Appeal No. UKEAT/0241/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 27 & 28 February 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

DR R GUNNY — APPELLANT

GREAT ORMOND STREET HOSPITAL FOR CHILDREN NHS FOUNDATION TRUST & 3 OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SCHONA JOLLY (One of Her Majesty's Counsel) and MS SARAH FRASER BUTLIN (of Counsel) Instructed by: Brahams Dutt Badrick French LLP 24 Monument Street London EC3R 8AJ
For the First Respondent	MR TIM NEWCOME (Solicitor) DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS
For the Second and Fourth Respondents	MR KEITH BRYANT (One of Her Majesty's Counsel) Instructed by: HCA International Ltd Legal Department 242 Marylebone Road London NW1 6JL
For the Third Respondent	MS CLARE HARRINGTON (of Counsel) Instructed by: Gateley plc Ship Canal House 98 King Street Manchester M2 4WU

SUMMARY

JURISDICTIONAL POINTS - Excluded employments

The appeal is dismissed. The Tribunal decided that the Claimant was not in employment in the extended sense. That conclusion was reached not just on the basis that the Claimant was party to a "group contract" but on all the circumstances relevant to the issue. The main plank on which the Claimant's appeal rests therefore falls away. There was no "lacuna" in the legislation as suggested since the Tribunal did not conclude that any worker providing services through a group arrangement was thereby excluded from the protection of the **Equality Act 2010**. Whether or not an employee was entitled to the protection depended on whether she satisfied the requirements of the statute. On the facts of this case, the Claimant did not satisfy those requirements in that, as the Tribunal found, she was not employed under a contract personally to do work.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. This issue in this appeal is whether the Employment Tribunal ("ET") sitting in London (Central) erred in law in concluding that the Claimant, Dr Gunny, was not an employee of the Second Respondent, HCA International ("HCA") within the meaning of section 83(2)(a) of the **Equality Act 2010** ("EqA").

Factual Background

2. The Claimant is a consultant neuroradiologist; as is Dr Chong, the Third Respondent. The Claimant and Dr Chong are employed by the First Respondent at Great Ormond Street Hospital for Children NHS Foundation Trust. The Tribunal described this employment as the Doctors' "day job". Both doctors undertook private work for other hospitals. They were part of a group of consultant neuroradiologists, which provided services to HCA pursuant to a written agreement between HCA and the group.

3. From about the beginning of 2013 until 30 June 2016, the members of the neuroradiology group providing neuroradiology reporting services to HCA consisted of Dr Chong, Dr Mankad and the Claimant. They referred to themselves as the "Portland neuroradiology group".

4. The members of the group had provided services to HCA under a series of agreements over the years. Initially, the agreements were between HCA and each individual consultant in the group. However, from about 2011, the agreements were between HCA and all the consultants in the group jointly. The relevant agreement in place at the time this dispute arose was the agreement entered into in 2015 ("the 2015 agreement").

5. The Tribunal's findings as to the relationship between the consultants, the group and HCA included the following:

(a) The consultants negotiated and otherwise dealt with HCA as a group, with Dr Chong acting as a representative of the group.

(b) A rota was put together by the members of the group and presented to HCA. HCA did not play any part in the setting of the rota, which could be subject to last minute changes without any input from HCA.

(c) The consultants in the group agreed to split all fees payable in relation to services carried out for HCA equally between them, irrespective of how much work was actually done by an individual member of the group. Once again, this was a decision in which HCA played no part.

(d) There was no obligation on HCA to provide work to the group or to any individual consultant within the group, although in practice there was generally a reasonable amount of work available.

(e) The group could allocate whichever consultant to any particular spot in the rota and HCA did not have to give and was not asked to give permission for changes to the rota. So long as someone covered the relevant slots, HCA was not concerned by which of the consultants did so. The Tribunal described this as "an unfettered right to substitute within the members of the group" (paragraph 43). However, it was noted that once an individual consultant had agreed as amongst the group to be available for a particular slot, that consultant was then obliged, subject to any further changes to the rota agreed with the group, to be available for that slot.

(f) The work done for HCA involved providing reports on neuroradiology images. Members of the group could view the images remotely and were required to submit a report on HCA's systems. These reports were generally to be submitted within 24 hours.

(g) Although the contractual arrangements had changed over the years, with contracts initially being between individual consultants and HCA, the Tribunal found that the group arrangements since 2011 "more accurately reflected the reality of the situation involving a group providing the services rather than a series of individuals" (paragraph 50).

(h) Whilst the consultants were expected to comply with the Portland Hospital's clinical policies and procedures to ensure patients received the best care, they were excluded from the hospital's disciplinary, grievance, appraisal and performance management procedures.

(i) The Claimant had instructed HCA to pay her share of her fees to a personal services company, which she had set up. The Claimant submitted tax returns and paid tax in respect of this work on a self-employed basis. The Tribunal found that she thereby benefited from the tax advantages of paying tax on that basis.

(j) None of the members of the group enjoyed the benefits associated with employment workers' status which would apply to HCA's employees, such as holiday pay, sick pay, indemnity insurance or entitlement to membership of a pension scheme.

(k) The members were free to market themselves to, and work for, other hospitals, and did so.

6. On 1 July 2016, the 2015 agreement was terminated. The Claimant claims that a new agreement was formed comprising either male doctors or female doctors without children. The Claimant claimed that as a female doctor with children, she was unlawfully excluded from the group.

The Claimant's Claims

7. On 2 December 2016, the Claimant lodged proceedings in ET raising complaints of unlawful sex discrimination, harassment and victimisation against the Respondents. The claims may be summarised in very broad terms as follows:

(a) A claim against Dr Chong (for which the First Respondent was said to be vicariously liable) relating to the Claimant's NHS work at the First Respondent.

(b) Claims against Dr Chong and Ms Hall, the Fourth Respondent, relating to the Claimant's private work for HCA.

(c) Claims against Dr Chong also relating to the Claimant's private work for HCA.

8. The Claimant has also raised a breach of contract claim against HCA. That claim was subsequently withdrawn before the ET.

9. The matter came on for a Preliminary Hearing before the ET in order to determine a number of issues, including whether or not the Claimant and Dr Chong were employees of HCA for the purposes of section 83(2)(a) of the **EqA**. I shall refer to employment under that section as "employment in the extended sense".

The Tribunal's Findings

10. The Tribunal identified the issues at paragraph 72 of the Reasons:

(1) Were their contracts entered into by the Claimant and Dr Chong as individuals personally to do work?

(2) If they were, were the individuals "employed under" those contracts?

A The Tribunal noted that those issues had been submitted by HCA's representative and that Ms Jolly for the Claimant had not objected.

B 11. Based on its findings of fact and analysis of the law, the Tribunal made the following findings in respect of the first identified question:

> **"90. I turn first to the terms of the 2015 agreement. It was not made between HCA and any individual; the contracting parties were HCA on one hand and a group of consultant Neuroradiologists, including the Claimant and Dr Chong, on the other. Furthermore, obligations were imposed by the agreement on the group rather than on any individual and the members of the group were expressly liable on a joint and several basis. Under its terms, HCA was under no obligation to provide any work but, insofar as work was provided, it was to the group as a whole and not to any individual. The group was responsible for devising and providing to HCA a rota and HCA had no say in which individual was assigned on any particular day nor did it have any concern as to which of the individuals provided the services on a particular day, so long as the services were provided. Furthermore, the group had an express power to substitute an alternative consultant who was not a member of the group but it had an unfettered power to substitute for each other within the group and that power was regularly exercised by members of the group sometimes at short notice.**
>
> **91. I have accepted Mr Bryant's submission, in accordance with the principles in *Arnold*, that the terms of the agreement are to be interpreted objectively and in light of the known circumstances at the time of the agreement and not with the benefit of hindsight. I have seen no evidence to suggest that at the time the agreement was entered into or at any point up to these proceedings that the agreement did not reflect the true objective intention of the contracting parties. Ms Jolly now suggests that the agreement does not reflect reality. Whilst she has not set out precisely which parts of the agreement are said not to reflect reality, the general thrust is that the reality was that there were a series of individual agreements between individual consultants and HCA rather than the group arrangement; she has also suggested that the provision in the agreement that the consultants were jointly and severally liable is a fiction. She maintains that, following the principles in *Autoclenz*, that I should find that the agreement was otherwise than what is set out in the written terms of the 2015 Agreement.**
>
> **92. However, I do not accept this. Firstly, as is evident from the findings of fact I have made, the core terms of the 2015 agreement did reflect what was happening in practice and indeed what had been happening in practice for many years, at least since 2006. The group had always supplied the services on a group basis, had always substituted amongst themselves in terms of the rota and had always had an agreement where HCA were instructed to split the fees equally between all of them, regardless of the respective amounts of work which any given member of the group did. Therefore, the reality is that it was the earlier individual agreements which did not reflect the reality of the situation and not the group agreement which was in place from 2011 onwards and the group agreement in 2015.**
>
> **93. The answer to the question for the Tribunal as to "what was the true agreement between the parties", as set out in *Autoclenz*, is that the true agreement was reflected in the arrangements in 2011 and 2015 rather than in the contractual arrangements in place before then.**
>
> **94. Furthermore, in relation to the other principle from *Autoclenz* which I referred to in the section on the law above, I do not accept that there was a substantial difference in the relative bargaining power of the parties in this case. Dr Chong, the Claimant and the other consultants are all highly educated intelligent individuals who were capable of knowing the terms they were signing up to and indeed of negotiating those terms. Whilst, as Dr Chong said in evidence, many of the terms were terms which the consultants wanted in themselves anyway and although their ability to negotiate already generous fee arrangements was limited, there were ongoing discussions about the terms of the contract and the nature of the services throughout the group's engagement with HCA and they did, through Dr Chong, negotiate. This is not a case like that of the valets in *Autoclenz* where there was real and significant inequality of bargaining power between the parties.**

95. Furthermore, the terms of the 2015 agreement were clear. I have already referred in the findings of fact above to the errors in the 2015 agreement, particularly when set alongside the 2011 agreement, where references to "Consultant" in the singular should have been to "Consultants" plural and have concluded that, looking at all the circumstances, these were typographical errors and the references should simply have been in the plural. When one does look at the whole picture, I consider, for the reasons already set out in my findings of fact, that it is clear that these singular/plural references are merely mistakes and that the proper reading of the contract is that it is between HCA and the three consultants as a group.

96. The agreement was, therefore, not an agreement between the Claimant as an individual (or Dr Chong as an individual) and HCA but rather an agreement between a group of consultants and HCA.

97. Ms Jolly submits that, importantly from her client's point of view, the clause in the 2015 agreement regarding the consultants being jointly and severally liable, was a fiction, and she relies on the fact that Dr Chong said in evidence that he had not paid much attention to that clause when it was put into the agreement. However, there is a great deal of difference between an individual not paying much attention to a clause and that clause not having any effect. The clause was there, set out in the agreement, very clearly. There is no suggestion from anyone that it was never intended to apply. Furthermore, it is not a clause which is a surprising one to see in an agreement of this sort. I do not, therefore, accept that this clause was a fiction; it was part of the agreement.

98. The only clause in the 2015 agreement which my attention has been drawn to which should not have been included was the non complete clause [sic]. This is, however, a clause which Ms Jolly seeks to rely on in her later arguments in relation to the level of control which she says HCA exercised over the Claimant (and the other consultants). However, even if it were mistakenly included and did therefore form part of the agreement, it did not, as set out in my findings of fact, in fact place any restriction in practice upon any of the consultants.

99. Turning to the issue of whether there Claimant [sic] and Dr Chong had entered into a contract personally to do work, as I have found, the essence of the 2015 agreement was that the group, which at the time consisted of the Claimant, Dr Chong and Dr Mankad, undertook to provide Neuroradiology reporting services to HCA. There was no obligation on HCA under the agreement to provide any work to the group. No individual member of the group was entitled, under the agreement, to be provided with any work. It was agreed that any work and any fees would be split evenly between the members of the group, but that was a separate agreement between those members of the group and was no part of any agreement with HCA. The essence of the agreement was that HCA had contracted with another business, i.e. the group, for the provision of services. How the group agreed amongst its members to provide those services was entirely up to the group.

100. As noted, this is supported by what had been happening for some years before the 2015 agreement. The group allocated slots in the rota to its members and notified HCA. HCA did not mind who from the group covered any particular slots and did not have to give, and was not asked to give, permission for changes to the rota, which occurred frequently and often at the last minute without any issues being raised by HCA. It is also of note that on occasions members of the group took time out of the rota, for example, when Dr Mankad had to go to India for compassionate reasons and the Claimant for some two months following the birth of her child; again, as long as someone covered the relevant slots in the rota, HCA had no issue with this.

101. I therefore accept Mr Bryant's submission that this amounts to an unfettered right to substitute within the members of the group and that that is therefore inconsistent with a contract personally to do work (in accordance with paragraph 84 of *Pimlico Plumbers*). The fact that the Claimant and her fellow consultants within the group could only substitute another member of the group (who by definition had practicing privileges at the Portland Hospital and the relevant skills and experience) does not detract from this; there was [an] unfettered right to substitute within the group.

102. Ms Jolly has submitted that the group aspect of the agreement is a "red herring", that it was no more than an administrative convenience and does not detract from the essence of the agreement, which she says was personal performance by each of the individual doctors who formed the relevant group. However, I reject that submission, which is entirely contradictory to the facts that I have found. By contrast, rather than being a "red herring", the group aspect is the most significant feature of these arrangements and one which means that neither the Claimant nor Dr Chong entered a contract as an individual personally to do work.

103. Ms Jolly suggested that, at paragraph 30 of her skeleton, insofar as the Claimant was able to swap her rota shifts with either of the other two consultants in the group, this amounted to no more than "shift swapping" or job sharing and was not therefore substitution. For the reasons given above, I do not agree with or accept this analysis. However, the language which she used, and which she expanded upon in her oral submissions, was language used in the *Pimlico Plumbers* case, and used in relation to a different factual scenario in that case, where there was a written contract expressly requiring personal performance (unlike the facts of this case) and an argument was put as to whether that condition of personal performance was affected by the fact that in practice engineers such as the claimant in that case occasionally swapped jobs around with other plumbers; it was concluded that this did not affect the requirement for personal performance in that contract. The facts of that case are, therefore, entirely different from the facts in this case where not only is there no requirement for personal performance but there was an unfettered right to substitute amongst the members of the group.

104. The Claimant therefore fails at this point in relation to the issue I have to decide.

105. Moving on, for completeness, there was also a right under the agreement to substitute, albeit with HCA's consent, outside the group. This was, I accept, a real right and had been exercised in respect of Dr Jarosz under a previous version of the 2015 agreement; it was agreed that he would substitute if needed but in the event Dr Chong and Dr Mankad covered the entire rota between them. There was therefore a genuine power to substitute outside the group; it was not however an unfettered power to do so and therefore it is far less clear as to whether this right would in itself have prevented the agreement from being one of personal service. This right was exercised only occasionally, which points against that; furthermore, whilst HCA and the consultants were obliged to use their "reasonable endeavours to mutually agree that a substitute can be provided", I do not consider it to be a right to substitute "limited only by the need to show that the substitute is as qualified as the contractor to do the work" (the fourth example given at paragraph 84 of *Pimlico Plumbers*) and therefore inconsistent with personal performance; there would still be scope for HCA to refuse someone ostensibly qualified to provide the services. Therefore, whilst this is a close run thing, on balance I consider that the degree of fetter associated with this right is enough so that its inclusion does not preclude the possibility of personal service (were personal service not precluded by the unfettered right of substitution within the group referred to above)."

12. As to the second issue identified by the Tribunal - namely whether if there was a contract to do work personally, the Claimant and Dr Chong were employed under such a contract - the Tribunal concluded as follows:

(a) Control of membership of the group clearly lay in the hands of the group itself.

(b) The Claimant presented herself as an independent contractor and arranged her tax affairs accordingly.

(c) HCA did not control the rotas.

(d) The totality of the evidence did not show a substantial degree of integration into HCA's business.

(e) The case of **Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005, in which a doctor was found to be a worker in relation to the Respondent company to whom

A he supplied services as a hair restoration surgeon, could be distinguished because there were crucial differences between that case and the circumstances of the present one.

B 13. The Tribunal said as follows:

> **"121. However, there are also some crucial differences between the *Westwood* case and the present one. The main obvious and crucial distinction is that Dr Westwood was not part of any group arrangement with the respondent company such that he had agreed to split work and fees with others. A further difference is that Dr Westwood provided his services exclusively at the respondent company's premises dealing face to face with that company's clients, which was not the case here. Another distinction is the fact that he was approached and recruited, which was not the case here. Another is that he, as an individual, was expressly required under his contract to provide such advice and assistance to the respondent company which the respondent company might request, to make himself available on request and to obey all reasonable instructions, none of which was the case here. Another was that he as an individual had contracted specifically and exclusively to carry out a particular type of work for the respondent company, which was not the case here. Another was that there was no suggestion of any right of substitution in Mr Westwood's agreement, indeed the question of engagement personally to do work was conceded and was not even a live issue before the Tribunal, which is not the case here. Mr Bryant also noted that the Court of Appeal in *Westwood* discouraged any "prescriptive approach" which would tend to apply a gloss to the statutory wording (paragraph 18) and expressly declined to give any general guidance (paragraph 20)."**

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D

14. The Tribunal therefore concluded that neither the Claimant nor the Third Respondent, Dr Chong, were employees of HCA in the extended sense and within the meaning of section 83(2)(a) of the **EqA**.

E

Legal Framework

F 15. Section 83(2)(a) of the **EqA** provides:

> **"(2) "Employment" means -**
>
> **(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;**
>
> **…"**

G

16. It is common ground that only the third limb of this definition is relevant for present purposes. Thus, the question for the Tribunal was whether the Claimant was employed under a contract personally to do work.

H

17. There is some similarity between the third limb of section 83 and the definition of a worker under section 230(3)(b) of the **Employment Rights Act 1996** ("the 1996 Act"). That provides:

> **"(3) In this Act "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."**

18. The interplay between these provisions has been considered in various cases. I was taken to several, but I shall just refer to just two. In **Windle v Secretary of State for Justice** [2016] ICR 721, the Court of Appeal rejected the argument that mutuality of obligation was only relevant in cases concerned with employees and not with the issue of whether the Claimant was engaged under a contract personally to provide services. In that case, in which professional interpreters who worked on an assignment-by-assignment basis for the Court and Tribunal Service, the Claimants were held to be in a relationship which involved no mutuality of obligation and were not therefore employees in the narrower sense.

19. Underhill LJ analysed section 83 of the **EqA** in that case as follows:

> **"8. Section 83(2)(a) identifies three kinds of contract. The first - "a contract of employment" - means a contract of service. The claimants accept that they were not employed under such a contract. It is their case that they were employed under the third kind of contract listed, namely "a contract personally to do work". The best explanation of what that phrase refers to appears in *Bates van Winkelhof v Clyde & Co LLP (Public Concern at Work intervening)* [2014] ICR 730. In that case the Supreme Court was concerned with whether the claimant was a "worker" within the meaning of section230(3) of the Employment Rights Act 1996, but Baroness Hale of Richmond DPSC, who delivered the majority judgment, reviewed the field more widely. Limb (b) of section 230(3) refers to employment under**
>
> > **"any other contract … 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".**
>
> **Baroness Hale DPSC pointed out, at para 25, that that formulation distinguished between two kinds of self-employed people:**

> **"One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] ICR 1004 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a 'worker' within the meaning of section 230(3)(b) of the 1996 Act."**

She then, at paras 31-32, went on to observe that the same distinction was recognised for the purpose of discrimination law, even though section 83(2)(a) of the 2010 Act does not contain anything equivalent to the elaborate words of exception in the second half of section 230(3)(b). She said:

> **"31. As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class. Discrimination law, on the other hand, while it includes a contract 'personally to do work' within its definition of employment (see, now, Equality Act 2010, section 83(2)) does not include an express exception for those in business on their account who work for their clients or customers. But a similar qualification has been introduced by a different route.**
>
> **32. In *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328 the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a 'worker' for the purpose of an equal pay claim. The court held, at para 67, following *Lawrie-Blum v Land Baden-Württemberg* (Case C-66/85) [1987] ICR 483: 'there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration'. However, such people were to be distinguished from 'independent providers of services who are not in a relationship of subordination with the person who receives the services' (para 68). The concept of subordination was there introduced in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account. It was used for the same purpose in the discrimination case of *Hashwani v Jivraj* [2011] ICR 1004."**

9. As Baroness Hale DPSC there acknowledged, the qualification on the apparently broad scope of the phrase "a contract personally to do work" had in fact already been recognised in the decision of the Supreme Court in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] ICR 1004, although the discussion is less explicit. In that case the issue was whether an arbitrator was an employee for the purpose of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), which had an identical definition. Lord Clarke of Stone-cum-Ebony JSC, with whose judgment the other members of the Supreme Court agreed, emphasised, at para 36, that it was not enough that the putative employee should be a party to a contract personally to do work: he or she must be "employed under" such a contract.

10. It has become common to refer to persons employed under contracts falling within the terms of section 230(3)(b) of the 1996 Act as "limb (b) workers". Because, inconveniently, the 2010 Act uses different language, it is inapt to refer to employees of the third kind listed under section 83(2)(a) by the same label. I will refer to them as "employees in the extended sense".

11. As to how the distinction is to be made between the two kinds of self-employment - that is, between employees in the extended sense and the "truly self-employed", as it is sometimes put - in *Hashwani* Lord Clarke JSC said, at para 34:

> **"The essential questions … are … those identified in paras 67 and 68 of *Allonby* [2004] ICR 1328, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the**

> **parties … The answer will depend upon an analysis of the substance of the matter having regard to all the circumstances of the case."**

12. It will be seen that both Baroness Hale DPSC in *Bates van Winkelhof* and Lord Clarke JSC in *Hashwani* refer to the decision of the Court of Justice in *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328; [2004] ECR I-873. This concerned an equal pay claim by part-time lecturers at a further education college who had initially been employed by the college but had been made redundant and required to offer their services through an agency. One of the issues was whether the claimants were "workers" within the meaning of article 141 of the EC Treaty. At paras 64-72, pp 1359-60, the Court said:

> **"64. The term 'worker' within the meaning of article 141(1)EC is not expressly defined in the EC Treaty. It is therefore necessary, in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the treaty.**
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> **65. According to article 2EC, the Community is to have as its task to promote, among other things, equality between men and women. Article 141(1)EC constitutes a specific expression of the principle of equality for men and women, which forms part of the fundamental principles protected by the Community legal order: see, to that effect, *Deutsche Post AG v Sievers* (Joined Cases C-270/97 and C-271/97) [2000] ECR I-929, 952, para 57. As the court held in *Defrenne v Sabena* (Case 43/75) [1976] ICR 547, 566, para 12, the principle of equal pay forms part of the foundations of the Community.**
>
> **66. Accordingly, the term 'worker' used in article 141(1)EC cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively.**
>
> **67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration: see, in relation to free movement of workers, in particular *Lawrie-Blum v Land Baden-Württemberg* (Case 66/85) [1987] ICR 483, 488, para 17, and *Martínez Sala v Freistaat Bayern* (Case C-85/96) [1998] ECR I-2691, para 32.**
>
> **68. Pursuant to the first paragraph of article 141(2)EC, for the purpose of that article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer. It is clear from that definition that the authors of the treaty did not intend that the term 'worker', within the meaning of article 141(1)EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services (see also, in the context of free movement of workers, *Meeusen v Hoofddirectie van de Informatie Beheer Groep* (Case C-337/97) [1999] ECR I-3289, 3311, para 15).**
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> **69. The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.**
>
> **70. Provided that a person is a worker within the meaning of article 141(1)EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article: see, in the context of free movement of workers, *Bettray v Staatssecretaris van Justitie* (Case 344/87) [1989] ECR 1621, 1645, para 16, and *Raulin v Minister van Onderwijs en* Wetenschappen (Case C-357/89) [1992] ECR I-1027, 1059, para 10.**
>
> **…"**

13. Both Lord Clarke JSC in *Hashwani* and the Court of Justice in *Allonby* refer to a "relationship of subordination". In *Bates van Winkelhof* [2014] ICR 730, para 39 Baroness Hale DPSC warned against treating the presence or absence of "subordination" as the infallible touchstone for distinguishing between the two kinds of self-employed worker under section 230(3). That term was, however, used by the employment tribunal in this case (loyally applying *Hashwani*) and neither party criticises it for doing so. I will occasionally use it myself, though bearing in mind Baroness Hale DPSC's caveat."

20. It is clear from that analysis that:

(a) The jurisprudence under limb (b) of section 230(3) of the **Employment Rights Act 1996** ("ERA") is relevant to an analysis of whether a person is employed under a contract personally to do work.

(b) There are two kinds of self-employed people: those that carry on a professional business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them (and who would therefore not be workers); and those who provide their services as part of a profession or business undertaking carried on by somebody else (and who would therefore be workers).

(c) Under EC case law, the concept of subordination may distinguish between those who are independent providers of services and those workers who, for a certain time, perform services for and under the direction of another person in return for remuneration. However, subordination is not by any means to be regarded as the "infallible touchstone" for distinguishing between the two kinds of self-employed worker under section 230(3) of the **ERA**.

(d) Whether an employee is or is not employed under a contract personally to work will depend upon the detailed consideration of the relationship between the parties. In other words, the facts will be all important.

21. That analysis was approved in the more recent decision of the Court of Appeal in **Pimlico Plumbers Ltd v Smith** [2017] ICR 657, where Underhill LJ said as follows:

> **"123. At its most general, the issue is whether the employment tribunal 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 tribunal'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 1998 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] ICR 721, para 8. The question for the tribunal 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. …"**

22. The Claimant further submits that section 83(2)(a) of the **EqA** must be construed in accordance with the **Recast Gender Directive** and European Law more generally. This includes, in particular, Article 14 of the Directive, which provides:

> **"1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:**
>
> > **…**
> >
> > **(c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;**
> >
> > **…"**

Grounds of Appeal

23. All but one of the Claimant's nine grounds of appeal were permitted to proceed (subject to one or two exceptions) after a Rule 3(10) Hearing presided over by Her Honour Judge Eady QC. Those grounds of appeal overlap to a very significant extent. Ms Jolly QC, who appears on behalf of the Claimant with Ms Fraser Butlin, as was the case below, has very sensibly grouped grounds 1 to 4 and 9, and grounds 5, 6 and 8, together in her skeleton argument. There are now essentially just three grounds of appeal. These are as follows:

(a) Grounds 1 to 4 and 9: The Tribunal misdirected itself when analysing section 83(2)(a), in particular by focusing on the formality of the "group" contract as opposed to the nature of the relationship during the period that work was being done.

(b) Grounds 5, 6 and 8: The Tribunal erred in its analysis of the substance of the relationship and its approach to relevant legal and evidential matters such as the mutuality of obligation, personal service and subordination.

(c) The Tribunal's conclusion was perverse. In particular, it was certainly wrong to conclude that: (1) the changed contractual agreements reflected the reality on the ground; and (2) no individual was required to provide personal service, particularly having regard to the Tribunal's own finding that personal service was required once an individual consultant agreed to be available for a particular slot.

24. I shall deal with each of these three grounds in turn.

Grounds 1 to 4 and 9

Submissions

25. Ms Jolly submits that the Tribunal erred by placing undue emphasis on the formality of the group contract, and in failing to consider the true nature of the work done and the relationship between the parties. She submits that there is no requirement under the legislation that a contract must be a personal contract. Ms Jolly accepts that the Courts have treated limb (b) workers under section 230(3) of the **ERA** in the same way as employees in the extended sense under section 83(2)(a) of the **EqA**. However, she submits that there is a key difference not focused on by the Courts and that is the opening words to section 230(3). These provide that a worker means an "individual who has entered into or works under" the relevant contract. There is, says Ms Jolly, no equivalent provision in section 83(2).

26. The effect of this difference, if I understand the submission correctly, is that whereas section 230(3) requires there to be a contract with an individual, section 83(2) of the **EqA** is

broader in scope and does not require there to be a contract only with an individual. If Parliament had wished to exclude people from protection because the formal contract was not with an individual, it could be expected to do so directly and expressly, said Ms Jolly, but it did not do so. Moreover, having regard to the need to interpret legislation broadly in order to ensure that the fundamental freedoms conferred by EC law are not diluted, one should, she submits, not be swayed by the nature of the legal relationship between the parties but should focus mainly on the question of whether the person is a "worker". In doing so the concept of a worker must not be interpreted narrowly.

27. Ms Jolly further submits that if individuals providing their services through a group were excluded from basic anti-discrimination provisions, it would leave a significant lacuna in the law which cannot have been the intention behind these provisions. When considering the autonomous definition of "worker" under EU law there is, Ms Jolly submits, no basis for excluding someone because of the formal strictures of the contract in place. She submits that the answer to the question is clear, but if there is any doubt then the question should be referred to the Court of Justice of the European Union.

28. Mr Bryant QC, for the Second and Fourth Respondents, submits that the Tribunal did not simply rely on the fact that the agreement had been signed by a number of consultants as a group in deciding that the Claimant was not an employee for the purposes of section 83 of the **EqA**. Rather, he said, the Tribunal looked beyond the form and examined in detail the substance as to what had been happening in practice before and during the currency of the agreement to see whether its written terms in fact reflected the true agreement between the parties.

29. He submits that in reality the group was, as a matter of law, a partnership (although I should say the Tribunal was not asked to make any determination as such, and nor is this Tribunal) and as such there was protection under the **EqA** in respect of the acts of other members. He further submits that the Claimant would also have protection in respect of any acts of HCA or its employees under the contract worker provisions since the Claimant had been supplied by the hospital under the group contract for HCA. There is therefore no lacuna in the law; the Claimant simply brought her claim under the wrong provisions.

Analysis and Conclusions - Grounds 1-4 and 9

30. The Tribunal did not, in my judgment, misdirect itself in applying section 83(2)(a). The question under that section is whether the Claimant was employed under a contract personally to do work. It is a necessary part of that analysis to consider the terms of the contract. In considering whether it was still relevant to consider the dominant purpose of a contract in determining whether it was a contract of employment in the extended sense, Lord Clarke said as follows in **Jivraj v Hashwani** [2011] ICR 1004, at paragraphs 36 to 38, having set out some cases dealing with dominant purposes issue:

> **"36. In particular, the cases did not focus on the fact that the "employment" must be *employment under* a contract of employment, a contract of apprenticeship or a contract personally to do work. Given the importance of the EU perspective in construing the legislation, including the 2003 Regulations, the cases must now be read in the light of those decisions. They show that it is not sufficient to ask simply whether the contract was a contract personally to do work. They also show that dominant purpose is not the test, or at any rate not the sole test.**
>
> **37. That is not to say that the question of purpose is irrelevant but the focus is on the contract and relationship between the parties rather than exclusively on purpose. Elias J, sitting as President of the Employment Appeal Tribunal, recognised some of the difficulties in *James v Redcats (Brands) Ltd* [2007] ICR 1006. He discussed the relevance of dominant purpose in this context by reference to the cases at paras 53 to 68. At para 59, after quoting from the judgment of Balcombe LJ in *Gunning* [1986] ICR 145, he said that the dominant purpose test is really an attempt to identify the essential nature of the contract. In the context of the case he was considering he posed the question whether it was in essence to be located in the field of dependent work relationships or whether it was in essence a contract between two independent business undertakings.**
>
> **38. At paras 67 and 68, after referring to a number of cases and observing at para 65 that the description of the test as one of identifying the dominant purpose was perhaps not an altogether happy one, he said:**
>
> > **"67. An alternative way of putting it may be to say that the courts are seeking to discover whether the obligation for personal service is the dominant feature of the**

> **contractual arrangement or not. If it is, then the contract lies in the employment field; if it is not - if, for example, the dominant feature of the contract is a particular outcome or objective - and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field.**
>
> **68. This is not to suggest that a tribunal will be in error in failing specifically to apply the 'dominant purpose' or indeed any other test. The appropriate classification will in every case depend upon a careful analysis of all the elements of the relationship, as Mr Recorder Underhill QC pointed out in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667. It is a fact sensitive issue, and there is no shortcut to a considered assessment of all relevant factors. However, in some cases the application of the 'dominant purpose' test may help tribunals to decide which side of the boundary a particular case lies." "**

31. See also **Pimlico Plumbers Ltd v Smith** at paragraph 127, where Underhill LJ refers to it being essential to identify the terms of the contract and that that is the "starting point".

32. Ms Jolly referred me to a number of European cases in several of which it was stated that the nature of the legal relationship "is of no consequence in determining whether or not a person is a worker within the meaning of Article 141 of the Treaty". These cases were as follows:

(a) **Allonby v Accrington and Rossendale College** [2004] ICR 1328:

> **"69. The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.**
>
> **70. Provided that a person is a worker within the meaning of article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article: see, in the context of free movement of workers, *Bettray v Staatssecretaris van Justitie* (Case 344/87) [1989] ECR 1621, 1645, para 16, and *Raulin v Minister van Onderwijs en Wetenschappen* (Case C-357/89) [1992] ECR I-1027, 1059, para 10."**

(b) **Betriebsrat der Ruhrlandklinik** C-216/15, a case dealing with the employment status of temporary agency workers, where it was stated:

> **"28. It follows, moreover, from Article 1(1) of Directive 2008/104, and from Article 3(1)(c) thereof which defines the concept of 'temporary agency worker', that that directive applies not only to workers who have concluded a contract of employment with a temporary-work agency, but also to those who have an 'employment relationship' with such an undertaking.**
>
> **29. Therefore, neither the legal characterisation, under national law, of the relationship between the person in question and the temporary-work agency, nor the nature of their legal relationships, nor the form of that relationship, is decisive for the purposes of characterising that person as a 'worker' within the meaning of Directive 2008/104. Accordingly, in particular, contrary to what Ruhrlandklinik contends in its observations, a person, such as Ms K., cannot be excluded from the concept of 'worker' within the meaning of that Directive, and thus from the scope of that directive, on the sole ground that she does not have a contract of employment with the temporary-work agency and that she therefore does not have the status of worker under German law."**

(c) **Raulin v Minister van Onderwijs en Wetenschappen** [1992] ECR I-1027, where it was stated:

> **"10. It should be recalled at the outset that the Court has consistently held that the concept of worker has a Community meaning and must not be interpreted in a restrictive manner. Nevertheless, in order to be regarded as a worker, a person must perform effective and genuine activities to the exclusion of activities on such a small scale as to be purely marginal and ancillary. The essential characteristic of an employment relationship is that for a certain period a person performs services for and under the direction of another person in return for which he receives remuneration (see in particular the judgment in Case 197/86 *Brown v Secretary of State for Scotland* [1988] ECR 3205, paragraph 21). In this context, the nature of the legal relationship between the employee and the employer is not decisive in regard to the application of Article 48 of the EEC Treaty (see the judgment in Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] ECR 1621, paragraph 16)."**

(d) I was also taken to the case of **Bettray v Staatssecretaris van Justitie** C-344/87 referred to in the **Raulin** judgment.

33. The effect of those cases was clearly not that the legal relationship is entirely irrelevant. Indeed, several of the cases say no more than the nature of the legal relationship is not decisive. What they do say, and this is hardly controversial, is that where a person is found to be a worker within the meaning of the relevant provisions, the legal designation of that relationship should not undermine that finding.

34. In this case, the Tribunal considered carefully the nature of the contractual relationship. It was right to do so as part of its analysis of all the relevant circumstances of the case. Ms Jolly's submission, however, is that the Tribunal's analysis began and ended with the finding that this was a group contract, that it saw all remaining issues through the lens of this being a group contract, and that it did not therefore fulfil its function of considering all the facts and circumstances and in particular the substance and nature of the relationship between the Claimant and HCA.

35. The basis for this submission is paragraph 89 of the Reasons where the Tribunal identified the issue as follows:

> **"<u>Contracts entered into by Claimant/Dr Chong as individuals personally to do work?</u>**
>
> **89. I turn first to the question of whether or not the Claimant and Dr Chong entered into the 2015 agreement as individuals personally to do work. If it is not established that the Claimant did so, she cannot be an employee for the purposes of Section 83(2)(a)."**

36. Ms Jolly says that the reference to entering the agreement 'as individuals' indicates that the Tribunal was applying the provisions of section 230(3)(b) of the **ERA** and thereby asked itself the wrong question, namely whether there was an agreement between the HCA and the Claimant as an individual. I do not accept that submission for four reasons.

37. First, I consider the Claimant's submission to be based on a misreading of paragraph 89. The reference to entering the agreement 'as individuals' was in connection with the personal obligation to do work, which is a necessary requirement for there to be employment in the extended sense. Although section 83(2)(a) of the **EqA** does not refer expressly to individuals, section 230(3)(b) of the **ERA** does, in that it refers to "the individual undertaking to do or perform personally any work or services". It is clear that the Tribunal is referring to "individuals" in that sense rather than in the sense contended for by Ms Jolly.

38. Second, insofar as the Tribunal has imported that use of the word "individual" from section 230(3)(b) in identifying the issue, there was no error in doing so. The authorities have, as already stated, confirmed that the approach under section 230(3)(b) of the **ERA** is similar to that under section 83(2)(a) of the **EqA**. I do not accept Ms Jolly's argument that the use of the word "individual" in section 230(3) of the **ERA** means that that provision only bites where there is a contract with a single individual. There is nothing in the wording of section 230(3) that precludes its application where the contract was entered into by an individual with others.

A The key issue is whether the obligation arising out of such a contract, whether it be as an individual or whether it be as a group, is such as to impose an obligation to do or perform work personally.

B

39. Third, the Tribunal did not, as Ms Jolly submits, impermissibly insert a requirement into section 83 that the contract must be a personal contract. Had it done so then this analysis would have ended after determining that there were no separate contracts with each individual C consultant. But the analysis did not end there. Instead, the Tribunal embarked on a careful analysis of all the factors necessary to determine whether the Claimant was employed under a contract to do work personally. In particular, it considered the nature of the obligations D imposed by the contract and whether those obligations are placed on individual members of the group or the group as a whole. The Tribunal reached a conclusion at paragraph 96 that the agreement was not an agreement with the Claimant as an individual, but rather an agreement between a group of consultants and HCA.

E

40. If the Tribunal had approached the matter incorrectly and on the basis that the group contract was by itself sufficient to render an employment relationship impossible, then its F analysis would have stopped there. However, the analysis, as I have said, did not end there, as is clear from the remainder of the Judgment, and in particular from paragraph 99 onwards, where the Tribunal turned to consider "the issue of whether [the] Claimant and Dr Chong had G entered into a contract personally to do work".

41. It would have been wholly superfluous to consider that issue if, as the Claimant suggests, the Tribunal had approached the section 83 question on the basis that there must be a H personal contract in order to fall within it. In analysing whether the Claimant had entered into a

contract personally to do work, the Tribunal noted, amongst other matters, that no individual member of the group was entitled to be provided with any work. Furthermore, it was noted that any work and fees would be split evenly between members of the group regardless of how much each individual had done. That was an arrangement between the members of the group and in respect of which HCA had no input. That, it seems to me, is a significant indicator that the arrangement was not one whereby work was to be provided personally.

42. Fourth, the way in which the issue was framed was apparently agreed, or at least not objected to, by the Claimant.

43. Thus, the main plank upon which Ms Jolly rests her arguments in this appeal falls away. The Tribunal did not ask itself the wrong question and nor did it introduce a requirement there must be a personal contract as opposed to a group one in order to satisfy section 83(2)(a) of the **EqA**. None of the EC cases to which I was referred effect that conclusion in the slightest. It is worth noting that most of the European cases were not cited to the Tribunal and nor was the argument put in the terms that it is at present. However, even if it had been, there is nothing to indicate that the Tribunal's judgment would have been any different. The Tribunal did not approach the issue as if any single factor, not least the nature of the contractual relationship, was decisive of the question it had to answer.

Lacuna

- The Claimant's submission here is that the Tribunal's decision means that there is a lacuna in the protection conferred by the **EqA**, in that workers engaged under a group contract are not within scope. I can deal with this point very briefly. The premise of the Claimant's submission is incorrect because the Tribunal did not decide that workers engaged in group

A contracts are necessarily outside the protection. The Tribunal concluded that the Claimant was not in employment in the extended sense. That conclusion was based on all the circumstances including the fact there was a group contract. There may well be other cases where there was a group contract but the obligations on the individual members of the group are such that work is B to be performed personally. In such cases there would be no "lacuna", so-called, since the members would have the protection available to those in employment in the extended sense.

C

44. The concept of a lacuna, it seems to me, is misplaced in any case. The mere fact that the Claimant was not found to be in employment in the extended sense does not mean that there is a lacuna. The legislation is not, and is not intended to be, all encompassing such that any and D every relationship between two parties where work is done in return for remuneration amounts to employment in the extended sense. There will be cases where, on the facts, the requirements of the statute are not met. This was one such case.

E

45. In response to the suggestion that there was a lacuna, Mr Bryant raised an argument (also raised below though not prominently) that the Claimant was a member of a partnership and that, as such, she would have a remedy against her fellow partners in respect of any F discriminatory treatment by them. This led to extensive submissions on both sides on the question of whether or not the Claimant was or could have been a partner. It is neither necessary nor appropriate for me to make any findings in this regard. It is unnecessary because G the Claimant's argument that there is a lacuna is based, as I have said, on an incorrect premise. It is inappropriate because partnership was not an issue before the Tribunal.

H

46. The skeleton argument and the oral submissions did not cover all the subsidiary points raised in the Notice of Appeal. As these points in the Notice of Appeal were not formally withdrawn, and for completeness, I briefly address each of the points which arise as follows:

Ground 1

(a) This has been dealt with above.

(b) The Tribunal did not treat the form of contract as determinative.

(c) The Tribunal did consider the nature of the actual work performed; see for examples, paragraphs 31 to 36, 44 to 45, 61.13, 65, 68 and 69.

(d) The weight to be attached to evidence was a matter for the Tribunal. The points about paragraph 43 of the Reasons are dealt with below.

(e) The contractual terms argument is dealt with below.

(f) This has already been addressed.

(g) This has already been addressed.

Ground 2

(a) This argument is about the proper legal approach to the analysis of the terms. It was not pursued in the oral submissions. It is in any case unarguable that the Tribunal erred in applying a Supreme Court authority on contractual interpretation.

(b) This is not pursued.

(c) The Tribunal made a finding of fact about relative bargaining power. That conclusion is hardly perverse.

(d) This is the paragraph 43 point, which is addressed below.

(e) Not permitted.

(f) Not permitted.

(g) The weight to be attached to findings of fact or to evidence is a matter for the Tribunal.

(h) These are challenges to the Tribunal's finding of fact. Those findings cannot be said to be perverse.

(i) These challenges are to the Tribunal's finding of fact. No error of law is identified.

Ground 3

The Claimant's contentions about shift swapping are addressed below.

Ground 4

This would appear to be the lacuna point, which is addressed above.

Ground 9

The Tribunal did not approach its task with a close mind as suggested. See above.

47. That deals with grounds 1, 2, 3, 4 and 9, all of which are dismissed.

Grounds 5, 6 and 8

Submissions

48. Ms Jolly submits that the Tribunal erred in viewing the relationship through the lens of the group contract, which the Tribunal considered to be "the more significant feature of these arrangements". She further submitted that the Tribunal's conclusion that the contractual arrangements "more accurately reflected the reality of the situation" is unsupportable because neither Ms Hall nor Dr Chong were able to say why the arrangements were changed from the previous individual contracts or what the impetus for that change was. She also points to the terms of the 2015 agreement itself, which, she submits, all indicate that the obligations imposed on individuals were personal to the consultants.

49. As to the various matters taken into account in determining whether the Claimant was employed in the extended sense:

(a) The first is mutuality of obligation. Ms Jolly submits that the Tribunal failed to take account of the fact that there was a full rota service and that there was therefore an obligation on HCA to provide work.

(b) The second is personal service and substitution. As to this, Ms Jolly submits that the Tribunal failed to take account of the finding in paragraph 43 of the Reasons, which makes it clear, she submits, that there was an obligation on the Claimant personally. She submits that the Claimant's right of substitution was limited and that the Tribunal failed to consider the nature of the shift swapping, which was similar to that which existed in the **Pimlico Plumbers** case. In any event, she says the existence of some degree of substitution is not inconsistent with there being an employment relationship.

(c) The third is subordination. As to this, it is said that the Tribunal erred in its approach to subordination in that, once again, the Tribunal was improperly and materially influenced by the finding that this was a group arrangement, and that there was no real distinction between the circumstances of this case and those which pertained in the **Westwood** case.

50. Mr Bryant submits that these grounds largely raise issues of fact and the challenges are really perversity challenges, which come nowhere near to crossing the high hurdle in such appeals. He also says that the Claimant does not have permission to challenge findings in respect of the contractual terms, as these are not properly the subject of this appeal.

Analysis and Conclusions - Grounds 5, 6 and 8

51. In my judgment, the submission that the whole of the Tribunal's analysis was infected by the focus on the form - namely the group nature of the contract - cannot be accepted. The group nature of the contract was a relevant factor to be taken into account. Having correctly started with the contract, the Tribunal went onto consider all the other factors. The mere fact

that the group is mentioned in considering the other factors does not mean that the Tribunal was unduly swayed by that. It was, as I have said, a relevant factor to be taken into account.

52. Ms Jolly's challenge in respect of the finding that the contract reflected the reality of the situation must be rejected for the simple reason that it was open to the Tribunal to make that finding. There were facts found based on evidence presented, which supported that conclusion. See for example the analysis at paragraphs 30 to 50. The mere fact that there might have been some evidence going the other way, or an absence of an explanation from Ms Hall and Dr Chong as to why group contracts were introduced in 2011, does not undermine that conclusion. It cannot, on any view, be said that the Tribunal reached a conclusion which was perverse by reason of being wholly unsupported by any evidence.

Contractual Terms

53. I do not accept Mr Bryant's submission that this is not a matter properly before the Court. All of ground 1 was permitted to proceed and that does refer, albeit somewhat indirectly, to the Tribunal's findings in respect of the contractual terms. This challenge is based on the Tribunal's conclusion that insofar as the contract refers to "consultant" in the singular instead of "consultants" plural, that was a result of slack drafting, as the reality of the situation was that there was genuinely an agreement between the consultants plural and HCA. The Tribunal dealt with this as follows:

> **"56. However, in other areas of the 2015 agreement, rather than the expression "the Consultants" being used, there is frequently simply the use of "the Consultant". Ms Jolly has submitted that this in fact reflects that the agreement was effectively an individual agreement with each consultant. However, I do not accept this. Firstly, if one takes the use of "the Consultant" singular at face value, several clauses of the agreement do not make sense and therefore it seems unlikely that it was the intention that the singular should be used in these clauses. Secondly, the 2015 agreement contains a clause at 1.2.2 providing that "words importing the singular or plural number include the plural and singular number respectively". Thirdly, given the reality of the arrangements, it is simply impossible that each individual consultant can have undertaken to provide the entirety of the Portland Services. Fourthly, the plural of "Consultants" reflects, as noted, what had been happening in practice before this agreement was agreed. Therefore, even on the terms of the agreement itself, I find that this was genuinely an agreement between HCA and the "Consultants" plural. However, the language of the 2011 agreement confirms this even further. That agreement, as noted,**

properly reflects the plural of "the Consultants" throughout, which was the reality of the situation. What appears to have happened in relation to the 2015 agreement is slack drafting, where the singular should have been replaced by the plural in certain sections. However, that does not affect the meaning or interpretation of the agreement, which is that it relates to services being provided by "the Consultants" plural, in other words the group as a whole."

54. Ms Jolly says that this was a good example of the Tribunal's analysis being distorted by viewing the facts through the "lens" of the group contract. She took me carefully through the terms of the 2015 agreement to show that they all do make sense even without "distorting" the language used as the Tribunal sought to do. The difficulty for Ms Jolly is that the Tribunal has made a clear finding of fact as to the nature of the relationship between the consultants and HCA and that it was a relationship as between a group and HCA. As stated already, there were ample findings of fact supported by evidence on which that finding was based. If the terms of the contract, by their reference to consultant in the singular, were to override that finding of fact, then that would be to put form over substance. But, in any case, I do not see any error of law in the Tribunal's approach to the terms of the contract. The Tribunal gave four reasons for concluding that the 2015 agreement was between HCA and the consultants plural, notwithstanding the references to consultant singular:

(1) The first was that some clauses would not make sense if the reference to consultant in the singular were to be taken at face value. Whilst the Tribunal did not identify any such clauses, it is clear that in the absence of any definition for "consultant" some of the provisions do not make sense. For example, clause 2 refers to the fact that HCA has agreed to engage "the consultant" when it has clearly agreed to engage all three, as is apparent from the fact that the named parties are HCA on the one hand and the consultants plural on the other. If the phrase "the consultant" were to be read at face value, then the question would arise as to which consultant it so engaged.

(2) The second point relied upon is the fact that clause 1.2.2 states that the words "importing the singular or plural number include the plural and singular number

respectively". In the absence of a specific definition for "consultant" or "consultants", it seems to me that this interpretation provision enables the contract to be read consistently with the Tribunal's finding as to the reality of the situation, namely that this is a contract between HCA and the group of consultants.

(3) The third point is that it is impossible that each individual consultant could have undertaken to provide the entirety of the Portland Services. This would appear to be a reference to clause 3.7 and it may be that that clause is one of those that the Tribunal had in mind under its first point as not making sense. I agree that a literal reading of clause 3.7 would result in an undertaking which was not that which was intended by each individual consultant. Ms Jolly sought to attack that analysis by reference to the definition of 'medical services' to be provided under schedule 1 to the agreement, which were also couched in terms of obligations on the part of an individual consultant. However, that does not undermine the Tribunal's analysis as to the meaning of the clause when read literally. The Claimant's case might have had more force if the wording had been "each consultant" as opposed to "the consultant". The latter formulation certainly suggests that the Tribunal was correct that this agreement was the product of slack drafting. It is possible that a template intended for a single consultant has been adapted for use in a group situation, although I accept that no specific findings are made to that effect.

(4) The fourth point relied upon by the Tribunal was simply that its interpretation fits with its findings of fact. That is a view the Tribunal was entitled to reach. In my judgment, no error of law is disclosed by the Tribunal's analysis of the contracted terms.

Mutuality of Obligations

55. As to mutuality of obligation, I accept Mr Bryant's submission that the mere fact that there was a full rota and a lot of work provided by HCA did not mean that there was an

obligation to provide individuals with work. The point can be tested in this way: did the Claimant have any legal recourse under the contract in the event that work stopped being provided? Given the terms of the contract, which include no stipulated minimum quantity to be provided, it would appear that there is no remedy under the contract because the Respondent would not be in breach of any of its terms.

Substitution

56. Ms Jolly relies heavily on paragraph 43 of the Tribunal's Judgment, in which it concluded as follows:

> **"43. The group could allocate whichever consultant they agreed upon to any particular slot in the rota and HCA did not have to give and was never asked to give permission for changes to the rota, which occurred frequently and often at the last minute without any issue being raised by HCA. Furthermore, on several occasions members of the group took time out of the rota. Examples include when Dr Mankad had to go to India for compassionate reasons and when the Claimant took time out of the rota for some two months following the birth of her child. So long as someone covered the relevant slots, HCA had no issue with this. There was, therefore, an unfettered right to substitute within the members of the group. However, once an individual consultant had agreed as amongst the group to be available on a particular slot, that consultant was then obliged, subject to agreeing any further rota changes as amongst the group, to be available for that slot."**

57. Ms Jolly submits that this is an indication that there is not an unfettered right of substitution because once an agreement as to a particular slot has been reached then the consultant could not readily change that commitment and was obliged to fulfil it. However, Ms Jolly's argument seems to me to ignore one fundamental detail, which is that any obligation owed by the consultant who had agreed to a slot is owed to his or her fellow members and not to HCA. It is not any limitation on the right of substitution that is relevant for the purposes of analysing whether there is mutuality of obligation, but only those limitations imposed by the putative employer. Limitations to which a person has agreed with others are not, in my judgment, fetters on the right of substitution for these purposes.

58. In any case, even on the Tribunal's findings, the Claimant could still change her rota slot so long as her colleagues agreed. Furthermore, the Tribunal found that this did happen on many occasions, sometimes at the last minute (see paragraph 41). Those are findings of fact that cannot be challenged as being perverse, and to be fair not so challenged, and support the conclusion of an unfettered right to substitute.

59. Ms Jolly did take me to paragraph 84 of **Pimlico Plumbers** where the Master of the Rolls said as follows:

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

60. It was submitted that the facts of this case do not fit with the analysis of the Master of the Rolls in support of a finding of an unfettered right of substitution. I disagree. The Tribunal's findings were clear. It was entirely up to the consultants who covered which slots and changes were regularly made, often at the last minute, without any input from HCA. It was certainly open to the Tribunal to conclude on those facts that the right of substitution was unfettered. The fact that the substitution would be by another consultant in the group, and therefore by a person accepted by HCA as qualified to do the work, does not undermine that conclusion.

61. As in the Master of the Rolls' fourth example in **Pimlico Plumbers** above, a right of substitution limited only by the need to establish that the substitute is as qualified as the contractor to do the work will, subject to any exceptional facts, be inconsistent with personal performance. This is not a mere shift swapping arrangement as described in **Pimlico Plumbers**. There the employer was not obliged to agree any changes to shifts. By contrast, in the present case the Tribunal found that HCA had no say on who turned up for the rota so long as it was one of the group.

62. I do not therefore consider that the finding at the end of paragraph 43 of the Reasons was one which meant the Tribunal's conclusion on substitution was incorrect. The critical point is that HCA had no concern as to who covered the rota so long as they were covered. The Tribunal correctly regarded this as a factor pointing away from an obligation to perform work personally.

63. There was a further point based on the terms of clause 3.7 and clause 10 of the 2015 agreement. It was suggested that clause 3.7 reflected the true position, which was that there is an obligation on the Claimant to provide the services herself and that any right of substitution was limited. My reading of that clause is that it deals with the situation where external assistance is sought from outside the group. That is clear from the references in that clause to "other individuals" and the need for such to be approved by HCA. Those references would have been unnecessary if clause 3.7 was dealing only with substitution by one of the others in the group. Ms Jolly submits that that cannot be the case as clause 10 is the clause dealing expressly with subcontracting arrangements. Whilst it is correct that clause 10 does deal with subcontracting, that does not prevent clause 7 from also doing so. There is no inconsistency between the two terms, and clause 10 imposes further requirements where subcontractors are

engaged, (for example that any agreement with subcontractors be in writing) that are not imposed by clause 3.7.

Subordination

64. As to subordination, the submission here is also that the Tribunal was improperly influenced by its finding as to the group nature of the contract. In particular, it is said that it was wrong to treat the group as being effectively a business in its own right. This point does not raise any error of law. It is really a perversity argument. There is no merit in it. The Tribunal had regard to the fact that the members of the group had agreed to split fees evenly irrespective of the amount of work each did. That was an arrangement that could support the conclusions which the Tribunal reached about subordination. The factors relied upon by the Tribunal to distinguish this case from **Westwood**, seems to me to be entirely reasonable. Certainly there is nothing in the factors identified to suggest that the Tribunal went astray in its analysis of the distinguishing factors. Whilst the Tribunal did say that the main, obvious and crucial distinction between this case and that of Dr Westwood was that Dr Westwood was not part of any group arrangement, the Tribunal did also go on to refer to a host of other matters such as the agreement to split work and fees with others and the absence of any right of substitution in Dr Westwood's case (see paragraph 121). Those matters are more than ample, in my judgment, to distinguish this case from that of Dr Westwood.

65. The points made at paragraph 47 of the Claimant's skeleton argument attempt to reargue the merits of the case and do not raise any errors of law. For example, it is asserted that the Second Respondent had the power to veto anyone it did not want to be part of the group. That is inconsistent with the Tribunal's finding that the membership of the group was a matter for the members. Furthermore, it is said that the Claimant's ability to negotiate the terms of the

contract were "illusory" and the reliance is placed on some emails dealing with fees and remote access. However, having reviewed these matters it is not apparent to me that they demonstrate conclusively that the Tribunal was incorrect to find that the group was in a position through Dr Chong to negotiate fees.

66. It follows that for those reasons, grounds 5, 6 and 8 are also dismissed.

Perversity

67. The points made by the Claimant in paragraphs 50 and 51 of the skeleton argument come nowhere near to crossing the high hurdle that exists in respect of perversity claims. The points made in respect of whether the contract reflected the reality on the ground and whether there was an obligation to provide personal service have already been dealt with above.

Conclusion

68. For all these reasons, and notwithstanding Ms Jolly's very helpful submissions, this appeal is dismissed.