Neutral Citation Number: [2022] EAT 91

Case No: EA-2020-001047-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date:16 June 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER
MRS E LENEHAN
MRS N SWIFT

- -

Between :

MRS N SEJPAL	**Appellant**
- and -	
RODERICKS DENTAL LIMITED	**Respondent**

- -
- -

Christopher Milsom (instructed by Doyle Clayton Solicitors) for the **Appellant**
Julia Furley (JFH Law LLP) for the **Respondent**

Hearing date: 10 May 2022

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JUDGMENT

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SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

Determining whether an individual (A) is a worker for another person (B) pursuant to section 230(3)(b) ERA requires a structured application of the statutory test:

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

2. A must have agreed to **personally perform <u>some</u> work or services <u>for B</u>**

However, A is excluded from being a worker if:

3. A carries on a **profession or business undertaking**; **<u>and</u>**

4. B is a **client or customer of A's** by virtue of the contract

The employment tribunal did not correctly apply the statutory test and erred in law in concluding that the claimant was not a worker for the respondent.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of Employment Judge Professor A C Neal after a preliminary hearing on 10 and 11 December 2019, with oral submissions on 5 February 2020. The judgment was sent to the parties on 24 November 2020. The employment tribunal held that the claimant was not a “worker” within the meaning of section 230(3)(b) ERA, nor an “employee” pursuant to section 83(2)(a) EQA, not being a person who was employed under a contract personally to do work. As a result, her claims were dismissed.

2. The claimant is a dentist and a member of the Faculty of Dental Surgery. The respondent owns and operates over 100 dental practices across the United Kingdom.

3. The General Dental Council (GDC) regulates dentists. Dental practices are regulated by the Care Quality Commission (CQC).

4. The claimant started working as an "Associate" at the respondent’s Oxford practice in August

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2009. In 2010 she moved to the Kensington practice. The claimant's final contract with the respondent was an "Associate Contract" dated 20 January 2013.

5. The claimant commenced a period of maternity leave in December 2018. At about this time the respondent announced that the Kensington practice would close on expiry of the lease for its premises on 31 December 2018. The claimant asserts that her contract was terminated, whereas others were redeployed.

6. The claimant submitted a claim form that was received by the employment tribunal on 16 April 2019. The claimant asserted that the termination of her contract was discrimination because of pregnancy or maternity (sex discrimination was also referred to in additional information). She also claimed unfair dismissal and a redundancy payment, which claims were not pursued because by the time of the preliminary hearing the claimant no longer asserted that she was an employee. The claimant brought other claims that required that she be a worker.

The Law

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.

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8. In **Clyde & Co LLP & another v Bates van Winkelhof** [2014] ICR 730, [2014] UKSC 32, Baroness Hale held, at paragraph 39:

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

9. Accordingly, the starting point must be the words of the statute. Section 230 **Employment Rights Act 1996 ("ERA")** provides:

> "230 Employees, workers etc.
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "**worker**" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> > (a) **a contract of employment**, or
> >
> > (b) **any other contract**, whether express or implied and (if it is express) whether oral or in writing, whereby **the individual undertakes to do or perform personally _any_ *work or services* for another party to the contract** whose **status is not by virtue of the contract** that of **a client or customer** of **any profession or business undertaking carried on by the individual**;
>
> and any reference to a worker's contract shall be construed accordingly." **[emphasis added]**

10. Accordingly, 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

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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

12. Section 83(2) **Equality Act 2010 ("EQA")** provides:

> "(2) "Employment" means –
>
> (a) employment under a **contract of employment**, a contract of apprenticeship **or** a **contract personally to do work**;" **[emphasis added]**

13. The issue in this appeal is whether the employment tribunal erred in law in concluding that the claimant was not a worker within the meaning of section 230(3)(b) **ERA**, nor an employee who contracted personally to do work for the purposes of section 83(2)(a) **EQA**. The statutory language of the ERA and EQA does not fit together well, as noted in **Alemi v Mitchell** [2021] IRLR 262 [7], because a person who is a "worker" within the meaning of section 230(3)(b) **ERA** (sometimes referred to as a "limb b" worker) will also be an "employee" pursuant to section 83(2)(a) **EQA**, being a person who is employed under a contract personally to do work (other than a contract of employment). For the sake of convenience, we will refer to **ERA** "limb b" workers and **EQA** employees (who do not work under contracts of employment) as "workers". Despite the difference in wording between the Acts, the same test applies in determining whether a person is a worker: **Pimlico Plumbers Ltd and another v Smith**, [2018] UKSC 29, [2018] ICR 1511, Lord Wilson [13-15].

14. Baroness Hale identified three possible situations in **Bates van Winkelhof** [31]:

> "As already seen, employment 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**. Discrimination law, on the other hand, while it includes a contract "personally to do work" within its definition of employment (see, now, Equality Act 2010, s 83(2)) does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route." **[emphasis added]**

15. Baroness Hale said of the distinction between the two types of self-employed people [25]:

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> "Second, within the latter class, the law now draws a distinction between **two different kinds of self-employed people**. **One kind** are people who **carry on a profession or a business undertaking on their own account** and **enter into contracts with clients or customers to provide work or services for them**. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. **The other kind** are **self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else**. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005; [2013] ICR 415 , who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act." **[emphasis added]**

16. So, it is clear that the focus must be on the statutory language, and distinguishing between employees, self-employed workers and self-employed people who carry on a profession or a business undertaking on their own account (and therefore enter into contracts with clients or customers to provide work or services for them).

17. Focus on the statutory language tells us that there must be a contract (or, for reasons we will briefly consider below, in limited circumstances, a similar agreement) between the worker and the putative employer. But how do we analyse the nature of the agreement? Is it by applying undiluted common law contractual principles? No, it is not; as the Supreme Court authorities now make clear. While there must generally be a contract, the true nature of the agreement must be ascertained and contractual wording, that may have been designed to make things look other than they are, must not be allowed to detract from the statutory test and purpose.

18. In **Autoclenz Ltd v Belcher and others**, [2011] UKSC 41, [2011] ICR 1157 Lord Clarke held:

> "29. However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in *Kalwak* and of the Court of Appeal in *Szilagyi* and in this case to that of the Court of Appeal in *Kalwak* . The question in every case is, as Aikens LJ put it at para 88 quoted above, **what was the true agreement between the parties**. I do not perceive any distinction between his approach and the approaches of Elias J in *Kalwak* , of Smith LJ and Sedley LJ in *Szilagyi* and this case and of Aikens LJ in this case.

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30. In para 57 of *Kalwak* (set out above) Elias J quoted Peter Gibson LJ's reference to the importance of **looking at the reality of the obligations** and in para 58 to **the reality of the situation**. In this case Smith LJ quoted (at para 51) para 50 of her judgment in *Szilagyi* :

> "The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by."

31. She added in paras 52, 53 and 55:

> "52. I regret that that short paragraph [ie para 51] requires some clarification in that my reference to 'as time goes by' is capable of misunderstanding. What I wished to say was that the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.
>
> 53. In my judgment the true position, consistent with *Tanton* , *Kalwak* and *Szilagyi* , is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. **To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice** and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right.
>
> …
>
> 55. It remains to consider whether the EJ directed himself correctly when he considered the genuineness of the written terms. I am satisfied that he directed himself correctly in accordance with, although in advance of, *Szilagyi* . In effect, he directed himself that he must seek to find the true nature of the rights and obligations and that the fact that the rights conferred by the written contract had not in fact been exercised did not mean that they were not genuine rights."

32. Aikens LJ stressed at paras 90 to 92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ's analysis of the legal position in *Szilagyi* and in paras 47 to 53 in this case. In addition, he correctly warned against focusing on the "true intentions" or "true expectations" of the parties because of the risk of concentrating too much on

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what were the private intentions of the parties. He added:

> "What the parties privately intended or expected (either before or after the contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the Chartbrook case at [64] to [65]. **But ultimately what matters is only what was agreed**, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."

I agree.

33. At para 103 Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:

> "recognising as it does that **while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract**."

I agree.

34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:

> "92. I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, **it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed** and the court or tribunal **must be realistic and worldly wise** when it does so … "

35. **So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem**. If so, I am content with that description." **[emphasis added]**

19. This realistic and worldly-wise determination of the true nature of the agreement between the parties must be undertaken with a focus on the statutory provision. In **Uber BV v Aslam**, [2021] UKSC 5, [2021] ICR 657, Lord Leggatt held:

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"62. Beginning at para 22 of the judgment, Lord Clarke considered three cases in which "the courts have held that the employment tribunal should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship". From these cases he drew the conclusion (at para 28) that, in the employment context, **it is too narrow an approach to say that a court or tribunal may only disregard a written term as not part of the true agreement between the parties if the term is shown to be a "sham", in the sense that the parties had a common intention that the term should not create the legal rights and obligations which it gives the appearance of creating**: see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802 (Diplock LJ) . Rather, the court or tribunal should consider what was actually agreed between the parties, "either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded": see para 32, again agreeing with observations of Aikens LJ in the Court of Appeal. …

68. The judgment of this court in the *Autoclenz* case made it clear that **whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and other "workers" is not to be determined by applying ordinary principles of contract law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake**. Not only was this expressly stated by Lord Clarke but, had ordinary principles of contract law been applied, there would have been no warrant in the *Autoclenz* case for disregarding terms of the written documents which were inconsistent with an employment relationship, as the court held that the employment tribunal had been entitled to do. **What was not, however, fully spelt out in the judgment was the theoretical justification for this approach. It was emphasised that in an employment context the parties are frequently of very unequal bargaining power**. But the same may also be true in other contexts and inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law, except in so far as Parliament has made the relative bargaining power of the parties a relevant factor under legislation such as the Unfair Contract Terms Act 1977 .

69. Critical to understanding the Autoclenz case, **as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker"** in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. **In short, the primary question was one of statutory interpretation, not contractual interpretation**.

70. The **modern approach to statutory interpretation** is to have regard to the purpose of a particular provision and **to interpret its language, so far as possible, in the way which best gives effect to that purpose**. …

76. Once this is recognised, it can immediately be seen that **it would be**

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> **inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker"**. To do so would reinstate the mischief which the legislation was enacted to prevent. **It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker.** Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it." **[emphasis added]**

20. Lord Leggatt also noted that terms of a contract that are designed to disapply the statutory protections for workers may fall foul of the various provisions prohibiting contracting out:

> "80. These provisions, as I read them, **apply to any provision in an agreement which can be seen, on an objective consideration of the facts, to have as its object excluding or limiting the operation of the legislation**. It is just as inimical to the aims of the legislation to allow its protection to be limited or excluded indirectly by the terms of a contract as it is to allow that to be done in direct terms." **[emphasis added]**

21. The fact that terms of an agreement may be necessary to comply with regulatory requirements does not alter the fact that they form part of the agreement, and so are relevant to assessing its nature:

> "102 I would add that the fact that some aspects of the way in which Uber operates its business are required in order to comply with the regulatory regime - although many features are not - cannot logically be, as Uber has sought to argue, any reason to disregard or attach less weight to those matters in determining whether drivers are workers. To the extent that forms of control exercised by Uber London are necessary in order to comply with the law, that merely tends to show that an arrangement whereby drivers contract directly with passengers and Uber London acts solely as an agent is not one that is legally available."

22. In limited circumstances, such as is the case for a person who cannot enter a contract because of being an office holder, the true nature of the agreement for the provision of work or services is to be ascertained to determine whether the person is, nonetheless, a worker: **Gilham v Ministry of Justice** [2019] UKSC 44, [2019] 1 WLR 5905. There may be circumstances in which the agreement to work is not contractual but the person is, nonetheless, an employee. It was not necessary to consider

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those circumstances for the purposes of this appeal.

23. The concept of mutuality of obligation goes principally to the issue of whether there is a relevant agreement, or agreements. There must be mutuality of an obligation for there to be a contract at all. In **Quashie v Stringfellows Restaurants** Ltd [2012] EWCA Civ 1735, [2013] IRLR 99, Elias LJ held:

> "10. An issue that arises in this case is the significance of mutuality of obligation in the employment contract. **Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract**. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in *Meechan v Secretary of State for Employment* [1997] IRLR 353 and *Cornwall County Council v Prater* [2006] IRLR 362." **[emphasis added]**

24. Many of the cases that have considered mutuality of obligation have been about the situation of "casual" workers and whether they remained subject to an "umbrella contract" during the periods between engagements, for purposes such as continuity of service. The concept of the "irreducible minimum" is generally applied when analysing whether there is an umbrella contract in the case of casual workers. Often there will be no issue about mutuality of obligation because there is no doubt that there is a contract that governs the relationship, and services are not only provided from time-to-time.

25. Even in the case of casual workers the concept of the irreducible minimum does not assist in considering whether the person is a worker during the periods when they are undertaking work. In **Nursing and Midwifery Council v Somerville** [2022] EWCA Civ 229, [2022] I.C.R. 755 Lewis LJ held:

> "41. **Ms Darwin, together with Ms Swords-Kieley, for the respondent submits that a contract cannot fall within the scope of limb (b) of reg 2(1) of the Regulations unless it includes an irreducible minimum of obligations on the parties. That meant, submitted Ms Darwin, that each contract had to include an obligation on the part of the worker to perform some minimum**

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

26. Just as the concept of the irreducible minimum does not assist in considering worker status during the period that a person is working pursuant to one of a series of engagements, it does not assist in considering the position of a person working under a single engagement.

27. The concepts of mutuality of obligation, and its sibling, irreducible minimum, in the sense of an obligation on the person to accept and perform some minimum amount of work for the other party to the contract who is obliged to offer and/or pay for the work, have also been considered in the context of substitution clauses, it being suggested that an unfettered right to provide a substitute is inconsistent with there being the irreducible minimum obligation to provide personal service in return for payment.

28. Just as the concept of irreducible minimum mutuality of obligation has little to offer to the analysis of the situation when a person is working during one of a number of periodic engagements, it is hard to see what it has to offer while a person is working pursuant to a contract, even if substitution would be permissible, with the result that there could be other periods during which the person is not providing services that are, instead, provided by a substitute.

29. The concept of substitution is particularly relevant to the question of whether an agreement is for personal service. In **Pimlico Plumbers Ltd v Smith** (CA) [2017] ICR 1511 - Sir Terence Etherton

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MR considered a number of possible examples of substitution:

> "84 Some of those cases are decisions of the Court of Appeal, which are binding on us. Some of them are decisions of the appeal tribunal, which are not. In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

30. While these examples may assist in the analysis of whether there is an agreement for personal service, they are not themselves tests. In **Stuart Delivery Ltd v Augustine**, [2021] EWCA Civ 1514, [2022] ICR 511 Lewis LJ, held:

> "Discussion
>
> Preliminary observations
>
> 34 In considering the question of the employment status of an individual, it is helpful to start with a reminder of what the relevant issue is. Much of the discussion in the present case had focused on analysis of what were said to be different categories recognised by the Court of Appeal in *Pimlico Plumbers* [2017] ICR 657and attempts to shoehorn particular facts, or particular findings of the employment tribunal, into what were said to be relevant categories. It is more appropriate to identify first the basic issue and then to consider the decision of the employment tribunal, read fairly and as a whole, to determine whether it identified the correct issue, applied the relevant principles to that issue and whether it reached findings it was entitled to reach on the material before it.
>
> The issue
>
> 35 The issue here is that the 1996 Act and the other relevant legislation confer rights on a "worker". Section 230(3) of the Act defines a worker as a person who has entered into or worked under (1) a contract of employment; or (2) a contract where the individual undertakes to do or perform personally any work or services for another person who is a party to the contract and whose status is not by virtue

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of the contract a client or customer of any profession or business undertaking carried on by the individual.

36 That reflects a distinction between (1) persons employed under a contract of employment, (2) persons who are self-employed, carrying on a profession or a business on their own account and who enter into contracts and provide work or services to clients and (3) persons who are self-employed and provide services as part of a profession or business carried on by others: see *Bates van Winkelhof v Clyde & Co LLP* [2014] ICR 730, para 25. If it is relevant or helpful to talk of categories at all, those are the three categories. The persons in (1) fall within section 230(3)(a) of the Act. The persons in group (3) are those who fall within section 230(3)(b) of the Act. Those in the second group are not workers within the meaning of section 230 of the Act. Again, that demonstrates the difficulty, and artificiality, of seeking to shoehorn the facts of a particular case within the examples given by the Court of Appeal. The example in point 4 appears to refer back to, and be a summary of, earlier cases analysed by Sir Terence Etherton MR. Those included one case where a claimant had an express right under the contract to delegate the performance of services to other persons (whether or not they were his employees) provided that the respondent was notified in advance and provided that the substitute was at least as capable and experienced as the claimant. They also included a case where a claimant could, under the terms of the contract, delegate the performance of the services to any of his agents, employees and other individuals who was approved in writing by the respondent, that consent not to be withheld unreasonably. The factual situations of the cases analysed are different from the facts of the present case. It is unhelpful to attempt to force the facts of this case into the language used in point 4, or to try and analyse it by reference to the language used in point 4. **It is more appropriate to focus on the real issue, that is whether the nature and degree of any fetter on the right or ability to appoint a substitute to determine whether that was inconsistent with any obligation of personal performance.**" **[emphasis added]**

31. The relevant test was considered by Lord Wilson in **Pimlico Plumbers Ltd v Smith**, [2018] UKSC 29, [2018] ICR 1511

"28 So the question becomes: was Mr Smith's right to substitute another Pimlico operative inconsistent with an obligation of personal performance? It is important to note that the right was not limited to days when, by reason of illness or otherwise, Mr Smith was unable to do the work. His own example of an opportunity to accept a more lucrative assignment elsewhere demonstrates its wider reach.

32 … The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part."

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32. It is arguable, post **Uber**, and the focus on statutory interpretation that is now expressly required, that there could be a situation in which despite there being a contractual term that provides an unfettered right of substitution, the reality is that the predominant purpose of the agreement is personal service, so that the person is a worker. It might even be argued that personal service need not be the predominant purpose of the agreement, provided that the true agreement is for the provision of **"any"** personal service as required by the statute. It was not necessary to decide those points in this case.

33. If there is a contract pursuant to which A undertakes to do or perform personally any work or services for B, it is then necessary to consider whether A is excluded from being a worker because A carries on a profession or business undertaking of which B is a client or customer. The concepts of integration, control and/or subordination may assist in these tasks.

34. Any profession or business undertaking carried on by A should be identified. Logically, that is the starting point of the analysis.

35. It is not enough that A carries on a profession or business undertaking so as to be "self employed"; it is also necessary for the exclusion to apply that B is a client or customer of A's. In **Hospital Medical Group v Westwood** [2012] ICR 415, Maurice Kay LJ considered a submission that if a person is genuinely self-employed that person cannot be a worker. The contention was firmly rejected [19]:

> "I am unable to accept Mr Green's submissions for a number of reasons. Firstly, they effectively emasculate the words of the statute. If Parliament had intended to provide for an excluded category defined as those in business on their own account, it would have said so, rather than providing a more nuanced exception. Secondly, whilst it is true that Mr Green's approach has the attraction of greater simplicity and predictability, it simply does not fit with the words of the statute. The status exception does indeed provide a third, albeit negative hurdle. Thirdly, it is counterintuitive to see HMG as Dr Westwood's 'client or customer'. HMG was not just another purchaser of Dr Westwood's various medical skills. Separately from his general practice and his work at the Albany Clinic, he contracted specifically and exclusively to carry out hair restoration surgery on behalf HMG. In its marketing material, HMG referred to him as 'one of our surgeons'. Although he was not working for HMG pursuant to a contract of

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> employment, he was clearly an integral part of its undertaking when providing services in respect of hair restoration, even though he was in business on his own account."

36. In considering appeals from the employment tribunal the Employment Appeal Tribunal should be slow to conclude that an employment tribunal that has properly directed itself to the law has failed to apply it: **DPP Law Ltd v Greenberg** [2021] IRLR 1016 [58]. But, that does happen on occasion: **Brent v Fuller** [2011] EWCA Civ 267, [2011] ICR 806, [30].

The employment tribunal's direction as to the law

37. To a large extent, the employment tribunal directed itself properly to the relevant law. The employment tribunal set out the relevant statutory tests [38]. The employment judge noted that "the ET's starting point must always be the statutory language" [59] and that "It has been common ground that the Tribunal is required to identify the "true agreement" between the contracting parties" [57]. The employment judge accepted that the same approach was to be adopted under ERA and EQA [58]. The employment judge considered the judgments of the Supreme Court in **Autoclenz**, **Pimlico Plumbers** and **Bates van Winkelhof** and of the Court of Appeal in **Uber** which was yet to reach the Supreme Court, so Lord Leggatt's consideration of the central importance of statutory interpretation was not available to the employment judge.

38. We start on the assumption that there was a proper direction as to the law, so we must be slow to conclude that the employment judge did not apply that direction to the facts of the case.

The analysis of the employment tribunal

39. The employment judge set out the approach that he was to adopt:

> "63. The nine aspects identified by counsel for the Claimant were set out as being:
>
> (1) The Claimant's mode of appointment and selection (including the probation period);
>
> (2) The terms of the contract;
>
> (3) Mutuality of obligations;

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> (4) The requirement for personal service and the true position as regards cancellation and substitution;
>
> (5) Pay and apportionment of financial risk;
>
> (6) The use of the Respondent's resources;
>
> (7) Control;
>
> (8) Integration within the Respondent's operations; and
>
> (9) Integration in the eyes of the public (Was the Claimant in business on her own account?).
>
> 64. The evaluation of the Tribunal follows the order of those matters as presented by counsel for the Claimant."

40. We do not consider that this was a sound framework for the analysis of this case. It did not focus on the statutory test and did not ensure that the concepts that can assist in determining worker status were applied to the correct components of the statutory test.

The Appeal

41. The appeal was advanced on seven grounds:

> "The ET erred in its approach to the written terms (Ground One: Written Terms);
>
> The ET erred in finding that there was insufficient mutuality of obligations (Ground Two: Mutuality of Obligations);
>
> The ET erred in its Approach to Personal Service (Ground Three: Personal Service);
>
> The ET erred in its approach to control (Ground Four: Control);
>
> The ET erred in its approach to integration (Ground Five: Integration);
>
> The ET erred in diverging worker status from vicarious liability (Ground Six: Vicarious Liability);
>
> The ET failed to exercise its interpretative obligations under s3 HRA 1998 and/or Article 14 ECHR (Ground Seven: Article 14 ECHR)."

42. The vicarious liability ground (Ground 6) was not pursued in the light of the decision of the

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Court of Appeal in **Hughes v Rattan** [2022] 1 WLR 1680.

43. In analysing the grounds of appeal we have been guided by the statutory framework.

Contract

44. The starting point for the employment tribunal in this case should have been to determine whether there was a contract between the claimant and the respondent. We consider that the principal application of the concept of mutuality of obligation in this case was as being a necessary requirement for a contract to come into existence. There was no realistic issue about there being an umbrella contract and no dispute that the claimant had entered an "Associate Contract" dated 20 January 2013. We cannot see that the concept of an "irreducible minimum of mutual obligation" had anything significant to add in this case.

45. Nonetheless, the employment tribunal concluded that the necessary mutuality of obligation was missing [73]

> "Having regard to the entirety of the relationship between the parties, and having taken into account the extensive witness evidence tested under cross-examination, the Tribunal is firmly of the view that the engagement in this case lacked the requisite "mutuality of obligation" as established by the historical case-law development. In particular, the evidence in relation to there being "no restriction on the right to refuse" does not support the proposition that this was not "the reality of the situation". The Tribunal is of the view, therefore, that this relationship lacked the necessary "mutuality of obligation" (in the sense discussed by Underhill LJ) to establish "worker" status for the purposes of the Claimant's employment protection claims."

46. The reference to the discussion of Underhill LJ was to **Windle and another v Secretary of State for Justice** [2016] EWCA Civ 459, [2016] ICR 721, which was a case about periodic casual working, and the consequence that the absence of sufficient mutuality of obligation when the individuals were not working (which meant that there was no umbrella contract) had on the analysis of the agreement when they were working. It was not relevant to this case, in which there was no need to introduce the concept of umbrella contracts. There obviously was a single contract between the claimant and the respondent. In the circumstances, Ground 2 is made out.

The true nature of the agreement

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47. In assessing the other features of the statutory test for establishing worker status the employment tribunal was required to assess the true nature of the agreement, without excessive focus on wording that might be designed to avoid worker status being established. The employment tribunal had to apply the statutory test having regard to its purpose.

48. The first paragraph of the "discussion" section of the judgment suggests that, despite the direction as to the importance of assessing the true nature of the agreement, the focus was on the wording of the contract [47]:

> "At the heart of this case is a written document reflecting the terms of a contract into which the parties entered, referred to as an "Associateship Contract"."

49. The employment tribunal stated [52]:

> "52. On the face of its wording the 2013 "Associateship Contract" into which the parties entered is drafted unequivocally in language which is intended to exclude the Claimant enjoying the employment status of "employee". Thus, it is provided that:
>
> > (5) Nothing in this agreement shall constitute a contract of employment between the Company and the Associate. This is a contract for services."

50. The reliance on this clause is a little hard to follow, as it was not asserted that the claimant was an employee, but a worker. The passage possibly suggests that the employment tribunal considered that a "contract for services" was inconsistent with worker status. That is incorrect, because a worker can be self-employed, provided that they do not carry on a profession or business undertaking of which the other party to the contract is a client or customer.

51. The core of the employment tribunal's reasoning was set out in the following passage:

> 69. It is common ground that the **"labels"** adopted by the parties – particularly in the written "Associateship Contract" signed by the Claimant – **will not necessarily be decisive for the determination of employment status**. The Tribunal notes particularly the observations of the Supreme Court in the case of *Autoclenz Ltd v. Belcher* in this context. The Claimant additionally submits that the functioning of the relationship between the parties under a contract "devised entirely by the Respondent" illustrates an alleged "inequality of bargaining power" which should be taken into account by the Tribunal.
>
> 70. The Tribunal notes, as has already been set out, that **the Associateship**

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> **Contract in question is drafted in the language of "self-employment" and clearly intended to avoid the assumption by the Respondent of statutory employment protection obligations**. However, in relation to the submissions founded upon observations by the Supreme Court in *Autoclenz Ltd v. Belcher* **the Tribunal does not consider that, in the circumstances of this case, there is anything near sufficient to reach the conclusion that the agreement (or parts of it) constitutes "a sham" in the sense in which that expression is used in English contract law.** Nor does the Tribunal consider this contract to be an example of "lawyer-drafted documentation" giving rise to the abuse identified by the then President of the Employment Appeal Tribunal, Elias J, in *Consistent Group Ltd v. Kalwak* and as envisaged by Underhill LJ in his Court of Appeal judgment in *Pimlico Plumbers Ltd v. Smith*. On the evidence presented in this case, **the Tribunal rejects the submission on behalf of the Claimant that the terminology of the written agreement "does not reflect the reality of the situation". There is no evidence in this case of misrepresentation (in any of its Common Law contractual guises), nor has it been demonstrated that the Claimant has in any sense lacked the capacity to understand precisely what she was signing up to when entering into the relationship** recorded in the Associateship Contract. Finally, the Tribunal **does not find the submissions as to "inequality of bargaining power" made out on the evidence**, and certainly **not to the extent required to establish "sham" or any other reason to displace the old Common Law rule first enunciated in *L'Estrange v. Graucob*,** as discussed by the Supreme Court in **Autoclenz Ltd v. Belcher**. **[emphasis added]**

52. We consider that this passage demonstrates a number of substantive errors of law. The employment judge considered that he should give the words of the contract primacy unless the contract was a sham, in the sense of "traditional English contract law" and/or for the purpose of the "old common law rule in **L'Estrange v. Graucob**". That is not what is required by **Autoclenz**. The Supreme Court held that employment contracts had to be considered differently to other contracts and that it is necessary to determine the true nature of the agreement. There is no requirement for "misrepresentation" or for a putative worker to lack "capacity", as this passage of the judgment suggests, for an employment tribunal to conclude that the words of a contract do not fully set out the agreement. It is necessary to ascertain the true nature of the agreement and to apply the statutory test in accordance with its purpose. Accordingly, we conclude that Ground 1 is also made out.

53. The erroneous approach of the employment tribunal in concluding that it must apply the strict wording of the contract (because it was not a sham) affected the entirety of the analysis of the agreement, and necessarily means that the appeal must succeed on the remaining grounds, save

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Ground 7, which we did not consider was necessary for the analysis of this appeal. There were also a number of specific errors that resulted from this overall failure to analyse the true agreement between the parties.

Personal Service

54. The focus of the respondent's submissions in the employment tribunal was that the requirement for personal service was not made out because there was an unfettered right of substitution. The employment tribunal accepted this argument. Clause 30 of the Associate Agreement provided that:

> "In the event of the **Associate's failure** (through **ill health maternity paternity or <u>other cause</u>**) to utilise the facilities for **a continuous period of more than 14 days** the Associate shall **use his best endeavours to make arrangements for the use of the facilities by a locum tenens**, such locum tenens **being acceptable to the Primary Care Trust and the Company** to provide Personal Dental Services Plus/Personal Dental Services as a Performer at the practice, and in the event of the failure by the Associate to make such arrangements the Company shall have authority to engage a locum tenens on behalf of the Associate and to be paid for by the Associate. The Company and Associate will agree the method of payment of the locum tenens. The Company will notify the PCT that the locum tenens is acting as a Performer at the Practice. **The Associate will be responsible for obtaining and checking references and the registration status of the locum and ensuring that the locum is entered into the Performers list of a Primary Care Trust in England and will confirm to the Company that these requirements have been carried out**, The Associate will provide the Company with such relevant information as he may reasonably require." **[emphasis added]**

55. The employment tribunal analysed the matter as follows:

> 77. The Respondent's position is that the Claimant was not under an obligation to provide the services personally, with the consequence that she is not a "limb (b) worker" or "employed" for the purposes of the Equality Act 2010. It is said that the issue of "substitution" requires consideration of two dimensions, reflecting (1) the position regarding the regulatory framework established for the dentistry profession and (2) the contractual arrangements set out in the Associateship Contract entered into by the parties and signed by the Claimant. Challenge is made to the Claimant's version of events during her recruitment, and particular reference is made to the Claimant's registration with the NHS as a "performer". At paragraph 26 of the Respondent's final written submissions the case is articulated in terms that:
>
> > It is submitted that an unfettered right to send a substitute, does not equate to an unfettered right to send a substitute without notice and without meeting regulatory requirements. In this case, the right of

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> substitution is present, so long as the dentist meets the minimum legal and regulatory requirements i.e the substitute must be qualified to perform the services; this is not at the discretion of the Respondent.

and, more generally, that:

> Ensuring legal and regulatory obligations are met does not equate to fettering the right to send a substitute. If this were the case, it would render it impossible for any self-employed individual within a regulated profession to send a substitute.

78. Counsel for the Respondent was also keen to draw the Tribunal's attention to the decision of the Employment Appeal Tribunal in *Community Dental Centres Ltd v. Sultan-Darmon*, where, it is suggested, a "near identical locum clause" was considered not to have given rise to an obligation upon the dentist in question personally to perform the work, with the result that the Claimant in that case was held not to be a "worker".

79. The Tribunal **has considered at great length the evidence presented in relation to "substitution" and the operation in practice of the "locum tenens clause" in the Associateship Contract signed by the Claimant.** In addition, both counsel have devoted substantial parts of their final written submissions to offering interpretations of the clause itself, as well as to interpretation of the oral evidence given under cross-examination on this aspect of the relationship.

80. Notwithstanding the valiant efforts by counsel for the Claimant (in particular at paragraph 45 of the Claimant's final written submissions) to make a case that the clause did not reflect a true freedom/right to substitute, the Tribunal finds that **the assertion to the effect that, "At no stage did the Claimant exercise a substitution right nor is she aware of it being exercised in Kensington", does not serve to displace a clearly expressed right (if not, in certain circumstances, duty – at least to the extent of the Claimant being required to use "best endeavours") of substitution contained in the "locum tenens clause".** The purpose of the clause, and the modalities for its activation, are clear, and it is not an answer to the Respondent's case to point out that no occasion had so far arisen in which it might have proved necessary to trigger that provision. **Nor is this an answer to the unchallenged assertion that the clause forms part of standard terms throughout the dentistry profession in the United Kingdom**.

81. **The Tribunal is satisfied that there existed a clear and genuine right for the Claimant to introduce a "locum tenens" for performance of her obligations under the Associateship Contract. Only the regulatory requirements that such a locum must satisfy specified standards of competence and qualification served to limit the absolute freedom of the Claimant in circumstances where the clause might be triggered**, …" **[emphasis added]**

56. The employment tribunal relied on the decision of Silber J in **Community Dental Centres**

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Ltd v [2010] IRLR 1024. The Employment Appeal Tribunal considered a very similar clause:

> "In the event of your failure (through ill health, maternity leave or other causes excluding up to 30 days' annual holiday allowance) to utilise the facilities for a continuous period of more than five days you shall make arrangements for the use of the facilities by a locum tenens acceptable to [the respondent] and in the event of your failure to make such arrangements [the respondent] shall have authority to appoint a locum tenens if possible to act on your behalf who should be your servant or agent and shall be paid by you"

57. Silber J concluded that there was an unfettered right of substitution which meant that the claimant could not be a worker for the respondent.

58. We have considered whether **Sultan-Darmon** is binding on us, and requires us to find that the employment judge was correct in holding that there was an unfettered right of substitution. We do not consider that is the case:

a. The respondent did not assert that we were bound by **Sultan-Darmon**

b. It is now clear that assessing the true agreement between the parties is fact specific and that the focus is on the statutory test. Accordingly, the same clause will not necessarily be analysed in the same way in every case

c. The wording is not precisely the same

d. The decisions of the Supreme Court have substantially shifted the focus of analysis away from contractual construction alone

59. We consider that the employment judge erred in holding in this case that there was an unfettered right of substitution:

a. We reject the respondent's assertion that a requirement to provide a locum after 14 days of failing to utilise the facilities implies an absolute right to provide one before the 14 day period has elapsed

b. The contract does not allow for the appointment of a locum before the associate has been absent for 14 days

c. The limitation on who may be a locum is not only a result of regulatory requirements, but there is an express requirement that the replacement must be

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acceptable to the respondent

d. In any event, the fact that elements of the agreement between the parties may result from regulatory requirements does not prevent them from being taken into account in considering whether there is an unfettered right of substitution

e. The employment tribunal was required to consider whether the manner in which the provision of a locum operated in practice was relevant to the true agreement between the parties. The claimant's assertion that she had never provided a locum was not challenged.

60. Accordingly, we hold that Ground 3 is also made out. The employment tribunal should have properly considered whether the claimant was required to provide some personal service to the respondent on a realistic assessment of the true agreement between the parties, by application of the statutory test.

Profession or business undertaking

61. The employment tribunal was required to decide whether the claimant carried on a profession or business undertaking. That requires proper analysis of the nature of any such profession or business undertaking. The issue was not expressly considered by the employment tribunal.

Client or customer

62. Even if the claimant did carry on a profession or business undertaking, the exclusion from worker status would only apply if the respondent was a client or customer of the claimant's by virtue of the contract between them. This question was not considered at all in the judgment. It is a necessary component of the analysis: see **Main v SpaDental Limited** EA-2020-000023-AT.

Control and integration

63. The concepts of control, integration and/or subrogation were potentially relevant to assessing both the questions of whether the claimant carried on a profession or business undertaking and whether the respondent was a client or customer of the claimant's. As the structured analysis required by the statute, the ascertainment of the true agreement and focus on the statutory purpose, was not

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undertaken, we do not consider that the employment tribunal properly considered whether the claimant was someone who carried on a profession or a business undertaking on their own account and entered into contracts with clients or customers to provide work or services for them (so was not a worker) or a self-employed person who provided her services as part of a profession or business undertaking carried on by the respondent (and so was a worker). Accordingly, we hold that Grounds 4 and 5 are made out.

Other grounds

64. Ground 6 was not pursued and we do not consider that consideration of ground 7 was necessary for the determination of this appeal.

Disposal

65. Accordingly, the appeal succeeds on grounds 1-5.

66. We consider that applying the approach in **Jafri v Lincoln College** [2014] IRLR 544 there was only one right answer to the first two questions that arise under section 230(1)(a) ERA and section 83(2)(a)EQA

a. There was a contract between the claimant and the respondent – there was no proper basis on which it could be said that the existence of a contract was vitiated by lack of mutuality of obligation.

b. There was a requirement for some personal service. The respondent's contention that this was absent because of an unfettered right of substitution is unsustainable because it is clear that there were fetters on the right to substitute, under the terms of the agreement, and in its practical application. On an overview of the contract and of the tribunal's findings as to how it worked in practice, it is clear that its predominant purpose required personal service by the claimant.

67. However, we do not consider that it can be said that there could only be one correct answer to each of the two remaining questions that determine whether the claimant fell outside of the statutory definition of a worker because the claimant carried on a profession or business undertaking **and** the

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respondent was a client or customer pursuant to the contract of that profession or business undertaking. That is to be assessed by consideration of the full obligations set out in the written agreement, the real nature of the agreement between the parties and by application of the statutory test, in accordance with its purpose, as explained in the decisions of the Supreme Court, particularly **Bates van Winkelhof** and **Uber**.

68. Accordingly, a determination that the claimant had entered into and worked under a contract with the respondent whereby she agreed to provide some personal work or services for the respondent will be substituted for the determination of the employment tribunal.

69. The questions of whether the claimant carried on a profession or business undertaking; **and** of whether the respondent was a client or customer of the claimant's by virtue of the contract is remitted. We have decided that it is appropriate for the matter to be considered by a different employment tribunal having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763:

a) It is important to avoid further delay, which could be caused by awaiting the availability of the same employment tribunal;

b) The outstanding issues must be determined afresh, so there would be no saving of cost or time in remitting it to the same employment tribunal; and

c) The errors of law were fundamental.

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