Appeal No. UKEAT/0022/20/LA V

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 19 & 20 May 2020

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

MR P M HUNTER

MR P PAGLIARI

MS J VARNISH APPELLANT

BRITISH CYCLING FEDERATION T/A BRITISH CYCLING RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr David Reade (One of Her Majesty's Counsel) Ms Lydia Banerjee (of Counsel) Instructed by: Fenton Elliot Solicitors The Manor House 34 London Road Newbury Berkshire RG14 1JX
For the Respondent	Mr Jason Galbraith-Marten (One of Her Majesty's Counsel) Instructed by: Mills & Reeve LLP 78-84 Colmore Row Birmingham West Midlands B3 2AB

SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

The Claimant is a talented professional cyclist. The Respondent is a not-for-profit organisation that promotes and controls the sport of cycling in the UK. The Claimant entered into a written agreement with the Respondent, pursuant to which she undertook (amongst other things) to train hard for the common purpose of winning medals for the British cycling team. The question for the Tribunal was whether the Claimant was an employee or a worker of the Respondent within the meaning of s.230 of the **Employment Rights Act 1996**. The Tribunal concluded that the Claimant was neither. The Claimant appealed.

Held, dismissing the appeal, that the Tribunal was entitled to conclude, based on an evaluative judgment taking account of all relevant factors, that the Claimant was not an employee or a worker. The Tribunal had not erred in its approach to the assessment of employee status and nor had it reached conclusions that no reasonable tribunal, properly directed, could have reached.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. Jessica Varnish ("the Claimant") is a talented professional cyclist. The British Cycling Federation ("the Respondent"), which goes by the trading name, 'British Cycling', is a not-for-profit organisation that promotes and controls the sport of cycling in the UK. The Claimant entered into a written agreement with the Respondent, pursuant to which she undertook (amongst other things) to train hard for the common purpose of winning medals for the British cycling team. The question for the Manchester Employment Tribunal, Employment Judge Ross presiding ("the Tribunal"), was whether the Claimant was an employee of the Respondent or a worker within the meaning of s.230 of the **Employment Rights Act 1996** ("the 1996 Act"). The Tribunal concluded that the Claimant was neither. The Claimant contends that in so finding the Tribunal erred in law.

Background Facts

2. The Claimant started competitive cycling from a very young age. By the time she was aged 12, she was selected for the British Talent Team Programme which had been established by the Respondent. In 2006, whilst the Claimant was still at school, she was selected to join the Respondent's World Class Programme as a junior sprinter, and was subsequently selected for the Respondent's Olympic Podium Programme ("the Podium Programme").

3. Over the course of her relationship with the Respondent, the Claimant entered into various "Athlete Agreements". The Athlete Agreement relevant for present purposes was signed by the Claimant on 16 November 2015 ("the Agreement"). The Agreement, which the Tribunal found accurately reflected the relationship between the parties, expressly provides that it is not a contract of employment and that participation in the Podium Programme will not create an employment relationship.

A

4. Pursuant to the Agreement, the Respondent agreed, amongst other things, to develop a performance plan, known as the Individual Rider Plan ("IRP"), which identifies the Claimant's personal performance, development goals and support service requirements; and agreed to provide a package of services, benefits and other support to the Claimant, including coaching support, team clothing and equipment, sports science support, medical services, travel and accommodation expenses, and access to facilities. It was estimated that the value of the various services and benefits provided by the Respondent to the Claimant over a four-year period was in the region of £600,000-£700,000.

B

C

5. Pursuant to Clause 6 of the Agreement, the Claimant agreed to comply with the IRP (described by the Tribunal as the Claimant's "primary responsibility"), to train with the British Team squad as and when required by the IRP, to attend training camps unless otherwise agreed with the Senior Management Team ("SMT"), to enter identified competitions as specified and agreed with the SMT, and to follow all reasonable directions of the Respondent relating to the matters set out in the Agreement. The Claimant also agreed to wear team clothing, to use her best efforts to obtain and maintain the highest possible levels of health and physical fitness commensurate with being an elite international competitor, to conduct herself in a proper manner at all times whilst a member of the Podium Programme, to comply with Anti-Doping rules, to permit the Respondent to make use of her image in connection with the promotion, publicity or explanation of the Podium Programme, to engage in contractual appearances, to obtain prior written consent of the SMT before working in any media capacity, and not to engage in any personal commercial work with any third party without the prior written consent of the Respondent.

D

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G

6. Clause 10 of the Agreement deals with suspension and termination. It provides that the Respondent may, at its absolute discretion, terminate or suspend the Agreement and the Claimant's membership of the Podium Programme at any time and with immediate effect by

H

written notice in certain specified circumstances. Membership of the programme may also be suspended or terminated as a consequence of the disciplinary process under the applicable policy, or for performance-related reasons.

7. There was a second respondent in the proceedings before the Tribunal, namely, UK Sport. UK sport is an executive non-departmental public body sponsored by the UK Government through the Department for Digital Culture, Media and Sport. UK Sport is responsible for high performance sport at a national level, and for investing HM Treasury and National Lottery funding into a number of different sports and partner organisations in order to support and showcase Olympic and Paralympic medal success. The Claimant's membership of the Respondent's various development programmes, including the Podium Programme, meant that she was eligible to apply to UK Sport for a means-tested grant known as an Athlete Performance Award ("APA"). The APA is a means-tested contribution towards an athlete's living and sporting costs. The Tribunal found that the APA enables athletes to dedicate a significant amount of their time and energy to maintaining a high level of competitiveness in their chosen sport. The Tribunal also found that the APA is a grant based on an assessment of future performance. The Claimant received an APA in varying amounts between the years 2007 and 2016.

8. The Claimant also set up her own business, Jess Varnish Management Limited, in 2010. She was successful in obtaining sponsorship agreements with companies such as Boots and Adidas. In the period 2013 to 2016, the Claimant's business made approximately £35,000 annually.

9. The Tribunal found that the Claimant agreed to a high level of control under the Agreement. In particular, the Tribunal noted that both coaches and athletes were working towards the goal set out in the Agreement, and the Claimant accepted a high degree of control in achieving that goal. The Tribunal also noted, however, that the Claimant was not obliged

under the Agreement to use the coach supplied by the Respondent. The Claimant was entitled to have her own coach, although any such coach was required to comply with relevant obligations under the Agreement and to use his or her best attempts to work with the SMT to further the Claimant's interests as well as those of the Podium Programme as a whole.

10. The Claimant's relationship with the Respondent was terminated for performance-related reasons with effect from 31 March 2016. She lodged proceedings in the Tribunal against both the Respondent and UK Sport. Her claims included unfair dismissal and discrimination. Employee and worker status was disputed, and a preliminary hearing was convened to determine that issue.

The Tribunal's Conclusions

11. The issue for the Tribunal was whether the Claimant was employed by or a worker of the Respondent, UK Sport or both the Respondent and UK Sport under a tri-partite arrangement. The Tribunal first considered whether the Claimant was an employee. Having identified that the "irreducible minimum" for a contract of employment comprised the elements of mutuality of obligation, control and personal performance, the Tribunal concluded as follows in respect of the first of those elements:

> **"139. Usually mutuality of obligation is expressed as an obligation on the part of the employer to provide work and a corresponding obligation on the part of the employee to accept and perform the work in exchange for consideration, usually wages. The case law refers to this as the "wage/work bargain". It is of course possible for remuneration to be provided in a form other than money. The claimant's representative reminded me an employed domestic servant might receive a number of benefits in kind but no cash.**
>
> **140. I must ask myself in the language used in the Ready Mixed Concrete case: "Has the servant agreed that in consideration of a wage or other remuneration she will provide her own work and skill in the performance of some service for her master?" I find the answer to this question is no. I find there was no wage/work bargain in this case. The claimant did not work in exchange for a wage. The first respondent did not provide work for the claimant to do. The first respondent did not pay her.**
>
> **141. What occurred was that the claimant was selected, on the basis of her potential, to take part in the first respondent's World Class Programme (also referred to as the Podium Programme). By 2015 she was taking part at the elite**

level on the Olympic Podium Programme. This was reflected in the legal agreement, the Athlete Agreement. The purpose of the Agreement was "to recognise the ultimate goal of everyone involved in the Podium Programme to win medals for the British Team at international competitions" (see page 2.1.1).

142. The claimant's responsibilities under the Agreement are set out at paragraph 6. Her primary responsibility was the individual rider plan. She agreed to develop and agree an individual rider plan in close consultation with an individual identified by British Cycling. In other words, she agreed to train in the hope she would be selected to compete for the British Cycling Team.

143. To enable her to have the best chance to do this the British Cycling offered her extensive services as detailed in the findings of fact above and see paragraph5.1.5 of the 2015 Athlete Agreement at page 701 although she was not obliged to take up those services. See the evidence of Mr Barnes referred to above. Indeed she was not required to use the coach allocated by British Cycling. The Agreement makes it clear she could use her own coach.

144. The claimant did not receive money from British Cycling, the first respondent. There is no provision within the Athlete Agreement (see pages 698-725) for any money to be paid to the claimant. Instead the claimant was eligible as an athlete who has been selected for British Cycling's Podium Programme to apply for a National Lottery funded Athlete Performance Award (APA) which I find was a non repayable means tested grant and thus a contribution towards her living and/or sporting costs as an elite athlete.

145. I find it is significant that the APA was not funded by British Cycling, the first respondent. The APA was funded by the National Lottery and the claimant had to apply to UK Sport, the second respondent, for such an award.

146. Although the claimant was only eligible for such an award if she had been selected for British Cycling's Academy or Podium Programme, there was no absolute guarantee that she would receive such an award. Ms Nicholl explained that UK Sport retained an inherent discretion to reject the application. In addition, there were athletes on the Olympic Podium Programme who did not receive an award because their means meant they were not eligible.

147. Another feature of the award from UK Sport was that it was variable. I rely on my findings of fact to show that over the ten years the claimant received an award in accordance with UK Sport's Development Programme she received different levels of award, sometimes at the highest level (A) but at other times at the lower level (B). The amount varied, not on the basis of the level of the claimant's past efforts in training and competing but on the assessment of her future potential.

148. I entirely accept the evidence of Ms Nicholl to find that unlike conventional wages, the sum was not payable on the basis of past performance or past results, or past work done. Instead the award was considered on an annual basis by considering the future potential of an athlete. Although Ms Nicholl accepted that past performance would be a factor in making that assessment, she stressed the basis of the assessment was the athlete's future potential: it was in future potential that the National Lottery Fund via UK Sport was seeking to invest.

149. In order to obtain an award from UK Sport, the claimant had to complete a detailed application form and include details of her means because the award was means tested. The claimant was quite clear in evidence that she was careful to fill in that part of the form accurately.

150. I reject the suggestion by the claimant in evidence that she was in some sense compelled by British Cycling to complete an application for the APA. I find the chasing emails in the bundle are no more than that. I find those emails show that those who coached the claimant had her best interests at heart and tried to ensure she completed the relevant paperwork so she could be considered for funding from UK Sport. 151. I rely on the fact the funding was

from a third party, the fact the claimant had to submit an application for funding, the fact the award was means tested and the fact that the funding was a grant where the award was based on assessment of likely future potential, not on the basis of work done in the past as factors which mean the claimant was not providing work or skill in consideration for wages or remuneration, for the first respondent.

152. I remind myself that Mr Justice Langstaff held in Cotswold Developments Construction Ltd v Williams 2006 IRLR 188 in relation to mutuality of obligation that it is important to know precisely what is being considered under that label. "Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed under those obligations is a contract of employment, or should be categorised differently. A contract of employment where there is no obligation to work could not be a contract of employment". Later he states; "The focus must be upon whether or not there is some obligation upon an individual to work and for the other party to provide or pay for it"

153. In this case I find that that not only did the first respondent not provide the claimant with remuneration, neither did they provide work for the claimant. I remind myself I must scrutinise the nature of the Agreement. I find the obligations of the parties under the Athlete Agreement do not amount to a mutuality of obligation. The first Respondent selected the claimant for the World Class Programme. They did not provide her with work. She agreed to train in accordance with the individual rider plan in the hope she would achieve success in international competition.

154. I find therefore the claimant's claim of employment by the first respondent fails at this point because I find there is no mutuality of obligation between the claimant and the first respondent."

12. As to personal performance, the Tribunal concluded as follows:

"Personal Performance

156. Superficially, it appears the category of personal performance here is consistent with a contract of employment. There is obviously no dispute that it was the claimant who performed the rider plan as set out in her Agreement with British Cycling. It is certainly not a case where there is a power of substitution. It was inevitable it was the claimant who must train in accordance with the rider plan.

157. However, I consider more closely what exactly was the claimant's personal performance under the terms of the Athlete Agreement. Her personal performance was necessary in relation to her agreement to train in accordance with the individual rider agreement. There is no doubt the claimant put in huge amounts of personal effort to train hard. However I have already found that the first respondent was not providing the claimant with work so care must be taken with the concept of personal performance. The claimant personally performed the agreement to train under the individual rider plan-that is obvious and inevitable: she had been individually selected because of her own ability to be on the programme. However she was not personally performing work provided by the respondent. Rather she was personally performing a commitment to train in accordance with the individual rider agreement in the hope of achieving success at international competitions. I find that does not amount to personal performance consistent with a finding of a contract of employment."

13. Whilst accepting that control was a "significant feature" of the relationship, the Tribunal found that:

> **"165. In conclusion the claimant was subject to control as reflected in the clauses of the Athlete Agreement referred to above. However as I have already found there is no mutuality of obligation and no personal performance consistent with a contract of employment, there is therefore is no contract of employment. The claim the claimant was employed by the first respondent fails at this stage."**

14. The Tribunal rejected the Claimant's submission that the various services provided by the Respondent amounted to "remuneration". Instead, the Tribunal found:

> **"168. I find that the benefits provided under the contract at 5.1.5 are benefits and not remuneration. In making this finding I rely on the nature of the two most important services listed at (i) and (ii) of clause 5.1.5. The first benefit is described as "training, competition and personal development planning and review" and the second benefit is described as "coaching support". I find those are genuinely services, not remuneration.**
>
> **169. In addition there was no obligation on the claimant to accept coaching support from the coach supplied to her by British Cycling. Clause 6.1.3 makes it clear that the claimant was entitled to engage the services of a personal coach. This is reflective of a finding that these genuinely were services provided to the claimant rather than remuneration.**
>
> **170. Likewise, I accept the evidence of Mr Dyer whom I found to be a clear, conscientious and careful witness. I rely on his evidence to find that the services provided under the contract are services not remuneration. He explained that one of the types of support available to athletes under the elite Podium Programme was psychological support, but some athletes chose never to avail themselves of that support. That is suggestive of a service which is open to the athlete to use or not, rather than remuneration.**
>
> **171. Clause 5.1.5 states "the services are "general services benefits and other support" and they are "designed to support you in delivering your individual rider plan." This language suggests the reality I have found-the services are available to support the claimant in her training. They are not remuneration awarded in exchange for work or skill performed.**
>
> **172. Furthermore the provision of the benefits is not automatic: Clause 5.1.5 states; "The level or amount by which you are entitled to enjoy any of the services benefits and other support is decided upon your individual circumstances and is at the discretion of the programme". An inherent discretion on the part of British Cycling in allowing enjoyment of a particular benefit or service is inconsistent with a finding that these benefits amount to remuneration.**
>
> **173. Finally, although how the parties are taxed is not definitive in assessing an employment relationship, it is interesting and relevant to note that the benefits received under the Athlete Agreement by the claimant, which have a very significant monetary value are not regarded as taxable by the Revenue.**
>
> **174. For these reasons I find that the services and benefits provided under the Athlete Agreement are not remuneration. I find there is no mutuality of obligation between the claimant and the first respondent because she was not provided with remuneration in exchange for work. I find the first respondent did not employ the claimant."**

15. Having concluded that the Agreement was not a sham and that it did accurately reflect the arrangements between the parties, the Tribunal went on to consider the other features of the Agreement and whether these were or were not consistent with employee status. The Tribunal considered the Respondent's policies, the Claimant's ability to negotiate terms, the financial arrangements (including the Claimant's tax arrangements), the extent to which the Claimant was integrated into the Respondent's organisation, the restrictions on the Claimant's engagement with the media, and her obligation to make appearances. Some of these (integration, media guidelines and commercial restrictions) were found by the Tribunal to point towards employee status, but the other factors were considered to point away from such status. The Tribunal, following the guidance of Mummery J in **Hall v Lorimer** [1992] ICR 739 (as approved by the Court of Appeal in **Hall v Lorimer** [1994] 1 WLR 209), then 'stepped back' to look at the whole picture and concluded as follows:

> **"Conclusions**
>
> **228. At this point I step back and look at the whole picture as advised by Mr Justice Mummery. The claimant was an athlete. She wished to perform to the best of her ability and to represent her country at international competitions. British Cycling wanted to assist athletes who could perform in international competitions at the highest level and win medals. British Cycling selected the claimant for their Podium Programme. She agreed to participate in a detailed training plan. To support her in her training they offered her state-of-the-art equipment and a range of services to which she could avail herself should she wish.**
>
> **229. The cost of providing these services by British Cycling was met partly from public funds (the National Lottery) and partly from funds raised by commercial sponsorship. The claimant was restricted in terms of her own commercial sponsorship and media appearances.**
>
> **230. The claimant received no money from the first respondent and could choose her own coach if she wished. She could choose her own equipment in certain circumstances if she wished. The money she did receive was from another party, UK Sport, was a non repayable grant and was not based on past "work" but rather on her future potential. It was means tested and variable.**
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> **231. I find the picture wholly inconsistent with a contract of employment with the first respondent. I find she was not employed by the first respondent."**

16. Having concluded that the Claimant was not an employee, the Tribunal turned its attention to whether the Claimant was a 'worker' within the meaning of s.230(3)(b) of the **1996**

Act, and in particular, whether there was some minimum amount of work that the Claimant was obliged to perform personally. The Tribunal concluded as follows:

> **"242. Alternatively, if the real question is whether or not there is some minimum amount of work that the claimant is obliged to perform personally, I find that the answer to the question is that there was not. The claimant was not personally performing work for British Cycling. She was training in accordance with the rider plan in the hope she would be selected to compete in international competitions.**
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> **243. [Blank in original]**
>
> **244. I also rely on my finding that the claimant was not working for British Cycling. She was an athlete training in accordance with the individual rider plan. She was not undertaking to do or perform personally any work or services for another party to the contract.**
>
> **245. I find that this is not a contract for services. The Athlete Agreement is a contract where services are provided to the claimant, not the other way around. I find the analogy with education which has been put in this case by the first and second respondents counsel to be helpful. I rely on the principle in the old case of Daley v Allied Suppliers [1983] ICR 90 97F-98E, that the relationship is not one of employment where the purpose of the contract is training for the benefit of the trainee.**
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> **246. In stepping back to look at the true nature of the relationship between the parties I remind myself of the purpose of this section in the Employment Rights Act 1996. It is to give employees and workers jurisdiction to bring certain types of claim, including a claim for enforcement of wages under Part II of the Act as clearly expounded to me by the first respondent's counsel. I rely on my findings above there were no wages paid by the first respondent under the terms of the Athlete Agreement The only remuneration available to the claimant under the contract with the first respondent was potentially benefits and services. The general nature of the services is set out in the Athlete Agreement at 5.1.5, at page 701.**
>
> **247. I heard evidence that there are a wide range of benefits available including world class coaching, top quality clothing and equipment and a dedicated support team including mechanics, together with access to physiotherapy, massage, medical support, nutritionists, biomechanics, psychologists, lifestyle management experts and sports scientists. In addition, the claimant had the benefit of personal accident insurance, travel insurance, travel and accommodation for training camps and competitions, world class facilities and a passport scheme. I rely on the evidence of Mr Dyer that different athletes chose to avail themselves of different parts of this Programme. It is very difficult to understand how the mechanism of Part II in relation to wages could apply. I find this is a pointer to my original finding that the fact the claimant was availing herself of benefits offered to her, she was not providing services to the first respondent.**
>
> **248. I rely again on the factors set out in the section of my judgement above dealing with employee status to find the picture is not consistent with worker status.**
>
> **249. Accordingly, for these reasons the claim fails under "limb b" at that point. There is therefore no need for me to ask myself the second question and to deal with the so-called "carve out" provision, namely "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" (section 230(3)(b)).**
>
> **250. Accordingly, I find that the claimant is not a worker for the purposes of the definition in ERA 1996."**

17. The Tribunal also dismissed the claim that the Claimant was employed by or a worker of UK Sport or of both the Respondent and UK Sport under a tri-partite arrangement. The Tribunal considered a further issue which was whether the Claimant was an employed under a contract personally to do work within the meaning of s.83(2)(a) of the **Equality Act 2010**, and found that she was not. That aspect of the Tribunal's judgment is not the subject of this appeal.

The Legal Framework

18. Section 230 of the **1996 Act** provides:

> **"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) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.**
>
> **(5) In this Act "employment"–**
>
> **(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and**
>
> **(b) in relation to a worker, means employment under his contract;**
>
> **and "employed" shall be construed accordingly."**

19. The difficulty faced by the Court in trying to formulate a simple test for identifying whether a person is an employee is eloquently summed up by Elias LJ in **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 99:

"5. There is voluminous case law seeking to encapsulate the essence of the contract of employment and to distinguish it from other forms of working relationship. The distinction is important because some rights, including the right to claim unfair dismissal, are conferred on employees whereas others are conferred upon workers, a more widely defined category. All employees are workers but not all workers are employees.

6. Various tests for identifying when a contract of employment exists have been proposed in the cases, although none has won universal approval. These tests include, to use the shorthand descriptions, the following: the control test, which stems from the decision of Bramwell LJ in *Yewens v Noakes* (1880) 6 QBD 530 (which focuses on the nature and degree of control exercisable by the employer); the business integration test, first suggested by Denning LJ in *Stevenson, Jordan and Harrison v MacDonald and Evans* [1952] 1 TLR 101 (whether the work provided is integral to the business or merely accessory to it); the business or economic reality test, first propounded by the US Supreme Court in *US v Silk* 331 US 704(1946) (whether in reality the worker is in business on his or her own account, as an entrepreneur); and the multiple or multi-factorial test, reflected in the judgment of McKenna J in *Ready Mixed Concrete (South East Limited) v Minister of Pensions and National Insurance* [1968] 1 QB 497 (involving an analysis of many different features of the relationship).

7. Employment relationships come in such diverse forms that, whilst each of these tests may in any particular case cast some light on the problem of classification, none provides a ready universal answer. However, the test most frequently adopted, which has been approved on numerous occasions and was the focus of the Employment Tribunal's analysis in this case, is the approach adumbrated by McKenna J in the *Ready Mixed Concrete* case. He succinctly summarised the essential elements of the contract of employment as follows (p.515):

> **"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."**

He later added (p.516-517):

> **"An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control."**

8. This approach recognises, therefore, that the issue is not simply one of control and that the nature of the contractual provisions may be inconsistent with the contract being a contract of service. When applying this test, the court or tribunal is required to examine and assess all the relevant factors which make up the employment relationship in order to determine the nature of the contract."

20. The Tribunal in this case, as we have seen, referred to the need for there to be *"mutuality of obligation"* before there could be a contract of employment. Elias LJ gave guidance on the relevance of that in construing the nature of the relationship between parties:

> **"*Mutuality of obligation.***
>
> **10. An issue that arises in this case is the significance of mutuality of obligation in the employment contract. Every bilateral contract requires mutual obligations; they constitute the consideration from each party necessary to create the contract. Typically an employment contract will be for a fixed or indefinite duration, and one of the obligations will be to keep the relationship in place until it is lawfully severed, usually by termination on notice. But there are some circumstances where a worker works intermittently for the employer, perhaps as and when work is available. There is in principle no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration, as a number of authorities have confirmed: see the decisions of the Court of Appeal in *Meechan v Secretary of State for Employment* [1997] IRLR 353 and *Cornwall County Council v Prater* [2006] IRLR 362.**
>
> **11. Where the employee working on discrete separate engagements needs to establish a particular period of continuous employment in order to be entitled to certain rights, it will usually be necessary to show that the contract of employment continues between engagements. (Exceptionally the employee can establish continuity even during periods when no contract of employment is in place by relying on certain statutory rules found in section 212 of the Employment Rights Act.)**
>
> **12. In order for the contract to remain in force, it is necessary to show that there is at least what has been termed "an irreducible minimum of obligation", either express or implied, which continue during the breaks in work engagements: see the judgment of Stephenson LJ in *Nethermere (St Neots) v Gardiner* [1984] ICR 612, 623, approved by Lord Irvine of Lairg in *Carmichael v National Power plc* [1999] ICR 1226, 1230. Where this occurs, these contracts are often referred to as "global" or "umbrella" contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee. This was the way in which the employment tribunal analysed the employment status of casual wine waiters in *O'Kelly v Trusthouse Forte plc* [1983] ICR 728, and the Court of Appeal held that it was a cogent analysis, consistent with the evidence, which the Employment Appeal Tribunal had been wrong to reverse.**
>
> **13. In *Stephenson v Delphi Diesel Systems* [2003] ICR 471 I sought to bring some of these strands concerning mutuality together in the following way (paras 11-14):**
>
> > **"11. The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is 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."**
>
> **14. On reflection, it is clear that the last sentence of paragraph 14 is too sweeping. Control is not the only issue. Even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement. *O'Kelly* and *Ready Mixed* provide examples."**

21. This makes it clear that mutuality of obligation is most likely to be of significance where there is intermittent working and there may be an issue as to whether any sort of contract at all governs the periods when no work is actually being performed. Elias LJ, also in **Quashie**, gave a salutary reminder of the role of the appellate court in dealing with appeals in respect of decisions as to employee status:

> **"*The role of an appellate court.***
>
> **9. Where, as in this case, the contract is to be gleaned from a mixture of written documents and working practices, an appellate court should not readily interfere with the determination of the first instance court. Absent some misdirection from the tribunal, it can only do so if no reasonable tribunal, properly directing itself, could have reached the decision it did. This firmly established principle has been reiterated on numerous occasions. In Clark v Oxfordshire Health Authority [1998] IRLR 125 Sir Christopher Slade summarised it as follows:**
>
> **"Principles governing appeals from an industrial tribunal**

> **35. At first impression one might suppose that the question whether one person is 'employed' by another under a 'contract of employment' within the meaning of s.153(1) of the 1978 Act would in any case be regarded by the court as a bare question of law, since it raises the question whether there exists between the two parties the legal relationship of employer and employee. And indeed exceptionally, if the existence or otherwise of the relationship is dependent solely upon the true construction of a written document or documents, the question is treated by the court as being one of law, so that an appellate tribunal or court is free to reach its own conclusion on the question without any restriction arising from the decision of the tribunal below (Davies v Presbyterian Church of Wales [1986] IRLR 194).**
>
> **36. But in the more ordinary case, where the determination of the question depends not only on reference to written documents but also on an investigation and evaluation of the factual circumstances in which the work is performed, a quite different situation arises: see Lee Ting Sang v Chung Chi-Keung [1990] IRLR 236 at p.240; Clifford v Union of Democratic Mineworkers [1991] IRLR 518 at p.520 per Mann LJ). In such a case, as these two authorities show, the responsibility of determining and evaluating all the relevant admissible evidence (both documentary and otherwise) is that of the tribunal in the first instance; an appellate tribunal is entitled to interfere with the decision of that tribunal, that a contract of employment does or does not exist, only if it is satisfied that in its opinion no reasonable tribunal, properly directing itself on the relevant question of law, could have reached the conclusion under appeal, within the principles of Edwards v Bairstow [1956] AC 14. An illuminating summary of the legal position in this context is also to be found in the judgment of Sir John Donaldson in O'Kelly v Trusthouse plc [1983] IRLR 369 at pp. 381-393."**
>
> **The EAT cited this passage in its judgment."**

22. With that guidance in mind, we turn to the grounds of appeal.

Grounds of Appeal

23. The Claimant was given permission to pursue three grounds of appeal:

a. Ground 1 – The Tribunal erred in law in finding that there was no "mutuality of obligation" between the Claimant and the Respondent.

b. Ground 2 - The Tribunal erred in concluding that the claimant was not a worker under s.230(3)(b) of the **1996 Act**. As is now common, we shall refer to a worker falling within this provision as a "limb (b) worker"; and

c. Ground 3 – The Tribunal's reasoning was irrational in relation to certain findings of fact.

24. We shall deal with each ground in turn.

Ground 1 – Mutuality of Obligation

Submissions

25. Mr Reade QC, who appears with Ms Bannerjee for the Claimant (as they did below), submits that the Tribunal took an unduly restrictive approach in determining whether there was mutuality of obligation. The first challenge is as to the Tribunal's conclusion, at [139] to [140] of the Judgment that "*there was no wage/work bargain in this case*". Mr Reade submits that it is clear from the decision of Langstaff J in **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 that the question to be asked is whether:

> **"the natural inference from the facts [is] that the claimant agreed to undertake some minimum, or at least some reasonable, amount of work … in return for being given that work, or pay": Cotswold at [61].**

26. In relation to the work side of that requirement, the Tribunal's fundamental error, submits Mr Reade, was in failing to recognise that in the case of a professional cyclist, the obligation under the Agreement to train hard for the common purpose of achieving medal success for the British Team, *was* work done by the Claimant for the Respondent. The Tribunal had been referred to cases, such as **Walker v Crystal Palace Football Club Ltd** [1910] 1 KN 87, **CA and Eastham v Newcastle United FC** [1964] Ch 413 (together, "the football cases"), which established that, for professional football players, the training that they did with a view to being selected to play in competitive matches, was work done in order to achieve a common benefit, i.e. winning competitions, and that, by analogy, the same should apply to the Claimant. On any view, submits Mr Reade, such work satisfies the "*some minimum or at least some reasonable amount of work*" test identified by Langstaff J in **Cotswold**. The mere fact that the athlete derives a personal benefit from the arrangement, i.e. by being provided with state of the

art equipment and services to enhance their own skill and reputation, does not undermine the fact that some minimum or some reasonable amount of work is provided.

27. Moreover, submits Mr Reade, it is clear that in order to satisfy the requirement that there is mutuality of obligation, the work done does not have to be directed to the employer and nor is it necessary for the employer to provide the work; it may be enough that the employer pays an employee to carry out work for another. In the present case, the Claimant, as a professional athlete was clearly required to provide work by training and, when selected, competing for the common purpose of all those involved in the Podium Programme of winning medals for the British Team.

28. Mr Reade also challenges the Tribunal's finding at [153] of the Judgment that, *"[the Respondent] selected the claimant for the World Class Programme. They did not provide her with work*." This is said to be incompatible with the Tribunal's earlier finding that only the athletes selected could compete in international events and that, in that sense, the athletes were provided with work by the Respondent.

29. On the remuneration side, although the Tribunal acknowledged that benefits could be in kind, Mr Reade submits that it erred in concluding at [167] that the services provided to the claimant by the Respondent "*are not and were not regarded by the parties at the time, as remuneration*". That error stems, says Mr Reade, from the Tribunal's original failure to regard the training done by the Claimant as work; had it been appreciated that it was work, then the Tribunal would not have reached the erroneous conclusion that the Claimant was merely the recipient of services provided by the Respondent. The substantial value of the services in this case was such that it could clearly amount to remuneration, and the fact that the Claimant was not obliged to take them all up (e.g. she could use her own coach), or the fact that some benefits were discretionary, were not inimical to such benefits amounting to remuneration.

30. Mr Galbraith-Marten QC, who appears for the Respondent, submits that the Tribunal's conclusions involved evaluative judgments as to the nature of the contract, with which the EAT cannot readily interfere, unless there has been a misdirection of law or its decision was one that no reasonable Tribunal, properly directing itself, could have reached on the facts. In short, submits Mr Galbraith-Marten, the Respondent's appeal is a perversity challenge. As to Ground 1 specifically, Mr Galbraith-Marten submits that the Tribunal clearly did direct itself correctly in relation to mutuality of obligation since it expressly referred, at [152], to the test identified in **Cotswold**. Furthermore, the Respondent's challenge comprises little more than criticisms of the weight attached by the Tribunal to certain factors, which is a matter for the Tribunal. He submits that the football cases take the Claimant nowhere as, not only did these cases not form the basis of the arguments below, the factual circumstances in those cases (including the fact that in **Walker** there was an express contractual term that the footballer agreed to "*serve the club*", in consideration for which the club "*agrees to pay*"), were very different. The Respondent does not dispute that the Claimant worked very hard to achieve the goals set out in the IRP, but submits that it was open to the Tribunal to conclude that this did not amount to work in the sense of providing personal service consistent with a contract of employment. Mr Galbraith-Marten submitted that a closer analogy to the present case was that of a student attending University. Such a student may work hard to achieve success and the University will provide valuable resources to help the student achieve that success, but no-one would suggest that students are employees of the University.

31. Mr Galbraith-Marten submits that a contract, the primary or dominant purpose of which is to train, support and assist an individual, cannot be a contract of service or a contract personally to execute any work or labour: **Daley v Allied Supplies Ltd** [1983[ICR 90, EAT.

32. As to remuneration, Mr Galbraith-Marten submits that the Tribunal was entitled to conclude that the true nature of the Agreement was for the provision of services to the Claimant

by the Respondent, and that it would be unnatural to view these as 'pay' or remuneration for training hard and competing.

Ground 1 – Discussion

33. Section 230 of the **1996 Act** provides that an "employee" is "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment". A "contract of employment" means a "contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing". Thus, the question, in a case where there is an issue as to whether a person is an employee or not, is whether that person works (or worked) under a contract of service. But the **1996 Act** provides no further assistance in determining whether or not a contract is a contract of service. For that one must turn to the numerous authorities in the field. One of the key authorities, and one which has stood the test of time to a remarkable degree, is the judgment of MacKenna J in **Ready Mixed Concrete (South East) Ltd v List of Pensions and National Insurance** [1968] 2 QB 497. In that decision, MacKenna J identified three requirements before it could be said that there is a contract of service. The first is that there is an agreement that in consideration of a wage or other remuneration, an individual will provide his own work and skill in the performance of some service for the employer. The second is that the individual agrees that in the performance of that service he or she will be subject to the other's control in a sufficient degree to make that other the employer. The third is whether the other provisions of the contract are consistent with its being a contract of service: see **Ready Mixed Concrete** at 515 C to D (set out at **[**19] above).

34. The **Ready Mixed Concrete** approach is not the only test that may be applied, as the judgment of Elias LJ in **Quashie** makes clear, but it is the one that is most frequently adopted. That is perhaps because the multifactorial approach that it embodies renders it capable of

application to the multitude of factual circumstances that can give rise to a contract of employment. The third limb of the test, under which the court or tribunal is required to consider whether the other provisions of the contract are consistent with a contract of service, requires an assessment of the entirety of the contract and the obligations thereunder in order to determine the nature of the contract. Of course, that is not to say that any single provision pointing away from a contract of service would necessarily preclude a finding that this was a contract of service. As in any multifactorial analysis, no one factor is likely to be determinative. This inevitably means that the Tribunal will have to consider and evaluate all of the relevant factors. Having done so, it is not then just a question of counting up the factors pointing towards or away from a contract of service in order to arrive at a conclusion. The exercise is very much one of judgment based on an analysis of the whole picture. As stated by the Court of Appeal in **Hall v Lorimer (**agreeing with Mummery J in the EAT):

> **"… In cases of this sort there is no single path to a correct decision. An approach which suits the facts and arguments of one case may be unhelpful in another. I agree with the views expressed by Mummery J. in the present case [1992] 1 W.L.R. 939, 944:**
>
> > **"In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. The process involves painting a picture in each individual case. As Vinelott J. said in *Walls v. Sinnett* (1986) 60 T.C. 150, 164: 'It is, in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case.'"**

35. A decision that involves an evaluative judgment of this type on the part of the Tribunal, is one with which, as we have seen, the EAT will not readily interfere unless there is some misdirection of law or the conclusion reached is one that no reasonable tribunal, properly directed, would reach.

36. Much has been said in this case about 'mutuality of obligation'. Once a contract is found to exist (which in itself would mean that there were mutual obligations sufficient for there to be a contract), the question is whether the obligations thereunder are such that it is a contract of service. It is in relation to that question that the phrase 'mutuality of obligation' has become something of a term of art, as if it inherently defined the nature of the obligations necessary for a contract of employment to arise. Of course, the phrase itself does no such thing; it tells one nothing about the *nature* of the obligations necessary for there to be a contract of employment. For guidance as to what those are, one needs again to look at the authorities. Some of those authorities use the phrase as meaning no more than the minimum set of obligations necessary to create a contract (see, e.g. **Quashie** above), whereas others treat it as a label for the type of obligations necessary for there to be a contract of employment: see Langstaff J's analysis in **Cotswold** at [12] to [24] and [40] to [53]. Langstaff J, after reviewing the authorities, concluded as follows:

> **"54. Since "mutuality of obligation" may be used in either [the minimum necessary to create a contract] sense, or it may relate to those obligations which are of such a nature that they indicate that the contract might be one of service (although there are differences of definition in case-law as to the nature of the employer's obligation) it is important to know precisely what is being considered under that label (to adopt the second general point made by Elias J in Stephenson) and for what purpose. Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment, or should be categorised differently. A contract under which there is no obligation to work could not be a contract of employment. It may be a contract of a different type: it might, for instance, be a contract of licence (see *Royal Hong Kong Golf Club v Cheng Yuen [1998] ICR 131(Privy Council)* or even carriage, as was the contract in Ready Mixed. However, the phrase "mutuality of obligations" is most often used when the question is whether there is such a contract as will qualify a party to it for employment rights or holiday pay. In this situation a succession of contracts of short duration under each of which the person providing services is either an employee or a worker will give rise to no rights (for**

> **instance to pay unfair dismissal or holiday pay) unless (i) the individual instances of work are treated as part of the operation of an overriding contract, or (ii) Section 212 (Continuity of Employment) or, arguably, a continuing employment relationship sufficient to satisfy the principal of effectiveness applies (for holiday pay). Such an overriding contract cannot exist separately from individual assignments as a contract of employment if there is no minimum obligation under it to work at least some of those assignments.**
>
> **55. We are concerned that Tribunals generally, and this Tribunal in particular, may, however, have misunderstood something further which characterises the application of "mutuality of obligation" in the sense of the wage/work bargain. That is that it does not deprive an overriding contract of such mutual obligations that the employee has the right to refuse work. Nor does it do so where the employer may exercise a choice to withhold work. <u>The focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it</u>…." (Emphasis added)**

37. The formulation in the underlined words was re-stated when Langstaff J identified the questions that the tribunal below should consider upon remitting the matter:

> **"61. The consequence of our conclusion is that the matter should be remitted to the Employment Tribunal. Having regard to the guidance given in cases such as Sinclair Roche Temperley v Heard and Fellows [2004] IRLR 763 we see no reason why remission should not be to the same Tribunal who have heard the evidence, and are in a position to focus upon the central questions:**
>
> > **(a) was there one contract or a succession of shorter assignments?**
> >
> > **(b) if <u>one contract, is it the natural inference from the facts that the Claimant agreed to undertake some minimum, or at least some reasonable, amount of work for Cotswold in return for being given that work, or pay</u>?" (Emphasis added)**

38. The underlined words, which appear to encapsulate the EAT's approach in **Cotswold** as to the nature of the obligations necessary for there to be a contract of service, may be seen as a refinement of the first limb of the test in **Ready Mixed Concrete**, which provides that there must be an agreement whereby in consideration of pay or remuneration, the individual will provide his own work and skill in the performance of some service for the employer. The relevant obligations as encapsulated in **Cotswold** involve an obligation upon an individual to undertake some minimum or at least some reasonable amount of work, and some obligation upon the other party to provide or pay for it. Whereas under the **Ready Mixed Concrete** approach, there is no quantification of the amount of work that is to be provided by the putative

employee, and the putative employer's obligation comprises pay and remuneration, it is clear now that a contract of service may exist where the putative employee agrees to *some reasonable minimum amount* of work and the putative employer's obligation may be discharged by merely *providing* the work to be done.

39. The differences are important, for they have the effect of considerably broadening the scope of what is often described as the 'wage/work bargain' that is an essential prerequisite for there to be a contract of employment. However, they do not undermine the appropriateness of the **Ready Mixed Concrete** approach as a starting point in the analysis. In particular, none of the cases on mutuality of obligation undermine the requirement under the first limb of Ready Mixed Concrete that there needs to be an obligation on the part of the putative employee to provide his own work and skill in the performance of some service for the other party. In cases such as the present one, where there is no dispute that there is a contract governing the relationship and there is no intermittency in the relationship, it may not always be helpful, given the different usages of the term of 'mutuality of obligation' in the authorities, to analyse the situation by reference to that term. The better approach in such cases, in our view, is to determine whether the obligations under the contract are of the type that give rise to a contract of employment.

40. In the present case, although there was reference to mutuality of obligation, it is clear that the Tribunal was applying the refined **Ready Mixed Concrete** approach. Thus, the Tribunal asked itself the first question set by that case:

> **"140. I must ask myself in the language used in the Ready Mixed Concrete case: "Has the servant agreed that in consideration of a wage or other remuneration she will provide her own work and skill in the performance of some service for her master?" I find the answer to this question is no. I find there was no wage/work bargain in this case. The claimant did not work in exchange for a wage. The first respondent did not provide work for the claimant to do. The first respondent did not pay her."**

41. Mr Reade QC attacks that conclusion as an incorrect application of the test for the obligations necessary for there to be a contract of service as set out in **Cotswold**: see above at [36] and [37]. We do not agree. The Tribunal, at [152], asked itself precisely the question from **Cotswold** that Mr Reade identifies, namely whether or not there was an agreement to undertake some minimum, or at least some reasonable amount of work in return for being given that work, or pay. The Tribunal answered that question as follows:

> **"153. In this case I find that that not only did the first respondent not provide the claimant with remuneration, neither did they provide work for the claimant. I remind myself I must scrutinise the nature of the Agreement. I find the obligations of the parties under the Athlete Agreement do not amount to a mutuality of obligation. The first Respondent selected the claimant for the World Class Programme. They did not provide her with work. She agreed to train in accordance with the individual rider plan in the hope she would achieve success in international competition."**

42. The reasoning is terse. However, it is tolerably clear that the Tribunal did not consider that selecting the Claimant for the training programme or providing her with training facilities and services amounted to providing her with 'work'. In other words, the Tribunal did not find against the Claimant because of some concern that there was an *insufficient* amount of work being done; its finding was based on the more fundamental notion that what the Claimant did was not 'work' at all in this context. That is to say, the Claimant was not found to have provided her own work and skill in the performance of some service *for* the Respondent. In fact, as the Tribunal later concluded (in a section dealing with the question of whether the Claimant was a limb (b) worker), far from this being an arrangement where any service is performed by the Claimant *for* the Respondent, it was "*a contract where services are provided to the Claimant*": see [245].

43. Mr Reade's real challenge, it seems to us, is not that there was some misapplication of the 'mutuality of obligation' test, but with the Tribunal's conclusion that what the Claimant did under the Agreement did not amount to 'work'. He submits that, by analogy with the football cases, there is no reason why the training that the Claimant, a professional athlete, undertook to

do could not be seen as work too. In **Walker**, the Court of Appeal was required to consider whether a professional footballer was a "workman" within the meaning of the **Workman's Compensation Act 1906** ("the 1906 Act"). The definition of 'workman' for the purposes of **1906 Act** bears some similarity to that of an employee under **1996 Act**, in that a 'workman' was "*any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise and whether the contract is expressed or implied, is oral or in writing*." The Court noted that the agreement between the player and the club included terms requiring the player to serve the club, the club to pay the player, the player to play in all matches when required to do so by the club, the player to keep himself in good playing form and to attend regularly to training, the player to comply with the instructions of the club and to do all that may be deemed necessary by the club to fit himself as an efficient football player. Cozens Hardy MR, at p.92 of the judgment, concluded, in the light of these facts, as follows:

> **"I feel myself quite unable to entertain any doubt that this man has entered into a contract of service with the club. I think it was a contract by way of manual labour, but, whether it was so or not, I think it is a contract which plainly comes within those words "or otherwise," and that we should be narrowing the Act most unduly to say this man is not entitled to get compensation as a result of the accident."**

44. Similarly, Fletcher Moulton LJ, at p.92-93, in a concurring judgment held that:

> **"I cannot see any reasonable room to doubt that a professional football player employed as this man was is within the terms of the Act. Here is a company that carries on the game of football as a trade, getting up and taking part in football matches. In order to share in the proceeds of those matches they must, of course, have a team which they can send to represent them in the games. This they obtained by entering into contracts of service with definite persons who are caught professional football players, and who, in the language of the Master of the Rolls, give up their time for the purpose. Now I ask myself why is such a contract, which is in its form a contract of service, not to be regarded by us as such? I can see no reason; …"**

45. Mr Reade submits that there are numerous similarities with the Claimant's case: both the footballer and the Claimant are professional athletes who trained hard in order to be selected

for the team or for competition; the interests of the athletes are aligned with those of the Club/Respondent in that the athletes' success can result in greater commercial success or, in the Respondent's case, an enhanced reputation and the ability to attract more commercial sponsorship; and the work done by both athletes, i.e. training hard to be selected, was similar in nature. Mr Reade rightly acknowledged that there are also some differences between the footballer in **Walker** and the Claimant, the principal one being that the footballer's contract contained express provisions consistent with employment. The player was required to "serve the club" and the club was required to pay the player. By contrast, the Agreement expressly states it is not a contract of employment. It is, of course, well-established that such labels or exclusions are not definitive, but where, as in this case, the Agreement is not a sham (and there is no challenge to that conclusion), such labels can be useful in resolving ambiguity and in ascertaining the true intentions of the parties and whether the Agreement gives effect to those. Another key difference is that there was a clear obligation on the part of the football club to pay the footballer, whereas in the present case there was no payment of money from the Respondent. Mr Galbraith-Marten also pointed out that whereas the footballer's commitment was to play for the success of the team employing him, the Claimant's aim was to win medals for Great Britain. It is also significant in our view that that the club in **Walker** carried on the game of football "as a trade".

46. We note that, whilst the footballer analogy and the football cases were drawn to the Tribunal's attention, this was by way of a single a single short sub-paragraph and footnote in the course of substantial 23-page closing submissions. Moreover, the Claimant had submitted below that her case was *not* about the status of all athletes or cyclists, but about the Claimant. There is, therefore, some force in Mr Galbraith-Marten's submission that it was not surprising that the Tribunal did not spend any time expressly considering the position of other athletes including professional footballers. In any case, we do not see any error of law on the part of the

Tribunal in not expressly referring to the football cases and/or the analogy that is drawn with them. In the first place, the analogy breaks down at the initial stage of determining the contractual obligations. Given that the fundamental task of the Tribunal was to determine the nature of the obligations imposed on each party and whether these gave rise to a contract of employment, a key difference as to what those obligations were seriously diminishes the utility of the analogy. However, even if the contractual provisions had not differed in this respect, the mere fact that training done by an athlete in one sport or case was found to comprise work (or, as it was described in the **Walker** case, 'manual labour') does not mean that the same must apply to any other athlete who trains hard for the common purpose of achieving success for team or country. To take that approach would be to focus on one factor (training to compete) out of the many that must be weighed and considered in forming an overall picture. As stated in **Hall v Lorimer** (CA) at p.226 F:

> **"As Vinelott J. said in *Walls v. Sinnett* (1986) 60 T.C. 150, 164: 'It is, in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case.'"**

47. Another analogy presented to us, and which did find favour with the Tribunal below (see [245] and [257] of the Judgment), was that of a student attending University. Whilst the analogy is superficially attractive - given that the student may also work hard, receive the benefit of valuable teaching resources and services, and achieve success that will reflect well on the institution, but would not be considered an employee - it would not be prudent to treat it as determinative for the same reason as in the football cases: there is no information as to the precise obligations of either party in the University analogy, and what may be compelling in that case in the light of all the facts may not be so in the present. The Tribunal, however, did not

base its decision on the analogy; it merely considered that it provided helpful confirmation for its conclusion that the Agreement is a contract whose purpose was primarily to provide services to the Claimant, and not the other way around.

48. In the present case, the Tribunal considered all the relevant factors and came to the conclusion that what the Claimant did, albeit that it involved training very hard, did not amount to personal performance of work or services for the Respondent: see [156] and [157] of the Judgment (set out above at [12]).

49. In our judgment, that was a conclusion that the Tribunal was entitled to reach and does not disclose any error of law. The Tribunal's conclusion does not mean that in another case, where perhaps the contractual provisions, and the balance between services provided to and performed by the athlete, are different, the training done by a cyclist could not be found to amount to work. The legislation does not seek to define what is meant by "work" or "service". The constantly evolving nature of what is regarded as amounting to work or service would probably make such definition impossible, or at least liable to be quickly outmoded. Not all work will be of the kind that gives rise to an employment relationship; the hard-working student at University is a possible example of that. It is left to the Tribunal, having found that there is a contract, to consider all the relevant factors (including the nature of the work done) and assess whether the contract is one of service or not. This task of classifying the nature of the contract (i.e. whether it is a contract of service or some other type of contract) has been evident since **Ready Mixed Concrete**, whereby, under the third limb of the test in that case, it is necessary to consider whether the other provisions of the contract are inconsistent with its being a contract of service. In giving further guidance on that limb of the test, MacKenna J stated, at p.516 B to 517 B:

> **"The third and negative condition is for my purpose the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service.**

> **(i) A contract obliges one party to build for the other, providing at his own expense the necessary plant and materials. This is not a contract of service, even though the builder may be obliged to use his own labour only and to accept a high degree of control: it is a building contract. It is not a contract to serve another for a wage, but a contract to produce a thing (or a result) for a price.**
>
> **(ii) A contract obliges one party to carry another's goods, providing at his own expense everything needed for performance. This is not a contract of service, even though the carrier may be obliged to drive the vehicle himself and to accept the other's control over his performance: it is a contract of carriage.**
>
> **(iii) A contract obliges a labourer to work for a builder, providing some simple tools, and to accept the builder's control. Notwithstanding the obligation to provide the tools, the contract is one of service. That obligation is not inconsistent with the nature of a contract of service. It is not a sufficiently important matter to affect the substance of the contract.**
>
> **(iv) A contract obliges one party to work for the other, accepting his control, and to provide his own transport. This is still a contract of service. The obligation to provide his own transport does not affect the substance. Transport in this example is incidental to the main purpose of the contract. Transport in the second example was the essential part of the performance.**
>
> **(v) The same instrument provides that one party shall work for the other subject to the other's control, and also that he shall sell him his land. The first part of the instrument is no less a contract of service because the second part imposes obligations of a different kind: Amalgamated Engineering Union v. Minister of Pensions and National Insurance. 20**
>
> **I can put the point which I am making in other words. An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. <u>The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour</u>). He may, in performing it, take into account other matters besides control." (Emphasis added)**

50. Elias LJ in **Quashie**, in a passage cited above at [88], stated that in applying the test in **Ready Mixed Concrete**, the court or tribunal is required to examine and assess all the relevant factors which make up the employment relationship in order to determine the "*nature"* of the contract. Langstaff J in **Cotswold** stated, at [54], that "*Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment or should be categorised differently*." Mr Galbraith-Marten also drew our attention to the following passages in the judgment of Kerr LJ in **Nethermere (St Neots) Ltd v Gardiner** [1984] ICR 612 at 628E to 629B

> **"If this is an accurate account of the course of the proceedings, as Mr. Tabachnik submitted on behalf of the company on this appeal, then I think that it must follow that the tribunal and the majority of the appeal tribunal erred in law in reaching their conclusions. The determination of the statutory issue whether the applicant home workers were "employees" under section 54(1) of the *Employment Protection (Consolidation) Act 1978* involves a two-stage process. The first stage requires the determination of the question whether there was any contractually binding nexus between the alleged employees and the alleged employer in relation to the "employment" in question. This must be a question of law. The existence or non-existence of a binding contract cannot be anything else. It cannot be a question of fact or of degree. The second stage, if some binding contract exists as a matter of law, is then to classify or define the nature of the contractual relationship. Some contracts which require a person to work for another will be "contracts of employment" or "contracts of service," to use the statutory definitions in section 153(1) of the Act which derive from "employment" and "employee" in section 54(1) and which Stephenson L.J. has set out in his judgment. Other such contracts will be contracts "for services" or to be classified still more succinctly in some other way. Illustrations of this process of classification were given by MacKenna J. in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 Q.B. 497, 515 et seq. We were also referred to the decision of Webster J. in *WHPT Housing Association Ltd. v. Secretary of State for Social Services* [1981] I.C.R. 737, 748, in this connection, but I do not find much assistance in the differentiation between cases where the employee provides himself to serve and where he provides his services for the use of the employer.**
>
> **However, at this second stage of classification, the correct analysis of the contractual relationship between the parties does involve questions of fact and degree: see *Simmons v. Heath Laundry Co.* [1910] 1 K.B. 543 (Court of Appeal) and *Smith v. General Motor Cab Co. Ltd.* [1911] A.C. 188 (House of Lords). But all these cases must necessarily have proceeded on the basis that the requirement of the first stage — the existence of some contract binding as a matter of law — had been established." (Emphasis added).**

51. As all of these passages make clear, the task for the Tribunal, having determined that there is a contract, is to consider all the relevant factors in order to determine whether the contract should be classified or categorised as one of employment. That involves, as Mr Galbraith-Marten submitted, an evaluative judgment on the part of the Tribunal. Mr Reade's submission effectively amounts to a contention that the Tribunal got that evaluative judgment wrong, that it should have treated the Claimant's training (amongst other matters) as work, and that it should have classified this as a contract of employment. However, that is insufficient to demonstrate that the Tribunal erred in law. The EAT can only interfere with such evaluative judgments of the Tribunal if there is some clear misdirection or if the conclusion reached is one that no reasonable tribunal properly directed could have reached. In our judgment, there was no

such misdirection, and Mr Reade's challenge does not get near to establishing that the Tribunal reached such a conclusion.

52. That is sufficient to dismiss Ground 1 of the appeal. For completeness, however, we deal briefly with some of the other points made by Mr Reade in support of this ground:

a. It is submitted that the Tribunal erred in failing to consider that it was merely necessary for the employer to provide or pay for work, and that it was not necessary for such work to be directed to the employer as it could be for the benefit of or direction of another. We do not see any merit in this submission, which was not pursued in oral submissions. The Tribunal did not decide the matter on the basis that the Claimant's training benefitted a third party, but rather that, principally, it benefitted the Claimant.

b. It is said that the Tribunal failed to consider the Claimant's other obligations under the Agreement and instead focussed entirely on the obligation to train in accordance with the IRP. It is not correct that the Tribunal failed to consider the Claimant's other obligations. The analysis at [101] to [127] of the Judgment, for example, makes that abundantly clear. The challenge here is really directed to the weight attached by the Tribunal to training. However, the weight to be attached to a particular factor is a matter for the Tribunal, and it can hardly be said to be perverse to focus on what the Tribunal found to be the Claimant's "primary responsibility", namely to comply with the IRP: see [142].

c. It is submitted that the Tribunal failed to take proper account of the fact that both parties had the common goal of winning medals for the British Team. Insofar as "failing to take proper account" equates to saying that this issue was not given enough weight, we make the same point as above. In any case, it will be rare for a contract to be entirely one-sided in terms of the value to be derived from it, and the

mere fact that there is a common or shared goal does not mean that the contract must be one of employment.

d. It is said that the Tribunal erred in treating the fact that the Claimant benefitted under the arrangement as being decisive against employee status. In our view, the Tribunal's analysis and approach was not as simplistic as that. The conclusion it reached was based on an overall judgment based on a number of factors *including* the benefit that the Claimant derived from the relationship. Whilst the latter was considered by the Tribunal to be important, it was not determinative on its own and nor was that fact alone treated as rendering the relationship as being incompatible with the provision of work or with employee status.

e. It is submitted that work is provided by the Respondent in that it selected the cyclists who would participate in competitions. It is not clear to us why selecting the Claimant for competition should be regarded as the provision by the Respondent of "work" any more than the requirement that she complies with the IRP; both activities come up against the same hurdle which is the Tribunal's permissible conclusion that they did not amount to the personal performance of some service for the Respondent.

53. As to remuneration, Mr Reade submitted that, whilst the Tribunal acknowledged that payment could be in kind, it erred in failing to conclude that the valuable benefits provided to the Claimant could amount to remuneration. That error is said to stem from the Tribunal's earlier failure to accept that the Agreement was one under which the Claimant provided work. Mr Galbraith-Marten submits that the Tribunal's finding that the Agreement was a contract for the provision of services by the Respondent to the Claimant, and not the other way around, 'feels right', and that it would be unnatural to view the efforts made by the Respondent's staff to help the Claimant succeed as the 'pay' she receives for training hard and/or competing.

54. We agree with Mr Galbraith-Marten's submissions. The benefits which the Claimant received were indeed valuable, but they were provided to the Claimant in order to enable her to train and compete at the highest levels; they were not the Claimant's remuneration for doing so. As Mr Galbraith-Marten put it, to conclude otherwise would be akin to saying that the tools given to a person to enable them to do the job were that person's pay for doing it. We accept that there may be instances where the tools of the trade can be their own reward; where for example, the tools have an intrinsic value and the parties agree that the employee can earn the right to keep the tools once the job is done. In this case, however, the services provided by the Respondent were not ones that would have any value for the Claimant after the Agreement ends.

55. Mr Reade further submits that the Tribunal placed unjustified restrictions on what can amount to remuneration for these purposes. The findings which are challenged are at [170] to [172] of the Judgment:

> **"170. Likewise, I accept the evidence of Mr Dyer whom I found to be a clear, conscientious and careful witness. I rely on his evidence to find that the services provided under the contract are services not remuneration. He explained that one of the types of support available to athletes under the elite Podium Programme was psychological support, but some athletes chose never to avail themselves of that support. That is suggestive of a service which is open to the athlete to use or not, rather than remuneration.**
>
> **171. Clause 5.1.5 states "the services are "general services benefits and other support" and they are "designed to support you in delivering your individual rider plan." This language suggests the reality I have found-the services are available to support the claimant in her training. They are not remuneration awarded in exchange for work or skill performed.**
>
> **172. Furthermore the provision of the benefits is not automatic: Clause 5.1.5 states; "The level or amount by which you are entitled to enjoy any of the services benefits and other support is decided upon your individual circumstances and is at the discretion of the programme". An inherent discretion on the part of British Cycling in allowing enjoyment of a particular benefit or service is inconsistent with a finding that these benefits amount to remuneration."**

56. Mr Reade submits that the fact that an employee can choose not to accept a benefit does not mean that there was no remuneration. He gave the example of an employee remunerated in stock options which are never exercised. Mr Reade further submits that the fact that the amount

of benefits was in the Respondent's discretion does not detract from the fact that this was still remuneration in kind which the Respondent was required to provide.

57. It seems to us that the Tribunal, at [165] to [174], was considering the various services provided and weighing each one up in order to form an overall picture of whether these amounted to remuneration. None of the factors was treated as determinative; thus, the option not to take up certain benefits was said to be "suggestive" of a service open to the athlete to use or not, rather than remuneration, and the inherent discretion in relation to the benefits was said to be "inconsistent" with a finding that they amounted to remuneration. The Tribunal was entitled to engage in that evaluative exercise and reach an overall conclusion. Moreover, the conclusions reached in respect of the particular benefits highlighted by Mr Reade were ones that were open to the Tribunal. It cannot be said to be obviously wrong to conclude that an option to take up a benefit or not, points away from this being remuneration, even in kind. A person who decides not to exercise his stock options still has the benefit of those options, which may have some intrinsic value even in their unexercised state. By contrast, a service such as coaching, if it is not taken up by the Claimant, has no value for her at all. It is unsurprising in our view that the Tribunal regarded this as "suggestive" of a service being *offered to* the athlete rather than remuneration (in kind) which the Respondent was obliged to provide. Similarly, it would, as Mr Reade accepted, be highly unusual for the obligation to pay to be comprised entirely of discretionary benefits (as was the case here, at least as to the level or amount of those benefits) rather than there being a proportion or element of remuneration that is discretionary. Once again, we cannot say that the Tribunal was obviously wrong to conclude that a situation where every benefit is subject to some discretion appears inconsistent with an obligation to pay.

58. For these reasons, we find that the Tribunal did not err in reaching the conclusion that the Claimant was not an employee.

The relevance of "dominant purpose"

59. Before leaving this ground, we should say a few words about the "dominant purpose" test, about which there was much argument before us, even though the Tribunal's use of that test in this case was not a specific ground of appeal. The Tribunal referred to this at [256] and [257] as follows:

> **"256. The claimant was a talented athlete who agreed that her goal, like the goal of everyone involved in the Podium Programme, was to win medals for the British Team, in international competition. To that end she agreed to develop a dedicated performance plan incorporating her individual training. I rely on my finding that the dominant purpose of the Athlete Agreement was the joint "ultimate goal of everyone involved in the Podium Programme to win medals for the British Team at internal competitions". To assist the claimant to fulfil this goal British Cycling provided services, facilities and benefits.**
>
> **257. At this stage it is worth repeating that the analogy of education is most helpful in this case. As was submitted by counsel for both respondents, the relationship between the claimant and the first respondent is much more akin to the relationship between an Institute of Higher Education such as a University where education including teaching, lecturing and other services, is provided to the student. Funding is nowadays provided by a loan but historically was provided by a grant. The funding provided to the claimant is analogous to a grant. I rely on the evidence of Ms Nicholl in that regard. I rely on the finding in Daley v Allied Suppliers that the relationship is not one of employment where the purpose is training is for the benefit of the trainee. The claimant wanted to be the best athlete she could possibly be and the dominant purpose of this contract to enable her to do so."**

60. These references to the dominant purpose appear under that part of the Tribunal's Judgment dealing with the Equality Act 2010. As we have said above, that part of the Judgment is not the subject of this appeal. However, it does appear that the purpose of the contract was a feature of the Tribunal's analysis in relation to its assessment of the limb (b) worker question: see [245] of the Judgment. Mr Galbraith-Marten submits that it was appropriate to consider the purpose or dominant purpose of the Agreement as that was one means of identifying the essential nature of the contract and whether it was one of service or not (or whether it gave rise to limb (b) worker status or not). Mr Reade responds that there is a danger in using the dominant purpose test in the context of assessing whether the relationship falls within s.230 of

A the **1996 Act**, as the test was specifically formulated to address whether a person was undertaking personally to do any work or labour within the meaning of discrimination legislation as opposed to being in business on their own account. We were referred **to Mirror Newspapers Ltd v Gunning** [1986] ICR 145, where the Court of Appeal considered whether a person engaged in a newspaper distribution service was employed under a "*contract personally to execute any work or labour*" within the meaning of s.82(1) the **Sex Discrimination Act 1975**. A question arose as to whether the word "any" in that definition, meant "any amount" as well as "any kind" of work or labour. After setting out the arguments, Oliver LJ concluded as follows at 150H to 151B

> **"The arguments are closely balanced and indeed, on analysis, are probably not for practical purposes widely different in their results, since, as already mentioned, Mr. Beloff does not contend that any obligation, however minimal, is sufficient to constitute a "contract" of the kind in question. On balance, however, for my part I am persuaded that the more natural and logical meaning is that contended for by Mr. Irvine and expressed by Mr. Scott in the appeal tribunal. In my judgment, what is contemplated by the legislature in this extended definition is a contract the dominant purpose of which is the execution of personal work or labour, and I would allow the appeal on this ground, for quite clearly here the dominant purpose was simply the regular and efficient distribution of newspapers."**

61. Thus, it was not sufficient to fall within the terms of the definition for personal service to comprise only a small proportion of the overall purpose of the contract, in this case, the regular and efficient distribution of newspapers. Elias J (as he then was) considered the test in **James v Redcats (Brands) Ltd** [2007] ICR 1006. There, the court was considering whether a parcel courier was a worker within the meaning of s.54(3) of the **National Minimum Wage Act 1998**, or was in business on her own account, even if in a small way. After setting out the definition of "employment" in the then discrimination legislation, Elias J said as follows at [53]:

> **"On the face of it this might appear to be wider than the definition of "worker" since there is no exclusion for those operating a business undertaking and contracting with a customer. However, the Courts have effectively applied such an exclusion by another route. They have not treated the personal provision of *any* services as being sufficient to engage the legislation, however insignificant**

> **that may be under the contract. Rather they have asked whether the "dominant purpose" of the contract is the provision of personal services or whether that is an ancillary or incidental feature. It is only if it is the dominant purpose that the definition is engaged."**

62. Elias J continued at [59]:

> **"… the dominant purpose 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? The test does not assist in determining whether a contract is a contract of service or of services; it does not, in other words, help in discriminating between cases falling within limbs (a) and (b) of the definition of worker. Its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way."**

63. Mr Galbraith-Marten submits that in setting out the scope of the dominant purpose test in the way that he did, Elias J was not limiting it merely to distinguishing between those who are workers and those in business on their own account. There is no reason that the test cannot be used to distinguish between contracts which are in the world of work (whether as an employee or a worker) or not. There is some support for that proposition in the subsequent passages of Elias J's judgment at paras 61 to 68.

> **"61. As I have said, these cases concerned the definition of employment in various discrimination statutes. A critical question is whether the definition of worker in the National Minimum Wage Act and the other more recent statutes can be similarly analysed. Certain decisions of the EAT have assumed that it can: see Bamford v Persimmon Homes NW Ltd UKEAT/006/06 (HH Judge Peter Clark presiding), and Green v St Nicholas Parochial Church Council UKEAT/0904/04 (Rimer J presiding). I agree with them. Although the wording of the two provisions is different, in each case the crucial feature is an undertaking personally to perform work.**
>
> **62. The older discrimination statutes talk of personally executing any work or labour whilst the more recent provisions talk of undertaking personally to perform work or services. It is possible that the concept of services is wider than the concept of labour, and to that extent the more recent definitions may be broader. But I do not think that this has any bearing on the application of the dominant purpose test. Mr Rose argued that it was a potentially applicable test, and I agree.**
>
> **63. I recognise that the definition of "employment" in the discrimination statutes do not have the exception for those in business found in the recent definition of "worker". I do not, however, consider this very significant. In practice the application of the dominant purpose test in the discrimination statutes has the effect of excluding from their scope those found to be in business on their own account, as the Gunning case shows. I am inclined to think that even had the exception not been present in the definition of "worker", the Courts would have applied a dominant purpose test when analysing that definition in a similar way, given both the similarity in the wording of the provisions and the fact that the objective in each case is to, to**

put it loosely, to determine whether the contract should be located in the world of work or not.

64. But even if that is wrong, the existence of the exception for those in business on their own account demands that the courts must differentiate between workers and those in business, and that inevitably requires consideration of whether the contract, properly analysed, is predominantly of the former or the latter kind. So a similar test to identify the dominant characteristic of the contract applies.

65. I would add that the description of the test as one of identifying the dominant purpose is perhaps not an altogether happy one. As Maurice Kay LJ observed in Mingeley, "it has its difficulties because the search for the dominant purpose can be elusive and does not always result in clear and incontrovertible conclusions." (para 15).

66. The problem, I suspect, lies in the word "purpose" which can mean both immediate and longer term objectives. If I employ bus drivers who are employees, it may still be said that my purpose is to run an efficient bus service rather than personally to employ the drivers. By "dominant purpose" in this context the courts are focusing on the immediate purpose of the contract.

67. An alternative way of putting it may be to say that the courts are seeking to discover whether the obligation for personal service is the dominant feature of the contractual arrangement or not. If it is, then the contract lies in the employment field; if it is not - if, for example, the dominant feature of the contract is a particular outcome or objective and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field.

68. This is not to suggest that a Tribunal will be in error in failing specifically to apply the "dominant purpose" or indeed any other test. The appropriate classification will in every case depend upon a careful analysis of all the elements of the relationship, as Mr Recorder Underhill pointed out in Byrne. It is a fact sensitive issue, and there is no shortcut to a considered assessment of all relevant factors. However, in some cases the application of the "dominant purpose" test may help tribunals to decide which side of the boundary a particular case lies." (Emphasis added).

64. We are inclined to agree with Mr Galbraith-Marten that the highlighted passages of Elias J's judgment might be seen as lending some support to his submission that the dominant purpose test is not limited to distinguishing between a person who is working and one who is business on her own account. These include the references to determining whether the contract should be located "*in the world of work or not*", and whether the contract lies "*in the employment field*" or not. Not all contracts which fall outside the world of work must necessarily be in the field of being in business on one's own account; they could, for example, lie in the world of education and/or training. True it is that Elias J expressly stated that the dominant purpose test does not assist in distinguishing between cases falling within limbs (a)

and (b) of the definition of worker. However, that does not preclude it from being used to identify whether the case falls outside of both limbs (a) and (b).

65. However, even if we are wrong about the effect of Elias J's judgment, we do not see any reason why the dominant purpose test cannot be used more broadly. Although the dominant purpose test was developed specifically with the distinction between a worker and a person in business on her own account in mind, the identification of the main or principal purpose of the contract has also been a relevant part of the task of determining whether a contract is one of service or not since the days of **Ready Mixed Concrete**. Under the third limb of the **Ready Mixed Concrete** test, one must consider whether other aspects of the relationship are inconsistent with its being a contract of service. MacKenna J went on to give examples to illustrate its operation: see [49] above. Two of those were considered not to be contracts of service, notwithstanding the fact there was some element of personal service, because the purpose of the contract was something else, e.g. to produce something for a price, or the carriage of goods. In other words, the main purpose of the contract was something other than personal service for the other party.

66. We do not consider that it would be an error of law for a tribunal to consider the dominant purpose of a contract in determining whether it is a contract of service or not (or whether it gave rise to limb (b) worker status or not). If the dominant purpose is not personal service for the other party then that may be a factor pointing away from the relationship being one that lies in the world of employment or work. However, in saying that we would not sanction any approach that treated that question as determinative of the issue on its own. As Elias J stated, at paragraph 68 of **James v Redcats**, the "*appropriate classification will in every case depend upon a careful analysis of the all the elements of the relationship, and there is no shortcut to a considered assessment of all relevant factors...*" Furthermore, caution must be

exercised in identifying the purpose of the contract, as the example given by Elias J in **James v Redcats** at [66] makes clear:

> **"66 The problem, I suspect, lies in the word "purpose" which can mean both immediate and longer term objectives. If I employ bus drivers who are employees, it may still be said that my purpose is to run an efficient bus service rather than personally to employ the drivers. By "dominant purpose" in this context the courts are focusing on the immediate purpose of the contract."**

Conclusion on Ground 1

67. For all of these reasons, we consider that Ground 1 of the appeal fails.

Ground 2 – Was the Claimant a limb (b) worker?

68. Mr Reade made two brief points under this ground: the first was that the Tribunal erred in concluding that mutuality of obligation was a requirement for limb (b) workers; and the second was that, once it is accepted that there is no such requirement under limb (b), the only possible conclusion is that the Agreement was a contract whereby the Claimant undertook to do or perform personally any work or services for the Respondent. Even if training and competing for medals is not "work", there can, he submits, be no doubt that it amounted to the personal performance of services.

69. Mr Galbraith-Marten submits that, irrespective of whether mutuality of obligation is a requirement for limb (b) workers, the Tribunal did not err because it also decided the issue on the alternative basis that it was not. In any case, the Tribunal was entitled to consider the same sorts of factors in assessing whether the claimant was a limb (b) worker as it did in considering whether she was an employee. Its conclusion, based on those factors, that she was neither cannot be said to amount to an error of law.

70. There was little developed argument before us on whether mutuality of obligation is a requirement for a limb (b) worker. That is not surprising as the Tribunal decided the limb (b)

worker issue both on the basis that it was a requirement and on the basis that it was not. In the circumstances, this is not the case in which to attempt to give any definitive answer to the question whether mutuality of obligation, as that phrase has been applied in the caselaw relating to employees, applies also to limb (b) workers, save to say that it must at least apply in the sense of the minimum required to give rise to a contract. The real issue here is whether the Tribunal erred in its alternative conclusion that the Claimant was not party to a contract whereby she undertook to do or perform personally any work or services for the Respondent. The Tribunal relied on its earlier findings as to employee status in coming to that conclusion and also its findings that the Agreement was "*a contract where services are provided to the claimant, not the other way round*". We have already concluded that that was a permissible finding: see [51] and [52] above. Insofar as the Tribunal had regard to the purpose of the contract in reaching its conclusion as to limb (b) worker status, that too would not give rise to any error for the reasons set out at [66] above. In those circumstances, it seems to us that this ground of appeal cannot succeed either.

Ground 3 – Irrational Conclusions

71. Mr Reade relied upon three aspects of the Tribunal's judgment as being irrational. The first is its reliance upon the Claimant's inability to negotiate terms of employment as being inconsistent with there being a contract of employment. Mr Reade submits that this is a feature of many employment relationships given the inherent inequality of bargaining power, and that, if anything, it points toward, rather than away from employee status.

72. We agree with Mr Reade that the Tribunal's conclusion in this regard does appear surprising. The usual starting assumption (and it can be no more than that) is that employees are often in a weaker bargaining position than the employer, and therefore unable to exert any influence on what the terms of engagement should be. In the present case, that starting

assumption is probably incorrect, given the Tribunal's finding that, "*the opportunity to obtain advice on the agreement whether from her parents or an agent so the claimant was clear about its terms ameliorates the inequality of bargaining power…"*: para [203]). In that context, where the Claimant was professionally represented and in a position at least to attempt to negotiate terms (albeit unsuccessfully), the conclusion that the Claimant's position was not consistent with employee status may be seen as less surprising, and certainly not wholly irrational.

73. However, even if the Tribunal was incorrect in this regard, the inability to negotiate terms was but one factor out of many that it took into account and was far from being determinative. That factor was not so significant as to distort the overall picture which the Tribunal formed having regard to all the relevant factors. As such, even though Mr Reade may be right that the Tribunal was wrong on this point, it does not materially advance his case.

74. The second finding said by Mr Reade to be irrational is that the requirement for the Claimant to be a member of the Respondent was seen as pointing away from employee status. Mr Reade submits that it is not uncommon for an individual to be a member and employee of the same organisation (e.g. a Trade Union) and that the Tribunal ought to have regarded this as at most a neutral factor rather than one weighing against the Claimant.

75. Once again, this seems to us to be a very minor point relied upon by the Tribunal in its overall assessment of the relationship. Thus, even if it could be said to be wrong, it would not undermine the Tribunal's overall conclusion. Furthermore, as Mr Galbraith-Marten points out, membership of an organisation is not synonymous with employment by it, and, in some cases, as where a Trade Union employs a person to represent its members' interests, there could even be a conflict of interest if that person is also a member. In our view, the Tribunal's conclusion that compulsory membership pointed away from employee status cannot be said to be obviously wrong and is certainly not irrational.

76. The final point made by Mr Reade is that the Tribunal was wrong to find at [221] of the Judgment that the requirement under Clause 2.2.5 of the Agreement for the Claimant to be responsible for her own financial and tax affairs was inconsistent with employee status. This finding must be seen in context. It was one of a series of findings at [220] to [223] and [225] as to the Claimant's financial arrangements and tax status. The Tribunal noted, amongst other matters, that the Claimant was not treated as an employee for PAYE tax purposes, that the benefits she received from the Respondent were not regarded by HMRC as taxable remuneration, and that she had established her own company of which she was an employee. In those circumstances, it was far from irrational for the Tribunal to consider the contractual provision as to responsibility for tax and financial affairs as being inconsistent with employee status. In any event, as with the other points relied upon by Mr Reade under this ground, it was not determinative and merely one factor out of many that the Tribunal was clearly entitled to take into account.

77. For these reasons, Ground 3 fails.

Conclusion

78. For the reasons set out above, it is our judgment that none of the grounds of appeal succeeds and the appeal is dismissed.

79. We would like to express our gratitude to both Counsel and their legal teams for their helpful submissions, which had to be delivered via an internet-based video link in the EAT's first fully remote hearing conducted with Lay Members.