Neutral Citation Number: [2024] EAT 4

Case No: EA-2022-000414-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 January 2024

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

Lancashire and South Cumbria NHS Foundation Trust

Appellant

- and –

R Moon

Respondent

- -
- -

Edward Morgan KC (instructed by Hempsons) for the **Appellant**
William Young and Patrick Tomison (instructed by Advocate) for the **Respondent**

Hearing date: 13 June 2023

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JUDGMENT

SUMMARY

JURISDICTION, EMPLOYEE, WORKER OR SELF-EMPLOYED

The Tribunal had made no error of law in concluding that the claimant, who had been appointed as an Associate Hospital Manager, namely a person authorised by the board of the respondent NHS trust under section 23(6) of the Mental Health Act 1983, had been a worker under section 230(3)(b) of the Employment Rights Act 1996 and employed under a contract personally to do work, as defined by section 83(2)(a) of the Equality Act 2010, such that it had jurisdiction to consider her substantive claims.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

1. In this judgment, I refer to the parties by their respective statuses before the Manchester Employment Tribunal (Employment Judge Doyle, sitting alone), from the judgment of which the respondent appeals. That judgment followed a preliminary hearing to determine whether, as the claimant contends and the Tribunal found, she was, at all times material to her substantive claims, a worker, as defined by sections 43K(1) and 230(3) and (6) of the **Employment Rights Act 1996 ('the ERA')**, and employed under a contract personally to do work, as defined by section 83(2)(a) of the **Equality Act 2010 ('the EqA')**. Before me, as below, the respondent was represented by Dr Morgan KC. Having represented herself below, on appeal the claimant is represented by Mr Young and Mr Tomison. I am grateful to all counsel for their helpful written and oral submissions.

2. Under section 23(1) of the **Mental Health Act 1983 ('the MHA')**, as amended, a patient who is for the time being liable to be detained or subject to guardianship under Part II of the MHA shall cease to be so liable or subject if an order in writing discharging him absolutely from detention or guardianship is made in accordance with section 23. Section 23(1A) makes similar provision in relation to a community patient who is liable to recall. Section 23(6) provides:

> **'The powers conferred by this section on any NHS foundation trust may be exercised by any three or more persons authorised by the board of the trust in that behalf each of whom is neither an executive director of the board nor an employee of the trust.'**

3. The respondent is a specialist mental health foundation trust which provides services extending to those detained under the MHA. Its pleaded position is that, with effect from 8 August 2016, the claimant was one of approximately 30 individuals whom it engaged as an Associate Hospital Manager ('AHM'), namely a person authorised by the board of the trust under section 23(6) of the MHA. In very broad terms, it contends that appointment as an AHM necessitates independence from the trust, hence the statutory restriction on those whom a trust may authorise to discharge its functions. That independence is said to be inconsistent, in principle and in practice, with either status for which the claimant contends. As refined in the course of the hearing, the appeal is advanced on the following grounds:

    a. **Ground One:** The Tribunal failed properly to interpret and give effect to Parliament's intention and purpose, as expressed in section 23(6) of the MHA;

b. **Ground Two:** The Tribunal erred in law in concluding that the position of an AHM was 'quite different' from that of an arbitrator, whilst also concluding that an AHM was an independent decision-maker who could not be controlled;

c. **Ground Three:** The Tribunal erred in its conclusion as to the nature of the legal relations which the parties intended to create (said to be an alternative statement of grounds 2, 4 and 5);

d. **Ground Four:** The Tribunal erroneously concluded that the relationship between the parties was contractual in nature, as distinct from the appointment of the claimant to an office, and did not define or identify the terms of the contract which it found to have existed; and

e. **Ground Five:** The Tribunal failed properly to consider and/or give effect to the legislative purpose to which section 23(6) of the MHA and Article 5 of the European Convention on Human Rights ('ECHR') are directed.

The respondent submits that an alternative way of framing grounds two, four and five is that the Tribunal's failure to have engaged with the terms and conditions upon which the claimant is said to have been appointed had operated to bypass consideration of whether she had been appointed to an office or to some 'wider type of worker relationship' and of whether any provisional view which it had formed as to the latter undermined or served the statutory framework and Article 5 ECHR.

4. The Tribunal received a witness statement from Dr David Fearnley, Consultant Forensic Psychiatrist, on behalf of the respondent, the content of which was unchallenged by the claimant. Dr Fearnley is employed as the respondent's Chief Medical Officer (an executive director position). He joined the respondent in October 2020, having previously held the position of Executive Medical Director at Betsi Cadwaladr University Health Board (2019), and at Mersey Care NHS Foundation Trust (2005). The Tribunal recorded that the evidence had been designed to provide information on the position of AHM within the respondent trust and on Dr Fearnley's understanding of the relevant statutory framework for the role. The claimant is a qualified solicitor who pursued a career, first in private practice and, thereafter, within a local authority. She secured several independent roles within the mental health sector, including appointment as a Mental Health Act Manager and AHM. She did not give evidence and relied upon her written submissions.

The Tribunal's findings of fact

5. The Tribunal's findings of fact were set out at paragraphs 8 to 33 of its judgment, recited, in material part, below:

'8. It appears to be common ground as follows.

9. …

10. The respondent is a specialist Mental Health Foundation Trust. It is concerned in the provision of in-patient assessment and treatment. In line with the statutory framework applicable to the NHS, a Foundation Trust is a corporate entity. The respondent operates at several sites [308].

11. The health and related care services provided by the respondent extend to those who are detained under the Mental Health Act. Pursuant to Article 5 of the European Convention on Human Rights, the decision to detain a patient must be capable of review. The conduct of such a review is undertaken by a "Managers Panel". The statutory regime makes express reference to eligibility to participate in such a panel and/or the persons to whom the powers under the Mental Health Act may be delegated for this purpose. These include the AHM.

12. Foundation Trusts are required to facilitate the conduct of the patient review by means of the Managers Panel and the designation of AHM. The Managers Panel comprises no fewer than 3 members. It is by means of this panel that the statutory powers are to be given effect. Each is required to conform to the MHA Code of Practice [Chapter 38 at 117 onwards]. These AHM are entrusted with statutory powers and under obligations which are personal to them [125]. The respondent draws upon a cohort of independent AHMs.

13. From a clinical governance perspective, it has been necessary to record the core obligations of the AHM and the character of the relationship between the AHM and the respondent. Several such documents are included within the hearing bundle: (i) job descriptions [126, 132 and 185]; (ii) person specification [130]; (iii) Hospital Managers Handbook [136]; (iv) reviews [182-194]; and (v) policy statements [197]. The respondent's position is that each of the core documents confirm the legislative reality: an employee and/or officer of the respondent cannot discharge the powers of an AHM.

14. The claimant applied for the role of AHM [317]. At that time, the claimant recognised the duties of the AHM to involve participation within management panel determinations, requiring delegation for this purpose, pursuant to section 23(6) of the Mental Health Act [100]. The claimant was appointed for participation in the AHM panel [329]. She discharged the responsibilities and statutory powers of an AHM [5]. She has been exercising those powers since 13 July 2016. The documents issued by the respondent confirm that the relationship between the respondent and the AHM is one of statutory delegation [297].

15. The position of an AHM is statutory and is regulated by section 23(6) of the Mental Health Act and its Code of Conduct. It is on this account that the primary activity is participation in determinations by means of review which requires an evidential assessment by the AHMs who together comprise a panel [214-287 and 365]. The claimant's participation in the conduct of review proceedings generates a sitting fee. The fee is fixed. The claimant has been paid in accordance with this arrangement [421 onwards].

16. It also appears from the respondent's unchallenged witness evidence as follows.

17. The responsibility for the execution of all duties or acts carried out by staff of the Trust in relation to the Mental Health Act 1983 (the "Act") is retained by the Hospital Managers. This includes the assurance that, as far as reasonably

practicable, the grounds for detaining patients are valid and legal. Under the Mental Health Act, Hospital Managers are those with Mental Health Act responsibilities, such as the Chairman and other Non-Executive Directors of the Trust Board.

18. **Under the Act, certain duties can be delegated. In particular, the power to discharge patients rests with Non-Executive Directors on the Trust Board. However, section 23(6) of the Act confirms that the power to discharge may be delegated to a sub-committee of three or more members known as Associate Managers. These are known within the Trust as "AHMs" and have previously been known in the Trust as "Associate Managers". Many Trusts call them "Mental Health Act Managers". Employees of the Trust and Executive Directors are expressly barred from performing the duties set out in section 23 of the Act [101]. This arrangement upholds the five sets of guiding principles of the Act: particularly in determining the least restrictive option and maximising independence; and supporting empowerment and involvement. The Trust's policy on Hospital Managers confirms that, as per the Trust Board's delegation document, a review panel may be formed from any combination of Chairman, Non-Executive Directors or AHMs [203].**

19. **An AHM is neither an officer of the Trust nor a member of the Trust Board. They are members of the committee or sub-committee established by the Trust who are appointed solely for the purpose of reviewing the cases of patients who are detained under the Act to determine whether they are suitable for discharge. The Act does not define specific criteria to be applied by the AHMs in making their decision. However, the yardstick is whether the grounds for admission or continued detention are satisfied [202]. All patients under the care of the Trust have the right to request their case be reviewed by the AHMs, except those patients detained under sections 5, 35, 36, and 38 of the Act [201].**

20. **The recruitment of AHMs at the Trust is via NHS Jobs. This is a centralised website on which most roles (including Non-Executive Directors) are advertised and through which applications are submitted and processed. Short-listed applicants will be invited to an interview and, if successful, they will be appointed. The appointment letter sent out to Trust AHMs will confirm the role. To date the Trust has used an "honorary contract" for the appointment. The honorary contract should confirm that the role is for a fixed term of 3 years. Payment is made on a per session basis.**

21. **The Trust has undertaken a review of its AHMs. Going forward the Trust should shortly be implementing new appointment arrangements for AHMs, to avoid some of the confusion that honorary contracts can create. The last review of the remuneration for AHMs, which stood at £55 per half day session, was undertaken in 2019. A scoping exercise was carried out and the remuneration of 10 local NHS Trusts and private providers was considered. It was noted that the fees ranged from £45 to £100 per half day session. Some of those organisations making higher payments had removed the right to claim travel expenses, and the average payment across the board was £70 per half day session. The Trust Remuneration Committee therefore felt that the half-day session fee for AHMs at the Trust should be increased by £15 per session. Currently, the remuneration is £70 per half-day session (which can include up to two hearings) plus standard travel expenses. The AHMs have the benefit of a cancellation policy paying the full sum where a session is cancelled anytime on the working day prior.**

22. The Trust's AHMs are expected to attend at least one AHM forum per year, and since 2021-22 the forum is held quarterly. The AHMs are also expected to attend one out of three relevant training sessions each year, and to undergo self-appraisal and mandatory peer appraisal every 3 years. The minimum expectation for patient reviews is 12 per year. An AHM is subject to a 3 yearly re-appointment process. Following independent reviews of the Mental Health Law Administrators and AHMs an action plan was approved by the Trust board in 2021, which introduces changes to the AHM appraisal process, diversity of AHMs, and planning of hearings. These changes are being introduced in 2022-23 in collaboration with the AHMs and Mental Health Law Administrators.

23. The Trust's AHMs are directly responsible to the Trust Board and in their day-to-day role the AHMs are supported by the Trust's Mental Health Law Administrators (the "MHLAs").

24. A request for a review may be made in writing or verbally by a patient to clinical staff or the MHLAs, or by an individual authorised to act on the patient's behalf. A review can also be triggered by the Responsible Clinician when a section has been renewed or a Community Treatment Order has been extended or on receipt of the Responsible Clinician's barring order preventing discharge by the nearest relative [203 onwards].

25. Following receipt of the request, the MHLAs will request various reports (Responsible Clinician's report; Social Circumstances report; Nursing report; and the patient's views). The MHLA will then fix a date and venue for the hearing [204 onwards]. As part of this, it is expected that the MHLA will contact the AHMs by email and ask if they are able to sit on the panel. From those who confirm that they are available, a panel of at least three is chosen by the MHLA before a hearing date is finalised. Attempts will be made to have a mix of male and female panel members where possible. If there are more than 3 AHMs available, then those who sat least recently on the panel will be chosen.

26. The Trust has adopted specific timescales for the holding of the AHM reviews which are: within 5 working days of receipt for a patient detained under section 2; within 15 working days of receipt for all other applicable sections; and prior to expiry of the current detention for renewals of detention [205].

27. Once chosen for the panel, the three AHMs will receive the reports along with the patient's legal representative (if applicable) and the patient [206]. To ensure sufficient time is available for the patient (and their representative) and the panel to prepare for the hearing, the reports will be requested as follows: due 3 working days from request for a patient detained under section 2; due 10 working days from request for all other applicable sections; and due 2 weeks before expiry of the current section for renewals of detention [206]. Where the reports are not submitted or hearings are not held within the timeframes set out above, an incident will be reported on the Trust's risk management system, Datix [206].

28. On the day of the hearing, the panel assembles at least half an hour before the start and agree between themselves who will act as the chairperson for that hearing. The MHLA will ensure that panel members are reminded of their powers under section 23 of the Act prior to commencement of the hearing [207]. The Trust's policy is that, while recognising the review as a formal Mental Health Act duty, the hearing should be conducted as informally as possible [207]. During the hearing, the Responsible Clinician and other professionals are

invited to give their views on whether the continued detention of the patient is justified, the factors on which those views are based, current treatment and care, and the plan for future care. The patient will be provided the opportunity to speak privately with the panel, unless the level of risk suggests that this would be inappropriate [208].

29. While the Responsible Clinician and other professionals will give their views, it is for the AHM panel to decide whether continued detention is needed. After hearing the evidence, the panel will adjourn and dismiss all parties from the room to discuss their decision in private [210]. In all unrestricted cases, AHMs have a discretion to discharge patients even if the criteria for continued detention or CTO are met. A patient will be discharged if the panel makes a unanimous decision to do so [209-210].

30. Once a decision has been reached, the MHLA will confirm this in writing to the patient, the nearest relative (unless the patient withholds their consent) and the relevant professionals. If appropriate, the MHLA will undertake to refer the patient to the Mental Health Tribunal where section 68 of the Act applies [211]. The AHMs may wish to add recommendations or comments to their decision, be that to discharge or not. These recommendations are not legally binding, but they may be useful to the care team in planning the patient's care [210].

31. The Trust Board has a named Non-Executive Director who oversees the AHMs, keeping their management separate from the Executive Director with responsibility for the MHLA. The MHLA provides administration in relation to the Mental Health Act and a Mental Health Law Sub-committee meets quarterly, chaired by the Chief Medical Officer. This sub-committee reports to the Quality Assurance Committee of the Trust board, chaired by a Non-Executive Director (who is also the Lead Non- Executive Director for overseeing the AHMs). The MHLA provides guidance and support to the AHMs to ensure the proper functioning of the Mental Health Act. AHMs can report issues or concerns to the MHLA and Chief Medical Officer, and these will be discussed with the Non-Executive Director, acknowledging that the Executive Director is not in a line manager role to the AHMs.

32. The AHM forum met twice a year until 2021, when there was an agreement to meet quarterly in view of changes to the MHLA, the adjustments for the pandemic (for example, virtual hearings from July 2020), and the independent reviews of the MHLA and AHMs that were approved by the Trust Board in July 2021. The forum offers an opportunity for AHMs to raise issues, undergo training, and to share feedback from hearings that are of interest to the group. In 2021 a representative AHM was identified to help support the AHMs and this representative meets the Interim Head of Mental Health Law and the Chief Medical Officer on a regular basis. This individual also attends the Mental Health Law Subcommittee.

33. Between April 2021 and February 2022 there were 794 hearings planned, and 114 hearings were subsequently cancelled. In 2021/22, an average of 2% of all hearings resulted in discharge. There are 28 AHMs who take part in reviews and a further 13 were interviewed in January 2022 (the first recruitment for three years) and are waiting to start induction.'

6. The Tribunal's conclusions were set out at paragraphs 122 to 151 of its reasons. Given the nature of the appeal, they bear reciting in full (sic):

'Discussion

122. The Tribunal has been well served by the quality of the legal submissions made by both parties and which accordingly have been set out fully above. Although the preliminary hearing was a relatively short one, the issue was comparatively novel and sufficiently taxing to warrant judgment being reserved. Nevertheless, because of what is set out in some detail above, it should be possible to set out the Tribunal's reasoning and conclusion with appropriate economy.

123. Section 23 of the Mental Health Act 1983, as amended (in particular, by the Mental Health Act 2007), addresses the discharge of patients and the appointment of AMHs. Section 23(6) of this Act provides that the powers conferred by section 23 on any NHS foundation trust may be exercised by any three or more persons authorised by the board of the trust in that behalf *each of whom is neither an executive director of the board nor an employee of the trust.* See also the relevant extracts from the Mental Health Act Code of Practice.

124. In the Tribunal's analysis, this means that the respondent trust could not appoint as an AHM an individual who was already an executor director of its board or an existing "employee" of the trust. It must also mean that once appointed, an AHM does not thereby become an executive director of the board or an "employee" of the trust. It is not possible to be simultaneously an AHM and an "employee" of the trust.

125. However, in the Tribunal's assessment, this does not mean that an AHM is inevitably without employment rights or employment protection. First, there is no definition of "employee" for the purpose of section 23(6). It might be assumed that Parliament intended to apply the narrower definition of an "employee" contained within the existing Employment Rights Act 1996 (a limb (a) employee) if it directed its mind to the question at all. There is no express provision in the Mental Health Act, as amended, that points to an intention to exclude the possibility that an AHM could be found to be a "worker" or someone who falls within the broader definition of "employee" contained within the Equality Act 2010. Second, there is no indication one way or the other that Parliament intended that an AHM should enjoy no employment rights or employment protection at all. Accordingly, the Tribunal does not consider that section 23(6) of the Mental Health Act is dispositive of the claimant's claim before the Employment Tribunal.

126. The claimant does not seek to establish that she is a limb (a) employee under section 230 of the 1996 Act or an employee in the narrower sense under section 83 of the 2010. She is right to take that position, not only in the face of section 23(6) of the Mental Health Act, but also because she faces evidential and legal difficulties in establishing that she is an "employee" of the trust in the narrow sense. Instead, she seeks to establish that she is "employed" under a contract personally to do work (as the Equality Act puts it) or 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 (as the Employment Rights Act puts it).

127. The starting point is whether the claimant has established a contractual relationship with the respondent trust at common law. Although the application for the position of AHM was made via NHS Jobs (Application Form (NHS Jobs) [317- 328]), there is no suggestion that NHS Jobs is the actual employer or that she is an agency worker supplied by NHS Jobs (as an agent) to the trust (as a principal). Whatever the actual legal relationship, it is clearly one between the claimant and the trust. See the various documents that evidence that relationship, including the Job Descriptions and Person Specifications [126-135, 185-193]; the Hospital Manager's Handbook [136-184]; the respondent's Policy on Section 23 Review [194-287 and 288-314]; the "Honorary Contract" for a fixed term contract [329-333]; the letter of appointment [334]; the Training Record [337-344]; the appraisals documents [413-419]; the requirement of vaccination as condition of deployment [420]; and the claimant's wage slips [421-432].

128. The Tribunal is satisfied that an agreement existed between the claimant and the trust, via a process of offer and acceptance, for the engagement of the claimant as an AHM. That agreement was supported by consideration (the payment of fees in return for the carrying out of panel work and associated duties or requirements). The terms of that agreement were certain and understood.

129. However, the respondent argues that there is no intention to create legal relations (see leading counsel's submissions above). The Tribunal cannot accept that argument. The exclusion of an intention to create legal relations is usually expressly reserved and made plain on the face of any agreement or the process for reaching one. That is not the case here. An absence of an intention to create legal relations might be inferred from the context or from another source. The Tribunal does not consider that section 23(6) of the Mental Health Act is fit for that purpose. The documentation already referred to points strongly in the direction of an implicit intention to create legal relations, although what legal relationship thereby resulted remains to be determined.

130. The Tribunal is satisfied that the claimant's appointment as an AHM is a contractual appointment and not simply a matter of appointment to an office or under statute (as was the case in *Gilham*). Again, section 23(6) of the Mental Health Act does not disturb that conclusion, in the Tribunal's judgement. The documentary evidence and the practice of the parties post-appointment points strongly to there being a contractual relationship. But what sort of contractual relationship is it?

131. As *Alemi* reminds us, the authorities establish that the definition of "employee" under the Equality Act 2010 is not broader than that of a limb (b) "worker" under the Employment Rights Act 1996. The claimant in providing her service to the trust as an AHM is not someone who is genuinely in business on her own account or who worked for her own clients or customers. The fact that she has a portfolio of similar appointments does not disturb that impression or conclusion.

132. The *Uber* decision sets out the up-to-date approach to the determination of employment status. The written agreements here may be an appropriate starting point as they tend to point towards the claimant being a "worker" (or an "employee" in the broader sense). The Tribunal reminds itself that

Autoclenz **made it clear that whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and other "workers" is not to be determined by applying ordinary principles of contract law. The task for the Tribunals is to determine whether the claimant falls within the definition of a "worker" in the relevant statutory provisions to qualify for the rights therein.**

133. It is worth setting out again that, in *Uber*, the primary question was one of statutory interpretation, not contractual interpretation. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. The purpose of section 47B of the 1996 Act and section 27 of the 2010 Act is to protect an individual such as the claimant from being subjected to unfair treatment (such as being victimised or suffering detriment for whistleblowing). Any terms (such as the use here of the phrase "honorary contract") which purported to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract were of no effect and had to be disregarded.

134. As *Bates van Winkelhof* establishes, the vulnerabilities of workers which created the need for statutory protection were subordination to and dependence upon another person in relation to the work done. A touchstone of such subordination and dependence was the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who was employed under a "worker's contract".

135. Turning to that question, some degree of mutual obligation is necessary for any contractual relationship. That is present here in this case, both in the overarching contract between the parties and the individual contracts that arise on each occasion that the respondent trust offers the claimant a "sitting" and she accepts it. As noted above, the question is whether a worker's contract requires an "irreducible minimum of obligation".

136. The present case is in many ways like the inquiry necessary in *Pimlico Plumbers Ltd v Smith* [2017] ICR 657 CA, although otherwise the two cases are not on all fours with each other. The tribunal in *Pimlico* found that a self-employed plumber was both a limb (b) worker under the Employment Rights Act 1996 and an employee in the extended sense under section 83(2)(a) Equality Act 2010. Where the substantive claim directly depends on the claimant enjoying employee/worker status in respect of his or her periods of work, the question whether the engagement is casual is relevant, but only on the basis that it may shed light on the nature of the relationship while the work in question is being done. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had worker status, even if the contract clearly provided that there was no legal obligation either way in between the periods of work. Where the claim directly depends on the claimant's status during periods of non-work,

either because he or she must establish continuity of employment or because the claim itself relates to treatment during that period, in such a case, mutuality of legal obligations is essential.

137. As in *Pimlico*, the present Tribunal is satisfied that there are mutual obligations on both parties in the present case. Those mutual obligations are especially well expressed in the claimant's submissions above. The claimant was expected to make herself available for a minimum number of sittings, otherwise she would not be reappointed. In practice the respondent provided her with those opportunities and, although entitled to decline in the individual case, she accepted those opportunities, and the respondent was then obliged to pay her. She also had secondary obligations to the respondent, such as in respect of training, appraisal, and so on. The Tribunal is satisfied that she is both a limb (b) worker and an employee in the extended sense. The Tribunal also finds her engagement to be the subject of an umbrella contract between the parties (that is, that there was mutuality of obligation between assignments).

138. The claimant in the present case also places reliance on *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229 CA. The factual basis is very similar, although not identical. What is particularly noticeable (but absent in the present case) is that in *Somerville* the written agreement expressly stated that he had the status of an independent contractor and that nothing in the agreement created a relationship of employer and employee. As in the present case, the NMC was not obliged to offer him a minimum number of sitting dates and he was free to withdraw from dates he had accepted. The tribunal found that he was a "worker" because there was a series of individual contracts that arose each time that he agreed to sit on a hearing and an overarching contract in relation to his provision of his services. The EAT and the Court of Appeal upheld the tribunal's decision on appeal.

139. At the Court of Appeal, what was important was that the services agreement which governed his appointment stopped short of requiring him to do or personally perform any work or services. However, each time the NMC offered a hearing date, and he accepted it, an individual contract arose whereby he agreed to attend the hearing and the NMC agreed to pay a fee. The tribunal had found that under each individual contract, he had agreed to provide his services personally, and that the NMC was not the client or customer of a profession or business carried on by him. These findings were sufficient to entitle the tribunal to conclude that he was a worker. The present Tribunal in the case before it gleans assistance from that reasoning.

140. There is also the assistance afforded by the extended definition of employment in section 43K of the 1996 Act. Although the Tribunal has set out above all the provisions in the section that furnish an extended definition, it does not appear to it that the claimant falls squarely within those extensions that apply to NHS employment more widely. However, it is possible that, if section 230 does not assist the claimant, and the Tribunal is wrong about that, then section 43K(1)(a) might do so. It is possible that the claimant might be viewed as an individual who works or worked for a person (the respondent trust) in circumstances in which (i) she is or was introduced or supplied to do that work by a third person (NHS Jobs), and (ii) the terms on which she is or was engaged to do the work are or were in practice substantially determined

not by her but by the person for whom she works or worked (the respondent), by the third person (NHS Jobs) or by both of them (section 43K(1)(a)).

141. So far as section 43K of the 1996 Act is concerned, as noted above, this section extends the protection of the whistleblowing provisions. The Tribunal in interpreting and applying it should, in a case of ambiguity, seek a solution applying that extension rather than limiting it.

142. Section 43K(1)(a) is designed to apply to an individual who is not otherwise a worker in relation to the person sought to be established as the employer under this section. This deliberately extended definition is to be interpreted widely and purposively. It can apply to a person introduced or supplied by an agency, even where that person is himself operating through his own service company and there is no direct contractual nexus. That is not the position here. The reference to "terms" in section 43K(1)(a)(ii) means contractual terms and this provision cannot be used to extend the legislation to cases where there is no contract. Again, that is not the position here, as this Tribunal has found there to be a contract between the claimant and the respondent trust. Once there is such a contract, the Tribunal takes a broad view, not restricted to contractual terms.

143. The Tribunal takes the view that the claimant is a limb (b) worker falling within section 230 of the 1996 Act; but were it necessary to do so, it would also find her to be covered by the extended definition in section 43K(1)(a).

144. Alternatively, the claimant also relies upon *Gilham v Ministry of Justice* [2019] ICR 1655 SC. This is not obviously an analogous case, not least because the Tribunal has found there to be a contract, and because her appointment is not solely a creature of statute, as a District Judge was. Nevertheless, if the Tribunal is wrong about that, it would follow *Gilham* in allowing the claimant to bring a whistleblowing claim under section 47B of the Employment Rights Act, despite not meeting the literal definition of "worker" in section 230(3) of the Act, if that were so, because she did not work under a contract (which is, of course, not the Tribunal's primary finding). Section 230(3) had to be interpreted purposively to avoid a breach of Article 14 of the European Convention on Human Rights, which prohibits discrimination on several grounds – including "other status". The section is to be interpreted purposively to include someone in the claimant's position, relying on the Tribunal's obligation under section 3 of the Human Rights Act 1998.

145. The Tribunal does not consider this to be an exceptional case, such as is illustrated by *Hashwani*. The claimant's circumstances are quite different from an arbitrator who was an independent provider of services and who was not in a relationship of subordination with the person who received the services. The claimant's role was one of employment under a contract personally to do work. She provided services and she received fees for her work. She rendered personal services which she could not delegate. To a degree she performed those services and earned her fees for and under the direction of the respondent, as the documentation and practice of the parties referred to above demonstrates. Although she was an independent decision-maker, whom the respondent could not direct or control at the point of decision-making, she was not an independent provider of services who was not subject to the control of the respondent as to when and how she carried

out her otherwise independent role.

146. For completeness, the Tribunal will address the four key points made by Dr Morgan QC on behalf of the respondent.

147. First, while the Tribunal accepts that section 23(6) of the Mental Health Act prohibits the appointment of any officer or employee of the relevant trust to the position of AHM, it does not do so for all purposes of employment rights and employment protection. See the Tribunal's reasoning above. The AHM's independence is safeguarded by the prohibition on employment as an employee in the narrow sense. That independence is not undermined by affording the claimant employment rights or employment protection as a worker or as an employee in the Equality Act broader sense.

148. Second, the Tribunal does not accept that the AHM is not subject to terms and condition imposed by the Trust. Nor that there a relationship lacking subordination or control. This does not undermine the purpose of the panel of which the AHM is member and its ability to serve the needs of patients in accordance with Art 5 ECHR.

149. Third, in the Tribunal's analysis there was an intention to create legal relations between the parties to this case. The statutory prohibition in section 23(6) alone did not serve to negate any intention to enter a contract which placed the claimant under the control of the respondent, or at all. Intention to create legal relations could have been expressly excluded, but it was not – other than a rather milk and water attempt to describe a quite detailed legal relationship as being an "honorary contract". The reality was quite different, as the evidence shows.

150. Fourth, there is nothing inherent in the nature of the function that the claimant carried out that puts her on all fours with a judicial officer-holder who does not necessarily hold office pursuant to a contract. Whether a contract may be considered to exist is dependent upon the intention of the parties, but that intention may be gleaned from the circumstances, as the Tribunal has found.

151. In summary, the Tribunal accepts and prefers the claimant's submissions.

Conclusion

152. The Tribunal concludes that in relation to the respondent the claimant is a "worker" for the purposes of section 43K(1)(a) and/or section 230(3)(b) of the Employment Rights Act 1996 in relation to her complaint under section 47B of that Act and is also in employment under a contract personally to do work for the purposes of section 83(2)(a) of the Equality Act 2010 in relation to her complaint under sections 27 and 39 of that Act. Her claim may now proceed to a final hearing as listed.'

The parties' submissions

For the respondent

7. Dr Morgan contended that the issues raised by this appeal had wide-ranging implications for mental health provision within the National Health Service. He submitted that there was little between the

parties as to the legal principles to be applied. Central to all grounds of appeal and supported by the unchallenged evidence of the respondent was the independence of the AHM and the inability of the respondent to determine the terms of appointment, or to direct or control the actions of the AHM in the discharge of his or her statutory function. Once an NHS trust had elected to pursue the mechanism permitted by section 23(6) of the MHA, it was necessary for it to ensure that those to whom it delegated the task were competent and suitably equipped to discharge it, a matter to which the Tribunal ought to have had regard. Acknowledging that, in this case, there were 'factors redolent of other working relationships', the Tribunal ought to have focused upon the points of distinction, in particular albeit not determinative the respondent's motivation in imposing such requirements as it had imposed upon the claimant, intended to serve the statutory purpose of section 23(6) of the MHA. Had the Tribunal engaged properly with the material before it, it would have been duty bound to have concluded that there had been no contractual relationship between the parties. For the purposes of the ERA, it was necessary first to identify a contractual relationship between the parties and, only thereafter, to consider the extent to which the relationship was consistent with worker status. The provisions of the EqA had to be interpreted purposively. The starting point ought to have been the Tribunal's recognition that an AHM discharges an office which is task-specific and narrowly confined. Whether a contract may be considered to exist is itself dependent upon the intention of the parties; a matter of particular significance where the core elements of the relationship derive from statute. In so far as issues of public policy arose, they militated against the recognition of rights in favour of the procedural safeguards required under Art 5 ECHR.

Ground One

8. The role of AHM formed part of the mechanism by which the State discharged its duties under Article 5 ECHR — the right to liberty and security of person. That directly informed the nature of the relationship between the parties and whether it was contractual. In Dr Morgan's submission, the statutory framework giving rise to the appointment of an AHM ought to have formed the beginning and end of the Tribunal's analysis, in informing the activities of the parties; the rationale therefor; and that which each party had the right to expect of the other. It was to be noted that the language of section 23(6) of the MHA was permissive and restrictive of the category of persons eligible for appointment; a factor central to the integrity and impartiality of the system. Properly construed, the conditions imposed by the trust on those whom it appointed to the role of AHM simply enabled it to ensure that each was competent and suitably equipped to discharge the role. An AHM was an officeholder, appointed by the NHS, discharging the function which had been delegated to him or her by statute.

9. The Mental Health Act Code of Practice ('the Code') was a national code, which did not emanate from the respondent, which was in no position to dictate the standards for which it provided. The guidance

for which chapter 38 provided, headed 'Hospital Managers' Discharge Power' served to underscore the independence required of AHMs. Acknowledging that that would not, in and of itself, preclude either status for which the claimant contended, a suitably granular analysis of the facts, including the available documentation, ought to have led to a conclusion that she had held neither. Whilst clinicians were also expected to exercise independent judgement, their contracts of employment with the respondent would invariably incorporate an express provision requiring compliance with the regulatory obligations to which each was subject, itself emphasising that the clinician's autonomy was a fundamental expectation of the contract. Consultants' contracts were nationally negotiated and adopted by NHS trusts at local level. The independence of an AHM was of a different quality, recognised from the outset as falling outside typical working relationships and the framework of conventional employment. Acknowledging that the question was one of fact and degree, it was necessary to consider the extent to which any requirements imposed upon AHMs by the respondent had been imposed simply to support the statutory requirement for independence, applicable across the sector. Particular emphasis was placed upon paragraph 38.8 of the Code, said to correlate with the requirements imposed upon the claimant by the respondent. The existence of a contract required both an intention to create legal relations and the identification of the terms of the contract in question. Section 23(6) of the MHA was of direct relevance to both. It had been incumbent upon the Tribunal to interpret that section in accordance with its purpose in ensuring compliance with Article 5 ECHR. The mischief at which the statutory provision was directed was any arrangement by which the independence of the AHM could be undermined or adversely affected. Yet the Tribunal's conclusion was predicated upon the basis that there had been an intention to enter into a contractual relationship which would place the AHM under the authority and control of the respondent and thereby defeat the purpose of section 23(6) of the MHA. It was also inconsistent with its finding [145] that the AHM was an independent decision-maker, beyond the respondent's control.

Ground Two

10. Before the Tribunal, the respondent had submitted that not all officeholders could be classified as *in O'Brien v Ministry of Justice* [2013] IRLR 315, SC. Reliance had been placed upon *Hashwani v Jivraj* [2012] 1 All ER 629, SC, concerning the appointment of an arbitrator, and, in particular, upon the essential questions identified by Lord Clarke JSC [34]:

> **'…namely whether, on the one hand the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration, or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. These are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties…'**

11. The respondent had also referred the Tribunal to *Alemi v Mitchell and Anor* [2021] IRLR 262, EAT, in which the issue had been whether a locum doctor was to be considered an employee of the practice, for the purposes of the EqA. The EAT had observed ([23] and [25]) that, despite the difference in wording, the definition of 'employee' under EqA was not broader, to any significant degree, than that of a limb (b) worker under the ERA and that those who were genuinely in business on their own account and worked for their own clients or customers were excluded from the definition of employee in the extended sense for the purposes of the EqA, just as they were from the definition of limb (b) worker for the purposes of the ERA. Yet the Tribunal's conclusion had been that the position of arbitrator was 'quite different', by reason of such a person's independence and the absence of subordination. That conclusion had been at odds with the common ground as to the purpose of section 23(6) of the MHA and the evidence before the Tribunal, from which it had been clear that the position of an AHM was directly comparable.

Ground Three

12. The Tribunal had reached a conclusion parasitic upon its erroneous interpretation of section 23(6) of the MHA. Whilst it was acknowledged that the labels adopted by the parties were not determinative of the character of any relationship, that did not exclude from the Tribunal's consideration the provenance and purpose of the 'honorary contract' in the context of the statutory regime in question. Neither the Tribunal's suggestion of an implicit intention to create legal relations, nor the practice which was said to have founded the basis of the 'contractual relationship' [130] had been the subject of elaboration and its disregard of the 'honorary contract' had been an error of law. Section 23(6), taken with the unchallenged evidence of the respondent, had sufficed to support the absence of an intention to create legal relations.

Ground Four

13. The Tribunal had fallen into error in failing properly to have considered the caselaw as to status and the potential for a statutory office to have arisen. Albeit in the context of a concession by the claimant that she had not been an employee for the purposes of the ERA, the Tribunal had alluded to *'evidential and legal difficulties'* which would have undermined any contention to the contrary [126]. Implicit in that finding had been the Tribunal's conclusion that the provision of a service had been crucial, yet the service in question had not been identified. The service which the claimant was considered to have provided had not been

identified and the finding was inconsistent with the later findings ([144] to [145]) which had implicitly excluded the potential for the activities undertaken by the AHM to be classified as having arisen from statute, or having been attributable to an office.

Ground Five

14. The application and importance of Article 5 ECHR were reiterated. The exclusion of worker status would have served as a proportionate and legitimate means of attaining the procedural and substantive safeguards required by Art 5 ECHR for the benefit of those who were the subject of detention under the MHA. Any contrary conclusion would undermine (if not defeat) the effect of that regime, or the attainment of those objectives.

For the claimant

15. Mr Young submitted that the respondent was seeking to disturb a careful and well-reasoned reserved judgment, in which the parties' extensive argument and authorities had been considered. The respondent's appeal proceeded upon the basis of a fundamental misconception as to the effect of Article 5 ECHR and its interaction with the MHA. Article 5(1)(e) provided that no-one should be deprived of his liberty save in the case of the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants, and in accordance with a procedure prescribed by law. Article 5(4) provided that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if his detention is not lawful. In *MH v United Kingdom* 11577/06 [2013] ECHR 1008 [80], the European Court of Human Rights had held that, in the case of a person with legal capacity, the right to apply to the tribunal for discharge during the first fourteen days of detention under section 2 of the MHA would satisfy the requirements of Article 5(4). Thus, whilst the route for which section 23(6) of the MHA provided afforded an additional route to discharge, it did not constitute the means by which the UK discharged its Article 5 obligations. Whilst not a complete answer to the appeal, it significantly reduced the force of the respondent's suggestion that the independence of AHMs was crucial to securing compliance with Article 5. It was only if a necessary implication of section 23(6) of the MHA was that compliance with Article 5 required that AHMs could not be workers, that the respondent could succeed; Article 5 was not the trump card for which the respondent contended.

16. In order to establish that a claimant had the requisite status under the ERA or the EqA, it had first to be established that there was a contract between the parties. That required offer and

acceptance, supported by consideration, and the parties' intention to create legal relations. Only the last such requirement had been in issue in this case. Guidance on the distinction between contractual relationships and offices, and the intention to create legal relations in that context, had been provided in *Percy v Church of Scotland Board of National Mission* [2006] ICR 134, SC. Once the contract had been established, the question of employment status was a matter of statutory interpretation under the ERA or the EqA, as the case may be. It was wrong in principle to treat the written contract as the starting point: *Uber BV v Aslam & Others* [2021] ICR 657, SC, and the subjective intention of the parties, including the respondent's motivation, could not override objective findings as to the reality of the relationship. The purpose of the legislation was to protect vulnerable individuals who were in a subordinate and dependent position in relation to a person or organisation who exercised control over their work. That was not to say that, in a case in which the true intentions of the parties were in dispute, the contract was irrelevant; it was necessary to consider all of the circumstances of the case which might cast light on whether the written terms truly reflected the agreement between the parties: *Ter-Berg v Simply Smile Manor House Ltd* [2023] EAT 2.

Ground One

17. No error of law had been identified. The respondent had failed, here and below, to identify the legal mechanism by which the asserted intention of the legislature as expressed by section 23(6) of the MHA was given effect, in particular in regulating the relationship between two private parties who had otherwise appeared to have made an agreement between themselves. The only basis upon which it could have done so was if the latter had been unenforceable by reason of statutory illegality. That would only have been the case if the provision had prohibited a contract, whether expressly or by necessary implication: *Okedina v Chikale* [2019] CIR 1635, in particular at [16] to [22]. Section 23(6) of the MHA did not purport to define or alter the employment status of individuals. Even if it could be read so as to prohibit an NHS foundation trust from entering into a contract with an 'employee' in order to exercise the powers to which it related, that would not lead to a conclusion that such a contract and the rights consequential upon it are unenforceable by the individual who was a party to it, albeit that the Claimant did not seek to resile from the concession which she had made below. As the Tribunal had correctly identified [125], section 23(6) of the MHA made no express reference to 'limb (b)' workers, as distinct from 'employees' in the common law sense, i.e. those who worked under a contract of service. That was notwithstanding the fact that, as at the dates, respectively, of enactment of the MHA and of its later amendment to include section

23(6), there was a statutory distinction between employees and workers, of which those drafting the MHA must be taken to have been aware. There was no necessary implication to the effect urged by the respondent; Parliament would have been expected clearly to state if it had intended to deprive AHMs of all employment protection. Nor would such protection run contrary to Article 5 ECHR or public policy. Whether an individual enjoyed rights under the ERA and/or EqA was not determinative of the extent of control exercised by the employing entity, the latter being a question of fact. The Tribunal had made findings of fact regarding the latter which were not impeachable on appeal. Holding the claimant not to be a limb (b) worker did nothing to further the purpose of the MHA. Further, there was an important distinction between control and subordination of a worker pursuant to contract and control at the point of decision-making. The latter might present a problem in relation to Article 5 ECHR, but the former would not. Indeed, as a limb (b) worker, the AHM's independence would have greater protection because s/he could no longer be 'dismissed' with impunity for making a protected disclosure, or doing a protected act. There was a strong public policy interest in AHMs having employment rights: they were in a unique position of being 'outsiders' to the trust, to some extent, whilst having a high level of access and exposure to matters affecting detained patients. Thus, the public interest would be served by enabling them to make public-interest disclosures without fear of retribution.

Ground Two

18. The Tribunal's conclusion that the instant case was distinguishable from *Hashwani* had been a finding of fact, or, at least, heavily influenced thereby. There was no contradiction between its findings that, respectively, to a degree, the claimant performed services and earned her fees for and under the direction of the respondent and that she was an independent decision-maker whom the respondent could not control at the point of decision making. That was an important distinction, which could be made in relation to those working in almost any regulated profession. The point had been made expressly in *O'Brien* [35]. In *Somerville*, a case in which the facts had been closely analogous to those of the instant case, it had not been suggested that the claimant had not been in a sufficiently subordinate relationship to have been a worker. By contrast, the arbitrator in *Hashwani* had been in a very different position. In the words of Lord Clarke JSC [42], *'...Once an arbitrator has been appointed, at any rate in the absence of agreement between them, the parties effectively have no control over him.'* That could not be said of the claimant in this case.

Grounds Three and Four

19. Both grounds were closely related. The respondent argued that there had been no intention to create legal relations in the sense that the intention had been to appoint the claimant to a statutory office, rather than to create a contract. Thus, if the Tribunal had been entitled to conclude that she had not been appointed to a statutory office, the respondent's submission that there had been no intention to create legal relations could not stand independently.

20. Section 23(6) of the MHA had nothing to say as to whether parties could enter freely into a legally binding contract. At best, it could be argued that, against the background of that section, there could have been no intention to create legal relations. The Tribunal had found to the contrary. No criticism had been made of the Tribunal's self-direction at [132] and [133] of its reasons, in the context of which it had considered all relevant facts and documentation. The conclusion reached had been clearly open to it and, indeed, legally correct. As a matter of law, the labelling of an agreement was not determinative of its proper characterisation. There had been various obligations on the claimant; to attend training, to take part in an appraisal system, and to make herself available. She had been entitled to receive remuneration for attending hearings, together with travel expenses. All such features had been suggestive of a contractual relationship: see *Percy*, at [23] and [24]. An inclusive and purposive approach ought to be adopted towards employee protection. The Tribunal had also been entitled to have regard to the absence of indicia to the effect that there had been no intention to enter into a contractual relationship.

21. As to the respondent's submission that the claimant was a statutory officeholder, the key point was that the rights and obligations of such a person were created by statute, rather than by agreement between the parties. The contrast with the instant case was clear and the basis for the respondent's contention that the claimant was exclusively a statutory office-holder was very thin, being the terms of section 23(6) of the MHA. In fact, that section operated simply to define the class of persons who could be authorised to exercise a statutory power. The rights and obligations of the claimant's role were contained in her agreement with the respondent, rather than established by statute. The Tribunal had made no error of law. In any event, a conclusion that the claimant had been an officeholder could only have assisted her in relation to her claim under the ERA. Her claim under the EqA derived from EU law, such that the reasoning in *O'Brien* applied and any status as an office-holder was neither necessarily nor definitively inconsistent with having protection as a worker [29].

Ground Five

22. Whilst brief, the Tribunal's conclusions on this issue had been sound and disclosed no error of law. An argument similar to that deployed by the respondent in this case could have been deployed in *Gilham*, but the Supreme Court, albeit when addressing justification, had concluded that it might be thought that to give protection to judges making protected disclosures would enhance their independence [36]. The same rationale applied to AHMs whose independence was not enhanced by denying them the employment rights which came with limb (b) worker status under the ERA, or employee status under section 83 of the EqA.

Discussion and conclusions

23. Section 230 of the ERA provides, materially:

> **'230.— Employees, workers etc.**
>
> **(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" (except in the phrases "shop worker" and "betting 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.**
>
> **(4) In this Act "employer" , in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.**
>
> **(5) In this Act "employment" —**
>
> **(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and**
>
> **(b) in relation to a worker, means employment under his contract;**
> **and "employed" shall be construed accordingly.**

> **(6) This section has effect subject to sections 43K, 47B(3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker" , "worker's contract" and, in relation to a worker, "employer" , "employment" and "employed" have the extended meaning given by section 43K.**
>
> **(7) …'**

The claimant asserts that she falls within the definition of worker for which section 230(3)(b) provides.

24. Section 83 of the EqA provides, materially:

> **'83 Interpretation and exceptions**
>
> **(1) This section applies for the purposes of this Part.**
>
> **(2) *"Employment"* means—**
>
> **(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;**
>
> **(b) Crown employment;**
>
> **(c) employment as a relevant member of the House of Commons staff;**
>
> **(d) employment as a relevant member of the House of Lords staff.**
>
> **…**
>
> **(3) …**
>
> **(4) A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons.**
>
> **…'**

The claimant asserts that she was employed within the meaning of section 83(2)(a), under a contract personally to do work.

25. It is important to understand the task in which the Tribunal was engaged when determining whether it had jurisdiction to consider the substantive claims which the claimant sought to advance under each of the above statutes, the provisions of which dictated whether she had the requisite status. In relation to the ERA, those requirements have been considered in a number of cases and were pithily summarised by Lord Leggatt JSC in *Uber* (at [41], [87] and [88]):

> **'41 Limb (b) of the statutory definition of a "worker's contract" has three**

> **elements: (1) a contract whereby an individual undertakes to perform work or services for the other 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.**
>
> **…**
>
> **87 In determining whether an individual is a "worker", there can, as Baroness Hale DPSC said in the *Bates van Winkelhof* case [2014] ICR 730, para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".**
>
> **88 This approach is also consistent with the case law of the CJEU which … treats the essential feature of a contract between an employer and a worker as the existence of a hierarchical relationship. In a recent judgment the Grand Chamber of the CJEU has emphasised that, in determining whether such a relationship exists, it is necessary to take account of the objective situation of the individual concerned and all the circumstances of his or her work. The wording of the contractual documents, while relevant, is not conclusive. It is also necessary to have regard to how relevant obligations are performed in practice: see *AFMB Ltd v Raad van bestuur van de Sociale verzekeringsbank* (Case C-610/18) [2020] ICR 1432, paras 60—61.'**

26. Both before the Tribunal and before me, the claimant relied upon *Nursing and Midwifery Council v Somerville* [2022] ICR 755, in which the Court of Appeal was concerned with whether an individual appointed as a panel member and chair of a Fitness to Practise Committee of a professional regulatory body — the Nursing and Midwifery Council ('the NMC'), and who undertook hearings, was a worker within the meaning of regulation 2(1) of the Working Time Regulations 1998 (which is in terms materially similar to those of section 230(3)(b) of the ERA). Mr Somerville's appointment as a panel member and chair was subject to written terms of agreement referred to as an overarching contract, which provided that the parties had agreed that the panel member *'shall provide the Services on the terms of the Agreement'*. He also agreed to sit on panel hearings on particular days, although he was free to refuse to accept any particular hearing date, or to cancel a hearing which he had agreed to attend by notifying the NMC that he was no longer available for that hearing. The NMC's functions are governed by the Nursing and Midwifery Order 2001 (SI 2002/253). The NMC is under a statutory duty to maintain standards

of conduct and performance for nurses and midwives. By paragraph 15(3) of Part 1 to Schedule 1 to the 2001 Order, *'The Council may not employ any member of the Council or its committees, or sub-committees'*. Notwithstanding express contractual provisions to the effect that (1) Mr Somerville had the status of an independent contractor and that nothing in the agreement created a relationship of employer and employee, and (2) that nothing in the agreement rendered him an employee, partner or agent of the NMC, the Tribunal found him to be a worker on the basis that a series of individual contracts had come into being on each occasion on which he had agreed to sit and that there had been an overarching contract relating to the provision of his services, finding:

> **'242. ... Although I have concluded that there was insufficient mutuality of obligations 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 of 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 (President) in *James v Redcats (Brands) Ltd* [2007] ICR 1006, "semi-detached" rather than "detached", as an independent contract would be.**
>
> **244. Accordingly I conclude that the claimant was a worker of the NMC within the meaning of section 230(3)(b) of the 1996 Act and regulation 2(1)(b) of the Regulations.'**

27. The Court of Appeal upheld that conclusion. Having set out the three elements of the definition of a 'limb (b)' worker, Lewis LJ observed (at [46] to [49] and [54] to [55]):

> **'46 In the present case, the employment tribunal was dealing with two different kinds of contracts. The first was the contracts contained in the 2012 Agreement and the 2016 Agreement which governed the claimant's appointment as a panel member and chair. These agreements did include mutually enforceable obligations and so did give rise to a contract. They did not, however, include the type of obligations which were necessary to bring them within the scope of a worker's contract. That appears from the reasoning of the employment tribunal. It found that the Agreements imposed**

obligations on the Council to provide communications on guidance and procedure and to provide training. The Agreements imposed obligations on the claimant to comply with relevant guidance and to provide information when required and to deal with information confidentially (see paras 98, 99 and 190 of the tribunal's reasons). It is clear that those Agreements did not amount to a contract of employment because they did not impose any obligation on the Council to o›er or pay for work or any obligation on the claimant to provide any services (see paras 196—209 of the reasons).

47 By parity of reasoning, those Agreements did not of themselves include obligations of the kind necessary to make them worker's contracts within limb (b) of the definition of worker in regulation 2 of the Regulations. More specifically, they did not include an obligation on the claimant to do or perform personally any work or services. The obligations ensured that the claimant would be provided with the training and information necessary to discharge the duties of a panel chair. They imposed duties on the claimant to provide information and assistance if required. They expressly contemplated that the claimant might agree to provide services when requested (see clauses 11.2.4 and 17.5 set out above) and, if so, defined those services and set out obligations applicable to the provision of those services. But the 2012 Agreement and 2016 Agreement stopped short of being a contract under which the claimant undertook "to do or perform personally any . . . services". Put differently, the Agreements contemplated that the claimant might agree to provide services and they imposed obligations to ensure that he would be adequately trained and informed to do so if he agreed to provide them, but they stopped short of imposing any obligation on the Council to offer any hearing or, more significantly, any obligation on the claimant to do any work or perform any services. For that reason, although the Agreements were contracts, they did not include obligations of the sort that would bring them within the definition of a worker's contract in the Regulations.

48 The employment tribunal also found that the claimant and the Council entered into a series of individual contracts. Each time the Council offered a hearing date, and the claimant accepted it, he agreed to attend that hearing and the Council agreed to pay him a fee. By those individual agreements, and the obligations contained in the 2012 and 2016 Agreements setting out how the claimant was to carry out the task of conducting a hearing, the claimant "agreed to provide his services personally" (see para 219, and paras 189 and 191, of the employment tribunal's reasons). The employment tribunal went on to find that the Council was not the client or customer of a profession or business carried on by the claimant. Those findings were sufficient to entitle the employment tribunal to conclude that the claimant was a worker in that he entered into (and had worked under) a contract whereby he undertook to perform services personally for the respondent and the respondent was not a client of his business or professional undertaking. There is no need, and no purpose served, in seeking to introduce the concept of an irreducible minimum of obligation in the way defined by the respondent.

49 That conclusion is consistent with the decision of the Supreme Court in *Uber*…

…

54 Nor do any of the other factors, relied upon by Ms Darwin, point to any other

> **conclusion. It is correct that the individual contracts for individual assignments had to be read with the 2012 and 2016 Agreements, not least because those agreements contemplated that the claimant might agree to chair particular hearings and, if so, contained obligations that applied to the carrying out of a particular hearing. However, the fact that an overarching contract does not impose an obligation to work does not preclude a finding that the individual is a worker when he is in fact working: see para 91 of the decision in *Uber* [2021] ICR 657 and the cases referred to in that paragraph such as *Windle v Secretary of State for Justice* [2016] ICR 721, especially at para 23…**
>
> **55 Similarly, the fact that the claimant could withdraw from the agreement to attend a hearing even after he had accepted it does not alter matters. The claimant had entered into a contract which existed until terminated (see para 124 of the judgment in *Uber*). Furthermore, if it was not terminated and the claimant did chair the hearing, the claimant will, in the language of the Regulations, have worked under a contract personally to perform services. Nor does the reference to "undertakes" indicate that there must be some distinct, superadded obligation to provide services independent from the provision of the services on a particular occasion. "Undertakes to do or perform" in this context means no more than "promises to do or perform". Finally, when deciding whether a specific agreement to provide services on one particular occasion amounts to a worker's contract, the fact that the parties are not obliged to offer, or accept, any future work is irrelevant: see *McMeechan v Secretary of State for Employment* [1997] ICR 549, 565C—E.'**

28. That analysis is consistent with the Tribunal's findings in this case, in particular at [136] to [139] of its reasons.

29. The nub of the issue in this case is whether there was a contractual relationship, or whether the claimant was an officeholder. It is said that an absence of an intention to create legal relations ought to have led the Tribunal to conclude that the 'honorary contract' into which the parties had entered was not a contract which satisfied the first element of the statutory test and that, in the absence of the latter, the claimant did not have the status of a worker. It is of note that that submission does not address any contract which came into being on each occasion on which the claimant accepted the respondent's offer to sit as an AHM, for a fee. Its essential foundation is the provision made by section 23(6) of the MHA. Dr Morgan did not quibble with the Tribunal's analysis of the requirements in fact imposed by the so-called 'honorary contract', nor with the factual basis of the claimant's submissions before the Tribunal, as recorded at [73]to [85] of its reasons and accepted by the Tribunal, at [137]:

> **'73. The claimant referred the Tribunal to the terms of her "employment" as a AHM as set out in her "contract" with the Trust [329-333]. She asserted that all AHMs must enter this contract to act as AHMs for the Trust and that the terms of this trust's contract with its AHMs is specific to this trust. There is no set letter of appointment which covers the appointment of AHMs nationwide. Each trust and private hospital group "employs" its AHMs by similar contracts, but each with differing terms and conditions.**

74. The claimant submitted that her "contract" with the respondent sets out specifically: her remuneration fee for each hearing; the mandatory training that she must attend; her duties and responsibilities; her duty of confidentiality; her duty to be bound to comply with the trust policies and procedures; her duty to follow standards of conduct; and that acts of misconduct of AHMs will be investigated by the trust and lead to action under the trust's disciplinary procedure. She is referred to throughout her contract as "an employee" and "an honorary member of the trust".

75. The claimant referred the Tribunal to the Job Description, which accompanied the post application and contract [126-129]. She contended that this also specifies mandatory terms for all AHMs in this trust. These mandatory terms are specific to this trust. As a AHM for this trust, she highlights, she is required to attend mandatory training throughout each year of her "employment"; to undertake a minimum of 12 hearings per year; to attend a minimum of AHM forum meetings per year; to read the twice-yearly update newsletter; to attend 3 training sessions prior to commencing the role; and to carry out 3 observations of hearings prior to commencing the role.

76. She continued that as an AHM for this trust, it is mandatory for her to undergo and pass one appraisal by an appraiser of the trust in the first year of her "employment". Thereafter, she must undergo and pass one appraisal every 3 years. Those AHMs who do not "pass" the appraisal do not have their contracts renewed. Those AHMs who do not carry out the minimum of 12 hearings per year have their contracts terminated. A record is maintained by the trust of the number of hearings attended by each AHM and the number of hearings chaired by each AHM. This is shared periodically with the Associate Manager Group at forum committee meetings.

77. The claimant further explained that as an AHM, she is not required to obtain public liability insurance. This trust indemnifies the AHMs in the execution of their functions. This is not the case in self-employed roles. Moreover, AHMs are not permitted to travel to and from trust venues unless and until proof of car insurance details covering such business is provided to the trust. The Car Insurance Details Form [335-336] specifically refers to the use of "private vehicles for use on official journeys during the course of ... employment with the trust" and that the "vehicle will be maintained at all times in a roadworthy condition.... while being used on official business". This requirement of AHMs is specific to this trust.

78. She explained further that remuneration for attending hearings, forum committee meetings and training is set at a specific rate by this trust. This rate is specific to this trust, with other trusts and hospitals setting different and separate rates of remuneration. Periodically, there are increases in the rate of pay agreed by the trust. Additionally, specific to this trust, there is a verbal agreement between the trust and the AHMs that cancellation of a hearing within 24 hours will result in payment in full. This is a condition which is specific to this trust and varies from trust to trust. AHMs are paid by this trust via PAYE, with tax and NI deducted at source. All AHMs were provided with a £50 voucher in 2021 in recognition of all the trust's employees' efforts throughout Covid pandemic.

79. Further points advanced by the claimant included that all AHMs were informed in writing in January 2022 that they are required to "be vaccinated

against Covid 19 to continue your role with the trust". The Job Description annexed to the application form for the role of AHM specifically states that AHMs are "members of a sub- committee" of the trust.

80. As part of the mandatory appraisal, this trust sets out competency framework standards, which the AHM must meet. This is specific to this trust. There is no requirement in law that states that such terms must be met to carry out the role of AHM. This is specific to this trust, who have chosen to make appraisals mandatory for their AHMs. Prior to taking on the role of AHM, this trust insists on mandatory introductory training, which must be completed prior to the role of AHM being commenced. Other trusts and hospitals do not have this requirement. If similar training has been provided to a AHM elsewhere, the respondent trust will continue to insist that its own mandatory training must be completed. The mandatory training is of a style and choice specific to this trust. Prior to commencing the role of AHM, three observations of hearings must be undertaken by the AHM. This is a requirement specific to this respondent trust. Other trusts make their own arrangements for training, etc.

81. The claimant argued that the Associate Managers Group meets 2-4 times per year and that attendance is mandatory. As an AHM, she must perform the work/services personally for the trust. She cannot make her own arrangements to send a replacement person to carry out her role. If she is unavailable for a hearing that she is arranged to attend, she must contact the mental health law administrators to arrange a replacement AHM to attend in her place.

82. As an AHM, she must agree to the trust's particular terms and conditions, set out in the contract, the job description and verbally, to be appointed and to continue in the role of AHM. There is a verbal "agreement" that AHMs must chair one in three hearings and that any less is unsatisfactory. On attendance at each face-to-face hearing (prior to the commencement of virtual hearings, required during the pandemic) each AHM would sign a contract with the trust for attendance and payment for that hearing. This included the AHM's name, address, hearing specifics such as venue, and date. This formed the basis for payment for services provided on that date.

83. The claimant submitted that because of the terms and conditions which the AHMs must accept – including mandatory appraisals, mandatory training, mandatory minimum of attending 12 hearings per year – the AHMs are under the supervision and control of the trust. As an AHM, she is a "limb (b)" worker. She works under a contract whereby she undertakes to do or personally perform 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 that she is undertaking.

84. Her contention is that her work as a AHM is performed pursuant to a contract with the respondent trust, the recipient of that work or services. It is not performed pursuant to some different legal arrangement. While the role of AHM is a requirement of statute, the terms on which she carries out this role for the respondent trust is set out in their contract with her. None of the terms of her service are dictated by statute – but by the employing trust. It is clear from the manner of engagement, the terms and conditions of the specific job description, contract and mandatory requirements set out by this trust that the essential components of the relationship are not derived from

> **statute. It is easy to recognise the trust as her "employer", it is argued. Every trust and private hospital employing AHMs has its own arrangements and terms of employment for those AHMs, and these differ considerably from hospital to hospital.**
>
> **85. The claimant submitted that the trust intended to enter a contractual relationship with its AHMs, defined to a great extent by the terms of the contract, job description, and policies and procedures referred to therein. The trust did not envisage some other legal relationship, defined solely by the terms of statute. The source of the terms of engagement of the respondent trust's AHMs is the contract and not statute. The manner of appointment of the AHMs is at the discretion of the trust. It is not laid down by statute. It is an individual matter for each trust and hospital group. No criteria are laid down by statute to be applied to the process of appointment and "employment". Following appointment, a contract is provided from the respondent trust to the AHM, which must be signed before commencement of the role. The essential components of the relationship between the AHM and the trust are not derived from statute but from the specific contract entered when accepting the role. The removal of an AHM from the role is a matter for the trust, not a matter set out in statute.'**

30. In this case, the Tribunal made clear findings as to the terms under which the claimant had agreed to provide services as an AHM, summarised at [137], which itself cross-referred to the claimant's detailed submissions regarding the terms on which she in fact worked as an AHM. Given the way in which the respondent had framed its arguments, and the fact that the parties were not in dispute as to the factual matrix within which the legal issues had arisen, it is unsurprising that the matter was dealt with in economical terms, for which the Tribunal is not to be criticised.

31. It is right to recognise that the argument advanced in this case does not appear to have been run in *Somerville* but I am satisfied that Dr Morgan seeks to place more weight on the wording of section 23(6) of the MHA than it will bear. First, the starting point, for which there is the highest authority, is the wording of section 230(3)(b), and Dr Morgan is wrong to submit to the contrary. Secondly, nothing in section 23(6) of the MHA precludes an AHM from being a worker, whether expressly or by necessary implication, which would itself need to be clear. As was observed in *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32 [25], had Parliament wished to include workers within the meaning of the section, it could have done so expressly, but had not done so. Public policy does not require such a construction; as the Tribunal found [125], the independence of decision-making which section 23(6) of the MHA reflects does not require the denial of any employment rights to the AHM. Neither do the rights conferred on a detainee by Article 5 ECHR. Thirdly, section 23(6) does not itself require the terms imposed by the respondent in this case to be imposed, or make any (let alone detailed) prescription for the terms of appointment as an AHM. Fourthly, the status of worker and its associated rights do not themselves serve to compromise the independence or integrity of the role, which, to paraphrase Mr Young's submission, is what it is and has no impact upon a patient's rights under Article 5 ECHR; indeed — see *Gilham* [36] — independence and integrity are likely to be promoted by enabling an AHM to make public interest disclosures without fear

of retribution. It follows that worker status does not serve to defeat the purpose of section 23(6) of the MHA. Nothing in that conclusion is inherently undermining of the requirements of the Code (as Dr Morgan acknowledged in discussion), or of Article 5 ECHR. Fifthly, Parliament's intention in enacting section 23(6) does not, without more, say anything of the parties' intentions in entering into an overarching and/or series of individual contracts, which, as the Tribunal accepted, made various Trust-specific provisions which did not derive from the requirements of the MHA. Once it is acknowledged that the sole basis upon which a finding of worker status is impugned lacks merit, it is clear that the Tribunal's conclusion in relation to section 230(3)(b), following appropriate self-direction as to the law, was one which was plainly open to it on the facts as found (and agreed) and, in my judgement, was correct. As Dr Morgan acknowledged, the question was one of fact and degree and, in order to succeed, the respondent would need to establish perversity. Even if its grounds of appeal could be read in such a way, which is doubtful, it has come nowhere near crossing the requisite threshold.

32. Nor, subject to one important qualification (see below), is the position any different when viewed through the lens of section 83(2) of the EqA. As was held in *Alemi* [11]:

> **'There is a difference in the wording of the definitions of an employee in the extended sense for the purposes of the Equality Act 2010 who must have entered into *'a contract personally to do work'* and a 'limb (b) worker' for the purposes of the Employment Rights Act 1996 who not only must have entered into a contract *'to do or perform personally any work or services'* but also 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'*. The main point in this appeal is whether the additional wording makes a significant difference. It is now well established in the authorities that it does not.'**

The important qualification is that, for the purposes of a claim deriving from EU law, any status as an officeholder would not of itself be mutually exclusive with that of worker: *O'Brien.*

33. *Hashwani* does not assist the respondent. In that case, the Supreme Court held that an arbitrator's role was that of an independent provider of services, not one in a relationship of subordination with the parties who received his services or of *"employment under . . . a contract personally to do work"*. At [34], Lord Clarke JSC held:

> **'As I read *Percy* [2006] ICR 134, it sought to apply the principles identified by the Court of Justice, as indeed did this court in *O'Brien*. The essential questions in each case are therefore those identified in paras 67 and 68 of *Allonby* [2004] ICR 1328, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship**

> **between the parties. As I see it, that is what Baroness Hale meant when she said that the essential difference is between the employed and the self-employed. The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case.'**

That is the exercise in which the Tribunal in this case engaged, coming to a permissible conclusion, at [145] of its reasons. Nothing in its conclusion was inconsistent with its recognition that an AHM was not subject to the respondent's direction or control at the point of decision-making.

34. At paragraphs [44] to [46] of *Hashwani*, Lord Clarke JSC continued (with emphasis added):

> **'44 In this regard an arbitrator is in a very different position from a judge. The precise status of a judge was left open by this court in *O'Brien* [2010] 4 All ER 62, in which the court referred particular questions to the Court of Justice: see para 41. However, as Sir Robert Carswell said in *Perceval-Price* [2000] IRLR 380 and Lord Walker said in *O'Brien*, at para 27, judges, including both recorders and all judges at every level, are subject to terms of service of various kinds. As Sir Robert put it, although judges must enjoy independence of decision without direction from any source, they are in other respects not free agents to work as and when they choose, as are self-employed persons.**
>
> **45 In both those cases the court was considering the relationship between the relevant department of state and the judges concerned. It was not considering the relationship between the judges and the litigants who appear before them. Here, by contrast, the court is considering the relationship between the parties to the arbitration on the one hand and the arbitrator or arbitrators on the other. As I see it, there is no basis upon which it could properly be held that the arbitrators agreed to work under the direction of the parties as contemplated in para 67 of *Allonby* [2004] ICR 1328. Further, in so far as dominant purpose is relevant, I would hold that the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties.**
>
> **46 In reaching this conclusion it is not necessary to speculate upon what the position might be in other factual contexts.'**

35. As the emphasised text above indicates, *Hashwani* was concerned with the position of an arbitrator vis-à-vis the parties to that arbitration (as the Tribunal in this case noted, at [67]), recognising that the latter was not analogous to the relationship between the State and a judge, or necessarily, with 'other factual contexts'. In this case, the analogy would be with the position of the AHM vis-à-vis the patient whose detention s/he was reviewing, under whose direction it could not be said that the AHM had agreed to work. Contrary to Dr Morgan's submission, the AHM's position is not directly comparable with that of an arbitrator, nor did *Hashwani* compel the conclusion for which he contends, which, as that case makes

clear, will always be a fact-sensitive question. Ultimately, there is limited value to be gained from comparison with different factual circumstances.

Disposal

36. It follows that the respondent has established no error of law on the part of the Tribunal. All grounds of appeal fail and are dismissed.