Neutral Citation Number: [2023] EAT 2

Case No: EA-2020-000574-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 October 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

DR MARK TER-BERG	**Appellant**
- and -	
(1) SIMPLY SMILE MANOR HOUSE LTD **(2) NHS ENGLAND MIDLANDS AND EAST** **(3) MR PARUL MALDE** **(4) DR COLIN HANCOCK**	**Respondents**

- -
- -

Kevin McNerney (instructed by Leathes Prior Solicitors) for the **Appellant**
Stephen Butler for the **Third and Fourth Respondents**

Hearing date: 4 October 2022

- -

JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF-EMPLOYED

When deciding whether a claimant was an employee, a worker, or neither, and determining, for that purpose, whether the terms of a document relied upon as a written contract reflect what the parties in reality agreed, the employment tribunal should follow the approach set out in **Autoclenz v Belcher**, including not applying certain rules of contract law that would apply when considering other types of written contract. That approach is confirmed by the decision of the Supreme Court in **Uber BV v Aslam**, which provides further guidance as to the policy considerations underpinning it, which should be borne in mind when applying it. Provided that, in such a case, the tribunal does apply that approach, it is not necessarily an error for it, when explaining its reasons, to start with a consideration of the terms of any document said to amount to such a written contract. But it will be an error for the tribunal, in such a case, to confine its consideration to such terms, to treat them as conclusive, or to treat them as giving rise to a presumption which restricts what it might conclude from its consideration of all the facts and circumstances in accordance with the **Autoclenz/Uber** approach.

In relation to clauses to the effect that a written agreement is not intended to create a relationship of employment or a worker relationship:

(a) As held by the Supreme Court in **Uber**, such a clause will be void and ineffective if, upon objective consideration of the facts, the tribunal finds that it has as its object the excluding or limiting of the operation of the legislation in question (pursuant to section 203(1) **Employment Rights Act 1996** or the equivalent provisions of other legislation);

(b) In any event, if, apart from such a clause, the other facts found by the tribunal point to the conclusion, applying the law to those facts, that the relationship is one of employment or a worker relationship, such a clause cannot affect that legal conclusion; but

(c) If neither (a) nor (b) applies, then, in a marginal case, in which the tribunal finds the clause to be a reflection of the genuine intentions of the parties, it may be taken into account as part of the overall factual matrix when determining the correct legal characterisation of the relationship.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal claimed that he was unfairly dismissed by the first respondent for the reason or principal reason that he had made a protected disclosure, and that the third and fourth respondents, who were both directors of the first respondent, were co-liable in that respect. In a reserved decision following a hearing in Cambridge before Employment Judge Ord the tribunal determined that the claimant was not an employee of the first respondent and so it dismissed his unfair dismissal claim. This is the claimant's appeal against that decision.

2. I will refer to the parties as they are in the employment tribunal. The first respondent is, I am told, now in voluntary liquidation and has not participated in today's hearing. Nor has the second respondent, although its solicitor, Ms Heinz, attended today. She told me that she was not seeking to be heard and her client stands neutral on this appeal. It is fair to note that its overarching position is that there is no proper basis for it to have been made a party to the employment tribunal proceedings at all, but that is an issue that the tribunal has yet to determine. As before the employment tribunal, the claimant has been represented today by Mr McNerney and the third and fourth respondents by Mr Butler, both of counsel, Mr Butler also having represented the first respondent before the tribunal.

3. The tribunal identified at the start that the hearing had been listed solely to determine whether the claimant was an employee of the first respondent. It declined a request from Mr McNerney to consider at the same hearing whether he was, in the alternative, a worker.

The Employment Tribunal's Decision

4. The tribunal began its findings of fact by setting out that until 1 April 2013 the claimant, who is a dentist, was the principal of a group of three dental practices. He sold the business comprising those practices to the first respondent with effect from that date. Upon the first respondent's acquisition of the business, the claimant and the first respondent entered into a contract headed

"Associate Agreement for use in GDS Contracts". That is a form of standard contract produced by the British Dental Association (BDA). The claimant had himself previously entered into contracts in that same form, with dentists who had done work for him prior to his sale of the business.

5. The tribunal described or set out a large number of the provisions of that agreement in the course of its decision. I do not need to set them out at any length. However, I note the following. The agreement defined the first respondent as "the practice owner" and the claimant as a "performer" who was engaged by it to provide services under the head agreement and privately. It stated that the first respondent granted the claimant a non-exclusive licence and authority to carry on the practice of dentistry at specified premises and surgeries of the first respondent. The agreement was stated to be personal to the parties and not capable of assignment. It also contained provisions asserting that nothing in it constituted a partnership and nothing in it constituted a contract of employment.

6. Other clauses set out by the tribunal included a requirement on the claimant to provide the number of units of dental activity or UDAs in each NHS year as provided in a schedule. There were provisions that if the claimant did not meet the target in a given year, he could be required to pay a sum calculated by reference to the amount of the licence fee per UDA, multiplied by the shortfall in UDAs, to the extent that those had not been completed by another performer at the practice.

7. I need to set out the full text of clause 36 of the agreement, as did the tribunal, noting that the reference within it to the PCO is to what was then called a primary care organisation, which had responsibility for ensuring that dentists working within its remit were duly registered to practice:

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

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

8. Initially an appendix also provided for the claimant to carry out a clinical governance role for a discrete additional fee, but that additional role came to an end in 2015.

9. At [22] the tribunal noted that the claimant accepted in evidence that when he was initially engaged by the first respondent he was a self-employed contractor; but that his case was that matters had changed over time. At [23] the tribunal identified that in his particulars of claim the claimant claimed to be an employee on the basis that there was mutuality of obligation, that he was fully integrated into the practice, the first respondent exercised a significant degree of control over him and that he was required to provide personal service. His particulars of those matters cited various provisions of the Associate Agreement in support. As to personal service, his particulars contended that clause 36 "was not a genuine substitution clause" and was never engaged by the first respondent.

10. The tribunal also identified points set out in the first respondent's pleading as to why, on its case, the claimant had not been its employee. The tribunal then said this:

"26. Importantly the Claimant accepts that when he entered into the agreement, which was not changed in any material way (other than the Claimant giving up his role as clinical lead which was an addendum or annex to the agreement in any event) during the course of his engagement with the First Respondent, he was contracting as, intending to be, and was being engaged by the First Respondent as a self-employed contractor.

27. The intention of the parties when they entered into the agreement therefore was, as the parties both agreed, that the claimant would not be an employee of the first respondent.

28. The claimant continued to emphasise this. On 30 October 2013 he sent an email to Ms Rasmussen which included these words: 'You must remember we are not employees but independent contractors paid on piece rate.'"

11. After making a number of factual findings about various aspects of the working arrangements in practice, the tribunal then said this:

"37. In relation to the question of substitution, the claimant said that he had no right "just to appoint a substitute to step in and carry out my duties" and that the

> **contract was to provide personal services. He said in his evidence and on oath that he did not believe the locum clause was a genuine clause. He said it was never utilised nor did he see it used by another associate.**
>
> **38. Through his counsel, however, the claimant accepted that the locum clause was a genuine clause. The fact upon which the claimant relied was confirmed, through counsel, as being the fact that it was never used. He accepted that it was a genuine clause but one which was never used and thus he said the claimant did not have a right of substitution."**

12. After setting out some further aspects of the first respondent's case, including that the claimant had not identified when, on his case, he began to be an employee, the tribunal said this:

> **"46. When asked by me during he course of closing submissions, what had changed in the agreement in terms of its implementation or the parties' intentions during the currency of the agreement, counsel for the claimant relied solely upon the fact that the substitution/locum clause had never been used. He had accepted on the claimant's behalf that it was a genuine clause. The claimant referred in his evidence to it being "untenable." When asked to explain this, the issue related not to the efficacy or practicality of the implementation of the clause but to the financial implication to him (i.e. that if he used a locum to carry out work his net income would be substantially reduced)."**

13. In its self-direction as to the law, the tribunal started by citing the relevant provisions of section 230 **Employment Rights Act 1996.** It then briefly summarised the import of a number of authorities. The tribunal began its conclusions as follows:

> **"51. Applying the facts found to the relevant law I have reached the following conclusions.**
>
> **52. The starting point for any consideration of the terms of the agreement between the parties is the agreement itself (per <u>Arnold v Britton</u>).**
>
> **53. The agreement entered into between the parties was contemporaneous with the agreement by the Claimant to sell his dental practices to the Respondent.**
>
> **54. The wording is straightforward and is set out in a standard form of associative agreement for use in general dental surgery contracts. It is effectively identical to those contracts which the Claimant himself issued to dentists working in his practices and he accepted that at all times he considered them to be self-employed and not employees.**
>
> **55. In the agreement the following clauses are relevant:**
> **55.1 Under Clause 5 - "nothing in this agreement shall constitute a contract of employment between the practice owner [i.e. the Respondent] and the Associate [i.e. the Claimant]."**
>
> **56. Further, the agreement was annexed (in draft, not altered as far as I have been told at execution) to the sale agreement between the Claimant and the Respondent.**
>
> **57. In his own evidence before me, the Claimant accepted that the intention of the**

> **parties at the time the agreement was entered into, was that he would be engaged as a self-employed contractor. In his own evidence, he said that he was, "initially…engaged by the First Respondent under an Associate Agreement as a self-employed contractor."**
>
> **58. Further, the Claimant asserted his status as a self-employed contractor following the signing of the Associate Agreement. On 30 October 2013, he wrote to Ms Rasmussen stating, "you must remember we are not employees but independent contractors paid on piece rate."**
>
> **59. On 18 June 2014, he wrote again to Ms Rasmussen stating, "If you look at the contracts we signed, we are self-employed contractors - we pay 50 per cent of our income to SS Limited who provides us with the facilities and access to the patients...Therefore, the primary business activity of SS is to support us, the dentists."**
>
> **60. The Claimant was not bound, under the terms of the Associate Agreement, to work solely for the Respondent. He emphasised the fact that he did not work for any other practice, but he was at liberty to do so provided he was not in breach of any covenant in the sale agreement.**
>
> **61. Having therefore agreed at the commencement of the arrangement that the intention of the parties (and I found the wording of the agreement made between them) was entered into on the basis that the Claimant would be a self-employed contractor, the Claimant set out in his witness statement a number of reasons why he believed that his position had become one of employee.**
>
> **62. It is right, however, to say this. The matters which the Claimant sets out in his witness statement are matters which are either set out in the Associate Agreement (which specifically states it is not a contract of employment and which the parties did not intend it to be) and he does not identify particular changes from that agreement which would serve to alter that position, nor does he say that the written agreement between the parties was not as they intended or that it failed to reflect the position as it was 'on the ground.'"**

14. The tribunal then worked through the various clauses of the Associate Agreement relied upon by the claimant, commenting on each of them. It also discussed a number of other features of the factual matrix relied upon by the claimant, making findings about the position in relation to each of these topics. I do not need to set all of this out. The general picture that emerges is that the tribunal frequently did not accept the claimant's factual account as accurate or as giving the complete picture. The, at least implicit at this point, tenor of its observations was that most of the features relied upon by him did not point in favour of the relationship being one of employment as he contended.

15. At [75] the tribunal said this:

> **"None of those matters set out above altered in any way during the course of the Claimant's work for the Respondent. Accordingly, as the Agreement, in clear and**

plain language, states that the thing within it is [not] intended to form a contract of employment between the parties and further, given that the Claimant himself accepts that the intention at the time was that he would be a self-employed contractor. The Claimant has not in any of the matters set out above indicated any change in the arrangement between the parties."

16. It continued:

"77. In relation to the matter set out above, the Claimant has not met that burden. All of the items which he points to as indicative of a Contract of Employment were in place at the time that the Agreement was entered into, and at the times he asserted, in writing, his self-employed status.

78. They do not set out a degree of control, integration into the business and a requirement to carry out services personally which are the three components of a Contract of Employment under the test in Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance."

17. The tribunal then turned to what it called the issue of substitution. It set out again the text of clause 36. It was common ground before me that there was some typos in this rendition of clause 36, and that it was accurately given earlier in the decision. The tribunal then went on to say the following:

"83. Although it was submitted on the Claimant's behalf that the 'other cause' must be interpreted as meaning something similar in gravity or substance to ill health to warrant non-performance of duties under the Agreement, I find no such implication in the wording. If the Claimant had wished to take a period of holiday, he would have been entitled to procure the services of a locum to fill his absence and to ensure that the Claimant's UDAs were fulfilled.

84. It is said that the Respondent retained a 'veto' on whom the Claimant could send. The only requirement, however, was for the individual to be a qualified dentist who was registered as such at a Primary Care Trust in England.

85. It was further said on behalf of the Claimant that "a third party to whom the Claimant owes no contractual obligations also retains a veto on whom the Claimant can send in his absence because of ill health or similar cause."

86. Provided the individual is a registered performer as a dentist, there is no such 'veto.'

87. The 'restriction' on the identify of the individual provided by the Claimant as locum tenens is purely, I find, one which is obviously necessary for the protection of the Respondent's business and the patients of the dental surgery. Any locum tenens (or in any arrangement a substitute) must be competent to carry out the work. Where the work involves health treatment of the public, it would be bizarre if a wholly unfettered right of substitution (allowing an unqualified person to carry out dental work) were allowed. That would put not only the public and the Claimant at risk, but the business of the Respondent at risk too.

88. The Claimant relied heavily (indeed this was the one thing which counsel on behalf of the Claimant said had 'changed' from the initial agreement when the parties intended there to be no employment and entered into an agreement which

> **specifically stated that there was no employment) was the fact that the clause had not been activated in five and a half years.**
>
> **89. It was accepted, on the Claimant's behalf, that the clause was genuine. The fact that it was not used does not prevent it being a genuine substitution clause and the passage of time does not render it less genuine."**

18. The judge then described a submission of the claimant's counsel, the gist of which was that the starting point was to consider whether the terms of the written agreement amounted to a contract to provide personal service as a worker or an employee. If the tribunal found that they did not, then the reality of the relationship needed to be ascertained. The tribunal's response was as follows:

> **"91. The starting point, is not to question whether the Agreement delineates one of the three relationships. The starting point is to consider what the Agreement says and what the intention of the parties was.**
>
> **92. The Agreement states that it is not a Contract of Employment and does not create a relationship of employer and employee. That is clear.**
>
> **93. The Claimant himself confirms that at the time the Agreement was entered into, the parties intended that he would be a self-employed contractor.**
>
> **94. It is, as set out, for the Claimant to establish that the terms of the Agreement do not match the intention of the parties. In fact, however, the Claimant has established on oath that the intention of the parties (that he should be a self-employed contractor) is entirely consistent with the terms of the Agreement.**
>
> **95. The Claimant was content that he was a self-employed contractor at least until June 2014. What then changed?**
>
> **96. The only thing that changed, in relation to the working arrangements between the parties, from that date was, as submitted by counsel on behalf of the Claimant, the fact that the substitution clause was not activated.**
>
> **97. I am satisfied that the substitution clause was – and indeed the Claimant through counsel accepts that it was – a genuine substitution clause. That is inconsistent with a Contract of Employment. The fact that it was not used for five and a half years does not render it any less genuine.**
>
> **98. Accordingly,**
> **98.1 The Agreement between the parties sets out that no relationship with employer/employee is created by it.**
>
> **98.2 That was the intention of the parties at the time and the parties were content to proceed on that basis.**
>
> **98.3 The Claimant asserted his position as a self-employed contractor on two occasions in writing and never asserted that he was an employee during the currency of his work with the Respondent.**
>
> **98.4 The Claimant has not established that there was control over his work to make the Respondent his employer.**

98.5 The power of delegation/provision of a substitute was genuine (as was accepted on behalf of the Claimant) and was only 'limited' to the extent that is obviously necessary to give business ethnicity to the right of substitution in circumstances where health treatment is being provided to a member of the public.

98.6 The fact that the Claimant chose not at any stage to implement or use the locum clause does not render it any less genuine."

19. In a final summary section the tribunal said this:

"99. At all times the parties proceeded on the basis, and entered into an Agreement on the basis, that the Claimant would be a self-employed contractor. He raised no complaint about that status and indeed asserted it during he currency of his work with the Respondent. Nothing in the Agreement fails to reflect the intentions of the parties at the time and the Agreement itself is specifically said not to be a Contract of Employment.

100. Nothing changed in the way the Contract was carried out on a day to day basis to suggest that the Agreement did not reflect the true intentions of the parties.

101. For those reasons the Claimant was not an employee of the Respondent. I am not dealing with the question of whether or not he was a "worker" as defined within the Employment Rights Act 1996, the only question before me is whether he was an employee. He was not."

The Statutory Framework

20. While the tribunal in this decision was solely concerned with whether the claimant had been an employee of the first respondent, a number of the authorities are concerned with worker status. I will therefore set out the core subsections of section 230 of the **1996 Act** which relate to both:

"(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."

21. Section 203(1) provides as follows:

> **"Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports-**
> **(a) to exclude or limit the operation of any provision of this Act, or**
> **(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal."**

22. The remainder of that section sets out certain types of provision or agreement to which that subsection does not apply, which I do not need to consider.

Grounds of Appeal

23. At a Rule 3(10) hearing I permitted three amended grounds to proceed, worded as follows.

> **"Ground 1**
>
> **1 The Employment Tribunal (ET) erred in lay by beginning their analysis of whether the Claimant was an employee by scrutinising whether the Associate Dentist Agreement (the Agreement was a contract of service.**
>
> **2 This approach amounts to an error of law following the Supreme Court decision in *Uber v Aslam* 2021.**
>
> **Ground 2**
>
> **3 The ET erred in law in failing to consider the possibility the provisions of the Agreement purporting to define the relationship as one of for service (self employed) were void further to section 203(1)(a) of the Employment Rights Act 1996 as suggested by Lord Leggatt in *Uber* paragraph 85.**
>
> **Ground 3**
>
> **4 Following the Court of Appeal's decision in Smith v Pimlico Plumbers [2017] EWCA 51 the ET erred in law in its analysis of the substitution clause in the Agreement by failing to consider whether the phrase "other cause" should be given the meaning of not requiring any cause or, in the alternative, requiring a cause of a nature similar to ill health."**

Arguments, Discussion and Conclusions

24. I remind myself that in **Uber v Aslam** [2021] UKSC 5; [2021] ICR 657, at [118], the Supreme Court said the following:

> **"It is firmly established that, where the relationship had to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual as an employee (or a worker in the extended sense) or as an independent contractor is to be regarded as a question of fact to be determined by the first level tribunal. Absent a misdirection of law, the tribunal's finding on this question can only be**

> **impugned by an appellate court (or appeal tribunal) if it is shown that the tribunal could not reasonably have reached the conclusion under appeal: see Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374, 384-385; Clark v Oxfordshire Health Authority [1998] IRLR 125, paragraphs 38-39; the Quashie case, paragraph 9."**

25. I turn to ground 1. **Uber v Aslam** was decided by the Supreme Court in point of time after the decision which is the subject of this appeal was given. Mr McNerney submitted that it had changed the landscape. It seems to me that his arguments on this ground rest on the following key propositions.

26. First, in determining whether an individual is or was a worker or an employee, for the purposes of various statutes which use the same formulation found in section 230 **1996 Act,** it is an error to treat the terms of the written contract, if there is one, as the starting point, even *prima facie*. The tribunal made that very error by starting with a detailed consideration of the words of the written agreement and in particular stating in terms, as it did at [52] and [91], that those terms were its starting point. Secondly, and relatedly, he submitted that the tribunal repeatedly placed emphasis on the parties' common intention as to the claimant's status when they signed that agreement. But, as Mr McNerney put it, enjoining the intention of the parties as corroboration of the written agreement being the indicator of status, was also inconsistent with the approach required by the decision in **Uber**.

27. Mr McNerney confirmed during the course of oral argument this morning that it was not his case that the import of the decision in **Uber** is that the terms of any written agreement are now to be treated as wholly irrelevant, nor that whether an individual is an employee, or for that matter a worker, for the purpose of access to employment protection rights, is now to be decided by employment tribunals purely and wholly as a matter of status, and not to any extent as a matter of contract. But he said that the tribunal had erred in the way that throughout its decision it had given primacy and centrality to the terms of the written agreement, which in turn meant that it had failed to give sufficient consideration to the realities, as required by **Uber**. Although this overlaps somewhat with ground 2, he also argued that it had erred by the weight and significance that it attached to clause 5, which was the clause that stated that nothing in the agreement was intended to create a contract of employment.

28. A third point relied upon by Mr McNerney was that, whilst the discussion in **Uber** had focused on various statutory protections that apply to workers, such as the right to the national minimum wage and to a minimum amount of annual paid holiday, an additional consideration in this case was that the claimant claimed to be a whistle blower, and that if he was not treated as an employee or a worker he would not be able to avail himself of protection in that capacity. The tribunal, he said, should have had regard to the purposes of the provisions of the legislation protecting whistle blowers.

29. The challenge posed by ground 1 draws in particular on what Lord Leggatt JSC said in the course of [76] of the judgment he gave for the whole court in **Uber**, in particular stating:

> **"… it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'."**

Further on in that paragraph he also said:

> **"The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterized in the written contract determine, even *prima facie*, whether or not the other party is to be classified as a worker."**

30. In my judgment, to understand the import of these phrases, one must consider how they fit in to the wider analysis and reasoning set out by Lord Leggatt in the course of his decision. His starting point is a lengthy consideration of the earlier decision of the Supreme Court in **Autoclenz Ltd v Belcher** [2011] ICR 1157. This includes a citation by him of a passage in which Lord Clarke JSC, with whom the other justices in **Autoclenz** agreed, referred to certain contract law principles which apply to ordinary contracts such as commercial contracts, but indicated that in relation to employment contracts a different approach has to be taken.

31. These principles were the parol evidence rule, the signature rule and the principle that the only basis on which it might be alleged that the terms of a written contract do not accurately reflect the true agreement of the parties is if there has been a mistake which requires rectification, or, as was discussed further on, the term is said to have been a sham in the established common law sense of

there having been a common intention that it should not create the rights and obligations that it appears to create. See **Snook v London and West Riding Investments Ltd** [1967] 2 QB 786. Rather, said Lord Leggatt in **Uber** at [62], Lord Clarke in **Autoclenz**, adopting the words of Aikens LJ in the Court of Appeal, said that the court or tribunal should consider what was actually agreed between the parties:

> **"… either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded."**

32. In **Uber** at [63] Lord Leggatt continued his discussion of **Autoclenz** as follows:

> **"After quoting (at para 34) a further statement of Aikens LJ contrasting the circumstances in which contracts relating to work or services are often concluded with 'those in which commercial contracts between parties of equal bargaining power are agreed,' Lord Clarke ended his discussion of the law (at para 35) by saying,**
>
> > **'So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.'"**

33. Further on, under "interpreting the statutory provisions", Lord Leggatt began [68] as follows:

> **"The judgment of this court in the <u>Autoclenz</u> case made it clear that whether a contract is a 'workers contract' within the meaning of the legislation designed to protect employees and other 'workers' is not to be determined by applying ordinary principles of contract law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake."**

34. He went on to say: "What was not however fully spelt out in the judgment was the theoretical justification for this approach." He went on to note the reference there to the fact that in an employment context the parties are frequently of very unequal bargaining power, but noted also that the same may be true in other contexts. At [69] he observed that "critical to understanding the **Autoclenz** case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation." Over the succeeding paragraphs he expounded upon the purpose of legislation which creates statutory rights of that sort in order to protect workers, citing various

authorities, including of the European Court of Justice, the Supreme Court and the Supreme Court of Canada as well as academic treatises.

35. Lord Leggatt concluded at [75]:

> **"It is these features of work relations which give rise to a situation in which such relations cannot safely be left to contractual regulation and are considered to require statutory regulation. This point applies in relation to all the legislative regimes relied on in the present case and no distinction is to be drawn between the interpretation of the relevant provision as it appears in the Working Time Regulations 1998 (which implement the Working Time Directive), the National Minimum Wage Act 1998 and the Employment Rights Act 1996."**

36. Lord Leggatt then continued:

> **"76. Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker." To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.**
>
> **77. This point can be illustrated by the facts of the present case. The Services Agreement (like the Partner Terms before it) was drafted by Uber's lawyers and presented to drivers as containing terms which they had to accept in order to use, or continue to use, the Uber app. It is unlikely that many drivers ever read these terms or, even if they did, understood their intended legal significance. In any case there was no practical possibility of negotiating any different terms. In these circumstances to treat the way in which the relationships between Uber, drivers and passengers are characterised by the terms of the Services Agreement as the starting point in classifying the parties' relationship, and as conclusive if the facts are consistent with more than one possible legal classification, would in effect be to accord Uber power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers.**
>
> **78. This is, as I see it, the relevance of the emphasis placed in the Autoclenz case (at para 35) on the relative bargaining power of the parties in the employment context and the reason why Lord Clarke described the approach endorsed in that case of looking beyond the terms of any written agreement to the parties' 'true agreement' as 'a purposive approach to the problem.' "**

37. Lord Leggatt then turned to consider the implications of section 203(1) of the **1996 Act** and

cognate provisions in other employment protection legislation. He stated at [80]:

> **"These provisions, as I read them, apply to any provision in an agreement which can be seen on an objective consideration of the facts, to have as its object excluding or limiting the operation of the legislation."**

He referred to examples in the documentation in that case, which could each be seen to have as their object precluding a driver from claiming rights conferred on workers by the applicable legislation. En route he observed that it was also arguable that those provisions were in any case ineffective:

> **" … as it is for the courts and not the parties (still less someone who is not a party) to determine the legal effect of a contract and whether it falls within one legal category or another, see, e.g., Street v Mountford [1985] AC 809, 819."**

38. I note the following features that emerge from this discussion. First, the principle underlying the **Autoclenz** approach, as set out in the passages cited in **Uber**, is that the quest in every case is to ascertain what was in truth and reality truly agreed by the parties. Secondly, that approach does not hold that where there is what purports to be a written agreement, its terms should necessarily be regarded as irrelevant to that quest in every case. Rather, where this is in issue, consideration must be given to whether there are circumstances or features of the wider picture which indicate that those written terms may not reflect the true reality of what was agreed. In considering that question the court or tribunal is also not restricted by the conventional principles of contract law, which would ordinarily restrict its ability to consider evidence of other facts and circumstances which may be said to cast light on that.

39. The discussion in **Uber** indicates that the theoretical justification for the approach which **Autoclenz** set out was not fully spelled out in **Autoclenz**. It builds on the discussion in **Autoclenz** of inequality of bargaining power, by adding what Lord Leggatt describes as the critical insight that the rights asserted by the claimants are statutory employment protection rights. It explains that for this reason a different approach is required to ensure that the protection which Parliament intended to confer on those who have little or no ability to influence the terms of their contract in relation to matters such as wages or paid holidays, is not defeated by their employer using the written contract

terms to designate whether they qualify for those very rights.

40. It seems to me, reading [68] to [76] as a whole, that the decision in **Uber** does not displace or materially modify the **Autoclenz** approach itself, which it cites extensively and adopts. What is said at [76] should not be read as intended to reformulate, in substance, the approach which **Autoclenz** enjoins tribunals to take. Rather, it forms part of the conclusion of Lord Leggatt's developed account of the theoretical underpinning for that approach, which he says should also accordingly inform the tribunal's assessment of the realities of a given case when it carries out the **Autoclenz** exercise, in its consideration of whether the enjoyment of employment protection rights may be otherwise at risk of being denied to someone who Parliament intended should benefit from them.

41. The reference at [76] to it being wrong to treat the terms of the written contract as the starting point is not, to my reading, intended to signify that the written terms are in every case necessarily irrelevant or could not conceivably ever accurately convey the true agreement of the parties. Rather, what this means, as fully stated in the course of [76] and [77] as a whole, is that in a case where what was the true intention of the parties in reality is a live issue, it is necessary to consider all the circumstances of the case which may cast light on whether those terms do truly reflect their agreement, and to do so applying the broad doctrinal approach which **Autoclenz** describes, rather than the stricter approach that conventional contractual principles would normally allow. It would therefore be wrong in such a case for the tribunal simply to regard those written terms as conclusive, and thereby fail to conduct that exercise at all. But it would also be wrong for the tribunal to regard the written terms as having a primacy in the sense of exerting a constraint on what the tribunal may find as a result of that exercise were in fact the terms that the parties truly intended to agree.

42. This reading is, to my mind, confirmed by a consideration of what Lord Leggatt goes on to say at [85] when considering "whole agreement" terms, and the insights offered by **Carmichael v National Power plc** [1999] ICR 1226. Lord Leggatt says explicitly: "This does not mean that the terms of any written agreement should be ignored." He sets out that the conduct of the parties and

other evidence may show that those terms *were* in fact understood and agreed to be a record, possibly an exclusive record, of their true agreement. But he adds that there is "no legal presumption" that a written document contains the whole agreement and "no absolute rule" that it represents the true agreement, just because it has been signed. As he goes on to note, that approach is consistent with that of the CJEU, being that the wording of contractual documents is relevant, but not conclusive.

43. **Uber** does not therefore mean that written terms to which the parties have ostensibly signed up should generally now be disregarded. It does not signify that we have reached a point in the development of the law where the question of whether someone is a worker or an employee has become purely one of status with no role at all for contract. Mr McNerney confirmed in the course of argument that he did not so contend, and nor do I think that Lord Leggatt intended to go that far.

44. That is not surprising. The starting point, as always, is the words of the statute. Section 230 requires that there be a contract of employment, or to be a worker, a contract that fulfils the section 230(3) definition. The **Autoclenz** approach does not simply bypass or ignore the contract. It travels through it, but, in a case where the true intention of the parties is contentious, it requires that the journey not end there, and that, in such a case, the contract be approached differently than a contract forged in a commercial or other conventional context would be. It allows the possibility that, having completed that exercise, the tribunal may conclude that what in reality the parties intended and agreed is not conveyed by some, or possibly all, of the terms of the contract.

45. But this does not mean that it is no longer possible for parties genuinely and in an informed way to agree that they want to form a working relationship which is neither one of employee nor one of worker, one consequence of which will be that various statutory employment protection rights will not apply to the individual who will be doing the work. Nor does it mean that a written agreement might not in a given case truly reflect everything that the parties have in fact agreed.

46. In many cases there will be no dispute that the terms of the written agreement do reflect

faithfully the intentions and true agreement of the parties as to the nature and basis of the working relationship that they have formed. In such cases there will be no need for a wider inquiry. But, where that is contentious, and it is asserted that the wider factual circumstances suggest that the written terms do not, in some material way, reflect the reality of what was agreed, then the tribunal will err if it confines its inquiry to a consideration of those terms and the application of conventional contract law principles. Rather, it must look beyond those terms to all the relevant circumstances, applying the purposive approach described in **Autoclenz** and **Uber**. Provided that it does so, however, it is not in my judgment an error for the tribunal to begin its analysis by considering those written terms. But it must not treat that as both the beginning and the end of its inquiry. Whether the tribunal has in a given case erred is therefore to be judged not by reference merely to where, in setting out its reasons, it started its inquiry, but by considering, reading the decision as a whole, whether it has overall carried out a sufficiently wide-ranging inquiry in accordance with **Autoclenz** and **Uber**.

47. In **Uber** the issue was one of worker status and the focus was on statutory rights which are peculiarly available to workers. But plainly – Mr Butler did not suggest otherwise – the **Autoclenz/Uber** approach does apply to all employment protection rights conferred by legislation which turn on an individual being an employee or a worker in accordance with provisions that are substantially similar to section 230, including for these purposes those of the **Equality Act 2010**.

48. But I do not think anything further is added by the additional dimension in this case that the claimant complained not only of ordinary unfair dismissal but of unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A **1996 Act.** I note, for completeness, that in **Gilham v Ministry of Justice** [2019] ICR 1655, it was recognised that the peculiar nature and basis of the relationship in that case was such that a contract was not required; but I do not think that casts any further light on the general approach to be taken to a conventional case, such as the present, where the relationship is formed by the making of a contract. In principle, the tenor of Lord Leggatt's reasoning indicates that the *same* approach should be taken in respect of

any claim relating to employment protection rights, including **Equality Act** claims. To put the matter the other way around, I do not think that someone claiming worker status has to surmount a higher threshold if doing so for the purposes of a national minimum wage or an ordinary unfair dismissal claim, than they would do if they were claiming to be a whistle blower.

49. I turn then to the application of these principles to the grounds of appeal. Mr Butler submitted that there is a very short answer to ground 1, being that the claimant did not run an **Autoclenz** point in the tribunal at all. The claimant confirmed that he accepted and agreed that the terms of the Associate Agreement reflected the true intentions and understanding of the parties when they signed it. His case was not that a consideration of the realities would show that they did not, or that for any other reason he should be taken not to have truly signified his agreement to them when he signed them. His case was, rather, that the circumstances had changed since that agreement was signed in 2013 and by the time that the relationship ended in 2018. The tribunal considered that contention on the evidence and made unassailable findings of fact that it was not made out. I do not think that that submission entirely disposes of this ground. It is true as far as it goes but it does seem to me that the claimant's pleaded case, of which the tribunal was plainly cognisant, went further than that.

50. The claimant contended that, factually, all of the elements of the **Ready Mixed Concrete (South East) Ltd v Minister of Pensions** [1968] 2 QB 467 tests for the existence of an employment contract were satisfied. But it seems to me that the employment tribunal duly examined that case and, for reasons that it gave, rejected it. Mr McNerney submits that in doing so the tribunal failed to apply a worldly-wise and realistic approach as required by **Autoclenz** and **Uber** and confined itself to examining that question through the prism of the written terms of the Associate Agreement.

51. As to that, it seems to me that the case as pleaded by the claimant relied upon a number of provisions of the written agreement to which his pleading expressly referred. The tribunal properly took that case advanced by him as its starting reference point when considering whether the facts established that he was an employee applying the **Ready Mixed Concrete** test. The tribunal would

have erred if it had failed to do that. I therefore do not accept that it should be criticised for dwelling upon or analysing the provisions of the written agreement to the extent that it did. The shape of the case advanced by the claimant demanded that it do so.

52. It also seems to me that there is in principle a difference between a case that contends that a correct application of the law to the true factual position as described in the written agreement would result in the conclusion that the relationship was one of employment, which does not involve any invocation of the **Autoclenz** point; and a case that the terms contained in the written agreement do not reflect the actual true agreement between the parties at all, which is an **Autoclenz** point.

53. A contention that the terms of a written agreement accurately reflected what the parties intended to agree *when it was signed*, but that circumstances have changed so that it no longer does, may or may not be based on the **Autoclenz** principle. Agreements can be varied expressly or impliedly, orally or in writing or by conduct. There is a well-established distinct body of authority as to the circumstances in which an agreement may be found to have been varied by conduct, which I do not need to explore. The short point is that putting the case that way may involve some invocation of the **Autoclenz** principle but will not necessarily always do so.

54. In the present case I am bound to say it is not obvious to me that the claimant's case – that things had changed since the contract was first made – was advanced before the employment tribunal by reference to an **Autoclenz** point. But even assuming that in his favour, it was still not an error for the tribunal, in the way that it set out its decision, to have started with the written agreement. It would still have been wrong to regard its terms as necessarily irrelevant and to give them no consideration at all. Nor was it wrong for the tribunal to consider what they might indicate were the intentions of the parties when the relationship was formed *and* when it ended. What matters, once again taking his case at its highest, is what else the tribunal considered and how its consideration of the terms of the written agreement fitted into and influenced its reasoning and decision as a whole.

55. Assuming that the claimant's case required the tribunal to take an **Autoclenz** approach, a potential warning signal might be sounded in isolation by the tribunal's citation early on in its conclusions of **Arnold v Britton** [2015] UKSC 36. That was one of the well-known trilogy of Supreme Court decisions on the principles of construction of contracts, all three of which, it can be seen from its self-direction as to the law, were cited to the tribunal. Had the tribunal simply and solely applied unvarnished the general contract law principles set out in the trilogy it would have erred.

56. Another potential warning signal, in isolation, might be said to be the tribunal's observation at [94] that it was for the claimant to establish that the terms of the agreement do not match the intention of the parties, because, as I have said, it would be wrong to treat the scope of its inquiry or its possible outcome as somehow constrained by those terms. But I do not think, reading its decision as a whole, that the tribunal restricted its consideration in either of those ways.

57. Rather, it appears to me that the tribunal did also consider all of the wider circumstances and context relating to this relationship that were raised before it. These included: that the agreement was not produced by the respondent but was in a standard form produced by the BDA; that it had been used before by the claimant himself when he was the principal of the business in that capacity; that it was entered into on the occasion of the sale of the business by him to the first respondent; that the claimant reminded the first respondent more than once subsequently that he and his colleagues were not employees but, as he put it, independent contractors paid at a piece rate, supporting the inference that he was entirely cognisant of the contents and significance of what he had signed; and that he accepted and agreed in evidence that when the agreement was signed it was the mutual intention of the parties that he was to be engaged as a self-employed person. The foregoing are all features which were plainly considered by the tribunal and which concerned the wider circumstances of the case looking beyond the written terms of the agreement. It is relevant also that the tribunal noted at [62] that the claimant did not assert that the written agreement failed to reflect the position "on the ground".

58. How matters stood at the start was bound also to have formed part of the consideration by the

tribunal of whether to any material extent things then changed in the years that followed. The tribunal did indeed consider that question as well. It considered various features relied upon by the claimant as to how things worked in practice over the years, including the discussion at [29] to [36] of various aspects of the relationship and the discussion at [64] to [74]. The tribunal came to a conclusion, that it was entitled to reach and cannot be challenged on appeal, that on examination nothing had changed from the start, during the course of the relationship, and up to the time that it came to an end.

59. I do not agree with the second strand of Mr McNerney's case on ground 1, to the effect that the tribunal placed undue and erroneous emphasis on what it found to be the parties' intentions when they signed the agreement. This in one sense overlaps with ground 2 insofar as it relates specifically to clause 5 and section 203 of the **1996 Act** and I will come to that aspect when I turn to that ground. The tribunal did not rest its analysis upon a consideration of the high level statement of intention by clause 5, that the relationship was not to be one of employment, but properly considered what were the true intentions of the parties regarding a range of aspects of the working relationship, and whether the terms of the written agreement did or did not reflect that reality. Indeed the language that it used, albeit not by specific citation, echoed the language of **Autoclenz** in its conclusions at [99] to [101].

60. So, on the assumption that it was required to engage with the **Autoclenz** approach, the tribunal did not fail to do so. It did not confine its consideration to the terms of the written agreement, nor constrain the approach it took to its inquiry by the application purely of conventional contract law principles. As Mr Butler pointed out in his skeleton, this was not a case where, as in **Uber v Aslam**, the written terms were drafted by the putative employer and tabled by it on a take-it-or-leave-it basis, nor one where the claimant did not read or understand the terms when he signed them. The tribunal plainly considered that the position was otherwise, given that these were BDA terms that the claimant had himself used, and that he himself invoked them during the course of the relationship.

61. Mr McNerney drew attention to **Sejpal v Rodericks Dental Ltd** [2022] ICR 1339, a recent decision involving a dentist, which considered a very similar agreement. The EAT in that case held

that the tribunal had erred by not following the **Autoclenz** approach. He invited me to draw the same inference in the present case. But **Sejpal** provides no support for his suggestion that the decision in **Uber** requires a different approach to be taken from that mapped out in **Autoclenz**. In summary, the reason why the tribunal in **Sejpal** was found to have erred by not following that approach, was because it applied conventional contract law principles, such as the common law rule enunciated in **L'Estrange v F Graucob Ltd** [1934] 2 KB 394, rather than recognising that it should not be fettered by such conventional principles of common law: see **Sejpal** at [51] – [53].

62. In conclusion therefore on this ground, even if the tribunal should have read the claimant's case as requiring it to follow the **Autoclenz** approach, I do not think that its reference to the written agreement as the starting point betrays that it failed in its overall decision to do so. Nor was there any feature of the wider circumstances relied upon by the claimant that the tribunal failed to take into account, though he disagrees with the outcome of its assessment. Ground 1 accordingly fails.

63. I turn to ground 2. This asserts that the import of the discussion in **Uber** at [79] to [82] and in the last sentence of [85] is that the effect of section 203 of the **1996 Act** is that the tribunal should have regarded the clause in the written agreement stating that it did not create a contract of employment as void and of no effect. But instead, submitted Mr McNerney, it wrongly relied upon that clause at a number of points, and treated it as conclusive of the claimant's non-employed status.

64. Once again, we need to tease out with some care the import of the discussion in **Uber v Aslam**. The approach propounded by Lord Leggatt at [80] is that section 203 and cognate provisions apply to any term "which can be seen on an objective consideration of the facts to have as its object excluding or limiting the operation of the legislation." At [81] there follows the observation that it is arguable that the provisions relied on in that case were in any case ineffective and the citation of **Street v Mountford** [1985] AC 809. At [85] he states that terms that purport to classify the relationship or exclude or limit statutory protections by preventing the contract from being interpreted as one of employment are of no effect. At [86] it was held that the tribunal in **Uber** was entitled on

its findings of fact to conclude that provisions that the claimants were not employees had been inserted "with the object of excluding the operation of employment legislation" and were "therefore void."

65. Two propositions can be seen as running through this section of the decision. The first is that if *other* factual features indicate that as a matter of law an agreement is to be classified as falling into a certain category, then a term asserting that it nevertheless does not will not make any difference. The second is that a provision which purports to state which type of agreement the parties have chosen to form cannot stand if, on an objective consideration it is apparent that the *object* of that provision *in the given case* is to defeat the operation of legislation conferring workers' rights.

66. But what can still stand alongside those propositions is a third proposition articulated by Lord Denning MR in **Massey v Crown Life Insurance Company** [1978] IRLR 31 and more recently restated by Elias LJ in **Stringfellow Restaurants Ltd v Quashie** [2012] EWCA Civ 1735 at [52], that **"it is legitimate for a court to have regard to the way in which the parties have chosen to categorise the relationship, and in a case where the position is uncertain, it can be decisive"**.

67. Thus, if an agreement, as in **Street**, has all the factual features, such as a grant of exclusive possession, that make it as a matter of law a tenancy, the parties calling it a licence will not make it so. Similarly, if an agreement has all the factual features that make it in law a contract of employment, then a clause denying that will be ineffective. But in a scenario where the parties could properly have chosen to form a non-employment relationship, and there are factual features that may be said to point both ways, then a clause of that sort should not automatically be regarded as of no weight at all, in the tribunal's evaluation of the overall picture.

68. Given how the passages that come before and after it are framed, I do not think that the last sentence in [85] of **Uber** was intended to state a more absolute principle to the effect that any and every provision of this sort must in any and every case as a matter of law now be regarded as irrelevant, effectively wholly casting aside the scenario described in **Massey** and **Quashie**. Of course

the **Autoclenz/Uber** principle means that such a clause should be given no weight *if* the tribunal concludes that it is not a true statement of the parties' intentions because, in this case, it has as its *object and purpose* the thwarting of the statutory regime; and a tribunal may err if it fails to give the consideration to that possibility that is needed in a given case. But that is not the same as saying that such a clause must necessarily always be regarded as wholly irrelevant in every case.

69. In the present case, the tribunal at [55] described this clause as "relevant." At [61] the tribunal said that it was the intention of the parties when the agreement was reached that the claimant be a self-employed contractor, adding also in parenthesis that that was the wording of the agreement. At [64.2] and again at [75] the tribunal referred both to this clause and to the intention of the parties. Given all of that, and that, as I have described, the tribunal surveyed the circumstances going beyond the terms of the written agreement, I think it is clear that it did not treat this clause as providing a determinative and complete answer to this issue by itself. Rather, it concluded that it was a genuine reflection of what the other evidence, both of the various terms of the agreement and beyond, showed were the parties' true intentions as to how the relationship would operate, all of which material was regarded as supporting the conclusion that this was not a contract of employment.

70. I therefore do not conclude that the tribunal erred by failing to conclude that this clause had a proscribed object in this case, and so fell to be struck down by section 203(1). Ground 2 fails.

71. I turn to ground 3. Here, the focus is on the tribunal's conclusion, specifically at [97], that clause 36 of the written agreement was inconsistent with a contract of employment. Mr Butler noted that ground 3 is narrowly drawn, asserting that the specific error was one of the tribunal failing to consider whether the phrase "other cause" should be given the meaning of not requiring any cause, or, in the alternative, requiring a cause of a nature similar to ill health. In his skeleton argument Mr McNerney put forward a wide-ranging submission as to what he said were a number of defects in the tribunal's consideration of whether that clause did or did not negative the requirement for an obligation of personal service, drawing and relying upon various passages in the discussion in **Sejpal**.

Mr Butler, however, submitted that it was not open to the claimant to mount new lines of challenge not covered by ground 3, in the absence of an application to amend being made and granted. Mr McNerney in reply accepted that he was confined to ground 3 as framed and did not apply to amend.

72. Nevertheless, part of Mr McNerney's case, once again echoing ground 1, is that the tribunal erred by focusing on the terms of the written agreement and failing to consider the reality of whether personal service was required and promised. In principle, a written term which appears to negative an obligation of personal service could, in a given case, be found not to reflect the wider realities and actual intentions of the parties. However, in this case the actual ground is confined to the question of *interpretation* of the meaning of the clause. There is no challenge to the decision that the clause was genuine in the sense that its wording accurately reflected the parties' intentions. Similarly, the argument that the fact that the clause had not been invoked during the five years of the relationship should have been considered relevant by the tribunal, is not within scope of this ground of appeal.

73. In general, it is established law that whether a given clause has implications for the individual's status will not be affected by whether or with what frequency it has been invoked. But this principle could in a given case give way to an **Autoclenz** point to the effect that lack of usage of the clause itself demonstrates that the parties never truly intended it to apply. (See the recent discussion of this point in **Independent Workers Union of Great Britain v Central Arbitration Committee (Roofoods t/a Deliveroo as an interested party)** [2021] EWCA Civ 952 at [77] to [79].) However, once again that point does not come within the four walls of this ground of appeal.

74. But did the tribunal err in its construction of the opening words of the clause in the manner raised in this ground? Although the challenge is narrowly confined to that, the reality is that whether the tribunal erred in its construction of the opening words cannot be entirely divorced from a consideration of other features of the clause of which those words formed a part.

75. In relation to worker status the requirement for an obligation to perform services personally

derives from the wording of section 230(3)(b). The statutory definition of a contract of employment does not include any equivalent wording. The obligation of personal service requirement derives from the authorities going back in the modern era to **Ready Mixed Concrete**, referring to a condition that the individual who claims to have been an employee have agreed to provide his own work and skill in the performance of some service for the other party. But the test is the same whether for the purposes of employment or worker status. See: **Byrne Brothers (Formwork) Ltd v Baird & Ors** [2002] ICR 667 at [13] and **Pimlico Plumbers Ltd v Smith** [2018] ICR 1511 at [20].

76. In **Pimlico Plumbers Ltd v Smith** [2017] ICR 657 in the Court of Appeal, after reviewing various authorities, Sir Terence Etherton MR said at [84]:

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

77. In the Supreme Court Lord Wilson JSC, with whom the other members of the court agreed, reached the conclusion that Mr Smith's only right of substitution was of another Pimlico operative, so that the question was then whether that right was inconsistent with the obligation of personal performance. After considering other authorities he concluded at the end of [32]:

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

performance on his part."

78. In **Stuart Delivery Ltd v Augustine** [2022] ICR 511 it was stressed that [84] of the Court of Appeal's decision in **Pimlico** does not set out rigid categories or rules of law. It only sets out two principles: that an unfettered right of substitution is inconsistent with an obligation of personal service, and that a conditional right may or may not be, depending on the nature or degree of the fetter So it is therefore unhelpful to try to shoehorn the given case into one of these supposed categories.

79. In the present case I consider that the tribunal did err at [83] as asserted by this ground. The example given there, that if the claimant had wished to take a holiday he would have been entitled to procure a locum to fill his absence, shows that it took the view that this clause effectively gave the claimant a free choice, if he wished, for any reason, to nominate a substitute. That is an erroneous reading of the natural meaning of the opening words of clause 36, which describe the event that triggers the rest of the clause as being a failure through ill health or other cause to utilise the facilities for a continuous period of more than 20 days. The obligation thereby triggered is to use best endeavours to make arrangements for the use of the facilities by a locum.

80. To construe "other cause" as meaning that this clause can be invoked by the claimant in any circumstances where he merely wishes not to use the facilities for such a period fails to take on board that it contemplates that the triggering event is a *failure* to utilise the facilities for a defined period, which carries with it the implication that the claimant has failed to use them to a minimum extent, which he ordinarily was required to do. Further, "through ill health or other cause", must be read as meaning "ill health or other similar cause." That is to say, the other cause contemplated will also be one that has not been chosen by the claimant, but has in some sense been visited upon him. If the clause was meant to be capable of applying whenever the claimant *chooses* not to use the facilities for more than 20 days, it would not need to have referred to "ill health or other cause," at all.

81. In the course of argument, I drew attention to clause 16, which appears to have placed an

obligation on the practice owner to cause the facilities to be available at certain times, but also on the associate to use every reasonable endeavour to utilise the facilities during those hours. But Mr Butler fairly submitted that this was not a point that had been identified or raised by Mr McNerney and I do not rely upon it. Even if clause 16 did not exist, I would consider that the tribunal erred in its construction of the phrase "other cause" in clause 36 for the reasons I have given.

82. I raised with counsel this morning what the implications might be were I to uphold only ground 3, as I have. Mr Butler invited me in that eventuality to allow an opportunity for further submissions once I had given my decision. I will invite such submissions now.

(After further submissions)

83. I have now heard further argument from counsel as to what should happen next. There is some measure of agreement. Firstly, both counsel agree, rightly in my view, that the error that I have identified in upholding ground 3 contributed to the tribunal's conclusion that the personal service requirement of an employment contract was not satisfied in this case; and therefore that conclusion cannot stand and that matter must be remitted to the tribunal for fresh consideration. Counsel also agree that it is at least possible that if the tribunal reaches a different conclusion next time on the question of whether the agreement satisfied the requirement for personal service, that could impact on its overall conclusion as to whether the claimant was an employee, even if all the other findings in EJ Ord's decision remain as given. Neither of them suggested that I could dispose of the matter on the basis that there can only be one right answer to those questions.

84. What they disagree about is the following. Firstly, Mr Butler says that the tribunal's consideration next time around should be confined solely to the question of construction of the reference in clause 36 to "ill health or other cause" and, depending on that, whether clause 36 negates an obligation of personal service. However, as I have said, those words have to be considered in the

context of the whole clause; and so, upon remission, in order to reach a fair and just outcome, the tribunal needs to look afresh at the implications of that clause as a whole. But I agree with Mr Butler that on the question of personal service the tribunal does not need to look *beyond* the implications of that clause, because the respondents' case on the personal service point rests solely upon it. I also agree with him that the tribunal will not be concerned with an **Autoclenz**/**Uber** point here, but simply with the construction of the clause applying relevant authorities.

85. While it is common ground that if the tribunal concludes that clause 36 does not negate personal service, that could in turn have an impact on its conclusion on the overall question of whether the claimant was an employee, Mr McNerney, putting his case at its highest, argued that all of those questions should be amenable to entirely fresh consideration. However, his fallback position was, in agreement with Mr Butler, that EJ Ord's findings on all other matters could be taken as a starting point, save in relation to clause 36, so that if the second time around it was found that the personal service requirement was not negated by that clause, the tribunal will then need to feed that finding in to the picture created by the overall findings already made by EJ Ord, which should therefore stand.

86. I consider that is the appropriate basis on which remit. I have rejected grounds 1 and 2 and I can see nothing wrong with EJ Ord's approach which led to his findings of fact and conclusions on the other matters that feed into a consideration of whether the claimant was an employee. As Mr Butler accepts, that does not mean that a conclusion that there was an obligation of personal service could not affect the overall outcome. But there is no need to require all of EJ Ord's other findings to be cast aside.

87. Lastly, counsel disagree as to whether I should allow that EJ Ord may preside when this matter is further considered. I was told that the claimant at any rate may well be asking for a hearing before a judge and members next to be convened, to decide all outstanding issues at one final trial, including the issue of worker or employee status and the substance of the claim that the termination of the relationship was unlawful. But that does not as such affect my decision on this particular aspect.

88. I am persuaded by Mr McNerney that I should direct that EJ Ord should not decide this issue. Whilst I have upheld this appeal only on one point and directed that on all other points EJ Ord's findings should serve as the starting point next time, nevertheless this point does have potentially very significant implications for this litigation. Although the claimant claims to have been a worker, if not an employee, which has yet to be considered, personal service is a requirement for worker status as well. So the decision on this point could potentially be determinative of the entire claim.

89. I also accept, and it is no criticism of EJ Ord, who I am sure would do his best were I to remit the matter to him, that it would be a big ask to expect him to approach this question with a completely fresh mind. It will be important, whatever the outcome next time, that the decision commands the confidence of both parties. No doubt there is a strong desire for finality in this litigation, which has already been running for some four years and looks set to go into possibly a fifth year.

Outcome

90. I quash the tribunal's decision that the claimant was not an employee of the first respondent. I remit the matter to the tribunal for fresh consideration of the correct construction of clause 36 of the Associate Agreement of 2013 and hence of the overall question of whether the claimant was or was not an employee of the first respondent, taking account of the findings and conclusions of the tribunal in the decision under appeal, save in relation to clause 36, and the need for an obligation of personal service. I direct that that question should not be determined by, or by a panel chaired by, EJ Ord.