Neutral Citation Number: [2024] EAT 43

Case Nos: EA-2022-SCO-000075-JP

EA-2022-SCO-000076-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 8 April 2024

Before:

THE HONOURABLE LORD STUART

- -

Between:

MRS GILLIAN PHILIP

Appellant

- And –

(FIRST) WORKING PARTNERS LIMITED and
(SECOND) HARPERCOLLINS PUBLISHERS LLC

Respondents

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- -

Mr David Mitchell (instructed by Irwin Mitchell LLP) for the **Appellant**
Mr David Hay KC (instructed by Keystone Law & Pinsent Masons LLP) for the **Respondents**

Hearing date: 20 September 2023

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JUDGMENT

SUMMARY

WORKER STATUS; whether claimant a "worker" within meaning of section 230(3)(b), Employment Rights Act 1996 and "employee" for purposes of section 83(2)(a), Equality Act 2010.

The claimant, a writer, brought a claim for discrimination against a book packager, with whom she had entered into a contract to provide text for a number of books, and the publisher of those books. By judgement dated 30 June 2022, following a preliminary hearing at which he heard evidence, the Employment Judge dismissed the claim on the basis that the claimant was not an "employee" for the purposes of section 83(2)(a), **Equality Act 2010** nor a "worker" within the meaning of section 230(3)(b), **Employment Rights Act 1996**. The claimant appealed, arguing that the Employment Judge had erred in not finding that the claimant had "employee" and "worker" status for the purposes of the above-named sections.

Held: Dismissing the appeal, the Employment Judge had correctly identified and applied the appropriate legal test, had not taken into consideration any irrelevant considerations nor failed to take into account any relevant considerations and had reached a conclusion, in all the circumstances, that was open to him, having properly directed himself on the evidence and relevant law.

THE HONOURABLE LORD STUART:

Introduction

1. This is an appeal against the judgement of Employment Judge Kemp dated 30 June 2022 following a preliminary hearing heard over 8 to 10 June 2022.

2. The claimant is, in general terms, a writer. The first respondent are a fiction packager of children's books. The Second Respondent are a publisher of books. Between 2011 and 2019 the claimant, through her literary agent, entered into a series of contracts with the first respondent to provide text, under a pseudonym, for a number of books within a series. The second respondent published the books. In addition to providing text, the claimant participated in promotional tours organised by the second respondent in connection with the books for which she provided text. In June 2020 the claimant posted, from what was described as her professional account, a tweet in support of a well-known author who had expressed certain views in connection with gender/biological sex based issues. In response to the claimant's posted tweet, the first respondent declared the claimant to be in breach of their contract and terminated the contract. As a consequence of that termination, the claimant made a claim against the respondents, including various claims for discrimination.

3. In response to the claim made, the first and second respondents advanced various preliminary arguments. Only one of those arguments is relevant for the purposes of this appeal, namely that the claimant was not an employee under section 83(2)(a) of the **Equality Act 2010** (**EqA 2010**) and, consequently, the claimant's case for discrimination could not succeed. Following the hearing on 8 to 10 June 2022, EJ Kemp accepted the respondents' argument that the claimant was not an employee for the purposes of section 83, **EqA 2010** and dismissed the claim.

4. This appeal is limited to the question of whether EJ Kemp was wrong in law to hold that the claimant was not an employee for the purposes of section 83, **EqA 2010** and thereby to dismiss the claim.

The relevant law

5. By way of preliminary comment, it was common ground between the parties that the test for determining employment status under section 83(2)(a), **EqA 2010** is treated as the same as that for determining worker status under section 230(3)(b) of the **Employment Rights Act 1996** (ERA 1996) (**Pimlico Plumbers Ltd v. Smith** [2018] UKSC 29) and that whilst EJ Kemp focused his analysis primarily on authorities dealing with **ERA 1996**, it was appropriate in law for him to do so. If EJ Kemp's conclusion that the claimant was not a worker for the purposes of **ERA 1996** was sound in law, it followed that she was not an employee for the purposes of **EqA 2010**. Accordingly, in this appeal, it is EJ Kemp's application of the test under section 230(3), **ERA 1996** that is the focus of challenge.

6. Section 230(3), **ERA 1996** defines a worker as follows:

> (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.

7. It was not disputed that the claimant was not a worker under a contract of employment (sub-paragraph (3)(a)). The focus of argument was on whether the claimant met the test for worker status under sub-paragraph (3)(b), often referred to as a 'limb (b) worker'.

8. In **Bates van Winkelhof v. Clyde & Co LLP** [2014] UKSC 32 a solicitor and equity partner in the respondent, a Limited Liability Partnership, brought a claim against the respondent alleging detriment under reference to **ERA 1996**. The respondent argued that, standing the terms of section 4(4) of the **Limited Liability Partnership Act 2000**, the claimant could not qualify as a worker within the meaning of section 230(3), **ERA 1996**. Although three judgements were given (Baroness Hale (with whom Lords Neuberger and Wilson agreed), Lord Clarke and Lord Carnwath), all of the Justices were in agreement with Baroness Hale's judgement on her interpretation and application of section 230(3), **ERA 1996**.

9. At paragraph 31 Baroness Hale stated:

> "[E]mployment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class."

10. Baroness Hale thereafter, having discussed a number of cases in which the courts, in seeking to determine the status of the respective claimants, made reference to concepts such a 'subordination', 'integration' and 'dominant purpose', concluded at paragraph 39:

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

11. In **Uber BV v. Aslam** [2021] UKSC 5 the Supreme Court considered again the terms of section 230(3)(b), **ERA 1996**, this time in the context of whether the taxi-driving claimants worked under a contract of employment for Uber London (as opposed to contracts with the taxi passengers). At paragraph 38, the Supreme Court, in a single judgement by Lord Leggatt, cited with approval Baroness Hale at paragraph 31 of **Bates van Winkelhof** (as cited above). At paragraph 41 Lord Leggatt stated:

> "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."

12. At paragraph 87 Lord Leggatt stated:

> "In determining whether an individual is a "worker", there can, as Baroness Hale said in the *Bates van Winkelhof* case at 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".

13. In **Sejpal v. Rodericks Dental Ltd** [2022] EAT 91, the Employment Appeal Tribunal considered whether the employment tribunal had been entitled to hold that a claimant dentist was not a person who was employed under a contract personally to do work, in accordance with section 230(3)(b), **ERA 1996**. Following a careful review of the relevant authoritative case law, HHJ Tayler, stated:

"7. The entitlement to significant employment protection rights depends on a person being a worker. Deciding whether a person is a worker should not be difficult. Worker status has been the subject of a great deal of appellate consideration in recent years. Worker status has come to be seen as contentious and difficult. But the dust is beginning to settle. Determining worker status is not very difficult in the majority of cases, provided a structured approach is adopted, and robust common sense applied. The starting point, and constant focus, must be the words of the statutes. Concepts such as "mutuality of obligation", "irreducible minimum", "umbrella contracts", "substitution", "predominant purpose", "subordination", "control", and "integration" are tools that can sometimes help in applying the statutory test, but are not themselves tests. Some of the concepts will be irrelevant in particular cases, or relevant only to a component of the statutory test. It is not a question of assessing all the concepts, putting the results in a pot, and hoping that the answer will emerge; the statutory test must be applied, according to its purpose."

14. HHJ Tayler explained:

"10. … for an individual (A) to be a worker for another (B) pursuant to section 230(3)(b)

ERA:

a. A must have entered into or work under a contract (or possibly, in limited circumstances briefly discussed below, some similar agreement) with B; and

b. A must have agreed to personally perform some work or services for B.

11. However, A is excluded from being a worker if:

a. A carries on a profession or business undertaking; and

b. B is a client or customer of A's by virtue of the contract."

15. HHJ Tayler in **Sejpal** (as above) was cited with approval by The Honourable Mrs Justice Eady, DBE, President of the Employment Appeal Tribunal, in **Catt v. Table Tennis England** [2022] EAT 125.

16. It is against the law as stated in these authorities that I consider the claimant's submission on appeal.

Summary of the Judgement of Employment Judge Kemp

17. At paragraph 12 of his judgement EJ Kemp sets out that the Tribunal had over 6,000 pages of documents. No Statement of Agreed Facts had been prepared, albeit parties had been invited, not ordered, to prepare one. It was not apparent that the claimant and first respondent in particular had fulfilled their duty of co-operation. This all meant that what had been a complex case was made far more so unnecessarily.

18. Between paragraphs 18 and 83 EJ Kemp made findings in fact. Judge Bowers KC, in allowing the appeal to proceed to a full hearing, noted that "the fact finding is meticulous". I note that the claimant on appeal does not argue that EJ Kemp was either not entitled to reach any of the findings in fact made or that he ought to have made findings in fact not made.

19. At paragraph 86 EJ Kemp summarised the claimant's submission. Insofar as relevant to this appeal, the claimant was a worker and that that was equivalent to an employee under section 83,

EqA 2010. The claimant's position could be contrasted to that of an author. The first respondent in particular exercised substantial control over the claimant and her work, to the extent of minute detail. The claimant was not an independent freelance author, but a writer who was a worker and employee.

20. At paragraph 90 EJ Kemp summarised the respondents' submission. Again insofar as relevant to this appeal, it was clear from the evidence that the claimant was self-employed, marketing herself as an independent writer to the world. She had a portfolio of work, assisted by her agent. It was not a binary position between author as self-employed and writer as worker, as submitted by the claimant. The level of control was materially less than claimed.

21. Between paragraphs 110 and 125 EJ Kemp analysed the law relevant to the claimant's status. He considered various cases, including **Bates van Winkelhof** and **Uber BV** and a number of cases cited therein. The hearing before EJ Kemp slightly pre-dated the issue of the judgement in **Sejpal**.

22. EJ Kemp then, at paragraphs 155 to 173 addresses the question of whether the claimant was a section 230(3)(b), **ERA 1996** "worker" or s.83(2)(a), **EqA 2010** "employee". This is the element of EJ Kemp's judgement appealed against. Given the structure and content of the claimant's appeal, I will not narrate the analysis undertaken by EJ Kemp, rather I will consider his analysis as part of my decision in respect of the various grounds advanced on appeal.

Summary of claimant's argument on appeal

23. The claimant provided a comprehensive written skeleton submission, which her counsel adopted. The claimant's grounds of appeal concentrate on the issues of (1) whether the claimant was carrying on a profession or business undertaking and (2) whether the first respondent was a client or customer of the claimant. Within those two grounds the claimant makes a number of criticisms aimed at particular paragraphs of EJ Kemp's judgement, variously based on (i) failure to take into account a relevant consideration or reaching an inconsistent finding, (ii) misdirection or misapplication of the law, (iii) taking into account an irrelevant consideration and (iv) reaching a perverse or irrational finding.

Summary of respondent's argument on appeal

24. The respondents also provided a written submission, which their counsel adopted. Perhaps unsurprisingly the submission advanced on behalf of the respondents was that EJ Kemp was entitled to reach the conclusion he did on the facts found by him. EJ Kemp had correctly identified the relevant law, had applied it correctly, had not failed to take into account any relevant considerations and had not taken into account any irrelevant considerations. His judgement was not perverse. Much of the respondents' written submission was a paragraph by paragraph response to the claimant's submissions.

Decision

25. EJ Kemp approached the question of the claimant's status under reference to the test in section 230(3)(b), **ERA 1996**. It is accepted by both parties that the tests under section 230(3)(b) **ERA** and section 83(2)(a), **EqA 2010** are materially identical in law and a finding under the former is sufficient for a finding under the latter, albeit the latter providing the actual basis for the claimant's remedy. Thus, it is clear that EJ Kemp correctly identified the relevant legal test.

26. The test under section 230(3)(b) requires a Tribunal to make findings in respect of a number of matters, namely (i) whether there is a relevant contract, (ii) whether, under that contract, the claimant provides services personally, (iii) whether the claimant carries on a profession or business undertaking and (iv) whether the respondent is a client or customer of such profession or business undertaking. It is clear from paragraph 155 of his judgement that EJ Kemp decided the first of those two matters in favour of the claimant, namely that there was a contract and that the claimant provided services personally under that contract.

27. The claimant's appeal in this case, notwithstanding it formally being advanced as two grounds of appeal, is, to a large extent, a relatively extensive series of distinct and isolated criticisms made in circumstances that appear to decline to consider either the context in which the criticised elements of EJ Kemp's judgement arise or EJ Kemp's judgement when read as a whole, or acknowledge that weight is pre-eminently a matter for the fact finder. Subject to a limited number of criticisms regarding EJ Kemp allegedly misdirecting himself on the law, which I address below, the vast majority of the criticisms amount to a disagreement about what weight ought to be attached to various findings in fact and/or which of a number of permissible conclusions ought to be drawn. Many of the criticisms ignore clear findings of fact made by EJ Kemp and/or mischaracterise EJ Kemp's conclusions as a necessary precursor to seeking to criticise that mischaracterisation. Whilst many of the criticisms give rise to the same or materially similar decision on appeal, standing the approach taken and obvious effort expended by counsel on the claimant's behalf, I have sought to address each of the criticisms.

28. In the face of this approach, it is necessary to reiterate that whilst the approach the Employment Appeal Tribunal adopts to appeals has been the subject of considerable appellate consideration, the approach is clear. The decision of an employment tribunal must be read fairly and as a whole,

without focusing on individual phrases or passages in isolation, and without being hypercritical. A tribunal is not required to identify all of the evidence relied upon in reaching its conclusion of fact. It is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision (albeit I reiterate Judge Bower KC's observation that EJ Kemp's "fact finding is meticulous"). An appellate court or tribunal should not interfere with a first instance judge's conclusions on primary facts unless it is satisfied that he or she was plainly wrong, by which is meant that no reasonable judge could have reached such a conclusion. The weight which the first instance judge gives to the evidence is pre-eminently a matter for them.

29. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate court or tribunal should be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision (if authority for these propositions is needed, see **DPP Law LLP v. Greenberg** [2021] EWCA Civ 672; **Volpi v. Volpi** [2022] EWCA Civ 464). It is clear in this case that EJ Kemp both correctly identified the relevant legal principles and took an appropriately structured approach to the application of those principles.

30. Finally, a significant number of the arguments made by the claimant in this appeal are based on asserted perversity or irrationally. It is trite law that an argument based on perversity ought to only succeed where an overwhelming case is made out that the Employment Tribunal reached a

decision that no reasonable tribunal, on a proper appreciation of the evidence and the law, could have reached (**Yeboah**, paragraph 94, Familiar Authority, no. 14).

Ground of appeal 2: was the claimant carrying on a profession or business undertaking.

31. Paragraph [156]. The claimant argues that EJ Kemp failed to take into account that the contract required personal service and that there was no right of substitution. At paragraph 155 EJ Kemp expressly took into account that the contract required personal service. Indeed, it is narrated that that fact was not in dispute. At paragraphs 33(i) and 157 EJ Kemp, again, expressly found and took into account that there was no right of substitution. These factors might or might not in the circumstances of any particular case be strong indicators of worker status but they are not, in themselves, conclusive and must be considered in the context of the whole of the evidence before the tribunal. Thereafter, the weight to be applied to such factors was pre-eminently a matter for EJ Kemp. Further, EJ Kemp's analysis must be read it its proper context, which is, along with paragraphs 157 to 165 and concluding at paragraph 166, whether the claimant carried on a profession or business undertaking. To argue "that claimant was carrying on a profession or business undertaking whether working for the first respondent or for herself doesn't take matters any further" either misunderstands or ignores that proper context. It is precisely a question raised by the test set out in section 230(3)(b). Further, to argue that EJ Kemp 'conflates' the two types of work undertaken is to misunderstand or ignore the context in which the analysis is undertaken. The word "writer" is expressly used in a "general rather than technical meaning" to describe the relevant profession or business, with the cited roles as examples within that profession or undertaking, in the latter the claimant having sole responsibility for creative input. Against that background there is no contradiction within paragraphs 22, 49 and 28. Accordingly, I reject the ground of appeal insofar as raised against paragraph 156 of EJ Kemp's judgement.

32. Paragraph [157]. The claimant submits that EJ Kemp has misapplied the control test. The claimant argues that, on the basis of factual findings (i) that at the end of the relationship the claimant worked almost exclusively for the first respondent, (ii) that there was a high degree of control by both respondents over what the claimant could say about her job during promotional tours in the USA, (iii) that approximately a third of the final book was pre-written before any input from the claimant and (iv) that the respondents did have control of the final book, the "inevitable conclusion" was that the claimant was so closely integrated into the first respondent's business that the first respondent was not the claimant's client or customer. I reject that submission. In the first place, and reiterating the guidance of HHJ Tayler in the **Sejpal** case: "The starting point, and constant focus, must be the words of the statutes. Concepts such as … "control" or "integration" ... are tools that can sometimes help in applying the statutory test, but they are not themselves the test." The line advanced here is contrary to the above dicta. Moreover, it is clear from EJ Kemp's judgement that he considered 'control' as a factor in his application of the statutory test. That approach was clearly appropriate and in accordance with authority. Secondly, the factual findings set out by EJ Kemp are done so in the context of a discussion of whether the claimant was carrying on a profession or business undertaking. The argument advanced appears to misunderstand that context. EJ Kemp addressed the question of whether the first respondent was a client or customer of the claimant separately. Thirdly, the matters relied upon first to thirdly by the claimant at paragraph 18 of her written submission disclose no error of law. EJ Kemp does not introduce creative control in paragraph 156. He refers to creative input in the context of the claimant writing under her own brand. EJ Kemp refers to creative control in paragraph 157, does so under reference to the claimant's evidence, and expressly explains that control must be seen in a wider context. That was plainly correct. Whilst the claimant might be correct to assert that factors suggestive of autonomy do not negate findings indicating control, rather both being matters to be weighed in the balance, it is clear from reading EJ Kemp's judgment as a whole, that that is precisely what he did. The weight to be attached to these factors was pre-eminently a

matter for EJ Kemp. Finally, it is a mischaracterisation of EJ Kemp's judgement to assert that he treated integration and autonomy as inconsistent. It is abundantly clear from paragraphs 156 to 165, which includes EJ Kemp's discussion at paragraph 157, that he was considering matters that were relevant to, and with his constant focus remaining on, the terms of section 230(3)(b), rather than on concepts such as integration and autonomy.

33. [158]. The claimant submits that EJ Kemp took into account a number of irrelevant considerations. I reject that submission. As previously noted, EJ Kemp was assessing whether the claimant carried on a profession or business undertaking. In doing so it was entirely legitimate for him to assess the wider scope of claimant's working activities. The claimant provided services to the first respondent from 2011 to 2019. The White Fox proposal was in 2013 and was, accordingly, relevant to an assessment of that wider scope. EJ Kemp's consideration of the terms of the claimant's contracts was also relevant to this assessment. It is clear from the terms of paragraphs 33 and 158 of his judgement that EJ Kemp was aware of the wider terms of the claimant's contacts with the first respondent. EJ Kemp's reference to increases in advances and royalties is quoted directly from the claimant's own statement. Finally, the claimant does not explain or reconcile the apparent inconsistency of her own reliance on a 2011 email at paragraph 22 of her written submission with her criticism of EJ Kemp's consideration of the White Fox proposal in 2013. These factors being relevant, the weight to be attached to them was pre-eminently a matter for EJ Kemp in his overall assessment.

34. [159]. The claimant submits that (i) EJ Kemp failed to reach any finding as to the actual hours or days worked by the claimant under the relevant contracts and (ii) EJ Kemp's finding that the claimant's days/hours of work were not under the control of the first respondent was unsupported by the evidence. I reject these submissions. In respect of the first point, the claimant fails to identify any evidence before EJ Kemp from which such a finding might be made. The claimant

bore the onus of proof. Counsel for the respondents in this appeal also acted for the respondents at the preliminary hearing. In his written submission for the appeal, Counsel for the respondents states, at paragraph 43, that no evidence was led by the claimant regarding hours/days worked at the preliminary hearing. The correctness of that statement was not challenged. In respect of the second point, EJ Kemp's finding of fact at paragraph 38 of his judgement that the claimant "could and did decide when to work on the writing of text for the first respondent" clearly supports his conclusions at paragraph 159. In respect of the claimant's submission regarding 'autonomy', EJ Kemp does not use the word autonomy. In any event, if the claimant's submission seeks to use autonomy as the contrary of control, it would be plainly relevant to EJ Kemp's analysis of whether the claimant was providing services as part of a profession or business undertaking carried on by her.

35. [160]. The claimant submits that whether the claimant worked from home and used her own computer was irrelevant to the issue of whether she carried on a profession or business undertaking. I reject that submission. It is trite that the provision of work equipment and premises may be relevant to an assessment of worker status. Again, the question of the weight to be attached to any such provision, or absence of such provision, is pre-eminently a matter for the fact finder in all of the circumstances of a case. The same considerations apply in respect of the claimant's travel to the USA to undertake marketing.

36. [161]. It is not clear what the substance of the claimant's criticism is in respect of paragraph [161] of EJ Kemp's judgement. The claimant appears to submit that her use of an agent to act on her behalf, a matter discussed by EJ Kemp as relevant to his conclusion, was irrelevant to whether she carried on a profession or business undertaking. I reject that submission. The use of, and extent to which, an agent acted on the claimant's behalf, both in respect of the first respondent and others, was plainly relevant to an assessment of whether the claimant carried on a profession

or business undertaking. Again, the weight to be given to any findings in fact in this regard was pre-eminently a matter for EJ Kemp in the whole circumstances. Further, at paragraph 86 of his judgement EJ Kemp records the claimant's submission that the first respondent "had exercised *substantial* control over her work, to the extent of *minute* detail." (my emphasis). Standing the strength of that submission when considered against the full findings in fact made by EJ Kemp, it was plainly open to him to make the relative finding that the facts were indicative of less control over the claimant than she argued for.

37. [162]. The claimant makes various criticisms about EJ Kemp's findings in connection with the nature of the services performed by the claimant for the first respondent. I reject these criticisms. An assessment of the nature of the work or services the claimant performed, both with the first respondent and more generally, was clearly relevant to a proper analysis of whether the claimant carried on a profession or business undertaking. It is clear from EJ Kemp's recording of the claimant submission on this point (paragraph 86 of his judgement) that the claimant considered it relevant to raise different types of work that might and, in fact were, undertaken by the claimant. As I have already made clear, how individual, relevant findings in fact are to be interpreted within an overall body of evidence and what weight ought to be attached to those individual findings are pre-eminently matters for the fact finder. The conclusions that claimants in other cases, who might or might not, have exercised specialist skill meet the test in section 23(3)(b) is immaterial. As has been repeatedly emphasised, cases turn on their own facts and circumstances.

38. [163]. The claimant makes various criticisms regarding EJ Kemp's conclusions in respect of income received by the claimant by way of 'advances' and 'royalties' and regarding his application of the **Allonby** case. The claimant argues that EJ Kemp's conclusions are irrational or perverse. I reject these criticisms. In relation to the former, EJ Kemp made various findings in fact regarding advances and royalties and their inter-relationship, see in particular paragraphs

33(v) and 34 to 36 of his judgement, and thereafter drew conclusions that were plainly available to him from those factual findings. In relation to the asserted misdirection in connection with the **Allonby** case, the criticism is misplaced. Simple reference to words plucked from another judgement in the absence of the context in which they arise is insufficient. In **Allonby** the European Court of Justice was concerned with equal pay for male and female workers in terms of Article 141 EC. Under reference to the 'Community meaning' of worker the Court referred to the receipt of "remuneration". Thereafter, under reference to Article 141(2), the Court referred to the prescribed definition of "pay", which included the word "consideration". The claimant appears to assert that the inclusion of the words 'remuneration' and 'consideration' in the claimant and first respondent's contract dictate a certain conclusion. That is plainly incorrect. The words identified were used by the ECJ in the context of European Community legislation or legal meaning and are not determinative of UK legislation. In any event, at paragraph 69 of its judgement the ECJ held that the question of whether worker status exists "must be answered in each particular case having regard to all the facts and circumstances by which the relationship between the parties is characterised." The claimant's argument here expressly fails to do this. The same observations apply to the claimant's purported reliance on **Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005; [2013] I.C.R. 415.

39. [164]. The claimant argues that, following the first respondent's failure to lodge standard form contracts for 'writers' or 'authors', which the first respondent admitted in evidence were different, (i) EJ Kemp ought to have inferred that author contracts were self-employed contracts and that a person was a worker under a writer contract and (ii) that it was irrational or perverse for EJ Kemp to find that the claimant's status depended on an analysis of all of the evidence when the standard form contracts had not been lodged. I reject these arguments. The former merely seeks to re-argue a point that was clearly before EJ Kemp and which he considered. That is not permissible on appeal. EJ Kemp, correctly, kept his analysis focused on the statutory provision. In relation

to the second point, it is clear that EJ Kemp is referring to the evidence before him. It is also clear that counsel for the claimant had, in cross examination, obtained concessions from Mr Snowdon in relation to differences between the contracts. EJ Kemp's approach on this point is neither perverse nor irrational, in that it cannot be said that his approach or conclusions were not ones that no reasonable tribunal on a proper appreciation of the evidence and law could have reached. This is particularly the case when one takes into account the approach of an appellate court or tribunal as set out at paragraphs 28 to 30 above.

Ground of appeal 3: was the first respondent a client or customer of the claimant.

40. [167]. The claimant argues that EJ Kemp failed to take into consideration the existence of a contract between the first respondent and second respondent, by which the latter was the former's client or customer, and that both respondents required the claimant to undertake certain marketing commitments. I reject that argument. At paragraph 25 of his judgement EJ Kemp found as a fact that the first respondent and second respondent had entered in a "Development Agreement". At paragraph 33 of his judgement EJ Kemp found as a fact that the second respondent was not a party to the contact between the claimant and first respondent. At paragraph 42 of his judgement EJ Kemp found as a fact that the claimant was expected by both respondents to go on promotional tours. These factual findings are then considered by EJ Kemp at paragraph 167. In relation to the parties' respective bargaining positions, the claimant does not explain the relevance to the question of whether the first respondent was a client or customer of the claimant. Notwithstanding, it is clear from EJ Kemp's judgement when considered as a whole that he was fully aware and took into account the parties' respective positions in relation to each other. To the extent that the claimant seeks to repeat arguments already made, I refer to my decisions previously given above.

41. [168]. The claimant reiterates her argument that EJ Kemp misapplies the **Westwood** case. I reject the argument. Whilst I acknowledge that in **Westwood** the court appeared to focus on the aspect of the statutory test of 'client or customer', and thus the claimant's line of argument might be more appropriately included under her ground 3, it is evident from paragraphs 122 and 168 of his judgement that EJ Kemp was well aware of the correct application of **Westwood** and that he applied the legal principles from **Westwood** to the facts before him. Again, I refer to the proper approach of an appellate court or tribunal on such questions as set out at paragraphs 28 and 29 above.

42. [170]-[171]. The claimant argues that EJ Kemp was wrong to find that she was not subordinate to the first respondent and, separately, in reaching that conclusion EJ Kemp misdirected himself in respect of the law by apparently concluding that subordination and vulnerability were prerequisites of worker status. I reject that argument. Having applied the facts to the test under section 230(3)(b), **ERA 1996**, as he was required to do, EJ Kemp considers the general purpose of employment legislation by reference to recent Supreme Court authority. In what is self-evidently a consideration of those general principles in the context of the particular facts of the claimant's case, EJ Kemp cannot, on any reasonable reading of his judgement, be understood to be making subordination and/or vulnerability prerequisites of worker status under section 230(3)(b), **ERA 1996**.

43. For the reasons given above, I reject the arguments advanced on behalf of the claimant and, accordingly, dismiss the appeal.