Appeal No. UKEAT/0107/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 October 2017
Judgment handed down on 8 June 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

HAFAL LTD — APPELLANT

MISS K LANE-ANGELL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GEORGE ROWELL (of Counsel) Instructed by: Peter Lynn & Partners 2nd Floor Langdon House Langdon Road Swansea SA1 8QY
For the Respondent	MISS KAREN LANE-ANGELL (The Respondent in Person)

SUMMARY

CONTRACT OF EMPLOYMENT - Whether established

JURISDICTIONAL POINTS - Worker, employee or neither

The Tribunal erred in concluding that there was an overarching contract so as to give rise to an employment contract. The terms of appointment, which were not properly taken into account, provided that there was no obligation to provide or accept work, and the other features of the relationship were not inconsistent with those terms. Accordingly, the Claimant was not an employee of the Respondent.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. This is an appeal against a finding by the Cardiff Employment Tribunal ("the Tribunal") that the Claimant was an employee of the Respondent. The engagement of the Claimant was described as being on a "bank basis" with no guaranteed hours of work. The main issue before the Tribunal was whether the nature of the engagement was such that there was sufficient or any "mutuality of obligation" to create a contract of employment.

Factual Background

2. The Respondent is a registered charity. Part of its function is to support people with, or recovering from, mental ill health. The Respondent runs a scheme which enables appropriately trained adults ("Appropriate Adults" or "AAs") to be available to assist persons detained at police stations where such persons are in need of support.

3. The Claimant's relationship with the Respondent commenced in November 2012 when she applied for the position of volunteer AA. On 14 February 2013, the Respondent sent the Claimant a letter confirming her appointment as an unpaid volunteer AA on a "bank basis". The letter stated:

> **"… This role is unpaid and has no guaranteed hours, engagement is on a 'bank basis' i.e. your details will be placed on Hafal's database and we will use your services as and when they are required if you are available."**

4. It was also stated that, "There are no guaranteed hours or payment for this role".

5. This volunteer status did not continue for long. It appears that after completing various shadowing opportunities in order to familiarise herself with the AA role, the Claimant had

shown herself to be available and willing to attend police stations as and when required. The police stations to which support was provided under the Respondent's various contracts covered a large geographical area in Wales, and it was not easy to find persons who could provide the requested cover. And so, on 20 March 2013, the Respondent wrote a further letter to the Claimant appointing her to the role of AA, this time without any reference to volunteer status. This letter of appointment stated as follows:

> **"I am pleased to confirm that your vetting has been successful and I am therefore able to offer you the position of Appropriate Adult. This post has no guaranteed hours and engagement is on a 'bank basis' i.e. that your details will be placed on Hafal's database and we will use your services as and when they are required and if you are available."**

6. The letter of appointment continued by setting out various "terms and conditions". These included the rates of payment for callouts, holiday entitlement, places of work, and subsistence and mileage rates. It also stated that:

> **"There are no guaranteed hours within the service and paid Appropriate Adults do not qualify for paid sick leave or company pension provisions."**

7. The Tribunal found that this change from volunteer to paid status was a significant change. Indeed it was, for the Claimant was now being paid for the work that she did, and no doubt that provided an added incentive to do more work than would have been the case had she remained a volunteer. However, that in itself did not mean that she thereby became an employee.

8. The way in which work was allocated to AAs was described by the Tribunal as follows:

> **"4.8. The way in which the Appropriate Adult Scheme works is that Appropriate Adults email their availability to the respondents to allow and assist in the respondents preparing a rota system. The rota is divided into four shifts per day; the first shift from 7am and the last shift overnight from 10pm to 7am. In addition the rota is subdivided between seven police stations which access the Appropriate Adult Service. … the call handler for the respondents telephones an Appropriate Adult and directs him/her to attend the specific police station at a specific time. Then the Appropriate Adult contacts the custody sergeant at the station by telephone to agree the exact time that they will be in attendance at the police station. The respondents have requirements for Appropriate Adults to attend the police stations within the minimum set time of receiving a callout. …**

4.9. As an Appropriate Adult the claimant had to wait for a telephone call requesting attendance at a police station. The claimant had no authority to phone the police direct. If the claimant attended as an Appropriate Adult, that she was entitled to make a claim for expenses such as mileage and payment was at an hourly rate for the time in attendance."

9. The Tribunal also found that the Claimant's earnings fluctuated from month to month, and that she undertook other fixed term engagements for the Respondent which lasted for a few months or weeks. Several of the AAs engaged by the Respondent had other jobs and the Claimant was not unusual in that regard. However, these other engagements were not considered by the Tribunal to have a bearing on whether or not the engagement as an AA was a relationship of employment. The Tribunal was correct to take that approach.

10. In the course of 2015, the Respondent began to have concerns about the level of availability being offered by AAs. On 15 April 2015, Ms Lianne Martynski, the Respondent's Criminal Justice and Staff Development Team Lead, wrote an email addressed, it appears, to all the AAs. Ms Martynski expressed concern about the state of the rotas and the fact that call handlers were finding it difficult to locate AAs to attend at police stations. In order to address this difficulty, Ms Martynski said as follows:

"Moving forward, we have to ensure that we are never again in this position and new systems, particularly around the training and recruitment of new AA's, will be put in place. There will also be changes to the existing service around minimum availabilities required, we will continue to remain flexible and fair and will be more than happy to discuss alternative arrangements if required.

From the 1st May onwards all paid Appropriate Adults will be required to give a minimum availability of 10 shifts per month, 2 of these must be on the weekend, similarly, all volunteers will be required to give a minimum of 5 shifts per month. This is not an unreasonable request and some of you already provide us with far more availability each month. As I have already said, we will be flexible and take into account personal circumstances and holidays etc.

In the meantime, I would very much appreciate it if you could all check your diaries and let me know any availabilities that you may have. …"

11. One of the jobs which the Claimant undertook, other than her role as an AA, was for Advocacy Support Cymru. This job involved a substantial commitment of 4 days' work a week. This obviously had a knock-on effect on her availability to be on the Respondent's rota.

A The Tribunal heard evidence from Ms Martynski that there were times when the Claimant had missed calls when she was on the rota. The Claimant took issue with the suggestion she had missed calls. However, there does appear to be some documentary evidence that calls were missed on occasion. It appears that the call handlers would attempt to call those who were on the rota, and, if they failed to make contact, they would simply move down to the next person whose name appears on the rota. The Respondent did operate what has been described as the "3 strikes and off" rule ("the 3-strikes rule"). This rule meant that if an AA did not respond to a call-out request on 3 occasions they may be taken off the rota. It is not clear from the Tribunal's findings whether the 3-strikes rule applied to 3 successive requests or to any 3 requests made during a period of availability.

12. In December 2015, it appeared to the Claimant that she had been taken off the rota for no good reason. She wrote to Ms Martynski on 30 December 2015 to say that she seems to have been missed off the January rotas and asked to be added to them. Ms Kay Davies, one of the Respondent's managers, responded to the Claimant on 5 January 2016 and said as follows:

> **"With regards to your inclusion on the rota we have noticed there has been a number of times you have given availability but not answered your phone when called. This was one of the issues that was on the agenda for the 2 AA meetings held in December. It was agreed at those meetings that anyone who had missed 3 calls would be contacted before being placed back onto the rota."**

13. Ms Martynski wrote to the Claimant on 11 January 2016 to say that there has always been the 3-strikes rule but that it has not always been managed properly. However, she said that with Ms Davies now in post this is no longer the case and a number of AAs have already been contacted about this kind of behaviour, some of whom are already back on the rotas. Then on 14 January 2016, the Claimant was informed that she would no longer be offered any further AA work. The Claimant regarded that as her dismissal and indeed referred to that as her date of termination in her ET1.

14. The Respondent denied that there was a dismissal on the basis that she was never employed.

The Tribunal's Decision

15. After setting out a summary of the law and the parties' submissions, the Tribunal expressed its conclusions on the question of employment status in the following key paragraphs:

> **"22. As the cases have stressed the whole picture must be looked at in order to determine employment status. The claimant was expected to provide a list of available dates to the respondents and it was expected that should she be contacted on those dates that she would agree to undertake work that was offered by the respondents. It is clear from the events which occurred towards the end of her period of her employment that the respondents operated a system that if after a period of time, an appropriate adult declined to undertake work then they would be moved from being offered any further work (the 3 strikes rule). I accept the [claimant's] evidence that if three missed calls are recorded there are sanctions in being taken off the appropriate adult rota and invited to attend supervision and no longer contacted by the Respondents. Reference was made to an email from the respondents of the 17th September 2015, in which it was stated unless appropriate adults are "unwell or [an] emergency crops up", appropriate adults are not "permitted to change their shifts with less than 2 weeks notice".**
>
> **23. The respondents also instructed appropriate adults that from the 1st May 2015 onwards all paid appropriate adults are required to give a minimum availability of ten shifts per month, two of these must be on a weekend. Similarly volunteers will be required to give a minimum of five shifts per month. Although it was said the minimum was not enforced and was flexible and that minimum availability was asked in order to clarify how much availability there would be, and that the focus was on a recruitment and not enforcement of the ten shifts, nevertheless that indicates a clear intention on the parts of the respondents to require a degree of obligation on the part of the appropriate adults to continue to undertake the job. Once availability had been given it is clear that there was an expectation and intention that a person would attend if asked to do so. Miss Martynski said there was an expectation that they will attend, although the 3 strike rule would have not been enforced if it was illness.**
>
> **…**
>
> **29. One of the key factors here is that when work was offered there was an obligation on the part of the claimant to accept that work otherwise there would be sanctions. It was clear that the respondents expected the claimant to undertake the work as indeed other appropriate adults were expected to undertake work if they provided availability. The lack of mutuality can only defeat employment status if it applies to both sides. Here looking at all the factors and balancing them together with the clear intentions of the parties suggests strongly that there was a relationship of employer and employee and not simply one of a worker. …**
>
> **30. By looking at page 53 of the bundle being the summary of work undertaken by the claimant, it can be seen that there were some periods when the claimant did not undertake any callouts. In particular, emphasis is put on a period in December 2015. There were absences of receipts of monies in a few months in 2013/14 and 15. These absences, in which had been contrasted with the periods of payments for call outs in all the other months, may indicate the absence of the umbrella type of contract or some degree of obligation on both sides in this period of time. I do not accept that it is necessarily shows [sic] an absence of a mutuality of obligation. The claimant made herself available for that period of time as per the rotas and, subject to the demands of the [respondent's] business, may not have been offered particular work for a short period of time but the overall pattern shows that the claimant was utilised and offered and was expected to take a substantial amount of work. There was a continuing over arching contract which had the necessary elements of mutuality of obligation.**

31. Taking into account all the factors I find that the claimant was an employee at the material time when she was dismissed. If I am wrong about this then I find that the claimant was a worker. The claimant was not at any time a volunteer nor was she self employed and running her own business. The claimant offered her services and was subject to rigorous supervision and instructions on how to undertake the work on the part of the [respondent's] organisation which has obligations to maintain an efficient service as required. The claimant was not in any sense running her own business. The fact that the claimant was also employed on other specific fixed term contracts by the respondents does not negate the claimant being an employee and or a worker during the relevant period of time. It is not inconsistent that the person having more than one employment and indeed this is frequently the case in the modern world where multiple employments exist."

The Grounds of Appeal

16. There are 4 grounds of appeal:

a. Ground A - The Tribunal's conclusion that the Claimant was an employee was inconsistent with the express terms of her appointment which negated any mutuality of obligation;

b. Ground B - Faced with these express terms of appointment, it was impossible for the Tribunal to find that an 'umbrella contract' with mutuality of obligation arose by implication or otherwise;

c. Ground C - The finding that there was mutuality of obligation was based on impermissible findings, perverse and/or not properly reasoned or explained;

d. Ground D - Even if there were mutual obligations to offer and accept work, such obligations could not have come into existence until 1 May 2015 when the minimum availability requirements for AAs were introduced.

17. The Respondent was ably represented by Mr Rowell of counsel. In respect of Ground A, he submitted that the terms of the letter of appointment are unequivocally clear and that the references to there being no guarantee of work and that the Claimant's services would be used "if she is available", are determinative. There cannot, in those circumstances, be any mutuality of obligation. Insofar as the Tribunal gave weight to the 3-strikes rule, Mr Rowell submitted that it failed to appreciate that the rule only operated in respect of AAs who had agreed to go on

the rota; it had no applicability for those periods in between being on the rota during which the employee was not under any obligation at all.

18. As to Ground B, it was submitted that there was no scope for implying a term importing mutuality of obligation when there were express terms to the contrary. It was also said that, to the extent that the Tribunal followed the approach taken in the case of **St Ives Plymouth Ltd v Haggerty** UKEAT/0107/08/MAA, 22 May 2008 (where it was found that commercial imperatives could, over time, crystallise into legal obligations), it erred in doing so. That was because in **Haggerty**, there were no express terms of appointment that negated any mutuality of obligation.

19. As to Ground C, it was submitted that the Tribunal reached impermissible findings or had drawn incorrect conclusions in respect of three matters which had underpinned its conclusion that there was mutuality of obligation. These were: the finding that sanctions would be applied for missing callouts; the 3-strikes rule; and the introduction of a minimum availability requirement as from 1 May 2015.

20. Finally, in relation to Ground D, Mr Rowell submitted that even if there was mutuality of obligation by the time of the Claimant's termination, such obligation could not have come into existence until 1 May 2015. The Tribunal, however, failed to make any finding of fact as to when the Claimant became an employee. This was flawed, particularly as the Tribunal had been expressly required to determine whether the Claimant had the requisite length of service to bring an unfair dismissal claim.

21. The Claimant represented herself as she did below. The Claimant has some legal experience but is not a practising lawyer. It was clear that she had a reasonable grasp of the legal issues arising. The Claimant submitted that although the terms of the contract referred to her as a "bank" worker, the parties operated on the basis that there would always be plenty of work available to do. It was pointed out that the contracts which the Respondent had entered into with police services contain penalties. In those circumstances, it was, she submitted, a nonsense to suggest that there would be no obligation to provide work. If there were no such obligation then those contractual commitments would have been difficult to meet. The Claimant also refers to the fact that the situation evolved over time as the demands for AAs increased thereby requiring a more formal approach to the allocation of work. The letter of appointment did not reflect the reality of the situation, although the Claimant did not go so far as to suggest that it was a sham.

22. The Claimant considered that she was under an obligation in that if she continually said "no" to requests for call-outs she would lose her spot on the rota. It was also in her interests to accept offers of work because that would mean more income. She further submits that the Respondent was in a position to enforce the obligations because it could simply decide to take her off the rota. In relation to Ground C, and, in particular, the obligation between rotas, the Claimant points out that there were occasions when she accepted call-outs at such times. She contends that there must be an obligation in respect of such periods because if there were not then she would be in "no man's land". Finally, in relation to Ground D it was submitted that this is a new argument and that the Respondent had not previously sought to suggest that the contract only came into being on 1 May 2015. Her position was that there were obligations going both ways during the whole of the contract and that these increased over time in order to match increasing demands.

The Law

23. Section 230 of the **Employment Rights Act 1996** ("the Act"), so far as relevant, provides:

> **"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) -**
>
> > **(a) a contract of employment, or**
> >
> > **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**
>
> **and any reference to a worker's contract shall be construed accordingly."**

24. I was taken to several well-known authorities dealing with the question of employment status. The following are of particular relevance to the present case:

a. **Nethermere (St Neots) Ltd v Gardiner** [1984] IRLR 240. In that case, the Court of Appeal, Stephenson LJ presiding, said as follows:

> **"21. Of (iii) the learned judge proceeded to give some valuable examples, none on all fours with this case. I do not quote what he says of (i) and (ii) except as to mutual obligations:**
>
> > **"There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill."**
>
> **…**
>
> **38. … The inescapable requirement concerning the alleged employees however - as Mr Jones expressly conceded before this court - is that they must be subject to an *obligation* to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer. If not then no question of any 'umbrella' contract can arise at all, let alone its possible classification as a contract of employment or of service. The issue is therefore whether the Tribunal's findings and conclusions show that they took account of this essential requirement."**

b. **Clark v Oxfordshire Health Authority** [1998] IRLR 125. That case concerned a "bank nurse" whose terms of service stated that she was not a regular employee, and had no entitlement to guaranteed or continuous work. The Court of Appeal referred to

the **Nethermere** case above. At paragraph 41 of the judgment, Sir Christopher Slade said as follows:

> **"41. … I would, for my part, accept that the mutual obligations required to found a global contract of employment need not necessarily and in every case consist of obligations to provide and perform work. To take one obvious example, an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was not offered would in my opinion, be likely to suffice. In my judgment, however, as I have already indicated, the authorities require us to hold that *some* mutuality of obligation is required to found a global contract of employment. In the present case I can find no such mutuality subsisting during the periods when the applicant was not occupied in a 'single engagement'. Any obligation of confidentiality binding her during such periods would have stemmed merely from previous single engagements. Apart from this, no continuing obligation whatever would have fallen on the authority during such periods."**

c. Both of those cases were endorsed by the House of Lords in **Carmichael v National Power plc** [2000] IRLR 43. The Claimants in that case were tour guides at a power station. Their letters of appointment provided that their employment would be on a "casual as required basis". Whilst their engagement had some of the characteristics of employment, such as the provision of company uniforms and vehicles, they only worked when invited by the company to do so and when they were available and chose to work. The guides had never been disciplined for refusing to accept offers of work. Based on those circumstances, the Tribunal held that the parties had not intended to create an employment relationship which subsisted when the Claimants were not working. One of the questions before their Lordships was whether the Tribunal was correct to take into account matters other than those set out in the written terms of appointment. As to this issue Lord Irvine of Lairg said as follows:

> **"19. In my judgment, it would only be appropriate to determine the issue in these cases solely by reference to the documents in March 1989, if it appeared from their own terms and/or from what the parties said or did then, or subsequently, that they intended them to constitute an exclusive memorial of their relationship. The industrial tribunal must be taken to have decided that they were not so intended but constituted one, albeit important, relevant source of material from which they were entitled to infer the parties' true intention, along with the other objective inferences which could reasonably be drawn from what the parties said and did in March 1989, and subsequently."**

As to mutuality of obligation, Lord Irvine of Lairg said as follows:

> **"20. … The objective inference is that when work was available they were free to undertake it or not as they chose. This flexibility of approach was well suited to their family needs. Just as the need for tours was unpredictable, so also were their domestic commitments. Flexibility suited both sides. As Mrs Carmichael said in her application form, 'the part-time casual arrangement would suit my personal circumstances ideally!' The arrangement turned on mutual convenience and goodwill and worked well in practice over the years. The tribunal**

observed that Mrs Leese and Mrs Carmichael had a sense of moral obligation to the CEGB, but would infer no legal obligation. Mr Lovatt also gave evidence for the CEGB that 'neither of the ladies are required to work if they do not wish to do so.' In my judgment, therefore, the industrial tribunal was well entitled to infer from the March 1989 documents the surrounding circumstances and how the parties conducted themselves subsequently that their intention neither in 1989 nor subsequently was to have their relationship regulated by contract whilst Mrs Leese and Mrs Carmichael were not working as guides. The industrial tribunal correctly concluded that their case 'founders on the rock of absence of mutuality.' I repeat that no issue arises as to their status when actually working as guides."

d. **Stevedoring & Haulage Services Ltd v Fuller** [2001] IRLR 627. In that case, the Court of Appeal overturned a decision that, notwithstanding express terms that workers were engaged on an ad hoc and casual basis with no obligation to offer or accept work, they were working under an overarching contract of employment. Tuckey LJ held as follows:

"10. With these preliminary observations in mind we turn to consider the ET's decision. They found that the documents containing the terms upon which casual work was offered and accepted 'expressly negative mutuality of obligation'. Such a finding was, we think, inescapable. Casual work was to be done 'on an ad hoc and temporary basis', 'with no obligation on the part of the company to provide such work nor for you to accept any work so offered'. If this finding stood alone the ET should have concluded that there was no global or overarching agreement. Like the documents in *Carmichael*, they provided no more than a framework or facility for a series of successive ad hoc contracts. At best the parties assumed moral obligations of loyalty where both recognised that their mutual economic interests lay in being accommodating to one another. But the ET did not consider the matter in this way. They concluded that there was an agreement (which on this analysis there was not) and then sought to supplement it by implying terms so as to water down the effect of the documents containing the express terms and give it sufficient mutuality to pass the test. We do not think this approach can be justified. If there was no contract, there was no contract and one could not be created by the implication of terms in this way.

11. If there was a contract we cannot see any way in which the ET's implied terms could be incorporated into it. The implied terms flatly contradict the express terms contained in the documents: a positive implied obligation to offer and accept a *reasonable amount* of casual work (whatever that means) cannot be reconciled with express terms that neither party is obliged to offer or accept *any* casual work. None of the conventional routes for the implication of contractual terms will work. Neither business efficacy nor necessity require the implication of implied terms which are entirely inconsistent with a supposed contract's express terms.

…

14. Mr Linden also attempted to derive support for a submission that there was a continuity of relationship between the appellants and respondents from various aspects of how the arrangement worked in practice. He relied on the rota, the provision of training and protective clothing and the regularity with which some (but not all) of the respondents did casual work. But on analysis each of these features can be explained by the fact that the respondents were performing a series of successive ad hoc contracts of service or services. We do not see anything which is inconsistent with the framework set out in the documents to which all parties subscribed."

e. **St Ives Plymouth Ltd v Haggerty** UKEAT/0107/08/MAA. This case concerned casual print workers who were not obliged to accept any particular shift offered. In practice, the Respondent company felt obliged to offer them sufficient work to dissuade them from working for other companies and the workers felt obliged

to accept sufficient work to secure continuing offers of further work. The Employment Appeal Tribunal, Elias P (as he then was) presiding, said as follows in expressing the decision of the majority:

> **"25. Unfortunately, we are not able to reach agreement on the effect of these principles to the facts of this case. We are, of course, bound by the reasoning of the majority in *Nethermere*. The majority (the President and Mr Smith) recognise that there was some evidence in *Nethermere* that the Claimant felt obliged to do the work "whenever needed". But in our opinion the two passages we have extracted from the judgments of Stephenson and Dillon LJJ do not make that finding central to their analysis; rather they focus on the course of dealing itself.**
>
> **26. In our judgment, it follows that a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided. The issue for the tribunal is when a practice, initially based on convenience and mutual cooperation - an alternative if less personal description may be market forces - can take on a legally binding nature.**
>
> **27. The point was put succinctly by Sir John Donaldson MR in the *O'Kelly* case. One of the issues in that case was whether there was an umbrella contract regulating the relationship of the employer and the waiters who regularly worked for them during banquets. The Employment Tribunal held that there was not, and the Court of Appeal held that this was a sustainable decision. Sir John Donaldson said this (762H-763A):**
>
> > **"So far as mutuality is concerned, the 'arrangement', to use a neutral term, could have been that the company promised to offer work to the regular casuals and, in exchange, the regular casuals undertook to accept and perform such work as was offered. This would have constituted a contract. But what happened in fact could equally well be attributed to market forces. Which represented the true view could only be determined by the tribunal which heard the witnesses and evaluated the facts."**
>
> **28. On this analysis, the only issue is whether the tribunal in this case was entitled to find that there was a proper basis for saying that the explanation for the conduct was the existence of a legal obligation and not simply goodwill and mutual benefit. The majority consider that it is important to note that the test is not whether it is necessary to imply an umbrella contract, or whether business efficacy leads to that conclusion. It is simply whether there is a sufficient factual substratum to support a finding that such a legal obligation has arisen. It is a question of fact, not law. The majority place weight on the fact that nowhere does Lord Irvine state that the only proper conclusion for the tribunal was to find a lack of mutual obligations. The emphasis is on this being a finding that the tribunal was entitled to make.**
>
> **29. It is in truth a highly artificial exercise for a tribunal, not least because there are no clear criteria for determining when it is the one rather than the other, or indeed both (which we suspect will frequently be the case). However, in the judgment of the majority, there was a sufficient basis here. We recognise that in part it may be said that the tribunal's reasoning is finding the legal obligation arising out of the practical commercial consequences of not providing work on the one hand or performing it on the other. But we do not see why such commercial imperatives may not over time crystallise into legal obligations.**
>
> **30. Furthermore, there were other factors which were taken into account, including the lengthy period of employment, the fact that the work was important to the employers, and the work was regular even if the hours varied. One might also readily infer, although it was not spelt out, that the employers felt under an obligation to distribute the casual work fairly, rather as did the allocator in the *Nethermere* case."**

f. **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181. In this case, in which there was no written contract, the EAT, Langstaff J presiding,

considered the significance of the right to refuse work in determining whether or not there is a contract of service:

> **"55. We are concerned that tribunals generally, and this tribunal in particular, may, however, have misunderstood something further which characterises the application of 'mutuality of obligation' in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it. Stevenson LJ in *Nethermere* put it as '… an irreducible minimum of obligation …' He did so in the context of a case in which home workers were held to be employees. Mrs Taverna refused work when she could not cope with any more. She worked in her own time. It is plain, therefore, that the existence and exercise of a right to refuse work on her part was not critical, providing that there was at least an obligation to do some. The tribunal had accepted evidence (see 619B-C) that home workers such as she could take time off as they liked. Although Kerr LJ dissented in the result, he too expressed the 'inescapable requirement' as being that the purported employees '… must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer.' Dillon LJ said at 250:**
>
> > **'The mere facts that the outworkers could fix their own hours of work, could take holidays and time off when they wished and could vary how many garments they were willing to take on any day or even to take none on a particular day, while undoubtedly factors for the industrial tribunal to consider in deciding whether or not there was a contract of service, do not as a matter of law negative the existence of such a contract.'**
>
> **He added - of particular relevance for the present appeal at 250:**
>
> > **'I find it unreal to suppose that the work in fact done by the applicants for the company over the not inconsiderable periods which I have mentioned was done merely as a result of the pressures of market forces on the applicants and the company and under no contract at all.'"**

Discussion

25. Although there is a letter of appointment in this case, it cannot be said that the question of whether the Claimant was employed under a contract of employment is to be determined solely by reference to that letter. There is nothing in it, or in anything said between the parties, to suggest that all aspects of the relationship were to be determined solely by reference to the letter. This is, therefore, the kind of case where the intention of the parties, objectively ascertained, has to be gathered partly from the documents and partly from the facts surrounding the relationship as found by the Tribunal: see **Carmichael v National Power** at [19].

26. The difficulty with the Tribunal's Judgment is that it focuses only on the facts surrounding the relationship and pays little or no regard to the terms of the appointment.

Although the Tribunal did refer to the letter of appointment, its emphasis in doing so was on the change from volunteer status to paid status introduced by that letter. At no stage in the Reasons does the Tribunal expressly set out those terms in the letter stating that there were no guaranteed hours and that the Claimant's services would be used on an "as and when required" basis and only if she is available. It seems to me that that is a significant omission in the Tribunal's analysis. In its conclusions, the Tribunal states that it has balanced all the factors and taken them all into account. However, in the absence of any mention of the key terms in the letter of appointment, which could be seen as negating any mutuality of obligation, one cannot be confident that those terms were amongst the factors taken into account.

27. Of course, if the written terms were ambiguous in their effect, then it might be said that the failure to refer to them expressly, when it was clear that the Tribunal did have the letter in mind, does not undermine its analysis of the whole picture. However, in my judgment, the written terms were unambiguous. Apart from there being no guaranteed hours, which indicates that the Respondent was not obliged to offer any minimum quantity of work, there is also the reference to the Claimant providing services "if you are available". Had the intention been for the Claimant to be available whenever the Respondent required her it would not have used the conditional "if". Pursuant to these terms, the Claimant could indicate that she was not available and was not, therefore, obliged to work when requested to do so. The position is not dissimilar to that in **Stevedoring & Haulage Services Ltd** where there was also no obligation on the part of the employer to offer work and no obligation on the part of the employee to accept work that was offered. Whilst the language used in the letter is not as definitive about the absence of obligation as in the **Stevedoring** case, it has, in my judgment, the same effect. The letter creates a framework pursuant to which successive engagements will be carried out. Thus, if the

Claimant says she is available, is placed on the rota and then accepts work, she will be paid in accordance with the terms of the letter and will accrue the benefits set out.

28. The terms of the appointment therefore indicate that there was no mutuality of obligation. However, that is not the end of the analysis. It is necessary to consider whether the way in which the Respondent obtained work from the AAs was such as to indicate the existence of such obligations notwithstanding what is stated in the terms.

29. The Tribunal's findings indicate that the Claimant was expected to provide dates of availability to the Respondent. The Claimant would then be placed on the rota. There was an expectation that the Claimant would be able to provide work should she be contacted whilst on the rota. However, there is no finding that the Claimant was obliged to provide any or any minimum number of dates of availability, certainly not for the period before 1 May 2015. It is a trite observation that an *expectation* that the Claimant would provide work is not the same as an *obligation* to do so. I recognise that there may be cases where, as a result of a commercial imperative or market forces, the practice is that work is usually offered and usually accepted and that such commercial imperatives or forces may crystallise over time into legal obligations. That was the case in **Haggerty**. However, in that case, there were no express terms negating such obligations. I consider that to be a significant distinguishing feature. On the facts, this case is closer to the situation in **Stevedoring** and **Carmichael** than that in **Haggerty**.

30. At paragraph 23 of the Reasons, the Tribunal does refer to a "degree of obligation on the part of the appropriate adults to continue to undertake the job". There was also the 3-strikes rule, which, although not enforced, created an expectation of attendance. Does this obligation

A and this rule create an irreducible minimum degree of obligation? In my judgment, the Tribunal erred in concluding that it did.

B 31. The "degree of obligation" found by the Tribunal arose out of the content of the 15 April 2015 letter which provided that as from 1 May 2015 there was to be a minimum availability of 10 shifts per month. However, even if that did create a degree of obligation from 1 May 2015, it says nothing about the period up to that point. Indeed, the fact that the C Respondent considered it necessary to state that the minimum availability would apply as from that date suggests that there was no such minimum applied before then. The Claimant submitted that the minimum availability was always there. However, there is no finding of fact D to that effect, and the content of the 15 April 2015 letter contradicts that submission.

32. The 3-strikes rule was viewed as a sanction. The Tribunal considered it to be a "key E factor" in determining that there was an obligation. A sanction that is applied when work is not accepted can be an appropriate way of testing whether an expectation that something will be done amounts, in reality, to an obligation. However, the 3-strikes rule was very clearly only applicable to those who had expressed their availability and had been placed on the rota. The F Tribunal's own findings support that conclusion because they state that "the respondents expected the claimant to undertake the work as indeed other appropriate adults were expected to undertake work <u>if they provided availability</u>" (Reasons at [29]; emphasis added). There is G nothing in the Tribunal's findings to indicate that the 3-strikes rule applied at any other time. The Tribunal therefore took what appears to be an obligation whilst on the rota and applied it to the whole of the relationship in order to find that there was an overarching or umbrella contract of employment. That was, in my judgment, an error. The Tribunal did note that there were H periods when the Claimant did not undertake any call-outs. However, the Tribunal did not

A think that that showed an absence of mutuality of obligation. Its conclusion was that whilst she may not have been offered particular work for a short period of time:

> **"30. … the overall pattern shows that the claimant was utilised and offered and was expected to take a substantial amount of work. There was a continuing over arching contract which had the necessary elements of mutuality of obligation."**

B

33. However, the fact that the Claimant may have been "utilised" for much of the period or that she was "expected" to accept work, does not establish the existence of an obligation over the whole period. The Tribunal once again noted in that paragraph that any availability offered by the Claimant was "for that period of time as per the rotas". The absence of any finding of fact that there was some degree of obligation between periods when the Claimant was on the rota is, in my judgment, fatal to the conclusion that there was some sort of continuing overarching contract for the whole of the period.

C

D

34. I should add that, following the conclusion of the hearing, the Claimant sent an email to the EAT for my attention in which she stated that there was evidence before the Tribunal suggesting that the 3-strikes rule was applied even when AAs were not on the rota. Even if that were the case (and it is not clear from the extracts from the witness statements set out in the Claimant's email that that was the case), the Tribunal did not make any findings of fact to that effect (see paragraph 32 above).

E

F

35. The Claimant submitted in this court that she had permanently given her availability to the Respondent. There is no finding of fact to that effect; the Tribunal refers to availability "as per the rota". But even if she had made herself permanently available, that would have been her choice and not something that arose out of any legal obligation. Similarly, if the Respondent had plenty of work to offer such that there were no significant periods when none was available, that would not mean that it was legally obliged to offer any or any particular

G

H

quantity of work. The Claimant said in submissions that had she not been offered work for several weeks her recourse would have been to make inquiries. That falls far short of showing that there was any means of enforcing any particular quantity work to be provided by the Respondent.

36. The Claimant emphasised the fact that the Respondent itself had to meet contractual obligations to the police and could not have done so without requiring AAs to make themselves available. However, the Respondent has chosen to provide services through the use of AAs on a "bank basis". No doubt this has something to do with the unpredictability of demand. There may be occasions when the demand is so great and/or the availability of AAs is so limited that the demand cannot be met. However, that is the commercial risk that the Respondent has chosen to take. There are no findings of fact to indicate that the Respondent was contractually obliged to have a minimum number of, or any, employed AAs in order to be able to provide the AA services.

Conclusions

37. For the reasons set out above, Ground A of the appeal succeeds. The failure to have regard to terms of the letter of appointment renders the Tribunal's analysis of "all the factors" flawed. This is not a case where it has been alleged that the letter of appointment was a sham designed to create the impression of casual work when in fact the relationship was one of employment. Any such allegation would have been contrary to the Claimant's pleaded case, in which she acknowledged that she was employed on a "bank basis"; her case being that the position evolved over time to become something more formalised.

38. For similar reasons, Ground B of the appeal also succeeds. There is no scope for implying an umbrella contract given the existence of the express terms negating such contract in the letter of appointment.

39. As to Ground C and the claimed impermissible findings, these have largely been dealt with already under Grounds A and B. The Tribunal erred in finding that there was any obligation in between the rotas; that the 3-strikes rule applied to the period between the rotas; and that there was any minimum availability requirement at any point prior to 1 May 2015. The Tribunal's conclusions in these respects were either unsupported by, or contrary to, the evidence.

40. Finally, in relation to Ground D, the Tribunal's apparent finding that the Claimant had sufficient qualifying service to bring a claim of unfair dismissal was incorrect. Even if the Tribunal was correct that there were mutual obligations giving rise to an overarching contract for some of the period, that period could not have commenced before 1 May 2015.

41. It follows that this appeal succeeds.

Disposal

42. Mr Rowell submits that this is an appropriate case for the EAT to substitute its decision for that of the Tribunal. He submits that the inevitable result of succeeding on Grounds A and B is that there cannot be any overarching employment contract subsisting throughout the period of the engagement. I agree. As stated above, the terms of the letter are clear; they negate mutuality of obligation in respect of work being offered or performed. There is nothing to suggest that the terms were a sham. Furthermore, the Tribunal's findings, far from indicating

an ongoing overarching contract, only support mutual obligations during the periods when the Claimant was on the rota. There are no findings which support, and there is no evidence which would support, such obligations for the periods between the rotas. As such, it does seem to me that, in the circumstances of this case, the only possible conclusion that the Tribunal could come to, properly directing itself in law, is that there was no overarching contract of employment for the duration of the relationship.

43. Accordingly, this appeal is allowed and a decision is substituted that the Claimant was not an employee of the Respondent.