Appeal No. UKEAT/0075/18/RN

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 & 19 November 2018

**Before**

**THE HONOURABLE MR JUSTICE KERR**

**(SITTING ALONE)**

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| (1) EXMOOR ALES LIMITED<br>(2) MR JONATHAN PRICE | APPELLANTS |
| MRS JOAN HEDY HERRIOT | RESPONDENT |

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Transcript of Proceedings

JUDGMENT

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**APPEARANCES**

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| For the Appellants | MR JAMES DAWSON<br>(of Counsel)<br>Instructed by:<br>DAS Law<br>North Quay<br>Temple Back<br>Bristol<br>BS1 6FL |
| For the Respondent | MR JULIAN ALLSOP<br>(of Counsel)<br>Instructed by:<br>Porter Dodson LLP<br>The Quad<br>Blackbrook Park Avenue<br>Taunton<br>Somerset<br>TA1 2PX |

**SUMMARY**

**CONTRACT OF EMPLOYMENT – Whether established**

**JURISDICTIONAL POINTS – Worker, employee or neither**

**JURISDICTIONAL POINTS – Agency relationships**

The employment tribunal had not erred in law or made any perverse decision in finding that the Claimant became an employee of the First Respondent, employed under a contract of employment, from April 2011 onwards when she undertook an obligation to work exclusively for the First Respondent, in return for a quarterly "exclusivity" payment of £1,000. Nor was the tribunal's reasoning deficient.

It was not open to the Respondents to contend on appeal that the Claimant had never entered into any contract of any kind with either Respondent and that the contract was, rather, between the partnership in which the Claimant was a partner and the First Respondent. That argument had not been advanced to the employment tribunal; the argument below had been that the Claimant provided services personally to the First Respondent under a contract for services, not that she never contracted personally at all.

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**THE HONOURABLE MR JUSTICE KERR**

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1. This is an appeal by the Appellants against a decision of Employment Judge D Harris sitting alone, given at the Employment Tribunal sitting at Bristol ("the ET"), dated 14 September 2017 and sent to the parties on 21 September 2017, following a hearing on 3 July 2017. I will call the Claimant (who is the Respondent to this appeal) "the Claimant" and I will call the Respondents below (who are the Appellants in this appeal) "the Respondents".

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2. The Claimant is an accountant. The First Respondent is a brewery company, whose owner since about 2006 is the Second Respondent.

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3. The Claimant brought claims in January 2017, just before her work relationship with the Respondents ended. The claims were for unfair dismissal, age discrimination, holiday pay, failure to provide a statement of written particulars of employment, harassment and victimisation.

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4. The Respondents denied that the Claimant was employed by either Respondent. They also, eventually, denied that she was a "worker" within section 230(3) of the **Employment Rights Act 1996** ("ERA"), regulation 2(1)(b) of **Working Time Regulations 1998** ("WTR") or section 83(2)(a) of the **Equality Act 2010** ("EqA"). Therefore, they said, the ET had no jurisdiction to entertain any of the claims.

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5. The outline facts were mainly undisputed and were as follows. In about 1990 the Claimant began working for the First Respondent, providing accountancy services. The

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Claimant was and is one of two partners in a partnership which provides such services. The other partner in the partnership was and is her husband.

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6. In about 2006 the Second Respondent, Mr Price, acquired the First Respondent. In the same year the Claimant was given a desk within a portacabin, then used by the First Respondent as its premises. She continued to provide accountancy services to the First Respondent for some years. Then, in April 2011, an arrangement was agreed whereby the Claimant began to receive quarterly payments from then onwards of £1,000.

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7. An issue arose at the hearing, which was the only major dispute on a factual point. The Claimant said in her evidence that the payment of £1,000 per quarter from April 2011 was payable in return for a new obligation on the Claimant to work exclusively for the First Respondent and no one else. The Second Respondent in his evidence accepted that the payment arrangement was made but disputed the Claimant's evidence that the £1,000 per quarter payment was in return for an exclusivity arrangement, whereby the Claimant was not free to work for others.

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8. Eventually, as we shall see, the employment judge accepted the Claimant's evidence on that disputed point and rejected the Second Respondent's evidence. The Tribunal found that from April 2011 the Claimant did indeed stop doing work for parties other than the First Respondent. The Tribunal found that there was a "*fundamental change*" in the nature of the relationship from that point onwards.

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9. In 2015, the First Respondent moved to new business premises. The Claimant was allocated a work place at those premises. In the same year, agreement was reached between the

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Claimant and the Second Respondent, on behalf of the First Respondent, that there would be an agreed "cap" on how much the Claimant would invoice at a time for the work she did. The cap was understood to be temporary; it was intended to delay any invoicing at a level above the cap, in order to avoid adverse effect on the First Respondent's cash flow.

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10. In May 2016, the relationship between the Claimant and the Second Respondent began to deteriorate. The deterioration continued into 2017. On 27 January 2017, shortly before the work relationship was due to end, the Claimant filed her claim at the Tribunal. Four days later, on 31 January 2017, the relationship between the Claimant and the Respondents ended.

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11. The matter was heard before the judge, as I have said, in July 2017. His reserved judgment was sent to the parties on 21 September 2017. He found that the Claimant became an employee of the First Respondent, under an oral contract of employment, from 1 April 2011 onwards and that the Claimant was a "worker" within the statutory definitions of the **ERA 1996** and the **WTR 1998** from 1 April 2011 onwards.

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12. In his reasons, the judge began by setting out the pleaded cases of the parties. The Respondents advanced a pleaded case that the Claimant "*provided accountancy services to the first respondent as a self employed accountant*". She did this, according to the Respondents' pleaded case, "*[a]t all times*".

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13. The point was then made in the Respondents' pleadings, quoted by the judge, that she submitted invoices, usually monthly, to which 20% VAT was added, that the invoices were in the name of the partnership and that there "*were not written agreements between the claimant*

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*and either respondent or between the claimant's accountancy firm and either respondent. All arrangements were verbally agreed between the claimant and the second respondent*".

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14. The Respondents' pleading went on to recite that the Claimant accounted to HMRC for her own tax, national insurance and VAT, and made other points in favour of self-employment, to some of which I will return.

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15. The judge went on to set out what he called a "*Summary of the Evidence on the Preliminary Issue*". This constituted a recitation of the evidence, first of the Claimant (paragraphs 6 to 25) and then of the Second Respondent (paragraphs 26 to 36). The judge then

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set out the parties' submissions.

16. He then set out the relevant statutory provisions, namely, the definition of "worker" in

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the **ERA**, the **EqA** and the **WTR**; and went on to recite some case law from among the authorities relied upon by Mr Allsop, then and now representing the Claimant. The judge cited, in particular, from the speech of Lord Hoffman in **Carmichael & Another v National Power plc** [2000] IRLR 43, the judgment of Langstaff J in **Cotswold Developments Construction**

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**Ltd v Williams** [2006] IRLR 181, and the judgment of Sir Terence Etherton MR in **Pimlico Plumbers Ltd v Smith** [2017] IRLR 323 (before the Supreme Court's decision in that case).

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17. Under the heading "*Decision*" the judge then set out his determination of the issues. He started from the proposition that the question whether or not the Claimant was an employee, and whether she was a worker, was "*a question of fact*" (paragraph 45). At paragraphs 46a to

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46e he set out his key findings as follows.

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18. First, he said that until April 2011 the Claimant was an independent contractor who provided accountancy services to the First Respondent. Next, there was a "*fundamental change*" to the relationship from April 2011. The Tribunal accepted the Claimant's evidence on the exclusivity point and rejected that of the Second Respondent, which was that the quarterly payment of £1,000 represented "*a simple bonus payment to the Claimant*". Third, he found that the Claimant was regarded as "*fully integrated*" into the First Respondent's business from April 2011.

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19. Next, he professed himself "*satisfied that there was a mutuality of obligations between the Claimant and the First Respondent from April 2011 onwards and that the First Respondent exercised a high level of control over the Claimant whilst at work*". The mutual obligations were, on the Claimant's side, to provide services personally, precluding any substitution, and on the First Respondent's side to provide her with work and pay. The judge also found that "*substitution of the Claimant, in the event of her absence from work for whatever reason, would not have been contemplated by the parties*".

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20. Finally, the judge said he was not persuaded that the evidence from the Second Respondent that the Claimant was known to refer to herself as a contractor was "*determinative, to any degree, of the Claimant's status*". It was, he said, "*not at all apparent from the evidence as to when the alleged comment had been made by the Claimant. It was certainly not clear that it was being alleged by the Respondents that the Claimant had made such a comment after April 2011*".

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21. Such was the judge's decision. The Respondents appealed. The original grounds of appeal came before the sift judge who said that the appeal raised no arguable point of law and

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directed, subject to Rule 3(10), that no further action should be taken on the appeal. A Rule 3(10) Hearing then took place before Lavender J. He allowed three grounds of appeal to proceed. All three were argued before me.

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22. Lavender J also stated in his written reasons that, for the avoidance of doubt, his decision was not intended to permit the Respondents to challenge the judge's findings of fact on the issues of integration, mutuality of obligations, the exercise of a high level of control or substitution.

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23. The first ground of appeal is in reality two separate grounds. It subdivides into a misdirection argument and, separately, an alternative perversity argument. I will call them, respectively, grounds 1a and 1b.

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24. Ground 1a of the appeal is that the ET erred in law in finding that the Claimant was an employee from April 2011. This raises a preliminary issue, because Mr Dawson - who did not appear below - seeks to argue that there never was any contract between the Claimant personally and the Respondents, or either of them.

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25. He submits that he ET ought to have found that the situation was analogous to that in **Tilson v Alstom Transport** [2011] IRLR 169, where the services of a worker are provided by a third party which contracts (directly or as part of a chain of contracts) with the end user to provide the services of the worker and there is no direct contractual relationship at all between the worker and the entity to which or whom her services are provided.

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26. The preliminary point is whether it is open to the Respondents in this appeal to argue that there was never any contract at all between the Claimant personally and the Respondents or either or them; or whether that argument is not open because it was effectively conceded by the Respondents before the ET that the Claimant personally contracted with the First Respondent, albeit that the Respondents did not concede that the contract was one of employment.

27. Mr Dawson submitted that the point was properly open to the Respondents. Picking up on a point raised by Lavender J arising from the Rule 3(10) Hearing, Mr Dawson contended that the employment judge had failed to ask himself whether it was necessary to imply any contract between the Claimant personally and the First Respondent from April 2011, when, as the employment judge found, the relationship changed.

28. He submitted that **Tilson** is authority that such a contract may be implied only if it is necessary to do so (per Elias LJ in **Tilson** at [8], citing the judgment of Mummery LJ in **James v Greenwich London Borough Council** [2008] IRLR 302 at [23]-[24]). He argued that it was not necessary to do so here. The premise of that contention is that, as Mr Dawson submitted, the employment judge ought to have found that the contract prior to April 2011 was with the partnership, not the Claimant as an individual.

29. Mr Dawson accepted, in his skeleton argument at paragraph 13, in his words: *"[i]t appears from the Reasons that the argument may not have been put this way on behalf of the Respondent[s] below*"; but he submitted this was nevertheless "*not a new legal point*" because "*[t]he legal question remains the same- whether the Claimant was an employee or not" and "the relevant authorities require the starting point to be whether it was necessary to imply any contract at all*".

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30. In oral argument, Mr Dawson said that although he accepted that his predecessor, Mr Johnson, had not in terms asserted the existence of a trilateral arrangement, it was open to the Respondents on the pleadings. He said that the Claimant had not, through Mr Allsop, asserted in the Claimant's skeleton argument in this appeal that the point was barred on appeal as a new point of law. In oral argument, Mr Dawson relied on two exceptions, if it were necessary to do so, to the procedural bar prohibiting the raising of new points of law on appeal.

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31. The first is the exception identified by HHJ Peter Clark in **Langston v Cranfield University** [1998] IRLR 172: where a principle is so well established that an ET may be expected to consider it as a matter of course (for example, the principles applying where unfair selection for redundancy is asserted; the **Burchell** test in assessing the fairness of dismissals for alleged misconduct; the recognised heads of compensation for unfair dismissal; and the **Polkey** principle).

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32. The second exception on which Mr Dawson relied is that identified in **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719; paraphrasing, this is the narrow exception that may apply where there is a knock-out point, not requiring further enquiry or evidence, such that it would be a "glaring injustice" not to allow the point to be taken on appeal.

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33. For the Claimant, Mr Allsop submitted that while the employment judge had correctly considered whether there was any contract between the Claimant and the First Respondent, express or implied, as well as considering further whether the contract was one of employment, the employment judge had clearly decided, without any opposition from the Respondents, on the basis of common ground, that a contract existed.

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34. That position is reflected, he submitted, in the unchallenged finding of the employment judge at paragraph 46a that "*[u]ntil April 2011 the Claimant was an independent contractor who provided accountancy services to the First Respondent*". That is not consistent with what the Respondents now seek to argue, namely that the Claimant did not contract with the Respondents at all, ever.

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35. In his skeleton argument, Mr Allsop described as "*misconceived*" the suggestion now made on appeal that the employment judge should, as a starting point, have considered whether the Claimant herself ever contracted at all. The issue below had been not the implication of a contract but "*whether there was a variation to the existing arrangement*" and if so, whether the varied contract was one of employment.

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36. My decision on this issue is as follows: First, I do not think it is fair to say that Mr Allsop did not seek to rely in this appeal on the procedural bar against new points of law. Paragraph 10 of the Respondents' answer to the amended grounds of appeal, permitted by Lavender J, made the same argument as now made that the point was "*misconceived*".

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37. Second, the manner in which the case for the Respondents was put by Mr Johnson to the employment judge included factual material (e.g. invoicing through the partnership in which the Claimant and her husband were both partners) which could have provided the foundation for what I will call a **Tilson** trilateral analysis - provision by the contracting party to the end user of a worker's services, without the worker herself entering into any contract with the end user.

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38. Third, however, the manner in which the case for the Respondents was put by Mr Johnson to the employment judge did not include any assertion by Mr Johnson that such was

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the correct and appropriate analysis. Rather, I am quite satfied that he was relying on a bilateral analysis, whereby the Claimant provided accountancy services in her own name to the First Respondent under a contract entered into by her personally, but that contract between her personally and the First Respondent was one for services at all times, and never of employment.

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39. I am, therefore, satisfied that at no point below did Mr Johnson submit to the employment judge that there was never any contract between the Claimant personally and the First Respondent. Mr Allsop, who appeared below, confirmed that; Mr Dawson, who was not present below, did not dispute it. Mr Johnson's case was not "the Claimant did not contract at all"; it was "the Claimant did contract but her contract was not a contract of employment".

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40. The judge's finding at paragraph 46a of the decision that the contract prior to April 2011 between the Claimant and the First Respondent was one for services, is consistent with that analysis. That finding has not been directly challenged in this appeal, even after the Rule 3(10) Hearing and consequent re-casting of the grounds of appeal.

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41. It follows that the point is not open to the Respondents unless one of the exceptions applies. I do not think either of the two exceptions relied on by Mr Dawson can be invoked here. There is no obvious and universal principle in play here. A person may contract with a partnership or the person may contract with an individual personally, who is also a partner in a partnership.

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42. It was up to Mr Johnson to explain to the employment judge which of those positions represented his case. It is clear that it was the latter and not the former. This appears to be a

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case of an inexpert advocate making a concession from which the new representative on appeal seeks to resile (**Kumchyk v Derby City Council** [1978] ICR 1116, per Arnold J at 1123B-G).

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43. Furthermore, the case now sought to be argued on appeal by Mr Dawson would or could, in my judgment, require further factual enquiry. The partnership documents might have been looked at. The other partner, the Claimant's husband, might have been called as a witness. No consideration was given to the impact of partnership law and in particular the **Partnership Act 1890** (this partnership not being a limited liability partnership).

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44. I need say no more in this Judgment than that the **Tilson** situation, where a worker is supplied to an end user by an agent, may not apply in its pure form where the worker is also a partner in the firm that is the agent. That issue may merit consideration one day, but it was not considered below by this employment judge because it was not raised below by the Respondents.

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45. I do not agree that it would be a glaring injustice to disallow the new point. Rather, I think it would be unjust to allow it now to be taken. I therefore pass on from that preliminary point and proceed to consider the remaining arguments in this appeal.

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46. Under ground 1a of the appeal, the Respondents also submit that, in considering what type of contract existed between the Claimant and the First Respondent, the employment judge failed to weigh in the balance six factors pointing in the direction of self-employment, concentrating instead only on those factors pointing towards the contract being one of employment.

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47. The six factors to which Mr Dawson points are:

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a. that the Claimant had chosen to provide services to the First Respondent via a partnership;

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b. that it is consequently likely she had set off, against her tax liability, expenses which could not be set off against an employee's tax liability;

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c. that she had (at least through the partnership) accounted for VAT in respect of the services provided and had presumably set off input tax against those expenses; a benefit not open to employees;

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d. that she was an accountant providing accountancy services and, as such, likely to have decided deliberately how to account to HMRC;

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e. that she had drafted employment contracts for other staff of the First Respondent, but never one for herself; and

f. that she had not received any shares in the First Respondent as part of an employees' share scheme in place from 2008.

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48. Mr Dawson says the employment judge erred in law by failing to take those factors into account in his analysis and findings. He pointed to authorities supporting his proposition that this was a misdirection in law rather than, primarily, a perversity challenge: **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 99; **Calder v H Kitson Vickers & Sons (Engineers) Ltd** [1988] ICR 232; **O'Kelly v Trusthouse Forte plc** [1983] IRLR 369; and **Pimlico Plumbers Ltd v Smith** UKEAT/0495/12/DM, especially at [99] (subsequently upheld in the Court of Appeal and the Supreme Court). Mr Dawson relied on those cases for the propositions, first, that if the weight given to a particular factor shows a misdirection in law an

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A appellate court can interfere and, second, that the court should give appropriate weight to how the parties choose to categorise their relationship.

B 49. He relied further on **Ready Mixed Concrete (South East) Ltd v Ministry of Pensions and National Insurance** [1968] 2 QB 497, in particular, the proposition derived from that case that the judge must consider whether the remaining provisions of the contract are consistent with it being a contract of service. He said the judge failed to do that here. Finally, he accused
C the ET of failing to "*paint a picture from the accumulation of detail*". The phrase is that of Mummery J (as he then was) in **Hall v Lorimer** [1992] ICR 739, approved by the Court of Appeal in the same case in the judgment of Nolan LJ, [1994] ICR 218, at 226D.

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50. Mr Dawson complained that the key findings of fact at paragraph 46 of the employment judge's decision dealt only with points favourable to the Claimant's case and overlooked all but
E one of the points going the other way (the one being implicit recognition at paragraph 46e that the Claimant had referred to herself as a contractor).

F 51. Mr Allsop defended the reasoning and conclusion of the employment judge that the Claimant became an employee and a worker after April 2011, when she undertook an obligation to work exclusively for the Respondents.

G 52. He submitted that the employment judge had correctly referred to authority of direct relevance to what he had to decide: the speech of Lord Hoffman in **Carmichael & Another v National Power plc** [2000] IRLR 43; **Ready Mixed Concrete (South East) Ltd v Ministry of**
H **Pensions and National Insurance** [1968] 2 QB 497, not overlooked but included within the judge's lengthy citation from Langstaff J's judgment in **Cotswold Developments Construction**

**Ltd v Williams** [2006] IRLR 181; and the citation from the judgment of Sir Terence Etherton MR in **Pimlico Plumbers Ltd v Smith** [2017] IRLR 323 in the Court of Appeal.

53. Mr Allsop's next point was to remind me that the findings of the employment judge on four key areas pointing towards employment from April 2011 onwards were sound, not open to challenge and consistent with employment and not with a contract for services. Those four findings are at paragraphs 46b and 46c: that from April 2011, first, the Claimant was fully integrated into the First Respondent's business; second, there was mutuality of obligations between her and the First Respondent; third, the First Respondent exerted a high degree of control over the Claimant while she was at work; and fourth, she had an obligation to provide her services personally and could not do so through a substitute.

54. As for the points that Mr Dawson had accused the employment judge of overlooking, Mr Allsop said this was not right. The judge had been well aware (see the decision paragraph 37) of Mr Johnson's point that invoicing was done through the partnership and that VAT was charged on the amount invoiced, as pleaded by the Respondents below. Mr Allsop pointed to a passage in the judgment of Ralph Gibson LJ in **Calder v H Kitson Vickers & Sons (Engineers) Ltd** [1988] ICR 232 at 247D-H, showing that the mode of remuneration is far from conclusive.

55. The other points relied on by the Respondents - that the Claimant was a professional accountant, that she had drafted employment contracts for others but not herself and that she had not received any allocation of shares in the business - were all points from which the employment judge was invited to draw the inference of self-employment, but it remained open

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to him not to do so in the face of his findings in relation to integration, mutuality of obligations, control and non-substitutability.

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56. Mr Dawson said the employment judge did paint a picture from an accumulation of detail; his findings included those referred to in his recitation of the evidence which, on all points other than the issue of whether the £1,000 per quarter payment from April 2011 was in return for an exclusivity obligation, were not disputed.

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57. In my judgment, Mr Allsop's submissions are to be preferred and those of Mr Dawson, eloquently though they were made, do not persuade me that the employment judge erred in law

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in approaching his task of weighing up the factors for an against employment or self-employment.

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58. First, the employment judge rehearsed with the necessary degree of detail the mainly undisputed facts. Although his account was expressed as an account of what the evidence was, rather than as an account of the findings of fact he made, as ideally it should have been, that does not matter in the present case since the factors he recited were, in all but one instance,

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undisputed; and on the disputed matter, he made a clear and defensible finding accepting the Claimant's account and rejecting the Second Respondent's.

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59. Second, the employment judge set out the submissions of the parties without error. Third, he set out the law uncontroversially and again without error. It was not necessary for him to quote from McKenna J's celebrated judgment in the **Ready Mixed Concrete** case. He

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was plainly aware of it from Langstaff J's mention of it in the **Cotswold** case.

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60. Fourth, the employment judge set out his "*[d]ecision*" at paragraph 46. It is true that he concentrated on the factors that satisfied him that there was a relationship of employment after April 2011. I accept that he did not expressly refer, in his paragraph 46, to the matters

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mentioned by the Respondents and listed as a-f above. But I do not accept that he thereby failed to paint a picture from the accumulation of detail. It is obvious from his decision, fairly read as a whole, that he regarded the factors relied on by Mr Dawson in paragraph 15 of his skeleton argument as overridden by those he found decisive; specifically, the unassailable

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findings on integration, mutuality, control and substitution.

61. The remaining grounds of the appeal can be taken more shortly. Ground 1b of the

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appeal is a perversity challenge. The Respondents contend that the finding of employment from April 2011 onwards was not open to the employment judge even accepting his findings on integration, mutuality, control and substitution.

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62. Mr Dawson submitted, in effect, that no reasonable employment judge could treat them as leading to the conclusion that there was employment here, because a reasonable employment judge could only find them outweighed by the points that did not find favour with him: that the

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Claimant was an accountant, that she did not take shares in the business, that she drafted employment contract for others and that she accounted to HMRC on a self-employed basis.

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63. I reject that submission. In my judgment, it was for the employment judge to weigh those matters and I have already said that he did not fail to do so. As he has done so properly it is not for me to do so on appeal, in a different manner, giving them different weightings. The high threshold of perversity is not close to being reached.

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64. Nor can I accept ground 2 of the appeal, which is that the reasons given by the employment judge were not adequate, i.e. insufficient to deal with the issues in the manner required by Rule 62(5) of the **Employment Tribunals Rules of Procedure**, or to the extent required to be what practitioners call "**Meek** compliant", i.e. sufficient to inform the losing party why it lost on particular issues.

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65. Mr Dawson says he does not know why his clients lost on the issue of employment. He says he does not know whether the judge found the facts pointing to self-employment unproved, or that he overlooked them, or that he found them unpersuasive and if so why. I agree that it would have been better if the employment judge had expressly stated that, as was obvious, it was the latter.

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66. It would have been better if the judge had stated expressly what is obvious from a fair reading of the decision taken as a whole: that the factors pointing in the direction of self-employment prevailed until April 2011, but were then outweighed form April 2011 onwards by the factors pointing the other way. It was not necessary for him to say (though, it would have been better if he had done, to avoid the present argument) that after April 2011, the factors pointing in the direction of self-employment remained, but were no longer decisive.

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67. It is obvious that he decided the combined effect of the new exclusivity obligation undertaken by the Claimant (in return for a quarterly payment), precluding substitution, and the findings on integration and mutuality of obligation and the high level of control the Respondents exercised over the Claimant's work, was such that those factors became determinative. The Respondents should know that is why they lost.

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68. Finally, ground 4 of the appeal is necessarily consequential on the outcome of the other three grounds. It attacks the findings of the employment judge that the Claimant, being an employee from April 2011 onwards, was also from then a "worker" within the statutory definitions of that word in section 230(3)(a) of the **ERA 1996** and regulation 2(1) of the **WTR 1998**. The Respondents accept that these findings can only be impeached if, contrary to what I have decided, the finding of employment can be impeached. Since it cannot be, this ground of appeal also fails.

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69. For all those reasons, this appeal is dismissed.

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