Appeal No. UKEAT/0258/20/RN(V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 16 March 2021
Judgment handed down on 5 May 2021

Before

HEATHER WILLIAMS QC, sitting as a DEPUTY HIGH COURT JUDGE

(SITTING ALONE)

NURSING AND MIDWIFERY COUNCIL — APPELLANT

MR R SOMERVILLE — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS CLAIRE DARWIN of Counsel Instructed by: DWF Law LLP, 1 Scott Place, 2 Hardman Street, Manchester M3 3AA
For the Respondent	MR ROBIN SOMERVILLE (In Person)

SUMMARY

TOPIC 30A: EMPLOYEE, WORKER OR SELF EMPLOYED

The Nursing and Midwifery Council ("the Respondent") appealed the Employment Tribunal's ("the Tribunal") conclusion that the Claimant, a panel member chair of its Fitness to Practice Committee, was a worker within the meaning of section 230(3)(b) **Employment Rights Act 1996** ("**ERA**") and regulation 2(1) Working Time Regulations 1998 ("**WTR**").

The Tribunal found that there were a series of individual contracts between the parties each time the Claimant agreed to sit on a hearing, for which the Respondent agreed to pay him a fee, and also an overarching contract between them in relation to the provision of his services as a panel member chair. The Tribunal also found that the Claimant agreed to provide his services personally to the Respondent. Those findings were not challenged in the appeal. In rejecting his alternative contention that he was an employee under a contract of service, the Tribunal decided that there was no irreducible minimum of obligation, as the Claimant was not obliged to offer a minimum amount of sitting dates and he was free to withdraw from dates he had accepted. The Claimant did not appeal that decision.

The Respondent appealed the conclusion that the Claimant was a worker on the basis that: (i) the Tribunal had misdirected itself in law, since an absence of mutuality of obligation in the sense of an absence of an irreducible minimum of obligation as identified in the employee caselaw was incompatible with a finding of worker status; and (ii) that in finding the Respondent was not a client or customer of a business carried on by the Claimant, the Tribunal had failed to consider relevant factors and had taken into account irrelevant considerations.

Held: A review of the authorities and a consideration of the statutory language indicated that an irreducible minimum of obligation in the sense relied upon by the Respondent was not a prerequisite for satisfying the **ERA** and **WTR** definitions of worker status, in circumstances where, as in the instant case, an overarching contract existed between the parties under which the individual agreed to perform services personally to the Respondent and had done so in respect of

a series of separate contracts. The absence of an irreducible minimum of obligation could be relevant to the question of whether the client / customer exception applied, but it was not necessarily fatal to a conclusion of worker status. Further, that in considering the client / customer exception in this case, the Tribunal had made no error of law; the weight that it attached to particular factors was a matter for its evaluation.

Accordingly, the appeal was dismissed.

HEATHER WILLIAMS QC

Introduction

1. The Nursing and Midwifery Council appeals from the finding in the reserved judgment of Employment Judge Massarella ("the Judge") in the London (East) Employment Tribunal ("the Tribunal") promulgated on 20 July 2020 that the Claimant, Mr Somerville, was a worker of the Council for the purposes of section 230(3)(b) **Employment Rights Act 1996** ("**ERA**") and regulation 2(1) of the **Working Time Regulations 1998** ("**WTR**"). I will refer to the parties as they were known below.

2. The Respondent is the regulator of nurses and midwives in the United Kingdom. Its functions are governed by the Nursing and Midwifery Order 2001. Pursuant to its statutory duty to maintain standards of conduct and performance for nurses and midwives, the Respondent is required to have a Fitness to Practice Committee ("FTP"), to determine allegations that such persons' fitness to practice may be impaired. The Respondent maintains a pool of appointed persons who sit as panel members of the FTP. The Claimant was appointed as a panel member chair for a four-year term on 16 April 2012. He was subsequently reappointed for a further four-year term in April 2016.

3. By a claim form presented on 20 July 2018, the Claimant claimed unpaid statutory holiday pay from this Respondent and also made claims against the Medical Practitioners Tribunal Service. The claim against the latter was dismissed on the basis that it was presented out of time. The Judge's conclusion in that respect was appealed by the Claimant (UKEAT/0527/20/RN) and is the subject of a separate ruling dismissing that appeal. The Claimant contended that he was an employee or a worker of the Respondent; propositions which were denied. An open preliminary hearing, listed to deal with the question of employment status, took place on 13 – 15 November 2019 and 14 – 15 February 2020.

4. In summary, the Judge concluded:

a. There was a series of individual contracts between the parties each time the Claimant agreed to sit on a hearing, for which the Respondent agreed to pay him a fee; and also an overarching contract between them, found in the letters of appointment and in the Panel Member Services Agreement ("PMSA") and its Schedules and Appendices, agreed to by both parties in relation to each four year term of appointment;

b. These written materials represented the parties' true agreement;

c. There was no contractual obligation on the Claimant to offer / accept a minimum amount of sitting dates and he was free to withdraw from dates he had accepted. Accordingly, there was insufficient mutuality of obligation to give rise to an overarching employment contract or an employment contract in relation to individual assignments that he accepted;

d. The Claimant had no right of substitution under the contracts and he agreed to provide his services personally to the Respondent;

e. The Respondent was not a client or customer of a profession or business carried on by the Claimant ("the client / customer finding");

f. In light of the contract that existed between the parties, the personal service involved and the client / customer finding, the Claimant was a worker within the meaning of section 230 **ERA** and regulation 2(1) **WTR**.

5. The Claimant has not appealed the Judge's decision in relation to his lack of employee status. Accordingly, this appeal proceeds on the basis that the Tribunal was correct to find that there was insufficient mutuality of obligation for employment status. Equally, the Respondent does not challenge the Judge's finding that there was a series of individual contracts and an

overarching contract between the parties. The Respondent's central argument in this appeal is that the absence of any obligation on the Claimant to accept and perform some minimum amount of work was fatal to the proposition that he was a worker, as mutuality in this sense is a prerequisite to this status. The Claimant disputes this and submits that the Judge's findings which I have summarised above were sufficient for him to properly conclude that the statutory definition of a worker was met.

6. In considering this central issue it is important to keep in mind the two senses in which the phrase mutuality of obligation has been used in the caselaw. The first sense simply denotes the exchange of promises or consideration from each party of a kind necessary to create any form of bilateral contract. I will refer to this as "mutuality of obligation". The second sense refers to an obligation on a putative employee to accept and perform some minimum amount of work for the putative employer, who is obliged to offer some work and/or pay for the same. For reasons that will be apparent when I review the authorities, I will refer to mutuality in this second sense as the "irreducible minimum of obligation". The Respondent submits that this second form of mutuality is an essential requirement for worker status.

7. As the parties confirmed to me, this appeal is solely concerned with whether the Tribunal erred in law in finding that the Claimant was a worker of the Respondent. I am not asked to consider *the extent* of the Claimant's entitlement to annual leave under the **WTR** if I uphold the conclusion that he has worker status.

The Grounds of Appeal

8. There are four grounds of appeal. The first two concern the issue I have already summarised regarding the extent to which an irreducible minimum of obligation is a prerequisite of worker status. Ms Darwin accepts that Ground 2 depends on the success of Ground 1 and does

not have a free-standing utility. The Respondent submits that if Grounds 1 and 2 succeed, it must follow from the Judge's finding of no irreducible minimum of obligation, that I should substitute a finding that the Claimant is not a worker. In that event, Grounds 3 and 4 would become academic. Grounds 3 and 4 concern the client / customer finding. The Respondent accepts that if either or both of these grounds succeed, then the case should be remitted to the Tribunal on that issue.

9. The Respondent's grounds of appeal are as follows:

a. The Claimant could not be a worker within the section 230(3)(b) **ERA** meaning because mutuality in the sense of the existence of an irreducible minimum of obligation is a prerequisite to satisfying the statutory definition (Ground 1);

b. The Tribunal erred in taking into account an irrelevant consideration, namely the contracts which had been found to exist between the parties, as thereunder the Claimant was not contractually obliged to perform work or services (Ground 2);

c. In relation to the client / customer finding, the Tribunal erred by failing to take into account the following relevant considerations:

i. That both parties had agreed in the written documentation that the Claimant was an "independent contractor";

ii. The Claimant's work as a barrister, mediator and arbitrator;

iii. That the Claimant provided similar services to his work with the Respondent to a number of different Regulators;

iv. The Claimant had business accounts prepared and submitted to HMRC in which he set off his business expenses against fees received from the Respondent;

v. In his tax returns the Claimant declared he was carrying on a business offering "consultancy and professional disciplinary services" and similar descriptions (Ground 3);

d. In relation to the client / customer finding, the Tribunal erred by taking into account the following irrelevant considerations:

i. The importance of the work of the FTPs;

ii. That the convening of such panels allowed the Respondent to discharge its statutory functions (Ground 4).

The Tribunal's findings

10. The Tribunal's judgment is detailed and clearly expressed. Whilst I will refer to the aspects that are directly material to this appeal, I have considered the entirety of the Judge's findings and reasoning. References in the form [J/X] are to particular paragraphs of his judgment.

Findings of fact

The Claimant's portfolio of work

11. At [J/70 – 74] the Judge described the Claimant's "portfolio of work". He noted that since his 2012 appointment with the Respondent, the Claimant had been: an ombudsman at the Financial Ombudsman Services; an accredited mediator and mediation advocate; an arbitrator in a variety of different types of disputes; an independent member / chair of employee disciplinary and grievance hearings; and an independent investigator into serious disciplinary matters in various organisations. He had undertaken the Bar Professional Training Court in 2011/12 and in July 2012 was called to the Bar. In 2013/14 he studied for an LLM in Dispute Resolution. He completed pupillage in February 2018 and practised as a barrister thereafter. In addition to his work with the Respondent and as a panel member for the MPTS (where he sat for 98 days over

the period April 2014 – April 2018), he sat as a Member for the Chartered Institute of Management Accountants and the Construction Industry Council. In 2014 he applied to sit as a Chair of the Professional Conduct Committee of the Health and Care Professions Council. Throughout the period he also sat as a Magistrate. In 2019 he was appointed as a Judge of the First Tier Tribunal (Social Entitlement Chamber).

The appointments process and terms of engagement

12. The Judge described how the process of appointing panel members was overseen by the Appointments Board: [J/84 – 85]. The Respondent advertised for 100 panel chairs in 2011. The advert stated under the heading "Time commitment", "You will be expected to be able to serve the NMC for at least 30 days a year…" [J/87]. The Claimant applied.

13. On 9 May 2012, the Respondent wrote to the Claimant confirming his appointment as a panel chair. The terms of his appointment were set out in the PMSA, which the Claimant signed. "Services" were defined as the services of a panel member to be provided as set out in the Schedule to the Agreement. Clause 8 recorded that he was an independent panel member and that nothing in the Agreement created a relationship of employer and employee [J/90 – 91]. Following his re-appointment, the Claimant signed a further PMSA on 7 May 2016 [J/94]. Under the heading "Supply of Services", clause 11 of the 2016 PMSA (and clause 7 of the 2012 PMSA) stated:

> **"11. The Panel Member shall provide the Services as requested from time to time by the NMC.**
> **11.1 The NMC shall provide the Panel Member with reasonable notice of any request to provide the Services. If the Panel Member cannot provide the Services on the dates and at the time so notified, the Panel Member shall promptly inform the requesting person or department at the NMC of that fact.**
>
> **11.2 The NMC and the Panel Member agree and acknowledge that:**
>
> **11.2.1 the NMC is not obligated to request the Panel Member to provide the Services;**

11.2.2 the Panel Member is not obliged to provide the Services if so requested by the NMC; and

11.2.3 the Panel Member has no right to provide the Services; and

11.2.4 where the NMC requests the Panel Member to provide the Services in respect of the case and the Panel Member agrees to provide those Services the Panel Member will use all reasonable endeavours to attend the hearing of that case on each and every day on which it is heard including where it is adjourned for any reason and concluded later than originally anticipated.

11.3 …

11.4 The Panel Member shall be available on reasonable notice to provide any information advice or assistance about the Services as the NMC may reasonably require." [J/96]

14. Clauses 12 – 14 of the 2016 PMSA provided that the Claimant would have the status of an independent contractor [J/97]. Clauses 17 – 21 set out obligations on the panel member, including: (i) a requirement to "comply with all procedures of the NMC relevant to Panel Members in force at the time" including the Code of Conduct and the Service Standard for Panel Members, the performance feedback process and the complaints procedure; (ii) a requirement to promptly provide any assistance and information required of him by the Respondent; and (iii) to comply with confidentiality requirements [J/98]. Clause 22 listed obligations on the Respondent, including to provide panel members with such training as it considered appropriate, including compulsory training for those not performing to the required standard [J/99]. Clause 38 gave the Respondent power to suspend a panel member who breached the Code of Conduct; and clause 39 power to terminate the agreement if a panel member committed serious breaches. The panel member could terminate the agreement on three months written notice [J/100].

15. Schedule 1 to both the PMSAs set out the services to be provided by panel members. This included keeping up to date with the Respondent's policies, providing feedback when requested to do so and participating in all required training events [J/102]. Annex 1 to the 2016 PMSA

contained the Code of Conduct and Service Standard [J103 – 108]. Paragraph 16 provided that panel members should ensure they were available to provide their services as set out in the PMSA and to give notification at the earliest opportunity if they had to withdraw from a panel to which they had been booked. Paragraphs 17 – 19 indicated that compliance with the Code of Conduct was obligatory and that "appropriate action" would be taken to deal with any breach, including termination where the breach was serious. Annex 3 contained the "performance feedback process for Panel Members of the NMC's Practice Committees". The Judge described the contents at [J/110 – 111]. It included the prospect of requiring a panel member to submit to ongoing monitoring; and where an issue was regarded as serious, persistent or deliberate, to the complaints process, which could lead to suspension or removal.

Training, the booking system and limits on Claimant's ability to work for others

16. In addition to induction training, the Claimant was required to undergo one day's training per year [J/112 – 113].

17. The Panel Support Team ("PST") required the Claimant to book his availability over a six-month period. He was then notified when he was required for a hearing. If a hearing was cancelled or went short, he was initially still paid in full and, from October 2017, at a reduced rate [J/115 – 116]. The number of days on which the Claimant actually sat varied considerably: 129 days in 2013; between 61 – 98 days in each year in 2014 – 2017; and 17 days in 2018. There were occasions when he turned down sitting dates [J117 – 118]. Further, "the Claimant could withdraw from a case even after it had been booked, without a requirement to provide an acceptable reason; the only requirement was that he notify the allocation team". When he did withdraw, he was not penalised [J/120]. Noting that there was an "expectation" that Panel Members would offer dates each year, the Judge found that "members were spoken to if they

were not offering dates and encouraged to do so. However, members were not required to offer a specific number of dates and were not sanctioned if they did not do so" [J/122].

18. The Claimant was not permitted to represent nurses and midwives in his capacity as a barrister. Other than this, the Respondent placed no restriction on the type or amount of work he could undertake for other organisations, including other regulators [J/128].

Payment and expenses

19. Clause 23 of the 2016 PMSA provided that the relevant fees were determined by the Respondent from time to time. The fees were fixed and non-negotiable [J/134]. Members invoiced for work done. Travel and accommodation expenses were reimbursed in accordance with the Respondent's policy in force at the time of the request for services [J/136 – 137].

Performance monitoring and feedback

20. In February 2016, the Respondent introduced a performance benchmark process for panel members, in order to ensure that a quality service was being provided. In 2018 metrics for "hearing completion" and "sitting days" were removed from this process [J/153 – 154].

Income tax and national insurance

21. The Claimant was responsible for accounting to HMRC for any income tax and national insurance due on the fees paid to him by the Respondent [J/159]. In his 2012/2013 tax return he described his business as "consultancy and professional disciplinary". He agreed that he offset substantial expenses in this and following years against the income of the business. In subsequent tax returns he described his business as "Consultancy and Professional Disciplinary" and "Prof. Regulatory Panel Chair/Ombudsman" [J/161].

The existence of a contract

22. The Judge concluded as follows:

> **"189. I accept the Claimant's submission that there was both an overarching contract between him and the NMC and a series of individual contracts.**
>
> **190 In relation to the former, the MNC offered to appoint the Claimant to the FTP panel as a Chair for a period of four years; the Claimant accepted in writing. The terms of the contract are to be found in the letter of appointment, the PMSAs and its Schedules and Appendices. Those terms undoubtedly included some provisions which amounted to legally enforceable rights and obligations. These are set out in my findings above (paras 98 and 99).**
>
> **191. In relation to the latter, each time the NMC offered the individual, and the Claimant accepted, he agreed to sit on the hearing, for which the NMC agreed to pay him a fee."**

Personal performance

23. After referring to the evidence of Mr Paul Johnson (the Assistant Director within the Respondent's Fitness to Practice Directorate), that it was not permissible for a panel member to provide a substitute; and the fact that a panel member could not nominate a substitute, the Judge concluded: "the Claimant has no right of substitution of any sort, fettered or unfettered; under the contract, he undertook to perform work personally for the NMC" [J/194 – 195].

No contract of employment

24. Between [J/166-176] the Judge summarised the principles from the caselaw as to the requirements for employee status. I will only refer to the aspects that bear on the issues before me. The Judge observed that no contract of employment could exist in the absence of mutual obligations subsisting over the entire duration of the relevant period. He referred to Lord Irvine's speech in **Carmichael v National Power plc** [1999] ICR 1226 (at 1230) summarising the position as "if there were [sic] no obligation on the employer to provide work, and none on the putative employee to undertake it, there would be an absence of that irreducible minimum of obligation necessary to create a contract of service" [J/169]. He contrasted an obligation to undertake work with a mere expectation that an individual will undertake a certain amount of

work, citing from the judgment of Choudhury P. in **Hafal Ltd v Lane-Angell** UKEAT/0107/17 at [29] in that respect [J/174].

25. The Judge reasoned that there was no obligation on the Claimant to offer sittings and thus no overarching contract of employment, as follows:

> "**198. The starting point must be the contractual terms… They unambiguously provide that the NMC was not obliged to ask the Claimant to provide services, and the Claimant was not obliged to provide them, if asked to do so. I went on to consider whether those terms were consistent with the evidence as to how the arrangements worked in practice.**
>
> **199. Mr Johnson accepted in evidence that there was an expectation that the Claimant would make himself available for work. But, as Choudhury P. held in *Hafal*, an expectation is not the same as a legal obligation. Was this a case where 'expectations' crystallised into legal obligations? The Claimant, in his closing submissions, compared the offering by Members of dates of availability to the logging-on to the system by private hire drivers in *Addison Lee Ltd v Lange* [2019] ICR 637. The Tribunal in that case found that they were then obliged to accept bookings allocated to them, despite a clause in the contract which expressly stated that there was no obligation on the driver to provide services. If the reason the drivers provided for not accepting the booking was considered unacceptable, a sanction might follow, including being removed from the system.**
>
> **200. The Claimant's position was quite different: he controlled how many dates he offered to the NMC; if the NMC then offered assignments within those dates, he was free to refuse them. Not only was there no contractual obligation on him to offer dates, there was no obligation on him to honour them once he had accepted; he was free to withdraw, and the NMC was obliged to arrange a replacement.**
>
> **201. The contract did not provide for any sanction if work was not accepted, or was returned; nor was there evidence before me that the Claimant had been subjected to sanctions when he did not offer dates, or withdrew from work which he had previously accepted. He did not identify how many days the purported contractual duty required of him. If it was the 30-day 'expectation' referred to in the original advertisement, he fell below that in 2018 …, without any sanction being applied to him. As for his rate of withdrawal, I note that in 2015 the Claimant's rate of withdrawal from cases (16.5%) was significantly higher than average, yet no sanction was imposed on him; on the contrary, he was reappointed in 2016.**
>
> **202. I also considered the significance of the benchmark process, I accept Ms Darwin's submission that this was a 'light touch' process aimed at assisting with learning and development, but also monitoring the quality of Members' work. For part of the material time it included metrics in relation to sitting days. That was removed in 2018; the NMC acknowledged that there was a tension between its use and the fact that there was no obligation under the PMSAs for panel members to accept a minimum number of events each year.**
>
> **203. The fact that the NMC monitored sitting and withdrawal dates did not, in my judgment, give rise to a legal obligation on the Claimant to accept work. Even an independent contractor may find his/her availability and reliability being monitored by his/her client, without the relationship evolving into one of employment. Although such monitoring may give rise to an incentive to offer dates, and accept assignments, it does not create a legal obligation to do so. The fact that the NMC engaged in discussions and sought assurances from Members who offered little or no availability, did not, in my judgment, suggest the**

> **existence of a contractual obligation to do so: mere assurances lack contractual force."** (Emphasis added)

26. The Judge also found that there was no contractual obligation on the part of the Respondent to offer work, albeit there was a likelihood that this would be done [J/206]. As I noted earlier, he also determined that the written agreement reflected the parties' true agreement in these respects [J/208].

27. Turning to individual assignments, the Judge noted that he had already found that the Claimant was free to withdraw from a hearing, even after the agreement to sit on a particular date had been concluded [J/210]. Whilst the Code of Conduct spoke of an "expectation" that this would only occur in "exceptional circumstances"; an expectation was not the same as an obligation [J/211]. The Claimant was not obliged to give a reason for withdrawing, he was not obliged to find a replacement and nor was his ability to withdraw contingent upon the Respondent finding a replacement [J/212]. Nothing in the contractual documentation indicated that withdrawing from an assignment amounted to a breach of contract [J/212]. Accordingly "because the Claimant could withdraw without sanction, after the conclusion of the agreement and before the hearing, I conclude that there was insufficient mutuality of obligation to give rise to an employment relationship by reference to the individual assignment contracts" [J/213].

28. The Judge indicated that as he had concluded the Claimant was not an employee, it was unnecessary for him to consider the other elements of the test for employment status [J/217].

Worker status

29. The Judge began by setting out the three conditions that he said must be satisfied in these circumstances. I will return to this, given Ms Darwin submits that his self-direction as to the first criterion was erroneous. She did not take issue with his formulation of the second and third

criteria. Further, no criticism is raised in this appeal of the Tribunal's finding regarding personal performance. The three elements of the test as identified by the Judge were:

> "**218.1 there must be a contract between the Claimant and the NMC;**
>
> **218.2 the contract must be one in which he undertakes to perform work personally for the NMC;**
>
> **218.3 and the NMC must not be a client or customer of a profession or business carried on by the Claimant."**

30. The Judge set out his conclusion in relation to the first two elements of the test he had identified at [J/219]. He said:

> "**I have already found that there was an overarching contract between the Claimant and the NMC, as well as individual contracts when work was assigned, under which the Claimant agreed to provide his services personally, although I have concluded that neither were contracts of employment." (**Emphasis added**)**

The client / customer finding

31. The Judge referred to the guidance provided by Langstaff J. in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 ("**Cotswold**"). He also referred to the judgment of Elias J (as he then was) in **James v Redcats (Brands) Ltd** [2007] ICR 1006 commenting that "it is the degree of integration which is significant".

32. The Judge then evaluated a number of factors. Where his approach is criticised in Grounds 3 or 4 of this appeal, I will set out the detail of his reasoning. I will summarise more briefly the other features that he took into account.

33. Firstly, the Judge turned to the Claimant's portfolio career. He said:

> "**223. Portfolio careers are not uncommon; few, I imagine, are so wide-ranging as the Claimant's. However, I regarded his work outside the area of acting as a regulatory panel member/chair as a neutral indicator in this exercise: the fact that he also practices as a barrister, mediator and arbitrator does not assist me in identifying the character of his relationship with the NMC. If the Claimant is 'in business on his own account' when he is working for the NMC, in my opinion it is a different business from the one by which he does his other work, just as in the *Westwood* case at [11], the claimant had a number of different 'businesses or outlets for his professional skills', which were unrelated to each other.**

> **224. On the other hand, there is a strong similarity between the work that the Claimant did for the NMC and the work he did as a Panel Member for other regulators, such as MPTS. There was no contractual requirement that he do this type of work exclusively for the NMC; that was reflected in the way the relationship worked in practice. It is apparent from the email exchange I have quoted above … that the Claimant had no qualms about seeking Mr Johnson's advice as to how to secure similar work in another sector; Mr Johnson was similarly untroubled by the Claimant's warning … that he might start favouring other regulators over the NMC.**
>
> **225. The only restriction on the Claimant was the prohibition on offering his services as a barrister to nurses or to the Royal College of Nursing. … the reason for the prohibition is so plainly based in ethical considerations that it says nothing about the question of status.**
>
> **226. However, to characterise the Claimant's seeking work with other regulators as 'marketing his services' would be wrong. The Claimant did not market his services to the NMC; he was recruited by it via a structured exercise. Although it is possible to think of examples of independent contractors submitting to structured processes to secure work (architectural competitions come to mind), for a genuine independent contractor, that is not the sole route to obtaining work; s/he may also advertise and approach clients. Work as a Panel Member cannot be solicited by direct approach, nor generated through advertising."**
> (Emphasis added)

34. Next the Judge considered whether the Claimant worked as an integral part of the Respondent's operations. He noted that some factors pointed away from integration. However, he considered that these were reflective of the scrupulousness with which both parties maintained a degree of public distance from each other, so as to avoid any misleading impression that the Claimant was not free to make independent judgments [J/229].

35. The Judge then continued:

> **"230. Turning now to the factors which point towards integration, the first of these is the centrality of the work itself: without the work of the Claimant and his fellow Members, the NMC would not be able to discharge one of its principal functions: to ensure the maintenance of the standards of conduct and performance for nurses and midwives.**
>
> **231. There is then the fact that that the NMC provides mandatory training for Members. With an independent contractor, the onus would usually be on him/her to maintain necessary knowledge and skills. Although I accept Mr Johnson's evidence that the training was of a kind which the Claimant might not be able to source himself, there might be other ways of making that information available, other than through mandatory attendance at a training day. As for the requirement to do duty work if a hearing went short, I consider that an independent contractor would be unlikely to accept additional tasks, once the assigned work had been completed. Both these factors suggest to me a degree of integration.**
>
> **232. …**
>
> **233. However, the procedures for dealing with individual performance/conduct concerns and complaints, which I have set out above …, go beyond mere monitoring or assessment, or the provision of informal and supportive feedback. They provide for a mechanism whereby the NMC can formally raise, investigate and determine performance and conduct concerns with individual Members, with a view to taking action, including requiring them to undergo**

> **specific training and, in appropriate circumstances, leading to the termination of their appointment. The fact that this procedure is separate from the procedures applied to employees does not make it any less a procedure of the NMC's. In my opinion, it indicates a degree of subordination, to which an independent contractor would be unlikely to submit."** **(**Emphasis added**)**

36. The Judge then indicated that he attached weight to the fact that the Respondent set the level of fees, a process over which the Claimant had no control [J/235].

37. As regards the issues of tax he said:

> "**236. Turning to the issue of tax, the Claimant was responsible for accounting to HMRC for any income tax and national insurance contributions due on the fees paid to him by the NMC. I accept his submission that, <u>because NMC did not pay him through PAYE, he had no choice but to fill in a self-assessment form. Both workers and independent contractors would complete such a form, and, to that extent, it is a neutral factor</u>. The <u>descriptions of the 'business' which the Claimant gave in his tax returns appear to me to be little more than short-hand for his various activities, which I have already found cut across a range of quite different professional activities</u>."** (Emphasis added)

38. At [J/237 – 239] the Tribunal addressed an issue on which the Respondent had placed considerable reliance below, namely that the NMC was always one of the parties before the Claimant, when he sat as a Panel Member. The Judge did not consider this feature significant, given the various structural precautions that were in place to provide the necessary guarantees of independence. He referred to earlier cases involving judicial and quasi-judicial office holders (which he had summarised at [J/182 – 184]). He concluded that **<u>Ministry of Justice v O'Brien</u>** [2013] ICR 499 SC left open the possibility that a requirement for judicial (or quasi-judicial independence) was not incompatible with worker status; and he distinguished the present circumstances from the position of the arbitrator in **<u>Hashwani v Jivraj</u>** [2011] ICR 1004 SC on the basis of the Respondent's powers for addressing concerns about panel members' performance or conduct. There is no appeal against these conclusions.

39. At [J/241] the Judge said that he did not consider the label of "independent contractor" used by the parties in the contractual documentation to be "determinative of the question of the Claimant's status".

Conclusion regarding worker status

40. The Judge then set out the basis of his conclusion that the Claimant was a worker of the Respondent as follows:

> "**242. I also considered the relevance of mutuality of obligation. Although I have concluded that there was insufficient mutuality of obligation to give rise to a contract of employment, there were legal obligations on each side sufficient to create the necessary contractual relationship in the context of worker status. In the circumstances I have described, I do not consider that the absence of mutual obligations to offer/accept a minimum amount of work to be incompatible with worker status.**
>
> **243. I have already concluded that the Claimant entered into a contract with the NMC, whereby he undertook personally to perform work/services for it. Standing back and looking at the overall picture, when I have regard to the method of recruitment, the factors I have identified above which, cumulatively, suggest a significant degree integration into the operation, together with the element of subordination in the conduct/performance procedure and the absence of any negotiation in respect of pay, I am satisfied that the NMC's status was not by virtue of that contract that of the Claimant's client or customer. I have concluded that he was sufficiently integrated into the NMC's operations, such that he was, to borrow the language of Elias J in *James v Redcats*, 'semi-detached' rather than 'detached', as an independent contract would be.**" (Emphasis added)

The applicable law

The statutory definition

41. The claim was brought under the **WTR** and as an unlawful deduction from wages under the **ERA**. Section 230 **ERA**, so far as is relevant, provides:

> **"(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.**
>
> **(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.**
>
> **(3) In this Act "worker" …means an individual who has entered into or works under (or, where the employment has ceased, worked under) –**
>
> **(a) a contract of employment, or**
>
> **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally**

> **any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;**
>
> **and any reference to a worker's contract shall be construed accordingly."**

42. Regulation 2(1) **WTR** adopts the same definition of worker as the **ERA**.

43. In **Uber BV v Aslam** [2021] UKSC 5 ("**Uber**") at [41], Lord Leggatt (giving the judgment of the Court) described this statutory definition of worker as having three elements: (1) a contract whereby an individual undertakes to perform work or services for another party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual.

Mutuality of obligation and irreducible minimum of obligation in respect of workers: the authorities

44. It is necessary to review the authorities in some detail in order to address the Respondent's central submission that an irreducible minimum of obligation is an essential prerequisite of a worker's contract. I agree with Ms Darwin's suggestion that the caselaw is not entirely consistent in this area. I also agree that some confusion appears to have arisen from the two different senses in which mutuality has been used in the authorities. (In my discussion I will employ the terminology referred to in paragraph 6 above). My review of the authorities inevitably focuses upon the submissions made to me and is underpinned by the particular context of the present case, namely the unchallenged findings that there was no irreducible minimum of obligation sufficient to found an employment contract, but there was a contract between the parties both in relation to individual sitting assignments and an overarching contract to provide services as a panel member, as expressed in the PMSAs.

45. The term irreducible minimum of obligation appears to have first been used in **Nethermere (St. Neots) v Gardiner** [1984] ICR 612 CA (see Langstaff J's summary of the cases relating to employees at [16] – [20] in **Cotswold**). **Nethermere** concerned part-time home workers who undertook sewing tasks for the company. The claimants were paid for the tasks they undertook and were not obliged to accept a particular quantity of work. In considering their claims for unfair dismissal, the Employment Tribunal ("ET") found that they were employees within the equivalent definition to section 230 of the **ERA** (then section 153 of the **Employment Protection (Consolidation) Act 1978**). The Court of Appeal dismissed the employers' appeal. The entitlement to claim unfair dismissal depended upon the existence of an "umbrella" or over-arching contract existing between the particular sewing tasks that the Claimants undertook. In this context Stephenson LJ asked rhetorically: "Does the law require any and what mutual obligations before there can be a contract of service?" (622G). His very well-known answer at 623C-G was as follows:

> "**The obligation required of an employee was concisely stated by Stable J. in a sentence in *Chadwick v. Pioneer Private Telephone Co. Ltd.* [1941] 1 All E.R. 522, 523D: "A contract of service implies an obligation to serve, and it comprises some degree of control by the master." That was expanded by MacKenna J. in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 Q.B. 497, 515:**
>
> > **"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."**
>
> **Of (iii) MacKenna J. proceeded to give some valuable examples, none on all fours with this case. I do not quote what he says of (i) and (ii) except as to mutual obligations:**
>
> > **"There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill."**
>
> **There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced any lower than in the sentences I have just quoted**…"

46. The next case cited by Ms Darwin was **Shaikh v Independent Tribunal Service & Ors** UKEAT/0656/03, a decision of the Employment Appeal Tribunal ("EAT") which upheld the

ET's decision that two barristers in independent practice who sat on the Social Security Appeal Tribunal and Disability Appeal Tribunal were not employees under the extended definition of employment then contained in **section 78(1) Race Relations Act 1976**[1]. Although she did not refer to this decision in her oral submissions, Ms Darwin submitted in her skeleton argument that this case supported her central contention, given the fact there was no obligation on these Claimants to provide sittings during their appointments and thus there was no irreducible minimum of obligation meant they did not meet the **RRA** definition of employment. However, the EAT's reference to the absence of an irreducible minimum of obligation in that case was expressly related to the consequence that there was "here no contract of service" [31(1)]. Accordingly, it does not directly assist with the question of whether this form of mutuality is an inherent requirement of a worker's contract.

47. The EAT's decision in **Cotswold** requires detailed examination as one of the submissions advanced by counsel for the putative employer in that case was essentially the same as Ms Darwin's central contention. He submitted that Mr Williams could not satisfy the statutory definition of "worker" because the ET had found that there was no obligation resting on him to provide work; he contended that "mutuality of obligation (not simply an obligation to work personally) was required before the definition of 'worker' could be satisfied" [32] – [34]. It is clear that counsel was here using mutuality in the sense of the irreducible minimum of obligation. In order to understand the EAT 's decision on this issue, it is important to note that the cases counsel relied upon in support of this submission were **Byrne Brothers (Formwork) Ltd v Baird** [2002] IRLR 96 ("**Byrne Brothers**") ; **Cavil v Barratt Homes Ltd** [2003] All ER (D) 06 (Jul) ("**Cavil**"); **Firthglow Ltd t/a Protectacoat v Descombes and Lamont** [2004] All ER (D)

[1] The extended definition of "employment" applicable to discrimination claims, now found in section 83(2**) Equality Act 20210,** is substantially to the same effect as the **ERA** definition of "worker": **Pimlico Plumbers v Smith** [2018] ICR 1511 SC, Lord Wilson at [13] – [15].

415 ("**Firthglow**"); and **Bamford v Persimmon Homes NW Ltd** [2004] All ER (D) 14 (Aug) ("**Bamford**").

48. The Claimant in that case, Mr Williams, had been engaged by Cotswold to work as a carpenter on maintenance services they were sub-contracted to undertake for London Underground. He brought claims for unfair dismissal and holiday pay. The ET held that he was a "worker", but not an "employee". Both parties appealed.

49. The material findings of the ET are set out at [10] of the EAT's judgment. The references I provide in round brackets are to the ET's Reasons. Mr Williams was required by the terms of his contract to perform the work personally (7.2); the client / customer exception did not apply (7.3); he was therefore a worker (7.4); but "there was no mutuality of obligation…that on occasions the claimant declined work;…that on occasions there was no work available and the claimant was not paid" (7.6); and it followed from the absence of an irreducible minimum of obligation that he was not an employee (7.7).

50. It is of considerable significance that Cotswold's submission was discussed in detail, but rejected by the EAT. Langstaff J explained that the cases counsel relied upon were not authority for the proposition he advanced. At [23] he cited a "passage which deserves repetition" from Elias J (as he then was), giving the judgment of the EAT in **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471 ("**Stephenson**"):

> "**11. The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.**
>
> **12. The issue of whether there is a contract at all arises most frequently in situations where a person works for an employer, but only on a casual basis from time to time. It is often necessary then to show that the contract continues to exist in the gaps between the periods of employment. Cases frequently have had to decide whether there is an over-arching contract or what is sometimes called an 'umbrella contract' which remains in existence even when the individual concerned is not working. It is in that context in particular that courts have emphasised the need to demonstrate some mutuality of obligation between the parties but,**

> **as I have indicated, all that is being done is to say that there must be something from which a contract can properly be inferred. Without some mutuality, amounting to what is sometimes called the 'irreducible minimum of obligation', no contract exists.**
>
> **13. The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.**
>
> **14. The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work if available is irrelevant to the question whether a contract exists at all during the period when the work is actually performed..."**

51. Langstaff J explained at [40] that when Mr Recorder Underhill (as he then was) said in **Byrne Brothers** at [25] that "We accept that mutuality of obligation is a necessary element in a 'limb (b) contract' as well as in a contract of employment. The basis of the requirement of mutuality is not peculiar to the contracts of employment; it arises as part of the general law of contract":

> "**It is plain that Mr Recorder Underhill could not here have been talking of 'mutuality of obligation' in the restricted sense used in respect of contracts of employment and adopted specifically in cases which we have cited above. It is no part of the general law of contract for instance that one party to a contract (for the sale of goods, for work and services, or of carriage) must offer either work or payment, and the other party to the contract agree to work if asked to do so. That would be a requirement of mutuality specific to contracts of employment, but not specific to the general law of contract. In short, we consider that Mr Recorder Underhill here was making much the same point as was Mr Justice Elias in *Stephenson* at paragraph 11, where he is referring to an exchange of promises (or consideration) as being a prerequisite of any contract. So understood, Mr Recorder Underhill is saying no more than that there has to be a contract between the putative worker and the putative employer. He is not defining the necessary content of the terms of that contract."**

52. Langstaff J. then addressed **Cavil**, explaining that in the EAT's view "it gives no support to a suggestion that to be a worker there must be mutuality of obligation in the sense of a requirement to provide or pay for work on the one hand and an obligation to perform it on the other" [42]. He considered that the passage counsel had relied upon from **Firthglow** was based on an assumption that "by 'mutuality of obligation' Mr Recorder Underhill [at [25] in **Byrne Brothers**] was dealing with the requirement to provide work on the one hand, as against the agreement to preform it on the other, which, as we have already pointed out, he was not" [44].

Lastly, Langstaff J explained that the EAT in **Bamford** were not "as we see it, considering…whether mutuality of obligation was a necessary feature of any contract under which someone claimed to be a worker" [47].

53. On the face of it therefore, the EAT in **Cotswold** rejected the submission that Ms Darwin makes. However, she places reliance on the EAT's subsequent observations at [47] - [49], at [54] – [56] and on the question remitted to the ET (d) at [61]. She submits that these passages are inconsistent with that interpretation of **Cotswold**. I have therefore considered them in some detail.

54. In [49] the EAT made the uncontroversial point that: "Mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary then to determine what kind of contract it is is….These matters are determined by the nature of the mutual obligations by reference to which it is to be accepted that there is a contract of some type". At [48] the EAT observed that "the contract must also necessarily relate to mutual obligations to work and to pay for (or provide) it". However, it is clear from the preceding sentence that here reference is being made to a contract of employment. The same is also true of the passage Ms Darwin relied on in [49] (save for the uncontroversial observation at the end of the paragraph that when considering a statutory concept such as "worker", the words of the statutory definition are what matters).

55. At [50] Langstaff J set out the three criteria which had to be satisfied in order for an individual to be a worker. These are in equivalent terms to the Judge's threefold list at [J/218]. I will return to whether or not that articulation of the first criterion is now a correct statement of the law, particularly in light of the Supreme Court's decision in **Uber**. However, for present purposes, it is material to note that this formulation of the necessary criteria further confirms that the EAT was indeed rejecting Mr Gordon's submission, contrary to Ms Darwin's contention.

56. At [54] the EAT restated the point that: "Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment or should be categorised differently." Langstaff J went on to observe that "an overriding contract cannot exist separately from individual assignments as a contract of employment if there is no minimum obligation under it to work at least some of those assignments". Again, this observation was directed to contracts of employment and the paragraph that followed was concerned with the *content* of the wage / work bargain.

57. In short, I do not detect anything in these passages which is either inconsistent with or suggests that the EAT was resiling from the conclusion it had earlier expressed at [40] – [47] that an irreducible minimum of obligation was not a prerequisite for worker status.

58. The EAT then turned to the facts of the particular case, explaining why both the appeal and cross-appeal were allowed and that the questions of both Mr Williams' "employee" and "worker" status would be remitted to the ET. Whilst Ms Darwin relied on the EAT's characterisation of "the real question" as being "whether or not there was some minimum amount of work which the facts demonstrated that the claimant had obliged himself to do" at [56]; this in terms related to paragraph 7.6 of the ET's reasoning, namely the conclusion that there was no employment contract (see paragraph 49 above). The EAT considered that in the circumstances (which included that there was no written contract between the parties), the ET's reasoning did not explain how it had on the one hand found that there was an overarching contract for the entirety of the time the Claimant worked for the Respondent which required him to perform work personally (at 7.2), but had also found at 7.6 and 7.7 there was no irreducible minimum of obligation. Further, in relation to the latter, the EAT was concerned that the ET may have applied too high a threshold: see [58] in particular.

59. In turn, it appears to me that the central questions that were identified for the ET to focus upon on remission – including the reference at [61(d)] to "if there was insufficient control, or any other factor negating employment, whether the claimant was nonetheless obliged to do some minimum (or reasonable) amount of work personally?" - must be understood in this particular context, rather than as laying down a general requirement for an irreducible minimum of obligation for any worker's contract to exist, which would, of course, contradict the detailed reasoning and clearly expressed conclusion on that issue which had come before.

60. Ms Darwin relied upon **Community Dental Centres Ltd v Sultan-Darmon** [2010] IRLR 1024, a case where the ET held that a dentist engaged by the Respondent company was not an employee because, amongst other things, there was no mutuality of obligation (in the sense of an irreducible minimum of obligation) between the parties, but was a worker as he had an obligation under a contract to provide services personally. The EAT allowed the company's appeal. Silber J, giving the judgment of the EAT, said at [13] – [14]:

> "**Surprisingly the employment judge did not rely on the conclusions when later deciding if the claimant was a 'worker' but instead, when dealing with the issue of worker-status, the employment judge found that the claimant *had* entered into a contract whereby he undertook to do or perform personally work or services for the respondent. I agree with Mr Stafford that there is an obvious inconsistency between these two conclusions because either the first (but unchallenged) conclusion that the claimant was an 'employee' is wrong or the second conclusion that he was not a 'worker' is wrong.**
>
> **14. The crucial point is that the employment judge cannot simultaneously conclude in different parts of their decision first that there was and second that there was not an obligation to perform services personally. We are therefore driven to the conclusion that the failure of the employment tribunal to take into account these earlier findings (which are not disputed on this appeal) concerning the obligations entered into by the claimant amounts to an error of law**."
> **(**Emphasis in the original**)**

61. This passage undoubtedly supports Ms Darwin's central proposition. However, the weight that I find I can attach to it is limited since the authority cited in the judgment in support of counsel for the company's submission that mutuality was required for a worker's contract was [25] of Mr Recorder Underhill QC's decision in **Byrne Brothers**. The Claimant in this case was

not legally represented and it does not seem that the EAT had the benefit of seeing Langstaff J's **Cotswold** analysis of the earlier authorities, including **Byrne Brothers**; certainly, it is not referred to in the judgment. In these circumstances it seems to me, respectfully, that the EAT's approach likely stemmed from the same misunderstanding over [25] in **Byrne Brothers** that Langstaff J convincingly highlighted in **Cotswold**. Furthermore, as **Cotswold** is not discussed, this case does not suggest that Langstaff J's analysis of the earlier authorities was erroneous or identify a basis for departing from it.

62. Chronologically, the next case I was referred to is **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 99 ("**Quashie**"), where the Court of Appeal held that the ET had not erred in deciding that a lap dancer, who was paid by the customers and not by the company, was not an employee under a contract of employment. For present purposes, the principle point of note is that at [12] Elias LJ explained mutuality in the context of employment contracts as follows:

> "**In order for the contract to remain in force, it is necessary to show that there is at least what has been termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work engagements: see the judgment of Stephenson LJ in *Nethermere (St Neots) v Gardiner* [1984] IRLR 240, 245, approved by Lord Irvine of Lairg in *Carmichael v National Power plc* [2000] IRLR 43, 45. Where this occurs, these contracts are often referred to as 'global' or 'umbrella' contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee.**"

63. I will consider **Hospital Medical Group Ltd v Westwood** [2013] ICR 415 CA ("**Westwood**") in more detail when I turn to the client / customer exception. For now I will refer to two aspects. Firstly, at [10], Maurice Kay LJ (with whom the other members of the Court agreed) adopted the tripartite test for a worker under the section 230(b**) ERA** definition set out by Aikens LJ in **Autoclenz Ltd v Belcher** [2010] IRLR 70. Under this test, the three requirements are as follows: "First, the worker has to be an individual who has entered into or works under a contract with another party for work or services…The second requirement…is that

the individual undertakes to do or perform personally the work or services for the other party…The third requirement relates to the status of the other party to the contract. That other party must not, by virtue of the contract, have the status of a client or customer of any profession or business undertaking carried on by the individual who is to perform the work or services…" It will be appreciated that the first requirement is couched in different terms to the **Cotswold** formulation and thus is also in different terms to the Judge's self-direction (paragraphs 55 and 29 above, respectively). Ms Darwin accepted that this formulation did not include a requirement for an irreducible minimum of obligation used in the sense I have explained earlier; and that her case had to be that this formulation was wrong.

64. Secondly, **Westwood** concerned a GP who had entered into a contract with the Respondent company to undertake hair restoration surgery. The Court of Appeal upheld the ET's decision that he was a worker as he was engaged personally to carry out the work himself and the client / customer exception did not apply; but that he was not an "employee" as defined by section 230 **ERA** as "there was no mutual obligation that the respondent had to provide patients to be operated on, nor that the claimant necessarily had to undertake those arrangements. In short there was no mutuality of obligation" [3]. Whilst Ms Darwin correctly points out that the grounds of appeal were only concerned with the ET's findings in relation to the client / customer exception; I note that Maurice Kay LJ did consider the elements of the statutory test and there is no suggestion in his judgment that the findings of the ET were contradictory in concluding both that the Claimant was a worker and that there was insufficient mutuality for an employment contract.

65. **Windle v Secretary of State for Justice** [2016] IRLR 628 ("**Windle**") concerned claims for race discrimination brought under the **Equality Act 2010** ("**EA 2010**") by professional interpreters. The extended definition of an "employee" in section 83(2) of the Act, equivalent to

a "worker" (footnote 1, to paragraph 46 above) therefore applied. The ET determined that the Claimants did not satisfy this definition; its findings are summarised at [17]. Both Claimants worked for Her Majesty's Courts and Tribunal Service on a case-by-case basis and also undertook work as interpreters for other institutions. The Respondent was under no obligation to offer these Claimants work and they were under no obligation to accept work when it was offered. They were paid for work done and a contract was entered into on each occasion when they accepted a specific assignment. The ET held that there was no "umbrella contract" between the parties, because of the absence of any obligation on the Ministry of Justice to offer assignments or on the Claimants to accept them. Regarding the Claimants' status when undertaking individual assignments, the ET held that the absence of mutuality between assignments pointed away from them having section 83(2) employee status when they were engaged on assignments. The only issue before the Court of Appeal was whether this was a misdirection of law, as counsel for the Claimants argued. Underhill LJ (with whom the other members of the Court agreed) said as follows at [23]:

> "**I do not accept that submission. I accept of course that 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. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course, it will not always do so, nor did the ET so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it in limine runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances."**

66. Thus, the Court of Appeal accepted that an absence of an irreducible minimum of obligation outside of the contractual assignments was relevant (rather than decisive), in that it could, but would not always, indicate that the individual had such a degree of independence that they were not in a subordinate relationship of a kind that would satisfy the extended employee definition when assignments were undertaken. Accordingly, I do not accept Ms Darwin's

submission that **Windle** decided that an "irreducible minimum of obligation…is a prerequisite of the definition for extended employment status under the Equality Act 2010".

67. **Windle** was discussed by Lord Wilson (giving the judgment of the Court) in **Pimlico Plumbers Ltd v Smith** [2018] ICR 1511 SC ("**Pimlico Plumbers**"). The Supreme Court upheld the ET's decision that the Claimant was a worker within the meaning of section 230(3) **ERA**. Lord Wilson first addressed whether Mr Smith had undertaken to "perform personally" his work or services for Pimlico. He then turned to the client / customer exception. In this context he observed at [36]:

> "**In determining whether Pimlico should be regarded as a client or customer of Mr Smith, how relevant was it to discern the extent of Pimlico's contractual obligation to offer him work and the extent of his obligation to accept such work as it offered to him? The answer is not easy. Clearly the foundation of his claim to be a limb (b) worker was that he had bound himself contractually to perform work for Pimlico. No one has denied that, while he was working on assignments for Pimlico, he was doing so pursuant to a contractual obligation to Pimlico. Does that not suffice? Is it necessary, or even relevant, to ask whether Mr Smith's contract with Pimlico cast obligations on him during the periods between his work on its assignments?**

68. After referring to the fact that the ET had legitimately found that there was an umbrella contract between the parties, Lord Wilson indicated that it was "therefore unnecessary to consider the relevance to limb (b) status of a finding that contractual obligations subsisted only during assignments" [41]. He referred to Underhill LJ's judgment at [23] in **Windle**, describing it as "the leading authority in this respect" which "must await appraisal on another occasion". Whilst I appreciate that, like **Windle**, the specific point under discussion was whether the absence of an irreducible minimum of obligation *between* assignments impacted upon the applicability of the client / customer exception to the contractual assignments, nonetheless, it is noteworthy that there is no suggestion that mutuality used in this sense was an inherent requirement of a worker's contract.

69. The question of whether an irreducible minimum of obligation was required for worker status was also the subject of submissions in **Varnish v British Cycling Federation (trading as British Cycling)** [2021] ICR 44 EAT. However, in light of the ET's alternative finding that Ms Varnish was not a section 230(3)(b**) ERA** worker even if mutuality in this sense was not required, it was unnecessary for the EAT to resolve this issue. I note that in the course of discussing the authorities, Choudhury P. referred at [36] to the two senses in which mutuality had been used in the earlier judgments, citing Langstaff J's analysis in **Cotswold**. At [70] he observed: "this is not the case in which to attempt to give any definitive answer to the question whether mutuality of obligation, as that phrase has been applied in the case law relating to employees, applies also to limb (b) workers, save to say that it must at least apply in the sense of the minimum required to give rise to a contract".

70. Ms Darwin submits that whatever inconsistency or uncertainty there was in the authorities, the Supreme Court's recent decision in **Uber** has now established beyond doubt that an irreducible minimum of obligation is a prerequisite of worker status. As this submission is of fundamental importance to her case, I will return to it when I address Grounds 1 and 2. For now, I will refer to the relevant passages in Lord Leggatt's judgment, underlining particular parts of the text that I will make reference to subsequently.

71. The central question raised by the appeal was whether the ET had been entitled to find that drivers whose work was arranged through Uber's smartphone application worked for Uber under workers' contracts or whether they worked as independent contractors performing services under contracts made with their passengers through Uber as their booking agent. I have already set out Lord Leggatt's articulation of the threefold criteria required to satisfy the statutory test (paragraph 43 above). He went on to explain that the Court was concerned with the first of these requirements only ("a contract whereby an individual undertakes to perform work or services for

the other party"); personal performance and the non-applicability of the client / customer exception not being in dispute. The critical issue was described as being whether the Claimants were to be regarded as working under contracts with Uber London whereby, they undertook to perform services for Uber London or whether they performed services solely for and under contracts made with the passengers [42].

72. In the present appeal I am not concerned with any challenge to the Judge's finding that the written agreements represented the parties' true bargain. Accordingly, it is unnecessary for me to refer to [58] – [89] of Lord Leggatt's judgment, save to note, as Ms Darwin stresses, his emphasis upon applying the statutory wording when considering whether the statutory definition is satisfied, see for example [87].

73. From [90] onwards Lord Leggatt considered the status of the Claimant drivers. He said:

> "**The claimant drivers in the present case had in some respects a substantial measure of autonomy and independence. In particular, they were free to choose when, how much and where (within the territory covered by their private hire vehicle licence) to work. In these circumstances it is not suggested on their behalf that they performed their services under what is sometimes called an "umbrella" or "overarching" contract with Uber London - in other words, a contract whereby they undertook a continuing obligation to work. The contractual arrangements between drivers and Uber London did subsist over an extended period of time. But they did not bind drivers during periods when drivers were not working: rather, they established the terms on which drivers would work for Uber London on each occasion when they chose to log on to the Uber app.**
>
> **91. Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg *McMeechan v Secretary of State for Employment* [1997] ICR 549; *Cornwall County Council v Prater* [2006] EWCA Civ 102; [2006] ICR 731. As Elias J (President) said in *James v Redcats (Brands) Ltd* [2007] ICR 1006, para 84:**
>
> > **"Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work."**
>
> **I agree, subject only to the qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a**

> **degree of independence, or lack of subordination, in the relationship while at work which is incompatible with worker status: see … [*Windle*], para 23." (Emphasis added)**

74. At [93] Lord Leggatt determined that the findings of the ET justified its conclusion that, although free to chose when and where they worked, at the times when they were working, the drivers worked for and under contracts with Uber. He then set out a number of features that supported this conclusion, in particular those indicating the degree of control exercised by Uber, relative to the drivers, over the services provided to passengers. He went on to refer to a number of cases that Uber had placed reliance on. In this context I note that he considered **Mingeley v Pennock (t/a Amber Cars)** [2004] ICR 727 CA ("**Mingeley**"), in which the Claimant driver brought a claim under the **RRA** relying on the extended employee definition (see paragraph 46 above). Lord Leggatt noted that the Court of Appeal regarded it as fatal to the claim that he was "free to work or not to work at his own whim or fancy" and held that the absence of an obligation to work placed him beyond the reach of section 78. Rather than endorsing the correctness of this approach (as might be expected if Ms Darwin's submission is correct), Lord Leggatt said at [113]:

> "**It is not necessary for present purposes to express any view on whether the *Mingeley* case was correctly decided. I do not accept, however, that the fact that the claimant in that case was free to work as and when he chose was a sufficient reason for holding that, at times when he was working, he was not employed under a contract to do work for the firm. If that conclusion was justified on the facts of the *Mingeley* case, it would have to be on the basis that the claimant was not to be regarded as working for the minicab firm when transporting passengers…" (**Emphasis added**)**

75. Returning to the ET's decision, Lord Leggatt concluded:

> "**On the facts found in the present case, and in particular those which I have emphasised at paras 94-101 above, I think it clear that the employment tribunal was entitled to find that the claimant drivers were "workers" who worked for Uber London under "worker's contracts" within the meaning of the statutory definition. Indeed, that was, in my opinion, the only conclusion which the tribunal could reasonably have reached.**"

76. Having determined that the ET was correct to conclude that the Claimant drivers satisfied the statutory definition, from [121] onwards Lord Leggatt turned to consider the periods of time when the Claimants were "workers". He noted at [123] - 124] that the Claimants contended their workers' contracts came into an existence when the driver logged onto the Uber app; whereas

Uber contended if the Claimants were workers, they were only working under such a contract when they accepted a trip request. Ms Darwin places particular reliance on what was then said at [125] – [126]:

> "**125. Uber argues that it is clear from the tribunal's own findings that drivers when logged onto the Uber app are under no obligation to accept trips. They are free to ignore or decline trip requests as often as they like, subject only to the consequence that, if they repeatedly decline requests, they will be automatically logged off the Uber app and required to wait for ten minutes before they can log back on again. Furthermore, when logged onto the Uber app, drivers are at liberty to accept other work, including driving work offered through another digital platform… Counsel for Uber submitted that, on these facts, a finding that a driver who switches on the Uber app undertakes a contractual obligation to work for Uber London is not rationally sustainable. Nor can the fact that the driver is ready and willing to accept trips logically alter the position so as to give rise to such an obligation.**
>
> **126. The fact, however, that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract. What is necessary for such a finding is that there should be what has been described as "an irreducible minimum of obligation": see [*Nethermere*], approved by the House of Lords in *Carmichael v National Power plc* [1999] 1 WLR 2042, 2047. In other words, the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work."** (Emphasis added)

77. Ms Darwin also relies upon Lord Leggatt's analysis at [127] – [130] in which he concluded that the ET were entitled to find that by logging onto the Uber app, the Claimants came within the definition of a "worker" by entering into a contract with Uber London under which they undertook to perform driving services. At [129] Lord Leggatt said:

> "**Whilst the irreducible minimum of obligation on drivers to accept work was not precisely defined in the Services Agreement, the employment tribunal was entitled to conclude that it was in practice delineated by Uber's criteria for logging drivers off the Uber app if they failed to maintain a prescribed rate of acceptances. … It was open to the tribunal on the evidence, including Uber's internal documents, to find that this exclusion from access to the app was designed to operate coercively and that it was reasonably perceived by drivers, and was intended by Uber to be perceived, as a penalty for failing to comply with an obligation to accept a minimum amount of work."**

The client / customer exception: the authorities

78. The authorities relating to the **section 230(3)(b) ERA** client / customer exception were reviewed by Baroness Hale in **Bates van Winkelhof v Clyde & Co LLP** [2014] 1 WLR 2047 ("**Bates van Winkelhof**"). She cited the following passage from Langstaff J's judgment at [53] in **Cotswold**:

> "**a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls**."

79. Baroness Hale also referred to Elias J's discussion in **James v Redcats (Brands) Ltd** [2007] ICR 1006 at [50] where he agreed that the focus identified by Langstaff J would "often assist in providing the answer", but that the difficult cases were those where the putative worker did not market his services at all. She noted that he also accepted at [48]:

> "**in a general sense the degree of dependence is in large part what one is seeking to identify_ - if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached - but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."**

80. Baroness Hale then discussed **Westwood** (paragraphs 63 - 64 above). She explained the company argued that Dr Westwood was in business in his own account as a doctor, as he had three customers: the NHS for his services as a general practitioner, a clinic for whom he did transgender work and the company for whom he performed hair restoration surgery. The Court of Appeal considered that these were "three separate business, quite unrelated to one another" and upheld the ET's finding that he was a worker in relation to the company. Baroness Hale noted that in **Westwood** Maurice Kay LJ had pointed out at [18] that "neither the *Cotswold* "integration" test nor the *Redcats* "dominant purpose" test purported to lay down a test of general application. In his view they were wise 'to eschew a more prescriptive approach which would gloss the words of the statute'". She continued at [39]:

> "**I agree with Maurice Kay LJ that there is not 'a single key to unlock the words of the statute in every case'. There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of 'subordination' to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves."**

81. Turning in a little more detail to the Court of Appeal's reasoning in **Westwood,** after noting that the ET had found that Dr Westwood was in business on his own account, Maurice Kay LJ said at [11]:

> "**The next question is: what was that business? Mr Green submits that the claimant effectively had one business which he pursued through three activities - his practice as a general practitioner, his transgender work at the Albany Clinic and his work for HMG. I do not consider this to be correct. They were three distinct businesses or outlets for his professional skills, quite unrelated to each other. Our concern is with work done under the contract whereby the claimant undertook to do or perform work or services for HMG. In this, as in any other case, the starting point is the particular contract. Indeed, the status exception in limb (b) relates expressly to status 'by virtue of the contract'."**

82. After discussing the relevant authorities, Maurice Kay LJ referred to the EAT's analysis in the instant case. He said at [18]:

> **"…Judge Peter Clark reached his conclusion after consideration of *Cotswold* and *Redcats*. It is apparent from para 17 of his judgment that he placed particular reliance on *Cotswold*, observing that, under the contract, the claimant 'agreed to provide his services as a hair restoration surgeon exclusively' to HMG; that he did not offer that service to the world in general; and that he was recruited by HMG, 'to work for it as an integral part of its operations'. In my judgment, that was the correct approach in this case and it led to the correct conclusion that the claimant was indeed a limb (b) worker**....
>
> **19…HMG was not just another purchaser of the claimant's various medical skills. Separately from his general practice and his work at the Albany Clinic, he contracted specifically and exclusively to carry out hair restoration surgery on behalf HMG. In its marketing material, HMG referred to him as 'one of our surgeons'. Although he was not working for HMG pursuant to a contract of employment, he was clearly an integral part of its undertaking when providing services in respect of hair restoration, even though he was in business on his own account."**

Grounds 1 and 2

The parties' submissions

83. As I have indicated, the Respondent's central contention is that an irreducible minimum of obligation between the parties (used in the sense I have identified at paragraph 6 above) is a prerequisite for worker status under s.230(3)(b**) ERA** and that accordingly, the ET erred in law in directing itself that the contractual relationship which it had found to exist between the parties, but which lacked this form of mutuality, was sufficient (Ground 1). The Respondent submits that in circumstances where the Judge found that there was no contractual obligation on the Claimant

to perform any sittings at all, the statutory definition is not satisfied. In terms of the statutory wording, Ms Darwin emphasises it requires that "the individual *undertakes* to do or perform personally any work or services". She contends that although the earlier caselaw was not entirely consistent on this issue, in [126] of his judgment in **Uber,** Lord Leggatt determined beyond doubt that an irreducible minimum of obligation is essential to a worker's contract.

84. Ground 2 relies on the same central contention but focuses specifically on the Judge's conclusion in [J/242] that "there were legal obligations on each side sufficient to create the necessary contractual relationship in the context of worker status". Read with his identification of the statutory criteria at [J/218], Ms Darwin submits that he erred in accepting that any contractual agreement between the parties was sufficient, rather than one which contained an irreducible minimum of obligation.

85. Mr Somerville disagrees with this analysis of the statutory criteria. He submits that the Judge's finding of mutuality in the sense of contract between the parties regarding his services as a panel chair was sufficient to satisfy the first limb of the test and notes that there is no appeal against the Judge's conclusion in relation to personal performance. He accepts that he was not obliged to undertake sittings with the Respondent and says that this can be a relevant consideration in assessing whether the client / customer exception applies.

86. Mr Somerville also submits that when he arrived on the appointed day to undertake a sitting he was legally obliged to proceed with it (as opposed to there simply being an expectation that he would do so). He accepts the ET did not find this expressly, but he contends that it is implicit in the Judge's reasoning, in particular at [J/213] where he said: "But because the Claimant could withdraw without sanction after the conclusion of the agreement *and before the hearing*, I conclude that there was insufficient mutuality of obligation to give rise to an employment

relationship by reference to individual assignment contracts" (I have emphasised the phrase that Mr Somerville relies on.)

Discussion and conclusions

87. As Ms Darwin rightly observes, the starting point must be the statutory definition. Does the material wording of section 230(3)(b) **ERA** ("any other contract…whereby the individual undertakes to do or perform personally any work or services for another party to the contract…") require more than the existence of a contractual obligation concerning the provision of work or services which the putative worker undertakes to perform personally? If it does not, then it appears to me that the Judge's findings were sufficient to support his conclusion that the Claimant met this part of the statutory definition. (I consider the client / customer exception separately under Grounds 3 and 4, below.) On the Judge's unchallenged findings there was a contract between the parties at all material times and it related to the provision of Mr Somerville's services to the Respondent as a panel member chair [J/189 – 191]. Contrary to the suggestion raised in Ground 2, I do not read the Tribunal's judgment as suggesting that any kind of contract would suffice to meet the first aspect of this statutory definition. Plainly a contract, for example, to sell or otherwise supply goods would not suffice; and the Tribunal's reasoning does not suggest otherwise. The Judge's reference to the existence of a contract and to there being legal obligations on both sides (for example at [J/243]) must be seen in the context of the findings he had already made, including at [J/189 – 190] as to the nature of the overarching contract. Secondly, he found that the Claimant had "agreed to provide his services personally" [J/219] and that conclusion is not challenged in this appeal. Thirdly, it is plain that the Claimant did provide his services as a panel member chair for the Respondent in pursuance of the overarching agreement and that, on the Judge's unchallenged findings, each of these occasions was the subject of a specific contract between the parties, in relation to which the Respondent agreed to pay a fee in return for the Claimant agreeing to sit on a hearing [J/191].

88. In these circumstances, it is not immediately clear what a requirement for there to be an irreducible minimum of obligation (in the sense I have explained at paragraph 6 above) would add, in terms of showing that this part of the statutory definition was met. The position that arises in the instant appeal is distinct from one where the existence of an irreducible minimum of obligation is necessary in order to establish that a contractual relationship existed at the material time: see the passages from **Stephenson** and from **Quashie** that I have cited earlier (at paragraphs 50 and 62 above).

89. Furthermore, I have already referred to the way in which an absence of an irreducible minimum of obligation between individual contracts may be taken into account in deciding whether the client / customer exception is made out (paragraphs 65 - 68 above). I emphasise this because Ms Darwin's submissions might be taken to suggest there is only a binary question to be answered in terms of whether or not an irreducible minimum of obligation is a prerequisite for a worker's contract. However, if it is not a prerequisite, then the existence or absence of an irreducible minimum of obligation could nonetheless be relevant to whether the putative employer was a client or customer of a profession or business carried out by the individual. I note that the Respondent's grounds of appeal do not contend in the alternative that the Judge erred in the way that he approached the absence of an irreducible minimum of obligation when he came on to consider the client / customer exception in this case.

90. I bear in mind the emphasis that Ms Darwin places on the word "undertakes" in the section 230(3)(b) **ERA** definition, but, in itself, it does not seem to me to require more than I have referred to in paragraph 87 above, namely the existence of a contractual obligation concerning the provision of work or services which the putative worker undertakes to perform personally. In

this case, as the Judge said at [J/243]: "I have already concluded that the Claimant entered into a contract with the NMC whereby he undertook personally to perform work/services for it".

91. My review of the caselaw indicates that: (i) the equivalent of Ms Darwin's submission was considered in detail and rejected in terms by the EAT in **Cotswold** (paragraphs 47 - 59 above); (ii) the Court of Appeal's decision in **Westwood** appears to be inconsistent with her submission (paragraphs 63 – 64 above); and (iii) Underhill LJ's analysis in **Windle** and Lord Wilson's discussion in **Pimlico** (albeit addressing the slightly different question I have just referred to in paragraph 89) do not proceed from the starting point that an irreducible minimum of obligation is a necessary component of a worker's contract (paragraphs 65 - 68 above). On the other hand, I do not consider that the earlier authorities she relies upon can be accorded significant weight for the reasons that I have discussed earlier (see paragraphs 46 and 60 - 61).

92. I turn then to the Supreme Court's decision in **Uber**. I have considered carefully the passages that Ms Darwin relies upon. However, I have concluded that they do not bear the significance that she accords to them. My reasons are as follows:

a. If she is correct that in [126] Lord Leggatt was laying down a general test that for worker status to arise there must be an irreducible minimum of obligation, this proposition would not sit easily with the earlier passages in the learned Justice's judgment at [91] or at [113] (see paragraphs 73 - 74 above). As regards the latter, I have already discussed Lord Leggatt's observations concerning the Court of Appeal's reasoning in **Mingeley** at paragraph 74 above. As regards [91], Lord Leggatt says in terms that an absence of an obligation to provide services is not fatal to the existence of worker status in respect of periods when the individual is working for the putative employer. He goes on to cite with approval an aspect I have already discussed namely Underhill LJ's analysis in **Windle** as to the potential relevance to the applicability of

the client / customer exception of an absence of an irreducible minimum of obligation between assignments (paragraphs 65 – 68 above). Although Ms Darwin emphasised the other cases that were referred to by Lord Leggatt in [91], in particular **McMeechan v Secretary of State for Employment** [1997] ICR 549, I do not consider that this assists her submission. In **McMeechan** Waite LJ said in terms that contractual conditions excluding mutuality of obligation (in the irreducible minimum of obligation sense) were "irrelevant in this context", namely whether employment status existed in relation to an individual assignment. Further, that whilst it might be "crucial, even decisive" in establishing an umbrella employment contract, "when it comes to considering the terms of an individual, self-contained engagement the fact that the parties are not obliged in future to offer, or to accept, another engagement with the same, or a different, client must be neither here nor there" (565D);

b. The passage upon which the Respondent relies in [126] appears *after* Lord Leggatt has already decided that the ET was correct to find that the Claimant drivers were workers within the statutory definition (paragraph 75 above) and when he comes on to consider the periods of time during which the Claimants were workers[2]. The text in question addresses the Respondent's submission, summarised immediately beforehand at [125] (paragraph 76 above), that the drivers owed no contractual obligation to Uber simply by switching on the Uber app. Accordingly, in that particular context, the question of whether there was an obligation on the drivers to do some amount of work from the point when they switched on the app was directly germane to the question of their status and specifically whether there was a contract then in existence for them to provide their work or services to Uber. This is the point

[2] An issue which does not arise for my consideration in the present case (see paragraph 7 above).

that it appears to me Lord Leggatt was addressing at [126]. This is also consistent with the further passages Ms Darwin relied upon, particularly [129];

c. If in [126] Lord Leggatt was intending to lay down a general test that for worker status to exist there must be an irreducible minimum of obligation (as opposed to addressing the particular issue that he had identified at [125], relevant to that case) it would be expected that there would be a discussion of the earlier cases that have considered whether such an obligation is fundamental to worker status, not least because a review of those authorities indicates that the balance points in favour of the conclusion that it is not a prerequisite; and

d. It appears to me that Lord Leggatt's articulation of the first element of the tripartite criteria for establishing worker status at [41] ("a contract whereby an individual undertakes to perform work or services for another party"), refers to the need for there to be a contract between the individual and the putative employer for the provision of work or services; not to a requirement for an irreducible minimum of obligation (in the sense used in Ms Darwin's submissions). Whilst the wording is slightly different, the essence of this criteria does not depart from the first limb of the test endorsed by the Court of Appeal in **Westwood** (paragraph 63 above), which Ms Darwin frankly accepts is not consistent with her submission.

93. The Judge did not discuss in detail the question of whether an irreducible minimum of obligation was a prerequisite of worker status (though it is accepted that this was a plank of the Respondent's case below). However, the passages that I have already set out indicate that he proceeded on the basis that it was not a general precondition, whereas it could be relevant to the question of whether the client / customer exception applied: see [J/242] in particular (paragraph 40 above). This impression is also reinforced by the Judge's citation of Underhill LJ's analysis

in [23] of **Windle** at [J/179]. For the reasons that I have identified in this section of my judgment and in my earlier review of the caselaw, the Judge did not err in law in not concluding that his finding of an absence of an irreducible minimum of obligation was incompatible with the Claimant having worker status. Further, I consider that the findings which he did make afforded proper support for his conclusion that the first part of the statutory definition was satisfied (namely, that the Claimant had "entered into or…worked under…any other contract…whereby the individual undertakes to do or perform personally any work of services for another party to the contract").

94. Accordingly, I do not uphold the Respondent's Grounds 1 or 2.

95. I mention for completeness that I do not accept Mr Somerville's alternative contention that in any event the Judge made an implicit finding that an irreducible minimum of obligation existed in relation to each agreed occasion when he arrived to conduct a hearing. That appears to me to read too much into [J/123] and I note that Ms Darwin stresses that this was not how Mr Somerville argued his case below. However, for the reasons that I have just set out, I do not consider that the Tribunal needed to make such a finding in order to conclude that the Claimant was a worker in relation to the Respondent.

Grounds 3 and 4

The parties' submissions

96. I had already listed the five factors which the Respondent submits the Tribunal failed to take into account when considering the client / customer exception (Ground 3 at paragraph 9 above). Ms Darwin submits that the only proper and lawful inference that the Tribunal could have drawn in relation to each of these factors was that they supported the proposition that Mr Somerville was carrying on a business undertaking of which the Respondent was his client or

customer; and that accordingly, it was not open to the Judge to treat them as "neutral". She submits that evaluating them as "neutral" was equivalent to disregarding them. Ground 4 relates to [J/230], where it is submitted the Judge took into account irrelevant matters when considering whether or not the exception applied.

97. As regards Ground 3, Mr Somerville submits that the five factors identified by the Respondent were taken into account by the Judge and that the weight he accorded them, including deciding to assess certain matters as neutral, was for his assessment. He notes that no perversity challenge is raised and says that the Respondent is simply trying to re-argue this part of the case. In relation to Ground 4, he contends that the two matters identified by the Respondent were relevant and that in any event, even if they were not relevant (contrary to his primary submission), the Judge legitimately took into account a significant number of other factors which pointed against the Respondent being his client or customer.

Discussion and conclusions

Introductory observations

98. The Respondent accepts that determination of whether the client / customer exception applies entails a multi-factorial assessment, in which the degree of weight that is to be placed on a particular factor is a matter for the Tribunal's evaluation. It is also pertinent to recall that there is no one test of general application that must be applied when resolving this question, albeit consideration of whether the individual markets his or her services as an independent person (on the one hand) or whether they are recruited as an integral part of the putative employer's operations (on the other) is likely to assist in many instances (see paragraphs 78 – 80 above). Still less is there a checklist of factors that must always be treated by an ET as pointing significantly towards or away from the client / customer exception applying, whatever the overall circumstances.

99. As Lord Leggatt emphasised in the **Uber** case at [118], absent a misdirection of law, an ET's determination of whether or not a claimant is a worker can only be impugned by an appellate court if it is shown that the tribunal could not reasonably have reached the conclusion under appeal. Self-evidently, I am not hearing the case afresh and on this appeal, I am not deciding whether I would have concluded that the client / customer exception applied if I was the first instance judge.

100. In this case no complaint is made about the Judge's self-direction on the applicable legal principles: at [J/178] he cited [34] – [39] of Baroness Hale's judgment in **Bates van Winkelhof**, which in turn referred to **Cotswold** and to **James v Redcats** (paragraphs 78 - 80 above). Nor does Ms Darwin suggest his conclusion that the client / customer exception did not apply was perverse. With these important introductory observations, I turn to the five specific matters that it is said the Judge failed to take into account (Ground 3).

Ground 3

101. Ms Darwin's first point can be disposed of swiftly. The Judge said that the label used by the parties (in the written agreements which he had earlier found to represent their true bargain) was not "determinative of the question of the Claimant's status" (paragraph 39 above). This amply demonstrates that he had taken this feature into account. Ms Darwin accepts that he was right to say that it was not determinative; how much weight he then accorded it was a matter for his evaluation.

102. Secondly, the Respondent complains that in classing Mr Somerville's work as a barrister, arbitrator and mediator as a neutral indicator, the Judge failed to take this relevant portfolio of work into account.

103. The Judge considered this aspect to be neutral because, drawing an analogy with **Westwood** (paragraphs 81 - 82 above), he regarded the Claimant's work outside the area of acting as a regulatory panel member as constituting a different business: [J/223] (see paragraph 33 above).

104. The Tribunal heard the evidence about the Claimant's portfolio career. In my judgment, the Judge was entitled to evaluate it as he did, as distinct businesses for these purposes. As Maurice Kay LJ emphasised in **Westwood** at [11] (paragraph 81 above), the starting point is the particular contract; as the statutory test refers to the other party to the contract "whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual" (emphasis added). It is plain that the Judge did examine the Claimant's career and the range of roles that he undertook. I do not accept Ms Darwin's submission that considering the Claimant's work outside of his regulatory panel memberships, but assessing it as a neutral indicator for the particular reason that he gave, is to be equated with failing to take it into account at all.

105. Ms Darwin's third point is that the Judge failed to take into account or considered irrelevant the Claimant's similar work with other regulatory bodies, such as the MPTS. She submits that having multiple clients to whom a person non-exclusively provides similar services (here adjudicative and disciplinary panel work) is typical of an independent contractor. She also emphasises the distinction with **Westwood**, where the Court of Appeal considered it significant that the Claimant's services as a hair restoration surgeon were provided exclusively to the Respondent as part of the latter's business (paragraph 82 above) (as was also emphasised by the EAT in **Suhail v Barking Havering & Redbridge University Hospitals NHS Trust & Ors** UKEAT/0536/13/RN at [26] – [27]).

106. I have already set out the material part of the Judge's reasoning at [J/224 – 226] (paragraph 33 above). He accepted that there was a "strong similarity" between the work that the Claimant did for the NMC and the work that he did as a panel member for other regulators. However, he considered it was wrong to characterise the Claimant as "marketing his services" in a context where he was recruited to such bodies via structured selection exercises and he did not advertise his services or solicit opportunities via direct approaches.

107. Ms Darwin focused in particular upon the non-exclusivity of Mr Somerville's regulatory work for the Respondent. However, it is apparent from these passages that this was both acknowledged and taken into account by the Judge. His evaluation of this aspect must also be seen (as it was in **Westwood**) in the context of the factors that he legitimately identified as pointing towards the Claimant's integration into the Respondent's operation (see paragraphs 35 - 36 above); the majority of which are not challenged in this appeal and where they are, under Ground 4, I reject those contentions, as I explain below. The one aspect that gives me pause is the Judge's characterisation of the Claimant as not marketing his services, because he did not advertise or make direct approaches to clients. Given the range of professions, businesses and working relationships that will fall to be considered under the statutory test, too narrow a focus upon a concept of whether or not services are "marketed" in a conventional sense may prove to be unhelpful in some cases. It is clear from the Judge's findings that the Claimant made applications to and worked as a panel member for a number of regulatory bodies (paragraph 11 above), as such, on one tenable view, he was making approaches, offering these bodies his services as part of a business of providing services as a regulatory panel member.

108. However, I repeat that there is no contention on this appeal that the Judge's conclusion in this respect was perverse. Nor would it follow from the observations I have made in the previous paragraph that the Judge's conclusion was not one that it was open to him to draw. The ground

of appeal is that the Judge failed to take into account the Claimants' provision of services to other regulatory bodies; and in my view that is not made out in circumstances where he did consider this aspect, but came to the assessment I have described.

109. Ms Darwin rightly accepts that workers are a subset of those who are self-employed. Accordingly, the Judge was plainly entitled to regard Mr Somerville's tax and business expenses arrangements as a neutral factor (see paragraph 37 above). In support of this fourth complaint, Ms Darwin relied upon **Bacia v Muir** [2006] IRLR 35 EAT, specifically the non-exhaustive list of factors bearing on an assessment of whether the client / customer exception applies set out at [16], which included reference to "having business accounts prepared and submitted to the Inland Revenue". However, I do not consider that the EAT was laying down a rule of law that the presence of this feature should always be treated as pointing towards the exception applying. Furthermore, the case (in which both parties appeared in person) proceeded on the basis that "…it is evident that the statutory definition of 'worker' will normally exclude those who are self-employed". In fact, as Baroness Hale explained at [24] – [25] in **Bates van Winkelhof**, the law draws a distinction between those employed under a contract of service and the self-employed; and then *within the latter class* between those "who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them" and "self-employed people who provide their services as part of a profession or business undertaking carried on by someone else".

110. Finally, the Respondent submits that the Tribunal erred in failing to have regard to the Claimant's own descriptions of his business in his tax returns. I reject that complaint. Again the Judge did not ignore this feature; he specifically referred to it at [J/236] (see paragraph 37 above). He was entitled to evaluate this as a neutral indicator in the circumstances he identified, namely that these were "little more than short-hand for his various activities, which I have already found

cut across a range of quite different professional activities". I also note that Mr Somerville was cross-examined at the hearing on this aspect (amongst others); the Judge was well-placed to assess this and entitled to attach such weight to it as he saw fit.

111. Accordingly, for the reasons that I have identified, I do not uphold the Respondent's Ground 3, albeit I have expressed some reservations about the way the Tribunal approached the question of whether the Claimant marketed his services.

Ground 4

112. The Respondent submits that the Judge took into account two irrelevant considerations: (i) the importance of the work of its FTP panels; and (2) the fact that convening such panels enabled the Respondent to discharge its statutory functions.

113. These two points were closely interlinked, and the ground of appeal stems from one sentence of the Judge's reasoning at [J/230] (see paragraph 35 above). Ms Darwin suggests that it indicates a misunderstanding of [18] – [19] in **Westwood** (paragraph 82 above), in that Maurice Kay LJ was there focused on the exclusive nature of Dr Westwood's work for the company and the degree to which he was a part of their operation, not how important (or otherwise) his services were to the company.

114. However, I do not read [J/230] as involving any such misunderstanding or indeed any error of law. I can see no difficulty with the Judge noting how dependant the Respondent was on the services of its panel members in discharging its principal functions. I accept that in general it is unlikely to be a point of central importance; as Ms Darwin points out, key operational tasks may be undertaken for a particular entity by genuinely independent contractors. Nonetheless, I do not consider it was wholly irrelevant and it is plain, in context, that it was simply one of a number of features that the Judge took into account when explaining the degree of the Claimant's

integration in the Respondent's organisation. He went on to refer to the mandatory training provided by the Respondent; the requirement to do duty work if a hearing went short; the Respondent's procedures for dealing with performance and conduct concerns, which indicated an element of subordination; and the fact that the Respondent set the level of fees, over which the Claimant had no control (paragraphs 35 – 36 above). It does not appear to have been a feature that loomed large in the Tribunal's reasoning; it was not one of the factors mentioned by the Judge in his overall summary at [J/243].

115. Alternatively, even if I am incorrect in accepting that the features identified in Ground 4 were relevant; any error by the Judge in that regard was not a material one, given the extent of the other factors that he legitimately weighed in his assessment as pointing in the direction of the Respondent not being a client or customer of the Claimant.

116. In the circumstances Ground 4 fails.

Outcome

117. I am very grateful for the helpful submissions I received. For the reasons set out above, the appeal is dismissed.