Neutral Citation Number: [2017] EWCA Civ 51

Case No: A2/2015/0196

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
HIS HONOUR JUDGE SEROTA QC
UKEAT049512DM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2017

Before:

SIR TERENCE ETHERTON, MR
LORD JUSTICE DAVIS
and
LORD JUSTICE UNDERHILL

- -

Between:

(1) PIMLICO PLUMBERS LIMITED
(2) CHARLIE MULLINS — **Appellants**
- and -
GARY SMITH — **Respondent**

- -
- -

Thomas Linden QC and Akash Nawbatt (instructed by **Mischon de Reya**) for the **Appellants**
Karon Monaghan QC and David Stephenson (instructed by **TMP Solicitors**) for the **Respondent**

Hearing dates: 17 & 18 January 2017

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Approved Judgment

SIR TERENCE ETHERTON MR:

1. The question on this appeal is whether the Employment Tribunal (Employment Judge Corrigan) ("the ET") was correct to hold in a decision dated 16 April 2012 that the respondent, Gary Smith, was a worker within the meaning of section 230(3)(b) of the Employment Rights Act 1996 ("the ERA") and regulation 2(1) of the Working Time Regulations 1998 ("the WTR") and his working situation fell within the definition of "employment" in section 83(2)(a) of the Equality Act 2010 ("the EA") during the period that he worked for the first appellant, Pimlico Plumbers Limited ("PP").

2. The Employment Appeal Tribunal (HH Judge Serota QC) ("the EAT") in a decision dated 21 November 2014 upheld the decision of the ET.

3. The case puts a spotlight on a business model under which operatives are intended to appear to clients of the business as working for the business, but at the same time the business itself seeks to maintain that, as between itself and its operatives, there is a legal relationship of client or customer and independent contractor rather than employer and employee or worker.

<u>The background facts</u>

4. Mr Smith is a plumber. He carried out plumbing work for PP between 25 August 2005 and 28 April 2011. He claims that, following a heart attack in January 2011, he was unfairly or wrongfully dismissed on 3 May 2011.

5. PP is a plumbing and maintenance company. The second appellant, Charlie Mullins, is its founder and owner. At the time of the ET's decision it had 75 office staff and 125 people, like Mr Smith, carrying out plumbing and maintenance work on its behalf.

The 2005 Agreement

6. Mr Smith signed an agreement with PP on 25 August 2005 ("the 2005 Agreement"). It was in PP's standard form but with blanks completed in manuscript. The agreement, as completed in manuscript, described PP as "The Company" and Mr Smith as the "sub contracted employee".

7. Above Mr Smith's signature, it stated:

> "The terms of your agreement are detailed in the Company Procedures and Working Practice Manual which you must read and agree to comply with before signing.
>
> I agree to the terms of conditions as laid out in the Company's Procedures and Working Practice Manual and accept that this forms part of my agreement with the Company".

The Manual

8. The Company Procedures and Working Practice Manual ("the Manual") contained the following relevant provisions.

9. There were provisions governing personal appearance. It said:

> "After performance you and the Company are judged on your appearance which must be clean and smart at all times…The Company logo'ed uniform must always be clean and worn at all times."

10. Under the heading "Working times", the Manual provided:

> "Normal Working Hours consist of a 5 day week, in which you should complete a minimum of 40 hours. ...
>
> Adequate notice must be given to Control Room for any annual leave required, time off or period of unavailability. Any leave or time off must be taken in full days."

11. Under the heading "On-Call Rota" there was a provision that:

> "*Operatives must always be available during their shift to take* on-call work".

12. Under the heading "Operatives Telephone Procedure", there was provision for operatives to telephone the control room fairly frequently and for all customer contact, appointments and scheduling to be made through the control room.

13. There were detailed requirements as to timesheet procedures, invoice procedures, estimate procedures and additional labour charges.

14. Under the heading "Unpaid Invoices", it was provided:

> "No payment will be made to the Operative until payment in full has been received by the office. If any payment fails to be honoured a deduction will be made from the Operative who has already been paid.
>
> A 50% deduction will be made from the Operative's percentage if payment is received by the office later than 1 month from the job date.
>
> Invoices which remain unpaid after six months from the date of the job will be written off."

15. There was provision for every operative to be issued with a PP I.D. card, which had to be carried when working for PP, and for the supply of "complete logo'ed uniforms of various combinations" and the issue of a mobile telephone. The operative could select the preferred tariff. The Manual provided that mobile telephone charges plus VAT "will be deducted from wages on a monthly basis".

16. There were provisions relating to collecting and purchasing materials. The operative was required to collect and order the materials for jobs and charge the customer at cost plus 20% trade mark-up plus VAT.

17. Under the heading "Private Work" it was provided that:

> "Any individual undertaking private work for or as a result of contacts gained during your working week and contravening the signed contract will be dismissed immediately and may be subject to legal action by the Company.
>
> Any Operative using information gained while working for the Company for anything other than the Company's benefit will be prosecuted."

18. Under the heading "Termination of Contract", it was provided that:

> "Operatives who fail to observe the rules outlined in this working practice manual in respect of procedures or conduct, will be given a warning and may thereafter be subject to instant dismissal.
>
> Wherever possible the Company will give reasonable notice of termination of contract. Operatives are required to give reasonable notice of leaving and complete the following formalities: …"

19. Under the heading "Wages", it was provided that:

> "1. Wages will be paid directly into the Operatives designated bank or building society account …
>
> 2. Wage slips may be collected at Paying-in or sent by post."

20. The Manual provided for a standard rate of £120 + VAT for rental changes for PP's vans (which were marked with PP's logo), payable monthly in advance, which "allows Operatives to work on a Self-employed basis".

21. Under the heading "Working Practices and Customer Relations" it was provided that the operative must follow ten personal conduct guidelines, including arriving punctually, not smoking, not using the customer's telephone or toilet, keeping the customer informed if the operative needed to leave the job for any reason, removing all rubbish and tidying up completely after finishing, keeping all mobile phone calls to a minimum and job related so as not to waste the customer's time and money, and keeping visits to the van to a minimum so as to avoid customer dissatisfaction.

The 2009 Agreement

22. The 2005 Agreement was replaced by a longer and more detailed agreement in the form of a letter from PP to Mr Smith dated 21 September 2010, which was countersigned by Mr Smith ("the 2009 Agreement"). The date was wrong and should have been 21 September 2009. The title to the body of the letter was: "Agreement – Self-Employed Operative". PP was defined as "the Company."

23. Sub-paragraph 1.1 provided that the 2009 Agreement would commence on 21 September 2010 and would continue (subject to earlier termination in accordance with other provisions) until terminated by either party giving to the other not less than one week's notice. It is common ground that the commencement date was intended to be 21 September 2009 and the mention of 2010 was a mistake.

24. Sub-paragraph 1.2 provided for termination by notice in writing in specified circumstances, including if Mr Smith was to:

> "commit an act of gross misconduct or do anything which brings or may bring the Company into disrepute or, after notice in writing, wilfully neglect to provide or if you fail to remedy any fault in providing the Services or if, in the Company's opinion, your work is of poor quality or you do not perform the Services to a satisfactory standard."

25. Sub-paragraph 2.1 provided that Mr Smith was to**:**

> "provide such building trade services as are within your skills and all such ancillary services as are reasonable to the Company and/or its clients in a proper and efficient manner ("the Services") for the duration of this Agreement."

26. Sub-paragraph 2.2 provided that Mr Smith was to:

> "provide the Services for such periods as may be agreed with the Company from time to time. The actual days on which you will provide the Services will be agreed between you and the Company from time to time. For the avoidance of doubt, the Company shall be under no obligation to offer you work and you shall be under no obligation to accept such work from the Company. However, you agree to notify the Company in good time of days on which you will be unavailable for work."

27. Under sub-paragraph 2.4 Mr Smith warranted and undertook that he was competent to perform the work he agreed to carry out and that he would:

> "...promptly correct, free of charge, any errors in your work which are notified to you by the Company or, at the Company's option, repay to the Company the cost of correcting such errors."

28. Sub-paragraph 2.6 provided as follows:

> "You acknowledge that you will represent the Company in the provision of the Services and that a high standard of conduct and appearance is required at all times. While providing the services, you also agree to comply with all reasonable rules and policies of the Company from time to time and as notified to you, including those contained in the Company Manual."

29. Paragraph 3 was headed "Fees and Expenses". Sub-paragraph 3.1 provided, so far as relevant:

> "you shall be paid a fee in respect of the Services equal to 50 per cent of the cost charged by the Company to the client in relation to labour content only, provided that the Company shall have received clear funds from the client, and there are no outstanding complaints relating to the Services performed by you."

30. Sub-paragraph 3.3 provided:

> 3.3 Your fees will be paid by the Company only against receipt of your invoice (showing VAT separately, if applicable). Invoices should be submitted weekly in arrears and will be paid once the Company has received cleared funds from the relevant client. If an invoice remains unpaid for more than one month, the fee payable to you will be reduced by 50 per cent. If an invoice remains unpaid for more than six months, you will not receive a fee for the work.

31. Sub-paragraph 3.4 provided:

> "you will account for your income tax, value added tax and social security contributions to the appropriate authorities. You will indemnify the Company against any liability or claim made by any competent authority against the Company in respect of any income tax, National Insurance or similar contributions or any other taxation, in each case relating to the provision of the Services to the full extent permitted by law …"

32. Sub-paragraph 3.5 required Mr Smith to provide all his own tools, equipment, materials and other items required for performance of the Services unless it had been agreed that those should be provided through the Company. If Mr Smith provided his own materials, he was to be entitled to up to 20 per cent trade mark-up on such materials provided the cost of such materials used was at least £3,000 (excluding VAT). If the cost of the used materials was less than £3,000, he was entitled to a trade mark-up of 12.5 per cent.

33. Sub-paragraph 3.7 provided that, save as expressly set out in the 2009 Agreement, Mr Smith was to bear all expenses incurred by him in providing the Services and the Company was not obligated to reimburse him for any such expenses.

34. Sub-paragraph 3.9 provided that:

> "You will have personal liability for the consequences of your services to the Company and will maintain suitable professional indemnity cover to a limit of £2 million … [to] cover you in respect of any liability incurred in the provision of your Services."

35. Paragraph 4 was headed "Restrictions". Sub-paragraph 4.1 provided that Mr Smith was obliged to inform the Company of his other activities:

> "which could give rise to a direct or indirect conflict of interest with the interests of the Company, provided that, without limiting this clause 4.1, you shall not be permitted at any time to provide services to any Customer or Prospective Customer...other than under this Agreement."

36. Sub-paragraph 4.2 provided:

> "You have no authority (and shall not hold yourself out as having authority) to bind the Company save in so far as you are specifically authorised to do so by the Company in writing to the extent necessary for the provision of the Services."

37. Sub-paragraph 4.4 contains 8 covenants restricting the business activities of Mr Smith after the termination of the 2009 Agreement. They are set out in the annexe to this judgment. It is sufficient to refer here only to the provision in sub-paragraph 4.4.1 that Mr Smith would not, directly or indirectly, on his own behalf or on behalf of or in conjunction with any firm, company or person for three months following termination be engaged, concerned or involved (whether as agent, consultant, director, employee, owner, shareholder or in any other capacity) with any part of the business of PP, with which he was involved to a material extent during the period of 12 months ending on the termination.

38. Sub-paragraph 5.4 provided that Mr Smith was under no circumstances to provide a customer with his contact details, save PP's office number.

39. Sub-paragraph 6.1 provided:

> "You are an independent contractor of the Company, in business on your own account. Nothing in this Agreement shall render you an employee, agent or partner of the Company and the termination of this Agreement (for whatever reason) shall not constitute a dismissal for any purpose."

40. Sub-paragraph 6.2 provided that no variation of the 2009 Agreement would be effective unless made in writing.

41. Sub-paragraph 6.3 contained the following entire agreement provision:

> "This Agreement contains the entire agreement between the parties, and is in substitution for any previous agreement or arrangement, whether written or oral, between you and the Company relating to the provision of services or otherwise, which shall be deemed to have been terminated by mutual consent as from the commencement of this Agreement."

Other facts found by, or agreed in, the ET

42. Mr Smith worked solely for PP although other colleagues did at times do private work and by arrangement left for a period to do other jobs and then returned. Mr Smith could reject particular jobs taking into account, for example, the nature of the job and how far he would have to travel. He could also make a decision about when to go home on a working day. He decided his own working hours. Mr Smith agreed that PP had no obligation to provide him with work on any particular day and, if there was not enough work, PP would not have to provide him with work and he would not be paid.

43. In relation to a particular plumbing job Mr Smith could exercise his discretion in relation to the work needed for a customer and whether to negotiate on price. He was unsupervised in relation to the plumbing work itself. He decided when he would do a job and how it would be done. He could decide the number of days it would take and whether to use another engineer to help him. Mr Smith only worked on average about 20 hours a week in the last weeks of his relationship with PP.

44. Mr Smith accepted that whilst working with PP he believed the arrangement was that he was self-employed. He was registered with the Construction Industry Scheme. He engaged an accountant to prepare income and expenditure accounts throughout the period of his relationship with PP. He filed tax returns on the basis that he was self-employed. He was registered for VAT and presented monthly invoices to PP for VAT.

45. Mr Smith's income and expenditure accounts demonstrate that he had to cover substantial costs of materials himself. In the last full year he worked for PP he paid £52,887 on materials. He also provided his own protective clothing. He paid his wife £4,680 per year for minimal secretarial duties and also claimed a sum of £520 per year to reflect the use of a room in his home as his office. He also set off sums for accountancy charges, insurance, telephone and internet, tools and equipment hire and motor vehicle expenses. Against receipts of £130,753 Mr Smith set off expenses totalling £82,454.

The statutory provisions

46. Section 230 of the ERA, which defines an "employee" and a "worker" is as follows (so far as material):

> 230 Employees, workers etc
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—

> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
>
> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly. …"

47. The definition of "worker" in regulation 2(1) of the WTR is in materially the same terms as section 230(3) of the ERA.

48. Section 83(2)(a) of the EA provides (so far as relevant) that "employment" means "employment under a contract of employment … or a contract personally to do work". As a result of the jurisprudence of the European Court of Justice it is implicit that a relationship in which an independent contractor is doing work or providing services to another as a client or customer is excluded from that definition as in the case of section 230(3)(b) of the ERA and regulation 2 of the WTR: *Bates van Winkelhof v Clyde & Co* LLP [2014] UKSC 32, [2014] ICR 730.

The proceedings

49. Following the termination of the 2009 Agreement, Mr Smith presented a claim form on 1 August 2011, in which he complained of unfair dismissal, wrongful dismissal, entitlement to pay during medical suspension, holiday pay and arrears of pay. He also claimed against both PP and Mr Mullins direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments.

50. A pre-hearing review was listed to address the issues whether Mr Smith was an employee of PP; whether Mr Smith was a worker of PP; Mr Smith's working situation met the definition of "employment" in section 83(2)(a) of the EA; or Mr Smith was, alternatively, genuinely self-employed in business on his own account.

51. Following the hearing of evidence and submissions on 23 and 24 January 2012, the ET's decision on that review was sent to the parties on 17 April 2012.

Decision of the ET

52. On the issue of whether or not Mr Smith was an employee, Judge Corrigan cited *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157, *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 and *Consistent Group Ltd v Kalwak* [2007] IRLR 560. She concluded that Mr Smith was not an employee for the following reasons:

> "39. In my view the Claimant was not an employee. The irreducible minimum obligation on the First Respondent was missing. The first contract was silent about the obligations on the First Respondent. However, I have accepted that the Claimant signed the second contract which states that there is no legal obligation on the First Respondent to provide work. In any event the Claimant accepted in evidence that that did reflect the reality of the obligations between the parties.

> 40. Secondly there was more than one circumstance when, under the agreement, the First Respondent had no obligation to pay the Claimant for the work done. Firstly, when a customer's invoice had been outstanding more than six months (even if the customer then paid the First Respondent for the work). Secondly, where the Claimant had an obligation in the agreement to rectify problems with his own work at his own cost. The Claimant agreed that these clauses reflected reality.
>
> 41. Although the obligation on the employer can vary I consider that there was insufficient obligation to provide work or pay for this relationship to be one of employer and employee.
>
> 42. I also find this consistent with what the parties themselves thought during the duration of the contract as it was the clear and ongoing intention of the parties that the Claimant was self-employed rather than an employee. The Claimant employed an accountant and sought to make full use of the tax advantages of being self-employed.
>
> 43. Moreover, the Claimant was VAT registered and elected to take advantage of the 20 % mark up available on materials as it was financially beneficial for him to do so. This applies to the self-employed but not to employees. I therefore find this inconsistent with an employment contract.
>
> 44. I also find the financial risk borne by the Claimant, which included the payment for materials in advance, the risk that he might have to work without payment in the two circumstances outlined at paragraph 40 above, as well as the risk of the work taking longer than estimated and therefore being less lucrative than expected, are all inconsistent with there being a contract of employment."

53. Having cited *Community Dental Centres Ltd v Dr G Sultan-Darmon* [2010] UKEAT/0532/09/DA, [2010] IRLR 1024, *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 and *Cotswold Developments Construction Ltd v Williams*, Judge Corrigan did, however, find that Mr Smith was a worker within section 230(3) of the ERA and that his working situation met the definition of "employment" in section 83(2)(a) of the EA.

54. In summary, she gave as her reasons the following. (1) The agreement, and its main purpose, was for Mr Smith personally to provide work for PP. (2) The Manual obliged Mr. Smith to work a normal week of 40 hours. Alternatively, Mr Mullins' evidence was that there was a minimum obligation to work 36 hours a week. In any event, Mr Smith's contract required him to provide work on the days agreed with PP. (3) Although there was some flexibility, PP expected engineers to discuss their working hours with, and to agree them with, PP. Mr Smith had sufficient obligation to provide his work personally to be a worker. (4) There was not an unfettered right to substitute at will. There was no such right given to Mr Smith by the contractual documents and no evidential basis for such a practice. Even though in practice engineers with PP swapped jobs around between each other, and also used each other to provide additional help where more than one person was required for a job or to do a job more quickly, and there was evidence that external contractors were

sometimes required to assist a job due to the need for further assistance or to conduct specialist work, the fact was that Mr Smith was under an obligation to provide work personally for a minimum number of hours per week or on the days agreed with PP. (5) Although Mr Smith had autonomy in relation to the estimates and work done, PP exercised very tight control in most other respects. That included a high degree of restriction on Mr Smith's ability to work in a competitive situation, which suggested that he was not in business on his own account and was certainly inconsistent with PP being a customer or client of any such business. (6) PP could not be considered to be a client or customer of Mr Smith's business but is better regarded as a principal. Mr Smith was an integral part of PP's operations and subordinate to PP. He was not in business on his own account.

55. According to the ET's decision, therefore, the ET does not have jurisdiction to consider Mr Smith's claims for unfair dismissal, wrongful dismissal, entitlement to pay during the period of a medical suspension and failure to provide particulars of employment. It does, however, have jurisdiction to consider his complaints of direct disability discrimination, discrimination by reason of failure to make reasonable adjustments, and in respect of holiday pay as well as in respect of unauthorised deductions from wages.

Decision of the EAT

56. PP and Mr Mullins appealed, and Mr Smith cross-appealed, to the EAT.

57. Judge Serota gave a lengthy, detailed and conscientious judgment, in which he dismissed both the appeal and the cross-appeal. I intend no disrespect to him in summarising his conclusions quite briefly. I do so because we are primarily concerned on this appeal with whether the ET was correct insofar as it decided against PP and Mr Mullins.

58. On the issue whether or not Mr Smith was an employee, Judge Serota QC considered that the ET's conclusions at paragraphs 41, 42 and 44 of its decision were based on the evidence. He said that, having stood back and looked at the facts as found by the ET as a whole, "the relationship simply does not look anything like a contract of employment and the Employment Judge was correct in finding that [Mr Smith] was not an employee."

59. On the issue of whether or not Mr Smith was a worker, Judge Serota said that the contract terms and the Manual clearly envisaged that Mr Smith would be providing his services personally. Judge Serota concluded that there was not an unfettered right to provide services through a substitute. He said that, at most, PP was willing to tolerate a form of job-sharing or shift swapping between the operatives but without any legal obligation to do so. He said that was in itself sufficient to determine the appeal on the "worker" issue.

60. Judge Serota considered that the ET was entitled to find that the extent of the restrictive covenants limiting Mr Smith's right to work were also inconsistent with Mr Smith being in a business on his own account.

61. Judge Serota concluded that the ET took all the relevant matters into account, correctly directed itself by reference to the relevant statutory provisions and authorities, and the ET's conclusions that Mr Smith was not an employee but was a "worker" were conclusions to which it was entitled to come.

The appeal

62. PP and Mr Mullins appeal to this Court. There is no appeal by Mr Smith from the dismissal of his cross-appeal to the EAT.

63. The written grounds of appeal are that the ET erred in law in the following four respects: (1) its approach to the question whether Mr Smith was under an obligation personally to perform the jobs he contracted to carry out; (2) failing to consider whether the relevant contract under which Mr Smith was a "worker" was one single contract or a series of successive separate contracts; (3) finding that Mr Smith was contractually obliged to work a minimum 40 or 36 hours a week which was inconsistent with the express terms of the contract, its own findings and Mr Smith's own evidence, or, alternatively, its conclusion was inadequately reasoned; and (4) failing to carry out the required balancing exercise and failing to take into account relevant considerations and taking into account irrelevant considerations and providing inadequate reasons for its conclusion.

64. PP and Mr Mullins say that, in view of all or any of those errors, the case should be remitted to the ET for further findings.

65. There is a respondent's notice to uphold the decision of the ET on different or additional grounds. It is not necessary to set them out here.

Discussion

66. In the context of the legislation relevant to this appeal, a distinction is to be drawn between (1) persons employed under a contract of service; (2) persons who are self-employed, carrying on a profession or a business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them; and (3) persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else: cf. Lady Hale in the *Bates van Winkelhof* case at [25] and [31]. The persons in (3) fall within section 230(3)(b) of the ERA and regulation 2 of the WTR and their employment falls within the definition of "employment" in section 83(2)(a) of the EA. I shall for convenience refer to them as a "limb (b) worker". The question on this appeal is whether the ET was wrong to decide that Mr Smith was a limb (b) worker rather than falling within category (2).

67. In broad terms, the case of PP and Mr Mullins on this appeal is that the ET was wrong to find that Mr Smith undertook with PP "to do or perform personally … work or services" for PP within the meaning of those statutory provisions; and was also wrong to conclude that the relationship between Mr Smith and PP was not one falling within category (2), that is to say a relationship under which the status of PP was, in the words of section 230(3)(b), "that of a client or customer … of … [the plumbing] business undertaking carried on by" Mr Smith.

68. Mr Thomas Linden QC, for PP and Mr Mullins, submitted that whether or not Mr Smith undertook personally to do work for PP depended entirely on the terms of his contract. He contended that, under the terms of the 2009 Agreement, Mr Smith was not obliged personally to do work offered to him by PP because the 2009 Agreement entitled him to arrange for such work either to be done by another PP operative or, with the prior consent of PP, any other person.

69. Mr Linden submitted that the 2009 Agreement so provided either because, interpreted against the factual background in which it was concluded, all references in the 2009 Agreement to the provision of services by Mr Smith are to be read as services performed by him or any other PP operative or, with the consent of PP, any other person or persons in substitution for him; alternatively, a right to substitute such persons was an implied term of the 2009 Agreement.

70. The ET's findings on the relevant factual background to the 2009 Agreement on this point are contained in paragraphs 24 and 49-51 of its decision, as follows:

> "24. … Usually the engineer who quotes for work is the engineer who performs the work. According to Mr Mullins, engineers decide whether they want to sub-contract some of, all of or none of their own trade and/or whether they need to bring in additional trades though the engineer who provided the estimate has responsibility for completion of the job. The Claimant accepted that if he quoted for work and something more lucrative came up he could arrange for someone else (a substitute) to do a particular job from amongst other operatives of the Respondent. He accepted that some plumbers have their own apprentices. He also accepted that he could use external contractors if they were specialists in trades that the Respondent does not provide either to assist him or to do a specialist job … . Where some of the work was delegated the work would be paid for directly by the First Respondent but come out of the Claimant's share of the labour costs rather than the First Respondent's share of the labour costs. Although the First Respondent relies on a number of invoices to establish a wider right to substitute I do not accept that they establish anything more than the degree of substitution accepted by the Claimant (internal to other of the First Respondent's operatives and to external specialists). They are not evidence of an unfettered right to substitute at will."
>
> "49. The emphasis of the First Respondent was that the Claimant could choose to substitute to another operative if he had a more lucrative job with the First Respondent or get an operative to help him to do a job more quickly. He might also require the assistance of external tradesmen.
>
> 50. I accept that in practice engineers within the First Respondent swapped jobs around between each other, particularly where they had more than one job available. They

> also used each other to provide additional help where more than one person was required for a job or to do a job more quickly. That is not a right to substitute but a means of work distribution amongst the First Respondent's engineers. Even if the Claimant could choose to give a job to another operative on a day he preferred not to work that is still not an unfettered right to substitute at will, but more akin to swapping a shift between workers.
>
> 51. I do not consider the evidence that I was shown in relation to the use of external contractors was evidence of an unfettered right to substitute at will. There was no evidence of a plumbing engineer substituting work to an external plumber of his choice on a day when he preferred not to work or to conduct work independent to the First Respondent. There is merely evidence to support the Claimant's evidence that external contractors are sometimes required to assist on a job due to a need for further assistance or to conduct specialist work. The First Respondent's current documentation makes clear that the First Respondent must give approval before work is done by an external contractor which would suggest there is not an unfettered right to substitute. None of this negates the fact that the Claimant was under an obligation to provide work personally for a minimum number of hours per week or on days agreed with the First Respondent."

71. Mr Linden drew our attention to various references in the Manual referring to payments and charges in respect of work done by persons other than the operative offered the work by PP. These included, under the heading "Time Sheet Procedures", the entry "Other Engineer Collecting Payment: Date, your invoice number, name and invoice number of Operative collecting payment, your labour/materials due"; and under the heading "Invoice Procedure", the entry "Date and initials, also initials of any other Operative for whom you are collecting payment …"; and, under the heading "Additional Labour Charges", the direction that "any operative requiring assistance on any job must inform the customer of the additional charges involved and obtain the customer's approval for such charges", including "qualified operatives" and "labourer".

72. Mr Linden further relied on paragraph 25 of the ET's decision, which, he submitted, showed that Judge Corrigan herself had concluded that Mr Smith had a contractual right to substitute other operatives of PP or, with the consent of PP, other persons. Paragraph 25 was as follows:

> "The First Respondent now has contracts in place with operatives (after the Claimant ceased working with the First Respondent) which reflect what the First Respondent says is the reality and they say … as follows:
>
> '2.8 1 [the operativel reserve(s) the right to assign or subcontract any or all of my duties under this Agreement, subject to the prior consent of the Company and providing

> always that I agree to remain responsible and liable for the acts or omissions of such assignee or subcontractor.
>
> 2.9 1 will ensure that the duties under this agreement are performed. I will either perform the duties personally or engage another Pimlico contractor to do it for me at my own expense. I will remain responsible and liable for the acts or omissions of such person …'
>
> In my view this clarifies that the Claimant was contracted to provide work personally with, at most, only a limited power to substitute either to other internal operatives or with the prior consent of the First Respondent."

73. I agree with Mr Linden that the issue whether Mr Smith undertook to do or perform personally work or services for PP turns entirely on the terms of the contract between them. *Redrow Homes (Yorkshire) Ltd v Wright* [2004] EWCA Civ 469, [2004] ICR 1126 is clear Court of Appeal authority to that effect.

74. We were referred to a number of cases in which the issue was whether a right to substitute another person to do the work or perform the services was inconsistent with an undertaking to do so personally.

75. *In Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, at 515, McKenna J, citing Atiyah "Vicarious Liability" (1967) pp. 59-61, drew a distinction between freedom to do a job either by one's own hands or by another's, which he said was inconsistent with a contract of service, and a limited or occasional power of delegation, which may not be.

76. In *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 the claimant, a driver, provided his services to the respondent under an agreement which provided that in the event he was "unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services". Another provision stated that, in the event that he provided a relief driver, he had to satisfy the respondent that the relief driver "is trained and is suitable to undertake the services". The Court of Appeal held that the right of substitution was inconsistent with a contract of employment.

77. In *MacFarlane v Glasgow City Council* [2001] IRLR 7 the claimants were two gym instructors working in the respondent council's recreational and sports and centres. The ET found that there was an arrangement under which, if for any reason they were "unable" to take a class, they would contact a replacement from the register of coaches maintained by the council and arrange for the class to be covered by a member on the register. The EAT held that right was not incompatible with the existence of a contract of employment. Mr Justice Lindsay, giving the judgment of the EAT, gave as two reasons for distinguishing *Express & Echo Publications Ltd v Tanton*, firstly, that the claimants could only arrange for another to take her class if she was unable to attend; and, secondly, they could only provide as a replacement someone from the council's own register, and "to that extent the council could veto

a replacement and also could ensure that such persons as were named on the register were persons in whom the council could repose trust and confidence".

78. In *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 the EAT concluded that a provision in an agreement subcontracting work to carpenters that, if the subcontractor was unable to provide the services, he might provide an alternative worker, was not inconsistent with an obligation of personal service for the purposes the WTR. The EAT referred to, and contrasted, the decisions *Express & Echo Publications Ltd v Tanton* and *MacFarlane v Glasgow City Council* because it was of the view that it would not be right to adopt a different approach in considering the requirement of personal service implicit under limb (a) of the definition of "worker" in regulation 2(1) of the WTR and that explicitly stated in limb (b). The EAT held that the facts of the case brought it within the ambit of *MacFarlane v Glasgow City Council* rather than *Express & Echo Publications Ltd v Tanton*.

79. In *Redrow Homes (Yorkshire) Ltd v Wright* a clause in an agreement subcontracting work by a building company to a bricklayer, which provided for the contractor to supply sufficient labour to maintain the rate of progress and required the contractor to maintain a competent foreman or chargehand on site, was held to be inconsistent with a personal obligation for the purposes of regulation 2 of the WTR.

80. In *Premier Groundworks Ltd v Jozsa* [2009] UKEAT/047/08 the claimant, a groundworker, entered into a written agreement with the respondent to carry out groundwork. The agreement contained in clause 13 a provision that the claimant should have the right to delegate the performance of services under the agreement to other persons, whether or not his employees, provided that the respondent was notified in advance and provided that such person was at least as capable, experienced and qualified as the claimant himself. The EAT, allowing the respondent's appeal from the ET, held that by virtue of clause 13 the claimant was not a worker within regulation 2(1) of the WTR because he was not a person who undertook to do or perform work or services personally. The EAT concluded that it was bound by and had to follow the decision and reasoning in *Express & Echo Publications Ltd v Tanton* and distinguished the facts and decision in *MacFarlane v Glasgow City Council*. Mr Justice Silber, giving the decision of the EAT, said the following:

> "25. In conclusion, we consider that where a party has an unfettered right for any reason not to personally perform the contractual obligations under a contract but can delegate them to someone else, he cannot be a "worker" within the meaning of the WTR even though the person actually performing the contractual obligations has to meet certain conditions. The position would be different if the right not to perform the contractual obligation depended on some other event such as where that party was "unable" to perform his or her obligations …".

81. In *UK Mail Ltd v Creasey* (26.9.2012) UKEAT/1095/12 the EAT held that the claimant van driver was not a limb (b) worker because a provision in his contract that the contracted services could be provided by any of the claimant's "agents,

servants, employees and other individuals" who was approved in writing by the respondent (such consent not to be unreasonably withheld) was inconsistent with a personal obligation. The EAT held that inconsistency was not avoided by a procedure for obtaining consent that required the substitute to complete an application form and provide various documents and evidence of various matters reflecting relevant experience and competence.

82. Mr Linden emphasised that, in the present case, by contrast with *UK Mail Ltd v Creasey*, it was not even necessary to obtain prior consent in the case of substitution by another operative of PP.

83. Finally, on this part of the appeal, Mr Linden referred to, and relied upon *Halawi v WDFG UK Ltd* [2014] EWCA Civ 1387, [2015] 3 All ER 543. In that case the claimant worked as uniformed beautician consultant in a duty-free outlet operated by the respondent on the airside of Heathrow Terminal 3, for which the claimant needed an airside pass. The respondent withdrew her airside pass, which effectively prevented the claimant from continuing to work at the outlet. She brought proceedings claiming that the withdrawal was discriminatory on the grounds of race and/or religion. The Court of Appeal dismissed the claimant's appeal from the EAT dismissing her appeal from the ET on the ground (among others) that she did not agree to provide services personally within EA section 83(2)(b) because of the arrangements for substitution. Under those arrangements the claimant could change shifts or withdraw from shifts and could send a substitute; in selecting a substitute she had to choose someone who had store approval and an airside pass and she had to tell the respondent the name of the substitute but she did not have to give reasons for the substitution or seek approval for it.

84. Some of those cases are decisions of the Court of Appeal, which are binding on us. Some of them are decisions of the EAT, 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.

85. In the present case the ET was correct to find that, on the proper interpretation of the 2009 Agreement, Mr Smith undertook to provide his services personally within

section 230(3)(b) of the ERA, regulation 2 of the WTR and the definition of "employment" in section 83(2) of the EA.

86. The express wording of the 2009 Agreement requires personal performance by Mr Smith. It provides, for example, in sub-paragraph 2.1 that: "You shall provide such building trade services are within your skills"; in sub-paragraph 2.2 that "You shall provide the Services for such periods as may be agreed with the Company … The actual days on which you will provide the Services will be agreed between you and the Company …"; in sub-paragraph 2.4 that "you will be competent to perform the work which you agree to carry out", and "you will promptly correct … any errors in your work …"; in sub-paragraph 2.5 that "If you are unable to work due to illness or injury … you will notify the Company"; and in sub-paragraph 3.9 that "You will have personal liability for the consequences of your services to the Company" (in all cases emphasis supplied).

87. Unlike each of those cases cited above in which it has been held that an express right of substitution or delegation was incompatible with an obligation of personal performance, within the meaning of the relevant statutes, neither the 2009 Agreement nor the Manual contains an express right of substitution or delegation.

88. Mr Linden submitted that, in view of the widespread general practice of PP operatives substituting for other PP operatives at the time the 2009 Agreement was made, the word "you" in the passages which I have quoted should be read as "you or any other PP operative who substitutes for you". That seems to me to be an impossible interpretation for four reasons. Firstly, it is simply inconsistent with the language of the 2009 Agreement which refers to Mr Smith's skills, competence and personal liability. Secondly, the existence of a general practice by way of purely informal concession is perfectly consistent both with the express terms of the 2009 Agreement and with the provisions of the Manual which refer to payment due to other operatives. Thirdly, the provisions of the Manual are also consistent with the use of other operatives and labour to assist in a job requiring specialist or non-specialist assistance. Fourthly, the ET's findings (at [48] to [50]) on the circumstances and frequency of substitution of other PP operatives were that there was no unfettered right to substitute at will; the emphasis of the evidence of PP was that Mr Smith could choose to substitute another operative if he had a more lucrative job with PP; that in practice engineers within PP swapped jobs between each other, particularly where they had more than one job available; and there was no evidence of a plumbing engineer substituting work to an external plumber of his choice on a day when he preferred not to work or to conduct work independent to PP. That evidence falls far short of a factual background compelling an interpretation of the express words of the 2009 Agreement inconsistent with their natural and ordinary meaning.

89. There is no scope for an implied term conferring an unfettered contractual right to substitute another operative of PP. In the light of the factual findings of the ET about the practice of substitution, such a right was not so obvious that it went without saying; nor was such a right necessary to give the 2009 Agreement commercial or practical coherence: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.

90. Mr Linden submitted that paragraph 25 of the ET's decision contains a finding that the 2009 Agreement conferred a power to substitute other PP operatives or, with the prior consent of PP, others. I do not agree. Judge Corrigan's language was that "at most" there was such a power. It is not, therefore, necessary to consider the implications of the ET's characterisation (in paragraph 50 of its decision) of the swapping of jobs between PP's operatives as "more akin to swapping a shift between workers" than substitution.

91. For those reasons, the challenge to the ET's finding of an obligation on Mr Smith of personal performance by virtue of the express terms of the 2009 Agreement must fail.

92. I can see no reason to remit the case to the ET for further findings on whether there were any and, if so, what contractual provisions allowing substitution.

93. Turning to the second principal line of Mr Linden's submissions, he contended that the ET made serious errors in arriving at the conclusion that Mr Smith's relationship with PP was not one between a self-employed person and his customer or client but rather that of a limb (b) worker.

94. In deciding whether a worker is a limb (b) worker or falls within the second category in paragraph 66 above, the ET carries out an evaluative exercise, with an intense focus on all the relevant facts: *Hashwani v Jivraj* [2011] UKSC 40, [2011] 1CR 1004 at [34]. There is no single touchstone, such as whether there is a relationship of subordination of one party to another, for resolving the issue: *Bates van Winkelhof* at [39]. Subordination might, nevertheless, be relevant, as might be such factors as whether there are a number of discrete separate engagements, whether obligations continue during the breaks in work engagements (sometimes called an "umbrella contract"), and also the extent to which the claimant has been integrated into the respondent's business: *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721; *Halawi v WDFG UK Ltd*; *James v Redcats (Brands) Ltd* [2007] ICR 1006.

95. Mr Linden submitted that the ET made critical errors in respect of an important element in the ET's evaluation, namely the ET's finding in paragraph 47 of the decision that it was a term of the 2009 Agreement that Mr Smith was obliged to work 40 hours per week or alternatively a minimum of 36 hours per week. Paragraph 47 was as follows (so far as relevant):

> "The First Respondent's Company Procedures & Working Practices obliged the Claimant to work a normal week of 40 hours, even if that was not enforced. That was part of the Claimant's original contract and neither party suggested the procedures no longer reflected the reality of the obligations between them. Alternatively, even if the 40 hour clause was no longer part of the Claimant's contract, Mr Mullins accepted in evidence there was a minimum obligation to work about 36 hours a week. …" .

96. Mr Linden advanced a raft of criticisms of those observations of the ET. They can be briefly summarised, in no particular order, as follows. First, he said that any finding that Mr Smith was obliged to work any particular or minimum number of hours was inconsistent with the express provision in sub-paragraph 2.2 of the 2990 Agreement that:

> "For the avoidance of doubt, the Company shall be under no obligation to offer you work and you shall be under no obligation to accept such work from the Company".

97. Second, Mr Linden said that they were inconsistent with Mr Smith's acceptance (recorded in paragraph 24 of the ET's decision) that, if he quoted for work and something more lucrative came up, he could arrange for someone else to do a particular job from amongst other PP operatives.

98. Third, Mr Linden said that the provisions in the Manual stating that "normal working hours consist of a 5 day week, in which you should complete a minimum of 40 hours" were not incorporated into the 2009 Agreement. He submitted that the references to the Manual in the 2009 Agreement (in sub-paragraphs 2.6 and 3.2) only incorporated those provisions relevant to doing the work and performing the services during an actual work assignment and not to anything in between work assignments. He said this was one of the material changes intended to be made by the 2009 Agreement. He further submitted that, in any event, even if that was wrong, the provisions of the Manual which were inconsistent with the express provisions in sub-paragraph 2.2. of the 2009 Agreement must be ignored on the basis of the principle stated in Lewison on *"The Interpretation of Contracts"* (5th ed) at 9.12 that "where a contract incorporates the terms of another document, and the terms of that other document conflict with the terms of the host contract, the terms of the host contract will prevail".

99. Fourth, he submitted that, similarly, there is no scope for any implied term as to minimum working hours based upon actual working practices because that would be inconsistent with the express terms of the 2009 Agreement. On this point he referred to *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651, [2011] IRLR 627, in which the Court of Appeal held that, contrary to the decision of the ET, the applicant dockers were not employees but were working under a series of individual engagements. Tuckey LJ, giving the judgment of the Court, said (at paragraph [11]):

> "If there was a contract we cannot see any way in which the ET's implied terms could be incorporated into it. The implied terms flatly contradict the express terms contained in the documents: a positive implied obligation to offer and accept a reasonable amount of casual work (whatever that means) cannot be reconciled with express terms that neither party is obliged to offer or accept any casual work. None of the conventional route for the implication of contractual terms will work. Neither business efficacy nor necessity require the implication of implied terms which are entirely inconsistent with a supposed contract's express terms."

100. Fifth, Mr Linden said that there was practical difficulty in assessing whether or not a minimum number of hours were worked since that would depend on how long any particular assignment took and that could not necessarily be known in advance of actually undertaking the work.

101. Sixth, Mr Linden said that, in any event, Mr Smith had not advanced a case before the ET of a minimum 40 hours week based on the Manual. Mr Smith's contention, in the closing written submissions on his behalf, was that, as he was obliged to hire PP's branded van and take and pay the tariff on PP's mobile phone, there was an implied obligation to offer him a minimum of 36 hours work and a corresponding obligation on him to accept a minimum of 36 hours work so as to earn sufficient remuneration to cover the costs of the van and mobile telephone hire. In the written reply submissions for Mr Smith, it was said that he was required to work five days per week and a minimum of 36 hours per week.

102. Seventh, Mr Linden said that the ET was not correct to say, in paragraph 47 of the decision, that Mr Mullins accepted in evidence that there was a minimum obligation to work about 36 hours a week. His evidence went no further than that, if the contractor only worked fifteen hours a week, that would be unacceptable but 36 hours a week would be acceptable. The relevant part of his evidence in chief (at paragraph 40 of his witness statement) was as follows:

> "However, given that Pimlico usually takes 50% of contractors' labour charge, the more hours that contractors work, the more money PP makes. Therefore, the engineer will need to work sufficient hours to make it both his and Pimilico's while. For example, if an engineer wanted to work three twelve hour days then this would be of value to us but if they only wanted to work three five hour days then we would probably not continue to use them".

103. Eighth, he said that paragraph 47 of the ET's decision was wholly inconsistent with the ET's finding in paragraph 39 (which I have set out in full above) that there was no "irreducible minimum obligation" on PP because the 2005 Agreement was silent on PP's obligations, the 2009 Agreement states that there is no legal obligation on PP to provide work, and Mr Smith accepted in evidence that did reflect the reality of the obligations between the parties. Mr Linden pointed out that Mr Smith had not cross-appealed the findings in paragraph 39.

104. Ninth, Mr Linden pointed out, if the ET had concluded that the written terms of the 2009 Agreement failed to reflect the true terms of the agreement between PP and Mr Smith, it could and should have applied the principle laid down by the Supreme Court in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157, namely that the written terms should be ignored in favour of the true agreement between the parties. As explained in that case, the principle is particularly applicable in workers' contracts, where there is disparity in the bargaining powers of the parties and the courts should be "realistic and worldly wise" in investigating allegations that the written contract does not represent the actual terms agreed, by contrast with the stricter sham principle in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 applicable in commercial contracts. In the present case, the ET

made no finding that the written 2009 Agreement failed to reflect the true contractual obligations between the parties.

105. For all those reasons, Mr Linden submitted this is not a case in which Mr Smith and the other operatives worked under an "overarching" or umbrella contract rather than a series of separate engagements. Rather, he argued, it was similar to the situation in *Carmichael v National Power plc* [1999] 1 WLR 2014 and *Stevedoring & Haulage Services Ltd v Fuller*. In the *Carmichael* case, the question was whether the applicants, who acted as guides taking parties on tours of power stations owned by the predecessor of the respondent company, were employees. Endorsing the finding of the Industrial Tribunal that they were not, Lord Irvine LC (with whom the other members of the Appellate Committee agreed) said (at page 2045):

> "The industrial tribunal held that [the applicants'] case "founders on the rock of absence of mutuality" that is that, when not working as guides, they were in no contractual relationship of any kind with the C.E.G.B.
>
> The tribunal made this finding on the basis of (a) the language of the March 1989 documentation; (b) the way in which it had been operated; and (c) the evidence of the parties as to how it had been understood. … this was in my judgment the correct approach. In substance the tribunal held that the documents did no more than provide a framework for a series of successive ad hoc contracts of service or for services which the parties might subsequently make; and that when they were not working as guides they were not in any contractual relationship with the C.E.G.B. The parties incurred no obligations to provide or accept work but at best assumed moral obligations of loyalty in a context where both recognised that the best interests of each lay in being accommodating to the other."

106. Lord Hoffmann said (at p. 2051):

> "Once it is accepted that the tribunal's finding as to the lack of mutuality of obligation between the applicants and the C.E.G.B. cannot be disturbed, it follows that the engagement of the applicants as guides in 1989 cannot have constituted in itself a contract of employment. It laid down the terms upon which it was expected that they would from time to time work for the C.E.G.B. and it may well be that, when performing that work, they were being employed. But that would not be enough for the applicants. They could succeed only if the 1989 engagement created an employment relationship which subsisted when they were not working. On the findings of the tribunal, it did not in itself give rise to any legal obligations at all and the applicants' claim must therefore fail."

107. In the *Stevedoring & Haulage Service* case, the Court said the following:

> "10. … [The ET] found that the documents containing the terms upon which casual work was offered and accepted "expressly negative mutuality of obligation". Such a finding was, we think, inescapable. Casual work was to be done "on an ad hoc and temporary basis" "with no obligation on the part of the company to provide such work nor for you to accept any work so offered". If this finding stood alone the ET should have concluded that there was no global or overarching agreement. Like the documents in Carmichael they provided no more than a framework or facility for a series of successive ad hoc contracts. At best the parties assumed moral obligations of loyalty where both recognised that their mutual economic interests lay in being accommodating to one another. But the ET did not consider the matter in this way. They concluded that there was an agreement (which on this analysis there was not) and then sought to supplement it by implying terms so as to water down the effect of the documents containing the express terms and give it sufficient mutuality to pass the test. We do not think this approach can be justified. …"

108. Mr Linden submitted that the error of the ET in the present case in finding that there was a minimum working hours contract between PP and Mr Smith was an important one in carrying out the evaluative exercise of assessing whether Mr Smith was an independent contractor working on a series of separate engagements for PP as a client or customer as distinct from a limb (b) worker, and so the case must be remitted to the ET for that reason.

109. Despite the comprehensive and skilful arguments of Mr Linden on this part of the appeal, I reject them. The starting point is that, as Mr Linden conceded in his oral submissions, the Manual, including the provision for a normal working week of 5 days and a minimum of 40 hours, undoubtedly formed part of the 2005 Agreement. The ET said (at paragraphs 21and 47) that neither party suggested that the Manual ceased to apply after the 2009 Agreement was entered into; on the contrary, both parties' cases were presented on the basis that the document was still current and reflected the current relationship. The ET was, therefore, both entitled and right to conclude at paragraph 47 of the decision that, under the terms of the 2009 Agreement, Mr Smith was obliged to work a normal 40 hour week, even if that was not enforced. That was a point of law and it is irrelevant whether or not it was argued on Mr Smith's behalf.

110. As Ms Monaghan explained, there is no inconsistency between paragraphs 39 and 47 of the ET's decision. It would be absurd to think that Judge Corrigan, when writing paragraph 47 of the decision had forgotten or overlooked what she said in paragraph 39. The obvious explanation for the difference between them is that paragraph 39 was addressing the issue of mutuality in the context of the issue whether or not Mr Smith was an employee. It was looking exclusively at the obligations of PP and, consistently with the express terms of the 2009 Agreement, stated that there was no legal obligation on PP to provide work. That was consistent with the reality that there might not be work available to offer to Mr Smith on any particular day or days.

111. The provision in sub-paragraph 2.2 of the 2009 Agreement that Mr Smith was not under any obligation to accept work, interpreted in the light of practical reality, was also not inconsistent with the Manual's contractual obligation to work a minimum 40 hour week. It meant that Mr Smith was free to refuse any particular work assignment or any particular date but not that he could refuse all assignments. That would make no sense at all from either side's perspective.

112. The evidence before the ET was clear and consistent, on the part of both Mr Mullins and Mr Smith, that the relationship between PP and its operatives would only work if the operative was given and undertook a minimum number of hours' work. Mr Smith, like the other operatives, was required to use the PP logo'ed van for work assignments and also a mobile phone issued to him by PP. The Manual provided that the van was to be rented to the operative at a standard rate of £120 per month in advance plus VAT. In fact, the accounts of Mr Smith (who only ever worked for PP) show that in the tax years 2007 to 2011 his motor vehicle expenses were never less than £19, 000 and in three of those years exceeded £21,000. So far as concerns the telephone, the Manual provided that the mobile telephone charges, plus VAT, were to be deducted from "wages" on a monthly basis. The operative had to earn sufficient from work assignments to be able to pay those expenses and, presumably, to provide an income for Mr Smith's ordinary living expenses. His case was that would have to be a minimum of 36 hours a week. At the same time, PP's business depended on earning a profit from taking half the labour costs of the operatives. As Mr Mullins said in his witness statement, quoted above, "the engineer will need to work sufficient hours to make it worth both his and Pimlico's while". In cross-examination he said that "it has to be worth both Pimlico's and the operatives while. We both have to make money". If they did not, then the one or the other could, and presumably would, give not less than one week's written notice to terminate the 2009 Agreement in accordance with sub-paragraph 1.1. There was clear evidence as to the financial consequences of the van rental and of the telephone issued to operatives, and there was no need for the ET to refer to them specifically.

113. I do not accept that the only way the ET could reconcile that reality with the express terms of sub-paragraph 2.2 of the 2009 Agreement was to adopt an *Autoclenz Ltd v Belcher* approach of ignoring sub-paragraph 2.2 because it did not represent the true agreement between the parties. As with any contract, the 2009 Agreement has to be interpreted in the light of the relevant and admissible facts which form its background. For the reasons I have given, it is perfectly possible to interpret the express words of sub-paragraph 2.2 in a way that does so: namely that Mr Smith normally had to be available to take on work for a minimum of 40 hours per week, but PP did not have to offer him work if there was none to offer him, and Mr Smith was not obliged to take on any particular assignment on any particular day if he was unable or unwilling for any reason to do so. The fact that PP might choose not to insist on the full 40 hours work in any particular week is not inconsistent with those legal obligations, which give practical effect to the combination of the express terms of the 2009 Agreement, the Manual and the practical financial and other realities of the working relationship.

114. Finally, Mr Linden submitted that, in any event, the ET failed to carry out a proper evaluative exercise, weighing in the balance all relevant factors in order to determine whether the essence of the relationship was that of an independent

contractor doing work or performing services for a client or customer or that of a limb (b) worker. As I understood Mr Linden's submissions on this part of the case, his criticism was that the ET had not, for example, taken any or sufficient account of the matters in paragraphs 40-45 of the ET's decision (quoted above), or analysed sufficiently whether, and if so the extent to which, Mr Smith was in a subordinate position, economically and substantively, to PP, including any control over the way Mr Smith performed his work, what was the dominant purpose of the 2009 Agreement, and the extent to which Mr Smith was an integral part of PP's business. He also criticised the weight which the ET placed on the restrictive covenants in the 2009 Agreement, which are set out in the annexe to this judgment.

115. I do not accept those criticisms of the ET's decision. Having rejected PP's case that Mr Smith had an unfettered right of substitution and did not have to do the work personally, and having found that Mr Smith was contractually obliged to do a minimum number of hours work a week, the ET concluded and was entitled to conclude in paragraph 52 of its decision, that the degree of control exercised by PP over Mr Smith by virtue of the 2009 Agreement was also inconsistent with PP being a customer or client of a business run by Mr Smith. In particular, the ET was entitled and right to place weight on the onerous restrictive covenants in sub-paragraph 4.4, which, on the face of it, included a covenant in sub-paragraph 4.4.1 precluding Mr Smith from working as a plumber in any part of Greater London for three months after the termination of the 2009 Agreement. Furthermore, although not specifically mentioned in paragraph 53 of its decision, the ET had already set out relevant provisions of the Manual governing the working arrangement binding on operatives, including the renting of PP's logo'ed vans.

116. Having considered all those factors, the ET rightly stood back and asked and answered (in paragraphs 52 and 53 of the decision) the over-arching question whether the better conclusion was that PP was a client or customer of Mr Smith's business or rather PP should be "regarded as a principal and Mr Smith was an integral part of PP's operations and subordinate to [PP]". In carrying out its evaluation and reaching its conclusion that it was the latter, the ET made no error of law or principle and did not reach a decision outside the ambit of what was judicially permissible. In that latter context, it is entitled to the respect due to a specialist tribunal carrying out that kind of evaluation: comp. *Banco Santander Totta SA v Companhia Carris De Ferro De Lisboa SA* [2016] EWCA Civ 1267 at [67].

117. There is no need to address separately the different or additional grounds in the respondent's notice for upholding the decision of the ET.

Conclusion

118. For all those reason, I would dismiss this appeal.

119. We were told by counsel that the final submissions to the ET were all in writing and that there were no closing oral submissions. In a complex and important case like the present one, that course is unsatisfactory, carries considerable risk and should be avoided if at all possible. It does not give the ET the opportunity to question and test the case of each side in the light of the evidence and to clarify submissions which are or appear to be inconsistent or unclear. The fact that we have spent over

a day in the Court of Appeal doing precisely that shows how important and valuable that can be.

.....

ANNEXE

"4.3 In this clause 4:

"Capacity" means as agent, consultant, director, employee, owner, shareholder or in any other capacity;

"Customer" means any person, firm, company or entity who or which at any time during the Relevant Period (i) was provided with goods or services by the Company; or (ii) was in the habit of dealing with the Company, other than in a de minimis way, and about whom or which you have confidential information; and in each case with whom or which you had material dealings at any time during the Relevant Period;

"Relevant Individual" means any director, technical service manager, office manager, qualified tradesman or other key employee or tradesperson who immediately prior to the Termination Date was employed or engaged by the Company and who (individually or together with others) could materially damage the interests of the Company if they were involved in any Capacity in any business which competes with any Restricted Business, and with whom you had personal dealings during the Relevant Period;

"Prospective Customer" means any person, firm, company or entity to whom or which, during the period of six months prior to the Termination Date, the Company had submitted a tender, quotation, made a pitch or presentation or with whom or which it was otherwise negotiating for the supply of goods of services and with whom or which you had material dealings at any time during the Relevant Period;

"Relevant Period" means the period of 12 months ending on the Termination Date;

"Restricted Business" means those parts of the business of the Company with which you were involved to a material extent during the Relevant Period;

"Supplier" means any person, firm, company or entity who or which was at any time during the Relevant Period a supplier of services or goods (other than utilities and goods or services supplied for administrative purposes) to the Company and with whom or which you had material dealings on behalf of the Company during the Relevant Period; and

"Termination Date" means the date on which this Agreement terminates.

4.4 You covenant with the Company that you will not, directly or indirectly, on your own behalf or on behalf of or in conjunction with any firm, company or person:

4.4.1 for three months following the Termination Date be engaged, concerned or involved in any Capacity with any business which is (or intends to be) in competition with any Restricted Business;

4.4.2 for twelve months following the Termination Date solicit or endeavour to entice away from the Company the business or custom of a Customer or Prospective Customer with a view to providing goods or services to that Customer in competition with any Restricted Business or otherwise induce, solicit or entice or endeavour to induce, solicit or entice any Customer to cease conducting, or reduce the amount of, business with the Company or discourage or prevent any Prospective Customer from conducting business with the Company;

4.4.3 for twelve months following the Termination Date be involved with the provision of goods or services to, or otherwise have any business dealings with, any Customer or Prospective Customer in the course of any business which is in competition with any Restricted Business;

4.4.4 for twelve months following the Termination Date solicit or endeavour to entice away from the Company the business or custom of any Supplier in the course of any business which is in competition with any Restricted Business;

4.4.5 for twelve months following the Termination Date be involved with the receipt of goods or services from any Supplier where such receipt would adversely affect the ability or willingness of the Supplier to meet the requirements of the Company;

4.4.6 for twelve months following the Termination Date offer to employ or engage or otherwise endeavour to entice away from the Company any Relevant Individual (whether or not such person would breach their contract of employment or engagement);

4.4.7 for twelve months following the Termination Date employ or engage or facilitate the employment or engagement of any Relevant Individual (whether or not such person would breach their contract of employment or engagement) in any business which is in competition with any Restricted Business;

4.4.8 at any time after the Termination Date represent yourself as being in any way connected with (other than as a former contractor), or interested in the business of the Company or use any registered names or trading names associated with the Company.

4.5 None of these restrictions in clause 4.4 above shall prevent you from:

4.5.1 holding shares in any company whose shares are listed or dealt in on any recognised investment exchange; or

4.5.2 being engaged or concerned in any business insofar as your duties or work relate solely to geographical areas where that business is not in competition with any Restricted Business.

4.6 Each of the restrictions contained in this clause 4 (on which you have had the opportunity to take independent legal advice) is intended to be separate and severable

and while they are considered by the parties to be reasonable in all the circumstances, it is agreed that if any one or more of such restrictions is held to go beyond what is reasonable in all the circumstances for the protection of the legitimate interest of the Company but would be valid if any particular restriction(s) were deleted or some part or parts of its or their wording were deleted, restricted or limited then such restriction(s) shall apply with such deletions, restrictions or limitation as the case may be.

4.7 If, during this Agreement or any period during which the restrictions in this clause 4 apply you receive an offer to be involved in a business in any Capacity, you will notify the person making the offer of the terms of this clause 4."

LORD JUSTICE DAVIS:

120. I agree with both judgments.

LORD JUSTICE UNDERHILL:

INTRODUCTORY

121. I agree that this appeal should be dismissed. My reasons are essentially the same as those given by the Master of the Rolls, but since I have not found the case entirely straightforward I think I should express them in my own words.

122. Although the issues are clearly explained by the Master of the Rolls, I shall briefly recapitulate them here, so as to have a firm jumping-off point.

123. At its most general, the issue is whether the ET was right to hold that Mr Smith was a worker within the meaning of section 230 (3) of the Employment Rights Act 1996 (for the purpose of his claim for unlawful deduction of wages) and regulation 2 (1) of the Working Time Regulations 1998 (for the purpose of his claim that he had been denied paid holiday) and that he was an employee within the meaning of section 83 (2) (a) of the Equality Act 2010 (for the purpose of his claim of disability discrimination). Given that there is now no challenge to the ET's decision that he was not employed under a contract of service, that issue turns on whether he falls within limb (b) of the definitions in section 230 of the 1996 Act and regulation 2 of the Regulations; it is now established that the criteria there identified apply equally to the more economical language of section 83 (2) of the 2010 Act – see, most recently, *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721, at para. 8. The question for the ET was therefore whether Mr Smith:

> "worked under … [a] 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".

124. That definition has two elements – the first requiring that the putative worker be obliged by the contract personally to do work or perform services for the other party, and the second providing an exception where the relationship is properly to be characterised as (so far as relevant for our purposes) one between a "business undertaking" – I will say "business" for short – and its customer. On this appeal there are issues as regards both elements. I take them in turn.

125. As to the first element, the issue relates to the requirement that Mr Smith be required by the contract to "do or perform personally" the relevant work or services. The issue is whether the ET's finding that he was entitled both to engage other labour to assist him and to pass work to other PP operatives was inconsistent with that requirement. I refer to this as "the personal performance issue".

126. As to the second element, PP takes issue with the ET's overall conclusion that the contractual relationship between Mr Smith and PP was not one of business and customer. I refer to that as "the business/customer issue". But that involves consideration of an important sub-issue, namely whether any, and if so what, contractual obligations subsisted between Mr Smith and PP apart from those arising during the actual jobs that he undertook, and more particularly whether he had to be available for work throughout the working week. I will call this sub-issue "the minimum hours issue".

127. For the purpose of all those issues it is essential to identify where the terms of the contract are to be found. As to that, the starting-point is the standard-form 2009 Agreement whose relevant terms are set out by the Master of the Rolls at paras. 22-41 of his judgment. It seems clear that that agreement, which was evidently drafted by lawyers, was intended to put the relationship of PP and its operatives on a more clearly defined footing, but it also seems clear that the exercise was not fully thought through. The Agreement does not on any view contain the full terms of the relationship, notwithstanding cl. 6.3. It explicitly cross-refers to "the Company Manual", which is agreed to be a reference to the document entitled "Company Procedures & Working Practices" which had already existed for some years and whose terms the Master of the Rolls summarises at paras. 8-21 ("the Manual"). The ET recited at para. 21 of its Reasons that the parties proceeded before it on the basis "that [the Manual] was still current and reflected the current relationship". As is not uncommon with manuals of this kind, it is a rather miscellaneous document: not all of its contents may have constituted contractual terms, but on the face of it some of them did. It is not always easy to reconcile the terms of the Agreement with the contents of the Manual: that too is not an uncommon situation. The ET also referred to, and summarised the contents of, a separate "Manual for Self-Employed Operatives". It described it as "non contractual", and we were not shown a copy; but the ET's summary leads me to wonder whether some of its terms – not least about the rental of PP-branded vans, which it seems that operatives were obliged to hire – may not have had contractual status. In addition to those documents, there may have been contractual terms deriving from things said by the parties or their conduct towards each other, as is very common in the employment context (see the observation of Lord Hoffmann in *Carmichael v National Power plc* [1999] ICR 1226, at p. 1234 C-D). In short, this is a case where the terms of the contract have to be discovered from a patchwork of different materials.

THE PERSONAL PERFORMANCE ISSUE

128. On the face of it the contractual documentation appears clearly to require Mr Smith to perform personally any work that he agrees to do for PP: see the passages quoted by the Master of the Rolls at para. 86 of his judgment. Neither the 2009 Agreement nor the Manual contains any provision allowing him to have the work done by a substitute: in this regard this case is unlike any of the many authorities to which we were referred, in all of which the contractual documents contained an express right of substitution, albeit in some cases qualified.

129. What muddies the water is the ET's finding at para. 24 of its Reasons (see para. 70 of the judgment of the Master of the Rolls) that in practice operatives were permitted to, and did, (a) use apprentices or assistants on a job, (b) sub-contract specialist tasks and (c) pass whole jobs on to other PP operatives if something more lucrative came up; and, further, what is said to have been a finding at para. 25 of the Reasons (made by reference to the terms of a form of contract introduced only after Mr Smith had left) that those practices reflected a contractual entitlement – see para. 90 of the judgment of the Master of the Rolls. If the latter finding is correct the effect of Mr Smith enjoying those rights would have to be considered even if they were not set out in any document.

130. I should say by way of preliminary that in my view the practice of PP's operatives employing assistants or specialist sub-contractors – i.e. my categories (a) and (b) above – is a red herring so far as the issue of personal performance is concerned. The fact that an operative has help in doing the work which he has contracted to do does not mean that he is not also working. (That is recognised in *Hill v Beckett* [1915] 1 KB 578, which is one of the authorities summarised by Atiyah in the passage endorsed by McKenna J in his classic judgment in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.) The only right, if it was one, which might be inconsistent with an obligation of personal performance is (c), i.e. the right to pass on an entire job. (I would also observe that the issue is only relevant to the characterisation of any "umbrella contract" between PP and Mr Smith: if we are concerned only with a series of job-by-job contracts, obviously an operative cannot be a worker in respect of a job which he has in fact passed in its entirety to someone else.)

131. The short answer to this part of the case is that I do not accept that the ET's findings justified the conclusion that operatives enjoyed any contractual right of the kind alleged. As the Master of the Rolls says at para. 88 of his judgment, the language of the 2009 Agreement is inconsistent with the existence of such a right; nor, as he says at para. 89, is there any basis for implying one on ordinary contractual principles. I accept that that might not be the end of the analysis if it were clear from the ET's findings that the parties had by their conduct clearly evinced an intention that operatives should have a contractual right to pass jobs to each other; but I agree with the Master of the Rolls that the finding that such substitution did sometimes occur (there is no suggestion that it was frequent) is equally consistent with a practice of informal concession. I also agree with him that what the Judge says at para. 25 of the Reasons falls short of a finding of a contractual term.

132. That means that it is unnecessary to decide whether if Mr Smith did enjoy a right of the kind found by the ET it would be inconsistent with the requirement that the

contract be one under which he was obliged to do or perform work or services personally. I respectfully agree with the summary at para. 84 of the judgment of the Master of the Rolls of the principles to be drawn from the authorities which he reviews. It may be a nice question whether the limitation on the class of people to whom Mr Smith was entitled to pass the work – i.e. only to other PP operatives – was a relevant "fetter" in accordance with those principles; but the point does not require to be decided on this appeal. Still less does the question whether any ostensible right of substitution of that character should be disregarded because it does not reflect the reality of the contract, in accordance with the principles enunciated in *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157.

THE MINIMUM HOURS ISSUE

133. The key passage for the purpose of this part of the case is at paras. 47-48 of the ET's Reasons. The Master of the Rolls has quoted most of para. 47 (see para. 93 of his judgment), but I will set out the passage in full:

> "47 The First Respondent's Company Procedures & Working Practices obliged the Claimant to work a normal week of 40 hours, even if that was not enforced. That was part of the Claimant's original contract and neither party suggested the procedures no longer reflected the reality of the obligations between them. Alternatively, even if the 40 hour clause was no longer part of the Claimant's contract, Mr Mullins accepted in evidence there was a minimum obligation to work about 36 hours a week. In any event the Claimant's contract required him to provide work on the days agreed with the First Respondent … .
>
> 48 I accept the Claimant was free to choose the particular hours he worked, whether he took a particular job and what time he left to go home on a particular working day. I also accept that by arrangement it was possible for an engineer to take an extended break from working with the First Respondent to pursue other work. Although there was flexibility the First Respondent expected engineers to discuss their working hours with the First Respondent and agree them with the First Respondent. I find the Claimant clearly had sufficient obligation to provide his work personally to be a worker."

134. The point being addressed in those paragraphs needs to be spelt out. The actual conclusion, at the end of para. 48, is that "the Claimant clearly had a sufficient obligation to provide his work personally to be a worker". The reference to providing his work "personally" might, if taken by itself, suggest that the Judge was addressing the "personal performance" issue. But that is misleading. It is clear from the passage as a whole that what she was concerned with was the nature and extent of Mr Smith's minimum obligations, and in particular the number of hours that he was obliged to work per week. The reason why that was relevant is that if the arrangement between PP and him was wholly casual that would not only mean that he would not have the status of an employee/worker in between particular jobs but it would be relevant to the assessment of whether he had that status during the

actual period that he was working: see *Windle* at paras. 23-24 (p. 731). Mr Linden's case before us (in line, I think, with how the case was put below) focused on the latter aspect: I am not clear, and we did not have to hear submissions, about to what extent, if at all, Mr Smith's substantive claims depend on his status between jobs.

135. Although the Judge found that Mr Smith "had a sufficient obligation", it is necessary to identify what she found that that obligation amounted to. Para. 47 makes three alternative findings, namely:

    (a) that Mr Smith was obliged by the terms of the Manual to work "a normal week of 40 hours";

    (b) alternatively, that Mr Mullins had accepted in evidence that he was obliged to work "about" 36 hours per week; or

    (c) that in any event he was obliged by the 2009 Agreement to "provide work" on the days agreed with [PP]" (this being a paraphrase of the first half of cl. 2.2 of the Agreement).

    (It is convenient to interpose at this stage that I am not sure how element (c) advances the argument, since it is only an agreement to agree.) The first part of para. 48 goes on to acknowledge various respects in which there was what the Judge calls "flexibility" as regards those obligations; but she then qualifies those findings by a further finding that operatives were expected to discuss their working hours and agree them with PP. That then leads to the overall conclusion which I have already quoted. In short, therefore, her finding is that Mr Smith was under a contractual obligation to do at least 40, alternatively 36, hours' work per week, and that the various elements of flexibility identified in para. 48 were not incompatible with that obligation. It seems that her finding that Mr Smith was entitled to decide whether he took a particular job means that the obligation to "work" 40 hours a week was more in the nature of an obligation to be available for work for 40 hours, but that is not crucial: either way she found that there was an obligation.

136. Before considering the sustainability of that finding more generally, it is convenient to dispose of one point by way of preliminary. Mr Linden submitted that what I have called the Judge's "alternative (b)" – that is, that Mr Smith was obliged to work a minimum of 36 hours – misrepresents the effect of Mr Mullins' evidence. In my view he is right about that. The relevant passage from Mr Mullins' witness statement is set out by the Master of the Rolls at para. 102 of his judgment. It is clear that he was not addressing the question of contractual obligation as such but simply how many hours it would be necessary for an operative to work for the contract to make commercial sense for both parties. That may be important background to identifying a contractual obligation, but it is not the same thing. And in any event Mr Mullins did not identify 36 hours (actually, "three twelve-hour days") as the minimum: he only said that such a level of hours would be "valuable to us", contrasting it with 15 hours ("three five-hour days"), which would not. Accordingly, the Judge's reasoning must stand or fall on her first alternative, i.e. the 40-hour "normal working week" referred to in the Manual.

137. It is Mr Linden's primary case that the finding of a 40-hour minimum working week was not open to the Judge, having regard to the explicit provision in cl. 2.2 of the 2009 Agreement that:

> "For the avoidance of doubt, the Company shall be under no obligation to offer you work and you shall be under no obligation to accept such work from the Company."

Mr Linden acknowledged that it would have been open in principle to Mr Smith to submit that that clause did not reflect the reality of the agreement between the parties and should be disregarded on *Autoclenz* principles; but he pointed out that in the context of the issue (which is no longer live) of whether Mr Smith was employed under a contract of service the Judge had made the precisely opposite finding. She refers at para. 39 of her Reasons to the provision that "there is no legal obligation on [PP] to provide work" – a clear reference to (part of) cl. 2.2 – and says in terms that that reflected the reality of the obligations: see para. 52 of the judgment of the Master of the Rolls. Mr Linden also said that no case based on an obligation to work a minimum of 40 hours per week was advanced in the ET: see para. 101 of the judgment of the Master of the Rolls.

138. Well though Mr Linden advanced those points, I have come to the conclusion that they must be rejected. The fundamental difficulty which has to be confronted on this part of the case is that cl. 2.2 of the Agreement and the provisions of the Manual about minimum hours appear to say two inconsistent things. On ordinary principles it was the job of the Judge to attempt to resolve the inconsistency in the way which she believed best reflected the intentions of the parties; and for that purpose she was fully entitled, indeed obliged, to have regard to the way in which the contract had been operated in practice and the realities of the situation. I do not believe that the principle stated in Lewison *The Interpretation of Contracts* (see para. 98 of the judgment of the Master of the Rolls) is determinative in a case of this kind. The realities of the situation as shown by the evidence adduced (which includes the evidence of Mr Mullins referred to at para. 136 above) are more consistent with the position set out in the Manual, under which PP could require Mr Smith to do – in substance – a full week's work (at least if work was available to give him) than with him being entitled to do however much or little work he chose or none. That being so, the Judge was entitled to treat the language of cl. 2.2 as referring only to a right to refuse particular jobs without derogating from the minimum obligation. That may not be the most natural meaning of the language if read on its own; but it is a way of giving it some meaning which is not inconsistent with the Manual. Contrary to a submission made by Mr Linden, there is no necessary inconsistency between a right to turn down a particular job and an obligation to work at least 40 hours – still less if the true nature of the obligation was to be available for work for at least 40 hours.

139. I should say that I am not convinced that the minimum obligation found by the Judge can be sufficiently characterised as a straightforward obligation to work (or be available for work) for at least 40 hours. As Mr Linden submitted, the nature of the work would not seem to lend itself to being quantified in terms of precise numbers of hours, and in a complete statement of the parties' mutual obligations it would be necessary to build in some of the elements of flexibility which the Judge referred to at para. 48 of the Reasons. It might be quite a ticklish task to state with

accuracy and in a sufficiently nuanced way the parties' mutual understanding of their respective rights and duties. But it was not necessary for the purpose of the issues before her that the Judge should undertake that exercise. The essence of her finding was that Mr Smith was, broadly and subject to some qualification, obliged to be available for work on a full-time basis. That finding was sufficient for the purpose of the issues that she had to decide.

140. As for Mr Linden's reliance on para. 39 of the Reasons, I start by noting that what the Judge there held "reflect[ed] the reality of the obligations between the parties" was not that Mr Smith was under no obligation to work a minimum number of hours but that PP was under no obligation to provide work. Analytically the two questions are separate: in theory Mr Smith might be under an obligation to do whatever work PP provided without PP being under any reciprocal obligation to provide work even if available. In practice, of course, that is not likely to have been the mutual understanding, particularly where Mr Smith was obliged to incur the cost of hiring a PP van and was also subject to the restrictive covenants which the Master of the Rolls sets out in the Annex to his judgment. I think that all that the Judge intended to hold at para. 39 of her Reasons – which is also all that I would have expected Mr Smith to have intended to accept in his evidence – was that PP was not under an obligation to provide work when none was available. That too may not be the natural reading of cl. 2.2 of the 2009 Agreement if taken in isolation, but it was one which was open to her on the basis of trying to make sense of the totality of the contractual materials.

141. As to how the case was argued below, we have been shown the closing submissions of both parties. It seems from these that Mr Stephenson on behalf of Mr Smith did indeed not advance an explicit case based on the 40-hour requirement in the Manual: the focus was much more on what Mr Mullins was supposed to have said about a 36-hour minimum. I do not accept that this precluded the Judge from making the finding that she did. The essential point was the same, namely that the evidence showed that Mr Smith was obliged to work (or be available for work), subject to the various elements of flexibility that she identified, essentially on a full-time basis and that he could not be properly said to be working on a casual basis.

142. For completeness, I should mention a submission by Mr Linden that there was unchallenged evidence of some periods during which Mr Smith worked on average no more than about 20 hours per week. Even if that meant that he was only available for work for those hours, I cannot see that that fact by itself carries great weight in the assessment of what his contractual obligations were: it is equally consistent with his failing to comply with them.

143. I would accordingly reject PP's challenge to the Judge's reasoning and conclusion at paras. 47-48 of the Reasons. My reasons, I believe, correspond to those in paras. 109-113 of the judgment of the Master of the Rolls. As will be apparent, the resolution of this issue has depended on an analysis of the contradictory and ill-thought-out contractual paperwork in the context of the Judge's findings about what happened on the ground. That means that although employment lawyers will inevitably be interested in this case – the question of when a relationship is genuinely casual being a very live one at present – they should be careful about trying to draw any very general conclusions from it. In this connection I would wish to make two particular points.

144. First, although the inconsistency in this case between the Agreement and the Manual allowed the Judge to reach her decision without recourse to the *Autoclenz* decision, it does not follow that that route might not have been available. The tribunals will look narrowly at lawyer-drafted documentation which does not appear to correspond to the reality of the relationship.

145. Second, although the argument before the ET and before us was couched in terms of whether Mr Smith was subject to a legal obligation to work (or be available) for a minimum number of hours, it should not be assumed that if there had been no such obligation the evidence about what hours he worked in practice would have been irrelevant. It is necessary to distinguish two separate circumstances in which the issue of whether a putative employee/worker is engaged on a casual basis might arise. The first is where the substantive claim directly depends on their enjoying employee/worker status in respect of their periods of work (e.g. because the claim concerns their pay or some discriminatory treatment in the workplace). In such a case the question whether the engagement is casual is indeed relevant, but only on the basis that it may shed light on the nature of the relationship while the work in question is being done (see *Quashie v Stringfellow Restaurants Ltd* [2002] EWCA Civ 1735, [2013] IRLR 99, at paras. 10-13, and *Windle* at paras. 22-25). But it is not only legal obligations that may shed light of that kind. If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work. The second situation is where the claim directly depends on the claimant's status during periods of non-work, either because he or she has to establish continuity of employment or because the claim itself relates to their treatment during that period: in such a case mutuality of legal obligations is essential.

THE BUSINESS/CUSTOMER ISSUE

146. On this issue, I agree with the reasoning and conclusions of the Master of the Rolls at paras. 114-116 of his judgment. While I would not wish to be critical of the Employment Judge, who approached her task in a structured and careful way, it might have been preferable if in the concluding section of her Reasons she had spelt out rather more fully the factors which she had taken into account in making her overall evaluation. But I agree with the Master of the Rolls that it is clear that she had in mind the essential considerations and reached a sustainable conclusion on the basis of them.

POSTSCRIPT

147. I agree with what the Master of the Rolls says at para. 119 of his judgment about the undesirability of a difficult and important case being decided entirely on the basis of written submissions. I would only add, on the basis of my experience sitting in the Employment Appeal Tribunal, that this is not an isolated case. The usual explanation is that the parties run out of time to deliver oral submissions. That situation ought not to occur. Where a hearing has been listed for several days, it should be possible by firm management to ensure that sufficient time for oral submissions is left within the hearing window – including, where appropriate, a

short gap during which written submissions can be lodged as a basis for the oral submissions. Where that is not possible – for example, where the hearing is shorter or has unavoidably over-run – it may be necessary to list a further date as soon as possible, in which case it will nearly always be useful for written submissions to be lodged in the meantime. I appreciate that this can be tricky to arrange if the problem is not seen coming, and I would not wish to be unduly prescriptive. No doubt there are particular cases where relying on written submissions alone is acceptable, even if not ideal; but that course should only be embarked on with real caution.