

Neutral Citation Number: [2026] EAT 157

Case No: EA-2023-001500-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 October 2026

Before :

MARCUS PILGERSTORFER KC
DEPUTY JUDGE OF THE HIGH COURT

Between :

TALWINDER SINGH NAGRA

Appellant

- and -

UNIPART GROUP LIMITED

Respondent

Talwinder Nagra the Appellant in person
Adam Ohringer (instructed by EEF Limited t/a Make UK) for the **Respondent**

Hearing date: 25 June 2026

JUDGMENT

SUMMARY

Practice and Procedure – Agency Workers

The claimant worked for the respondent under a tripartite arrangement involving a recruitment agency. Before the Employment Tribunal he maintained that another entity employed him and that the respondent was liable as that entity's agent. At an earlier case management hearing, an Employment Judge had explained the potential relevance of the contract-worker provisions in section 41 Equality Act 2010, but the claimant did not adopt that alternative case. The Tribunal rejected the claimant's case. On appeal, the principal issue was whether the Tribunal had been required to raise and determine potential liability under section 41 notwithstanding the way in which the claimant had chosen to advance his case.

Held, dismissing the appeal:

1. Potential liability under section 41 “shouted out” from the parties’ cases, but the Tribunal had responded appropriately by identifying and explaining that possible route at the earlier case management hearing. It was not required to raise the same point again. Nor did the fundamental duty of fairness make it necessary or essential for the Tribunal to formulate or determine that alternative case on the claimant's behalf. **Drysdale v Department of Transport [2014] IRLR 892**, **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust [2025] ICR 1231** and **Cherrington v University of Derby [2026] EAT 107** applied; **Eltek (UK) Ltd v Thomson [2000] ICR 689** considered.
2. The remaining grounds disclosed no error of law. Any possible error concerning whether the claimant was employed by the recruitment agency for Equality Act purposes was immaterial. The Tribunal was not required to determine an unadvanced case that the respondent directly employed the claimant, and its finding that there had been no material change in the agency arrangements was neither perverse nor inadequately reasoned.

MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. How far should an Employment Tribunal go to assist a litigant in person who may be advancing the wrong legal case? The Tribunal must provide such assistance as fairness requires, which may include raising for clarification a claim or issue which “shouts out” from the material before it. It must, however, remain impartial. It may clarify a case, identify an apparent issue and explain the potential relevance of a statutory provision. It cannot, however, take responsibility for choosing the case which a party should advance. The boundary between those functions is sometimes a fine one.
2. This appeal concerns that boundary. Mr Nagra worked for Unipart Group Limited (“UGL”) under a tripartite arrangement involving a recruitment agency, RE People Limited (“RE People”). He nevertheless maintained before the Tribunal that another entity, Supply Chain Coordination Limited (“SCCL”) employed him and that UGL was liable as SCCL’s agent. At an earlier case management hearing, an Employment Judge explained the potential relevance of the contract-worker provisions in section 41 of the Equality Act 2010 (“EqA”). Mr Nagra did not adopt that alternative case. After his claims were dismissed, he argued on appeal that the Tribunal should nonetheless have raised and determined it. The principal question is whether fairness required the Tribunal to go further than it did.
3. The remaining grounds concern the Tribunal’s treatment of Mr Nagra’s contractual status, the adequacy of its reasons and its finding that the subsequent change in his role did not alter the underlying agency arrangements. They raise related but narrower questions.

The Proceedings before the Employment Tribunal

4. This is an appeal against the judgment of the Employment Tribunal sitting at Birmingham (Employment Judge L Mensah) reached following a Preliminary Hearing held on 10 and 11 August 2023. The reasons were sent to the parties on 30 November 2023. There were two Respondents before the Tribunal at the Preliminary Hearing: SCCL and UGL. Only UGL remains a Respondent to this appeal for reasons I shall explain.

Previous Case Management

5. Prior to the Preliminary Hearing, the Claimant's claims (which had originally been presented by an ET1 claim form on 10 November 2021) were clarified at a Preliminary Hearing for Case Management held on 2 September 2022 before Employment Judge Harding. The Judge recognised from the pleadings that there was an issue about Mr Nagra's employment status. The Judge recorded that:

- i. It was UGL's case that Mr Nagra was an agency worker, and that his contractual relationship was with the agency (RE People). UGL's position was that Mr Nagra was assigned to work for UGL by RE People pursuant to a contract between the agency and UGL.
- ii. SCCL agreed that Mr Nagra was engaged by RE People and sent on assignment to UGL. Its case was that it had no direct relationship with Mr Nagra at all.

6. As Mr Nagra acted in person, Employment Judge Harding provided some explanation of relevant concepts to him. The record of the hearing states as follows (§2):

"I started to explain to the claimant that there were 3 different types of employment status; employees, workers and those who are in business on their own account working for their own clients and customers. The claimant told me that he was familiar with these concepts and did not need me to explain this to him. I also explained to the claimant that there were contract worker provisions under the Equality Act, which apply where a person is employed by one entity and supplied to another who makes work available for the individual. I further explained that it is possible for agency workers in some situations to bring claims under the Agency Workers Regulations against the work agency and the hirer. I then asked the claimant to explain the basis on which he asserted that [SCCL] and [UGL] were liable for all or any of the claims".

7. The Judge then set out Mr Nagra's response (§§3-4):

"3. The claimant told me that he does not accept that there was any contract in place between him and RE People Ltd, or, as he referred to them, RE Recruitment, although the claimant does accept that RE People Ltd were involved to an extent with his recruitment. I clarified on a number of occasions with the claimant that it is his case that there is no contract between him and RE People/RE Recruitment Ltd. Instead, the claimant told me, it is his case that he was an employee of SCCL. He relies both on a written contract and on the way that the parties conducted themselves day-to-day.

4. Given that it is the claimant's case that he was an employee of [SCCL]. I explored with him the basis on which he asserted that [UGL] were liable for all or any of the claims. Initially the claimant

told me that [UGL] had ‘secondary liability’. After some discussion we established that what the claimant was referring to was vicarious liability. What the claimant told me is that managers of [UGL] were acting for and on behalf of [SCCL] – i.e. an agency type relationship is asserted. The claimant’s case effectively therefore is that [UGL] was an agent for [SCCL] and [SCCL] were liable for its own acts by virtue of section 110 of the Equality Act (as well as [UGL] being vicariously liable for the acts of [SCCL] under section 109). ”¹

8. Employment Judge Harding then identified Mr Nagra’s claims. An unfair dismissal claim was pursued against SCCL as his employer. Claims of direct sex discrimination and harassment related to sex were pursued against SCCL and UGL. Further, a claim for equal pay was pursued against SCCL. It was directed that a two-day open Preliminary Hearing take place to determine whether the Claimant was an employee of SCCL and whether UGL was liable as SCCL’s agent.

The Preliminary Hearing

9. That Preliminary Hearing came before Employment Judge Mensah in August 2023. At the hearing Mr Nagra continued to represent himself. SCCL was represented by counsel and UGL by a solicitor. Despite indicating at earlier stages of the litigation that he proposed to give evidence, Mr Nagra chose not to do so. The Judge found that he made a “*clearly calculated decision not to give evidence*”, explained in correspondence and orally (see §18 of the reasons). The Judge explained (§19):

“He reiterated to me at the hearing that he understood this, and he was satisfied the documentary evidence proved his case without the need to give evidence, he understood this restricted his cross-examination of the Respondent[s]’ witnesses to what was set out in the documentary evidence and was clear he was not seeking to give evidence himself.”

10. Mr Paul Webster, Executive Director for Governance, Assurance and Legal gave evidence for SCCL and Ms Helen Timpson, Customer Services & Home Delivery Director gave evidence for UGL. The Judge also had documentary evidence in a bundle of 627 pages.

The Judge’s Findings

¹ Save at the very end, §4 of the record of the Tribunal’s case management hearing muddles up the references to the respondents. “R2” is used to refer to SCCL and “R1” to UGL, even though the numbering should be the other way around. This is an obvious mistake in light of the surrounding passages. I have corrected matters in this extract. At the appeal, neither party argued to the contrary.

11. The Judge found that, historically, the NHS had an arrangement with the Department of Health for the procurement of products required by the health service. SCCL was appointed to take over the management of the supply chain, which became known publicly as the “NHS Supply Chain”. UGL successfully tendered for a contract with SCCL to store and distribute products. Through a number of variations to the original agreement, UGL secured further work during the Covid pandemic, including the distribution of PPE and vaccines and the provision of vaccine customer services. The agreement operated on an ‘open book’ basis as to costs, subject to SCCL’s right to audit. UGL was otherwise left to perform the work as it saw fit, provided that it delivered the services within the agreed contractual and legal framework.
12. It was in this context that UGL sought the provision of staff. Mrs Timpson gave evidence that UGL approached RE People to obtain additional staff, over and above its own employees, to perform work secured under the contract with SCCL.
13. The Judge found that Mr Nagra had completed an on-line application for work with RE People. He then signed a “*Contract for services for engagement of an agency worker*” with that entity, which was defined as “*the Company*” in the agreement. Pursuant to that contract, Mr Nagra was to be supplied to provide services to a “*Hirer*”. The agreement contained an entire agreement clause (clause 2.1). Clauses 2.3 and 3.1–3.3 provided, in substance, that during an assignment Mr Nagra was engaged by RE People under a contract for services and supplied as a worker; that he was not an employee of RE People; and that the terms did not give rise to a contract of employment between him and either RE People or the Hirer.
14. The Judge quoted a number of contractual provisions at §12 of her judgment. It suffices for me to reproduce the following:

“2. The Contract

- 2.1 *These Terms constitute the entire agreement between the Company and the Agency Worker and supersede all previous agreements between the parties in relation to the subject matter hereof and shall govern all Assignments undertaken by the Agency Worker.*

- 2.2 *No contract shall exist between the Company and the Agency Worker between Assignments.*
- 2.3 *During an Assignment, the Agency Worker will be engaged on a contract for services by the [C]ompany on these terms. For the avoidance of doubt, the Agency Worker is not an employee of the [C]ompany although the [C]ompany is required to make the deductions from the Agency Worker's pay. These terms shall not give rise to a contract of employment between the [C]ompany and the Agency Worker, or the Agency Worker and the Hirer. The Agency Worker is supplied as a worker, and is entitled to certain statutory right[s] as such, but nothing in these Terms shall be construed as giving the Agency Worker rights in addition to those provided by statute except where expressly stated.*

...

3. Agency Worker's Status

- 3.1 *During an Assignment, the Agency Worker will be engaged by the Company under a contract for services.*
- 3.2 *The parties acknowledge that the Agency Worker is not an employee of the Company, and these Terms shall not give rise to a contract of employment between the Company or the Hirer and the Agency Worker.*
- 3.3 *The Agency Worker is supplied as a worker and is entitled to certain statutory rights. Nothing in these Terms shall be construed as giving the Agency Worker rights in addition to those provided by statute except where expressly stated.*

4. Assignments

...

- 4.2 *The Agency Worker acknowledges that, due to the nature of temporary work, there may be periods when no suitable work is available, and the Agency Worker agrees that the suitability of work shall be determined solely by the Company.*
- 4.3 *The parties agree that the Agency Worker shall not be obliged to accept any Assignment offered by the Company, and the Company shall incur no liability to the Agency Worker should it fail to offer Assignments to the Agency Worker.*
- ...
- 4.8 *The Agency Worker acknowledges that, should the Hirer or any third party introduced to the Agency Worker by the Hirer wish to engage the Agency Worker either directly or through another employment business or third party, before or during an Assignment or during the Relevant Period, the Company will be entitled to either charge the hirer a transfer fee or to agree an extended hire period with the Hirer at the end of which the Agency Worker may be engaged directly by the Hirer or the third party or through another employment business. The Agency Worker undertakes to inform the Company immediately of any such offer of engagement.*

5. Agency Worker's Obligations

- 5.1 *The Agency Worker is not obligated to accept any Assignment offered by the [C]ompany but if the Agency Worker does accept the Assignment, during every Assignment and afterwards where appropriate s/he will:*

5. 1. 1 cooperate with the Hirer's reasonable instructions and accept the direction and supervision of any responsible person in the Hirer's organisation.

5.1.2 make themselves available to the Hirer for not less than the minimum daily working hours (the Assignment Work Pattern), shown on the Assignment Schedule.

...

7. Payment and Deductions:

7.1 The Company shall pay to the Agency Worker the rate of pay set out in the relevant Assignment Schedule which will be paid for time worked during an Assignment weekly in arrears. The hourly rate may vary but will be at least equivalent to the appropriate statutory minimum wage in force at the time for the work undertaken.

...

9. Statutory Sick Pay

9.2 The Agency Worker is required to provide the Company with evidence of incapacity to work which may be by way of a self-certificate for the first 7 days of incapacity and a doctor's certificate thereafter.

...

10. Termination

10.1 Either party may terminate an Assignment or these Terms at any time without prior notice or liability."

15. In relation to these terms, at §7, and then at §24 of the reasons, the Judge made the following findings:

"7. ...the Claimant did not give evidence or take any of the Respondent[s'] witnesses to the contractual evidence regarding himself and the agency, he did not advance a case that the documents did not reflect the true nature of the contractual relationship he had with the agency, or that it had changed. Rather confusingly he was silent on those matters and simply [sought] to infer he was an employee notwithstanding those documents.

...

24. [Mr Nagra] does not adduce any evidence to counter these terms and conditions being an accurate reflection of the intention of the parties when they entered into this contract."

16. The Judge found that on 10 September 2020, Ms Jill Wanklyn of RE People informed Mr Nagra that he would be assigned to a hirer "NHS Supply Chain". The Judge accepted the Respondents' evidence that there was no legal entity known as "NHS Supply Chain" and the reference was no more than a label used for ease of reference to describe the network of contractors who collectively constituted the NHS supply chain function. The email stated that Mr Nagra's work was to commence on Monday 14 September 2020 as a Customer Service Advisor/Key Worker at Daisy House, Aston in Birmingham.

Those premises were those of UGL. Ms Wanklyn attended the site to meet Mr Nagra when he started. Mr Nagra did not dispute he accepted the assignment on this basis.

17. The Judge found that the assignment email was entirely consistent with the contract Mr Nagra signed with RE People and the intention of the parties at the time. It was also consistent with Mrs Timpson's evidence regarding UGL's contractual relationship with RE People and how UGL contracted with RE People to seek agency workers. The Judge concluded he had been assigned to work for UGL in accordance with the contract existing between him and RE People.
18. Mr Nagra argued that because Ms Wanklyn's email stated he would be working in the "*NHS Supply Chain*", and because SCCL managed the NHS supply chain, he was either employed by such a legal entity owned by SCCL or by SCCL directly. He also argued that the relationship between SCCL and UGL was that of agency. He relied on documents which, he contended, showed that UGL managers were exercising control over his working arrangements as agents for SCCL. As the Judge recorded at §36, Mr Nagra relied on an inference arising from the documents to prove that SCCL were his employer. He was arguing that an implied contract of employment had arisen between him and SCCL.
19. The Judge rejected those arguments. She found (i) that "*NHS Supply Chain*" was not a legal entity; (ii) there was no evidence that UGL or SCCL had any part in the documentation prepared by RE People assigning him to work for UGL; (iii) there was no evidence to show SCCL was involved in any way with any material decisions UGL made about its staff, that SCCL decided or influenced who UGL used in the customer service team, or that SCCL even knew of the existence of Mr Nagra; and (iv) there was no evidence establishing SCCL had any control whatsoever over Mr Nagra, nor did Mr Nagra say he had ever met anyone at SCCL. The Judge also rejected arguments advanced by Mr Nagra based on a transcript of a meeting he had with UGL managers when asking for increased pay. The Judge considered the transcript was open to interpretation and required context. Mr Nagra had provided no evidence supplying that context.

20. Citing a number of cases, including **James v Greenwich London Borough Council [2007] ICR 577** (EAT), **[2008] ICR 545** (CA) and **Smith v Carillion (JM) Ltd [2015] IRLR 467**, the Judge held that the proper question was whether it was necessary to imply a contract between Mr Nagra and SCCL in order to explain the relationship². She held that where agency arrangements were genuine and continued to represent the relationships involved, it would be a rare case where direct employment with the hirer/client is found.
21. The Judge concluded that Mr Nagra had contracted with RE People and that, under that contract, he had the status of a worker when working on an assignment. She regarded that conclusion as consistent with his email to Ms Wanklyn resigning from his “*current assignment as an analyst with Unipart logistics on the vaccine project*”, and with the subsequent communications following RE People’s acceptance of his resignation. His communications with Ms Wanklyn concerning holiday pay were also consistent with the contractual relationship with RE People.
22. Pulling all matters together, the Judge found as follows (§40):
- “(i) *There was a genuine agency relationship with the Claimant and the agency [RE People] at the outset and this is clearly documented. The documentation does represent the true nature of the relationship.*
- (ii) *That relationship remained in existence, including as the means of payment throughout the material time...*
- (iii) *On the evidence there has not been any change of circumstances or contractual arrangements since the initial hiring-out to the hirer/client by the agency*
- (iv) *The Claimant has failed to prove he was employed by SCCL and on the same basis has failed to prove Unipart were acting as agents for SCCL*
- (v) *I find the Claimant was an agency worker under the terms of his contract with the agency and was on an assignment as such with Unipart. There is simply no necessity to depart from the contracts and there is no evidence to support such a departure.*
- (vi) *The Claimant does not argue any alternative employment relationship and so I turn to his claims:*

² The Tribunal’s judgment in this case was promulgated prior to the Court of Appeal’s decision in **Ryanair DAC v Lutz; Storm Global Ltd v Lutz [2025] ICR 1448** which confirmed the **James** approach remained applicable in tripartite cases notwithstanding cases such as **Uber BV v Aslam [2021] ICR 657**. See the argument and discussion in **Ryanair** at §§42ff and the decision at §§60-65.

(vii) The UD dismissal claim/s as against SCCL is not well founded and is dismissed. He was not an employee of SCCL.

(viii) All claims for direct sex discrimination/harassment and equal pay discrimination under the Equality Act 2010 against SCCL fail because

(i) The Claimant was not an employee, under a contract of apprenticeship or a contract personally to do any work for SCCL as required by Section 83(2)(a) Equality [A]ct 2010 and,

(ii) SCCL were not a principal as required by section 41(5) as they did not make work available to the Claimant and the Claimant has not shown he was employed by another (Unipart or the agency) or that he was supplied by them as an employee in furtherance of a contract to which SCCL was a party (whether or not the employer is a party)."

23. The effect of those findings was that Mr Nagra had no contractual relationship with SCCL and that his relationship with UGL was explained by his assignment to it under the contract between him and RE People.

24. The Judge then concluded, at §41, as follows:

"By virtue of the above, all claims against Unipart as agent for SCCL are not well founded and are dismissed because the Claimant has not shown Unipart were acting as agents for SCCL and he does not plead any claim against Unipart as a contract worker because he denies any contract with the agency or that he was employed by the agency or Unipart."

25. By an application dated 12 December 2023, Mr Nagra applied for reconsideration of the judgment on various grounds. This was refused by EJ Mensah on the papers on the basis that there was no reasonable prospect of the original decision being varied or revoked.

The Appeal

26. On 23 December 2023, Mr Nagra submitted a Notice of Appeal raising three grounds of appeal. He complained that (i) the Tribunal had wrongly applied the test of necessity when considering whether to imply a contract; (ii) it had failed to take account of the existence of a probationary period; and (iii) it had conducted the hearing unfairly by permitting the Respondents to redact the commercial agreement between them, which, Mr Nagra contended, would unequivocally have demonstrated that UGL was

SCCL’s agent. These grounds were considered on the sift by Michael Ford KC, Deputy High Court Judge, who concluded that the grounds disclosed no reasonable basis for bringing the appeal. In particular, he noted that Mr Nagra had not suggested that he had pleaded a claim against UGL under section 41 EqA.

27. Aggrieved by that determination, Mr Nagra made an application pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (as amended). At a Rule 3(10) hearing before HHJ Tucker, held on 19 February 2025, Mr Nagra had the advantage of assistance provided by Mark Green of counsel under the ELAAS scheme. At that hearing, it was confirmed that Mr Nagra no longer challenged the conclusion that there was no contractual or employment relationship between him and SCCL. The appeal against SCCL was accordingly dismissed. Permission was sought (and granted) for Mr Nagra to rely on an Amended Notice of Appeal containing four new grounds and the appeal was permitted to proceed to this hearing on that basis.

Legal Principles

Section 41 EqA

28. In addition to the duties owed by employers to employees and applicants (see sections 39 to 40A EqA), section 41 EqA imposes duties on “principals” not to discriminate against, harass, or victimise “contract workers”, as well as to make reasonable adjustments for them. The relevant definitions appear in subsections (5) to (7) as follows:

“(5) A “principal” is a person who makes work available for an individual who is –

(a) employed by another person; and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it),

(6) “Contract work” is work such as is mentioned in subsection (5).

(7) A “contract worker” is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).”

The Tribunal’s Obligations towards Litigants in Person

29. Many litigants before the Employment Tribunal act in person without legal representation. That can present difficulties for them as explained in the Equal Treatment Bench Book (“Bench Book”), Chapter 1. It is important, however, not to treat all litigants in person in the same way. The Bench Book makes the point, at Chapter 1, §15 that there is no typical litigant in person: whilst some will find representing themselves very difficult due to a lack of skills, aptitude or familiarity with the process, litigants in person “*come from a diverse range of social and educational backgrounds. Some may be very skilled at representing themselves*”. For this reason, Sedley LJ explained in **Gee v Shell UK Ltd [2003] IRLR 82** that Tribunals should “*mak[e] a careful appraisal, case by case, of the parties and their respective capabilities*” (§34).

30. In **Drysdale v Department of Transport (Maritime and Coastguard Agency) [2014] IRLR 892**, the Court of Appeal reviewed the relevant authorities concerning how a Tribunal should provide assistance to litigants in person, including **Mensah v East Hertfordshire NHS Trust [1998] IRLR 531** and **Muschett v HM Prison Service [2010] IRLR 451**. In his judgment (with which Christopher Clarke and Arden LJ agreed) Barling J derived the following general principles (§49):

“(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.

(2) What level of assistance or intervention is “appropriate” depends upon the circumstances of each particular case.

(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.

(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and “feel” for what is fair in all the circumstances of the specific case.

(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant."

31. In that case, a claimant was represented by his wife before the Tribunal. During the hearing, the claimant's representative indicated she wished to withdraw the claim. The respondent's counsel then applied for the claim to be dismissed. After a short deliberation the Tribunal granted the application. The Court of Appeal upheld that result. It considered there was nothing that should have alerted the Tribunal to the possibility that the wife was or might be indisposed so that her judgment was or could be affected (§52). The Court applied a "*wide margin of appreciation*" for how the Tribunal should deal with a particular case (§55) and concluded that it was within that margin for the Tribunal not to have addressed a question directly to the claimant, notwithstanding the lack of legal qualifications of the wife (§58). Further, the Tribunal was under no obligation to enquire into the reasons for the decision to withdraw the claim, a step which, save in an exceptional case, would usually be unnecessary and inappropriate (§61). Nor was the Tribunal required to adjourn the proceedings to facilitate reflection (§64). As Barling J put it at §58:

"...It is clear that the ET was satisfied, and on reasonable grounds, that the appellant understood and assented to what his chosen representative had done.... Only where there is some clear indication of a dispute or failure of communication between a party and his or her chosen representative, or, perhaps in the event a manifestly inexplicable and irrational decision by a representative, should a tribunal feel obliged to seek confirmation directly from a litigant. There was nothing of the kind here."

32. The principles, and spirit, of the decision in **Drysdale** have been applied in a number of cases which concern the extent to which a Tribunal should help a litigant in person frame, or reframe, their complaint in a particular or more legally correct way.
33. In **McLeary v One Housing Group Ltd** (UKEAT/0124/18, Unreported, 6 February 2019), the claimant had presented a claim complaining of unfair constructive dismissal as well as complaints of discrimination arising from disability, harassment related to disability, victimisation and failure to comply with the duty to make reasonable adjustments. Any complaint under the EqA relating to conduct

which fell to be treated as having occurred on or after 21 June 2016 was in time; anything before was dependent on the Tribunal exercising its just and equitable discretion to extend time. The Tribunal took the view that all the EqA claims involved conduct occurring before 21 June 2016 such that they were all out of time. The constructive unfair dismissal complaint was not affected. It was argued on appeal that the Tribunal erred by not also identifying that the claimed constructive dismissal was not only said to be unfair but also discriminatory. Had it done so, that complaint would have been in time since the constructive dismissal fell to be treated as having occurred when the resignation took effect. HHJ Auerbach recognised (see §§79-80) that although there was no express statement in the particulars of claim that the claimant wished to claim discriminatory constructive dismissal, all of the factual elements of that claim were there, including that various acts relied on as discrimination had, according to the claimant, contributed to the fundamental breach of trust and confidence that founded her claim to have been constructively dismissed. The Judge went on then to consider whether the Tribunal ought to have picked up the point (or the possibility that this was what the claimant was arguing) at the case management stage, or even later at the preliminary hearing. After referring to Drysdale, at §§88-89, HHJ Auerbach held as follows:

“88. ...what was necessary here, starting with the Case Management Hearing, was simply to clarify the substance of what the Claimant was saying and the claims that she was seeking to bring. A margin of appreciation should indeed be allowed to the Judge below, as to how such matters are managed; but when, as in this case in my judgment, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining of trust and confidence that has driven an employee to resign and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought.

89. I have, I stress again, paused for reflection as to whether that would place too heavy a burden on Employment Judges conducting such hearings. However, I do not believe so, nor that this approach goes contrary to the spirit of the Drysdale guidance. In short, where it is clear from a claim form and/or particulars of claim, that a lay claimant is saying, factually, I was subjected to discrimination in my employment and this drove me to resign, it is both proper, and incumbent on the Tribunal to seek clarification of whether such a claim is intended.”

34. Judge Auerbach continued by emphasising that (§97):

“...every case will turn on its particular circumstances, the contents of the documents, the attributes and capabilities of the litigant and the Judge’s appreciation of how best to manage things, in order to make due allowance for a litigant in person while not intervening to take their side. Generally it must

be left to the appreciation of the Employment Judge, whether, or how, a point of this sort needs to be proactively raised or addressed. The EAT should be slow to second guess the Judge's approach, and a wide margin of appreciation should be allowed. The Drysdale guidance is the touchstone."

35. **Mervyn v BW Controls Ltd [2020] ICR 1364** involved a similar issue. The claimant's pleaded case was of unfair dismissal, but on a proper analysis, the particulars were found sufficient to plead a claim for constructive dismissal. After the respondent pleaded that the claimant had resigned, the claimant replied saying she had not resigned, and setting out further facts that could support a constructive dismissal claim. Following a case management hearing, the Tribunal sent the case to a full hearing with a list of issues which raised the issue of whether the claimant had been directly dismissed, but which excluded consideration of constructive dismissal (on the basis the claimant claimed there was no resignation). Borrowing the phrase from **McLeary**, Bean LJ considered that it "shouted out" from the particulars of claim, on a proper analysis, that the claimant was alleging she had been constructively dismissed³. At §43, his Lordship explained:

"It is good practice for an employment tribunal, at the start of a substantive hearing, with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the employment tribunal should consider whether an amendment to the list of issues is necessary in the interests of justice."

36. He concluded that it was not enough in that case for the Tribunal simply to ask at the start of the substantive hearing whether the parties confirmed the previous list of issues (§45). Concurring, Asplin LJ said this (§51):

"...Obviously, the tribunal must take care not to step into the factual and evidential arena and not to be perceived as favouring one party over another. However, in order to do justice to all parties, it is equally important, where at least one of those parties is unrepresented, to clarify the issues which arise on the pleadings and to seek to confirm whether any, and if so, which claims have been conceded."

37. There is an earlier decision concerning contract workers which should also be mentioned. In **Eltek (UK) Ltd v Thomson & Another [2000] ICR 689**, a claimant supplied by an employment agency had

³ In **Moustache**, Warby LJ observed that the Court in **Mervyn** was of the view that in all the circumstances the claimant ought not to be held to have waived or abandoned the constructive dismissal claim which had been sufficiently pleaded, and it was necessary for the list of issues to be amended: §46.

advanced a complaint on the basis that she was an employee. Having concluded at a preliminary hearing that she was not an employee, the Tribunal itself raised and permitted her to pursue instead a claim as a contract worker under section 9 of the Sex Discrimination Act 1975. The EAT held that this was permissible in the unusual circumstances of that case. The alternative claim introduced no new factual element and was, notwithstanding that it arose under a different statutory provision, a “re-labelling” of the claim arising from the same act of dismissal (see §7). The EAT nevertheless strongly deprecated the manner in which the point had arisen. It observed that in many cases it would be contrary to natural justice to require a party to meet a claim introduced for the first time by the Tribunal and expressly stated that its decision should not be regarded as any form of precedent (§15).

38. In **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] ICR 1231 the Court of Appeal considered the circumstances in which a Tribunal comes under a duty to identify and determine a claim which was not identified on an agreed list of issues. Warby LJ (with whom Elisabeth Laing and Dingemans LJ agreed) emphasised that proceedings in the Tribunal were adversarial, and that the “primary onus” was on the parties to identify the claims they wished to bring (§33). The claims which the Tribunal must determine are those which “*emerge clearly from an objective analysis of [the] statements of case*” (§34). The Tribunal must adjudicate on those issues, unless they are no longer pressed by the party in question (§36). At §37, his Lordship explained:

“...the ET’s role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law and the evidence in the case. It may consider it appropriate to explore the scope of a party’s case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take proactive steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT.”

39. Further, at §39, Warby LJ continued:

*“The following analysis seems to me correct in principle and consistent with the case law. The starting point is to consider what claims emerge from an objective analysis of the statements of case. A failure by the tribunal to identify and address those claims is liable to amount to a breach of its core duty and hence an error of law. A failure to identify and determine a claim that does not emerge from such an analysis can amount to an error of law but only in rare or exceptional circumstances of the kind outlined in **Drysdale**. It is in this overall context that the role of an agreed list of issues falls for*

consideration.”

40. The Court then went on to deal with lists of issues, concluding that they are not pleadings but a case management tool; agreeing to a list of issues was, however, one way that a party may conduct itself so as to lose the right to have a Tribunal decide a pleaded issue (§40). Warby LJ held (§40):

“...a Tribunal will usually be entitled to confine its attention to the issues on the list. By way of exception, however, it may be necessary in the interests of justice to depart from even an agreed list. There are at least two distinct categories of situation in which that may be so. The first is where a pleaded claim has been omitted from the list in circumstances which do not amount to abandonment of the claim. The second is where the claim has not been pleaded but the fundamental duty of fairness makes it necessary (that is to say, essential) that it should be raised and considered.”

41. There are two other cases decided this year by the EAT which I should refer to.
42. The first is **Whitaker v White Rose Academies Trust & Another [2026] EAT 43**. In that case, at a preliminary hearing, the Tribunal determined that the claimant was neither an employee nor a worker of the second respondent. On appeal it was argued that the Tribunal erred by not considering whether the claimant was a section 43K(1)(a) Employment Rights Act 1996 (“ERA”) worker of the second respondent. HHJ Auerbach rejected that argument. Applying **Moustache**, he concluded that on a fair and objective reading it was not part of the pleaded case: the section 43K(1)(a) argument did not “shout out” in the **McLeary** sense. Nor did the fundamental duty of fairness mean that it was “*necessary (that is to say essential)*” that the tribunal raise and consider it: see §49. Nor was the Tribunal required, “*as a matter of course*”, to consider separate provisions of the statute which the party concerned has not relied upon. At §56, HHJ Auerbach said:

“I consider that the EAT should be very circumspect before extending the list beyond those long-established and familiar categories in which the point in question is to be regarded as being ordinarily a sub-strand of the issues falling under the umbrella of the particular statutory provision which the tribunal is applying in the given case. I decline to do so.”

43. Finally, in **Cherrington v University of Derby [2026] EAT 107**, Cavanagh J considered whether a Tribunal hearing an unfair dismissal case had an affirmative duty to refer to and consider articles of the **European Convention on Human Rights** (“ECHR”) despite them not being raised by the claimant. Cavanagh J examined the two strands of authority concerning (i) where, though not pleaded or identified

in the agreed list of issues, an issue “shouts out” from the claim form, or, for some other reason, the fundamental duty of fairness makes it necessary and essential that the issue should have been raised and considered by the Tribunal; and (ii) where the issue should have been considered “as a matter of course”.

At §106, the Judge explained:

“...in my view the considerations identified in Moustache and the other cases in the first strand are relevant also in cases in which the ground of appeal is that the ET was obliged, of its own volition to consider some point of law or fact that was relevant to the cause of action as pleaded, even if it had not been mentioned by the party concerned. In contrast, if the contention is that the ET should have addressed a different type of claim from that which was relied upon by the Appellant, then only the Moustache strand of authority is relevant: there are no cases in which it can be said that “as a matter of course” the ET should have dealt with a different cause of action that was not pleaded or relied upon by a claimant.”

44. The EAT identified the questions that arose in that case as follows (§108): (i) Did the issue whether article 10 was relevant to the unfair dismissal claim “shout out” from the way the claim was pleaded and advanced? (ii) If not, was the ET obliged “as a matter of course” to consider whether article 10 was relevant to the unfair dismissal claim? (iii) If not, on the facts of the case, was the failure to address article 10 fundamentally unfair to the Appellant. As to the first question, Cavanagh J said: *“This is a ‘perversity’ test: did the ET act perversely in failing to recognise that the Art. 10 issue shouted out from the way his case was presented[?]”* In **Cherrington**, the EAT answered each of those questions in the negative.

Analysis

At the substantive Preliminary Hearing, was the Tribunal required to consider the potential liability of UGL under section 41 EqA?

45. It is convenient to start my analysis with **Ground 3**. By that ground, Mr Nagra argued that Employment Judge Mensah erred in law by failing to consider, or invite argument on, the potential liability of UGL under the contract worker provisions of the EqA contained in section 41.

Submissions

46. Mr Nagra argued that, on the findings of the Employment Judge, UGL met the definition of a “principal”

because it made work available for him, a person employed by another person (RE People), and he was supplied by RE People in furtherance of a contract to which UGL was a party (namely a contract between UGL and RE People). He further argued that he was a “contract worker” as he was an individual supplied by RE People to UGL in furtherance of the contract between them. During the appeal hearing, Mr Nagra acknowledged that a claim that UGL was liable under the contract worker provisions had not been pleaded or articulated by him before the Tribunal. He said this was down to his misunderstanding. He emphasised that he was a litigant in person and that he had relied on the reference to “NHS Supply Chain” in the assignment email. He contended that, acting fairly, the Judge ought to have raised and considered section 41 EqA as an alternative route to liability given that the preliminary hearing had been listed to determine employment status and jurisdiction against both Respondents, and that doing so was “not far from” the facts that had been found.

47. On behalf of UGL, Mr Ohringer submitted that the Tribunal was correct at the Preliminary Hearing to have adjudicated on the claim in the form it was advanced by Mr Nagra. Counsel placed considerable weight on the fact that, at the earlier case management hearing, Employment Judge Harding had explained to Mr Nagra that there were contract worker provisions which applied where a person is employed by one entity and supplied to another who then makes work available for that person. Mr Ohringer described Mr Nagra as having been given a “strong steer” by the Judge, one which he refused to take on board. Instead he had maintained his claim that he was employed directly by SCCL, and that UGL was liable as SCCL’s agent. Mr Ohringer submitted that whilst it was permissible for a Judge to assist a litigant in person to formulate a legal claim from the facts being explained, it remains the claimant’s case and that autonomy must be respected. Mr Ohringer argued that Mr Nagra specifically disavowed a claim under section 41 EqA. It was submitted that at the subsequent Preliminary Hearing Mr Nagra maintained the case he had articulated at the earlier case management hearing: see §§6-8 of the reasons for the judgment. UGL argued that Mr Nagra did not apply to amend his case, or otherwise to change the way he contended that UGL was liable, for example by arguing an alternative case. It was submitted that Mr Nagra even maintained this position in his original appeal documents to the EAT, and that it was only at the Rule 3(10) hearing that any reliance was placed on section 41 EqA.

48. Mr Ohringer submitted that this case is different from many of the authorities discussed above in that the alternative way of putting the case *had* been raised by the Tribunal for consideration but Mr Nagra had – as he was entitled to – refused to adopt it. Mr Ohringer accepted that the agency relationship and potential liability of UGL under section 41 EqA “shouted out” from the pleadings, not least because both respondents had adopted the position that Mr Nagra was an agency worker. He submitted Employment Judge Harding had therefore been correct to explore this issue at the case management hearing. That said, Mr Nagra had been entitled to refuse to take the course offered to him and to make the choice he did. It was not open to the Tribunal to override his choice; indeed to do so would infringe his right to choose how to put his case. In those circumstances, UGL submitted that Employment Judge Mensah could not be criticised, applying the authorities I have discussed, for not raising the issue again at the Preliminary Hearing and instead adjudicating on the case as it was brought by Mr Nagra.

Conclusions

49. In this appeal, it was not suggested that potential liability of UGL under section 41 EqA ought to have been considered by the Tribunal “*as a matter of course*”, that is to say, applying the second strand of authority identified by this Tribunal in **Cherrington**. In my view the appeal was correctly not advanced on that basis. As this Tribunal has made clear in both **Whitaker** and **Cherrington** the EAT will be “*very circumspect*” before adding to the list of well-established categories where a point arises for a decision “*as a matter of course*”: see **Whitaker** §56; **Cherrington** §105. It seems to me that the reasoning adopted by HHJ Auerbach in **Whitaker** is applicable. In that case, Judge Auerbach held that consideration of whether a claimant was a worker under section 43K(1)(a) ERA did not arise “*as a matter of course*” when determining whether the claimant was an employee or worker of an entity under section 230 ERA. None of the established examples involved a tribunal being required to consider as a matter of course separate provisions of the statute which the party concerned has not in fact relied upon: see §56. That is the position here. The theory of liability advanced by Mr Nagra in respect of UGL was that it was liable as SCCL’s agent. That did not require the Tribunal “*as a matter of course*” to consider

separate provisions of the EqA imposing liability on principals in respect of contract workers. Those separate provisions would have amounted to a new cause of action which was not pleaded, making this line of authority inapposite: see **Cherrington** §106.

50. Instead, the appeal was advanced on the basis that Employment Judge Mensah ought to have raised and considered section 41 because that form of liability “shouted out” from the pleadings or, alternatively, because the fundamental duty of fairness otherwise made it necessary and essential to raise and consider it.
51. In my view Mr Ohringer was right to accept that the agency relationship between Mr Nagra and RE People, and the potential applicability of section 41 liability to UGL, “shouted out” from the pleadings. Mr Nagra’s case was that UGL was liable to him, albeit he did not plead a precise legal basis for this conclusion and he did not rely on the contract worker provisions. UGL’s case was that Mr Nagra was an agency worker supplied to it by RE People pursuant to a contract between UGL and RE People. SCCL agreed. Read as a whole, the pleadings raised, in an obvious form, the potential application of section 41, including the questions whether UGL was a “principal” and Mr Nagra a “contract worker”. The possibility of liability under that section therefore “shouted out” from the parties’ pleaded cases.
52. Mr Ohringer was, in my judgment, also right to observe that this case is somewhat different from many of the decided authorities: this is not a case where the Tribunal did nothing in response to that potential liability “shouting out” from the pleadings. It carefully examined the pleaded cases with Mr Nagra at a case management hearing and explained that liability might arise under the contract worker provisions. In taking that course, the Tribunal responded appropriately to Mr Nagra’s position as a litigant in person and raised with him the possibility of putting his claim against UGL under section 41 EqA. I do not consider that the Tribunal erred in law by failing to go further.
53. **Drysdale** establishes that a tribunal enjoys a wide margin of appreciation when deciding what assistance fairness requires it to provide to a litigant in person. In **Cherrington**, the question whether an unraised

issue “shouted out” was expressed as a perversity test. The EAT must therefore accord substantial respect to the first-instance tribunal’s assessment of what fairness required in the circumstances before it.

54. I am satisfied that Employment Judge Harding’s approach at the case management hearing was entirely proper, and well within the margin of appreciation. She raised the contract worker provisions and the possibility of raising a claim under them. She then allowed Mr Nagra to decide whether to reframe his case in the light of that guidance. The Judge was not required to press the point further or to formulate an alternative case on Mr Nagra’s behalf. To have done so, notwithstanding the explanation already given and his decision to maintain a different case, would have risked crossing the line between appropriate assistance and entering the arena.
55. Mr Nagra chose not to accept Judge Harding’s guidance and to continue exclusively with his theory of the case: that SCCL employed him directly and that UGL was liable under agency principles. Nonetheless, it was not for the Judge to override that choice by formulating the case which she considered he ought to advance. That would have infringed Mr Nagra’s autonomy and liberty to decide the case he wanted to litigate. A litigant’s autonomy in making forensic decisions must be respected. It is the litigant who bears the consequences of the case advanced, including any potential costs consequences. Further intervention of a more directive kind would have risked the Judge stepping into the arena, contrary to Asplin LJ’s warning in her concurring judgment in Mervyn.
56. Langstaff P made the same point clearly in Dundee City Council v Malcolm (UKEATS/0019/15, Unreported, 9 February 2016) at §18:
- “... it is not for a tribunal to make a case for a litigant. However much a tribunal feels that a litigant is not making the best case that litigant could, given the facts as they appear to the tribunal, it cannot step into the shoes of the litigant and make for itself any case which it appears could have been advanced successfully in the light of that material. To do so would be to enter the arena. It would be to abandon impartiality. It would run counter to the very essence of the accusatorial procedure. Although litigants who are not lawyers might not know what precise legal label might categorise their cases, they will know what it is that they are complaining about. The line between making a case which is not being advanced by a party, on the one hand, and helping that party to articulate clearly that*

which they are complaining about on the other may be fine, but it is critical. A tribunal's duty to be fair to both sides means it cannot enter the contest on behalf of either one. It must listen to the cases made for each, and must not substitute a case of its own."

57. As Warby LJ explained in **Moustache** at §37, a Tribunal has no general duty “to take proactive steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage”.
58. **Eltek** does not, in my judgment, point to a different conclusion. It demonstrates that, in appropriate circumstances, a Tribunal may permissibly allow a litigant to pursue an unpleaded contract-worker claim which involves no new factual allegation. It does not establish that a Tribunal is required to do so. Indeed, the EAT strongly deprecated the manner in which the Tribunal had itself introduced the claim and emphasised the unusual circumstances in which its decision was reached. The position here is in any event materially different. Before the Preliminary Hearing, Employment Judge Harding had already identified and explained to Mr Nagra the potential contract-worker route. Mr Nagra did not adopt it but maintained the different case which he had chosen to advance. In **Eltek** the claimant had not, at any prior stage, been alerted to the contract-worker route and had not declined to adopt it.
59. The appeal is formally against the judgment of Employment Judge Mensah reached following the substantive Preliminary Hearing. It is argued that it fell to her to raise potential liability under section 41 EqA at that hearing. As I have explained, a wide margin of appreciation applies in respect of the assistance which a tribunal must provide to a litigant in person. Whether the conduct of the Preliminary Hearing fell outside the permissible margin of appreciation must be assessed in the light of the proceedings as a whole, including the earlier case management hearing. A substantive hearing builds upon previous case management. It would be artificial to assess the assistance provided at the later hearing while disregarding the explanation already given to the litigant at an earlier stage. Nor would the overriding objective be served by requiring a tribunal to repeat at each successive hearing every explanation previously and adequately given.

60. Accordingly, Employment Judge Mensah was entitled to conduct the substantive Preliminary Hearing in light of what occurred at the case management hearing. Employment Judge Mensah was certainly aware of the discussion which took place on that earlier occasion; indeed she set out the relevant passages in full at §14 of her judgment. She was, in my view, entitled to proceed on the basis that the potential liability of UGL under section 41 EqA had already been explained to Mr Nagra and that he had made a clear choice not to advance such a case.
61. As Bean LJ observed in Mervyn, it is “good practice” at the start of a substantive hearing for a Tribunal to confirm the contents of any list of issues previously drawn up with the parties. The Tribunal can then determine whether, in accordance with Moustache at §40, it should confine its attention to the issues on the list, or whether, by way of exception, it is necessary in the interests of justice to depart from that list. Even where a list of issues has not specifically been drawn up, that good practice would, in my view, extend to confirming with the parties the issues that fall to be decided and their essential positions on those issues. A failure to follow such good practice does not, however, automatically translate to an error of law.
62. The Tribunal’s reasons show that Employment Judge Mensah addressed the basis on which Mr Nagra advanced his case. She referred to the earlier case management order and recorded that he maintained the case formulated there. She also discussed with him his decision not to give evidence, finding that he had made a “*clearly calculated decision*” and understood its consequences (§§18–19). Those matters supported the conclusion that he had made a conscious choice about how to advance his case.
63. There is no indication that at the substantive Preliminary Hearing Employment Judge Mensah raised UGL’s potential section 41 liability with Mr Nagra. Nonetheless, I conclude that the Tribunal acted within its wide margin of appreciation. Although potential liability under section 41 EqA “shouted out” from the pleadings, the Tribunal was entitled to proceed on the basis that the point had already been fully explained to Mr Nagra. The Judge referred to that earlier discussion, and Mr Nagra maintained the case formulated at the case management stage. Another judge might have sought express reconfirmation,

but it was within the permissible margin of appreciation for Employment Judge Mensah to determine the case as presented. At §41, Employment Judge Mensah observed that Mr Nagra had not pleaded a claim against UGL as a contract worker and had denied the contractual premise upon which such a claim would depend. In all the circumstances, she did not err by determining the claims on the basis on which Mr Nagra had chosen to advance them.

64. That conclusion disposes of the argument based on section 41 “shouting out” from the parties’ cases. Had the point not been raised with Mr Nagra at any stage of the proceedings, its obvious potential application would have engaged the obligation identified in the authorities to raise for clarification a claim or issue which “shouts out” from the material before the Tribunal. Here, however, that occurred at the case management hearing. That obligation was thereby discharged. It did not require Employment Judge Mensah to raise the same point again at the Preliminary Hearing.
65. Nor do I consider that, independently of the fact that section 41 “shouted out”, the fundamental duty of fairness made it necessary or essential for Employment Judge Mensah to raise and consider a claim under that provision. I have considered that question separately, in accordance with the approach identified in Moustache and Cherrington. The relevant circumstances include that Mr Nagra was a litigant in person, but also that the potential alternative basis of liability had previously been identified and explained to him; that he had declined to adopt it and maintained a different case; that he had indicated that he understood relevant concepts; and that Employment Judge Mensah was aware of that procedural history. In those circumstances, I do not consider that the Tribunal erred by considering only the case Mr Nagra chose to maintain. The duty of fairness did not require the Tribunal to formulate or determine the alternative case on his behalf. Fairness was moreover owed to both parties. As Drysdale makes clear, the Tribunal was required to remain impartial and to avoid injustice to either side. The second category identified in Moustache is confined to cases where it is “*necessary (that is to say, essential)*” that a claim be raised and considered. In the present circumstances, where the point had already been raised and the litigant had chosen not to adopt it, no necessity — still less any essential necessity — arose at the later hearing.

66. For these reasons, ground 3 must be dismissed.

Was the Tribunal's conclusion that Mr Nagra had not shown he was employed by UGL wrong?

67. Ground 1 of the Amended Grounds of Appeal is put in the following way:

“Ground 1

Employment Judge Mensah erred in dismissing the claim against [UGL] because her conclusion [at §40(viii)(ii)] that the Claimant had not [shown] he was employed by [UGL] or another, was wrong in that:

- (i) It was inconsistent with para 40(i) where the Tribunal concluded that there was a genuine agency relationship with the Claimant;*
- (ii) The terms of that agreement at para 3.3 specified that the Claimant was a worker...*
- (iii) This meant that the Claimant was employed under a contract personally to do work within the wider definition of employment in the Equality Act 2010, giving rise to liability under s41 of the same act.”*

68. The three limbs of Ground 1 form part of a single argument. Mr Nagra relies on the Tribunal's findings that there was a genuine agency relationship between him and RE People and that, under his contract with RE People, he had the status of a worker. He submits that he was therefore “employed” by RE People within section 83(2)(a) EqA, which includes employment under “*a contract personally to do work*”, and so satisfied the requirement in section 41(5)(a) EqA that a contract worker be employed by another person.

69. Ground 1 misreads §40(viii) and overlooks the case which the Tribunal was deciding.

70. Section 40(viii) addresses the claims against SCCL, not the liability of UGL. The Tribunal held that SCCL was not a “principal” because it did not make work available to Mr Nagra. It also held that Mr Nagra had not shown that he had been supplied “as an employee” in furtherance of a contract to which SCCL was a party. Whether the words “as an employee” accurately expressed the statutory requirement does not arise for determination: the unchallenged findings that SCCL did not make work available to Mr Nagra and that there was no relevant contract to which SCCL was a party were each sufficient to exclude its liability under section 41.

71. The Tribunal also stated that Mr Nagra had not shown that he was employed by UGL or RE People. Viewed in isolation, that observation might be thought difficult to reconcile with the finding that he contracted with RE People as a worker. Mr Nagra submits that the contract was one personally to do work and therefore fell within the extended definition of “employment” in section 83(2)(a) EqA. It is unnecessary to determine that question. Even if the Tribunal erred on the point, the error could not affect its conclusion concerning SCCL, because the other requirements of section 41(5) were not satisfied.
72. Nor could the alleged error affect UGL’s liability unless the Tribunal was required to determine an unpleaded section 41 claim against UGL. For the reasons given under Ground 3, it was not. Any error in the Tribunal’s observation about Mr Nagra’s employment by RE People was therefore immaterial to the claims which it had to determine.
73. In oral submissions, Mr Nagra also argued that the Tribunal ought to have implied a direct contract between him and UGL. I doubt that Ground 1 encompasses that contention, but I address it briefly. Mr Nagra had not advanced such a case before the Tribunal. On the contrary, his case was that SCCL employed him and that UGL was liable as SCCL’s agent. The Tribunal did not err by determining the case which he had chosen to advance (see §40(iv) and §41 of the reasons for the judgment).
74. In any event, the Tribunal found that the contractual arrangements with RE People were genuine, remained in operation throughout the material period and reflected the reality of the relationship. It found no material change in those arrangements. Those findings provided no basis for concluding, applying the **James** line of authority, that it was necessary to imply a direct contract between Mr Nagra and UGL.
75. For these reasons, I dismiss ground 1.

Did the Tribunal fail to give sufficient reasons for its decision?

76. **Ground 2** alleges that the Tribunal failed adequately to explain why the claim against UGL could not proceed. Mr Nagra submitted that the Tribunal did not explain why its finding that he had contracted with RE People was insufficient to permit him to bring a claim against UGL under section 41 EqA.
77. I accept Mr Ohringer's answer to that submission. The Tribunal was not required to give reasons for rejecting a claim which Mr Nagra had not advanced and which, for the reasons already given, it was not obliged to formulate or determine. The Tribunal gave adequate reasons for rejecting the case which he did advance, namely that SCCL employed him and that UGL was liable as SCCL's agent. It was not required to give reasons addressing alternative cases which were not before it.
78. For these reasons, ground 2 must be dismissed.

Was the Tribunal's decision that there had been no change of circumstances since Mr Nagra's original assignment perverse or inadequately reasoned?

79. I turn finally to **Ground 4** which is in the following form:

“Ground 4

The Tribunal's decision at para 40(iii) that there had been no change of circumstances since the Claimant's original assignment began was perverse, alternatively the Tribunal failed to give adequate reasons for its conclusion, when, on the facts, the Claimant started as a customer service advisor in September 2020 but was interviewed directly by [UGL] for a new role as reporting analyst, was appointed to the role in December 2020, and given a pay rise. The Tribunal failed to consider if these changes led to direct employment of the Claimant by [UGL] (cf National Grid Electricity Commission v Wood [2007] EAT).”

Submissions

80. Mr Nagra submitted that the Tribunal's conclusion at §40(iii) (that there had not been any change of circumstances or contractual arrangements since he was initially supplied by RE People to UGL) was not consistent with material that was before the Judge concerning the position after he had been moved into an analyst role in or around January 2021. Mr Nagra took me to documents that were before the Judge. He placed reliance on a transcript of a conversation he had with two UGL managers, Neelam

Heera and Pawandeep Kaur, on 16 February 2021 shortly after he started the analyst role. I was taken to a passage of that transcript in which Mr Nagra was discussing his salary. Mr Nagra submitted that this was a negotiation of his salary directly with UGL managers. He also took me to an organisation chart in a document entitled “*MOU – Vaccine background supporting info*” showing him as a Reporting Analyst next to Neelam Heera. The same document also referred to “*Tal’s role which is on provision of MI*”. Finally, Mr Nagra relied on a document showing that he had an email address @nhsvaccinesupport.com with a signature of “*Analyst – NHS Vaccine Customer Service Team*”. Mr Nagra submitted that the Judge’s conclusion at §40(iii) was perverse because she had not looked at the evidence as a whole and she should have explored matters further.

81. Mr Ohringer submitted that ground 4 cannot succeed. He submitted that the Tribunal was not required to consider whether a change in Mr Nagra’s role might have given rise to a contract with UGL, because Mr Nagra had never advanced a case that UGL employed him directly. His case was that he was employed by SCCL. Mr Ohringer went on, in the alternative, to submit that given that Mr Nagra chose not to give evidence to the Tribunal (as recorded at §7 and §18 of the judgment), the suggestion that the Tribunal ought to have looked beyond the contractual documentation with RE People was unrealistic.

Conclusions

82. Mr Ohringer is correct that the Tribunal was not required to consider whether the change in Mr Nagra’s role gave rise to a direct contract with UGL. Mr Nagra had not advanced a case that UGL employed him at any stage of the assignment.
83. In any event, it plainly was not perverse for the Tribunal to reach the conclusions set out at §40(iii). The Judge was finding that there was no *material* change of circumstances, not that nothing changed about the role. The finding was that nothing of legal significance changed in terms of the contractual arrangements. The matters on which Mr Nagra relied did not compel a different conclusion. He remained subject to his contract with RE People, continued to be supplied by RE People to UGL, and continued to receive payment through RE People, albeit at an altered rate. The Tribunal had found that those

contractual arrangements reflected the reality of the relationship. A change in duties, job title or rate of pay did not, without more, establish a material change in that relationship.

84. Furthermore, the material to which Mr Nagra referred does not establish that the Tribunal's conclusion was perverse. An appellate tribunal must exercise particular caution before concluding that a first-instance tribunal's evaluation of the evidence was perverse by isolating a limited selection of the material before it. The evidence and the reasons must be considered as a whole: **Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5** at §114.

85. In this case the position is even more acute. Mr Nagra's case on appeal is advanced in circumstances where he made a clear decision not to give evidence below. In the present case, the Tribunal did consider the transcript I have referred to. At §38, the Judge said:

"The Claimant has referred me to a transcript of a meeting he appears to have had with two senior staff members of Unipart. Pawandeep Kaur and Neelam Heera. He refers to extracts from the transcript where there is discussion about his pay as he is seeking more money. Discussion about his hours of work as he is seeking to establish what hours he is required to work and discussions about staffing level[s] in the customer service team. At various pages in the transcript, he refers to Mr Kaur, mentioning in the meeting, for example that any agreement over pay would have to go through Finance (page 571), costing hav[ing] to be done and go[ing] back and forth (page 571) and that when he goes to finance and they ask why have you given that figure (the wage the Claimant was seeking) he says "because in the budgeting of the SCCL pay for it, not Unipart. So it's out of our remit. Were asked every single week (page 572)."

86. At §40, the Judge concluded that the transcript did not illuminate Mr Nagra's case. She concluded:

"...at best, the passages are open to interpretation and require context. The Claimant has chosen not to give evidence to expand the context. There is absolutely nothing before me to gainsay the evidence of Mrs Timpson and Mr Webster or to demonstrate the documents did not represent the true nature of the relationships between the parties and that includes the commercial relationships between the Respondents."

87. Those findings were in my judgment plainly open to the Tribunal.

88. Ground 4 must therefore be dismissed. The Tribunal was not obliged to consider whether UGL had directly employed Mr Nagra from January 2021 because that formed no part of the case before it. In any event, its finding at §40(iii) was neither perverse nor inadequately reasoned. The evidence did not

compel a finding of any material change in the contractual arrangements which the Tribunal had found reflected the reality of the relationship.

Conclusion and Disposal

89. For the reasons I have given, I dismiss the appeal.