Appeal No. UKEAT/0049/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 September 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR J CHATFEILD-ROBERTS — APPELLANT

(1) MS M PHILLIPS
(2) UNIVERSAL AUNTS LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CRAIG RAJGOPAUL (of Counsel) Instructed by: Mischon De Reya LLP Africa House 70 Kingsway London WC2B 6AH
For the First Respondent	MR DAVID GRANT (of Counsel) and MS ALEXANDRA BAUMGART (of Counsel) Free Representation Unit
For the Second Respondent	No appearance or representations by or on behalf of the Second Respondent

SUMMARY

JURISDICTIONAL POINTS – Worker, employee or neither

An Employment Judge was entitled to find, on the evidence before him, that a live-in carer who had worked for the First Respondent for over 3 years, being paid in full for the limited leave which she took, and having no residence other than the premises in which she carried out her duties, had the status of an "employee" notwithstanding that she was paid gross, and paid tax and NI contributions herself.

There are common-sense limits to the "intense scrutiny" which can be applied to a scenario in which neither party had discussed the question of payment for leave and sickness absence, particularly where no sick leave had been taken over the entire period. The Judge's findings were open to him on the evidence and demonstrated no error of law.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this Judgment, I shall refer to the parties as they were below.

2. The Claimant worked as a live-in carer for Colonel Henry Brooke, the uncle of the First Respondent. She began work in June 2013, and continued to do so until she was issued with a letter of termination on 6 August 2016. She had been introduced to the First Respondent by the then Second Respondent.

3. A Preliminary Hearing was held at the London (Central) Employment Tribunal (Employment Judge Stewart sitting alone). The purpose of the hearing was to determine whether the Claimant was an employee of the First Respondent and, as a second question, whether the Claimant was an employee of the Second Respondent. Its Decision was sent to the parties on 25 October 2017.

4. Having set out the law and the relevant findings of fact, the Employment Judge stated at paragraph 48 of the Written Reasons that he had no difficulty in answering "*No*" to the question "*Was the Claimant an employee of the second Respondent?*". There is no appeal against that finding and the consequent dismissal of the claim against the Second Respondent. Somewhat surprisingly, the Second Respondent has served a skeleton argument purportedly to protect its interests as well as assisting the Employment Appeal Tribunal ("EAT") "*in a balanced and neutral manner*", to quote from the opening paragraphs of that argument. The particulars of claim annexed to her ET1 made clear that the Claimant regarded the First Respondent as her "*employer*" and added the Second Respondent to the claim only as a result of something the First Respondent had raised. The former Second Respondent was not represented today and, whilst I acknowledge

the good intentions, I have not had regard to the arguments in its skeleton argument in reaching my decision.

5. The Employment Judge went on to find that the Claimant was an employee of the First Respondent. It is against that finding that the First Respondent appeals.

6. As a result of decisions of Her Honour Judge Eady QC, at the sift stage, and Mr Justice Kerr, at the Rule 3 (10) stage, there are now three grounds of appeal which have been permitted to go forward to this Full Hearing. These are that the Employment Tribunal ("ET") erred in holding that the Claimant was an employee of the Respondent in the following respects:

(1) First, by failing to analyse and determining the contractual relationship between parties as regards, (a) substitution, (b) mutuality of obligations in the sense of a requirement on the Claimant to provide services and on the Respondent to provide work and (c) annual leave and other unpaid absences.

(2) Second, by failing to make appropriately detailed findings of fact and not subjecting the relevant facts to the intense focus required in respect of (a) control, (b) substitution, and (c) annual leave and other unpaid absences.

(3) Third, by making internally inconsistent findings or findings unsupported by any evidence in respect of (a) the words used by the Respondent to describe the relationship and (b) the requirement to attend to the Colonel as and when he required attention.

7. The Respondent is represented today by Mr Craig Rajgopaul who did not appear below. The Claimant is represented by Mr David Grant and by Ms Alexandra Baumgart, instructed by the Free Representation Unit, neither of whom appeared below. I have had Word versions of

their skeleton arguments sent to me yesterday afternoon at 4 o'clock at my request, for which I am grateful. Today, Mr Rajgopaul and Mr Grant elaborated on their written arguments in focused and succinct oral submissions. If I do not deal with every submission in this Judgment, which is being delivered *ex tempore*, it is not to be thought that I have not taken heed of it. The same applies to the law. I have considered the passages in all of the authorities to which I have been referred, but I do not find it necessary to comment on all of them.

8. The Claimant had, the Employment Judge found, come on to the books of the Second Respondent in 2003, and thereafter worked for a succession of clients. He also found that the pattern of the Claimant's work with the Colonel (as he was known) was not the usual practice: the Second Respondent usually operated a rota system whereby carers would move on every three or four weeks. It seems that, due to factors specific to the Colonel, the First Respondent and his sister wanted someone who would be able to commit to a minimum period of six months of permanent placement. In the event, the engagement was to last for over three years, with cover provided by other people on the books of the Second Respondent on the Claimant's days off when she took leave and, for one period, when she was on jury duty.

9. Given the issues which fell to be determined, it is unsurprising to record that the Claimant was paid on a gross basis and paid her own tax and national insurance as though she was self-employed. It is trite law that this arrangement of itself is not determinative of the issue.

10. The following findings of fact are relevant (see paragraphs 18 to 39 of the Decision):

> **"18. The Claimant was told in the first week of her engagement that she was to assist the Colonel with his catheter and to contact a doctor should he become unwell. She was required to issue medication to the Colonel and to provide personal care which included cooking and shopping for him. She was expected to perform various tasks, find and engage plumbers and electricians when need[ed], book and organise medical appointments, accompany the Colonel to such appointments, liaising with medical professionals and keeping the first Respondent informed in such matters. She was instructed to organise birthday parties for the Colonel and was asked,**

on occasion, to communicate with a Chartered Surveyor and to send material to the Colonel's lawyer.

19. In his evidence on the first day of the hearing, the first Respondent denied that he had asked the Claimant to send material to the Colonel's lawyer saying that was 'the last thing on earth I would have asked' the Claimant to do. On the second day when confronted with an email message in which he had asked the Claimant to forward to the Colonel's lawyer an email in which he had summarised a discussion that had involved the Claimant, the Colonel and himself concerning the Colonel's wishes as regards his will, he accepted he had made the request but …

> **… this is not within the context of employment - I was trying to get some resolution so as we could all get on with our lives.**

20. Later, the first Respondent was challenged about his use of terminology in documents that, as above, might indicate he viewed the Claimant's engagement as one of employment. His response was to assert:

> **I was unaware of the importance of the use of the proper label "employment" … I was sent this [document at page 278] … - I probably did not read it, I am not an employment lawyer. I am not a lawyer - I do not write emails for the benefit of the legal profession.**

21. The Claimant kept the first Respondent informed of daily activities, of trips made and developments with house maintenance. On one occasion at the end of June 2016, the Claimant sought some additional assistance to keep the house clean, she was told by the first Respondent that "It is Universal Aunts' policy that you can only have a cleaner once a week" and "It may be Henry's house, but I am your employer and what I say goes." On another occasion when, in response to the Colonel's indication that he wanted the walls of the drawing room painted and the Claimant started that job, the first Respondent told her "That's the last wall you are going to paint. I did not employ you to paint walls".

22. Over the period of her engagement, the Claimant lived in the house and occasionally the first Respondent - who lived in Melton Mowbray but who worked in the City - would spend the night in his uncle's house. To begin with, the first Respondent would make an effort to visit once a week but that slipped to once a fortnight or every three weeks.

23. After the first year of the engagement when the Colonel reimbursed the first Respondent for the cost of his live-in carer, the first Respondent reached an accommodation with his uncle that the first Respondent would pay for the carer for the remainder of his life, it being anticipated that the first Respondent would be a beneficiary under the Colonel's will.

24. The reduction in the frequency of visits by the first Respondent coincided with his early appreciation of the Claimant's performance in her role. In his statement, he wrote:

> **9. I must admit that I never fully turned my attention to the long-term structure of my uncle's care. Through subsequent communications with Universal Aunts, I learned that residential carers they introduced to their clients are expected to adhere to a rota system whereby each Aunt is only in place for three or four weeks before been [sic] swapped for another Aunt. It transpires that Universal Aunts' intention was that my uncle's care would be run on a rota system. This is confirmed by the screenshot from their computer system.**
>
> **10. My intention on instructing Universal Aunts was that they would provide a full-time care structure for my uncle. Although I was not told about the rota system, I understood they would provide sufficient carers so that my uncle would have full-time care. I also understood that it meant the carers they provided were substitutable. When Mercedes started, it so happens that she never left. It was not my intention at the time that she would never leave, nor was it my intention that she would leave after a certain amount of time. Essex and I have been very worried and under strain about my uncle's well-being in the months leading up to the start the formal care arrangements. We were so relieved when things seem [sic] to be going well and my uncle soon settled that we do not want to risk that stability with regular change. It was a huge weight off my mind to see a reliable support system put in place. How the mechanics of that system operated was of little importance to me as long as my uncle was cared for each day and was content with the arrangement.**

25. The first Respondent devoted some 8 paragraphs of his statement to the issue of "Control". As he commented in the first of these paragraphs, with him living outside of London and having

a full-time job, it was never contemplated by him, his uncle or the Claimant that he would be heavily involved in overseeing his uncle's care in any way.

> **Therefore, I expected Mercedes to provide care independently without the need for supervision or oversight. Furthermore, at the beginning of Mercedes' engagement especially, my uncle was capable of giving instructions himself.**

26. On the Claimant's day off - she favoured Saturdays - another carer, Rachel, supplied by the second Respondent attended on the Colonel. However, when Rachel stopped providing care services, the Claimant and the Colonel made a decision not to replace her with another hired person from the second Respondent but to have the Colonel's cleaner, Olya, do extra hours on the day she was around. The Claimant was free to choose her working hours without any input from the first Respondent against a background whereby the second Respondent's brochure suggested she worked 12 hours per day with 2 hours respite.

27. The Claimant, when cross-examined by counsel for the first Respondent, commented on the communication between her and the first Respondent / Mrs Close-Smith as having been partly by email and partly face to face. She understood that her remit in respect of the Colonel was to cover his mobility which required him occasionally to visit hospital and resulted him [sic] an Occupational Therapist visiting the house thereafter and leaving exercises which the Colonel had to do. Sometimes, this generated communication but sometimes not. If she did not use her initiative, she explained, she would have been deemed not to be doing her job.

28. Under the heading of "Lack of Personal Service", the first Respondent explained that, during the Claimant's engagement, he continued each month to pay the second Respondent's agency fee of £125 plus VAT. This provided him with reassurance that, should the Claimant cease for whatever reason to provide care on a particular day or at all, the second Respondents could provide an alternative Aunt. He gave as an example the way in which the system coped with the Claimant being called up for jury service in June 2016 with the Claimant informing the second Respondent of the dates of her service and the second Respondent thereupon emailing the first Respondent's sister about replacement carers. The first Respondent would then arrange for the payment of the substitute carer.

29. The first Respondent cited Christmas 2013 as an example of the occasions when, if the Claimant was not available, she would inform the second Respondent and a substitute carer would be provided without the first Respondent being involved. The Claimant cited the period from 6 to 19 January 2014 as being a period of annual leave, which she took and for which she was paid. During that period, she visited her sister in California. Again, the second Respondent arranged cover for the period she was away.

30. Under the heading of "Mutuality of Obligation", the first Respondent wrote:

> **29. I was not obliged to provide Mercedes with work and similarly, she was not obliged to accept work. I had approached Universal Aunts in order to acquire full-time residential care from my uncle. My continued monthly payment of the agency fee throughout Mercedes' time at the House demonstrates my continued expectation that my uncle would receive full-time care. If Mercedes had decided that she no longer wanted to be part of that framework, she was free to inform Universal Aunts of that fact and they would have sent a replacement to take her place.**

31. For the first year or so, the Claimant submitted invoices and the first Respondent then paid. The rate she invoiced her time at was that suggested by the second Respondent. The Claimant asserts that, after a year, she was never asked for an invoice again and received payment from the first Respondent directly into her bank account. It would appear that the first Respondent experienced a degree of frustration at the Claimant's failure to supply monthly invoices on a regular basis and therefore moved to pay monthly by standing order. It meant that, at times when the Claimant worked overtime, he supplied a cheque for the requisite amount.

32. The sums paid by standing order or by cheque were the gross amounts. The Claimant, in line with what the second Respondent had informed her, accounted for her own tax and national insurance. Although the first Respondent comments that he did not think that paying a regular rate into the Claimant's account suggests that he was her employer, the Claimant was able to point to an email from the Respondent wherein he described her payment as a "salary".

33. On 23 July 2014, the first Respondent took it upon himself to increase the rate at which the Claimant was paid by 5% because, as he informed the Claimant, he had noticed that the rate

quoted by the second Respondent had not gone up since she had started. This took the rate at which the Claimant was paid for a full day to £115, or £690 per week.

34. The first Respondent asserted there to have been no holiday pay arrangement in place for the Claimant. He commented that the Claimant appeared loathe to take holidays and, when he expressed concern to her about her not having time off, her response was that she was "not a holiday person". However, there were four occasions when she did take time off. On each occasion, the first Respondent paid her normal remuneration. The first and third of these occasions were days off at Christmas: four days in 2013 and three in 2014. The first Respondent said:

> **On both occasions, I left the payment intact thinking the extra payment would be an appropriate Christmas gift. I saw it as a gesture of goodwill to thank Mercedes for her hard work. In Christmas 2015, Mercedes did not take any time off and so I have [sic] her a ticket for a show as her Christmas gift instead.**

35. The second occasion was when the Claimant travelled to California in January 2014. The first Respondent explained:

> **This continued payment was simply a gesture of goodwill. At the time, we were very satisfied with the care she was providing to my uncle and I wanted to remain on good terms with Mercedes, as I knew she was free to leave at any time. In my mind, this payment was a gift of thanks.**

36. The fourth occasion was when the Claimant was required to attend jury service for two weeks starting on 6 June 2016. The first Respondent continued to pay anticipating that, as and when the Claimant received reimbursement from the court for income through completing her service, he:

> **would have offset her future pay against this effective double pay. I was aware that losing two weeks' pay would cause Mercedes a cash flow problem so I was happy to wait for the reimbursement. The replacement Aunt, Joanna Dale, sent to cover Mercedes during this time was one of the main catalysts for Essex and I are to come [sic] to the decision that Mercedes[']engagement was no longer terrible. Joanna brought various concerns about the poor standard of Mercedes' care to my uncle (which are not the subject of this hearing) to our attention which led us to decide that Mercedes' engagement was no longer tenable. These new issues meant that the two-week payment and the reimbursement from the court slipped the bottom [sic] of my list of priorities.**

37. Thus, no reimbursement was sought for payment that was made for the period of two weeks' jury service.

38. There was no expenditure by the Claimant on equipment needed to attend on the Colonel - the house was fully furnished and such items as were needed for his personal care were paid for either by the Colonel himself or by the first Respondent.

39. The letter by which the first Respondent terminated the engagement was one of the two letters given to the Claimant by a process server on 6 August 2016. In his letter, the first Respondent used language which the Claimant asserts was suggestive of an employee / employer relationship, specifically:

> **… traits which do not befit your role …**
>
> **… Behaviour that is completely out of place for a carer … … known to inadequately hand over your care duties … … the kitchen is not kept clean and tidy, which is expected as part of your role … … egregious breach of your obligations … … carelessness with which you approach your duties …**
>
> **… accessing possessions in this way is beyond your remit as a carer and a breach of your obligations …"**

11. The Judge identified and set out the relevant legal provisions to which he had to have regard - I limit these to paragraphs 41 to 44 of the Decision:

> **"41. The statutory definition of employee simply incorporates the common law concept of what is a contract of service or employment, traditionally distinguished from a contract for services - or self-employment. There are many decided cases on what will amount to a contract of employment. *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515 is the source of a well-known summary from Mackenna J:**
>
> > **A contract of service exists if these three conditions are fulfilled.**
> >
> > **(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.**
> >
> > **(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.**
> >
> > **(iii) The other provisions of the contract are consistent with its being a contract of service.**
>
> **42. Mackenna J added this about (i) above:**
>
> > **There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service though a limited or occasional power of delegation may not be:**
>
> **43. Later at page 516-7, he commented:**
>
> > **An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.**
>
> **44. This test was quoted with approval by Elias LJ in *Quashie v Stringfellows Restaurants Ltd* [2013] IRLR 99. Elias LJ then observed at paragraph 8:**
>
> > **This approach recognises, therefore, that the issue is not simply one of control and that the nature of the contractual provisions may be inconsistent with the contract being a contract of service. When applying this test, the court or tribunal is required to examine and assess all the relevant factors which make up the employment relationship in order to determine the nature of the contract."**

12. Following his summary of the relevant law, the Judge set out his conclusions under the heading "*Discussion*". I omit the first two paragraphs of that section as it deals with his conclusions, summarised above, as to the Second Respondent:

> **"50. The terminology that the second Respondent used when describing to their clients the relationship that would be created upon a successful introduction was somewhat confused: "Our workers become your employees for their time with you" sits uneasily with the assertion that their workers were self-employed.**
>
> **51. So, I derive little assistance from the documentation supplied by the second Respondent as to the answer to the other question "Was the Claimant an employee of the first Respondent?"**
>
> **52. I also derive little assistance from the first Respondent's contentions in his evidence as to what should be the correct description of the legal relationship he formed with the Claimant. As he himself acknowledged, he is not an employment lawyer and nor had he ever fully turned his attention to the long-term structure of his uncle's care.**

53. I find that there was mutuality of obligation between the first Respondent and the Claimant from the start of the engagement. Mrs Close-Smith enquired through the second Respondent whether the Claimant could commit for six months ahead of the Claimant moving into the Colonel's house and the Claimant indicated she could so commit. During that time, the Claimant presented invoices and was paid. Thereafter, there was no or little discussion about the Claimant committing: the first Respondent had come to rely on the Claimant. I have no doubt that, whatever the documentation provided by the second Respondent might have said about there being no obligation on the part of the client to provide work or the Claimant to do the work, the first Respondent regarded the Claimant as under an obligation to provide her services to the Colonel and the Claimant regarded the first Respondent as under an obligation to continue to engage her to be the principal carer and housekeeper for his uncle.

54. It was understood on all sides that the Claimant was entitled to a day off per week and to annual leave, something that the first Respondent considered the Claimant did not make sufficient use of. The second Respondent provided a regular replacement for the Claimant on her weekly day off and, in anticipation of any longer absence, the second Respondent was approached (mainly by the Claimant) to provide a replacement carer for the duration of the Claimant's absence. I do not regard the Claimant's action in approaching the second Respondent as her providing a substitute for herself. Rather, she was making use of the facility that the first Respondent and his sister had negotiated with the second Respondent and for which they had approached the second Respondent - that of full-time care for their uncle.

55. At different times, the vocabulary used by the first Respondent (see paragraph 21 above) demonstrated how he saw the relationship - as one of employment. What was expected of the Claimant in the discharge of her duties as carer and housekeeper was set at the start of the engagement and she reported to the Respondent either face to face on his visits to the house or by telephone. I concur with the view expressed by the Claimant that the language used in the termination letter given to the Claimant on 6 August 2016 indicated an employer who considered himself to have control over the Claimant in the performance of her duties and was demonstrating that control in a very decisive manner.

56. Self-employment generally denotes a person to be carrying out a business. I discerned nothing in the circumstances of this case that indicated the Claimant was conducting a business. True, she received her remuneration without deduction of tax or national insurance and she was expected to, and did, account to HMRC for both. The second Respondent had advised that such should be the arrangement because, they suggested, the Claimant was self-employed. As I have indicated, the second Respondent's documentation contradicted itself. However, even had it been the case that the Claimant and the first Respondent agreed between themselves that she would be paid gross because she was self-employed, I would not regard their description of her status as determinative.

57. When one digs down beyond the description of self-employment attaching to the engagement because of payment was made gross, Mackenna J's three conditions are all, in my view, satisfied in this case. The Claimant had agreed that, in consideration of remuneration, she would provide her own work and skill in the performance of service at the behest of the first Respondent. She had agreed expressly and impliedly, that in the performance of that service she would be subject to the first Respondent['s] control in a sufficient degree to [m]ake him the master. And the other provisions of the contract are consistent with its being a contract of service - and by that I have in mind that one rest day per week was agreed, her absences over and above her day off per week were all paid absences and, while there was stipulation as to the hours for which she was to be paid, she lived in the house and was expected to attend to the Colonel as and when he required attention. She came to be paid by standing order only invoicing for overtime. Her rate of pay, having followed that suggested by the second Respondent, was unilaterally increased by the Respondent. And, importantly, there was nothing about this arrangement which indicated the Claimant was running a business."

13. Ground 1 of the appeal is concerned with the analysis of the contractual situation. Mr Rajgopaul points out that following **Autoclenz Ltd v Belcher** [2011] ICR 1157, the first question for the ET was to ascertain what the terms of the agreement were. He argues that the ET failed

properly to analyse the key aspects of the agreement between the Claimant and the Respondent in three defined areas: substitution, mutuality of obligation and annual leave.

14. As far as substitution is concerned, the Respondent's case below was that if the Claimant were unwilling for any reason to care for the Colonel personally, he could arrange personally for the Second Respondent to provide a substitute, indeed, that happened on leave days. Mr Rajgopaul has cited the comments of Etherton LJ (then MR) at paragraph 84 of **Pimlico Plumbers Ltd & Another v Smith** [2017] ICR 657 in the following terms:

> **"84. … Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Second, a conditional right to substitute another person may or may not be inconsistent with personal performance depending on the conditionality. It will depend on the precise contractual arrangements and in particular, the nature and degree of any fetter of a right of substitution or using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, the right of substitution only when the contractor is unable to carry out the work well, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work whether or not that entails a particular procedure will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute unqualified discretion to withhold consent will be consistent with personal performance."**

The subsequent decision of the Supreme Court in that case ([2018] UKSC 29) does not affect the point in issue.

15. Mr Rajgopaul says that the Employment Judge's analysis at paragraph 54 (see above) shows clearly that he had not analysed or considered the ability of the Claimant to use the Second Respondent's facilities without input from the First Respondent and failed to determine what the contractual arrangement were regarding substitution.

16. So far as mutuality of obligation is concerned, Mr Rajgopaul points to the First Respondent's case that there was no obligation on him to provide work or on the Claimant to

A accept work in the light of the substitution arrangements in place with the Second Respondent, and that failing to determine what was objectively agreed between the parties was an error of law.

B 17. So far as annual leave is concerned, he submits that the Employment Judge failed to determine what contractual rights the Claimant had, to be paid for absences in addition to her day off, including sick-pay, which he says is a significant failure given the Employment Judge's finding at paragraph 57 of his Reasons that "other provisions of the contract were consistent with a contract of service."

C

18. Ground 2 complains, in effect, that the findings of fact were insufficiently detailed and D that the Employment Judge failed to scrutinise the facts with the intense focus required. Mr Rajgopaul argues that it is unclear what degree of control the First Respondent exercised. He points to the finding that it was expected that the Claimant would be expected to provide care independently, without the need for supervision or oversight, to the finding that the Claimant was E entitled to choose her working hours without input from the First Respondent and to the absence of findings as to the degree of contact between the Claimant and the First Respondent.

F 19. In the light of the findings about the reasons for dismissal, he says it was important for the Employment Judge to make findings and "intensely scrutinise" what degree of control the Respondent actually had, rather than merely citing from a letter.

G

20. There is nothing in the second ground relating to substitution that is not covered in the first. So far as annual leave is concerned, Mr Rajgopaul refers to evidence in the First H Respondent's statement that he would have not have paid the Claimant had she taken regular holidays, and to evidence by the Claimant in cross-examination agreeing that she was not

A restricted to a maximum number of holidays, she saying that it had not been something that had come up or that she had thought about. There was no dispute that she had not been paid sick leave – she had not, in fact, sought such leave but it had not been raised between the parties. He argues that it was not open for the Employment Judge to find that it was a provision of the Claimant's contract that she would be paid for absences "*over and above*" her weekly day off (paragraph 57) and that he failed properly or at all to scrutinise the fact about paid time off.

C 21. Ground 3(b) relies on what is said to be an internal inconsistency between a finding at paragraph 57 of the Reasons - "*while there was a stipulation as to the hours for which she was to be paid, she lived in the house and was expected to attend on the Colonel as and when he required* D *attention*" - and, in addition, at paragraph 26 - "*The Claimant was free to choose her working hours without any input from the first Respondent against a background whereby the second Respondent's brochure suggested she worked 12 hours per day with 2 hours respite*."

E 22. He also submits that the Employment Judge failed to record the Respondent's evidence that, when he visited the house, he noted that the Claimant's routine varied and her evidence that she could leave the house when she wanted to during her free time. He says that if the Claimant F could choose her working hours without any input from the First Respondent and did not have to be in the house at all when she choose not to work, it could not be right that a term of the contract was that she was "*expected to attend to the Colonel as and when he required attention*."

G 23. The significance of that, Mr Rajgopaul submits, is that paragraph 57 is the key paragraph in the Employment Judge's determination and his approach to the issue indicative of the manner H in which he failed properly to determine what the actual contractual obligations between the

Claimant and the First Respondent were, and failed properly to determine and then intensely scrutinise the facts that were before him.

24. At the outset of their submissions on behalf of the Claimant, Mr Grant and Ms Baumgart reminded me of the well-known dictum of Mummery LJ (as he then was) in **Fuller v London Borough of Brent** [2011] EWCA Civ 267 at paragraph 30:

> **"30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the ET, but then overlooked or misapplied at the point of decision. The ET judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

25. I would add to that the equally well-known dictum of Elias J (as he then was) in **Associated Society of Locomotive Engineers and Firemen (ASLEF) v Brady** [2006] IRLR 576 when he said at paragraph 55:

> **"55. … The EAT must respect the factual findings of the Employment Tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not "use a fine toothcomb" to subject the reasons of the Employment Tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the Tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the Tribunal has essentially properly directed itself on the relevant law."**

26. The Claimant, in the skeleton argument served on her behalf, seeks to uphold the findings of the Employment Judge, pointing out in a helpful way the relevant passages in the Decision which relate to each aspect of the relevant test, there being no challenge to the correctness of the Judge's summary of the relevant legal principles as distinct from the application of those principles.

27. They describe the First Respondent's submissions - (1) that the Employment Judge did not consider substitution in determining mutuality of obligations and (2) that he focused unduly

on what the Claimant and the First Respondent regarded rather than what had been agreed - as misconceived. They say that the Judge determined the true position as to mutuality having regard to, among other things, the parties conduct, in keeping with **Autoclenz v Belcher**. What the parties "regarded" or "expected" inevitably influenced what they "agreed". They cited the dictum of Elias J (as he then was) in **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471 at paragraph 14:

> **"14. The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not."**

28. They also point to the fact that the First Respondent continued to pay the Second Respondent a monthly retainer precisely to enable themselves of a service to obtain cover when the Claimant was away on leave or on her day off.

29. I do not intend to set out the remainder of their submissions in any great detail at this stage, save as to ground 3(b), as they go simply to supporting the Employment Judge's findings. In relation to that ground, they submit that there was no inconsistency between the two passages, namely the Claimant being expected to attend to Colonel Brooke "*as and when he required attention*" (see paragraph 57) and his having found (at paragraph 26) that the Claimant "*was free to choose her working hours without any input from the first Respondent*."

30. The finding at paragraph 26 is, they say, explicable by reference to the Second Respondent's brochure, which suggested that "Aunts" work 12 hours per day with a two-hour break. The brochure was also referred to in the First Respondent's evidence, to which I was taken today, as a source, for example, of determining the rate of pay for the person who worked on the Claimant's day off. In theory, the submission is, the Claimant would be able to choose which of

A the 12 hours daily she would dedicate to caring for Colonel Brooke. In reality, there was not absolute freedom as it would depend upon the care to be provided. As it happened, her evidence was that she took two hours in the afternoon when it was convenient for Colonel Brooke as he was watching television.

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31. Consistent with this, they argue, the finding that the Claimant was expected to attend to the Colonel "*as and when he required attention*" is simply a reflection of the nature of her role and the care required.

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32. I deal first with ground 1, namely the analysis and determination of the contractual relationship between the parties in regard to substitution, mutuality of obligations and Annual leave and other unpaid absences. I asked Mr Rajgopaul, in the course of argument, how an Employment Judge is to make findings as to what agreement there was between the parties on issues where, on their own evidence, there was no agreement properly so called as to certain things such as sick pay and holiday; see for example the First Respondent's witness statement at paragraph 37, "*There was no holiday pay arrangement in place for the Claimant as she took extended holiday so rarely*."

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33. Mr Rajgopaul submitted that the Tribunal ET is still required to make findings. I was taken to **Autoclenz** at paragraph 32, where there is reference to the dictum of Aikens LJ in the case of **Consistent Group Ltd v Kalwak** [2007] IRLR 560 that:

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> **"What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the *Chartbrook* case [2009] AC 1101, paras 64-65. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."**

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However, this was said in the context of ascertaining the genuineness of written terms in a "sham" contract; that is, where one or both parties seek deliberately to create a written contract ostensibly providing for self-employment.

34. Dealing with the reality of the present situation there must be a limit to the analysis or "intense scrutiny" which can be performed when there is limited documentation - in the present case none other than the Second Respondent's brochure - and all that a Judge can do is work from the evidence put before the Tribunal.

35. Stepping back from a detailed analysis of words used in the Court of Appeal Judgment into the Tribunal room, what this Employment Judge had before him was a scenario in which a Claimant had worked on a full-time, 12 hour a day basis for over three years, living and sleeping at a house, which was not her own, taking one day off a week and very occasionally taking greater periods of leave. The role that she had was defined for her (see the Reasons at paragraph 18) and it is not been suggested that any of the tasks, which she was - as the Employment Judge put it – "expected to perform" were self-generated. She reported to the First Respondent. Paragraphs 20 and 21 contain instances where the First Respondent, albeit perhaps not intending his words to have legal effect, described himself as the Claimant's employer, in each case, in rather trenchant terms, indicating a reluctance to brook independent action on the part of the Claimant.

36. Even if I am wrong about this, it seems to me that this is peripheral to the principal test required by **Ready Mixed Concrete**. At its highest, it is an issue which might have pointed against employee status in what is accepted by both parties to be a multi-factorial test in which no one factor is determinative.

37. So far as substitution is concerned, it is clear that the Claimant was informed, although probably she did not need to be, that when she was unable to carry out her normal duties she should contact the Second Respondent to arrange for cover. The days on which she did this were, it is clear from the findings, limited to her day off, a period of jury service (during which she came back to the house each evening) and four other periods of leave during which time she was paid in full. Mr Grant argued that the provision of another "Aunt" or "Uncle" (because all those who covered for the Claimant were provided by the Second Respondent pursuant to a retainer paid by the First Respondent) in relation to days off, were not questions of substitution. It is clear that the Claimant worked six days a week, 12 hours a day including two hours off in accordance with the Second Respondent's standard terms. Thus, he argued, I should look only at the times when the Claimant chose to be away on leave or had to be away on jury service.

38. Looking at the third example cited by Etherton (MR) set out in the extract of **Pimlico Plumbers** above, I find apt the passage "*a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance*." In the present case, other than when she was taking leave, no substitute was ever sought; hardly surprising given the requirement or insistence by the First Respondent or his sister that the initial engagement be a commitment by the Claimant for six months (see paragraph 17 of the Decision). It was on that basis that the Claimant took the job and certainly suggests a requirement by the First Respondent for personal performance. Had the Claimant been able to arrange substitutes as and when she chose, the six-month requirement would have been meaningless. However, in any event, the key finding by the Employment Judge at paragraph 53 was that the Claimant was not providing a substitute for herself. She was taking advantage of an arrangement between the First and Second Respondents whereby she would notify the Second

Respondent of an intended absence and the Second Respondent would provide a replacement from a carer on its books.

39. I reach the same conclusion in relation to mutuality of obligation. The Employment Judge's conclusions are at paragraph 53 of the decision. The Claimant lived in the house permanently, save when on leave and had a two-hour absence each afternoon. She had no home of her own. At paragraph 14, the Employment Judge records the First Respondent's evidence that they had in mind at the outset "*to have someone there 24 hours a day, capable of coping with an irascible old man*." As stated in **Stephenson**, a case cited by the Employment Judge, at paragraph 13:

> **"13. The question of mutuality of obligation, however, poses no difficulties during a period when the individual is actually working. … For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. …"**

40. As to annual leave and other allowances, I do, with respect, find it a "pernickety" criticism (to use Mummery LJ's language) to criticise the Employment Judge for "notably failing to determine what, if any, contractual right the Claimant had to be paid for absence" when it was the First Respondent's evidence that there was no such arrangement and for sick leave, when she had never been sick.

41. It seems to me that this approach seeks to put the cart before the horse. What the Tribunal was seeking in this case, through the application of a variety of tests, was to establish whether, on the facts, the relationship was one of self-employment or employment, in circumstances where neither party had seriously turned their mind to the legal effect of the nature of the relationship.

42. Having established that the relationship was one of employment, certain consequences may flow as a matter of law but the Employment Judge was not being asked to determine these.

However, as the Claimant was being paid for every day of leave which she in fact took, it seems to me open to the Employment Judge to conclude that that was the basis of the relationship.

43. Ground 2 leaves little to be determined beyond what I have already said. I have found already that, in my judgment, the Employment Judge made ample findings of fact to justify his Decision.

44. So far as control is concerned, the findings as to the general requirements made of the Claimant, albeit with gradually decreasing levels of oversight, do not detract from the finding made. By way of example, an employee who worked predominantly from home may choose the hours that he or she works and may, if the work is satisfactory, receive little or no supervisory input. The fact that such an employee is trusted to manage his or her workload and hours of work does not make him any the less an employee. Moreover, the fact that the degree of oversight and number of overnight visits by the Respondent decreased in time is consistent with what the Employment Judge found to be an increasing degree of satisfaction with the way in which the Claimant was performing her duties. I ask myself, rhetorically, whether an employee who over time is trusted to such a degree that her duties are no longer supervised at all, would thereby lose her employee status? She would not.

45. I do not accept Mr Rajgopaul's submission that the only findings of control arise from the letter of termination; see for example paragraphs 18, 19, 21 and 22. Paragraph 55 begins with a statement that "*the vocabulary used by the first Respondent … demonstrated how he saw the relationship - as one of employment*". It goes on to refer to the Claimant reporting to the First Respondent either face to face or on the telephone. The comment about the rather trenchant letter given to the Claimant on 6 August 2016 was, it seems to me, merely indicative of the level of control which the Employment Judge had already found existed.

A 46. I turn finally to ground 3(b), namely the inconsistency contended for between the conclusions at paragraph 57 and paragraph 26.

B 47. Paragraph 57 was describing a state of affairs consistent with the First Respondent's own statement that they wanted someone living in the house 24 hours a day. They wanted, and got, a live-in carer. No employee is expected to provide such a service for 24 hours of each day and 365 days per year. Indeed, no self-employed person could be expected to do so either. Having

C examined what the Claimant did on a daily, weekly and annual basis and in the present context choosing which two hours to take off during the 12 which she was "on duty" is not inconsistent with the colloquial use of the term "*expected to attend to the Colonel as and when he required*

D *attention*."

48. I accept that the use by the Judge of the words *"…and the other provisions of the*

E *contract" are inconsistent consistent with it being a contract of service …"* (see para 57 of the decision) was unfortunate given that there was no previous finding that there was an agreement that leave should be paid. However read, the Decision in the whole, I agree with Mr Grant that the First Respondent' criticism could be regarded as over-analysis and, as per **Brady**, seeking to

F use a fine toothcomb to subject reasons of the ET to unrealistic detailed scrutiny, so as to find artificial defects.

G 49. It follows, for the reasons I have set out above, that I consider that the Employment Judge made no error of law in the findings that he made and I dismiss this appeal.

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