide any mutuality of obligation; control, which he dealt with at paragraph 24, by finding that the contracts were "fatal to the Claimant's contention that he was actually an employee". He went on to say, quoting again from paragraph 24:

> **"24. … It is clear that the control implicit in a contract of employment did not exist. He provided services for individual assignments and each was separate. In between neither Titan, Stallion nor Mr Badara were under any ongoing obligation."**

25. On the issue of control he rejected the Claimant's argument that the fact he had been disciplined by the Respondent for failure to disclose a drink-driving conviction, indicated a measure of control. He does so in these terms:

> **"25. … The offence was his as an individual person but the Respondent was entitled to regard it as relevant to the Agency contract. It went to the integrity of someone who was working for Titan. This was a degree of control appropriate to the working situation."**

26. It might be observed that this reasoning is somewhat difficult to follow. If there was indeed an agency contract, as Employment Judge Owen repeated several times, then one might have expected the character of the agent's employee to be a matter for consideration between

the agent and the employee. Similarly, when one moves to consider the Stallion contract, one might expect the character of a director of Stallion to be a matter for contractual negotiation as between limited liability companies, but the idea that the director of one company should be disciplined by another company seems to me to be an odd concept. Employment Judge Owen does not appear to have recognised that oddity.

27. The third matter that Employment Judge Owen took into account is that the Claimant was not obliged to do any work personally. In that paragraph, which deals with this, namely paragraph 26, the following sentence appears:

> **"26. … Furthermore there could be no reason to imply a contact between Mr Badara and Pulse because the separate contractual obligations between firstly the claimant as an individual, secondly, Titan/Stallion and thirdly Pulse were all in place."**

28. With that analysis, Employment Judge Owen concluded at paragraph 27 that the Appellant "was not an employee or worker engaged by Pulse". That led him to dismiss the unlawful deduction of wages claim. The second sentence starts with the word "Accordingly", so there is a clear causal link, but there are other reasons set out at paragraph 27 for the rejection of that claim. Firstly, that the sums claimed are not particularised and, secondly, that they are "woefully out of time". It is said that the Appellant was claiming unlawful deduction in respect of expenses that had been due in 2013, although these seem to have been paid in October 2013, according to the understanding of Employment Judge Owen. It was as a result of that he dismissed the claim.

29. Ms Proops invited me to consider the nature of the Appellant's complaint as set out in the ET1 form and in particular the details of the claim, included on the *pro forma*, at paragraph 8.2. The context in which the relevant sentence, to which I will come in a moment, appears is that of a complaint about suspension from work as a result of the Appellant being thought not to

have the necessary permission to work. In short, he had been suspended without pay. The issue, now accepted, of his right to work appears to have been misconceived and not properly understood at the Employment Tribunal, hence, the concession that I referred to earlier in this Judgment.

30. In that context, the last sentence is important. It reads: "I have been made to suffer huge financial loss and undue hardship". Perhaps that by itself would not have been enough, but the Employment Tribunal had been furnished with, as I understand it, two Schedules of Loss; one in a letter in the summer of 2015 and the second in a schedule form, albeit perhaps also in a letter. The Schedule is very ambitious and contains assessments made by a litigant in person of the compensation to which he was entitled that are not realistic. However, it seems to me that whether it is realistic or not, the first issue raised in paragraph 1(i) under the label "Loss of past earnings (20/01/15 - 18/09/15)" is a clear indication of the nature of the loss in the period that he was suspended. Whether it amounts to £23,375 is immaterial. What is important is that it identifies an aspect of loss that plainly relates to the period when he was suspended.

31. So, submitted Ms Proops, when one takes those two matters, the last sentence in paragraph 8.2 of the ET1 form and the first item in the Schedule of Loss and puts them together, it is entirely wrong to suggest that the unlawful deduction of wages claim is not particularised. Mr Midgley submitted that what had happened was the Appellant had changed his mind and had somehow or other confined his case to the matter discussed by Employment Judge Owen in paragraph 27, namely alleged unpaid expenses from two years previously, i.e. September 2013. There are emails that relate to expenses between pages 139 and 146. The forensic purpose of the inclusion of those emails by the Respondent may well have been to support the contention that the Claimant was not unhappy. I would not have thought that they

were of great evidential value in that regard because people seeking to be reimbursed for expenses do not necessarily express themselves in discourteous or contentious terms. Be that as it may, they were before the Employment Tribunal and, perhaps, it is as a result that there was some issue over expenses from September 2013 and the understanding that they had been paid in October 2013.

32. The difficulty with Mr Midgley's position on this is that the notes of evidence are not before me and the Employment Tribunal does not record a change or concession in terms of the Appellant's case, let alone any abandonment of the claim in respect of unpaid wages from the time of his suspension until, I think, the time when he was actually dismissed at a later point during 2015. I should finally add that there is reason to think that at least at the start of the hearing the Appellant was under the mistaken impression there was no issue about his unpaid wages claim, or indeed his discrimination claim, that was to be debated in the Preliminary Hearing that was held on 12 October 2015.

33. The final matter before me is the question of holiday pay. At paragraph 28 of the Reasons, by very much the same analysis as he had applied to the unlawful deduction of wages point, Employment Judge Owen rejected the holiday pay claim and struck it out, as he had done the unlawful deduction from wages claim. Employment Judge Owen thought that the claim was out of time. He says that it was not raised until an amendment was made in September 2015. It is accepted that in fact the amendment was made, I believe, on 1 June 2015 and Ms Proops submitted that at that stage if there had been a continuing holiday pay claim up until the time of the submission of the ET1 claim form on 29 April 2015, the claim would not be out of time. However, of course, it is a claim dependent upon the correctness of the view set out in the

first sentence of paragraph 27 of the Reasons that the Appellant was neither an employee nor a worker.

The Submissions

34. As I mentioned at the start of this Judgment, both Ms Proops and Mr Midgley submitted comprehensive skeleton arguments, which they developed in their submissions. In essence, however, I hope without doing any injustice to their scope and content, Ms Proops' submissions are threefold. Firstly, that there was a misdirection of law by Employment Judge Owen in his approach to the analysis of whether the Appellant was an employee or self-employed. Secondly, whether the Judgment of Employment Judge Owen could be said to have been one that no reasonable Tribunal could have arrived at on the evidential material before it. I should make this refinement that I would understand Ms Proops' second point to comprise both perversity and an error of law in various aspects of the Judgment and the Reasons in that the conclusions were not at all supported by evidence. That is not perversity but a specific error of law. Thirdly, she submitted that the Judgment was inadequately reasoned.

35. I, again, without intending any discourtesy to him, can summarise Mr Midgley's submissions in this way. There was, he submitted, no error of law on the part of Employment Judge Owen, who had clearly directed himself as to the authorities. He only names one but that is admirable brevity and he plainly recognises the significance of the **Belcher** case because of the last sentence at paragraph 17. In his analysis at paragraphs 17 to 27 he has applied that and other authorities. Secondly, the criticism levelled at Employment Judge Owen by Ms Proops is misplaced because there was evidential material to justify the conclusions that he reached, all of which were essentially factual matters, routed and supported in evidential material before the Employment Tribunal. Thirdly, the reasoning is perfectly plain.

Discussion and Conclusion

36. Despite her, I think it would not be too extreme to say, castigation of the Judgment and Reasons, Ms Proops does accept that in some cases, and in some circumstances, it will be justifiable and, indeed, necessary for any Tribunal or Court to state that its conclusions adverse to a particular party result from a finding that that party has not been truthful or has been dishonest. Mr Midgley submits that Employment Judge Owen is simply recording his reaction to the evidence that he heard and, in particular, to the evidence of the Appellant.

37. I would only observe that, as I have observed in other cases, the serious conclusion that somebody has been untruthful is one that should not be reached without clear material to justify it. It is not confined, in my judgment, as was urged upon me in some other cases, to situations where the reputation and livelihood of a professional person is at risk, it applies to all, including those who perform the low-paid but valuable work of caring for others. On the other hand, of course, this is an appellate Tribunal concerned only with errors of law and if there is an evidential basis for harsh conclusions and harsh conclusions are called for in the context of the case, then this Tribunal is not here to comment upon the mode of expression adopted by Employment Judges.

38. I make those remarks by way of an introduction to my own conclusions as to the three matters that seem to me to be in issue in this case. I turn firstly to the question of whether or not there is any error in the analysis, particularly at paragraphs 17 to 26 of the Judgment, but also in relation to the Judgment overall because one must step back and look at the overall shape of what has been decided. My starting point is the last sentence of paragraph 17. Although Employment Judge Owen appears to have been aware through that sentence of the necessity of a perspective that takes account of the relative strengths of bargaining position I am

afraid that I cannot reach the conclusion that what follows indicates that he thoroughly understood why that may be a very powerful factor in cases of the kind with which this appeal is concerned.

39. Moreover, although, in the course of his Judgment, he does recognise that what was being contended by the Appellant was that the contractual documents did not represent the real and true agreement between the parties, it seems to me that he has not looked at all carefully enough into the factual matrix of this case. Firstly, he seems to have misunderstood the difference between the Titan contractual arrangements and the Stallion contractual arrangements. Secondly, although I understand that I do not have all of the documents, it seems to me that he does not appear to have looked at all carefully at the financial basis upon which the Appellant was remunerated. I have no idea whether the timesheets were in the same form or a different form when he was an employee of the Respondent, when he was an employee of Titan or when he was said to be self-employed as a director of Stallion.

40. Employment Judge Owen appears to have had the advantage of an invoice rendered, I think, by Stallion, and I do not have that, but it seems to me that of itself, like the language of the contracts themselves, is not a destination but a departure point. I am not at all clear that Employment Judge Owen understood that, as was said in another case, contracts of this kind are likely to have been drafted by armies of lawyers and, of course, they contain all that one might expect to find to provide an argument that the contract itself had no mutuality of obligation, had no element of control, provided for substitution and, therefore, did not allow for personal service. I do not mean to suggest that each of these matters is not of importance. They are clearly regarded as being significant by Lord Clarke in giving the judgment of the Supreme Court in **Autoclenz v Belcher**. He, after all, in his analysis of legal principles that starts at

paragraph 17, goes back, as perhaps everybody should go back, to consider the judgment of MacKenna J in **Ready Mixed Concrete v Minister of Pensions and National Insurance** [1968] 2 QB 497 and, in particular, the paragraphs that start at page 515C in which the analysis of the factor of control is divided into three points.

41. Moreover, he has regard to other authorities at paragraph 19 including Stephenson LJ's remarks about mutual obligations in **Nethermere (St Neots) Ltd v Taverna & Gardiner** [1984] ICR 612 and to part of the judgment of Peter Gibson LJ in **Express and Echo Publications Ltd v Tanton** [1999] ICR 693. It does not seem to me, however, that if it was suggested by Peter Gibson LJ in **Tanton**, and, indeed, MacKenna J suggested the same in **Ready Mixed Concrete**, that when one identifies factors or statements in contracts of employment that are inconsistent with or contradictory to what one might expect to be the bare minimum of requirements for a contract of employment, that the search should stop at that point. In my judgment, **Autoclenz v Belcher** makes it clear that in what one might call the employment context the Court should look to see whether the factual matrix provides a basis for thinking that, despite the armies of lawyers who have drafted the documents that are put forward and said to be the agreement between the parties, some other agreement can be derived from a consideration of the factual matrix and emerge as the real and true agreement between the parties.

42. Employment Tribunals must devise their own case management. Occasionally, Judges of this Tribunal and very recently in the Court of Appeal make suggestions about such things as the practise of not having oral submissions and relying purely on written submissions and so forth. I make no observations about the way in which this case was case managed or conducted, save to say that sometimes where an issue of importance is taken as a preliminary

issue, that does not mean it is a summary issue. Employment Tribunals have to be careful to ensure that they are properly exploring the factual matrix. The misunderstanding that appears to have arisen in the mind of Employment Judge Owen, the absence of documents and what I accept from Ms Proops' submissions to be, generally speaking, a paucity of evidence, all to my mind indicate an inadequate application of the approach identified by the Supreme Court in **Autoclenz v Belcher** to the facts of this case.

43. In short, I will allow the appeal on the error of law or misdirection point that Ms Proops relies upon. In any event, I think she was right not to be daunted by the barricade presented by an allegation of perversity. It seems to me that in this case Employment Judge Owen has reached some conclusions which no reasonable Tribunal directing itself properly on the evidence could have reached. I do not criticise Employment Judge Owen for making findings of dishonesty, but it does seem to me that in this case that arises because Employment Judge Owen did not believe the Appellant.

44. Mr Midgley is right when he says that perhaps there were evidential factors that supported Employment Judge Owen's analysis, but it seems to me, whether this is straying into Ms Proops' third point or not, that if one is to make findings of dishonesty one should set out in sufficient detail the facts and matters that have led to that conclusion so that everybody can be clear why it is that such a stark conclusion has been reached.

45. Nor does it seem to me that turning to the two subsidiary matters, paragraphs 27 and 28, unlawful deduction and holiday pay, that the factual statements made at paragraph 27 really can reflect the evidential situation. If, and this, again, strays into the question of reasons, the understanding of the Employment Tribunal was that the Appellant had abandoned his broader

claim and confined it to a narrow claim relating to expenses going back two years earlier, that some account or detail of why that was so should have been set out in the Judgment. Otherwise the conclusion that it was not particularised seems to me to be one that no reasonable Tribunal properly directing itself could have arrived at.

46. I accept the proposition put forward by Ms Proops that if one claims in a pleading that there has been an unlawful suspension without pay and, in consequence, loss had been suffered, although that is an un-particularised claim save as to amount, it was, however, made good by the Schedule. I repeat, the amount does not have to be correct as long as the basis of claim is clear. Amounts, if I may say so, are often not correct, that is what Counter-Schedules are all about. But the Schedule makes clear what the issue is and the issue in this case was that the Appellant complained that he had lost money because he had been wrongly suspended. I cannot regard the characterisation of that as un-particularised as being a reasonable conclusion that any Tribunal could have arrived at. Likewise, it seems to me that the factual error as to the date of the amendment at paragraph 28 is simply an error based on a misunderstanding of the evidence. Of course, evidence is open to interpretation but dates are certain. Either the date is right or the date is wrong. If the date is wrong, the factual finding is wrong and the premise or inference that follows from it is false or falsified. Accordingly, it seems to me, that was also an error of law.

47. In that brief summary of my reasoning I have not mentioned all the points raised by Ms Proops nor have I dealt with all the evidential matters that Mr Midgley has put forward. I do not think that, in the circumstances, I need to do so. It does not mean that I have not taken account of them and considered them. In my judgment, for the three reasons that I have identified - namely a misdirection, perversity in some aspects and lack of reasoning in others -

this Judgment cannot stand. I will allow the appeal and I will now hear submissions on what steps I should take to dispose of it.

48. Sometimes it is necessary to resist the sirens' call, even if it involves strapping oneself to the mast. Ms Proops, whose submissions have been attractive and persuasive throughout this hearing, urges me to take the course of concluding that it is obvious what the result in this case must have been. This Tribunal is given the power to dispose of appeals in a way that is entirely conventional and, of course, reflects through the statute what may well have been the position at common law and is certainly the position under the **Civil Procedure Rules** now. By section 35 of the **Employment Tribunals Act 1996**, subsection 1, gives the Employment Appeal Tribunal a discretion for the purpose of disposing of an appeal, (a) to exercise any of the power of the body or officer from whom the appeal was brought, or (b) remit the case to that body or officer.

49. For many years it was the practice of this Tribunal to use that power in a pragmatic way. In her attractive submissions Ms Proops has emphasised, perhaps at times with some hindrance from me, the pragmatic reality of this case, that it has gone on for a long time, that there are other cases between the parties pending and that there have been other developments between the parties. Whilst I may have seemed to be impatient in relation to those aspects of her submissions, I am entirely cognisant of the fact that this is an ordeal for the Appellant and I would not wish to prolong it were I to think it was consistent with my duty to be able to shorten it. Ms Proops submits that this is a case in which I can take the step on the material that is before me of concluding that the outcome is inevitable, the evidence all points in one way and I can reach an opposite conclusion to that reached by Employment Judge Owen. The days when that was an acceptable possibility, so far as this Tribunal is concerned, were brought to an end

by the judgment of the Court of Appeal in **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] ICR 920. In his judgment, at paragraph 21, Laws LJ emphasised that it is not the task of this Tribunal to decide what it thinks is right on the merits of the case. That is a matter for the Employment Tribunal. Ms Proops takes the view that this is a case where I have concluded that there was several species of legal error and that if the error had not been made the result would have been different and that I am able to conclude what it must have been. Mr Midgley refers me to the next sentence in paragraph 21 which cautions me as making factual assessments, making judgments about the merits and that everything must flow from findings made by the Employment Tribunal.

50. I have to say that it seems to me this is a case where it is difficult to decide what flows from the decision of the Employment Tribunal. Ms Proops may well be right that when the matter is investigated thoroughly, as I believe it has not been, that the conclusions may all point in one direction. She warns me of the dangers of opening up a second bite of the cherry in which the Respondent can produce further evidence. I do not think that really poses the risk of injustice that she imagines. If the further evidence is sound and conclusive, then her client will, unhappily, lose the argument. If, on the other hand, it is simply a rehashing or trimming of the present evidence then that will be obvious.

51. In my judgment, this is a matter that ought to be remitted to a differently constituted Tribunal for a complete rehearing of these issues. Finally I allow myself the luxury of one observation, namely the parties may wish to consider whether, in the light of the concession and in the light of the debate today, taking up the opportunity of starting all over again, which the disposal of this appeal offers, is really a necessary and sensible step or whether some alternative might be explored but that, of course, is a matter that I must leave to judgment of the parties.