Neutral Citation Number: [2024] EAT 71

Case No: EA-2022-000623-AS

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 May 2024

**Before**:

**GAVIN MANSFIELD KC**
**DEPUTY HIGH COURT JUDGE**

**Between:**

**MR MARTIN GROOM**

**Appellant**

**- and –**

**MARITIME AND COASTGUARD AGENCY**

**Respondent**

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**Mr Stuart Brittenden KC** (instructed by Pattinson & Brewer Solicitors LLP) for the **Appellant**
**Mr Julian Allsop** and **Mr Mike Blitz** (instructed by the Government Legal Department) for the **Respondent**

Hearing date: 15 February 2024

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# JUDGMENT

## SUMMARY

*EMPLOYEE, WORKER, OR SELF–EMPLOYED*

The Claimant was a volunteer in the Coastal Rescue Service. He appealed against the Tribunal's decision that he was not a Limb (b) worker under section 13(1)(a) Employment Relations Act 1999 and section 230 Employment Rights Act 1996. On an analysis of the documents governing the relationship between the parties, the Tribunal found that there was no contract at all between them. "Volunteer" is not a term of art, and volunteers hold no special status as a matter of law. The legal status of any volunteer depends upon analysis of the particular relationship under which the volunteer's services are provided.

In applying the Limb (b) worker test, the Tribunal correctly said that the first question was whether there was a contract between the parties at all. The Tribunal held that, in the circumstances of this case, the answer to that question was a matter of construction and interpretation of the documents governing the relationship. As a matter of construction, the Tribunal held there was no contract.

Given the way the case was argued by the Claimant in the Tribunal, it was not now open to the Claimant to argue that there was an umbrella or overarching contract. The question was whether the tribunal erred in finding there was no contract in relation to individual activities attended by the Claimant.

The tribunal erred in its analysis of the Respondent's obligation to remunerate the Claimant. The documents created a clear right to remuneration in respect of many activities, and it was irrelevant that the Claimant had to submit a claim for payment and that many volunteers in practice did not do so. The tribunal also erred in its analysis of the requirement of mutuality of obligation in relation to attendance at an individual activity. Overall, the tribunal erred in the construction of the documents: on a proper construction, there plainly was a contract which came into existence when the Claimant provided services at an activity in respect of which there had been a promise of remuneration. The appeal was allowed.

There was no dispute that the obligation (if it existed) was for personal service; nor that Claimant was

not providing services to the Respondent as a business. Accordingly, a decision was substituted that the Claimant was a worker when he attended activities in respect of which he was entitled to remuneration. It did not necessarily follow that the same analysis applied to activities which did not attract remuneration. That remained an open question for the tribunal.

## GAVIN MANSFIELD KC, DEPUTY HIGH COURT JUDGE:

## INTRODUCTION

1 This appeal concerns the status of a volunteer in the Coastal Rescue Service. The Claimant claims that he was a "Limb (b)" worker for the purposes of s.13(1)(a) Employment Relations Act 1999 and s.230 Employment Rights Act 1996.

2 The claim before the Tribunal was for refusal to permit the Claimant to be accompanied by a trade union representative at a disciplinary hearing, contrary to ss. 10 and 11 Employment Relations Act 1999. The Claimant would only have rights under those sections if he was a Limb (b) worker.

3 The Employment Tribunal (Employment Judge Cadney sitting alone at a preliminary hearing) held that the Claimant was not a worker. The essence of the Tribunal's reasoning was that, on a proper construction of the documents governing their relationship, there was no contract at all between the parties. The Claimant now appeals.

## BACKGROUND FACTS

4 The Respondent is responsible for the initiation and coordination of civil maritime search and rescue. It discharges its functions in a number of ways, including through the Coastguard Rescue Service ("**CRS**").

5 The CRS is made up of 325 Coastguard Rescue Teams. There are approximately 108 employed staff and 3500 volunteer Coastal Rescue Officers ("**CRO**") and Station Officers ("**SO**").

6 The Claimant was a CRO from December 1985, and then an SO from 2011. For the purposes of this appeal, nothing turns on the distinction between a CRO and an SO. The Claimant was based at Bembridge on the Isle of Wight.

7 By letter dated 15 May 2020, the Claimant was invited to a disciplinary hearing. Following that hearing, the Claimant's membership of the CRS was terminated with immediate effect. An appeal was rejected. The Claimant was issued with a P45 on 8 September 2020, confirming his leaving date as 8 September 2020.

8 For current purposes, the circumstances of the termination are irrelevant. The sole issue is whether the Claimant was a Limb (b) worker, so as to engage the right to be accompanied at a disciplinary hearing.

## THE DOCUMENTS

9 As the Tribunal noted at paragraphs 4 and 7 of the Reasons, there was very little dispute of fact between the parties and the central dispute was the interpretation and legal effect of the Volunteer Agreement and the Code of Conduct.

10 The Tribunal noted (paragraph 6) that the documents before it were the current documents. There was no dispute that these documents set out the basis of the relationship between the Respondent and CROs. Nor was any issue taken as to different versions of the

documents over time. The question the Tribunal, correctly, set itself was the meaning and interpretation of the versions that were put before it.

11 The document which the Tribunal called the Volunteer Agreement is in fact entitled "Volunteer Handbook". The Tribunal noted (Reasons paragraph 8), there are repeated references to CROs as volunteers. The Introduction to the Volunteer Handbook includes the following passages:

> "*Volunteer Coastguard Rescue Officers are people who have chosen to serve their communities and the public by giving their time, skills and effort willingly and without salary. We value this contribution and commitment highly.*
> *The relationship between the Maritime and Coastguard Agency and its Coastguard Rescue Service volunteers is a voluntary two-way commitment where no contract of employment exists.*"
>
> *"Your safety and that of those you rescue and work with is our top priority and it is important for us all to understand our respective responsibilities.*
> *We believe we should set out clear policies and procedures which say what we expect from you and, equally important, what you can expect from us."*

12 A section headed "***The Volunteer Commitment***" contains the following:

> "*Membership of the CRS is entirely voluntary. In formal terms this means there is no "mutuality of obligation" between CROs and the MCA or HMCG.*
> *This Volunteer Commitment aims to make sure the relationship between HMCG and volunteer CROs works for everyone*".

13 "***The Volunteer Commitment***" then contains sections headed "***HM Coastguard will:***" and "***In return, we ask you to:***" The latter section includes:

- *be professional and loyal to HMCG and abide by the Code of Conduct*;
- *maintain competence by attending training and emergency response call-outs*;
- *Comply with all instructions and activities that apply to CRS activities.*

14 A version of the Code of Conduct appears in the Volunteer Handbook itself. There is a separate, more detailed, version of the Code of Conduct, to which I return below. The Volunteer Handbook version of the Code begins "*As a CRO you are expected to agree to keep up certain standards and follow Coastguard rules for your own safety and to maintain the professional image of the CRS.*" After setting out lists of rules a CRO is expected to abide by and things a CRO must not do, it concludes by saying "*If you do not abide by this Code of Conduct we may cancel your membership*".

15 A section headed "***Payment***" contains the following:

> "*You can submit monthly claims for payment for certain activities if you wish, although some CROs choose not to.*
> *This money is to cover minor costs caused by your volunteering, and to compensate for any disruption to your personal life and employment and for unsocial hours call-outs.*
> *Further details of how to claim are available from your SCOO*"

16 A section headed "Training" contains the following:

"*Training to maintain your skill levels is vitally important for CROs and regular attendance is part of the volunteer commitment.*"

17 The Code of Conduct begins:

> "*CROs are volunteers. The relationship between [the MCA] and CROs is an entirely voluntary one. We have no control over what type of incident may prompt a call out or when that may be. There is no minimum response commitment by our volunteers and they are not paid.*"

18 The Code describes itself as setting out "guidance" for CROs. Failure to follow the Code may result in termination of CRO membership. Under the heading "*A CRO must*" there are 13 requirements, including:

a. At paragraph 2: "*Act in line with CRS policies, procedures and processes and carry out all activities with due care and attention to all instructions, especially safe systems of work and health and safety advice*".
b. At paragraph 3: "*Carry out all reasonable requests made by the Coastguard management or CROs in a position of authority when responding to call outs or undertaking training or volunteer led practice."*
c. At paragraph 4, a requirement to attend certain training and exercises, and a requirement to "*maintain a reasonable level of incident attendance*" .

19 The Code then sets out a list of things a CRO must not do.

20 Details of the payments referred to in the Volunteer Handbook are set out in a separate document "***Coastguard Rescue Service – Detail Coastguard Rescue Officer Remuneration.***" That document begins *"[CROs], whilst not obliged to claim, but wish to claim remuneration for time, travel and expenses associated with specific activities undertaken whilst on authorised duty are required to follow this process."*

21 A section addresses "***Remuneration Claims***" and is said to apply to "*claims for time (hourly rate) remuneration"*. "*Authorised activities*" are divided into seven categories A-G. A method is set out for calculating sums payable in respect of each category of activity. It is not necessary to go into the detail of these provisions but broadly an hourly rate is paid for the number of hours participating in an activity. Different remuneration rates are applied to CROs, SOs and DSOs. The document contains separate sections for "***Expense Claims***".

22 As a matter of practice, when payments are made the CRO (or SO) receives a payslip, which itemises hourly remuneration and expenses. At the end of the year, the CRO receives a P60, and when the Claimant's membership terminated he received a P45.

## THE TRIBUNAL'S REASONS

23 The Tribunal decided that the Claimant was not a worker because there was no contract between himself and the Respondent. As it directed itself at paragraph 4 of the Reasons, the central dispute was as to the interpretation and legal effect of the documents. At paragraph 29 the Tribunal stated that the crux of the dispute raised two separate questions. The first was whether it was necessary to imply a contractual relationship at all. Second, if there was a contractual relationship, was it one of worker/employer?

24 At paragraph 31, the Tribunal set out four factors pointing to the conclusion that there was no contractual relationship between the Respondent and CROs.

a. The agreement was described as a voluntary agreement.

b. There was no "automatic" remuneration for any activity and many CROs never claim; there are a number of activities for which remuneration is not payable at all, participation in which is only explicable in the context of volunteering.

c. "*The degree of control does not appear to me to be particularly significant*".

d. The fact that an HMRC investigation concluded CROs were not workers was "*clearly significant*".

25 At paragraph 32, the Tribunal said that while none of those factors were individually decisive, taken together they point more naturally to the conclusion that there was a "*genuinely voluntary relationship*".

26 At paragraph 33, the Tribunal addressed the question of whether, in the absence of an "umbrella contract" the Claimant was a worker when he attended an activity. The Tribunal said that what it described as "*the reasoning in **Grayson***" applied. That was a reference to **South East Sheffield Citizens Advice Bureau v Grayson** [2004] IRLR 35. The Tribunal went on to hold that there was no contract between the parties in relation to attendance at an activity.

27 At paragraph 34, the Tribunal concluded with two points. First, that if both parties in starting the relationship genuinely believe it to be voluntary, then that is powerful evidence that this is precisely what it is. Second, there was no evidence that the relationship had changed. The Tribunal's understanding of the Claimant's position was that the effect of the decision in **Uber** was to transform the voluntary relationship to one located in the field of work and of employee/worker. The Tribunal found that there is nothing in **Uber** which would have the effect of transforming the nature of an existing voluntary agreement.

28 The Tribunal's ultimate conclusion, at paragraph 34 was that the agreement between the parties was "*a genuinely voluntary one*" and the Claimant was not a Limb (b) worker.

## GROUNDS OF APPEAL AND THE PARTIES' POSITIONS

29 There are three grounds of appeal:

a. The Tribunal's conclusion that there existed no contractual relationship between the parties was wrong.

b. The Tribunal erred in its reliance on **Grayson**.

c. The Tribunal misdirected itself on the question of control.

30 Grounds 1 and 2 overlap and together are, in my judgment, the main focus of the appeal. Ground 3 is based on a misreading of the Reasons, and I will address it more briefly later in this judgment.

31 In Ground 1, the Claimant argues that the Tribunal erred in its construction of the documents in concluding that there was no contract between the parties. The documents show on the one hand an obligation to attend a minimum number of activities on the part of the Claimant, and an obligation on the part of the Respondent to remunerate the Claimant for activities attended at an hourly rate. This, argues the Claimant, is essentially the wage/work bargain. The Tribunal erred in its analysis of the remuneration obligation. If a CRO attended an activity in respect of which they were entitled to receive remuneration and the Respondent failed to pay, the CRO must have a claim for breach of contract for the remuneration. The logical conclusion of the Tribunal's reasoning is that the CRO would have no claim in those circumstances.

32 In Ground 2, the Claimant argues that the Tribunal erred in its reliance on **Grayson** which led it to reject the Claimant's submission that during the time that a CRO is undertaking activities there is sufficient mutuality of obligation between the parties for the CRO to be classified as a worker. **Grayson**, and the other volunteer cases relied on, do not draw the distinction between "umbrella contracts" and specific contracts relating to the periods when work is carried out. That distinction has been more clearly developed in subsequent cases. The Tribunal erred in its analysis of whether there was a contract between the parties when work was being carried out.

33 The Respondent argues that the Tribunal correctly directed itself to consider whether or not there was a contract between the parties and reached a conclusion on that question which is essentially one of factual assessment. The Tribunal directed itself as to the correct principles and the Notice of Appeal discloses no error of law. Where an appeal involves a challenge to an evaluative exercise by a first instance tribunal, an appellate tribunal should be cautious before reaching a decision that the first instance tribunal erred in law (**Pendragon plc v HMRC** [2013] EWCA Civ 868). Where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal should be slow to conclude that it has not applied those principles (**DPP Law Ltd v Greenberg** [2021] IRLR 1016).

34 The Respondent argues that volunteering is a category of relationship that is sui generis; a key feature is an absence of intention to create legal relations. The position in the current case is analogous to **Grayson** and the Tribunal was entitled to reach its conclusions on remuneration and on mutuality of obligation. There is no "wage/work bargain" indicated by the payment of a fixed sum for attendance at some activities.

## OVERARCHING CONTRACT, OR CONTRACT IN RESPECT OF EACH ACTIVITY?

35 At this point I need to address one issue as to the scope of the appeal. In his oral argument Mr Brittenden KC sought to put the Claimant's case in two ways. First, that there was an overarching or umbrella contract governing the whole of the relationship between the parties. Second, in the alternative, there was a contract in respect of each individual activity attended by the Claimant.

36 The distinction between those two different types of contract is now well established by the authorities. However, the Respondent argues that is not open to the Claimant to put the case this way, as it is not the way the case was put below.

37 The way the case was put before the Tribunal was summarised as follows at paragraphs 33 of the Reasons: "*The contention in this case is that there is no overarching or umbrella contract but that during the time a CRO is undertaking CRO activities for the respondent*

*he is a worker*". Paragraph 23, in the summary of the Claimant's submissions, is to the same effect.

38 Mr Brittenden (who did not appear below) suggests that the argument as to individual contracts in the absence of an umbrella contract may have been put as an alternative in the Tribunal below, though he accepts this is not clear.

39 On my reading of the Reasons, the Tribunal was clearly under the impression that the case was not put on the basis of an umbrella contract, and the sole basis was that there were contracts in respect of each activity. I can see no other way of reading paragraph 33. The Notice of Appeal does not suggest that the Tribunal erred in its understanding of the Claimant's case. I agree with the Respondent's submission on this point. The Tribunal did not err in failing to find that there was an overarching contract, because that was not the Claimant's case. I confine myself to consideration of whether the Tribunal erred in finding that the Claimant was not a worker when he attended an activity.

## LEGAL FRAMEWORK

40 Section 10 Employment Relations Act 1999 confers a right to be accompanied to disciplinary or grievance hearings upon a "worker". The definition of worker is contained in section 13(1) of the same Act. For current purposes, the relevant part of the definition is a person who falls within the definition of worker in section 230(3) Employment Rights Act 1996.

41 A worker is defined by section 230(3) ERA to mean:

> *An individual who has entered into or works under (or where 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.*

42 There is no suggestion that the Claimant was an employee under Limb (a); the question before the Tribunal was whether he was a Limb (b) worker.

43 In **Uber v Aslam and Ors** [2021] ICR 657 Lord Leggatt said at paragraph 41 that the statutory definition of a worker's contract has three elements:

a. A contract whereby an individual undertakes to perform work or services for the other party;

b. An undertaking to do the work or perform the services personally;

c. 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.

44 There is no issue in this case as to the second and third elements. Whatever the nature of the arrangement under which the Claimant provided services, it is common ground that the services were to be performed personally. There is no suggestion that the Respondent was a client or customer of the Claimant. The dispute concerns the first element.

45 In **Nursing and Midwifery Council v Somerville** [2022] EWCA Civ 229, [2022] ICR 755 para 45, Lewis LJ pointed out that the first two elements can be enumerated differently:

> *"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 Stringfellow Restaurants Ltd.*** *[2013] IRLR 99 at para 10: "Every bilateral contract requires mutual obligations; they constitute the consideration necessary from each party necessary to create the contract." Next, the contract must include a certain type of obligation, as far as the individual is concerned, if he is 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 personall*y".

46 Lewis LJ's analysis helpfully separates out two questions in the first element as enumerated by Lord Leggatt. First, is there a contract at all? Second, is it a contract to provide work or services to the other party? The judgment of HHJ Tayler in **Sejpal v Rodericks Dental Ltd.** [2022] EAT 91, [2022] ICR 1339 makes the same point at paragraph 10.

47 At paragraph 69 of **Uber**, Lord Leggatt stated that the question of whether a person fell within the definition of worker for the relevant statutory definition was primarily a question of statutory interpretation, not contractual interpretation.

48 In **Sejpal** at paragraph 17 HHJ Tayler said:

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

## THE VOLUNTEER CASES

49 The Respondent makes two related points arising out of earlier cases concerning the status of volunteers. First, that the status of volunteers is sui generis, and negates the existence of a contract between the volunteer and the organisation to whom they volunteer. Second, that the Tribunal was right to follow what it characterises as the principles in **Grayson**.

50 The earliest case concerning the employment status of volunteers to which I was referred was **Murray v Newham Citizens Advice Bureau** [2001] ICR 708. The Claimant in that case had applied to be a trainee voluntary adviser with a CAB. When his application was rejected, he brought a claim under the Disability Discrimination Act 1995. He needed to

demonstrate that the post for which he applied was "employment" as defined by section 68 of that Act. Section 68 defined employment to include employment under a contract of service or under "a contract personally to do any work."

51 The Tribunal rejected the claim. It considered the standard agreement that governed the post for which he had applied. It held that it imposed no obligation on either party (either to provide work on the one side, or to work on the other). Although travel expenses would be reimbursed, the role was unpaid. The EAT allowed the Claimant's appeal. In construing the contract the Tribunal had been wrong to conclude that there was no contractual obligation: the document set out a "series of separate obligations and commitments". Further, it was wrong to regard the absence of pay as crucial rather than as one factor to weigh in the balance. In relation to pay, HHJ Wilkie QC said as follows:

> *"11 In saying that expenses cannot equate to pay or remunerated employment, whilst no doubt accurately characterising expenses as opposed to payment and remuneration, in so far as the tribunal was seeking to rely on that as a supporting a conclusion that this was not a contractual arrangement with mutually binding obligations, once again the tribunal was, in our judgment, plainly misdirecting itself as a matter of law.*
> *12 As Ms Williams has pointed out in her very clear, comprehensive skeleton argument, if the applicant, or anyone, having incurred expenses either travelling to work or while at work for the Citizen's Advice Bureau under such an agreement were not reimbursed for those expenses in accordance with the document, then an argument that he or she could not have recourse to law because the sums were not due under a contract or damages for breach of contract would be unsustainable. We therefore conclude that this tribunal has simply failed to understand the law or apply the proper legal principles to this standard form document and its terms.*
> *13 It therefore follows that in so far as this decision of the tribunal was founded on the basis that the document recording the agreement which the applicant was agreeing to make did not constitute a contract, then that decision cannot be allowed to stand and therefore we uphold this appeal."*

52 Having found that there was a contract, the EAT remitted the case to the tribunal to consider whether or not the contract was a contract of service, or a contract personally to do any work, or neither. As to that question, the live issue, which had not been determined by the tribunal, was whether the contract was a contract to do work or a contract to receive training.

53 The next case is the principal case relied on by the Respondent: **South East Sheffield Citizens Advice Bureau v Grayson** [2004] 353. The Respondent argues that this case sets out the nature of the volunteer relationship and that, on its facts, it is analogous to the current case.

54 The Claimant was an employee of a CAB. She brought a claim of disability discrimination. There was no dispute as to her own status as an employee, but at the relevant time the Disability Discrimination Act 1995 contained an exception for employers with fewer than 15 employees. As the CAB had only 11 paid employees, the Claimant needed to establish that the CAB's volunteers were also employees.

55 The volunteers were engaged under a "volunteer agreement". On analysis of the volunteer agreement, the tribunal found that the volunteers were employees. The EAT, on analysis

of the same document, allowed the appeal and held that the volunteers were not employees.

56 At paragraph 12 Rimer J (as he then was) said:

> *"We start from the point that the question for the tribunal was whether the Bureau's volunteer workers were subject to a contract under which they were obliged to work for the Bureau. So expressed, it would appear to us surprising if the answer were yes, since it is of the essence of volunteer workers that they are ordinarily under no such contract. As volunteers they provide their services voluntarily, without reward, with the consequence that they are entitled to withhold those services with impunity. However, that starting position is not necessarily also the finishing point. In every case, including this one, if a question arises as to the legal relationship between an alleged employer and a so-called voluntary worker, it is always necessary to analyse that relationship to see exactly what it amounts to. But if the proposition is that the volunteer worker is in fact an employee under a contract of service, or under a contract personally to do work, for the purposes of s.68 of the 1995 Act, then in our view it would be necessary to be able to identify an arrangement under which, in exchange for valuable consideration, the volunteer is contractually obliged to render services to or else to work personally for the employer".*

57 The document was expressed in terms of clarifying the CAB's "*reasonable expectations*" of its volunteers, and what the volunteers could reasonably expect of the CAB. That, the EAT held (paragraph 15) was not the language of contractual obligation. The passages dealing with hours the volunteers were to work was also expressed as a reasonable expectation (paragraph 16).

58 At paragraph 16, the EAT said "*The most striking pointer against it being such a contract is of course that the volunteer is not paid for his services.*" As to the reimbursement of expenses, it said (paragraph 18):

> *"We are prepared to accept that this element of the agreement, and also the provision in it to the effect that the Bureau will indemnify advisers against negligence claims by disgruntled clients, probably do, or at least may, evidence a binding contractual relationship between the Bureau and the volunteer, namely a unilateral contract in the nature of what is sometimes referred to as an "if" contract, one which can be expressed as follows: "if you do any work for the Bureau and incur expenses in doing so, and/suffer a claim from a client you advise, the Bureau will indemnify you against your expenses and any such claim". But that contract is still not one which imposes on the volunteer any obligation actually to do any work for the Bureau".*

59 At paragraph 19, the EAT went on to consider what it described as the critical question of whether the agreement read as a whole imposed a contractual obligation on the part of volunteer to provide any services at all to the Bureau. The EAT held that the tribunal erred in holding that it did.

60 At paragraph 20, the EAT also held that the tribunal erred in holding that the provision of training by the Bureau could amount to consideration.

61 Paragraph 21 of Rimer J's judgment was quoted in full by the Tribunal in this case (Reasons paragraph 24). It is the only passage quoted by the Tribunal. I set it out below including the underlining added by the Tribunal in its Reasons.

> *"We consider that the crucial question which was before the tribunal was not whether any benefits flowed from the Bureau to the volunteer in consideration of any work actually done by the volunteer for the Bureau, but whether the Volunteer Agreement imposed a contractual obligation upon the Bureau to provide work for the volunteer to do and upon the volunteer personally to do for the Bureau any work so provided, being an obligation such that, were the volunteer to give notice immediately terminating his relationship with the Bureau, the latter would have a remedy for breach of contract against him. We cannot accept that the Volunteer Agreement imposed any such obligation. Like many similar charitable organisations, similarly dependent on the services of volunteers, the Bureau provides training for its volunteers and expects of them in return a commitment to work for it, but the work expected of them is expressed to be voluntary, it is in fact unpaid and all that the Volunteer Agreement purports to do is set out the Bureau's expectations of its volunteers. In our view, it is open to such a volunteer at any point, either with or without notice, to withdraw his or her services from the Bureau, in which event we consider that the Bureau would have no contractual remedy against him. We find that it follows that the advisers and other volunteers were not employed by the Bureau within the meaning of the definition in section 68 of the 1995 Act."*

62 **Melhuish v Redbridge CAB** [2005] IRLR 419 concerned an unfair dismissal claim, for which the Claimant, a volunteer worker at a CAB, needed to establish that he was an employee under a contract of service. The EAT upheld the tribunal's decision that he was not an employee. Burton J's judgment draws on **Grayson** and also on his own earlier judgment in **Prior v Millwall Lioness Football Club** EAT/341/99.

63 The fundamental difficulty in **Melhuish** was that the volunteer was not entitled to any remuneration. Further, he was not under any obligation to attend work. As in **Grayson**, the EAT rejected the argument that an obligation to reimburse expenses amounted to remuneration. It also rejected an argument that the provision of training amounted to similar consideration to remuneration. Burton J concluded by saying that there was no contract at all in the case; in the alternative, at most there was what was referred to in **Grayson** as an "if contract" or "limited unilateral contract": if the appellant attended his expenses would be reimbursed.

64 The material distinction drawn by Burton J in **Melhuish** was not the distinction between a unilateral contract and a bilateral contract; rather it was the distinction between expenses and remuneration. Reimbursement of expenses was not remuneration. It was the absence of agreement to provide remuneration that was fatal.

65 I do not understand Burton J to say that there was something in the nature of a unilateral contract that meant it could not give rise to sufficient mutuality of obligation so as to give rise to a worker contract or a contract of employment. In **Prior** (quoted in **Melhuish** at paragraph 21) Burton J addressed the issue of mutuality of obligation at paragraph 9:

> "*But plainly the provision of a benefit to another party is not enough to create a contract. It would amount to the gratuitous gift of services or goods and not a contract if it arose out the simple provision of a benefit to another party. There has to be mutuality to any relationship in order to create a contract. Receipt by one of those two parties is not sufficient. There must be a promise in return. "I will give you something in return for your services." There is, it seems to us, no such bargain in this case, so no such mutuality of obligation.*"

66 Later in the same paragraph, on the question of mutuality in the case of a unilateral contract, he said:

> *"a unilateral contract is not one where there is no mutuality in the end, it is simply one in which …one party offers something if, in due course, the other party does something in return and then, by doing that act, the second party is accepting the offer and providing the consideration."*

67 He went on to find that the problem in **Prior**'s case was not that there was no such "staggered mutuality" but no mutuality at all. The highest that could be said was "I agree that I will accept the benefit that you are providing me."

68 In my judgment, if the agreement had been "if you attend and work we will remunerate you for the time worked", there is nothing in Burton J's judgments in **Prior** or **Melhuish** that suggests that a contract would not have been formed.

69 In **Breakall v West Midlands Reserve Forces' and Cadets' Association** UKEAT/0372/10/RN, the Claimant was an Adult Instructor (AI) for the Army Cadet Force. His claim for disability discrimination failed because the Tribunal found that he was not an employee for the purposes of s.68 DDA 1995.

70 The Tribunal had found that there was no obligation on the part of the Respondent to provide any work for the Claimant to do, nor any obligation on the part of the Claimant to do any of the work provided. If the Claimant attended on any day he would generally expect to be remunerated and to be subject while attending to the instructions of his superior officer. The Tribunal regarded those obligations as an "if" contract as described in **Grayson**. The Tribunal found that there was no mutuality of obligation such that the respondent was obliged to provide work to do and the claimant was obliged to undertake the work provided.

71 The case turned primarily on the question of whether there was an overarching contract. The claimant relied on **James v Redcats (Brands) Ltd.** [2007] ICR 1006, to argue that whatever the position when the Claimant was not at work, he was an employee when he was at work. The EAT briefly considered the argument but rejected it on the grounds that it was inconsistent with the factual findings of the Tribunal (paragraph 37).

72 **X v Mid Sussex CAB** was another case about the status of an unpaid volunteer at a CAB. Ultimately the case was determined at the Supreme Court which upheld the decision that the claimant was not employed for the purposes of the Disability Discrimination Act 1995. I was taken to both the Supreme Court decision [2013] ICR 249 and the Court of Appeal decision [2011] ICR 460. The claim failed in the tribunal on the basis that no contract at all existed between the volunteer and the CAB. In the appellate stages, the claimant did not challenge the decision that there was no contract between the parties (see the Court of Appeal per Elias LJ para 30). Instead, the claimant raised a number of arguments as to how the particular relationship fell within the scope of the DDA, or within the scope of Directive 2000/78, even in the absence of a contract. The appeal depended on an argument that the term "occupation" in the Directive extended to cover unpaid volunteer work. The Court of Appeal and the Supreme Court rejected that contention.

73 The issues **Mid-Sussex CAB** are of no direct relevance to this appeal. The scope of the argument was expressly about the status of volunteers who worked without a contract. The CAB (and the Secretary of State which supported its position) did not dispute that

some volunteers may be caught by the legislation. The issue was whether a volunteer who works without contractual obligations and without pay can be caught by the legislation (Elias LJ paragraph 53).

74 I note that both the Court of Appeal and the Supreme Court record the importance of voluntary work, and the policy reasons put forward by voluntary sector bodies as to why it may not be desirable to extend employment protections to voluntary workers. It appears that the evidence suggested strongly divergent views as to whether employment rights should be extended to volunteers (Court of Appeal per Elias LJ at paragraphs 48 and 60, Supreme Court per Lord Mance at para 6).

## ARE VOLUNTEER ARRANGEMENTS SUI GENERIS?

75 The Respondent argued that volunteering is a category of relationship that is "sui generis". A key feature is the absence of intention to enter into a contractual relationship. The Respondent relies on **Grayson** as an example of the sui generis nature of the relationship. A voluntary agreement sits, it is said, outwith those agreements regulated by the law, so as to be binding only in honour, and therefore outwith the scope of s.230 ERA 1996.

76 I reject this argument. There is nothing in the authorities to which I was taken to support the proposition that a volunteering is a sui generis category, nor that as a matter of law a volunteer provides service on a non-contractual basis.

77 **Grayson** does not stand as authority for the proposition that the volunteer relationship is sui generis. In my judgment, Rimer J's remarks at paragraph 12 that a volunteer worker would ordinarily not be an employee or worker appear to be a proposition of fact based upon general experience. It is clear from the following sentences of paragraph 12 that the status of any particular volunteer depends on the circumstances and, in particular the terms (if any) upon which they are engaged.

78 As Elias LJ said in **Mid-Sussex CAB** (paragraph 3): "*Volunteers come in many shapes and sizes, and it cannot be assumed that all will have the same status in law.*"

79 In each of the cases to which I have referred the court analysed the nature of relationship to establish whether there was a contract between the parties. In most of the cases referred to there was held to be no contract. However, that was not because the claimant was a volunteer per se, but because examination of the parties' obligations (or lack of them) showed there was no contract. **Murray** is an example of a case where the analysis led to the opposite conclusion, i.e. that there was a contract.

80 A variation of the Respondent's point is to say that it is inherent in the nature of volunteering that the volunteer provides their services on a voluntary basis – voluntary carrying with it the meaning "gratuitous" and that where the parties choose to define the person providing services as a volunteer, that is an indication that there is no intention to create legal relations.

81 However, as the Tribunal correctly identified at paragraph 31 of the Reasons, use of the description voluntary agreement is not determinative. I doubt that the terms "volunteer" or "voluntary" are used in so technical a sense in many situations. In any event, any inference arising from the use of the term "voluntary" would need to be seen in the context

of the arrangement between the parties as a whole. The implication of the use of the word volunteer could not override the clear meaning and effect derived from the other terms.

82 Each case turns on analysis of the particular arrangements between the parties, either written or derived from the evidence. However, in assessing nature of relationship, the fact that the parties describe the relationship as voluntary is a feature, not a conclusive one, that may indicate the parties' intention was that there would be no contract between them – that is how I interpret paragraph 12 of **Grayson**.

## THE NATURE OF THE OBLIGATIONS IN THE VOLUNTEER CASES: MUTUALITY OF OBLIGATION

83 The Respondent relied particularly on **Grayson**, and the passage at paragraph 21 that I have quoted above. The focus in that passage is on the obligation on one party to provide work and the obligation on the other party to carry out work, i.e. on the question of mutuality of obligation.

84 In **Grayson**, and the majority of the cases to which I was taken, the claimant's case was that there was a contract governing the whole of their relationship with the respondent. Subsequent authorities have drawn a distinction between (a) any overarching or umbrella agreement governing the relationship and (b) the question of whether there is a contract each time a person agrees to perform work, or attends to perform it. That distinction is now well developed in the cases. The correct focus is on whether the individual was a worker when they were at work.

85 As Underhill LJ put it in **Windle v Secretary of State for Justice** [2016] ICR 721 at para 23 "*the ultimate question must be the nature of the relationship during the period that the work is being done*".

86 See also **James v Redcats (Brands) Ltd**. [2007] ICR 1006 at paragraph 83 per Elias J:

> *"The fact that there is no contract in place when she is not working – or that if there is, it is not one that constitutes her a worker – tells us nothing about her states when she is working. At that point there is a contract in place. If the lack of any mutual obligations between engagements precluded a finding that an individual was a worker when carrying out work pursuant to an engagement, it would severely undermine the protection which the minimum wage legislation is designed to confer.*"

87 As Lord Leggatt said in **Uber** at paragraph 91:

> *"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.*"

88 HHJ Tayler in **Sejpal** pointed out that many of the cases that have considered mutuality of obligation have been about the situation of casual workers and whether they remained subject to an umbrella contract between engagements. The concept of an "irreducible minimum of obligations" is generally applied when analysing whether there is an umbrella contract. He relied on **Somerville** in stating "*Even in the case of casual workers the concept of the irreducible minimum does not assist in considering whether the person is a worker during the periods when they are undertaking work.*" (paragraphs 24 and 25).

## REMUNERATION

89 The Respondent submitted that the Tribunal's findings on remuneration and expenses were analogous to the position in **Grayson**. The Respondent says that it is wrong to say that the Claimant was entitled to an hourly rate of remuneration. First, the Tribunal found that the was no automatic remuneration for attendance. Second, the fixed sum paid for attendance was not in the nature of an hourly rate of remuneration.

No automatic remuneration for any activity.

90 It appears from paragraph 32(b) of the Reasons that the Tribunal attached weight to the following (i) remuneration is not "automatic", rather a CRO has to make a claim for it and (ii) as a matter of fact many CROs never claim.

91 The first of these points is simply a matter of payment mechanism. The nature of the right to payment cannot depend on the administrative requirement to make a claim for the payment to which a CRO is entitled.

92 The fact that in practice many CROs never in fact claim is an irrelevance. The Tribunal had (correctly) set itself the task of interpreting the meaning and effect of the documents. This was not a case about whether the documents reflected the reality of the relationship between the parties. The rights and obligations of the parties were to be derived from the documents: the problem was in construing them. Whether any particular CRO chooses to exercise a right given by the documents is not relevant to the existence of the right.

93 Although the Tribunal was correct in saying that there are a number of activities for which remuneration was not payable at all, on the face of the documents, those activities appear to be limited. Categories A to G (in respect which there is an entitlement to remuneration) are wide ranging. The only examples of activities which do not attract remuneration which are given are "*attendance at practice events*" and "*unauthorised attendance at public relations events*". Although that list is non-exhaustive, it suggests that non-remunerated activities are marginal.

Sums payable in respect of attendance are properly characterised as remuneration

94 I reject the Respondent's argument that the sum payable for attendance was not in the nature of an entitlement to an hourly rate of remuneration, but rather is analogous to the recovery of expenses. I have summarised the relevant provisions above. The detailed remuneration document draws a clear distinction between "Remuneration Claims" and "Expense Claims" which are dealt with in separate parts. The part headed Remuneration Claims states that the following sections relate to "*claims for time (hourly rate) remuneration*." The calculation of the sums payable is by reference to hours spent multiplied by an hourly rate. The Handbook describes the payment as "*compensation for any disruption to your personal life and employment.*" A payment in compensation for interference in a person's use of their time is the essence of remuneration. It is plain that the payments in this case were correctly described by the parties as remuneration.

## THE RESPONDENT'S COLLATERAL CONTRACT ARGUMENT

95 The Respondent argues that if there is any contractual obligation to make payment in respect of activities at all, the obligation to pay is not consideration for services provided. Only if the volunteering is carried out is there an opportunity to claim. The Respondent argues that the situation is analogous to **Grayson** – there is no more than a unilateral contract, or "if" contract, to pay expenses. It is argued that such a contract, if it is a contract at all, is not a contract for the provision of work or services. It is a separate contract following on from the work that has been carried out, and collateral to it.

96 I reject this argument. The distinction drawn between the time of provision of services and the later obligation to pay is wholly artificial. The remuneration is paid in respect of the activity attended – i.e. in respect of the service provided. When a CRO attends an activity, they do so in the knowledge that the remuneration provisions apply, and, if it is a relevant activity, they will be entitled to remuneration.

97 Whether the contract is unilateral or otherwise is immaterial. A unilateral contract, once complete, is no less a contract than any other type of contract, as is clear from the judgment of Burton J in **Prior**, to which I have referred earlier in this judgment.

98 In **Grayson**, there were two reasons why the "if" contract under consideration may have presented an obstacle for the Claimant. First, the claimant was seeking to establish an umbrella contract throughout the period of the volunteer agreement, not a contract in respect of a particular attendance. Second, the agreement to make payment in **Grayson** was only an agreement to repay out of pocket expenses. Neither of those factors are relevant in the current case.

## THE ARGUMENT BASED ON S.44 NATIONAL MINIMUM WAGE ACT 1998

99 The Claimant argues that s.44 of the National Minimum Wage Act 1998 makes express provision in respect of voluntary workers. He argues that such express provision underscores the point that a volunteer may still be a worker, the logic being that if a volunteer could not be a worker there would be no need for express provision in respect of voluntary workers.

100 The Respondent complains that this is a new point that was not raised before the Tribunal, but the point is in any event without merit, so I will deal with it, albeit briefly.

101 Section 44 (1) provides:

> "*A worker employed by a charity, a voluntary organisation, an associated fund raising body or a statutory body does not qualify for the national minimum wage in respect of that employment if…*"

102 The fallacy in the Claimant's argument is in the elision of a voluntary organisation and a voluntary worker. It does not necessarily follow that everyone who works for a charity or voluntary organisation is a volunteer. Such organisations will often engage some people who are undoubtedly and expressly employees or workers. **Grayson** itself is an example of such a situation: alongside its voluntary workers, the CAB had 11 paid employees, whose status was not in issue. Section 44 applies to those who are workers employed by a charity or voluntary organisation. It tells us nothing as to who is such a worker.

## CONCLUSIONS ON GROUNDS 1 AND 2

103 The points in relation to these grounds overlap, so I will deal with them together.

104 In my judgment, the Tribunal erred in holding that there was no contract at all between the parties. Paragraphs 31 to 34 of the Reasons show errors in approach which vitiate the Tribunal's conclusions. Further, while paying due respect to the evaluative exercise carried out by the Tribunal, the Tribunal reached an interpretation of the documents that was simply wrong, indicating that it erred in law.

105 It is clear from paragraph 31 that an important part of the Tribunal's reasoning was that there was no automatic right to remuneration for any activity, and that many CROs never claim. For the reasons I have set out above, the Tribunal was wrong to regard that as a relevant factor. In doing so, the Tribunal lost sight of the fact that CROs had the right to be remunerated for many activities. The right to remuneration, or its absence, was regarded as an important factor in the earlier volunteer cases. It failed to appreciate an important factor that pointed in favour of the existence of a contract.

106 The Tribunal erred in its consideration of whether a contract arose when a CRO undertook an activity. At paragraph 33 of the Reasons the Tribunal said:

> *"As set out above the respondent relies on a number of authorities and in particular the principle in "Grayson" referred to above. The contention in this case is that there is no overarching or umbrella contract but that during the time a CRO activities for the respondent he is a worker. However it appears to me that the reasoning in Grayson does apply in this case. Whilst a sense of public service might compel a CRO to continue to assist in an activity, particularly one in which there a risk [sic] to the health and safety of members of the public; there is no contractual right on the part of the respondent to require them to do so. I bear in mind, and as is relied on by the claimant, the respondent could in those circumstances ultimately terminate the CRO membership, which he contends is equivalent of a contractual right, but as a matter of fact there is no contractual right to take any action at all."*

107 There is nothing else in the Reasons that indicates a factual basis for the proposition that a CRO could cease to assist part way through an activity. The notion sits uncomfortably alongside the Code of Conduct, which requires CROs to carry out activities with care and attention to all instructions (paragraph 2); to carry out all reasonable requests made by Coastguard management or CROs in a position of authority when responding to call out or undertaking training or volunteer led practice (paragraph 3); and to set a good example to other CROs, among other things by maintaining a reasonable level of incident attendance (paragraph 4).

108 A finding that a CRO is not obliged to remain at an activity they have attended is not inconsistent with the CRO being a worker when he attends. In **Somerville**, at paragraph 54, the Court of Appeal cited with approval **Professional Game Match Officials Ltd. v Revenue and Customs Comrs** [2021] EWCA Civ 1370 per Laing LJ: "*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*". At paragraph 55 Lewis LJ went on to say that the fact that the claimant in **Somerville** could withdraw from the agreement to attend a hearing after he accepted it did not alter matters. The claimant had entered into a contract which existed until terminated. The Tribunal's reliance on paragraph 21 of **Grayson** which focusses on the mutuality of obligation issues that are more pertinent to umbrella contract

cases, caused it to lose sight of the principles applicable to the single engagement cases, as more recently articulated in these cases.

109 The Tribunal failed to have regard to the bargain which is to be derived from the documents: if the CRO attends an activity they will be entitled to be remunerated for his time. Put into the language of an "if" contract used in **Grayson** and **Melhuish** in essence the bargain is "if you work, we will pay you for your work". In general, there is no reason why such a bargain would not give rise to a contract. Mr Brittenden describes this as the essence of the wage/work bargain. He argues that it would be bizarre to say that there is no contract at all in this situation, as it would mean that a CRO who has attended an activity (to which remuneration attaches) would be unable to sue for payment. I agree. The Respondent had no real answer to that point, other than to argue that any such contract in respect of remuneration was a collateral contract akin to the reimbursement of expenses. I have already set out my reasons for rejecting that argument.

110 In my judgment, the only proper construction of the documents is that a contract comes into existence when a CRO attends an activity in respect of which there is a right to remuneration. Further, that contract is for the provision of services, not a collateral contract for the reimbursement of expenses incurred. When a CRO attends a relevant activity, they have a right to remuneration. They attend in the context of a Code of Conduct which sets out minimum levels of attendance at training and incidents. Pausing there, there is no reason why those factors should not give rise to a contract.

111 The principal factors weighing against there being a contract are the use of the term "voluntary" and the passages in the Handbook and Code which speak of an absence of mutuality of obligation. However, as the Tribunal itself said, the use of language is not determinative. As I have outlined above, although use of the word volunteer may suggest an absence of intention to create legal relations, "volunteer" is not a term of art, the legal status of all volunteers is not necessarily the same. Ultimately, whether or not there is a contract is determined from the documents as a whole.

112 **Uber** and subsequent cases make clear that a tribunal should be astute to look beyond the labels used in documents that may not reflect the reality of the relationship. Further, the use of language in these documents is far from clear-cut. The Handbook describes the volunteer's relationship with the MCA as a "*voluntary two way commitment where no contract of employment exists.*" That expression does not expressly negative the existence of any contract, nor even a worker contract. The phrase "two-way commitment" is indicative of some form of mutual obligation. The Code of Conduct says that "*There is no minimum response commitment by our volunteers and they are not paid.*" That sentence is incorrect in two respects. First, the Code goes on to say, on the same page, that a CRO must attend specified levels of training and must maintain a reasonable level of incident attendance. Second, as I have already set out, CROs are entitled to be remunerated for a wide range of activities.

113 Accordingly, the Tribunal erred in its judgment. It erred in failing to find that when the Claimant attended an activity (at least one attracting remuneration) there was a contract under which he provided services to the Respondent.

## GROUND 3

114 One of the four factors relied on by the Tribunal in paragraph 31 was as follows:

> "*The degree of control does not appear to me to be particularly significant in this case. The role of a CRO is safety critical and the same degree of control will necessarily be exercisable whether the CRO is a volunteer or a worker and does not, in this case help distinguish between the two.*"

115 The Claimant's primary argument under Ground 3 is that the Tribunal erred in applying a test that, in order for there to be a worker/employer relationship, the employer's control of the putative worker needed to be "significant" or "particularly significant". The Claimant relies on a number of features which indicate that there was sufficient control of the Claimant.

116 I accept the Respondent's submission that this ground is predicated on a misunderstanding of paragraph 31(c) of the Reasons. The Tribunal did not make a finding that the Respondent did not exercise significant control over the Claimant. It implicitly accepted that the Respondent did exercise control over the Claimant, but in its judgment the presence of that control was not a significant issue. In saying that "*the degree of control does not appear to me to be particularly significant in this case*" the Tribunal uses significance to describe the relevance of the issue of control, not to describe the level of control exercised by the Respondent.

117 The Claimant further argues that if the Tribunal was examining whether the issue of control was relevant to the existence of a contract it erred in its reasoning. It argues that it matters not that there are good reasons for close control of behaviour. I agree with that. However, in my judgment the Tribunal did not err at paragraph 31(c). It was entitled to take the view that seen in context, the level of control exercised over the Claimant was not a significant indicator of whether there was a contract or not.

## DISPOSAL

118 I allow the appeal on grounds 1 and 2. Although I have rejected ground 3, that makes no difference to the outcome.

119 The Claimant invites me to substitute a decision that he was a worker. The Respondent submits that if I allow the appeal I should remit it to the Tribunal. I bear in mind the principles in **Jafri v Lincoln College** [2014] ICR 920. I accept the Claimant's submission.

120 I have found that the Tribunal erred in failing to find that a contract for the provision of services arose between the Claimant and the Respondent when he attended an activity in respect of which he was entitled to remuneration. I have concluded that the only proper interpretation of the relevant documents is that a contract arises for the performance of services when the Claimant attends a relevant activity. If that is the proper construction of the document, it would not be right to remit the case for the Tribunal to consider the question again. There is no dispute between the parties as to the remaining elements of the statutory test for worker status. The Claimant was obliged to perform services personally. The MCA is not a client or customer of a business carried on by the Claimant. Therefore, it follows from my conclusion on grounds 1 and 2 that the Claimant was a worker.

121 There is one caveat. The Tribunal did not reach a separate conclusion in relation to attendance at activities which do not give rise to an entitlement to remuneration. I was not addressed at the appeal hearing on the question of whether the treatment of those cases may be different. I am setting aside the Tribunal's judgment in its entirety, but I do not

reach a conclusion on the "no-remuneration" activities. The question of worker status in relation to attendance at non-remunerated activities remains an open question, which the parties may argue in the Tribunal. Nothing in this judgment should be taken as reaching a conclusion on that question.