Appeal No. UKEAT/0162/18/JOJ

# EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 26 July 2019

Judgment handed down on
2 September 2019

**Before**

**THE HONOURABLE MR JUSTICE KERR**

**(SITTING ALONE)**

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COMMUNITY BASED CARE HEALTH LIMITED — APPELLANT

DR RESHMA NARAYAN — RESPONDENT

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JUDGMENT

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# APPEARANCES

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| For the Appellant | MR MARCUS PILGERSTORFER<br>(of Counsel)<br>Instructed by:<br>Samuel Phillips Law Firm,<br>18-24 Grey Street,<br>Newcastle upon Tyne NE1 6AD |
| For the Respondent | MS JANE CALLAN<br>(of Counsel)<br>Instructed by:<br>Direct Access |

## SUMMARY

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

The tribunal had correctly decided that the claimant doctor (general practitioner) was a "worker" within section 230(3)(b) of the **Employment Rights Act 1996**. There was no inconsistency between that finding and its decision that she was not an "employee" under section 230(1) of the 1996 Act or in "employment" within section 83(2) of the **Equality Act 2010**.

It was not open to the respondent to argue that the claimant had, by setting up a limited company in October 2015 to receive her remuneration from which she accounted for tax and national insurance, contracted on behalf of the company as her undisclosed principal. The point had not been taken below and there were no exceptional grounds for allowing it to be taken on appeal.

In any case, the company could not be the contracting party from October 2015. The claimant's terms of service required performance by her personally or by a qualified, approved substitute. The fifth proposition of Lord Lloyd of Berwick in *Siu Yin Kwan v. Eastern Insurance Co Ltd* [1994] 2 AC 199, at 207 therefore applied to exclude the undisclosed principal doctrine.

The tribunal had not erred by reaching a different conclusion to that reached by the employment tribunal, upheld by HHJ Serota QC on appeal, in *Suhail v. Herts Urgent Care*, UKEAT/0416/11 where, unlike in the present case, it was found on the facts that the doctor had been in business on his own account and self-employed.

Nor had the tribunal erred by finding as a fact that the claimant was integrated into the operations of the respondent. That ground of appeal amounted merely to a disagreement with the tribunal's finding of fact. The tribunal's conclusion that the respondent was not her client was properly grounded, supported by cogent reasoning and correct.

The parties did not address the tribunal on whether the claimant was a "worker" only during her shifts or whether she was under any minimum obligations to the respondent between her shifts. The judge left that issue open, deferring also to a future hearing the issue whether the respondent terminated the claimant's contract in February 2017.

**THE HONOURABLE MR JUSTICE KERR**

## Introduction

1. The appellant company, the respondent below (**the respondent**), a provider of National Health Service (**NHS**) general practitioner (**GP**) services, seeks to set aside the decision of Employment Judge Buchanan that the claimant GP, Ms Narayan (**the claimant**), is a "worker" within section 230(3)(b) of the **Employment Rights Act 1996** (the 1996 Act). He gave that ruling after a preliminary hearing in North Shields Employment Tribunal on 22 November 2017, in a reserved decision dated 23 February 2018 and sent to the parties on 27 February 2018.

2. The judge also ruled (a ruling that, it is agreed, stands or falls with the first ruling) that she is in "employment" within section 83(2) of the **Equality Act 2010** (the 2010 Act). And he ruled that she is not an "employee" under section 230(1) of the 1996 Act, a decision not challenged in this appeal. The only live issue directly affected by these rulings is that of unpaid holiday pay. Sex and race discrimination claims have fallen away for unconnected reasons.

3. The judge's ruling predated four important decisions: *Pimlico Plumbers Ltd v. Smith* [2018] ICR 1511 (Supreme Court, 13 June 2018); *Addison Lee Ltd v. Lange* [2019] ICR 637, EAT (Judge David Richardson, sitting with lay members, 14 November 2018); *Uber BV v. Aslam* [2019] ICR 845 (Court of Appeal, 19 December 2018); and the same case in the Supreme Court (forthcoming; permission granted; also predated by this decision).

## Facts

4. The respondent, a not for profit company, started providing the services of NHS GPs from 1992. From 2004, the respondent contracted with then primary care trusts to provide the services locally in Gateshead. The claimant is a GP. From 2005, she worked in or through or for the respondent. She also did locum GP work through an agency, which was treated as self-employed work. She was one of about 70 to 80 doctors signed up with the respondent to provide out of hours services. She was among 12 doctors who regularly worked the same shifts.

5. The claimant worked regular shifts on a 12 week rota, normally following a set shift pattern. She was not obliged to accept work and the respondent was not obliged to provide any. She took holidays when she pleased, after warning the respondent. The respondent required her and the other doctors to abide by its ground rules for allocation of shifts. They have to perform to nationally set standards; she (and the other doctors) could be penalised if they did not. She tended to work at one establishment, where she saw patients and treated them, like any other GP.

6. In 2014, the NHS rolled out a new standard contract for providers of out of hours services, requiring providers such as the respondent to ensure the doctors providing the services were competent and properly qualified. The respondent was required to satisfy the NHS that this was so by providing audits of the work done by the GPs and of the services provided.

7. From October 2015, on advice from her accountant, the claimant set up a company, RNJ Medical Services Ltd (the company). She did not tell the respondent about the company but gave its bank details and received payments into its account from October 2015 onwards. The

company also received payments from her locum work. She accounted for tax and national insurance through the company. Neither she nor the company sent invoices to the respondent.

8. In November 2016 an issue arose over certain telephone advice the claimant had given. As a result of that issue and a later allegation that she had unjustifiably swapped duties without informing the respondent and on short notice, the respondent wrote to her in February 2017 saying it was ceasing to offer her further work. She then presented claims to the tribunal on 15 June 2017, of unfair dismissal, race and sex discrimination, breach of contract and unpaid holiday pay.

**The Decision**

9. The respondent's case was that the claimant was self-employed and neither an employee nor a "worker". The judge therefore made detailed findings of fact about the respondent's activities and the claimant's working arrangements. He was astute to "paint a picture from the accumulation of detail" and to arrive at "an evaluation of the overall effect of the detail…" (per Mummery J, as he then was, in *Hall (Inspector of Taxes) v. Lorimer* [1992] ICR 739, 744-745, approved by the Court of Appeal ([1994] ICR 218, per Nolan LJ, as he then was, at 226).

10. The judge referred to many of the usual authorities and recorded the submissions of the parties. He noted the following main features (insofar as not already mentioned), which led him to conclude that the claimant was a worker for but not an employee of the respondent:

(1) The claimant worked mainly out of hours as a "duty doctor", providing her own professional indemnity insurance, describing herself for insurance purposes as an "[i]ndependent GP (locum or private work)".

(2) The claimant did not need or seek permission to work as a locum outside the respondent's activities. She (and subsequently the company) was paid gross for her locum work. She did not receive sick pay or holiday pay from the respondent.

(3) She had to log onto a shift booking system and book her shifts months in advance. In practice, the shifts were pre-populated because her shift pattern of about 30-40 hours a week was mostly regular and consistent over the 11 to 12 year period.

(4) The group of about 12 doctors working regular shifts would check availability with each other and to avoid administrative confusion would normally not "hand back" a shift to the respondent without checking availability of a substitute first.

(5) The claimant provided her own bag of medical equipment, the contents of which were the subject of guidance from the respondent. She was not required to wear a uniform. She used prescription pads supplied by the respondent.

(6) The respondent supplied required drugs to the claimant and other GPs providing the out of hours service. The respondent provided ambulance transport, and other transport when the claimant had to make home visits to patients.

(7) There were "sparse" documents setting out features of the relationship: a service manual requiring compliance with the respondent's rules; requirements to be on time, annual appraisals, familiarity with the respondent's IT systems, and the like.

(8) There was no written disciplinary or grievance procedure but the rules provided for disciplinary action, including imposition of fines, in the event of bad conduct, e.g. failing to follow guidance on telephone advice or prescribing, or late cancellation of shifts.

(9) The claimant and the other GPs were required to keep records of prescriptions and drugs issued and to provide these to the respondent and keep a computerised consultation record of all patient consultations.

(10) The claimant and the respondent were free not to offer work or accept work from each other. Thus, the claimant could book holidays as and when she wished, unlike an employee.

(11) The arrangement suited the parties over the 11 or 12 year period. The parties worked together but the arrangement "did not give rise to mutuality of obligation such as to create a contract of employment" (reasons, paragraph 15.4).

(12) The claimant was required to work personally for the respondent; if unable to work a shift, she would, albeit having ascertained availability of a suitable substitute, hand the shift back to the respondent (paragraph 15.12).

(13) Alternatively, if that was wrong and she were able to send a substitute, the right was not unfettered since the substitute had to be a GP already approved by the respondent from its panel of doctors (paragraph 15.12).

**Grounds of Appeal**

11. There were originally four grounds of appeal, but only three remain live. The first is that the judge erred in law by concluding that after October 2015 the respondent's contractual relations were with the claimant and not the company. The latter, said Mr Pilgerstorfer, necessarily became the contracting party when it started to receive the claimant's remuneration, through operation of the undisclosed principal doctrine.

12. Mr Pilgerstorfer went on to argue that the claimant could not be a "worker" under section 230(3)(b) of the 1996 Act once the company became the contracting party, if she ever had been; the definition requires the "worker" herself, not the company, to undertake to do or perform personally any work or services to the other contracting party. The respondent, he said, became a client of the company without knowing it, from October 2015.

13. He showed that the undisclosed principal doctrine is alive and well even though, anomalously, it imposes contractual liability owed to a person whose identity the party liable does not know: see the five propositions of Lord Lloyd in *Siu Yin Kwan v. Eastern Insurance Co Ltd* [1994] 2 AC 199, 207; and the judgment of Lord Sumption JSC in *Playboy Club London Ltd v. Banca Nazionale del Lavoro SpA* [2018] 1 WLR 4041, at [12].

14. He pointed to two examples of its invocation by HHJ McMullen QC in this appeal tribunal, (*Dixon v. Viollet and Santiago Management t/a T.HQ (in liquidation)*, UKEAT/3042/10, at [11] and *Orford v. S Three Staffing UK Ltd*, UKEAT/0058/13, at [5]) showing that an employer may be, unbeknown to the employee, a corporate undisclosed principal of the individual agent who hires the employee. Such cases are notorious and can cause no end of trouble, for instance where the employee needs to know what person or body to engage with in early conciliation.

15. He argued that the claimant had herself in her witness statement said that the company was set up in October 2015 "and was contracting with the Respondent", as "a way of getting a particular status under HMRC's rules". The judge erred, he said, by treating the respondent's ignorance of the company's existence as determinative; it is normal to be unaware of an undisclosed principal's existence, precisely because its existence and identity is not disclosed.

16. Ms Callan objected that the point was not open on appeal as it had not been taken below. Mr Gibson, the solicitor then representing the respondent, had submitted below (see paragraph 10.2 of the tribunal's decision and paragraph 30 of Mr Gibson's skeleton argument below, dated a week later than the claimant's witness statement) that the claimant was in business on her own account, applying the "economic reality" test.

17. The setting up of the company, said Ms Callan, was but one indication of that, along with many others, set out as bullet points in Mr Gibson's skeleton argument. He had not founded his case on a relationship of agency between the claimant and the company. If he had done, that would have appeared in his skeleton argument and would have featured in his questions to the claimant and his oral submissions. Had that been done, the evidence and argument would have been different and it would be an injustice now to allow the case to be argued differently.

18. Mr Pilgerstorfer's answer was that Mr Gibson had cross-examined the claimant about the company and had run the case on the basis that any contract was, after October 2015, with the company and not the claimant personally. It was not necessary for him to mention the undisclosed principal doctrine, which was an issue of law. Moreover, the judge had himself alluded to the issue presented by creation of the company and had then failed to apply the undisclosed principal doctrine, as he should have done without being prompted.

19. Mr Pilgerstorfer submitted that if the point was not properly taken below, the following exceptions applied, drawn from the authorities gathered together in *Secretary of State for Health v. Rance* [2007] IRLR 665, by HHJ McMullen QC at [50(6)]. The exceptions relied on were those listed at (b), (e) and (f): the appeal tribunal is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing; the point is an "obvious knock-out point" and the issue is a discrete one of pure law requiring no further factual enquiry.

20. In my judgment, Ms Callan's submissions are to be preferred on the preliminary issue. I do not think I should allow the point to be raised on appeal. A party seeking to deny a contract with a person by asserting that the contract (if any) was with another, should do so plainly; cf. the similar reasoning in *Exmoor Ales Ltd v. Herriot*, UKEAT/0075/18. Mr Gibson alluded to the identity of the contracting party merely as a building block in his case that the claimant was not an employee as she was in business on her own account and the respondent was her client.

21. He did argue that any contract was with the company after October 2015 but he did not argue the contract point as one of agency or of statutory construction of section 230(3)(b) of the 1996 Act, as Mr Pilgerstorfer now seeks to do. A person asserting an agency relationship needs to identify the principal and the agent and the reasons why the latter contracted on behalf of the former. While I do not think the factual enquiry would have been very different, the focus of the questions asked and of the advocacy would have been very different.

22. It is telling that Mr Pilgerstorfer says in his skeleton argument that there was "no basis to assume otherwise than that the respondent would have been willing to enter into a contract with

[the company]". The respondent never had to consider that issue and I am not aware that any of its witnesses were asked below whether the respondent was in the habit of contracting with companies rather than doctors.

23. Ms Callan therefore had no opportunity below to put to the respondent's witnesses that the respondent might have thought twice before accepting the company as counterparty. Why did the claimant not reveal its existence to the respondent? Nor did Ms Callan have the opportunity to engage with Mr Pilgerstorfer's construction of section 230(3)(b), that a "worker" contract must be concluded by the worker herself and not by any other person.

24. I do not think the reference in the claimant's witness statement to the company "contracting with" the respondent should be held against her applying a technical legalistic approach. The interposition of the company was a well known construct done for the purpose of obtaining tax advantages, a purpose the claimant could not dispute. The tax authorities might want to argue, if they were to address the issue, that the agency relationship was the other way round, with the company "contracting" as agent and the claimant as principal.

25. In case I am wrong and the point should be entertained on appeal, I am comfortable that there is no merit in the substance of this ground of appeal. The relationship between the parties, and the respondent's activities and raison d'être, required that those performing the out of hours service must be qualified and approved GPs capable of satisfying the strict qualification and performance requirements set by the respondent and by the NHS nationally.

26. The company could not possibly meet the respondent's entry requirements. It is not a doctor. It is not even human. It cannot treat a patient or prescribe a drug or exercise medical judgment. The respondent could not approve it without knowing of its existence. On the judges' findings the right of "substitutability", if it existed at all, was to substitute a suitability qualified and approved GP, not an inanimate corporate entity.

27. I would therefore have no hesitation in deciding that the terms of the claimant's relationship with the respondent before October 2015 precluded substitution of the company from then onwards. The case is therefore one where the undisclosed principal doctrine is excluded applying the fifth of Lord Lloyd's five propositions (at 207C-E) delineating the scope of the doctrine:

> **"The terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."**

28. If the issue had been presented to the judge in the way Mr Pilgerstorfer now presents it to me in this appeal, I think the judge would have found that those words apply *par excellence* to the facts of this case. I can therefore base my decision to dismiss the first ground of appeal not just on the proposition that it was not argued below and is not open on appeal, but that being considered on appeal it is found to be wanting in merit.

29. I come next to the second ground of appeal. It is that the judge erred by failing to consider and apply the decision of the appeal tribunal in *Suhail v. Herts Urgent Care*, UKEAT/0416/11. Mr Pilgerstorfer submitted that the *Suhail* decision was "extremely pertinent". He pointed to similarities in the facts of the present case and those of *Suhail*. Those similarities were such that the judge was bound to follow the result of *Suhail* and it was an error of law not to do so.

30. In that case, a doctor was found to be "marketing his services to whichever provider of medical services might wish to provide him with work" (per HHJ Serota QC at [44]). Those providers were the doctor's clients. He was based in the south of England and worked for providers in both London and Rotherham. This claimant also served at least two different bodies, working for the respondent and doing locum work through an agency.

31. Mr Pilgerstorfer also said that the judge should have attributed weight to the absence of any contractual relationship between claimant and respondent between her assignments, a point drawn from Underhill LJ's analysis in *Windle v. Secretary of State for Justice* [2016] ICR 721, at [23]:

> **"… the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it".**

32. Mr Pilgerstorfer submitted that the tribunal must have rejected the idea of any overarching contract outside the shifts assigned to the claimant. The judge should then have considered, and failed to consider, whether that absence pointed towards the absence of a "worker" relationship during the assignments.

33. Ms Callan pointed out, as did the judge, that no two cases are alike and each turns on its facts. She submitted that, in any case, the judge's finding that there was an absence of mutuality was a reference to the mutuality of the type required to sustain the existence of a contract of employment. Hence, he made that finding in the context of rejecting the existence of a contract of employment (at paragraph 15.4 of his decision).

34. The judge did not, Ms Callan submitted, thereby intend to exclude the existence of any overarching or "umbrella" contract; hence the finding (at paragraph 15.3) that "a contract existed between the claimant and the respondent … evidenced by the … documents and by a long course of dealing between the parties".

35. Although she accepted, in answer to a question from me, that she had not specifically addressed the tribunal on the difference between a series of assignment-based worker contracts and an overarching, "umbrella" contract, she said he had not excluded the latter in his judgment or reasons.

36. There was no such finding in *Suhail*. The judge had expressly stated that he considered *Suhail* "in detail" (paragraph 12.7 of the decision) and referred expressly to the factual similarities relied on by the respondent. It was not an error of law that he came to a different conclusion on the facts and on the evidence before him. The key distinction was the finding that the Dr Suhail marketed his services to NHS bodies while this claimant worked regular shifts for the respondent over many years.

37. Again, I prefer the claimant's submissions. It is true that the judge did not, having referred to *Suhail* and being clearly alive to the factual similarities relied on by the respondent, state precisely how he distinguished *Suhail* on the facts before him. But distinguish it he did, and not in a manner that shows any error of law.

38. It would have been better if the judge had spelled out the factual differences. But it is not difficult to discern what they were if you look at the findings he made, supporting his conclusion

A that the claimant was a section 230(3)(b) "limb (b)" worker, and then at the findings that impelled the *Suhail* tribunal and HHJ Serota QC on appeal from it, to reach the contrary conclusion.

39. The key difference, as Ms Callan pointed out, was the absence of marketing by the claimant. The terms of the relationship were drawn from documents and a long course of dealing. The course of dealing was that the claimant worked regular shifts for many years, also doing other work as a locum. There was eventually a superseding document issued by the respondent B but it came too late to bind the claimant and Mr Gibson's attempt to tie her to it failed.

40. In *Suhail*, the doctor's relations with Herts Urgent Care were derived from a "service level agreement" between that body and the primary care trusts which commissioned from Herts Urgent Care the services provided by Dr Suhail and other GPs. The agreement provided that the GPs were self-employed, and the tribunal (and HHJ Serota QC on appeal) accepted that. On the C facts, it was found in effect that the provider of the services was a client of the doctor.

41. Although I do not question the correctness of *Suhail* on its facts, I would not think of a provider of NHS services as, normally, the client of a doctor performing the work constituting provision of those services. It is an odd use of language to call the service provider the doctor's client; the doctor's primary client is the patient whom he or she advises and treats. The organisation administering the provision may be more akin to an employing organisation, but the D question is one of fact in each case, made by painting a picture from an accumulation of detail.

42. I also question whether Mr Pilgerstorfer is right to submit that the judge's exclusion of any obligation of mutuality, excluding the existence of an employment contract, went so far as to exclude the existence of any contractual obligations at all between assignments. In a practical sense, the claimant had things to do between her shifts. She had to log on, signal her availability, liaise by email, if necessary update her records, and so forth. The judge appeared to treat these E functions as non-contractual though he did not say so in plain terms.

43. The parties did not, I am told, address specifically below whether the claimant had any minimum obligations between assignments, or whether the obligations undertaken existed only during assigned shifts. The judge ruled out a contract of employment, largely on the basis of absence of the necessary minimum obligation of mutuality. But he did find the existence of "a F contract", in the singular, rather than a series of contracts.

44. He said, also, there was no obligation to work any specific shift. The finding of absence of mutuality might stand uneasily with the existence of an obligation to show willing to work at least some shifts, or to make work available if there was a demand that could not otherwise be met. The judge did not appear to consider directly whether there might be some limited mutuality obligation of the type noted in *Cotswold Developments Construction Ltd v. Williams* [2006] IRLR G 181, per Langstaff P at [55]. The judge cited the judgment at [53] and [54], but not at [55].

45. Langstaff J referred, in his discussion of obligations of mutuality at [55], to the home workers in *Nethermere (St Neots) Ltd v. Taverna* [1984] IRLR 240, CA. They were free to refuse specific work but not free to refuse any work at all. The judge did not focus on that aspect of mutuality and, as Ms Callan correctly pointed out, he found that there was a contract, in the singular, between the claimant and the respondent and not a series of contracts. H

46. He did not have available to him the analysis of Lord Wilson JSC in *Pimlico Plumbers Ltd v. Smith*, at [36]-[41] and the point left open at [41], referring to *Windle v. Secretary of State*

*for Justice*: namely, "the relevance to limb (b) status of a finding that contractual obligations subsisted only during assignments". Nor did he have the benefit of the discussion in the other cases I have mentioned which postdated his decision: in particular, HHJ Richardson's observations in *Addison Lee Ltd v. Lange* and the endorsement of them by Sir Terence Etherton MR in *Uber BV v. Aslam*, which remains pending in the Supreme Court.

47. Furthermore, the judge specifically said (paragraph 15.3) that the "oral contract" on the terms of the relevant documents "continued at least until February 2017". He noted the issue as to whether that contract came to an end in February 2017 or not, which he said was "not before me and will be an issue for another day". If the judge had clearly found that there was a series of contracts on a shift by shift basis, there would have been no outstanding issue about whether "the contract" was or was not terminated by the respondent's letter of 9 February 2017: there would be no contract to terminate.

48. In the light of those observations, it is quite impossible to accept Mr Pilgerstorfer's submission that the judge was bound by the result of the *Suhail* case, having no basis to depart from the reasoning in it and the conclusion which flowed from that reasoning. I therefore reject the second ground of appeal and I turn to consider, finally, the third ground.

49. The third ground is that the judge erred in law by concluding, on the findings of fact that he had made, that the claimant was an integral part of the operations of the respondent. Mr Pilgerstorfer complains that the tribunal placed too much weight on the duration and regularity of the working arrangements and ascribed too much weight to the "considerable control" (in the judge's words at paragraph 15.13) the respondent had over the claimant's work.

50. He said the judge overlooked the point that financial penalties are imposed on contractors in commercial contracts. He also said the tribunal wrongly disregarded the business arrangements the claimant had herself set up, receiving her remuneration gross and accounting for tax and national insurance through the company and working also for what Mr Pilgerstorfer called "other clients", meaning not patients but other medical services providers.

51. Ms Callan opposes this ground on the simple basis that the issue was one of fact for the tribunal and that it had plenty of evidence of the claimant's integration into the respondent's organisation. That submission is obviously correct. Indeed Mr Pilgerstorfer concludes his written submissions on this ground by repeating the argument that the facts are "materially indistinguishable from Suhail", showing this to be a repeat of the second ground.

52. The three grounds of appeal are, for those reasons, not persuasive and disclose no error of law. That is sufficient to dispose of the appeal. There is no separate complaint from either party in this appeal that the judge omitted to determine the nature and extent of the contractual relations between the claimant and the respondent and, in particular, whether any contractual obligations between them of any kind subsisted between assigned shifts, or only during them.

53. No doubt that is because, rather surprisingly, neither party below asked him for a ruling on that important issue. He was, therefore, entitled to defer it to a future hearing, though it is an unusual approach and it would have been better if he had insisted on flushing out the parties' respective positions on the issue and ruling on it, rather than deferring it as he did.

**Conclusion**

54. For those reasons, the appeal must be dismissed. There is no error of law in the judge's reasoning and he reached a conclusion open to him. The consequences of his decision will have to be worked out by the parties, if possible by agreement or, if that is not possible, at a further hearing before the employment tribunal.