Neutral Citation Number: [2023] EAT 138

Case No: EA-2021-000905-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 November 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

ANGLIAN WINDOWS LTD T/A ANGLIAN HOME IMPROVEMENTS

Appellant

- and –

MR ALLISTER WEBB

Respondent

- -
- -

Mr David Reade KC (instructed by Paladin-Knight Ltd) for the **Appellant**
Mr Darshan Patel (instructed by Lewis Silkin LLP) for the **Respondent**

Hearing date:10 October 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 3 November 2023

SUMMARY

Unfair dismissal – employment status – section 230 **Employment Rights Act 1996 -** application to strike out claim brought by partner

The claimant and his wife operated as a two-person partnership. Through that partnership, the claimant provided services to the respondent as an Area Sales Leader, for which payment was also made through the partnership. Upon the claimant's subsequent complaint of unfair dismissal, the respondent applied for his claim to be struck out as having no reasonable prospect of success. The ET refused the application, on the basis that the fact of these arrangements (which involved a genuine partnership and were not suggested to be a sham) did not preclude the possibility of the claimant being able to establish employee status. In reaching this conclusion, the ET sought to distinguish the EAT's decision in **Firthglow Ltd v Descombes and anor** UKEAT/0916/03. The respondent appealed.

Held: allowing the appeal

The ET had erred in seeking to draw a distinction between this case and **Descombes**, where it had been held that, where the relevant work was being undertaken under an agreement with a partnership, that precluded the possibility of one of the individual partners being able to claim he was an employee. The ET ought to have followed **Descombes**. Although it was open to the EAT not to follow a previous decision at this level, none of the circumstances that might warrant adopting this course applied (**British Gas Trading v Lock** [2016] ICR 503 EAT followed). Moreover, the agreed facts, confirmed by the ET's own findings, meant that the possibility of the existence of a contract of employment between the claimant and the respondent was precluded in the circumstances of this case. That being so, the claimant's claim of unfair dismissal could have no reasonable prospect of success and the ET ought to have allowed the respondent's strike out application.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. The issue raised by this appeal is whether the existence of a pre-existing partnership, through which services are then provided to another party by one of the partners, and for which payment is made to the partnership, precludes the possibility that the partner in question is an employee, as defined by section 230(1) **Employment Rights Act 1996** ("ERA")?

2. In giving this judgment, I refer to the parties as the claimant and respondent as below. This is the full hearing of the respondent's appeal against a judgment of the London South Employment Tribunal (Employment Judge Khalil sitting alone on 23 June 2021; "the ET"), sent out to the parties on 29 June 2021, by which the respondent's application to strike out the claimant's claim was dismissed. In his claim before the ET, the claimant complains that he was unfairly dismissed; it is the respondent's contention that he cannot pursue such a claim as he worked not as an employee but in partnership with his wife. The ET, however, refused the respondent's application to strike out the claim and the respondent now appeals against that decision. The appeal is resisted by the claimant. Representation on the appeal is as it was before the ET.

The ET Proceedings and Relevant Findings of Fact

3. On 11 September 2019 the claimant presented a claim for unfair dismissal. For its part, the respondent denied that the claimant was an employee and raised this as a point going to the ET's jurisdiction to hear the claim. Following disclosure, and its appreciation that the claimant had in fact provided his services through a partnership which he had previously established with his wife, the respondent applied for the claim to be struck out under rule 37(1)(a) **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (the "**ET Rules**").

4. At the hearing on 23 June 2021, although the parties had been prepared to address the broader issue as to whether the claimant was an employee for the purposes of section 230(1) **ERA**, the ET

considered that a discrete preliminary point arose, which (with the agreement of the parties) it identified as follows:

> "(6) …
> Does the existence of a pre-existing partnership, in which the claimant was a partner and through which activities were provided to the respondent and paid for through the partnership, preclude the possibility of the existence of a contract of employment between the claimant and respondent?"

5. In respect of this issue, the evidence before the ET was essentially agreed; the respondent having no questions for the claimant, his statement was taken as read.

6. By way of background, the respondent is a national company, which manufactures, retails and installs various home improvement products including windows, doors and conservatories. The claimant was engaged by the respondent as an Area Sales Leader ("ASL") pursuant to an ASL contract dated 3 March 2015; it was common ground between the parties that this was the contract relevant to the claimant's engagement in this regard (ET paragraph (11)). On 6 March 2019 the respondent terminated the claimant's engagement.

7. By clause 3.1 of the ASL contract, it was provided that:

> "The ASL is and shall at all times remain either a self-employed sole trader, a limited company or a partnership. The ASL shall not describe or hold him/her/itself out to be an employee or officer of Anglian or to have the authority to bind Anglian in any way."

8. The ASL contract did not specify the capacity in which the claimant was acting, still less did it state that he was contracting with the respondent through a partnership. It was, however, agreed before the ET that in fact the claimant was in a partnership with his wife, trading as Webb Consultants. This was a partnership that had been established before the claimant joined the respondent, and he continued this arrangement when he entered into the ASL contract. The ET referred to the claimant's evidence in this respect, where he explained (at paragraph 40 of his witness statement):

> "… I was in a partnership before I joined Anglian and it suited me to stay as a partnership while I was a rep and then an ASL for Anglian. I say suited only because I was advised by my accountant and there was no option to be PAYE. …"

9. In identifying the question it had to answer (at paragraph (6) of the ET decision; paragraph 4 above), the ET explained the basis on which it understood the claimant's services to have been provided to the respondent; that is, that the relevant activities were provided through the partnership and, in return, were paid for through the partnership. The ET further recorded that the partnership filed tax and VAT returns and the claimant and his wife took drawings as partners from the profits of the partnership. Indeed, the VAT registration number for the partnership had been provided by the claimant on the ASL contract and the claimant's disclosure confirmed that all the fees charged to the respondent for his services had been declared to HM Revenue and Customs ("HMRC") by the partnership, with deductions of partnership expenses. More generally, there was no suggestion that this was other than a genuine partnership under the **Partnership Act 1890** ("PA 1890") or that it was a sham arrangement.

10. For its part, other than the provision made at clause 3.1 of the ASL contract, the respondent had not concerned itself with the capacity through which the claimant's services were being provided (whether as a sole trader, or through a company or partnership), and it had not known about the Webb Consultants partnership until the disclosure process in the proceedings before the ET.

The ET's Decision and Reasoning

11. Answering the question it had initially posed at paragraph (6) of its decision, the ET concluded that:

> "(32) … the pre-existing partnership, in which the claimant was a partner, and through which activities were provided to the respondent and paid for through the partnership did not preclude the possibility of the existence of a contract of employment between the claimant and respondent. The Tribunal rejected the proposition that the claimant, as an individual within a partnership, could never establish employee status with a third party for whom activities or services were provided."

12. Explaining its reasoning, the ET noted that it was common ground that a traditional partnership was not, unlike a limited liability partnership, a separate legal body, and was not generally recognised as an entity distinct from the partners composing it (paragraph 3-05 *Lindley and Banks on*

Partnership (21st edn)).

13. Although the respondent had placed reliance on the decision of the EAT in **Firthglow Ltd v Descombes and anor** UKEAT/0916/03, the ET did not consider that precluded the possibility that the claimant in the present proceedings had been an employee. In this regard, it noted that, the conclusion at paragraph 24 **Descombes** had explicitly referred "*to a partnership firm and that a two-man partnership could not be an employee*"; it had not referred "*to an individual within a partnership*", and although the EAT had gone on to say that it had been wrong to say that "*each applicant was employed under a contract of employment*", the ET considered that did not "*rule out the possibility of any individual within the partnership from being able to mount a claim to employee status*" (ET paragraph (34)).

14. Moreover, the claims in **Descombes** had been brought by two individuals in a partnership, which had been engaged by Firthglow to undertake the required work; that was materially different from the present case, where only one of the partners was providing work (the claimant's wife essentially being an unknown, dormant partner), where the respondent had not known it was contracting with a partnership, and in circumstances in which the respondent had only stated that some 25% of its ASLs preferred to trade as non-employees (without providing information as to the type of arrangement this referred to) (ET paragraph (35)).

15. The ET further considered there was "*some force*" in the observation made by Sedley LJ at paragraph 75 **Protectacoat Firthglow Ltd v Szilagyi** [2009] EWCA Civ 9, where he had said he would wish to keep open the question "*whether the genuineness of the partnership agreement matters … "* (and see further below); that, the ET concluded, left open "*the possibility of an argument that an individual in a pre-existing partnership could still be engaged, in law, under a contract of employment*" (ET paragraph (36)).

16. The ET additionally considered there was support from decisions of the First-tier Tax Tribunal

("FtT"), in the cases of **Green v The Commissioner for HMRC** TC/2017/07500 and **Puttnam v The Commissioner for HMRC** TC/2017/01809, for concluding that what was precluded was an assertion of employee status by a partnership (rather than an individual partner) (ET paragraphs (37)-(38)). That, the ET opined, was also the point made in *Lindley and Banks*, where it was stated that "*a partnership cannot itself be an employee*" (ET paragraph (39)). The ET concluded that:

> "(40) There are many partnerships of many sizes, some very substantial and the effect of the case law appears to be that a partnership – and all of its members – cannot as a composite, be employed under a contract of employment. That is consistent with an LLP and a Limited company. Although a partnership is not a separate entity, claims are still issued by and pursued against the partnership/firm not by or against a list of partners. That is very much on the commercial view of a partnership. However, at the same time, it is the legal view of a partnership as comprising of individual partners which provides at least the possibility of an individual contract of employment with a third party."

17. The ET considered that further weight was given to that conclusion by the finding of the EAT in **Catamaran Cruisers Ltd v Williams** [1994] IRLR 386, where it was held that there was:

> "13. … no rule of law that the importation of a limited company into a relationship such as existed in this case prevents the continuation of a contract of employment"

By analogy, the ET concluded that it was possible that an individual in a partnership could establish employee status with a third party:

> "(42) … because it is about the possibility of seeking out the true or real position in relation to that individual."

18. The ET thus dismissed the respondent's application to strike out, albeit acknowledging that jurisdictional issues still arose for determination on outstanding issues of employee status and illegality.

The Grounds of Appeal

19. Having initially been viewed as identifying no reasonably arguable question of law, after a hearing under rule 3(10) **EAT Rules 1993**, before His Honour Judge Auerbach, this matter was permitted to proceed on the following three grounds of appeal:

(1) The ET erred in law in failing to direct itself that the effect of the claimant having contracted for and on behalf of the partnership with his wife, which traded as Webb Consultants, was that the material contract with the respondent, was a contract entered into by each member of the partnership. That is the effect of sections 5 and 6 of the **PA 1890**.

(2) Having found, it not being in dispute, that the partnership was a genuine pre-existing partnership and not a sham (paragraph 16) the ET erred in law in that it failed to conclude that it was bound by the decision of the EAT **Firthglow Ltd v Descombes** [2004] UKEAT/0916/03, and thus to find that if the material contract had been entered by a genuine partnership, that excluded the existence of an employment relationship between any of the partners and the putative employer.

(3) In so far as the ET purported to distinguish the case of **Descombes**, it did so erroneously, in that it failed to understand the underlying legal reasoning of the EAT in that case: namely that the contract with the partnership meant that the contract, to which each of the partners was then a party, could not simultaneously be an individual contract of personal service so as to be a contract of employment within section 230 **ERA**.

20. The claimant resists the appeal, relying on the reasons provided by the ET.

The Legal Principles

21. There is no dispute that the right to bring a claim of unfair dismissal under section 94 **ERA** requires the claimant to have been an employee, as that term is defined by section 230:

> "(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) "a contract of employment" means a contract of service or apprenticeship whether express or implied, and (if it is express) whether oral or in writing."

22. In determining whether a claimant is able to pursue a claim of unfair dismissal, therefore, the ET's task is one of statutory, rather than contractual, interpretation; although there must be a contract

of employment, the right in issue is not created by contract but derives from legislation. In carrying out that task, the ET must have regard to the purpose of the provision in issue, asking whether that provision, construed purposively, was intended to apply to the circumstances of the case before it, viewed realistically (see the observations of Lord Leggatt at paragraphs 69-70, **Uber BV and ors v Aslam and ors** [2021] UKSC 5).

23. In the employment context, it has long been recognised that in establishing whether there is a contract of employment, and thus that a claimant is an employee, the ET must apply a multi-factorial test (see **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] QB 497, QBD), albeit that mutuality of obligation and right of control have been identified as necessary pre-conditions to the existence of such a contract. As Peter Jackson LJ concluded (having reviewed the approaches laid down in **Ready Mixed Concrete** and in the case of **Hall v Lorimer** [1992] ICR 739 EAT), in the context of the tax case **Revenue and Customs Commissioners v Atholl House Productions Ltd** [2022] EWCA Civ 501:

> "122. … Both approaches recognise mutuality of obligation and the right of control as necessary pre-conditions to a finding that a contract is one of employment. Once those necessary, but not necessarily sufficient, conditions are satisfied, both approaches require the identification and overall assessment of all the relevant factors present in the particular case. In other words, they are both multi-factorial in their approach. …"

24. In the **Atholl House** case, Peter Jackson LJ further considered whether there must be any limit on the factors that might thus be taken into account, answering this question by reference to "*first principles*":

> "123. … The relationship of employment is created by the employer and employee through the contract made by them. The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could be reasonably be supposed to be known, to both parties. Those circumstances are the same as those comprising the factual matrix admissible for the interpretation of contracts: the "facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to the parties" (*Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at [21]).

> 124. If the person providing the services is known to carry on a business, profession or vocation on their own account as a self-employed person, it would in my judgment be myopic to ignore it, when considering whether or not the parties intended to create a relationship of employment. In many of the cases, it has been taken into account for that purpose. The weight to be attached to it is a matter for the decision-making court or tribunal. …"

25. That approach, in my judgement, is consistent with the emphasis in cases such as **Autoclenz v Belcher** [2011] ICR 1157 and **Uber** on the need to focus on the reality of the situation, recognising that the inequality of bargaining power in the employment context may require a court or tribunal to look "*beyond the terms of any written agreement to the parties' 'true agreement'*" (per Lord Leggatt paragraph 78 **Uber**). As the EAT observed in **Ter-Berg v Simply Smile Manor House Ltd and others** [2023] EAT 2, that does not mean that in every employment case the written agreement between the parties will be irrelevant, rather (per HHJ Auerbach in **Ter-Berg**):

> "41. … in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether those terms do truly reflect their agreement, and to do so applying the broad doctrinal approach which **Autoclenz** describes, rather than the stricter approach that conventional contractual principles would normally allow. It would therefore be wrong in such a case for the tribunal simply to regard those written terms as conclusive, and thereby fail to conduct that exercise at all. But it would also be wrong for the tribunal to regard the written terms as having a primacy in the sense of exerting a constraint on what the tribunal may find as a result of that exercise were in fact the terms that the parties truly intended to agree."

26. Recognising that there may be a need to look beyond the written documentation or labels used by the parties, in **Catamaran Cruisers Ltd v Williams and ors** [1994] IRLR 386, the EAT (Tudor Evans J presiding) held that it need not be fatal to the finding of a contract of employment for the claimant's services to have been provided through a limited company. In that case, Mr Williams had established a company, through which he was then paid, at the suggestion of Catamaran Cruisers (after the Inland Revenue had advised that the earlier arrangements under which he had worked were considered to give rise to a contract of employment). Overturning the ET's decision on this point, the EAT concluded:

> "13. There is no rule of law that the importation of a limited company into a relationship such as existed in this case prevents the continuation of a contract of employment. If the true relationship is that of employer and employee, it cannot be changed by putting a different label upon it. In *Massey v Crown Life Insurance Co* [1978] IRLR 31, Lord Denning MR observed at p.33, 13:
>
> > 'The law, as I see it, is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it.'
>
> 14. In our view, it is a question of fact in every case whether or not the contract in question is one of service or a contract for services. We accept that the formation of a company may be strong evidence of a change of status but that the fact has to be evaluated in the context of all the other facts as found.
> …
> 18. It is clear from the findings of fact that, save for the gross payments made to Mr Williams and described as a fee, there was no factual change whatsoever in the terms of Mr Williams's employment. It was, in our view, right for the Tribunal in these circumstances to find that Mr Williams worked for the appellants under a contract of service. "

27. In **Firthglow Ltd t/a Protectacoat v (1) Descombes (2) Lamont** [2004] UKEAT/0916/03 (Rimer J (as he then was) presiding), however, the EAT held that where the relationship was governed by an agreement between Firthglow on the one hand and a two-man partnership on the other, it would not have been open to the ET to find that each of the two partners was nevertheless separately employed by Firthglow under a contract of employment. In that case, Firthglow had created a scheme of requiring those who wished to work for it to form small teams, and enter into a partnership agreement between themselves, providing their services through that partnership. The documentation for the partnership agreement was produced by Firthglow but was nevertheless found by the ET to be genuine. In those circumstances, the EAT held:

> "24. … it was not open … to [the tribunal] to find that each applicant was nevertheless separately employed by Firthglow under a contract of employment. The tribunal could only find … that the relevant work was being done under the engagement agreement by which Firthglow retained the services of the partnership firm. "

28. The arrangements operated by Firthglow were the subject of further litigation in the ET, and then before the EAT and the Court of Appeal, in **Protectacoat Firthglow Ltd v Szilagyi** [2009] EWCA Civ 98. In that case, however, the ET found that the written documents were a sham and did not represent the true nature of the relationship between the parties; in truth, Mr Szilagyi had been an

employee of Firthglow. That decision was upheld by both the EAT and the Court of Appeal. The ET's finding of a sham meant that Mr Szilagyi's case was distinguishable from that of Mr Descombes, and the Court of Appeal did not need to grapple with the potential significance of a contrary finding. Both Smith LJ and Sedley LJ nevertheless went on to make *obiter* observations on this point, as follows:

> *Per* Smith LJ:
> "35. … The EAT had said … [i]f the men were in partnership they could not be employees. Speaking for myself, I would have thought that was right and that if there is a genuine partnership which contracts with a company, the members of the partnership could not be employees. …" (per Smith LJ)
>
> *Per* Sedley LJ:
>
> "73. …, it seems to me that, in the field of employment at least, it is more helpful and relevant, … to ask in a case like this not whether the written agreement is a sham but simply what the true legal relationship is. Although there will be in many cases (as there was in this one) an intention to conceal or misrepresent the actual relationship, there is no logical reason why this should be a universal requirement. The courts not uncommonly have to decide whether the entirety of a contractual relationship is constituted or evidenced by a document which one party says is definitive, without any need to decide whether that party has studied to deceive or is simply mistaken. I would wish to keep this question open for other cases in which the facts found are not as sharp as those found here.
> 74. The other question I would wish to keep open is whether the genuineness of the partnership agreement matters. Here it has been found, tenably, to have been a mere device to give colour to the purported contract for services and so to be part of a sham. But I have some difficulty in seeing why it should have made a difference if, for example, Mr Szilagyi and his mate had chosen to form a partnership before being taken on by Protectacoat. Protectacoat would still, in law, have been taking on two men, not a corporate entity, on terms and in circumstances which amounted, for exactly the same reasons as we have upheld in relation to Mr Szilagyi, to contracts of employment. The fact that in the present case the partnership was an instrument devised by Protectacoat for its own purposes, while it does nothing to help Protectacoat, does not seem to me to be a necessary element of Mr Szilagyi's case."

29. In recent decisions of the EAT, albeit focusing on the definition of "*worker*" rather than "*employee*", it has been emphasised that a structured approach is to be adopted to questions of employment status, with the starting point, and constant focus, being on the words of the statute; see **Sejpal v Rodericks Dental Ltd** [2022] EAT 91, **Catt v English Table Tennis Association Ltd and ors** [2022] EAT 125, **Plastic Omnium Automotive Ltd v Horton** [2023] EAT 85. In the present case, the respondent contends that this task needs to be undertaken having in mind the relevant

provisions of the **PA 1890**, in particular sections 5 and 6, which provide as follows:

> "5. Power of partner to bind the firm.
> Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."
>
> "6. Partners bound by acts on behalf of firm.
> An act or instrument relating to the business of the firm done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners."

The Submissions of the Parties

The Respondent's Case

30. It is the respondent's case that an individual partner contracting for and on behalf of a partnership acts as an agent of the firm and the other partner(s); section 5 **PA 1890**. In this case, the ASL contract was thus between the respondent and the partnership. A partnership cannot be an employee, and a contract with a partnership cannot be a contract of employment: per Rimer J, paragraphs 24 and 28 **Descombes**, a decision by which the ET was bound in the present case.

31. More specifically, on the agreed facts, the claimant's entry into the ASL contract was *"for the purpose of the business of the partnership"* and was an *"act for the carrying on in the usual way business of the kind carried on by the firm"*. That was also clear from the evidence: the claimant provided the partnership's VAT registration number on the face of the contract; the partnership charged VAT on the services provided to the respondent throughout the period of the contract; the claimant and his wife's tax returns showed that they took drawings as partners from the profits of the partnership. Under section 5 **PA 1890**, it must follow that the claimant entered into the ASL contract as *"agent of the firm and his other partners"* and the ASL contract was thus a contract between the respondent and each member of the partnership.

32. Moreover, the ET was bound by the EAT decision in **Descombes**, and it was wrong to try to distinguish that decision when addressing the present case. It was not relevant that the EAT in **Descombes** had referred to "*a partnership firm*" and "*a two-man partnership*"; once it was accepted that the claimant contracted as agent of the partnership and each of the partners, so the contract was between the respondent and the partnership, there was no material distinction between the cases and, as the EAT had held, it was not open to an ET to find a claimant in that position was nevertheless separately employed under a contract of employment; the only permissible finding was that the relevant work was being done under a contract with the partnership.

33. The EAT should also follow **Descombes**, where none of the possible bases justifying departure from an earlier EAT decision applied (**British Gas Trading v Lock** [2016] ICR 503). In any event, the decision was clearly right in principle. First, section 230(1) **ERA** defined an employee as *"an individual who has entered into or works under (or … worked under) a contract of employment"*, but a contract with a partnership is not with *"an individual"*: it is a contract with at least two partners. Second, a contract with a partnership is not for personal service, but with each of the partners such that the contractual obligations are not personal to any one partner (whether or not they are in fact performed by one partner). This view was supported by the *obiter* observations of Smith LJ in **Szilagyi**.

34. The ET had also erred in purporting to distinguish **Descombes** on the bases that (i) the respondent did not know it was contracting with a partnership, (ii) the claimant's wife did not do any work for the respondent, or (iii) only 25% of the respondent's ASLs preferred to trade as non-employees. First, the respondent's knowledge that the claimant was contracting on behalf of the partnership, was irrelevant: section 5 **PA 1890** applies whether or not the relevant third party is aware of the partnership; knowledge would only be relevant where the partner *"in fact has no authority"* (see **Bank of Scotland v Henry Butcher** [2003] 2 All ER (Comm) 557 *per* Chadwick LJ at paragraph 88, as cited in *Lindley and Banks* at paragraph 12-04); the claimant did not argue that he entered into

the ASL contract without authority. This was, moreover, consistent with the general law of agency: where an agent contracts on behalf of an undisclosed principal, the principal will be a party to the contract*: Bowstead and Reynolds on Agency* (22nd edn) at paragraph 8-068. Second, it was irrelevant whether or not the claimant's wife performed any work for the respondent (on which there was no evidence either way; although there was evidence that she shared in the partnership profits from income from the respondent): the ASL contract was an agreement between the respondent and each of the partners, whether only some, or all, of the partners performed obligations under the contract. Thirdly, the ET had misinterpreted the respondent's ET3, which had referred to *"approximately 25% of all of the Respondent's ASLs"* operating through *"partnerships or limited liability companies"*, with the other 75% operating as sole-traders.

35. Equally, the ET had been wrong to conclude that the decisions in **Green v HMRC** and **Puttnam v HMRC** supported its conclusion. In those cases, the FtT had held that a partnership cannot be employed and that *"[i]t is well established that an employment requires personal service and so cannot be undertaken in partnership"* (**Green** at paragraph 92; **Puttnam** at paragraph 72). Further, to the extent that the ET suggested there might be a separate contract of employment (see paragraph (32)), the only evidence was of the ASL contract between the respondent and the partnership and it was unnecessary to imply any additional contract of employment: the claimant's performance of services for the respondent was explained by, and pursuant to, the ASL contract (**Tilson v Alstom Transport** [2010] EWCA Civ 1308).

36. The ET had also erred in considering the *obiter* observations of Sedley LJ in **Szilagyi** supported the claimant's case. Those observations merely allowed for the possibility that it might have been found that Mr Szilagyi and his partner had not, in reality, contracted on behalf of their partnership when entering into the services agreement. On this analysis, there would be contracts of employment with all the partners and the (genuine) partnership would be entirely separate and unrelated to the performance of services for the respondent. That, however, was not the present case.

Similarly, the ET had been wrong to rely on the EAT decision in **Catamaran Cruisers v Williams** [1994] IRLR 386, which had involved the importation of a limited company into a pre-existing employment relationship. That, again, was plainly distinguishable.

37. Finally, the ET appeared to have applied the wrong test for strike out, by asking whether there was a *"possibility"* that the claimant's legal argument might succeed. Rule 37(1)(a) **ET Rules** grants the ET the power to strike out all or part of a claim on the grounds *"that it… has no reasonable prospect of success"*. Generally, the test to be applied was whether the claim has a *"realistic as opposed to a merely fanciful prospect of success"*: **Eszias v North Glamorgan NHS Trust** [2007] EWCA Civ 330 per Maurice Kay LJ at paragraph 26. Where, however, an ET has all the evidence necessary to resolve the issue before it, it should do so (see **RMC v Chief Constable of Hampshire** EAT 0184/16 at paragraph 34; **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 at paragraph 77); the test for strike out under the **ET Rules** reflected that for summary judgment under the **Civil Procedure Rules** and it was well-established, in that context, that the court should *"grasp the nettle and decide"* a short point of law or construction if satisfied it had all the evidence necessary for a proper determination of the question and that the parties have had an adequate opportunity to address it in argument (**Easyair Ltd v Opal Telecom Ltd** [2009] EWHC 339 (Ch) per Lewison J at para 15 (vii)).

The Claimant's Case

38. The claimant accepts that the ET, having considered the provisions of the **PA 1890**, concluded that the respondent's contract was with the Webb Consultants partnership. That, however, did not necessarily mean that the claimant could not be an employee. Section 230(1) **ERA** required that the contract be with an individual but a partner acts in a dual capacity, as both principal and agent; accepting a liability both as an individual and on behalf of the partnership. In this instance that gave rise to the question whether this individual (the claimant) was contracting as an employee or otherwise: in answering this question, the ET's focus had to be on the reality of the circumstances,

on what was being done by the individual; section 5 of the **PA 1890** did not provide the answer. A partnership was not a legal entity and the claimant was still an individual even if he was contracting with the respondent as a partner and through a partnership.

39. Moreover, where the contract required that the claimant personally provide services, the mere fact that the contract was with the partnership and, therefore, the respondent could potentially sue the claimant's wife for any breach, did not change that fact. Even if the respondent's submissions as to the effect of section 5 **PA 1890** were accepted, and a contract with a partnership was held to be inconsistent with the requirement of personal service, it would be open to the ET to find that, the terms of the contract in this regard outweighed the provisions of the **PA 1890**: if, as had been held in **Catamaran Cruisers**, it was permissible for the ET to pierce the corporate veil, there was no reason why it could not also look beyond the fact that the contract was with the partnership.

40. In **Descombes**, the EAT's conclusion, that a two-man partnership could not be an employee, was based on a concession from counsel. Certainly the mere existence of a partnership could not be conclusive given the approach taken in the analogous situation of a limited company in **Catamaran Cruisers** (a case that did not appear to have been referred to in **Descombes**). The reasoning in **Descombes** also showed a failure to grapple with the fact that a contract with a partnership was not a contract with a legal entity ("a firm") but with the individual partners. That case also decided at a relatively early stage in the jurisprudence, where there was less of a focus on the reality of the situation. It was, moreover, focused on the particular facts of the case; there was no suggestion that the EAT was seeking to lay down any general proposition of law.

41. The ET in the present proceedings had, in any event, distinguished **Descombes**, permissibly finding that there could be a distinction between a contract with a two-man partnership and a case in which there was one individual who was providing a personal service. As for the other points of distinction drawn by the ET, although the respondent's lack of knowledge of the partnership was

immaterial for the purposes of sections 5 and 6 **PA 1890**, it was a relevant matter when determining whether there was a contract of employment (which required personal service). As for the position of the claimant's wife, the ET had been entitled to draw the inference that she had not performed any relevant work (indeed, as the respondent had not known of her involvement, that was an entirely reasonable inference).

42. The tax decisions in **Green v HMRC** and **Puttnam v HMRC** did not assist the respondent as the question being determined in those cases was whether the partnership itself could be an employee, not whether individuals within the partnership could have that status.

43. Supporting the claimant's case, Sedley LJ had clearly envisaged the possibility of a contract of employment in similar circumstances in his (*obiter*) observations in **Szilagyi**. Accepting Smith LJ's point that if it was a genuine partnership that had contracted with the respondent, the partnership could not be an employee; Sedley LJ was saying, however, that there could still be contracts of employment with the individual partners.

44. Finally, the fact that the ET had, when determining the respondent's strike out application, used the language of "*possibility*" was not fatal. It was apparent that it was just seeking to answer the question identified by the parties and had permissibly found that the facts of this case did not preclude the possibility that the claimant was an employee.

Analysis and Conclusions

45. At the hearing before the ET, a discrete issue was identified that was seen to be potentially determinative of the proceedings and, therefore, suitable for consideration as a preliminary point. With the agreement of both parties, the ET framed the question that it had to answer, as follows:

> "(6) …
> Does the existence of a pre-existing partnership, in which the claimant was a partner and through which activities were provided to the respondent and paid for through the partnership, preclude the possibility of the existence of a contract of employment between the claimant and respondent?"

46. The question thus posed reflected a common understanding of the basic factual position: the ASL services undertaken by the claimant for the respondent were provided through a partnership in which the claimant was a partner with his wife (as he had been before entering into any relationship with the respondent), and payment for those services was similarly made through that partnership. As the ET recorded, this was a genuine partnership and there was no suggestion that the arrangement with the respondent was a sham. Moreover, although the respondent had not known of the existence of the partnership, the arrangement was entirely consistent with its stipulation at clause 3.1 of the ASL contract that the other contracting party should be an independent sole trader, a limited company, or a partnership. The claimant had not sought to hide the fact of the partnership: he had included its VAT number when completing the required contractual details and it was the partnership that charged the respondent fees for his services and duly declared those fees to HMRC, after the deduction of partnership expenses. Equally, although there was no evidence that the respondent was aware of the involvement of the claimant's wife, both partners took drawings from the profits derived from the contract with the respondent.

47. Although, as a matter of law, a partnership "firm" is not generally recognised as an entity distinct from the partners who compose it (*Lindley and Banks* paragraph 3-05), section 5 of the **PA 1890** means that, when entering into a contract, one partner, acting as such, will bind all other members of the partnership unless he does not in fact have the authority to do so and the other party to the contract knows that, or does not know or believe that he is a partner. In the present case, as the claimant accepts, the ET found that the ASL contract had thus been between the respondent and Webb Consultants: the claimant had been acting on behalf of the partnership when he entered into the contract and had (*per* section 5 **PA 1890**) thereby bound both members of the partnership. This was not a case where there was any suggestion that this arrangement did other than reflect the genuine intentions of the parties. Moreover, although the services provided to the respondent were undertaken by the claimant, that would not be inconsistent with many contracts with partnerships where there is

a requirement that work to be performed under the contract should be carried out by a particular named individual. The issue for the ET was whether such an arrangement could still give rise to a contract of employment, such that a claim of unfair dismissal arising from its termination should not be struck out as having no reasonable prospect of success.

48. On the respondent's case, the ET was bound to find that this could not give rise to a relationship of employment given the decision of the EAT in **Firthglow Ltd v Descombes and anor** UKEAT/0916/03. The ET sought to distinguish that case, because the judgment had referred to "*a partnership firm*", rather than to "*an individual within a partnership*"; the ET considered that the EAT had thus been concerned with the status of the partnership (which could not be an employee), rather than with that of the individual partner, who could be acting as an employee (see the ET at paragraph (34)). That, the claimant says, was a valid distinction: a partner can act as both principal and agent and the EAT's judgment in **Descombes** had failed to address that fact.

49. In giving the EAT's judgment in **Descombes**, I do not infer that Rimer J (as he then was) in any way overlooked the legal status of a partnership; although references were made to "*a partnership firm*", I read that as shorthand for stating that the contract was between Firthglow and all the members of the partnership. The EAT was clear: the ET's conclusion in **Descombes** recognised that Firthglow had contracted with the two-man partnership (comprising the two claimants) and, as such, that could not give rise to individual contracts of employment between each claimant and Firthglow. That, in my judgement, places **Descombes** on all fours with the present case, in which, as the claimant acknowledges, the ET had accepted that the contract for ASL services to be provided to the respondent had been entered into by the claimant on behalf of the Webb Consultants partnership.

50. I equally do not consider that the other differences identified by the ET provide a proper basis for distinguishing the decision in **Descombes**. Provided the claimant had the requisite authority to bind the partnership (as he did), the respondent's lack of knowledge of Webb Consultants would be

irrelevant for the purposes of section 5 **PA 1890**; the claimant would simply be treated as acting as agent for an undisclosed principal. As for whether the claimant's wife had undertaken work for the respondent, this would not detract from the fact that, as a member of the partnership with which the contract had been made, she was one of the parties to the ASL contract (and, of course, took drawings as a partner from the profits of the partnership, which were derived from that contract).

51. For the reasons I have provided, I therefore consider that the ET ought to have approached this case on the basis that it was bound by the decision of the EAT in **Descombes**. A separate question arises for me, however, as to whether there is any basis that would warrant my departing from this earlier decision of the EAT? In considering that question, I bear in mind that, although the EAT is not bound by its own previous decisions, they are of persuasive authority and will generally be followed, save where it can properly be said that (1) the earlier decision was *per incuriam*; (2) where there are two or more inconsistent decisions of the EAT; (3) where there are inconsistent decisions of the EAT and another court or tribunal of co-ordinate jurisdiction, on the same point; (4) where the earlier decision was manifestly wrong; or (5) where there are other exceptional circumstances (see per Singh J (as he then was) in **British Gas Trading v Lock** [2016] ICR 503, at paragraph 75).

52. Although the criteria identified in **Lock** were not addressed in the claimant's submissions, he did place reliance on the earlier decision of the EAT in **Catamaran Cruisers v Williams** [1994] IRLR 386, which does not appear to have been referred to in **Descombes**. Although not precisely on point (**Catamaran Cruisers** involved the introduction of a limited company into a pre-existing relationship rather than an initial contract with a partnership), I have therefore first asked myself whether it might be said that **Descombes** was thus decided *per incuriam* or whether I should treat these decisions as essentially inconsistent (**Lock** (1) and (2)).

53. The difficulty with the claimant's reliance on **Catamaran Cruisers**, however, is that the limited analysis provided in that case (the EAT was primarily concerned with the ET's approach to

the question of reasonableness relating to the finding of unfair dismissal) merely states that the ET had been entitled to find that the importation of a limited company into a pre-existing relationship - properly understood to have been one of employer and employee – did not, on the facts of that case, alter Mr Williams' continuing status as an employee. In the circumstances, I cannot see that the EAT's decision in **Catamaran Cruisers** could be said to render the judgment in **Descombes** *per incuriam*. I equally do not consider that it gives rise to any inconsistency between the decisions. **Catamaran Cruisers** was concerned with a relationship of employment that, as the ET had found in that case, had continued with "*no factual change whatsoever*" after the importation of a limited company, to which a fee was then paid for Mr Williams' services, this arrangement having been entered into for tax purposes. Whether or not the introduction of the limited company was to be seen as a sham (there appears to have been no finding on this question), it was found to have been irrelevant to the continued existence of a contract of employment between Catamaran Cruisers and Mr Williams. That is an entirely different factual scenario to that considered in **Descombes**, or, for that matter, to that presented in these proceedings.

54. Notwithstanding my view as to the relevance of the decision in **Catamaran Cruisers**, I have also gone on to consider whether the EAT's judgment in **Descombes** should be viewed as "manifestly wrong" or whether there are other exceptional circumstances that would warrant my departing from reasoning of the EAT in that case (**Lock** (4) and (5)). In considering these questions, I bear in mind that **Descombes** was determined at a relatively early stage in the jurisprudence relevant to the question of employment status. In particular, it was decided some years before the rulings of the Supreme Court in **Autoclenz v Belcher** [2011] ICR 1157 and **Uber BV and ors v Aslam and ors** [2021] UKSC 5. Given the need to adopt a purposive approach, focusing on the reality of the situation, and recognising that the inequality of bargaining power in the employment context may require a court or tribunal to look "*beyond the terms of any written agreement to the parties' 'true agreement'*" (*per* Lord Leggatt paragraph 78 **Uber**), might it be said that the decision in **Descombes** demonstrates the

adoption of an unduly restrictive approach, failing to recognise the realities of such relationships?

55. Although the EAT in **Descombes** did not use the same language as that of the Supreme Court in **Autoclenz** or **Uber**, I do not consider that the decision, or reasoning, is thus demonstrated to be "*manifestly wrong*" or that there are exceptional circumstances for departing from that decision. In **Descombes**, the ET had found that the agreement in issue was genuine, and the EAT permissibly approached the case as one in which the engagement agreement between Firthglow and the partnership properly represented the true intention of the parties. In the circumstances, that was not a case where there was some other reality to be preferred over the position provided within the written agreement such as to warrant the further enquiry envisaged by the EAT in **Ter-Berg v Simply Smile Manor House Ltd and others** [2023] EAT 2 (and see also the approach of the Court of Appeal in **Revenue and Customs Commissioners v Atholl House Productions Ltd** [2022] EWCA Civ 501, recognising that the key question for the fact-finding court or tribunal will be whether, "*judged objectively, the parties intended when reaching their agreement to create a relationship of employment*").

56. Following **Lock**, I therefore consider that I should treat myself as bound by the decision reached in **Descombes**. On that basis, the ET was wrong to consider that it was a "*possibility*" that the claimant might be able to establish (which I interpret as meaning that the claimant could not be said to have "*no reasonable prospect*" of being able to establish) that, as "*an individual in a partnership*", he had "*employee status with a third party for whom work is done*" (ET paragraph (42)).

57. Although I have thus considered myself bound to follow **Descombes**, it might be helpful if I sought to articulate why, in any event, I would see the ET in the present case to have erred.

58. While I would agree with the ET that the determination of employment status in any particular case will require the "*seeking out the true or real position in relation to that individual*" (ET paragraph (42)), that is to be done in a structured fashion, with the words of the statute providing the starting

point and constant focus (**Sejpal v Rodericks Dental Ltd** [2022] EAT 91). More specifically, in these proceedings, that question was answered in a way that precluded the possibility of the existence of a contract of employment between the claimant and the respondent. First, because the parties were in agreement that the ASL contract had been entered into by the claimant acting for, and on behalf of, the Webb Consultants partnership. As such, that was a contract between the respondent and the members of that partnership; applying the language of section 230 **ERA**, it was thus not a case of an individual entering into, or working under, a contract of employment. Second, because the parties were also agreed that this was the relevant contract in respect of the claimant's engagement (see the ET at paragraph (11)). There may be cases where, as well as the agreement between a partnership and another entity, there is, as a matter of fact, an entirely separate contract between that entity and one of the individual partners (the scenario that Sedley LJ might have had in mind in his obiter observations in **Protectacoat Firthglow Ltd v Szilagyi** [2009] EWCA Civ 98); that, however, was not the position in this instance. Third, because there was no suggestion that the ASL agreement between the respondent and the Webb Consultants partnership did other than genuinely represent the intentions of the parties (the fact that the respondent did not specifically know about the partnership did not change that position, in particular given clause 3.1 of the contract). Fourth, because none of the findings made by the ET suggested that there was some other reality that would mean that there might be a dispute of fact as to whether the ASL agreement did in fact represent the reality of the position in this case.

59. In the particular circumstances of this case, therefore, the factual position (as agreed between the parties, and as confirmed by the ET's own findings of fact) meant that the question the ET had posed could only be answered in the affirmative: the existence of a genuine pre-existing partnership, in which the claimant was a partner and through which his activities were provided to the respondent pursuant to contract (between the respondent and the partnership) by which the claimant's services were engaged, and were similarly paid for through the partnership, with no suggestion that this was

a sham arrangement, precluded the possibility of the existence of a contract of employment between the claimant and respondent. The ET ought, therefore, to have concluded that the claimant's claim of unfair dismissal could have no reasonable prospect of success and to have allowed the respondent's application.

Disposal

60. For the reasons provided, I therefore allow the appeal and set aside the ET's judgment in this matter, substituting a finding that the claimant's claim must be dismissed as having no reasonable prospect of success.