Neutral Citation Number: [2022] EWCA Civ 229

Case No: CA-2021-000670

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HEATHER WILLIAMS Q.C. SITTING AS A DEPUTY JUDGE OF THE HIGH COURT
UKEAT/0258/20/RN(V)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2022

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

NURSING AND MIDWIFERY COUNCIL	**Appellant**
- and -	
SOMERVILLE	**Respondent**

- -
- -

Claire Darwin and Roisin Swords-Kieley (instructed by **DWF Law LLP**) for the **Appellant**
Jeffrey Jupp and Matt Jackson (instructed by **Leigh Day**) for the **Respondent**

Hearing date: 2 February 2022

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Approved Judgment

Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 25 February 2022.

Lord Justice Lewis:

INTRODUCTION

1. This appeal concerns the question of whether an individual appointed as a panel member and chair of a Fitness to Practise Committee of a professional regulatory body, and who undertook hearings, was a worker within the meaning of regulation 2(1) of the Working Time Regulations 1998 ("the Regulations"). I will refer to Mr Somerville as the claimant and the regulatory body, the Nursing and Midwifery Council ("the Council") as the respondent as they were referred to in the tribunals below.

2. In brief, the claimant's appointment as a panel member and chair was subject to written terms of agreement referred to as an overarching contract. The claimant also agreed to sit on panel hearings on particular days although he was free to refuse to accept any particular hearing date, or to cancel a hearing that he had agreed to attend by notifying the Council that he was no longer available for that hearing.

3. By a claim form presented on 20 July 2018, the claimant claimed unpaid holiday pay on the ground that he was a worker entitled to paid annual leave under the Regulations. A preliminary hearing was ordered to determine the question of whether the claimant was a worker. This appeal is concerned solely with that preliminary issue. We are not asked to consider whether, or to what extent, the claimant is entitled to paid annual leave if he is a worker.

4. Following the preliminary hearing, an employment tribunal (Employment Judge Massarella) held that the claimant was a worker within the meaning of limb (b) of the definition of worker in regulation 2(1) of the Regulations as there was an overarching contract between the claimant and the Council, as well as individual contracts when hearings were assigned to the claimant, under which he agreed to provide his services personally.

5. The Council appeals that finding on the basis that there must be what it describes as an irreducible minimum of obligation, that is an obligation on the claimant to perform a minimum amount of work, in order for a contract to be a worker's contract within limb (b) of regulation 2(1) of the Regulations. It submits that the fact that the claimant was not obliged to offer to do any work or perform any services was inconsistent with the existence of the obligations necessary for the claimant to be a worker under the Regulations.

6. The claimant submits that he had attended hearings and had been paid for doing so. That work was performed under a contract whereby he undertook to do work or perform services personally and so he fell within the definition of a worker in regulation 2(1) of the Regulations when attending those hearings. Further, whilst the claimant accepted that he was not obliged to accept any work under the overarching contract, when he did agree to attend a hearing, obligations related to that hearing were contained in both the individual agreements and the overarching contract. That was sufficient to mean that the claimant was a worker within the meaning of limb (b) of the definition of worker in regulation 2(1) of the Regulations even in periods between individual assignments.

THE RELEVANT STATUTORY PROVISIONS

7. Regulation 2(1) of the Regulations defines a worker in the following way:

> ""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."

8. Similar definitions of a worker are included in other statutory provisions such as section 230(3) of the Employment Rights Act 1996 ("the 1996 Act"), section 54 of the National Minimum Wages Act 1998 and regulation 1(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

9. Regulation 13 of the Regulations confers a right to four weeks' annual leave. Regulation 16 provides for the worker to be paid in respect of periods of annual leave at the rate of a week's pay in respect of each week of leave. It provides a method for calculating the amount of a week's pay in circumstances where a worker does not work normal hours. Regulation 14 of the Regulations provides for the payment of compensation on termination of a worker's employment.

THE FACTS

10. The relevant facts can be taken from the findings of the employment tribunal.

Fitness to Practise Committees

11. The respondent is the regulator of nurses and midwives in the United Kingdom. Its functions are governed by the Nursing and Midwifery Order 2001. The Council has a statutory duty to maintain standards of conduct and performance for nurses and midwives. An Investigating Committee investigates allegations that a nurse or midwife's fitness to practise may be impaired by reason of misconduct, lack of competence, a conviction or caution, physical or mental health or lack of the necessary knowledge of English. Where it considers there is a case to answer, an allegation is referred to a Fitness to Practise Committee to consider.

12. The respondent maintains a pool of appointed persons to sit as panel members of Fitness to Practise Committees. There is a process of appointment overseen by an appointments board to ensure that only suitably qualified individuals are recommended to the Council for appointment as panel member.

The Claimant's Appointment

13. The claimant was appointed as a panel member and chair of one of its Practice Committees (now known as the Fitness to Practise Committee) for a four-year term by letter dated 9 May 2012. He was re-appointed for a further four-year term by letter dated 5 May 2016. Each appointment was subject to a panel members services agreement (the 2012 and the 2016 Agreements respectively).

14. Each of the Agreements was expressed to be made between the Council and the claimant. Each Agreement provided that the parties had agreed that the panel member" "shall provide the Services on the terms of the Agreement".

15. Under the heading "Supply of Services" Clause 11 of the 2016 Agreement (and clause 7 of the 2012 Agreement) provided that:

> "11. The panel member shall provide the services as requested from time to time by the NMC.
>
> 11.1 The NMC shall provide the panel member with reasonable notice of any request to provide the services. If the panel member cannot provide the services on the dates and at the time so notified, the panel member shall promptly inform the requesting person or department at the NMC of that fact.
>
> 11.2 The NMC and the panel member agree and acknowledge that:
>
> 11.2.1 the NMC is not obligated to request the panel member to provide the services;
>
> 11.2.2 the panel member is not obliged to provide the services if so requested by the NMC; and
>
> 11.2.3 the panel member has no right to provide the services; and
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> 11.2.4 where the NMC requests the panel member to provide the services in respect of the case and the panel member agrees to provide those services the panel member will use all reasonable endeavours to attend the hearing of that case on each and every day on which it is heard including where it is adjourned for any reason and concluded later than originally anticipated."
>
> 11.4 The panel member shall be available on reasonable notice to provide any information, advice or assistance about the services as the NMC may reasonably required."

16. The services to be provided by the panel member were defined in Part A of the 2016 Agreement in the following terms:

> "The Panel Member will attend hearings and meetings of a Practice Committee of the Nursing and Midwifery Council and will carry out the functions of a Panel Member of that

> committee in accordance with the provisions of the Nursing and Midwifery Order 2011 and the Nursing Midwifery (Fitness to Practise) Rules 2004."

17. Clause 12 of the 2016 Agreement provided that in performing the services, the panel member would operate and have the status of an independent contractor and nothing in the Agreement created a relationship of employer and employee. Clause 13 provided that nothing in the Agreement rendered the panel member an employee, partner or agent of the Council. Clause 14 provided that the panel member was an independent contractor and was responsible for accounting for income tax and national insurance contributions. Materially similar provisions were included in the 2012 Agreement.

18. Clauses 17 to 21 of the 2016 Agreement imposed obligations on the panel member including obligations to comply with the Council's Code of Conduct and Service Standards ("the Code of Conduct") and relevant Council policies. Clause 17.5 provided that the panel member:

> "will provide services (where they have agreed to do so) at such locations within the UK as are necessary for the proper performance of the Services in order to meet the reasonable requirements of the NMC".

19. There were further obligations on the panel member to provide information about certain matters and to attend meetings at the reasonable request of the Council to review the provisions of services by the panel member.

20. Clause 22 of the 2016 Agreement required the Council to provide information including communications about relevant guidance and procedure and to provide training. Again similar obligations were imposed on the panel member and Council by the 2012 Agreements.

21. Fees for hearings undertaken were fixed by the Council and were specified in Part B of the 2012 and 2016 Agreements. Under the 2016 Agreement, for example, the attendance fee for hearings for a panel chair was £340 for a full day or £170 for part of a day. There was a reading day fee of £100 payable for certain work done prior to the hearing.

22. Annexes to the 2016 Agreement contained the Code of Conduct. That described the obligations on panel members in respect of their conduct. Paragraph 16 of the Code provided that panel members "should ensure" that they were available to provide their services as set out in the 2016 Agreement and should:

> "inform the Panel Support Team at the earliest opportunity if they have to withdraw from a panel to which they have been booked. It is expected that this would be for exceptional reasons only."

The System for Booking, Cancelling and Withdrawing from Hearings

23. The employment tribunal described the practical arrangements for arranging hearings. The Council's panel support team would ask the claimant to provide his available dates over a six-month period. The Council would then notify him when he would be required and, about a month before a particular hearing, a hearing would be allocated to the claimant. The claimant could (and on occasions did) refuse hearing dates. The claimant could withdraw from a hearing even after it had been allocated to him without any need to provide a reason. The only requirement was that he notify the allocation team. He was not penalised if he withdrew from a hearing in this way. If the Council cancelled a hearing, the claimant would be paid in full up until October 2017 and thereafter he was paid 50% of the fee if less than 14 days' notice of the cancellation was given. If a hearing went short, or was cancelled once it had begun, the Council paid the fee in full.

24. The number of days on which the claimant sat on Fitness to Practise Panels varied over the years. It was at its highest (129 days) in 2013. Between 2014 and 2017, it varied between 61 and 98 days a year. In 2018, it reduced substantially to 17 days and, in 2019, he had sat for only 7 days by the beginning of November.

The Findings of the Employment Tribunal

25. The material conclusions of the employment tribunal were as follows. First, it found that there was an overreaching contract governing the claimant's period of appointment and a series of individual contracts.

26. In relation to the overarching contract, paragraph 190 of the employment tribunal's reasons records that:

> "190. In relation to the former, the NMC offered to appoint the claimant to the FTP panel as a chair for a period of four years; the claimant accepted in writing. The terms of the contract are to be found in the letter of appointment, the PMSAs [that is the 2012 and 2016 Agreements] and its schedules and appendices. Those terms undoubtedly included some provisions which amounted to legally enforceable rights and obligations. These are set out in my findings above (paras 98 and 99)."

27. The obligations referred to were those imposed on the claimant by clause 17, and on the Council by clause 22, of the 2016 Agreement summarised at paragraphs 17 to 20 above. Essentially, they reflect the duties on the claimant to comply with relevant procedures, to provide information and to maintain confidentiality. The obligations imposed on the Council related to the provision of communications on guidance and procedure and the provision of training. None of the obligations referred to by the employment tribunal imposed any obligation on the Council to offer work or on the claimant to perform work or provide services.

28. In relation to the individual contracts that the employment tribunal found existed, it said at paragraph 191 of its reasons that:

> "191. In relation to the latter, each time the NMC offered the individual, and the Claimant accepted, he agreed to sit on the hearing, for which the NMC agreed to pay him a fee."

29. Secondly, the employment tribunal found that neither the overarching contract nor the individual contracts amounted to contracts of employment and so did not fall within limb (a) of the definition of worker in regulation 2(1) of the Regulations. In relation to the overarching contract, the employment tribunal said at paragraph 198 of its reasons that its terms:

> "unambiguously provide that the NMC was not obliged to ask the Claimant to provide services, and the Claimant was not obliged to provide them, if asked to do so".

30. It noted that the claimant decided how many dates to offer to the Council and, if offered assignments on particular dates, he was free to refuse them. He was under no contractual obligation to offer dates. He was under no obligation to honour any dates once he accepted as he was free to withdraw. The employment tribunal accordingly concluded that the overarching contract, whilst a contract, was not a contract of employment. There is no appeal against that finding.

31. In relation to the individual assignments, the employment tribunal concluded at paragraph 210 of its reasons, that:

> "210. Once an agreement that the Claimant would undertake a particular hearing had been concluded, if the Claimant did the hearing, the NMC was obliged to pay him; even if the hearing was cancelled, there was an obligation on the Respondent to pay him: 100% of the fee (pre-2017); or 50% of the fee (post-2017). However, as I have already found, there was no equivalent obligation on the Claimant: he was free to withdraw from the hearing, even after the agreement had been concluded."

32. The reason why the employment tribunal found that the individual contracts governing assignments were contracts, but not contracts of employment, was because of the ability of the Claimant to withdraw. That appears from paragraph 213 of its reasons where it said that:

> "213. *Clark v Oxfordshire Health Authority* is authority for the proposition that an employment contract cannot exist in the absence of "mutual obligations subsisting over the entire duration of the relevant period". In respect of each individual assignment, that period began when the Claimant accepted the offer of the assignment. The NMC was not free to cancel to withdraw without incurring all or part of the fee; to that extent there was some obligation on it. But because the Claimant could withdraw, without sanction, after the conclusion of the agreement and before the hearing, I conclude that there was insufficient mutuality of obligation to give rise to an employment relationship by reference to the individual assignment contracts."

33. Accordingly, the employment tribunal concluded that the claimant was not an employee, that is, he was not working under a contract of employment. There is no

appeal against that finding. This reasoning is not, however, consistent with the subsequent decision of this Court in *Professional Game Match Officials Ltd v Revenue and Customs Commissioners* [2021] STC 1956 ("the *PGMOL* case"). In that case, the Court was dealing with referees at football matches. There, professional referees could accept an appointment to referee a particular match but could withdraw from the appointment subsequently. Elisabeth Laing LJ, with whom the other members of the Court agreed, held at paragraph 122 that:

> "… In my judgment, the [tribunal] erred in law in deciding that the ability of the either side to pull out before a game negated the necessary mutuality of obligation. The authorities which I have referred to above… show that that is not the correct legal analysis. The correct analysis is that if there is a contract, the fact that its terms permit either side to terminate the contract before it is performed, without breaching it, is immaterial, the contract subsists (with its mutual obligations) unless and until it is terminated by one side or the other".

34. The next question for the employment tribunal was whether the claimant, even if not an employee, was still a worker within the meaning of limb (b) of the definition of worker in regulation 2(1) of the Regulations. In that regard, the employment tribunal said this:

> "218. To qualify as a worker, three conditions must be satisfied:
>
> 218.1. there must be a contract between the claimant and the NMC;
>
> 218.2. the contract must be one in which he undertakes to perform work personally for the NMC;
>
> "218.3. and the NMC must not be a client or customer of a profession or business carried on by the claimant."

35. The employment tribunal set out its conclusion in relation to the first two elements of the test at paragraph 219 where it said that:

> "219. I have already found that there was an overarching contract between the claimant and the NMC, as well as individual contracts when work was assigned, under which the claimant agreed to provide his services personally, although I have concluded that neither were contracts of employment."

36. The employment tribunal then considered the third element, namely whether the Council was a client or a customer of a profession or business carried on by the claimant. It concluded that the Council was not. Furthermore at paragraphs 242 to 244 of its reasons the employment tribunal said this:

> "242. I also considered the relevance of mutuality of obligation. Although I have conclude that there was insufficient mutuality

> of obligations to give rise to a contract of employment, there were legal obligations on each side sufficient to create the necessary contractual status. In the circumstances I have described, I do not consider that the absence of mutual obligations to offer/accept a minimum amount of work to be incompatible with worker status.
>
> 243. I have already concluded that the Claimant entered into a contract with the NMC, whereby he undertook to perform work/services for it. Standing back and looking at the overall picture, when I have regard to the method of recruitment, the factors I have identified above which, cumulatively suggest a significant degree of integration into the operation, together with the element of subordination in the conduct/performance procedure and the absence of any negotiation in respect of pay. I am satisfied that the NMC's status was not by virtue of that contract that of the Claimant's client or customer. I have concluded that he was sufficiently integrated into the NMC's operations, such that he was, to borrow the language of Elias J. in *James v Redcats*, 'semi-detached' rather than 'detached', as an independent contract would be.
>
> 244. Accordingly I conclude that the Claimant was a worker of the NMC within the meaning of s.230(3)(b([1996 Act] and Reg 2(1)(b) [of the Regulations]."

The Appeal to the Employment Appeal Tribunal

37. The Council appealed to the Employment Appeal Tribunal ("EAT") against the finding that the claimant was a worker. For present purposes, it is necessary to note only grounds 1 and 2. The first was that the claimant could not be a worker within regulation 2(1) of the Regulations because the mutuality of obligation required for worker status was not present as the claimant was not under a contractual obligation to do or perform any work and the Council was not under any obligation to provide work. The second ground was that the employment tribunal erred in taking into account the fact that there was a contract between the claimant and the Council as that was irrelevant to the determination of whether the claimant was contractually obliged to perform work or services.

38. The EAT dismissed the appeal. It held that an irreducible minimum of obligation - in the sense of an obligation on the person to accept and perform some minimum amount of work for the other party to the contract who was obliged to offer or pay for the work - was not a prerequisite for establishing worker status as defined by limb (b) of the definition of worker in regulation 2(1) of the Regulations. In the present case, the employment tribunal had found that there was a contract between the parties at all material times and it related to the provision of the claimant's services as a panel chair. That was sufficient to meet the requirements of the regulation.

THE APPEAL

39. The EAT granted permission to appeal on the question of whether mutuality of obligations (in the sense of there being an obligation for the putative worker to accept and perform some minimum amount of work for the putative employer) is a prerequisite for satisfying the definition of worker status in section 230(3)(b) in the 1996 Act and regulation 2(1) of the Regulations.

40. That permission is reflected in the two grounds of appeal set out in the Council's notice of appeal. They are as follows:

    1. The employment tribunal erred in finding that an irreducible minimum of obligation is not a prerequisite for worker status within the meaning of limb (b) of the definition of worker in regulation 2(1) of the Regulations; and

    2. The employment tribunal was wrong in suggesting that the existence of a contract between the parties was relevant to the question of determining whether there was an irreducible minimum of obligations.

THE FIRST ISSUE - IRREDUCIBLE MINIMUM OF OBLIGATION

Submissions

41. Ms Darwin, together with Ms Swords-Kieley, for the respondent submits that a contract cannot fall within the scope of limb (b) of regulation 2(1) of the Regulations unless it includes an irreducible minimum of obligations on the parties. That meant, submitted Ms Darwin, that each contract had to include an obligation on the part of the worker to perform some minimum amount of work. That, she submitted, appears from paragraph 126 of the decision of the Supreme Court in *Uber BV and others Aslam* [2020] ICR 657 and is consistent with other case law such as *Nethermere (St Neots) Ltd. v Gardiner* [1984] ICR 612. Ms Darwin further submitted that the employment tribunal had not found that there was any such obligation on the claimant in the present case.

42. Further, Ms Darwin submitted that there were other features of the relationship that compelled the conclusion that there was no irreducible minimum of obligation in this case. They included, principally, the following. The individual assignments had to be read together with the overarching contracts contained in the 2012 Agreement and the 2016 Agreement and those did not oblige the Council to offer, or the claimant to perform, any work. The claimant was entitled to refuse any individual assignment or to cancel it once accepted. Further, the reference to a person who "undertakes" to do work or perform services in regulation 2 of the Regulations carried with it the sense that there was an obligation on the person to do work or perform services personally. Further, in her skeleton argument at paragraph 23, Ms Darwin submitted that the irreducible minimum obligation was about an obligation on the putative employer to offer work in future and an obligation on the worker to undertake that future work when it was offered. It was not about whether an individual was legally obliged to continue with a particular assignment until it was completed. Finally, Ms Darwin submitted that her interpretation was consistent with the policy underlying the Regulations which was to protect individuals who were in a dependent position and, in circumstances where there was no irreducible obligation, a person would not be in such a position of dependency.

43. Mr Jupp, together with Mr Jackson, for the claimant, submitted that mutuality of obligation was necessary to establish any bilateral contract. The concept of an irreducible minimum obligation was used as an aid to establish whether an individual has a contract of service extending beyond a single assignment. That obligation was not relevant to assessing whether the requirements of limb (b) of the definition of worker in regulation 2(1) of the Regulations were satisfied. In particular, where, as here, the claimant had in fact agreed to perform services by attending a hearing, and had done so and been paid, he was a worker within the meaning of the Regulations.

Discussion

44. The starting point must be the definition of worker within regulation 2 of the Regulations. A worker is defined to mean an individual who has entered into, or works, or has worked, under one of two types of contract. The first is a contract of employment. The second is:

> "(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".

45. That definition has within it a number of elements. First, there must be a contract. That is, there must be legally enforceable obligations owed by the parties. As Elias LJ expressed it in *Quashie v Stringfellows Restaurants Ltd.* [2013] IRLR 99 at paragraph 10: "Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract". Next, the contract must include a certain type of obligation, so far as the individual is concerned, if he is to be able to claim that he falls within limb (b) of the definition of "worker". The obligation must be one whereby the individual undertakes to do or perform any work or services and to do so "personally". Finally, the other party must not be a client or customer of any profession or business undertaking carried on by the individual. The various elements of the definition can be differently described, and enumerated. They are summarised in *Uber* at paragraph 41 in the following way:

> "41. Limb (b) of the statutory definition of a "worker's contract" has three elements: (1) a contract whereby an individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual."

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

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

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

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

49. That conclusion is consistent with the decision of the Supreme Court in *Uber*. The question in that case was whether mini cab drivers whose work was arranged though Uber's smartphone application worked for Uber under workers' contracts or whether they were independent contractors providing services under contracts with passengers concluded through Uber as their agent. It is clear from the judgment that the drivers

were not claiming to be providing services under any overarching contract between them and Uber. That would be inconsistent with the fact that the drivers were entitled to decide when, how and how much to work. They were, however, providing services under individual contracts when they were working. That appears from paragraphs 90 to 91 and 93 of the judgment of Lord Leggatt JSC, with whom the other members of the Court agreed, which appear under the heading "Status of the Claimants in this Case". The material parts provide that:

> "90. The claimant drivers in the present case had in some respects a substantial measure of autonomy and independence. In particular, they were free to choose when, how much and where (within the territory covered by their private hire vehicle licence) to work. In these circumstances it is not suggested on their behalf that they performed their services under what is sometimes called an "umbrella" or "overarching" contract with Uber London - in other words, a contract whereby they undertook a continuing obligation to work. The contractual arrangements between drivers and Uber London did subsist over an extended period of time. But they did not bind drivers during periods when drivers were not working: rather, they established the terms on which drivers would work for Uber London on each occasion when they chose to log on to the Uber app."
>
> 91. Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working, does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working: see eg *McMeechan v Secretary of State for Employment* [1997] ICR 549 ; *Cornwall County Council v Prater [2006] EWCA Civ 102;* [2006] ICR 731 . As Elias J (President) said in *James v Redcats (Brands) Ltd* [2007] ICR 1006, para 84 :
>
> > "Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work."
>
> I agree, subject only to the qualification that, where an individual only works intermittently or on a casual basis for another person, that may, depending on the facts, tend to indicate a degree of independence, or lack of subordination, in

> the relationship while at work which is incompatible with worker status: see *Windle v Secretary of State for Justice [2016] EWCA Civ 459; [2016] ICR 721, para 23*.
>
> ……
>
> 93. In all these respects, the findings of the employment tribunal justified its conclusion that, although they are free to choose when and where they worked, at times when they are working drivers work for and under contracts with Uber (and, specifically, Uber London)…..""

50. Lord Leggatt subsequently turned, under the heading "Working Time", to what he described as the "secondary question" of "during what periods of time were the claimants working?" (see paragraph 121). In that regard, Lord Leggatt considered that, at the latest, the drivers were working under a contract when they accepted a trip (notwithstanding the fact that they could cancel it). Lord Leggatt went further and concluded that the drivers were working when they turned on their app, and before accepting any trip, because, on the particular facts, whilst drivers were not obliged to accept any individual trip, they were required to be generally willing and available to take trips and a repeated failure to accept trips would lead to penalties in that the driver would be logged off the Uber app. That appears from the following paragraphs of Lord Leggatt's judgment:

> "124. I think it clear - as did all the members of the Court of Appeal, including the dissenting judge, Underhill LJ, if he was wrong on the main issue - that a driver enters into, and is working under, a contract with Uber London whereby the driver undertakes to perform services for Uber London, if not before, then at the latest when he accepts a trip. If the driver afterwards cancels the trip, that signifies only that the obligation undertaken to pick up the passenger and carry the passenger to his or her destination is then terminated. It does not mean that no obligation was ever undertaken. The more difficult question is whether the employment tribunal was entitled to find - as by implication it did - that a worker's contract came into existence at an earlier stage when a claimant driver logged onto the Uber app."
>
> 125. Uber argues that it is clear from the tribunal's own findings that drivers when logged onto the Uber app are under no obligation to accept trips. They are free to ignore or decline trip requests as often as they like, subject only to the consequence that, if they repeatedly decline requests, they will be automatically logged off the Uber app and required to wait for ten minutes before they can log back on again. Furthermore, when logged onto the Uber app, drivers are at liberty to accept other work, including driving work offered through another digital platform (see para 16 above). Counsel for Uber submitted that, on these facts, a finding that a driver who switches on the Uber app undertakes a contractual obligation to

work for Uber London is not rationally sustainable. Nor can the fact that the driver is ready and willing to accept trips logically alter the position so as to give rise to such an obligation.

126. The fact, however, that an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract. What is necessary for such a finding is that there should be what has been described as "an irreducible minimum of obligation": see *Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623 (Stephenson LJ)* , approved by the House of Lords in *Carmichael v National Power plc [1999] 1 WLR 2042, 2047* . In other words, the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work.

127. In the present case Uber London in the Welcome Packet of material issued to new drivers referred to logging onto the Uber app as "going on duty" and instructed drivers that: "Going on duty means you are willing and able to accept trip requests" (see para 17 above). Logging onto the Uber app was thus presented by Uber London itself to drivers as undertaking an obligation to accept work if offered. The employment tribunal also found that the third in the graduated series of messages sent to a driver whose acceptance rate of trip requests fell below a prescribed level included a statement that "being online with the Uber app is an indication that you are available to take trips, in accordance with your Services Agreement." The reference in this message to the Services Agreement must have been to clause 2.6.2, which stated:

> "Customer acknowledges and agrees that repeated failure by a Driver to accommodate User requests for Transportation Services while such Driver is logged in to the Driver App creates a negative experience for Users of Uber's mobile application. Accordingly, Customer agrees and shall ensure that if a Driver does not wish to provide Transportation Services for a period of time, such Driver will log off of the Driver App."

128. Counsel for the third respondent suggested that this clause is inconsistent with clause 2.4 of the Services Agreement, which provided that:

> "Customer and its Drivers retain the option, via the Driver App, to decline or ignore a User's request for Transportation Services via the Uber Services, or to cancel an accepted request …subject to Uber's then-current cancellation policies."

> I do not agree that these clauses are inconsistent. The position both as specified in the Services Agreement and in practice was that, on the one hand, a driver while logged onto the Uber app was free to decline or ignore any individual trip request (and might well, for example, choose to do so if the request came from a passenger with a low rating). But, on the other hand, the driver was required to be generally willing and available to take trips, and a repeated failure by a driver to accept trip requests was treated as a breach of that requirement.
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> 129. Whilst the irreducible minimum of obligation on drivers to accept work was not precisely defined in the Services Agreement, the employment tribunal was entitled to conclude that it was in practice delineated by Uber's criteria for logging drivers off the Uber app if they failed to maintain a prescribed rate of acceptances. Uber seeks to characterise this system as merely a way of seeking to ensure that drivers do not remain logged onto the app, perhaps through inadvertence whilst away from their vehicle, at times when they are not in fact available to work. However, if that were the only purpose of automatically logging off a driver, it is hard to see why the driver should then be shut out from logging back onto the Uber app for a ten-minute period. It was open to the tribunal on the evidence, including Uber's internal documents, to find that this exclusion from access to the app was designed to operate coercively and that it was reasonably perceived by drivers, and was intended by Uber to be perceived, as a penalty for failing to comply with an obligation to accept a minimum amount of work.
>
> 130. It follows that the employment tribunal was, in my view, entitled to conclude that, by logging onto the Uber app in London, a claimant driver came within the definition of a "worker" by entering into a contract with Uber London whereby he undertook to perform driving services for Uber London."

51. In other words, the parts of the judgment upon which the Council rely are, on a proper analysis, concerned with the time at which a contract to work or personally to perform services arose. There was a contract to perform services personally when the driver was in fact working (as appears from paragraph 91 of the judgment). As a minimum, such a contract existed when a driver accepted a trip – and the fact that the driver could cancel the trip simply meant that the contract came to an end and did not mean that there had never been an obligation to provide services (see paragraph 124). But, on the facts of this case, the contractual obligation to provide services arose at an even earlier time. Even though a driver could refuse to accept particular trips, he was required to be willing and available to take trips once he logged onto the app, and he would be penalised if he did not. That amounted to an obligation to do some work which meant that, from the time a driver logged on, he had entered into a contract under which he undertook to perform services personally.

52. These paragraphs in the judgment in *Uber*, therefore, are directed towards identifying *when* the obligation to perform work arose. They are not intended to suggest that, even where a person is working or providing services personally under a contract, there must be some superadded, distinct obligation on a putative employer to provide work or an individual to accept work before that can fall within the scope of limb (b) of regulation 2 of the Regulations.

53. Similarly, other cases relied upon by the respondent, such as *Nethermere*, and *Carmichael and another v National Power Plc* [1999] 1 WLR 2042 were concerned with whether overarching contracts were contracts of employment so that the individuals were employed in periods when they were not, in fact, working. In that regard, it was necessary to determine whether the contracts included obligations, referred to on occasions as the irreducible minimum of obligations, to provide and to accept some work. They were not dealing with the individual contracts under which work was carried out and do not impose any requirement that even where an individual is working (or has worked) under a contract of employment, that that individual contract requires there to be some distinct, superadded obligation to accept the work. See the analysis in the *PGMOL case* at paragraph 48 and following in relation to contracts of employment. The same reasoning applies in relation to contracts falling within limb (b) of the definition of worker in regulation 2 of the Regulations.

54. Nor do any of the other factors, relied upon by Ms Darwin, point to any other conclusion. It is correct that the individual contracts for individual assignments had to be read with the 2012 and 2016 Agreements, not least because those agreements contemplated that the claimant might agree to chair particular hearings and, if so, contained obligations that applied to the carrying out of a particular hearing. However, the fact that an overarching contract does not impose an obligation to work does not preclude a finding that the individual is a worker when he is in fact working: see paragraph 91 of the decision in *Uber* and the cases referred to in that paragraph such as *Windle and another v Secretary of State for Justice* [2017] 3 All E.R. 568, especially at paragraph 23. The position is clearly established in relation to contracts of employment by the decision in the *PGMOL case* and, in my judgment, similar principles apply when considering the relationship between a general or overarching contract and individual contracts to do work or perform services personally. Elisabeth Laing LJ, with whom the other members of the Court agreed, held that:

> "118. *McMeechan*, *Clark* , *Carmichael* and *Prater*, which bind this Court, are all cases in which this Court considered, in one way or another, the relationship between mutuality of obligation in an overarching contract and in a single engagement. They establish at least three propositions."
>
> i. The question whether a single engagement gives rise to a contract of employment is not resolved by a decision that the overarching contract does not give rise to a contract of employment.
>
> ii. In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered) (or that there are clauses expressly negativing such obligations) does

> not decide that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question.
>
> iii. A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment."

55. Similarly, the fact that the claimant could withdraw from the agreement to attend a hearing even after he had accepted it does not alter matters. The claimant had entered into a contract which existed until terminated (see paragraph 124 of the judgment in *Uber*). Furthermore, if it was not terminated and the claimant did chair the hearing, the claimant will, in the language of the Regulations, have worked under a contract personally to perform services. Nor does the reference to "undertakes" indicate that there must be some distinct, superadded obligation to provide services independent from the provision of the services on a particular occasion. "Undertakes to do or perform" in this context means no more than "promises to do or perform". Finally, when deciding whether a specific agreement to provide services on one particular occasion amounts to a worker's contract, the fact that the parties are not obliged to offer, or accept, any future work is irrelevant: see *McMeechan v Secretary of State for Employment* [1996] ICR 549 at p. 565C-E.

56. I do not consider that statements that the policy underlying the Regulations is to protect individuals who are in a dependent position assist in interpreting and applying the provisions of the Regulations in the present case. The purpose underlying the Regulations is to ensure that the relevant rights are available to employees, and also to those who are self-employed and who do work or provide services personally (otherwise than for clients in a business carried on by the self-employed person on his own account): see per Baroness Hale in *Bates van Winkelhof v Clyde & Co LLP* [2014] 1 WLR 2047 at paragraph 31. If, as here, the claimant falls within the group of self-employed persons providing services personally (but not as part of a profession or business undertaking carried on by him of which the other party is a client), there appears to be no policy reason to justify giving the words in the Regulations a narrower meaning, even if that were possible.

57. For completeness, I deal with one other issue. The claimant's position was that, in the present case, it was not necessary to determine whether the 2012 and 2016 Agreements were worker's contracts. It was sufficient, for the purposes of the claim for unpaid holiday leave, if the individual contracts were worker's contracts. Mr Jupp submitted, however, that the 2012 and 2016 Agreements were worker's contracts because they included obligations which related to, or concerned, the provision of services when the claimant did in fact conduct hearings.

58. I doubt that that submission is correct. The 2012 and 2016 Agreements were contracts (as they included mutually enforceable obligations) but they were not worker's contracts. They did not themselves impose any obligation on the claimant to do work or perform services personally. If the claimant did agree to provide services, then the overarching contracts contained a definition of the services to be provided under the individual contract and included obligations applicable to the way in which those services were to be provided. As such, the overarching agreements assisted in determining that the individual contracts were contracts under which the claimant undertook to provide services personally. That is what the employment tribunal meant

in paragraph 219 of its reasons. I would not, however, be minded to regard the claimant as being a worker when there was no individual contract in place and the only set of obligations governing the relationship between the claimant and the Council were the 2012 and 2016 Agreements as those Agreements did not include any obligation on the claimant to do work or provide services personally.

THE SECOND ISSUE – THE RELEVANCE OFA CONTRACT

59. Ms Darwin submits that, at paragraph 242 of its reasons, the employment tribunal suggested that the existence of legal obligations on each side, or the existence of a contract, was relevant to the question of whether there was an irreducible minimum of obligations. That, she submits was an error on the part of the tribunal.

60. That submission can be dealt with shortly. Decisions of employment tribunals must be read fairly and as a whole. It is clear from the decision that the employment tribunal understood that there had to be *a* contract in existence and also that it had to include certain types of obligations in order to be a contract of employment or a contract falling within limb (b) of the definition of worker. That is why it structured its reasons as it did, by asking first if there was a contract in existence, then, secondly whether the overarching and individual contracts were contracts of employment and then, if not, whether they were contracts to do or perform services personally. That is also reflected in paragraph 218 of its decision where it set out the three requirements that must be met for a contract to fall within limb (b) of the definition of worker's contracts. Finally, if there were any doubt about this (which there is not), it is clear from paragraphs 242 and 243 of the reasons read together that the employment tribunal found that there was a contract in existence and that was a contract whereby the claimant undertook personally to perform work or services. There is no substance in this second ground of appeal.

CONCLUSION

61. For those reasons, the employment tribunal was entitled to find that the claimant was a worker within the meaning of limb (b) of the definition of a worker in regulation 2(1) of the Regulations. He was a person who entered into, and indeed had worked under, a series of individual contracts under which he had undertaken to (and did) perform services (chairing Fitness to Practise Committees) personally. The Council was not a client or customer of a business or professional undertaking carried on by the claimant. I would dismiss this appeal.

Lady Justice Elisabeth Laing

62. I agree.

Lord Justice Moylan

63. I also agree.