EMPLOYMENT TRIBUNALS

Claimant: **Miss N Agada**

Respondent: **LPC Law Limited**

Heard at: **East London Hearing Centre**

On: **18 & 19 March 2021**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Mr Jon Ludford-Thomas a Solicitor from Farore Law

Respondent: Ms Laura Prince of Counsel instructed by the Respondent

JUDGMENT

1. **The Claimant was a worker for the purposes of sections 230(3)(b) of the Employment Rights Act 1996 and Regulation 2 of the Working Time Regulations 1998 and in employment for the purposes of section 82 of the Equality Act 2010.**

REASONS

1. By an ET1 presented on 19 August 2019 the Claimant had presented claims:

   1.1. That she had been subjected to a detriment because she had made protected disclosures brought under Sections 47B and 48 of the Employment Rights Act 1996; and

   1.2. That she had been discriminated against because of pregnancy or maternity leave contrary to Sections 18 and 39 of the Equality Act 2010; and

1.3. That the Respondent had failed to allow her to take paid annual leave under the Working Time Regulations 1998.

2. At a case management hearing on 16 December 2019 EJ Mclaren ordered that the issue of whether the Claimant's employment status permitted her to bring the claims identified should be dealt with at a preliminary hearing. The matter was first listed on 7 May 2020. As a result of the Covid pandemic that hearing was converted to a preliminary hearing for case management purposes only. On that date EJ Gardiner decided that 2 days would be necessary to determine the issue of employment status. The parties were both complaining about the other's failure to give disclosure of documents. EJ Gardiner made orders that were intended to resolve any outstanding disagreements and to allow the parties to properly prepare for the adjourned hearing. The matter was listed for a 2-day hearing commencing on 11 November 2020. On 15 September 2019 EJ Gardiner made orders without a hearing on the parties cross applications for specific disclosure. He ordered the Claimant to provide documents relating to any work that she had done for third parties whilst engaged by the Respondent.

3. The hearing on 11 November 2020 was listed before EJ Lewis. The Claimant told EJ Lewis that she did not have the bundle of documents that had been prepared by the Respondent. She said that because of her disabilities she needed paper copies. The matter was adjourned once again. The Claimant had not at that stage complied with the orders of EJ Gardiner. EJ Lewis recorded in her case management summary that the Claimant was in breach of the orders that had been made by EJ Gardiner and she made fresh orders requiring the Claimant to comply by 14 December 2020. It appears that the Claimant had attempted to reargue the question of whether she ought to provide the documents ordered by EJ Gardiner before EJ Lewis. The matter was relisted for 18 & 19 March 2021.

4. By a letter sent under cover of an e-mail sent on 28 December 2020 the Claimant asked EJ Lewis to vary the orders she had made. I do not need to deal with all of the matters referred to by the Claimant in that letter. It is sufficient to say that the Claimant asked for an extension of time to comply with the order that she provides disclosure. She had by then had some months to comply. EJ Lewis declined to vary the order in respect of disclosure and made an order under rule 38 of the Employment Tribunals (Constitution and Procedure) Regulations 2013. That order provided that unless the Claimant complied with the order of EJ Gardiner by 24 February 2021 the claim would be struck out.

5. On 23 February 2021 the Claimant applied to set aside or vary the unless order. The Claimant made wide ranging and generally misguided criticisms of EJ Gardiner and EJ Lewis. She did not say that she had actually provided the disclosure ordered by EJ Gardiner. She suggested that she had applied for a reconsideration of EJ Gardiner's order. Whether she had, or had not, she had not complied with it.

6. On 24 February 2021, before the unless order took effect, EJ Lewis issued an order staying the unless order that she had made. Her order was expressed in the following terms:

The Unless Order dated 17 February 2021 is stayed until 1 March 2021.

The Judge's reasons for making this order are to allow the Claimant an opportunity to make representations in respect of the Unless Order setting out what steps she has taken to comply with the order for disclosure made by EJ Gardiner on 15 September 2020 and Employment Judge Lewis on 14 December 2020.

The Claimant should set out which documents she das disclosed and when, and specifying what steps she is taking in respect of providing disclosure of each of the following:

1.1 All invoices rendered for services for which a fee was charged during the period from 20 February 2018 to 21 March 2019.

1.2 All documents evidencing payment for services whether in a self-employed or employed capacity

1.3 All receipts issued by the Claimant acknowledging receipt of payments made for services.

The Unless Order will be reconsidered on 2 March 2021

7. The Claimant sent an e-mail on 1 March 2021. She said *'I have sent the relevant documents to the Respondent'*. She went to make various other applications. The file was put before EJ Lewis. On 6 March, by a letter to the parties, EJ Lewis stated that as the Claimant had said that she provided the documents the claim was not dismissed. It does appear that EJ Lewis took the Claimant's assertion at face value.

8. On 12 March 2021 the Respondent wrote to the Tribunal. It was accepted that the Claimant had supplied 3 heavily redacted invoices but nothing else. It contended that the Unless Order made on 17 February 2021 had taken effect and the claim was struck out. EJ Russell responded to that e-mail on the same day. She informed the Respondent that (in her view) the issue of compliance with the unless order had already been dealt with by EJ Lewis. A flurry of further correspondence followed. The matter was again placed before EJ Lewis. On 15 March 2021 EJ Lewis accepted that she had acted on an assertion by the Claimant. She directed that the question of whether the Claimant had complied with the unless order would be dealt with at the outset of the hearing listed before me.

9. At the outset of the hearing I dealt with that matter. I found that the effect of the order of 24 February 2021 was to stay the effect of the unless order until 1 March 2021 the unless order was to be reconsidered on 2 March 2021. What was not stated was that unless the Claimant took some step by that date or dates her claim would be struck out under the order that had been stayed. I found that the effect of this later order was that there was no extant order which, if not complied with, would result in the

sanction set out in the order of 17 February 2021 being imposed. This may not have been EJ Lewis's intention – I do not know - but I consider that as the consequences of breaching an unless order are so serious, I should not strive to read into any order any obligation not found on the face of the order.

10. I therefore came to the conclusion that the Claimant was not in breach of any unless order. The only unless order had been stayed and it had not been re-imposed by any further order.

11. I went on to decide whether there had been any non-compliance with the order of EJ Gardiner. The Claimant told me that she did not have any documents in the latter two categories of the order for disclosure. She said that the three invoices disclosed to the Respondent represented the entirety of the documentary evidence she had in respect of work done for third parties in the relevant period.

12. The invoices provided by the Claimant were so heavily redacted as to be meaningless. She would or should have recognised that. The reasons for ordering disclosure had been explained by EJ Gardiner and EJ Lewis. The failure to comply fully with those orders would have been unimpressive from a person with no legal training. I ordered the Claimant to disclose unredacted copies of this invoices. They were sent to the Tribunal by e-mail shortly thereafter. I should make it clear that throughout this period the Claimant had not instructed her present solicitors and the criticisms I make are not directed at them.

13. I dealt with one further procedural matter. Leonard Crowder had prepared a third witness statement dated 17 March 2021. In that statement he deals with matters raised by the Claimant in her witness statement. The Claimant had objected to this statement being admitted. I decided that the Respondent should be entitled to rely on this statement. The statement covered ground that could not have reasonably been anticipated before the Claimant served her statement. If I had not admitted the statement, I would have permitted supplementary questions to deal with these matters. I could not see any prejudice to the Claimant in admitting the statement even if it could be said to have been served late. It was only 2.5 pages long and the Claimant had ample time to give instructions to her solicitor before the witness was called.

14. After reading the witness statements and documents I then heard from the witnesses. I heard from the Claimant herself. Her evidence took up the remaining part of the first day of the hearing. On the second day of the hearing I heard from Leonard Crowder.

15. Both advocates had provided written submissions/skeleton arguments and separate bundles of authorities and spoke to these during their submissions. I will not set out all of those submissions in these reasons but shall refer to the salient points during my discussions below. I mean no discourtesy to the advocates by taking this course and thank them for their assistance.

16. Unfortunately hearing submissions took up all the remaining time and I was unable to deliver an oral judgment. However after the hearing I was able to reflect on the evidence and reach a decision. I needed some further time to put that decision in a form suitable to send to the parties. I apologise for the delay in providing these reasons and can only point towards the volume of other cases and the fact that I had to complete a judgment in a case that taken 1 month to hear that ended shortly before the present case as the reasons for this.

General findings of fact

17. Ms Prince in her submissions suggested that much of the Claimant's evidence was not credible. Before making specific findings, I make the following observations. When giving evidence the Claimant frequently adopted the role of an advocate rather than giving evidence of fact. She was reluctant to make any concessions even where it was clear that she needed to. In contrast Leonard Crowder resisted any temptation to argue the Respondent's position from the witness box and gave straightforward answers to the questions put to him. I have taken these matters into account in reaching the conclusions below.

18. The Claimant attended court hearings on behalf of the Respondent's clients from approximately 8 March 2018 until 7 December 2018. A private parking company UKPC instigated a claim against the Claimant in 2018 and the final hearing took place in around December 2018. UKPC were a client of the Respondent and the Claimant was told that she would not be provided with further work until the matter was resolved. On 20 March 2019 Patrick Le Bas, the Head of Advocacy sent an e-mail to the Claimant informing her that the Respondent would ne longer use her services. I make no findings in respect of the Respondent's reasons for doing so as this is a matter that will need to be determined at the final hearing.

The Respondent

19. The Respondent is a company offering legal services and regulated by the Solicitor's regulation authority. The primary work carried out by the Respondent is to provide advocacy services to other firms of solicitors, companies and individuals by engaging what they describe as 'advocates' and getting those advocates to attend court hearings on behalf of their clients.

20. The work done by the advocates is typically carried out in the County Court but there are occasions where the work is done in the First Tier Tribunal or magistrates court. The Claimant's invoices submitted to the Respondent give an indication of the type of work that was done. The hearings included matters such as infant settlements, small claims, landlord and tenant matters and mortgage possession hearings.

21. The Respondent was incorporated and has traded since 1994. Leonard Crowder told me, and I accept, that the business has grown considerably and that it now directly employs 7 people including 2 solicitors at its offices and works with some 260 advocates.

22. Some of the advocates who the Respondent works with are fully qualified solicitors and barristers holding a relevant practicing certificate. However, the majority of the advocates are individuals who have passed their Legal Practice Course or Bar Vocational Course but who have not secured a training contract or pupillage. They have not yet qualified as solicitors or barristers. The Claimant said, and I accept, that many of the advocates working for the Respondent see this work as a means to gaining experience that will assist them secure a training contract or pupillage.

23. The provision of advocacy services is restricted by the Legal Services Act 2007. I shall return to that legislation below but here it is enough to say that that Section 14 of that act makes it a criminal offence to carry out a 'reserved legal activity' unless a person is entitled to do so (subject to a defence of knowledge). The reserved legal activities include exercising any right of audience and also conducting litigation. Section 13(2) sets out who is entitled to carry out reserved legal activities. That subsection provides that the only persons entitled to do so are persons who are 'authorised' or persons who are 'exempt'. The definition of an authorised person is found in Section 18. A fully qualified Solicitor or barrister holding a practicing certificate would fall within that definition. A person who had not done a training contract or pupillage would not. The definition of persons who are exempt is set out in Section 19 and Schedule 3. There are various categories of exempt persons, but the material exemption is contained in paragraph 7. That provides that a person is exempt if they are an individual whose work includes assisting in the conduct of litigation AND they are carrying out that work under the instruction and supervision of an authorised person AND the proceedings are being heard in chambers.

24. The Respondent has put in place systems for ensuring that the regulatory requirements are met and that their unqualified advocates can conduct their hearings lawfully. As I have set out above the Respondent employs a number of solicitors who, through an Advocacy Manager, give instructions and supervise the non-qualified advocates.

25. The Respondent has considerable experience of the types of work the advocates are likely to undertake. It has produced a guide for its advocates entitled 'Enforcement and Civil Proceedings Guide'. The edition I was provided with in the trial bundle ran to some 249 pages. Whilst I was not taken to many parts of that document, I did read a number of sections. I find that the document is a well written and practical guide to the law and procedure that the advocates would need to know. The guide frequently suggests what an advocate 'should' do. I have had regard to the guide as a whole and I conclude that this wording is intended to be guidance as to what is best practice. It is not written in mandatory terms. There is no suggestion that a departure from the guide would necessarily carry any implications.

26. The first issue covered in the guide concerns the rights of audience. There is a long discussion of the scope of the provisions regarding 'exempt persons' that I have referred to above. When discussing the need for supervision the guide says this:

> *'in terms of the supervision provided to advocates, this falls into two categories: knowing that the advocate is competent enough to attend the hearing and making sure that the advocate has attended the hearing competently. In terms of the*

former, LPC knows of the advocate's professional qualifications (i.e. that they have completed either the BVC/BPTC or the LPC) and that the advocate has received specific and detailed guidance in relation to the types of hearing that the advocate will be attending.

As to the continued monitoring of the advocate's performance the advocate submits a written report of each and every hearing that they attend. These attendance notes are checked, in terms of their accuracy, against the actual order received from the Court and any discrepancies will be drawn to the advocate's attention and discussed with an Advocacy Manager. The attendance notes are also checked the content, to make sure that the hearing was conducted in a suitably competent manner and in accordance with the advocate's instructions; again any issues will be raised and discussed between the advocate and their assigned Advocacy Manager'.

27. I was told by the Claimant and accept that in addition to the Guide the Respondent provides regular legal and practical updates on its 'Advocate Network'. The availability of legal updates on the Advocates Network is also mentioned in the guide. The Claimant told me, and I accept, that in addition the Advocates Network contains information about the specific requirements of some clients and also gives details of the how particular judges conduct proceedings.

The Claimant

28. The Claimant graduated from the University of Hertfordshire in 2012 having obtained a first-class degree in Law. After that she undertook the Bar Professional Training Course which she passed having achieved a "very competent" grade. She says, and I accept, that whilst on that course she attended a presentation by the Respondent encouraging graduates to come and work for them. Two matters were mentioned. Firstly; that if students put themselves forward for at least four days a week of work they could expect to live comfortably without needing another job and; secondly, that working with the Respondent would provide evidence of experience that would enhance the advocate's CV for the purposes of applying for a training contract or pupillage. The Claimant did not immediately apply for a position as an advocate.

29. The Claimant's CV sent to the Respondent in 2018 was included within the trial bundle. The Claimant sets out in that CV her 'Legal Work Experience'. She makes no distinction between paid work and voluntary work. That CV does show that the Claimant had undertaken an admirable amount of voluntary and charitable work. Two roles are identified which are relevant to the present proceedings. The first is that the Claimant says that from November 2014 to 'present' she has been working as a Legal Consultant and Mediator for a firm of solicitors called A & A Solicitors. In a description of the work that is done the Claimant says that she was an in-house consultant on various cases spanning numerous areas of law. Undertaking what she described as devilling for in-house solicitors. She says that she is responsible for the independent conduct of her own caseload .The Claimant says that she had been acting as a Freelance Solicitor's Agent/Court Advocate for Jeffries Solicitors. The description of the sort of work she did for Jeffries Solicitors is the sort of County Court work that I have described above and also undertaken by the advocates who work for the Respondent.

30. As I have set out above, EJ Gardiner, had ordered the Claimant to disclose details of any earnings that she had received from third parties. The Claimant ought to have recognised the importance of this and I have already been critical of her failure to comply with the orders that were made. When the Claimant did ultimately comply, she disclosed three invoices dated between 3 May 2018 on 13 July 2018. The invoices related to 2 cases the Claimant had undertaken whilst working for A & A Solicitors LLP. One matter the Claimant invoice for £9050. In respect of the other matter the Claimant invoiced for £860.42. When she gave her oral evidence the Claimant said that these invoices related to work that had been undertaken before she started work for the Respondent. The Respondent had obtained the Claimant's LinkedIn profile. That suggested that the Claimant was continuing to work for A & A Solicitors LLP. It shows her doing that from November 2014 – 'present'. The Claimant says that she simply had not updated her LinkedIn profile. I note that the Claimant on that profile does not mention working for Jeffries Solicitors at all nor does she mention her role with the Respondent. It therefore seems likely that the profile was not updated or accurate.

31. When the Claimant applied for work with the Respondent, she was asked to give a reference and provided details of A & A Solicitors LLP . On 16 February 2018 a reference was provided which stated that the Claimant was still an employee of that firm. However, that does not really assist in deciding whether the Claimant continued with that work after she started work for the Respondent. Despite my reservations about the Claimant's approach to disclosure. I find that the Claimant had stopped work for A & A Solicitors LLP and Jeffries Solicitors at the point she obtained work with the Respondent. The Claimant's covering letter when she applied for work with the Respondent states that she wants a 'full-time' position. When the Claimant does start work for the Respondent are a number of instances where she appears in court five days a week. In the first month the spreadsheet that showed when the Claimant booked time off, shows that she put herself forward to work for all but 2 days in the first 5 weeks of working for the Respondent. There would have been little time to undertake any work for any third party. I find that she gave up any other work at that stage.

The engagement of the Claimant

32. The Claimant applied to work for the Respondent by sending an email on 18 December 2017 and submitting a CV and a covering letter. The Claimant was invited to an assessment to take place on 22 January 2018. She was advised that the assessment would take place at the Respondent's offices in Canary Wharf and that she should expect the assessment take 2 ½ hours. In preparation the Claimant was sent materials that enabled her to prepare for the assessment. Suggestion was made that she should spend at least eight hours preparing. The assessment took the form of a written exercise, a mock advocacy exercise, a group exercise and an interview. The Claimant was telephoned a few days later and told that she had been successful. On 26 January 2018 she was sent induction documents which included online training videos. After she had watched those videos, she needed to undertake online tests. The Respondent arranged for her to shadow another advocate on 16 February 2018 at Clerkenwell and Shoreditch County Court and arranged a telephone conference in order to go through the assessment day feedback and to go through her answers to the online training.

33. The Claimant says that during this process there was reference to the possibility of one day being promoted to an Advocacy Manager. I would accept that this may have

been mentioned in passing but reject the suggestion that anybody said that it would be expected that in due course the Claimant would apply to be promoted to that role. The number of advocates far exceeded the number of Advocacy Managers and the chances of promotion were necessarily very slim.

34. Prior to doing any work for the Respondent the Claimant was required to provide a DAB certificate and references.

The terms applicable to the Claimant

35. The Claimant was sent, a 'Advocate Service Level Agreement' which she signed on 8 February 2018. The following clauses are the most relevant to the decision I have to make (but I have considered the whole agreement):

35.1. At Clause 1 there is a definition of the parties. The Claimant is defined as 'the Advocate' with a sub definition being 'a business undertaking operating within the legal jurisdiction of England and Wales'

35.2. Clause 2 includes a definition of 'Client' that defines that term as being the persons for whom the Respondent acts and includes prospective and former clients; and

35.3. At Clause 3 a further statement that the Advocate is *'an independent business undertaking providing advocacy, clerking and other legal services on a non-exclusive "when needed" basis, under a contract for services'.*

35.4. Clause 5.1 says: *'Nothing in this Agreement shall be so construed as to create, imply or otherwise form in any way whatsoever a partnership, association joint venture or employment relationship between LPC law and the Advocate'*

35.5. Clause 6.1 says: *'LPC law is not obliged to provide a minimum amount or any Jobs to the Advocate'.* Clause 6.2 says: *the Advocate is not obliged to accept any Instruction from LPC law'.*

35.6. Clause 6.6 says: *'Upon acceptance of and Instruction, the Advocate agrees to undertake the Job to which that Instruction relates. In the event that the Advocate wishes for a substitute to undertake the Job having accepted and Instruction, the Advocate's substitute must also have entered into an Agreement of this nature with LPC law (such agreement to be valid for the date of the Job) and the Advocate must inform the Head of Advocacy or the Director of LPC law as soon as reasonably practicable after the substitution to allow LPC law to update the Advocate Network.*

35.7. Clause 6.7 requires the Advocate to attend the relevant location for a job at least 30 minutes before the hearing is due to start.

35.8. Clause 6.8 and 6.9 require the Advocate to contact the client both before and after the hearing.

35.9. Clauses 6.10 and 6.11 require the Advocate to complete a typed report and return the papers to the Client on the day of the Job unless otherwise agreed with LPC law.

35.10. Clause 6.12 requires the Advocate to comply with the Solicitors Regulation Authority mandatory principles which are set out in the schedule to the agreement.

35.11. Clause 7.10 read as follows: *'the Advocate agrees not to solicit instructions the services of the type provided by LPC law and in competition therewith from any Client during the period of this Agreement and for a period of 12 months from the termination of this Agreement however that may occur'.*

35.12. Clause 7.11 read as follows: '*the Advocate agrees to attend one meeting per annum, either at LPC laws offices or at another specified location, for the purposes of a legal/business/compliance update'.*

35.13. Clause 9.2 includes a warranty that the Advocate owns the copyright in any Report provided to LPC Law.

35.14. Clause 11 provides that the advocate should be responsible for their own income tax liabilities and national insurance or similar contributions and clause 11.2 provides a warranty that the Advocate will indemnify LPC law against any demands for tax and the associated costs and penalties.

35.15. Clause 12.1 provides that the fee payable by LPC law to the Advocate in respect of any Job shall be that displayed on the LPC Law Advocate Diary for the relevant job when the Advocate confirms acceptance.

35.16. Clause 12.4 provides that *'if the Advocate is unable to undertake the job as a result of an occurrence beyond the control of either the Advocate or LPC Law, fee for that job will not be paid to the Advocate'*

35.17. Clause 12.6 provides that the fees set out in any Fee Cards may be varied by LPC law upon 14 days' notice.

35.18. Clause 12.7 states that any fee or disbursements may be varied by agreement by an employee of LPC Law and the Advocate at any point prior to the Advocate undertaking the job.

35.19. Clause 15.1 reads as follows: *'LPC Law agrees to pay professional indemnity insurance premiums to keep the Advocate insured for any civil*

liability or related Defence Costs arising pursuant to the Advocate undertaking any Job falling within this agreement'.

35.20. Clause 15.4 says: *'the Advocate agrees to indemnify LPC law against all liability, loss, damage and expense of whatever nature incurred or suffered by LPC Law or any third party as a result of the breach of warranty in clauses 9 and 11 or arising out of any of the exclusions set out in 15.2'*

36. On 1 May 2018 the Claimant was sent a further Advocate Service Level Agreement. I find that this agreement was updated primarily to reflect the renewed emphasis on data protection imposed by the GDPR. However the agreement does have two material changes in it firstly there is a new clause 6.13. That clause provides that the Advocate will use reasonable skill and care when performing any job. Secondly clause 15.4 is amended and now reads: *'The Advocate agrees to indemnify LPC Law against all liability, loss, damage and expense of whatever nature incurred or suffered by LPC Law or any third party as a result of a breach of this agreement'*. This indemnity is significantly broader than the very limited indemnity included in the original version. The Claimant signed this agreement on 16 May 2018.

Whether the terms offered to the Claimant were negotiable

37. The Claimant says in her witness statement that the terms that were offered to her were on a take it or leave it basis. It does not appear that there was any meeting or proposal to discuss these terms. I find that these were the standard terms that the Respondent expected its Advocate to agree to. In his third witness statement Leonard Crowder disputes the suggestion that amendments would never be agreed. He provides additional emails which he says demonstrate that the Respondent was prepared to negotiate certain terms. One example of this is an individual negotiating the length of the restricted covenant. It appears that the Respondent agreed to vary this clause from the usual 12-month period to 6 months. The Claimant suggested in her evidence that such changes would only be contemplated for more senior Advocates. I find that the Respondent was prepared to engage in limited negotiations about the standard terms which it offered to its Advocates. They were not set in stone but the emails that have been disclosed show that only minor variations were agreed.

Whether the Claimant was permitted to refuse work.

38. It was common ground between the parties that an Advocate was expected to, and in the Claimant's case did, notify the Respondent of the days upon which they were available for work. This was done using the electronic system on the Advocate Network. Leonard Crowder in his first witness statement said that this was similar to the practices operated by many barristers chambers. I agree. I have seen a spreadsheet of the work done by the Claimant and it is clear that she was unavailable for work for a number of weeks due to the fact that she was getting married and taking a honeymoon. She was able to indicate that she was unavailable for that period.

39. The Claimant agreed that when an Advocate had indicated that they were available for work the Respondent might allocate cases to them. When the Advocate looked

at their section of the Advocate Network, they would have an option on screen to accept or decline work. The Claimant says in her witness statement that in reality she would not be able to decline work unless she had a good reason. I find that the Claimant could have declined any job that she did not wish to do. That is not to say that I reject the Claimant's evidence entirely. Work was allocated to the Claimant by the allocations team. If the Claimant declined work having said she was available or delayed in accepting the job that would lead to a conversation with the allocation team. I accept that the Claimant would come under pressure to accept the work that she was allocated.

40. The Claimant refers to an email sent by a member of the allocations team (described in her email footer as a diary clerk) sent to the Claimant on 9 August 2018 when she was in fact on her honeymoon. She says: *'I was wondering whether there was any chance you may be old come back into the diary for tomorrow we are struggling to cover for the following hearings….. I would be very grateful if you could pick up any of the above.'*. This does not support the Claimant's position that she was unable to refuse work it is quite obvious that the Claimant is being asked whether she could possibly assist rather than being told that she must undertake work. In her witness statement she said that when she returned from her honeymoon, she was not allocated any work as punishment. Ms Prince challenge that in cross examination and took the Claimant to a record of the hearing is that she had been allocated. That clearly showed that the Claimant was allocated a hearing on her first day back at work and a full week of hearings shortly after her return. There is no evidence to corroborate the Claimants suggestion that she was punished for refusing these hearings.

41. I would accept that the Claimant would have recognised that if she repeatedly turned down work when she had said she was available the diary clerks would very probably start to view her as being unreliable. In those circumstances the Claimant would undoubtably feel that she was unable to turn down work unless she could justify it. That is not the same thing as the Claimant being contractually bound to take on work if she didn't want to do it.

42. It was common ground between the Claimant and the Respondent that if it chose to do so the Respondent was not obliged to offer the Claimant any work. It exercised that right when the issue arose about the Claimant's litigation with UK PC.

Whether the Claimant could negotiate a fee

43. The Respondent set out its standard fees and expenses that would be paid to an advocate in a Fee Card. It was the Claimants case that these were non-negotiable. In his witness statement Leonard Crowder took issue with this. He said that there were many occasions where higher fees had been agreed by the Respondent. The agreed bundle included spreadsheet showing were additional sums had been paid. I find that there were some occasions where a higher fee was agreed with an advocate. However, there are very few. I accept that in exceptional circumstances an advocate would be able to raise the fact that a fee was inadequate and propose a slightly higher fee. However, absent such exceptional circumstances, it would not be realistically possible for an advocate to negotiate a fee. The fee would be proposed when the job was entered into the Advocate Network absent any exceptional circumstances there was really just a take it or leave it option. There was

no evidence that any advocate had negotiated a different set of rates based on her or his skills and experience.

Whether the Claimant could use a substitute in reality

44. The Respondent did not suggest that the Claimant was free to delegate any part of her work generally. It did however maintain that clause 6.6 of the Advocate Service Level Agreement reflected the reality of the situation and Advocates were able to ask some other Advocate to cover a job providing they had a current agreement. The Claimant says that she never in fact used a substitute. The Respondent did not seek to dispute that. Its position was that if she had, it could not and would not have complained. I broadly agree. At paragraph 16.6 of her witness statement the Claimant gives evidence that she had been asked to cover a colleague's hearing because he had left some papers at home. When that colleague telephoned the Respondent the case was transferred on the Advocate Network. When he returned in time to do the hearing it was transferred back with no objection by the Respondent.

45. I would accept that there would be circumstances where the Respondent might have objected to the use of a substitute. If the proposed substitute was new and had insufficient experience then I find that the Respondent, may have objected or taken action if notified after the event. However in the ordinary course of events the Respondent would he unconcerned if the advocates swopped their allocated cases around. This is what the Claimant describes in her witness statement.

46. If an advocate asked another to do their case, then the case was reallocated on the system and the advocate who did the case was the one who got paid.

Supervision in practice

47. I am satisfied that the Respondent did supervise the Claimant in the following ways. The Claimant was only allocated cases that the Respondent thought were within her expertise. The Claimant said, and I accept, that she was told that would start with easier cases before being let loose on more complex matters. The Claimant had some previous experience and so was soon doing a broad range of cases. However, I accept that the Respondent ensure that the advocates had sufficient experience to do the cases they were allocated.

48. The Claimant was required to submit a daily report of any court hearings to her Advocacy Manager. I was provided with an e-mail sent by the Claimant's Advocacy Manager, Jason Furey on 6 December 2018. He wrote: *'It was me who called you and it was about your small claims hearing yesterday. The note was a bit too brief and didn't really set out what both parties had argued in terms of the claim. I was wondering if you could flesh it out a bit and resubmit as soon as you can'.* There were then further correspondence where further suggestions were made.

49. The Respondent suggested that the Claimant was free to take any tactical decisions in the cases she conducted. I find that that is correct to a certain extent. The Claimant's work was limited to advocacy at hearings. She was not responsible for

conducting ongoing litigation. Her role was to advocate in any application or trial and not to decide whether to bring or defend proceedings or indeed make any applications. She could decide what she would say in court subject to an expectation that she would follow the guidance in the materials provided by the Respondent. I find that the reasons for the Advocacy Managers monitoring the daily court reports were in part so that they could ensure that the work was being undertaken to a good professional standard. Had it not been I find that the Advocacy Manager would have taken steps to speak to the Claimant.

50. Where the Respondent considered that the standard of work performed by the Claimant was inadequate it would refuse to pay. In May 2018 the Claimant was instructed in a mortgage repossession matter. It transpired that the Claimant's mother had been a tenant and the Claimant had also lived in the property. The Landlords alleged that the reason for falling behind with their mortgage flowed from the Claimant's mother's failure to pay rent and the Claimant's actions in resisting possession proceedings. The Landlords complained about the Claimant representing the mortgage company alleging a conflict of interest. The Respondent dealt with the complaint after an investigation. They did not find the Claimant had a conflict of interest but informed her that she would not be paid as she had not provided 'an adequate level of service'.

51. Without adequate supervision from a solicitor the Claimant could not lawfully appear in Court. I find that the Claimant was supervised in the manner envisaged by the legislation and by the passages in the Enforcement and Civil Proceedings Guide I have quoted above.

Freedom to choose when and where to work, equipment etc

52. The Claimant did not have to put herself forward for work. She could mark herself as away on the Advocate Network. If she did that, she could not be allocated work unless she agreed. The Claimant gave evidence, which I accept, that the allocations team would occasionally put pressure on the Claimant to make herself available or accept an unattractive job. The Claimant would be told that if she assisted, she would be passed better work.

53. There are numerous occasions where the Claimant did not make herself available for work. She was married in the summer of 2018 and the spreadsheet showing her availability shows that she had a lot of time off over this period.

54. When the Claimant accepted any job, she was able to download the papers. Jobs were generally allocated 6 days in advance. It was then up to the Claimant when she did any preparation work. In reality much of the time that work would be done at evenings or on weekends.

55. The Claimant needed a computer and mobile telephone in order to do this work. She supplied that at her own expense. If she needed any textbook to assist her with her work, she would have needed to supply it. The Respondent provided the Claimant with access to the Advocate Network and the Enforcement and Civil Proceedings Guide and other materials. The Claimant was required to submit to inspection of her computer equipment by the Respondent for data protection purposes.

Dealings with the Respondent's clients

56. The Claimant was required to contact the Respondent's clients both before and after any court hearing. She told me, and I accept, that when she spoke to the client, she would introduce herself as the Advocate from LPC Law.

57. The terms of the restrictive covenant in the Advocate Service Level Agreement prevented the Claimant soliciting work from the Respondents actual or prospective clients. As such the Claimant could not market her services directly to those clients. Indeed, unless they had an in-house solicitor who could supervise the Claimant, she could not have lawfully worked directly for the clients in the same capacity.

58. The Claimant was not privy to the contractual arrangements between the Respondent and its clients (although she might infer what the going rates might be). Even if she were to impress a client at best, they would ask for her to act as an advocate on subsequent occasions. This would not affect the Claimant's rate of pay. Any following the Claimant built up would be of no value to her if she ceased working for the Respondent.

Other work done by the Claimant

59. The Respondent contends that the Claimant actually undertook work for A & A Solicitors during the time she was providing services to the Respondent. I have not accepted that suggestion. However, I was provided with e-mails that demonstrated that other advocates, working with the Respondent, did also work for other solicitor's firms. I find that some of those individuals were fully qualified. Most appeared to be outside London where there was less work to go around. However, what I take from this is that the Respondent would not have had any objection to the Claimant working for any third-party subject only to the restrictive covenant contained in the Advocates Service Level Agreement.

Taxation

60. There was no dispute between the parties that the Claimant was responsible for her own tax and national insurance contributions. Surprisingly, the Claimant did not disclose any tax returns.

The law to be applied

The legislation

61. Section 230 of the Employment Rights Act 1996 provides definitions of the terms used in the Act. The material parts say:

s 230 Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4)….(6)

62. The section 230(3) definition of 'worker' is adopted by Regulation 2 for the Working Time Regulations 1998 where exactly the same words are set out. Accordingly, all those who qualify as employees will also qualify as workers however some workers are not employees.

63. Under section 83(2)(a) of the Equality Act 2010, "employment" is defined as:

"… employment under a contract of employment, a contract of apprenticeship or a contract personally to do work"

The case law

64. The position of workers in the hierarchy of employment status was described by Lady Hale in ***Bates von Winkelhof v Clyde & Co LLP*** **[2014] ICR 730 as follows:**

'…the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj (London Court of International Arbitration intervening) [2011] UKSC 40, [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005; [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act'

65. The elements required for worker status were set out by Leggat LJ in ***Uber BV v Aslam and others*** **[2021] UKSC 5** at paragraph 41 where he said:

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

The requirement for a contract to perform work or services

66. The first requirement to establish status as a worker is to show that the relationship is governed by a contract - ***Sharpe v Worcester Diocesan Board of Finance Ltd and anor*** **2015 ICR 1241, CA**. That requirement may be displaced where not to do so would infringe some fundamental right protected by the European Convention on Human Rights - ***Gilham v Ministry of Justice*** **2019 UKSC 44, SC**.

67. Where a putative worker undertakes work sporadically it may be necessary to examine whether there is an overarching agreement that covers each occasion on which the putative worker carries out work or, if not, to look at whether the is an agreement on the occasions when work is done. In ***Stephenson v Delphi Diesel Systems Ltd*** **[2003] ICR 471**, Elias J (as he then was) said:

> *"11 The significance of mutuality is that it determines whether there is a contact in existence at all. The significance of control is that it determines whether, if there a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.*
>
> *12 The issue of whether there is a contract at all arises most frequently in situations where a person works for an employer, but only on a casual basis from time to time. It is often necessary then to show that the contract continues to exist in the gaps between the periods of employment. Cases frequently have had to decide whether there is an over-arching contract or what is sometimes called an "umbrella contract" which remains in existence even when the individual concerned is not working. It is in that context in particular that courts have emphasised the need to demonstrate some mutuality of obligation between the parties but, as I have indicated, all that is being done is to say that there must be something from which a contract can properly be inferred. Without some mutuality, amounting to what is sometimes called the "irreducible minimum of obligation", no contract exists.*
>
> *13 The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations*

(to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.

14 The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work if available is irrelevant to the question whether a contract exists at all during the period when the work is actually performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not."

68. Accordingly when looking at any individual assignment the it is not necessary for a worker to show that there was an obligation to offer work and an obligation to accept work that persisted between assignments. However, the absence of any such obligation may be relevant to the third issue – whether the putative employer is a client or customer of the putative worker see - ***Secretary of State for Justice v Windle & Arada*** **[2016] IRLR**.

69. The mere expectation that an individual will undertake a certain amount of work is not the same as an obligation to do so. In ***Hafal Ltd v Lane-Angell,*** **UKEAT/0107/17** Choudhury P. held at [29] that:

'The Tribunal's findings indicate that the Claimant was expected to provide dates of availability to the Respondent. The Claimant would then be placed on the rota. There was an expectation that the Claimant would be able to provide work should she be contacted whilst on the rota. However, there is no finding that the Claimant was obliged to provide any or any minimum number of dates of availability, certainly not for the period before 1 May 2015. It is a trite observation that an expectation that the Claimant would provide work is not the same as an obligation to do so. I recognise that there may be cases where, as a result of a commercial imperative or market forces, the practice is that work is usually offered and usually accepted and that such commercial imperatives or forces may crystallise over time into legal obligations. That was the case in Haggerty. However, in that case, there were no express terms negating such obligations. I consider that to be a significant distinguishing feature. On the facts, this case is closer to the situation in Stevedoring and Carmichael than that in Haggerty.'

The requirement for personal service

70. The second requirement that the contract provides for the work be performed personally It is not necessary that the work is done exclusively by the putative worker a limited power to delegate will not necessarily defeat employee or worker status. The circumstances where a power to delegate might be fatal to employment or worker status were explored in ***Pimlico Plumbers Ltd v Smith*** both in the Court of Appeal **[2017] ICR 657** and in the Supreme Court **[2018] ICR 1511**. In both courts it was held that a limited right to delegate would not necessarily be inconsistent with the dominant purpose of the contract being the provision of services personally. There is a useful discussion of the boundaries of the right to delegate in the Court of

Appeal judgment of Etherton MR at paragraph 83 where, having reviewed the authorities, he said:

> *'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.'*

71. The fact that there was no delegation in practice does not determine the question of whether there is a contractual obligation to perform services personally ***Redrow Homes (Yorkshire) Ltd v Wright*** **2004 ICR 1126, CA**

72. Where the express terms of an agreement for services are silent as to who might perform the services, whether a term that the services will be performed personally can be implied, will depend on the context and all of the surrounding circumstances. It may simply be a matter of common sense that that is what the parties would have agreed had it been expressly mentioned **- *Byrne Brothers (Formwork) Ltd v Baird and others*** **2002 [ICR] 667**

The third requirement – the client or customer exception

73. As the definition makes clear, an individual undertaking to do or perform work or services to clients or customers in the context of a profession or business undertaking carried on by the individual will not a be a worker. Some guidance was given in the case of ***Byrne Brothers (Formwork) Ltd v. Baird & Ors*** **[2002] ICR 667** where Underhill P (as he was) said:

> *'The structure of limb (b) is that the definition prima facie extends to all contracts to perform personally any work or services but is then made subject to the clumsily-worded exception beginning with the words "whose status is not …". The question is whether the contract between the Applicants and Byrne Brothers falls within the scope of that exception.*

We were referred to no authority giving guidance on that question; and we accordingly spell out our approach to it in a little detail, as follows:

(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.

(7) We should add for completeness that, although the Regulations are of course based on the Working Time Directive, we were referred to no provision of the Directive nor any case-law of the E.C.J. which sheds any light on the present issue. The Directive does not contain any definition of the term "worker".'

74. In ***Pimlico Plumbers Ltd v Smith*** **[2018] UKSC 29**, the Supreme Court considered, among other issues, whether Pimlico should be regarded as a client or customer of Mr Smith. The Court referred to two authorities which it indicated would be of some assistance in the conduct of the inquiry: ***Cotswold Development Construction Ltd v Williams*** **[2006**] IRLR 181 where it was said by Langstaff P:

"… a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls"

and ***Hashwani v Jivraj*** **[2011] UKSC 40** where Lord Clarke stated, at paragraph 34:

"… whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services"

75. Where the putative worker undertakes other activities in addition to the work undertaken for the putative Employer it is necessary to focus on the question of whether when performing that work the putative employer is a client or customer. In ***The Hospital Medical Group Ltd v Westwood*** **[2013] ICR 415** the fact that Mr Westwood had a number or other sources of income generated through his medical qualifications, did not necessarily mean that the Hospital Medical Group Limited were his client or customer. Whether they were or were not was a question of fact for the Tribunal. Declining to give any general guidance Kaye LJ stated that in his view there was not 'a single key with which to unlock the words of the statute in every case'. He suggested that the integration test suggested by Langstaff J 'would often' be appropriate.

76. While the question of subordination is clearly important in distinguishing a worker from those genuinely in business on their own account, Tribunals must be aware that a small business may be genuinely an independent business but be completely dependent upon subordinate to the demands of a key customer. While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker; see paragraph 30 of ***Bates von Winkelhof v Clyde & Co LLP*****.**

77. The following further matters emerge from the decision of the Supreme Court in ***Uber BV v Aslam:***

77.1. That the fact that there is no obligation to offer and accept work in gaps between the times when work is none is not fatal to establishing that somebody is a worker but may be relevant [see paragraphs 90 – and 91 and ***Secretary of State for Justice v Windle & Arada****]*

77.2. Where the work done benefits a third party it is relevant to look at (1) who decides the cost of the work to the third party (2) the degree of control that is exercised in governing how that service will be provided and (3) the extent to which the arrangements with the third parties affords the putative worker the potential to market their own services and develop their own independent business [see paragraph 92 and see below]

77.3. Where the putative employer controls the rate of remuneration that is a matter of major importance [see paragraph 94]; and

77.4. It is relevant to look at the degree of control exercised by the putative employer over the manner in which the putative worker carries out their work [see paragraphs 95-98]

77.5. The fact that the putative employer takes steps to prevent the putative worker building relationships with any third party in order to advance their own business is a relevant consideration [Paragraph 100]

77.6. The fact that the manner in which the parties conduct their arrangement is necessary in order to comply with some regulatory scheme is not any reason to disregard or attach less weight to those matters in determining whether one party is a worker [see paragraph 102].

The proper approach to any written agreement

78. Defending on the circumstances it may be necessary to look beyond any apparent agreement to discern the actual agreement see ***Autoclenz Ltd v Belcher*** and ***Uber BV and ors v Aslam and ors*** **2019 ICR 845**, CA where it is suggested that it was necessary to take a 'realistic and worldly wise' approach to an apparent agreement.

79. ***Autoclenz v Belcher*** **[2011] UKSC 41**, a was concerned with a complex written agreement the Supreme Court which the employees contended did not reflect the true agreement. Lord Clarke said:

> *'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.'*

80. In the Supreme Court in ***Uber BV and ors v Aslam*** Lord Leggat made it clear that the test of whether a person was a worker was not to be determined by the terms of any written agreement. He said at paragraph 76:

> *'Once [the fact that the test is statutory] is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.'*

81. The passage above does not mean that the contractual terms are irrelevant, Lord Leggat goes on to say at paragraph 85 (with my emphasis added):

> *'In the Carmichael case there was no formal written agreement. The Autoclenz case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the Carmichael case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections*

by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.'

The test under Section 83 of the Equality Act 2010

82. It was suggested in ***Windle v Secretary of State for Justice*** **2015 ICR 156** that the meaning of worker status is the same as the definition of employee found in the Equality Act 2010. There might be some debate as to whether the test is actually the same for rights derived from EU law but for the present purposes ***Windle*** is binding upon me.

Discussion and Conclusions

83. The Respondent has drawn my attention to the case of ***Mr R Green v LPC Law Limited*** **Case No:2202186/2014** which is a decision of EJ Wade in the Central London Employment Tribunal. In that case the Claimant had brought claims of unfair dismissal and breach of contract as well as claims for holiday pay. To pursue the unfair dismissal or breach of contract claims Mr Green would have needed to show that he worked under a contract of employment. In order to pursue the holiday pay claim he only needed to show that he was a worker. At a preliminary hearing EJ Wade decided that he was neither an employee or a worker. The Respondents say that, as Mr Green was an Advocate working in the same role as the Claimant under the same terms, this decision is persuasive, and I should reach the same conclusions.

84. In ***Mr R Green v LPC Law Limited*** EJ Wade gives herself a short self-direction on the ingredients of worker status. She does not deal with personal service. This appears to have been the consequence of a concession made by the Respondent recorded at paragraph 7. She cites ***Byrne Brothers (Formwork) Ltd v. Baird & Ors***, ***Cotswold Development Construction Ltd v Williams*** and ***The Hospital Medical Group Ltd v Westwood.*** She did not have the benefit of the more recent decisions I have cited above. EJ Wade deals with the issues of employment status and worker status together. In my respectful view that makes it very difficult to see quite why EJ Wade decided the worker status issue against Mr Green. At paragraph 34, EJ Wade sets out her reasons for deciding that Mr Green was not an employee and then goes on to *say 'I have also concluded that the Claimant was not integrated into the Respondent's business and that he was not recruited to work exclusively for the Respondent. Therefore his situation falls into the category of an individual who was working for a customer or client, in other words, he was somebody who was truly self employed'.* Whilst I shall have regard to that reasoning I consider that EJ Wade appears to consider that the features of the contractual arrangements (such as taxation) which had a bearing on employment status assisted her in answering the question whether the Respondent was a client or customer. If she has, then in my view there was a very real risk of making a mistake. Nevertheless I shall take the decision into account when reaching my own conclusions.

85. I shall address the three issues identified by Leggat LJ in ***Uber BV v Aslam and others*** in the order he has suggested.

Was there a contract to do work?

86. The first issue is whether the Claimant contracted to do work for the Respondent. There is no difficulty with the individual cases where the Claimant went to court. Once the Claimant had accepted any job, she was contractually bound to complete it (I leave aside for now the issue of personal service). There was no dispute before me that that would amount to 'work'.

87. The more difficult question is whether the Service Level Agreement amounted to an agreement that the Claimant undertake work for the Respondent. To answer that question I need to ask whether there was any obligation on the Claimant to carry out any work. It is clear that the Service Level Agreement imposes obligations on the Claimant is she accepts any Job. That is not the issue. I have found above that the Claimant was free to decline any offer of a Job. The actual agreement between the parties reflected the terms of the Service Level Agreement in that respect. I have accepted that the Claimant would not have been popular had she turned down work all the time nor if she had never made herself available for work at all. There was at the least an expectation on both sides that the Claimant would be offered some work and that she would accept it. However, if the Claimant had never put herself forward for work, she would not have been in breach of contract and the Respondent would have had no legal redress. I have regard to the amount of time the Claimant took off when she got married with no apparent objection from the respondent. This is not a case where the expectations of either party had crystallised into legal obligations – see ***Hafal Ltd v Lane-Angell***. Had the Claimant been contending that she was an employee this conclusion would have been fatal to any such a claim (I agree with EJ Wade on this point).

88. Whilst the Service Level Agreement did not require the Claimant to undertake any Job it did impose obligations on both her and the Respondent. For example she was required to register as a Data Controller and the Respondent was required to obtain indemnity insurance to cover any work she accepted. In that sense there was sufficient mutuality of obligations to give rise to a contract. I find that the purpose of that contract was to govern the relations between the parties in the anticipation that some work would be offered and accepted.

89. I had noted in the course of the hearing that Clause 7.11 of the Service Level Agreement required the Claimant to attend one annual meeting *'for the purposes of a legal/business/compliance/update'*. I have considered whether that imposes an obligation to do any work. I do not consider that it does. I find that it is an obligation to attend a meeting not for the purposes of doing work but for the purposes of training. This is an example of the Respondent demonstrating that its advocates are properly supervised. I note that in the National Minimum Wage Regulations 2015 training is considered to be work only when the training takes place at a time when the worker would otherwise be working. I do not consider that an obligation to attend a day of training means that the Claimant was obliged to do any work in the sense that word is used in Section 230.

90. I therefore conclude that the Claimant has satisfied this first element of the test in that, when she accepted and undertook any job, she did so under a contract to do work.

I find that, in the gaps between any such jobs, the Claimant was not obliged to undertake any work at all (although she had obligations which did not amount to work).

Was there a requirement of personal service?

91. The second element in the test is whether the Claimant undertook to do any work personally. I have found above that clause 6.6 reflected the true agreement between the parties. I have rejected the Claimant's case that in reality she was unable to ask anybody else to cover a job she had accepted.

92. Clause 6.6 allowed the Claimant to accept a job but if she did not then wish to do the job herself, she could ask one of the other advocates to do the job in her stead. I consider the following to be important features of this arrangement:

92.1. If any work was transferred to another advocate, then the Advocate Network was updated either prospectively or retrospectively; and

92.2. The new advocate would be under all of the obligations of their Service Level Agreement (for example they and not the Claimant would be responsible for the standard of their work and would be required to contact the clients and write a report in accordance with the terms of that agreement; and

92.3. The new advocate would invoice for and be paid for the work.

93. The manner in which the Respondent carefully recruits and trains the advocates is consistent with the fact that it expects them to carry out the work. They are selected for their suitability by the Respondent. I find that the purpose of Clause 6.6 is to permit the advocates to swop cases between themselves in circumstances where it is convenient to do so. For example if one advocate had accepted a job in Brentford in the morning and Colchester in the afternoon and learned that a fellow advocate had a job in Colchester in the afternoon and a job in Brentford in the morning they were free to swop things around between themselves to avoid any unnecessary travel provided that they were both competent to do the cases.

94. I have set out above passages from the decision of Etherton LJ in the court of appeal in ***Pimlico Plumbers Ltd v Smith***. The fifth example he gives in his analysis is where the putative employer has an unqualified right to veto any substitute. Etherton LJ is in apparent agreement with the case of ***MacFarlane v Glasgow City Council*** **[2001] IRLR 7** which he has cited. In that case the fact that an employee could and did ask another gym instructor to cover any class if they were members of a panel maintained by the Council was held not to be inconsistent with an obligation of personal service.

95. In ***Pimlico Plumbers Ltd v Smith*** the Supreme Court was prepared to accept that Mr Smith was entitled to use a substitute provided that the substitute was drawn from the ranks of other Pimlico Plumbers. At paragraph 34 Lord Leggat says:

> *'The tribunal was clearly entitled to hold, albeit in different words, that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done.'*

96. I consider that in this case, and for understandable reasons, there was a heavy emphasis on personal performance of the work. The advocates were carefully selected and trained. The general expectation was that advocates would do any job that they accepted. Switching jobs between themselves was permitted for practical reasons. The Service Level Agreement could be terminated by the Respondent at any time by service of a notice in writing. As such it could effectively veto the substitution of any advocate providing that it knew of the substitution before the work was completed.

97. I find that the limited right given by clause 6.6 is not inconsistent with an obligation of personal service. The Respondent was not merely concerned that the work was done. It carefully selected advocates to do the work. It needed to monitor and supervise those advocates. The right to delegate was limited, subject to a contractual right to veto and was an insignificant feature of the contract. I find that the Claimant has satisfied this element of the test.

Was the Respondent a customer or client of a business undertaken by the Claimant?

98. I then turn to the nub of the dispute. The question of whether, as the Respondent says, the Claimant ran a business as a freelance advocate of which they were just one client or whether, as the Claimant says, she was an advocate working for and within a business operated by the Respondent.

99. In its evidence, and in its submissions, the Respondent has referred to matters which do not assist in any great way with answering this final question. The first of these is that the Respondent has placed a heavy emphasis on the fact that the advocates are self-employed. As a consequence they are responsible for dealing with HMRC in respect of tax and national insurance. HMRC have apparently accepted that the label adopted by the parties is correct. However, Section 230(3)(b) is concerned only with those individuals who are not employees. Any such individual would be required to account for tax and national insurance on the basis that they were self-employed.

100. As pointed out in the authorities above, any person who is self employed may, in one sense be seen as being 'in business'. That does not mean that when they provide services the other party should always be regarded as a client or customer.

101. The Respondent has inserted in the Service Level Agreement declaratory terms that describe the Claimant as 'an independent business providing advocacy, clerking and other legal services on a non-exclusive 'when needed' basis'. I consider that the only reason for the inclusion of these terms is to seek to avoid a finding that the advocates have any employment rights. They have no other purpose. I do not consider that the inclusion of these terms assists me in any way. I need to look at the reality of the situation as I have found it. Mainly I have agreed that the parties performed the contract in a manner consistent with the written terms, but I do not accept that the use of the phrase 'independent' bears any close scrutiny.

102. In common with ***Uber***, there are many features of the arrangements whereby the Claimant worked as an advocate that can be explained by the regulatory regime. As I have set out above many of the advocates, and the Claimant in particular, were not legally qualified and could not appeal in court unless they satisfied the requirements of showing that they were exempt persons. In order to do that they needed to be instructed by a solicitor and be supervised. Even then, they were limited as to the type of hearings they could do. The Respondent was obliged to, and did, obtain professional indemnity insurance for itself. It then undertook to provide insurance for the Claimant.

103. I find, to its credit, that the Respondent did supervise its advocates to the extent required by law, if not more. The process started at recruitment where the advocates were carefully screened for their ability. Then the advocates were given training and tested on it. They were not only provided with comprehensive documentation but also with regular updates. They reported to an Advocacy Manager to whom they would send their court reports. As I have found above, these were read, and feedback was given. I find that the level of supervision was such that the Respondent had a high degree of control over the Claimant.

104. I have found above that the Respondent set the usual level of remuneration. Whilst fees are occasionally varied that is the exception. Fees are not varied to reflect skills, experience or goodwill. The fees are set based on the Respondent's assessment of what its clients will pay.

105. The nature of the Respondent's business is that it offers advocacy services to its clients. It markets those services. It then protects those client relationships through restrictive covenants. If the Claimant performed well, any goodwill generated would benefit her to the limited extent that she might be preferred for other cases, but she could not hope to build a business on the back of any personal relationship. The greater share of any goodwill benefited the Respondent's business. The Respondent's goodwill was promoted when the Claimant introduced herself as an LPC Advocate.

106. I accept that, had she chosen to do so, the Claimant could have obtained similar work with other solicitors firms at the same time as working for the Respondent. Only in that sense could the Claimant ever have marketed her services.

107. The Claimant's role in the Respondent's business was not ancillary it was an essential part of the business. Without advocates the Respondent could not function at all. In order to be able to send advocates to court the Respondent has to be a regulated solicitor, has to put in place a system of supervision, developed training materials and had maintains the Advocate Network. The Respondent has obtained insurance for itself and the Claimant. It requires the Claimant to submit to audits for the purposes of data protection. It requires the Claimant to undergo at least some training at its expense. I find that these matters show that the advocates are integrated into the Respondent's business in a significant way.

108. Ms Prince referred me to the passage in ***Cotswold Development Construction Ltd*** where Langstaff J suggests that a barrister is a paradigm case of a person who would not be a worker. It is fair to assume that when he did so he was referring to the traditional model of a barrister in chambers. It seems to me that there are some very real differences between business operated by a barrister in chambers and that operated by the Claimant. A barrister in chambers, once qualified, would not usually be subject to supervision by anybody. They can appear in court, any court, without any restrictions at all. A barrister can set their own charges. As their reputation and skills increase so can their fees. A barrister can specialise in a particular area of law. These were not options open to the Claimant.

109. I accept that the terms under which the Claimant was engaged are non-exclusive. She was free to offer her services to another firm of solicitors. I have accepted that some advocates working for the Respondent actually did so. The freedom to work elsewhere was limited only by the terms of the restrictive covenant. The freedom to work for others might indicate that the Claimant was in the business of offering her services as an advocate to clients or customers but that is not necessarily the case. In ***Uber BV v Aslam and others*** it was recognised that the drivers were free to use any of the rival taxi Apps. This was not fatal to their claim to worker status. In ***The Hospital Medical Group Ltd v Westwood*** Mr Westwood was held to be a worker despite offering similar, but not identical, services elsewhere. What I take from those cases is that the fact that a person does the same or similar work for third parties is a factor, but is not determinative of, the question of whether the other party to the contract is a client or customer of the business undertaken by the putative worker.

110. I have regard to the fact that I have found that there was no mutuality of obligations that persisted between jobs. That is a factor that might point to a conclusion that the Respondent was a customer or client of the Claimant. As it was made clear in - ***Secretary of State for Justice v Windle & Arada*** the weight to be placed on that factor depends on the facts of each case. Here I can have regard to the expectations of the parties. Both parties expected the Claimant to be offered and to accept work on a regular basis. That was the purpose of the careful and comprehensive recruitment and training process. That was the purpose of entering into the Advocates Service Level Agreement in the first place.

111. I have regard to the entirety of the evidence and in particular to the matters set out above. I do not find that the Respondent was a customer or client of the Claimant. Accordingly, I find that the Claimant was a worker. She will therefore also be 'in employment' for the purposes of his claims under the Equality Act 2010.

Employment Judge John Crosfill

20 September 2021