Neutral Citation Number: [2025] EAT 23

Case No: EA-2024-000265-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 February 2025

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

DR MARK TER-BERG

Appellant

- and -

MR PARUL MALDE
DR COLIN HANCOCK

Respondents

- -
- -

Jamie Jenkins (instructed by Leathes Prior) for the **Appellant**
Simon Butler (Direct Access) for the **Respondents**

Hearing date: 21 January 2025

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JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF-EMPLOYED

At a preliminary hearing the employment tribunal decided that the claimant was not an employee as defined in section 230(3) **Employment Rights Act 1996**. At a further preliminary hearing the employment tribunal decided that the claimant was not a worker. This appeal is against that decision. The tribunal erred, in summary, in the following respects:

(a) It was an error to conclude that it would be inconsistent with the findings and conclusions in the prior decision on employment status for the tribunal now to hold that the claimant had worker status. In particular the previous findings that the essential elements of the test of employment status in **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 2 QB 497 were not met, including as to "control" and as to the intention of the parties (as genuinely stated in the written contract) having been that the claimant was not an employee, should not have been regarded as automatically precluding the conclusion that the claimant was nevertheless a worker.

(b) It was an error to conclude that the requirement (as set out in section 203(3)(b)) for an obligation of personal service was not satisfied in this case. On examination the tribunal was not bound by its previous decision on employment status so to hold. On a correct construction of the clause of the written agreement between the parties concerned with the issue of substitution, and in all the circumstances, the only correct conclusion on the facts found was that this requirement was satisfied. Guidance in **Pimlico Plumbers Ltd v Smith** [2017] EWCA Civ 51; [2017] ICR 657; [2018] UKSC 29; [2018] ICR 1511 considered.

The matter was remitted to the employment tribunal for determination of whether the company in question was by virtue of the contract between them a client or customer of any profession or business undertaking carried on by the claimant, and hence whether he was or was not a worker.

HIS HONOUR JUDGE AUERBACH:

Introduction and Background

1. This is the appeal of the claimant in the employment tribunal against the decision of Employment Judge KJ Palmer sitting at Bury St Edmunds (by CVP) that the claimant was not a worker as defined in section 230(3) **Employment Rights Act 1996**. That provides:

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

2. The relevant background is this. The claimant is a dentist. He was formerly the principal of a group of three dental practices. He sold that business to Simply Smile Manor House Limited, which I will call "the company", with effect from 1 April 2013. At that time he and the company entered into a written agreement substantially in the form of the British Dental Association standard Associate Agreement for use in GDS Contracts (the Associate Agreement). The claimant had himself previously entered into contracts in that form with dentists who had worked with his business.

3. In November 2018 the claimant began a tribunal claim. The first respondent was the company. The second respondent was NHS England Midlands and East, but the claim against it has subsequently been struck out. The third and fourth respondents, Mr Malde and Dr Hancock, were directors of the company. The claimant claimed that he had been an employee of the company, alternatively a worker. He complained of unfair dismissal by reason of having made protected disclosures, alternatively that the termination of his contract amounted to detrimental treatment on the ground of having made protected disclosures. There was also a claim for holiday pay.

4. As part of their response, the company, Mr Malde and Dr Hancock disputed that the claimant had been either an employee or a worker of the company.

5. At a preliminary hearing EJ Ord decided that the claimant had not been an employee of the company. That was the Ord decision. The claimant appealed. I heard that first appeal. I allowed it and remitted the matter. There was then a further hearing before EJ Palmer in March 2023. EJ Palmer decided that the claimant had not been an employee. I will call that decision Palmer 1. There was no appeal. There was then a further hearing before EJ Palmer in October 2023. In a reserved decision he decided that the claimant was not a worker. I will call that Palmer 2. It is the subject of this appeal.

6. Having been in liquidation, the company was dissolved on 29 December 2023. Although, despite that, it had been named as a respondent to this appeal, I have therefore removed it.

7. My decision in the first appeal (which I will call **Ter-Berg 1**), which in turn cites passages from the Ord decision, gives further background. Relevantly to this appeal, I note the following.

8. First, the claimant accepted, and EJ Ord found, that, when he was initially engaged, the parties intended that he not be an employee. It was, however, the claimant's case that, by the time of the termination of the relationship, his status had changed to that of employee. But EJ Ord concluded that there had been no change in the claimant's status over the course of the relationship, and that there was not the "degree of control, integration into the business and a requirement to perform services personally, which are the three components" of an employment contract.

9. Secondly, there was a specific issue as to whether clause 36 of the Associate Agreement meant that the claimant had not undertaken to provide personal service. That clause read as follows:

> **"In the event of the Associate's failure (through ill health or other cause) to utilise the facilities for a continuous period of more than 20 days the Associate shall use his best endeavours to make arrangements for the use of the facilities by a locum tenens, such locum tenens being acceptable to the PCO and the Practice Owner to provide dental services as a Performer at the Premises, and in the event of the failure by the Associate to make such arrangements the Practice Owner shall have authority to find a locum tenens on behalf of the Associate and to be paid for by the Associate. The Practice Owner and Associate will agree the method of payment of the locum tenens. The Practice Owner will notify the PCO that the locum tenens is acting as a performer at the premises. The Associate will be responsible for obtaining and checking references and the registration status of the locum and ensuring that the locum is entered into the Performers List of a Primary Care**

> **Trust in England. The Associate will confirm to the practice owner that the requirements of the immediate preceding sentence have been carried out and will provide the Practice Owner with such relevant information as he/she may reasonably require."**

10. EJ Ord concluded that the effect of clause 36 was that the requirement for an obligation of personal service was not satisfied.

11. Of three grounds of the first appeal, (only) ground 3, which challenged that conclusion in relation to the effect of clause 36, succeeded. In the course of my decision I said:

> **"75. In relation to worker status the requirement for an obligation to perform services personally derives from the wording of section 230(3)(b). The statutory definition of a contract of employment does not include any equivalent wording. The obligation of personal service requirement derives from the authorities going back in the modern era to Ready Mixed Concrete, referring to a condition that the individual who claims to have been an employee have agreed to provide his own work and skill in the performance of some service for the other party. But the test is the same, whether for the purposes of employment or worker status. See: Byrne Brothers (Formwork) Ltd v Baird & Ors [2002] ICR 667 at [13] and Pimlico Plumbers Ltd v Smith [2018] ICR 1511 at [20].**
>
> **76. In Pimlico Plumbers Ltd v Smith in the Court of Appeal ([2017] ICR 657), after reviewing various authorities, Sir Terence Etherton MR said at [84]:**
>
> > **"Some of those cases are decisions of the Court of Appeal, which are binding on us. Some of them are decisions of the EAT, which are not. In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."**
>
> **77. In the Supreme Court Lord Wilson JSC, with whom the other members of the court agreed, reached the conclusion that Mr Smith's only right of substitution was of another Pimlico operative, so that the question was then whether that right was inconsistent with the obligation of personal performance. After considering other authorities he concluded at the end of [32]:**

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

> **78. In Stuart Delivery Ltd v Augustine [2022] ICR 511 it was stressed that [84] of the Court of Appeal's decision in Pimlico does not set out rigid categories or rules of law. It only sets out two principles: that an unfettered right of substitution is inconsistent with an obligation of personal service, and that a conditional right may or may not be, depending on the nature or degree of the fetter. So it is therefore unhelpful to try to shoehorn the given case into one of these supposed categories.**
>
> **79. In the present case I consider that the tribunal did err at [83] as asserted by this ground. The example given there, that if the claimant had wished to take a holiday he would have been entitled to procure a locum to fill his absence, shows that it took the view that this clause effectively gave the claimant a free choice, if he wished, for any reason, to nominate a substitute. That is an erroneous reading of the natural meaning of the opening words of clause 36, which describe the event that triggers the rest of the clause as being a failure through ill health or other cause to utilise the facilities for a continuous period of more than 20 days. The obligation thereby triggered is to use best endeavours to make arrangements for the use of the facilities by a locum.**
>
> **80. To construe "other cause" as meaning that this clause can be invoked by the claimant in any circumstances where he merely wishes not to use the facilities for such a period fails to take on board that it contemplates that the triggering event is a *failure* to utilise the facilities for a defined period, which carries with it the implication that the claimant has failed to use them to a minimum extent, which he ordinarily was required to do. Further, "through ill health or other cause", must be read as meaning "ill health or other similar cause." That is to say, the other cause contemplated will also be one that has not been chosen by the claimant, but has in some sense been visited upon him. If the clause was meant to be capable of applying whenever the claimant *chooses* not to use the facilities for more than 20 days, it would not need to have referred to "ill health or other cause," at all."**

12. In the course of the decision in Palmer 1 that followed, the judge, having declined Mr Butler's invitation not to follow my construction of clause 36, continued:

> **"48. The question I then have to determine is whether that construction of Clause 36 taken together with the other findings in Judge Ord's Judgment, with which I am not entitled to demur from, affects the final determination as to whether the Claimant was or was not an employee of the First Respondent.**
>
> **49. In this respect, I am persuaded by Mr Butler. The findings of fact of Judge Ord make it clear that the intention of the parties, as was expressed by the Claimant in the giving of evidence, was always that the Claimant was other than an employee. The wording of the contract as a whole, irrespective of my construction of Clause 36, evinces this intention."**

13. EJ Palmer noted that he was bound by various findings in the Ord decision, which he set out.

On the issue of whether the claimant was an employee Palmer 1 concluded as follows:

> "**55. I have therefore concluded that I agree with HHJ Auerbach's construction of Clause 36. I further conclude that the limited basis of Clause 36 means that it is consistent with personal service.**
>
> **56. I am bound by all other findings of Judge Ord (save for his final conclusion). I do not propose to repeat them here. However, at paragraph 98 of his Judgment in his conclusions, he says the following:**
>
> > **'98.1 The Agreement between the parties sets out that no relationship with employer / employee is created by it.**
> >
> > **98.2 That was the intention of the parties at the time and the parties were content to proceed on that basis.**
> >
> > **98.3 The Claimant asserted his position as self-employed contractor on two occasions in writing and never asserted that he was an employee during the currency of his work with the Respondent.**
> >
> > **98.4 The Claimant has not established that there was control over his work to make the Respondent his employer.'**
>
> **57. I am bound by those conclusions. Therefore, even applying my construction to Clause 36, the irreducible minimum in Ready Mixed Concrete is not met.**
>
> **58. Moreover, turning to the limited substitution clause itself, I agree with both Counsel that Clause 36 falls fairly and squarely into the third example given by Sir Terence Etherton MR at paragraph 84 of his Judgment in Pimlico Plumbers Limited v Smith. To repeat: "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."**
>
> **59. However, I agree with Mr Butler that here there are exceptional facts. They are set out in Judge Ord's findings of fact and drawn into his conclusions as I have indicated above. The true intention of the parties was reflected in the Agreement. The limited construction of Clause 36 does not defeat that true intention.**
>
> **60. For the reasons I have set out above, therefore, the Claimant is not an employee of the First Respondent.**
>
> **61. I would emphasise that this Judgment, along with the Judgment of Employment Judge Ord and His Honour Judge Auerbach, does not deal with and was never meant to deal with, whether the Claimant was or was not a "worker" under s.230(3) of the Employment Rights Act 1996.**
>
> **62. That is something that will have to be determined at a later date in these proceedings, either in a further dedicated Preliminary Hearing or at the Full Merits Hearing of this matter."**

The Tribunal's Decision on Worker Status

14. EJ Palmer began Palmer 2 by recapitulating on the history of the litigation, and what had been decided thus far. At [24] – [25] he set out what he had said at [56] and [57] of Palmer 1. He continued:

> **"26. That conclusion at paragraph 57, both in respect of the fact that I am bound by the conclusions of Judge Ord and my further statement that the irreducible minimum test is not met, have not been the subject of an appeal.**
>
> **27. It is therefore important to remember that those conclusions must be carried through into the examination and determination of the worker status issue.**
>
> **28. I am not permitted to reopen those issues in arriving at a conclusion as to worker status, that would plainly be wrong."**

15. The self-direction as to the law in Palmer 2 included the following:

> **"54. In the case of Community Dental Centres Ltd v Sultan-Darmon [2010] IRLR 1024 to which I have been referred, the EAT overturned a decision of the Employment Tribunal on the basis that there was an obvious inconsistency between the Tribunal's conclusion that the Claimant in that case was not an employee because there was no mutuality of obligation and its subsequent conclusion that he was a worker. In the EAT's view, the finding that there was no mutuality of obligation when considering the issue of employee status was also determinative in showing that he was not a worker. Under the contract, SD (the Claimant) was plainly entitled to decide for himself whether to turn up and provide dental services. This right did not depend solely on whether he was unable to provide services but whether he was willing to do so. Also, this was sufficient to decide the appeal in the company's favour. The EAT also held that the Claimant's unfettered right to appoint a substitute meant that he could not be a worker.**
>
> **55. In Uber v BV and others v Aslam and others [2021] ICR 657, the Supreme Court held that the determination of worker status is a question of statutory interpretation, not contractual interpretation and that it is therefore wrong in principle to treat the written agreement as a starting point. The correct approach is to consider the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependant position in relation to a personal organisation who exercises control over their work."**

16. The tribunal's conclusions in Palmer 2 were set out in the following passage:

> **"56. As I have indicated, the conclusions I arrived at in my March Judgment I am bound by. Those conclusions were arrived at in my March Judgment in light of binding findings in EJ Ord's Judgment.**
>
> **57. I was at great pains in my March Judgment to make it clear that the issue of whether the Claimant was a worker was not before me. It had not been before EJ Ord. My conclusions, therefore, related specifically to the Claimant's employee status.**
>
> **58. Despite the assertions of Mr Butler, I did not draw any definitive conclusion in that Judgment as to whether there was a requirement to carry out services personally or not.**
>
> **59. At paragraph 49 I did make it clear that pursuant to the findings of EJ Ord, the intention of the parties was always that the Claimant was other than an employee.**
>
> **60. At paragraph 57 I referred to the findings of Judge Ord at paragraph 98 of his Judgment and indicated that I was bound by those conclusions and that therefore, even applying my construction of Clause 36 (which agreed with HHJ Auerbach, and**

disagreed with EJ Ord), I found that the irreducible minimum in Ready Mixed Concrete, under the test set out, was not met.

61. As to the substitution clause, I found at paragraph 58 and 59, that the clause fell within the third example given by Sir Terence Etherton MR at paragraph 84 of his Judgment in Pimlico Plumbers. I found that there were exceptional facts. The true intention of the parties was reflected in the agreement. I was bound by Judge Ord's findings that the Claimant had not established that there was control over his work. The Claimant also asserted that his position as a self-employed contractor was clearly what was intended between the parties and had remained the same throughout the efficacy of the agreement. Those exceptional facts render Clause 36 inconsistent with personal performance.

62. Mr Jenkins argues that those cannot amount to exceptional facts. However, my March Judgment and the conclusions drawn at paragraphs 58 and 59 has not been appealed. It would be wrong for me to depart from those conclusions now. I repeat that the limited construction of Clause 36 does not defeat the true intention of the parties.

63. Applying the Autoclenz v Belcher principle, a Tribunal must look at the real arrangement between the parties rather than be a slave to the written agreement.

64. Applying the reasoning of the EAT in the case of Community Dental Centres Ltd v Sultan-Darmon, set out above, it would be inconsistent for me to find that the Claimant is a worker in light of my conclusions that there was a failure to meet the irreducible minimum in the Ready Mixed Concrete test.

65. Whilst I made no findings that there was no requirement to carry out services personally, I do so now, based on the conclusions drawn in my March Judgment.

66. There was no mutuality of obligation. The Claimant was plainly entitled to decide for himself whether to turn up and provide dental services. It was clear in his evidence before EJ Ord, set out in EJ Ord's Judgment by which I am bound, that this was the case and accepted it. That state of affairs, which is the true state of affairs which existed between the parties is inconsistent with the suggestion that there was a requirement to carry out personal services.

67. For the reasons I have set out above, the (b) limb is not satisfied. The Claimant is not a worker."

The Appeal

17. At the hearing of this appeal the claimant was represented by Mr Jenkins, and the respondents by Mr Butler, both of counsel, both having appeared at the Palmer 2 hearing. There are four grounds of appeal, but grounds 1 and 2 are an overlapping pair, as are grounds 3 and 4.

18. Grounds 1 contends, in summary, that, having found that clause 36 fell into the third category discussed by Sir Terence Etherton MR in **Pimlico Plumbers**, the tribunal erred in treating the intention of the parties in this case as an "exceptional fact". It is further contended by ground 2 that

it was wrong to do so, in light of the purposive approach indicated by **Uber v Aslam**.

19. Ground 3 contends that the tribunal erred in holding that, were it to find that the claimant was a worker, that would be inconsistent with the conclusion in Palmer 1 that the "irreducible minimum" in the **Ready Mixed Concrete** test was not met. By ground 4 it is also contended, in particular, that, in taking account of the previous finding that there was no mutuality of obligation, the tribunal erred, because that test was not relevant to the issue of whether the claimant was required to perform work personally, and the tribunal wrongly conflated the two questions.

The Law

20. I have already set out the statutory definition of a worker. There are three elements, that must all be satisfied. They are that (a) there be a contract (subject to a qualification discussed in **Ter-Berg 1** at [48] that has no relevance in this case); (b) whereby the individual undertakes to do or perform personally any work or services for another party; (c) whose status is not by virtue of the contract "that of a client or customer of any business undertaking carried on by the individual."

21. The concept of mutuality, or an irreducible minimum, of obligation, is a usage which dates back at least to the speech of Stephenson LJ in **Nethermere (St. Neots) Limited v Gardiner** [1984] ICR 612, at 623C- F. As subsequent authorities have discussed, it may be used refer to the fact that (whether for employee or worker status) there must, at the relevant time, be a contract, in which both parties have undertaken legally binding obligations to the other, and/or to the fact that those obligations must be of a kind which fulfils the essential elements of a contract of that type. Such issues may arise, in particular, in cases where the nature of the relationship is that it involves intermittent discrete assignments, and where issues arise about the position (as to the existence and/or the content of a contract) both during and between assignments (see e.g. **Stringfellow Restaurants Ltd v Quashie** [2012] EWCA Civ 1735; [2013] IRLR 99 at [10] – [14]).

22. As to the minimum content or nature of the obligations, in order for it to be a contract of

employment, the touchstone remains the decision of MacKenna J in **Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 2 QB 497 at 515C-D:

> **"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."**

23. In **Nethermere** Stephenson LJ referred to what MacKenna J went on to say about (i) at 515D-E, which I will cite a little more fully:

> "**As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him."**

24. In **Nethermere** Stephenson LJ then observed:

> **"There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt if it can be reduced to any lower than in the sentences I have just quoted …"**

25. There has been much discussion in the authorities as to the interpretation of the third limb of the definition of a worker, and what test marks out the boundary between being a worker and being neither a worker nor an employee. In **Byrne Brothers (Formwork) Ltd v Baird** [2002] ICR 667 the EAT (Mr Recorder Underhill QC and members) said at [17] (in part):

> **"(1) We focus on the terms "[carrying on a] business undertaking" and "customer" rather than "[carrying on a] profession" or "client". Plainly the Applicants do not carry on a "profession" in the ordinary sense of the word; nor are Byrne Brothers their "clients".**
>
> **(2) "[Carrying on a] business undertaking" is plainly capable of having a very wide meaning. In one sense every "self-employed" person carries on a business. But the term cannot be intended to have so wide a meaning here, because if it did the exception would wholly swallow up the substantive provision and limb (b) would be no wider than limb (a). The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business. (Possibly this explains the use of the rather odd formulation "business undertaking" rather than "business" *tout court*; but if so, the hint from the draftsman is distinctly subtle.) It is sometimes said that the effect of the exception is that the Regulations do not**

> **extend to "the genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuine" self-employment is to be defined.**
>
> **(3) The remaining wording of limb (b) gives no real help on what are the criteria for carrying on a business undertaking in sense intended by the Regulations – given that they cannot be the same as the criteria for distinguishing employment from self-employment. Possibly the term "customer" gives some slight indication of an arm's-length commercial relationship – see below – but it is not clear whether it was deliberately chosen as a key word in the definition or simply as a neutral term to denote the other party to a contract with a business undertaking.**
>
> **(4) It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees *stricto sensu* - workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.**
>
> **(5) Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.**
>
> **(6) What we are concerned with is the rights and obligations of the parties under the contract - not, as such, with what happened in practice. But what happened in practice may shed light on the contractual position: see Carmichael (above), esp. per Lord Hoffmann at pp 1234-5."**

26. In **Cotswold Developments (Construction) Ltd v Williams** [2006] IRLR 181 the EAT (Langstaff J presiding) at [53] postulated a test of whether the individual actively markets their services to the world in general or, conversely, works as an integral part of the principal's operations – the so-called integration test. In **James v Redcats (Brands) Ltd** [2007] ICR 1006 the EAT (Elias P) considered another test discussed in the authorities, the so-called dominant purpose test. He suggested at [59] that that test "is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract

between two independent business undertakings?" But ultimately there is, he opined at [68], "no shortcut to a considered assessment of all relevant factors."

27. In **Clyde & Co LLP v Bates van Winkelhof**]2014] UKSC 32; [2014] ICR 730 Lady Hale (with whom Lords Neuberger and Wilson agreed) reviewed these and other authorities, including **Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005; [2013] ICR 41. At [18] she noted that there Maurice Kay LJ had pointed out that neither the integration test nor the dominant purpose test purported to lay down a test of general application. At [19] she went on to agree with him that there is "not a single key to unlock the words of the statute in every case." She added that "[t]here is no substitute for applying the words of the statute to the facts of the individual case."

Discussion and Conclusions

28. As I have described, in the Ord decision the tribunal decided only the question of whether the claimant was an employee, not also whether he was a worker. The same was true of Palmer 1. It appears that, both times, at a prior case management hearing it had only been stipulated that the next hearing would be to determine employee status. That is unfortunate. Generally, where there are issues as to whether the claimant was either an employee or a worker (or neither), given the elements of overlap between the components of the two legal tests, and the corresponding likely element of overlap in relevant evidence, all such issues should be heard and decided on the same occasion.

29. I turn to the substantive lines of challenge advanced in support of the grounds of appeal. I will start with the contention that the tribunal erred in concluding that the requirement for an obligation of personal service was not met in this case. The tribunal had, correctly, followed and applied my construction of clause 36, and my conclusion that it was a clause of the third kind discussed at [84] of **Pimlico Plumbers**. But, argued Mr Jenkins, it then erred in concluding that there were "exceptional facts" in this case. He contended that the word "exceptional" suggested that something truly out of the usual run was required to support a conclusion that the requirement of personal service was not met in such a case. Further, the purposive approach described in **Uber**

indicated that a stringent approach to what might amount to "exceptional facts" must be adopted.

30. Taking the second point first, I do not think that the tribunal erred in not applying the **Uber** approach in this particular case. As I discussed in **Ter-Berg 1**, it was not entirely clear whether, in this case, it had been a part of the claimant's case that, because of circumstances of inequality of bargaining power, the written terms of the Associate Agreement did not reflect the true intentions of the parties. But, even assuming that the claimant *had* been advancing an **Autoclenz/Uber** argument, the tribunal in the Ord decision had considered and addressed it; and the conclusion was that clause 36 reflected the parties' genuine intentions (**Ter-Berg 1** at [72]).

31. As to the first argument, Mr Butler relied upon the fact that the decision in Palmer 1 was not itself appealed, so that, in principle, its relevant findings and conclusions bound the judge when deciding Palmer 2. Specifically, he relied upon the fact that in Palmer 1, the tribunal had concluded that there were "exceptional facts". The correctness of that conclusion could not be impugned in this appeal from Palmer 2. However, I do not agree that this does present an obstacle to the claimant advancing this line of challenge to the outcome of Palmer 2. That is for the following reasons.

32. A tribunal is only bound by findings in a previous decision involving the same parties, which were an essential part of the fact-finding or reasoning on the issue before it (**Bon Groundwork Ltd v Foster** [2012] EWCA Civ 252; [2012] ICR 1027 at [4]). In this case the reasoning in Palmer 1 ultimately turned on the conclusion at [57] that, even taking account of the construction of clause 36 that had been (following my decision) adopted by EJ Palmer, the "irreducible minimum" of the three elements outlined in **Ready Mixed Concrete** were not met. What followed at [58] and [59] of Palmer 1 was not essential, but additional, reasoning. Further, EJ Palmer himself stated in terms in Palmer 2 that he had not, in Palmer 1, determined the personal-service issue, which also supports my reading that the Palmer 1 decision rested on the *other* elements of employment in any event not being met.

33. Turning, then, to the substantive argument, it might be said that exceptionality is not, as such,

a legal test, and, further, that Sir Terence Etherton MR said no more than that a clause of the third type was "consistent" with an obligation of personal performance, meaning that it should not be treating as *precluding* that requirement being satisfied. However, as I noted in **Ter-Berg 1**, **Stuart Delivery Ltd v Augustine** [2022] EWCA Civ 1514; [2022] ICR 511 notes that **Pimlico Plumbers** gives examples by way of guidance, not rigid categories. It must also be remembered that this passage is not a statute, and the language should not be construed as if it was. I agree with the broad thrust of Mr Jenkins's overall submission, that the sense of the guidance in **Pimlico Plumbers**, is that if, in the given case, the position regarding substitution is governed by a clause of this third type, that will usually or ordinarily tend to point towards the personal service requirement being satisfied, unless there is some other feature or features clearly or strongly pointing the other way on that issue.

34. Applying that approach, I agree that, given the starting point of the correct construction of clause 36, and that it was of the kind envisaged in the third of the **Pimlico Plumbers** examples, the tribunal erred in then concluding that the requirement for an obligation of personal service was not satisfied in this case because there were no "exceptional facts". The things that the tribunal relied upon – in particular its previous findings (taken in turn from the Ord decision) as to the common intention of the parties, and as to control – could not be regarded as casting light on *that* specific issue. No other contraindication of personal service was identified in the facts of this case; and so, applying the law to the facts found, the tribunal should have concluded that the personal-service element of the definition of a worker *was* met in this case.

35. That, however, is not sufficient to resolve the question of whether the claimant was a worker. That is because there must be a contract which imposes an obligation of personal work or service in the requisite sense. But the third element of the statutory definition must also be met.

36. On this aspect I note, first, that, because the tribunal in Palmer 2 reasoned that the features it relied upon constituted exceptional facts which negated the essential obligation of personal service, it did not specifically consider that third limb of the test, nor any of the authorities discussing how

the tribunal should go about deciding which side of the line a contract which does satisfy the personal-service requirement falls, between a worker contract and one under which the contractor is neither an employee nor a worker. However, that might not matter, if the factual features that the tribunal did rely upon could be relied upon as necessarily pointing to the conclusion that this contract was – from the claimant's perspective – the wrong side of that line. Mr Jenkins, however, contended that, for a number of reasons, the tribunal's reasoning in any event fell into error.

37. First, Mr Jenkins argued that, as a matter of law, neither the concept of mutuality of obligation, nor the control test has any relevance *at all* to the question of whether an individual who is not an employee is a worker. In support of his submission that mutuality of obligation is of no relevance at all when considering whether an individual has worker status, Mr Jenkins relied upon the statement of Lewis LJ (with whose speech Moylan and Elisabeth Laing LJJ concurred) in **Nursing and Midwifery Council v Somerville** [2022] EWCA Civ 229; [2022] ICR 755 at [48] that "[t]here is no need, and no purpose served, in seeking to introduce the concept of an irreducible minimum of obligation in the way defined by the respondent."

38. As to that, the claimant in that case served periodically on fitness-to-practice panels of the respondent. As described at [5] at [6] the respondent had submitted that, as the claimant was not, under his overarching contract, obliged to accept any given assignment, there was no mutuality of obligation. However, the claimant contended that, in respect of panel hearings that he did undertake, all the elements of the worker definition were satisfied. At [48] Lewis LJ described how the tribunal found that, in addition to the overarching contract, there was a further contract formed each time the claimant was offered and accepted a panel hearing, the content of which satisfied the definition of a worker. Having regard to *that* there was "no purpose served" by the concept of an irreducible minimum *relied upon by the respondent*, which related to whether the overarching contract had the requisite content. It is clear from the conclusions at [57], [58] and [61] that all that the claimant was seeking at that point was a finding that he was a worker in respect of each hearing that he undertook.

I conclude that Lewis LJ was not, in that sentence at [48], advancing any general proposition of law as to what features it is essential that a contract have, in order for it to confer worker status.

39. Both counsel indicated in the course of argument on this appeal, that neither of them contended that the present case was one that turned on a distinction between an overarching contract and distinct assignments. The issue was simply whether the ongoing contract between the claimant and the company was one under which he was a worker, or not. There was plainly no dispute that the ongoing relationship was governed by a contract. What matters is whether the tribunal erred in relation to the substantive features that it concluded negated worker status under that contract.

40. As the authorities to which I have referred make clear, ultimately the answer to whether the individual was or was not a worker, applying the words of the statutory test, will depend on the tribunal's evaluation of the picture painted by all the relevant facts and circumstances in the given case. Further, as was discussed in **Byrne Bros**, the nature or degree of control *may* be one factor that is regarded as relevant to the assessment of worker status, just as it is to the assessment of employee status. However, it is important to remember that "control" is itself a word that may be used to refer to different features, and the context of consideration for the purposes of the worker definition is different from that of consideration when deciding whether an individual is an employee. That takes me to Mr Jenkins's next significant line of argument.

41. While he accepted that it was not wrong, as such, for the tribunal, in Palmer 2, to draw upon findings that it had made in Palmer 1, and/or in turn inherited from the Ord decision, Mr Jenkins contended that it erred in treating those earlier findings, which related to whether the contract fulfilled the elements of the test for employee status, as determinative of the test of worker status. Specifically, he argued, for that reason the tribunal erred in concluding, at [64], that it would be inconsistent for it now, in Palmer 2, to find that the claimant was a worker, "in light of my conclusions [in Palmer 1] that there was a failure to meet the irreducible minimum in the **Ready Mixed Concrete** test."

42. As to that, had the tribunal found, and properly found, in Palmer 1, that the requirement for an obligation of personal service was not satisfied, when deciding whether the claimant was an employee, *that* same finding would also have been fatal to the claim that the claimant was alternatively a worker. That is because, as the authorities indicate, the nature of the requirement for an obligation of personal service, is, in and of itself, the same for the purposes of both employee and worker status. But, for reasons I have explained, the tribunal did not so find, and the only correct conclusion, on the facts found, would have been that the obligation of personal service *was* satisfied.

43. As to control, while, as I have discussed, the concept may be regarded as relevant to worker status, as well as to employee status, a finding that the nature or extent of control is insufficient for the purposes of employee status, while potentially relevant, is not necessarily determinative of the issue of worker status – because of the different legal context and (as it was put in **Byrne Bros**) the lower "pass mark". I therefore agree with Mr Jenkins that the tribunal erred in Palmer 2, by proceeding on the basis that the finding, in Palmer 1, of lack of sufficient control to make the claimant an employee, meant that it would be inconsistent to conclude that he was, nevertheless, a worker.

44. Mr Jenkins also contended that the tribunal had also erred in simply transplanting without further consideration, the earlier findings as to what the parties had intended regarding the claimant's status, to the context of the worker issue. As to that, he advanced two distinct lines of argument. Firstly, the fact that the tribunal had found that the intention was that the claimant not be an employee did not necessarily mean that it was also intended that he not be a worker (in the legal sense). A lay person might not even appreciate that there was such an intermediate category. There was no previous finding that the parties had consciously addressed themselves to the question of worker status, and had intended that, as well as not being an employee, he should also not be a worker.

45. Secondly, Mr Jenkins referred to my observation in **Ter-Berg 1** at [45] that the **Autoclenz** approach "does not mean that it is no longer possible for parties genuinely and in an informed way to agree that they want to form a working relationship which is neither one of employee nor one of

worker". He submitted that there was no finding in this case (in either Palmer 1 or Palmer 2) that the claimant had acted in an "informed" way, appreciating the implications of the choice that he was making, for his potential statutory rights, and being content to forego the statutory rights and protections that apply to a worker, as well as those enjoyed by an employee.

46. Taking that second point first, I note that EJ Palmer specifically directed himself by reference to **Uber** at [55] and as to the need to give protection to vulnerable individuals who are in a subordinate and dependent position. Further, whether that scenario applies in the given case, is sensitive to the tribunal's appreciation of all the relevant facts of that case, in relation to that claimant, that respondent, and the circumstances in which the written contract that they have signed has come about.

47. In this case the tribunal had found that the claimant had previously owned and run the business himself; he had previously used the same form of contract in respect of the provision of services to his business and was familiar with it; and the contract had been entered on the occasion of the sale of the business by the claimant to the respondent. All of that had supported the conclusion that the provision of the contract stating that it did not create the relationship of employer and employee was an accurate reflection of the parties' intentions. (See **Ter-Berg 1** at [57]-[59].) Having regard to all of those previous findings, I do not think that the tribunal erred, as such, by failing to treat this as an **Autoclenz**-type case, when considering whether the claimant was or was not a worker.

48. Turning then to the first point, I agree with Mr Jenkins that the provision of the Associate Agreement that "nothing in this agreement shall constitute a contract of employment", and the previous finding (which was proper, as such) that this reflected the intention of the parties, could not be treated as automatically determinative of the question of whether they also intended that the claimant not be a worker, or whether he was a worker.

49. The findings in the Ord decision and in Palmer 1, that the parties intended the claimant to be "self-employed" or a "self-employed independent contractor", and described himself as such to the

company on more than one occasion, also could not properly be regarded by the tribunal, when it came to decide Palmer 2, as automatically determinative of the question of whether he be a worker. References to the concepts of "self-employed" and "independent contractor" are themselves inherently potentially ambiguous. These terms may sometimes by used, both by lawyers and non-lawyers, to denote someone who, in section 230(3) terms, would not be an employee, but might or might not be a worker, or sometimes to denote someone who, in those terms, would not be a worker. So the use by a party or parties, or indeed by a tribunal, of such expressions, needs to be considered with care, with a view to discerning what sense was meant in that particular instance.

50. Further, in this case the written contract only expressly stated that it did not constitute an employment contract (or, it appears, a partnership). While, as I discussed in **Ter-Berg 1**, in this case the tribunal was entitled to take into account that provision, showing how the parties had themselves designated the claimant's status, as a relevant factor pointing away from employment status, there was no similar express provision from which it might directly infer that they also applied their minds to whether he should have worker status and formed a common intention that he should not.

51. To be clear, I am not saying that provisions of a written agreement regarding status in other respects could necessarily not be regarded by a tribunal as a relevant part of the factual matrix when considering whether a claimant was intended to have, and did have, worker status. But I agree with Mr Jenkins that the tribunal erred in Palmer 2 by treating its conclusions in Palmer 1 on the significance of the evidence of the common intention of the parties being that the claimant was not an employee, for *that* issue, as also meaning that it would necessarily be inconsistent with those earlier findings to hold that the claimant was a worker.

Outcome

52. I therefore conclude that the tribunal erred in deciding that the personal-service requirement of a worker contract was not met in this case; and it erred in deciding that it would be inconsistent with its previous conclusions on the question of control, and the parties' intentions, with respect to

whether the claimant was an employee, to hold that he was a worker. The tribunal's decision that he was not a worker must therefore be quashed, and that question must be decided afresh.

53. In **Jafri v Lincoln College** [2014] EWCA Civ 449; [2014] ICR 920 the Court of Appeal held that, if a tribunal has erred in a way which affects the result, then, even in a case where all the necessary facts have been found, if more than one conclusion is possible, applying the law to those facts, then the matter must be remitted to the tribunal to decide again. However, Underhill LJ observed at [47] that the EAT can still decide the issue in such a case, if the parties consent to it exercising the powers of the employment tribunal pursuant to section 35(1) **Employment Tribunals Act 1996**.

54. At the conclusion of submissions at the hearing of this appeal, both counsel indicated that, in the event that, in my reserved decision, I upheld the appeal, I both could and should, as part of the same decision, decide the issue afresh, on the basis of the facts that have been found, rather than remitting to the employment tribunal. They both indicated that neither of them would want the opportunity to make further submissions.

55. Having indeed decided to uphold the appeal, however, I considered it necessary and fair to allow a further opportunity for submissions to be made as to the further directions that I should make, with the benefit of the parties knowing my decision, the reasons for it, and what remains to be determined. That is having regard, in particular, to the fact that, in light of my decision, including that the personal-service element of the statutory definition of a worker was met in this case, the question of whether the claimant was or was not a worker now turns entirely on what I have called the third limb of the statutory test, that is, whether the company was, by virtue of the contract between them, a client or customer of any profession or business undertaking carried on by the claimant.

56. Such submissions were therefore invited when sending this decision out in draft under embargo terms. As to whether the matter should be remitted to the employment tribunal, I cannot

say that there is only one right answer, given the nature of the issue a further hearing is required, and the respondent has indicated that it would only consent to the matter being decided in the EAT were it to be decided by another EAT judge. In all those circumstances, it would not be appropriate for the EAT to decide the matter. I am directing that the matter be remitted to the employment tribunal.

57. The parties are agreed that the matter should be determined at a further hearing at which they would not be entitled to submit fresh evidence, but for the purposes of which they would be entitled to table written submissions. I will so direct. The suggested time estimate for that hearing is one day, which would appear to me to be adequate, but I will leave that to the tribunal. Mr Jenkins has invited a direction that the matter not be heard by EJ Ord, EJ Postle or EJ Palmer. He informs me that the first two have recused themselves previously. While I am sure that EJ Palmer would approach the task conscientiously, there is no particular advantage to the matter being determined by EJ Palmer and I think it would be better for it to be considered by another judge who will come to it afresh. I will therefore make the further direction sought by Mr Jenkins.