Appeal No UKEAT/0457/05/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 27 October 2005
Judgment delivered on 21 December 2005

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

MR K EDMONDSON JP

MR P A L PARKER CBE

COTSWOLD DEVELOPMENTS CONSTRUCTION LTD — APPELLANT

MR S J WILLIAMS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JEREMY GORDON (Of Counsel) Instructed by: Messrs Sackvilles Solicitors 135 High Street Hornchurch Essex RM11 3YJ
For the Respondent	MR DAVID LEMER (Of Counsel) Instructed by: Messrs Edwards Duthie Solicitors 292-294 Plashet Grove East Ham London E6 1EE

SUMMARY

What is meant by "mutuality of obligations" where the claim relies on the Working Time Regulations; whether finding that there was no mutuality of obligations was inconsistent with holding that the Claimant was a "worker"; whether it is sufficient for claim under the W.T.R. for there to have been a series of separate short-term assignments, as opposed to one over-arching agreement; and what should be the correct approach to deriving the terms of a contract from the performances of it by the parties in the absence of any written or express oral agreement. Unclear ET decision remitted.

THE HONOURABLE MR JUSTICE LANGSTAFF

Judgment

1. This appeal from a Decision of the Employment Tribunal at Stratford which was sent to the parties on 25 April 2005, raises the issue whether it is necessary for a Tribunal to find mutuality of obligation to hold that a person is to be regarded as a "worker" for the purposes of the Working Time Regulations 1998; whether it is necessary in order to claim paid holiday entitlement under those regulations that an individual worker should have been employed under an over-arching or umbrella contract constituting him a "worker", or whether a succession of individual assignments in respect of each of which he is a worker or employee would suffice; and the approach which an Employment Tribunal should take when deriving the terms of a contract where there is no written document nor oral agreement, but simply the conduct of the parties over a period of time. None of these is easy to resolve.

The Underlying Facts

2. The Claimant was a carpenter, who was engaged to work for the Respondents ("Cotswold") who were themselves sub-contractors to a main contractor who provided maintenance services to the London Underground. He worked for the Respondents from October 2002 until 8 June 2004. He was then dismissed. He had no contract in writing. There is no suggestion that there was any oral conversation which definitively established the terms of his engagement. A broad overview of the facts found by the Employment Tribunal suggests that he worked regularly from day to day and week to week for Cotswold. There is no suggestion that he worked for any other person or firm throughout the twenty one months of his engagement. For practical purposes, there seems to have been nothing which would clearly distinguish his situation from that of most of those working as employees or workers in the building trades for one employer or principal throughout the period.

3. Following his dismissal, the Claimant complained to the Employment Tribunal of unfair dismissal, wrongful dismissal, non-payment of holiday pay and unlawful deductions from his wages. The issue before the Tribunal was whether he was an employee (in which case the Respondents did not dispute his claim for unfair dismissal, nor the correctness of his claim for compensation for wrongful dismissal (pay in lieu of notice) and he would, of course, have been entitled to complain of a failure to pay holiday pay). If he was not an employee but was a worker within the meaning of the Working Time Regulations 1998 he would not be entitled to complain that he had been unfairly or wrongfully dismissed.

4. Cotswold contended that he was neither an employee nor a worker.

5. The Employment Tribunal found that he was a worker, such that he could claim holiday pay; but dismissed his claim that he was an employee such that he might claim a right to unfair or wrongful dismissal.

6. In more detail, the findings of fact were set out by the Tribunal at paragraph 4 of its decision as follows:

> **"4.1 the Claimant began to work for the Respondent in October 2002 performing various duties, particularly as a carpenter. There was no written contract of employment;**
>
> **4.2 the Claimant worked night shifts. He was frequently telephoned by Mr Waite or Ms Hadaway on the day before he was due to work the following night shift, in order to arrange for him to attend work;"**

(Mr Waite was a director, and Ms Hadaway the administrator/secretary of Cotswold)

> **"4.3 there were occasions when the Claimant refused work. He owned a plot of land in Cornwall which he envisaged might require him to take long weekends to supervise the building of a bungalow there and told the Respondent that he would need to [be] absent on those occasions. In the event the building of the bungalow did not proceed. He also refused to work "back-to-back" shifts. Having done so on a number of occasions, the Respondent no longer offered him such shifts;**
>
> **4.4 the Claimant held a CIS Certificate as a result of which he was paid for the amount of each shift he worked less an 18% standard deduction;**
>
> **4.5 the Claimant was provided with the use of a company van;**

4.6 the duties carried out by the Claimant for (Cotswold) involved working on London Underground. (Cotswold) was a sub-contractor of a main contractor providing services to the London Underground;

4.7 the Claimant worked a variable number of shifts for (Cotswold). He was not paid when he did not work, either because work was not available or because he chose not to do so; although there were occasions on which he was paid a sum equivalent to half a shift;

4.8 the Claimant was paid £100.00 per shift gross, less the 18% deduction referred to above. Each shift was 6 hours in duration. The amount paid to the Claimant was not reduced if he finished work early;

4.9 the Claimant was subject to the supervision of a Mr P Hammond as well as to the general supervision of the staff at London Underground;

4.10 the Claimant was not paid while he was off sick for a period in November 2003;

4.11 the Claimant was asked to attend courses in order to satisfy the requirements of London Underground."

The Tribunal's Findings

7. Since there was no written contract nor (it appears) evidence of specific oral conversations about contractual terms, the Tribunal had to work from the facts which they set out in paragraph 4, all of which we have quoted above, in order to ascertain what it thought the terms of the contract were. In doing so they were implicitly adopting the approach set out in the speech of Lord Hoffmann in **Carmichael v National Power Plc** [1999] ICR 1226 at 1233C-1234D, where he pointed out (at 1233C) that the intention of the parties to a contract in the employment sphere may have to be discovered from oral exchanges and conduct, concluding (at 1234C-D):

> **"… I think that it was open to the Industrial Tribunal to find, as a fact, that the parties did not intend the letters to be sole record of their agreement but intended that it should be contained partly in the letters, partly in oral exchanges at the interviews or elsewhere and partly left to evolve by conduct as time went on. This would not be untypical of agreements by which people are engaged to do work, whether as employees or otherwise. ….. On this basis, the ascertainment of the terms of the agreement was a question of fact with which the Employment Appeal Tribunal were right not to interfere."**

8. Although the description "implied terms" may often be adopted in respect of terms which are not expressed in writing or orally, it may be more accurate to describe the terms as "inferred" rather than implied, since the process is not one of identifying a term necessary for business efficacy in the usual sense, nor identifying a term as established by law as a necessary

incident of a type of contract, but to recognise the terms to which, though otherwise unexpressed, the parties must have been working by agreement. The judicial member of the Tribunal had recently to consider the process of deriving contractual terms from conduct in the employment context: (see **Secession Limited v Mrs R Bellingham** EAT/69/05/DM, Judgment: 25 October 2005). The lay members of the Tribunal note that it is very common in the construction industry for people to be engaged to work without any written agreement, and with no, or the bare minimum, of oral exchange.

9. Accordingly, although engaged upon a fact finding exercise (per Lord Hoffmann) the Tribunal were deriving their findings of fact from the primary facts which they had held established by evidence.

10. The material findings for the present case were set out in paragraph 7 as follows:

> **"7.2The Tribunal finds that the Claimant was required by the terms of the contract between the parties to perform the work that he did personally. ….**
>
> **7.3 ….. by the nature of the Claimant's relationship with the Respondent, the latter was not in the position of a client or customer of any profession or business undertaking carried on by the Claimant.**
>
> **7.4 By reason of the foregoing, therefore, the Tribunal finds that the Claimant was a worker within the definition set out at regulation 2(1) of the Working Time Regulations 1998; and that as such the Claimant was entitled to holiday pay, the non-payment of which was an unlawful deduction from his wages.**
>
> **7..5 The Tribunal has gone on to consider whether the Claimant was an employee and hence entitled to bring claims for unfair dismissal and wrongful dismissal. It has carefully considered the submissions put before it.**
>
> **7.6 The Tribunal finds that there was no mutuality of obligation. Although it does not accept that the Claimant was invariably consulted each day as to whether he wished to work, the Tribunal finds that there was regular contact of that kind; that on occasion the Claimant declined to work; that the variation and the number of shifts worked is evidence of this; that on occasions there was no work available and the Claimant was not paid; and the Claimant was paid per shift worked.**
>
> **7.7 Since, as was held in the case of Montgomery v Johnson Underwood [2001] IRLR 269, mutuality of obligation and control are the irreducible minimum legal requirements for the existence of the contract of service, it follows that the absence of such mutuality of obligation means that the Claimant was not an employee under section 230(1) of the Employment Rights Act 1996, and his claims of unfair dismissal and wrongful dismissal must fail. The Tribunal observes, however, that had it found that there was mutuality of obligation it would have gone on to conclude that in all the circumstances the Claimant was subject to the Respondent's control to an extent sufficient to satisfy the test in Ready Mix Concrete. He worked in a shift pattern determined by the Respondent, was instructed as to what work was to be carried (out) was supplied with the necessary tools and equipment, had the use of a van, and was subject to supervision."**

The Appeal and Cross Appeal

11. Those conclusions give rise to both an appeal, and a cross appeal. Each centres on an apparent inconsistency of approach between paragraphs 7.2 and 7.6. Thus Cotswold argues that the finding that there was no mutuality of obligation means that the Tribunal concluded that there was no obligation upon the Claimant to do any work for Cotswold; that "mutuality of obligation" is a necessary constituent of any contract under which a person is constituted a "worker", and hence the Claimant, notwithstanding that over 21 months he might have appeared to be indistinguishable in practical terms from any other employee or worker in the construction trades, was actually neither. The Claimant argues that given the finding that there was control sufficient to render the relationship between Cotswold and himself one of employment, he should be treated as an employee, since "mutuality of obligation" was appropriate to a situation in which a Tribunal was examining whether actual work, as employee or worker, done under a succession of separate assignments could be linked collectively under the overall umbrella of one over arching contract. Yet the Tribunal appeared to have approached the contract, as a broad overview of the facts might suggest, as one contract over the period beginning in October 2002 and ending in June 2004. If right to do so, then the finding of control and the exclusion of any suggestion that the Claimant was in business on his own account (implicit in paragraph 7.7, but explicit in paragraph 7.3) must inevitably result in a finding that the Claimant here was an employee throughout.

The Law

12. Hallowed by repetition in case law though they may be, the words "mutuality of obligation" do not appear in any statute. The relevant definitions of "employee" and "worker" are statutory. Statute is therefore the place to begin.

13. Section 230 of the Employment Rights Act 1996 defines employee as:

> **"… 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 … whether express or implied, and (if it is express) whether oral or in writing."**

The Working Time Regulations 1998, regulation 2 provide for the meaning of worker, in terms which are identical to those contained in Section 230(3) of the Employment Rights Act 1996, as follows:

> **"…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;…"**

14. There is no separate definition of "contract of employment" within the Working Time Regulations. Although the regulations are made under the European Communities Act 1972, originally to implement the EC Directive 93/104 on working time, the meaning to be given to the expression "contract of employment" in the regulations is that under Section 230 of the Employment Rights Act 1996. That is because it is not only sensible to give the same definition to "contract of employment" in the health and safety field, in which the Working Time Regulations operate, as it is to the definition for the purposes of the employment rights, but because the alternative would in any event be to rely upon the common law. It is that common law to which Section 230 itself refers: by defining a contract of employment as a contract of service it necessarily refers to the common law development or recognition of the essential requirements of such a contract.

15. Those requirements were concisely stated by Stable J in one sentence, in **Chadwick v Pioneer Private Telephone Co Ltd** [1941] 1ALLER 522, at 523D:

> **"A contract of service implies an obligation to serve, and it comprises some degree of control by the master."**

16. That was expanded by **MacKenna J in Ready Mixed Concrete (SE) Limited v Minister of Pension and National Insurance** [1968] 2 QB 497, at 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."**

In respect of the first two conditions, MacKenna J said this:

> **"There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill."**

17. It was these citations from the judgments of Stable J and MacKenna J which led to Stephenson LJ in **Nethermere (St Neots) v Gardiner** [1984] ICR 612 using, for what may have been the first time, the expression "irreducible minimum of obligation": at 623F-G: "there must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service."

18. These words were approved in the speech of Lord Irvine of Lairg LC in **Carmichael v National Power Plc** [1999] ICR 1226 (at 1230G-H).

19. The nature of the irreducible minimum of obligation resting upon the employer has been variously stated in different cases. The judgments in **Ready Mixed Concrete** and **Nethermere**, **Carmichael**, (though there are parts of the judgment of Dillon LJ in the former (at 634G)) and Lord Irvine in the latter (see 1230G) which suggest the employers' obligation is

to provide work) contemplate the obligation on the employer as being that of providing pay. In **Stevedoring & Haulage Services Ltd v Fuller** [2001] IRLR 627, the "mutual obligations" recognised by the Court of Appeal appear to have been to offer work, on the employer's side, and to accept it, on the employee's (see paragraph 6).

20. It is unnecessary, however, to approach the definition of the obligation which is required on the employer's side upon too narrow a basis: as Sir Christopher Slade observed in **Clark v Oxfordshire Health Authority** [1998] IRLR 125, at paragraph 41:

> **"… the mutual obligations required to found a global contract of employment need not necessarily and in every case consists of obligations to provide and perform the work. To take one obvious example, an obligation by the one party to accept and to do work if offered and an obligation of the other party to pay a retainer during such periods as work was not offered would in my opinion, be likely to suffice. In my judgment, however … the authorities require us to hold that *some* mutuality of obligation is required to found a global contract of employment."**

(He went on to note that, in **Clark**, a case in which it had been contended by a nurse that whilst on the "bank" and awaiting assignment to work she was employed under a contract of employment, he could find no mutuality of obligation in the sense he had just described:

> **"…subsisting during the periods when the Applicant was not occupied in a 'single engagement'."**

21. In **Carmichael**, **Clark** and **Fuller** the central issue to which the question of mutual obligations was directed was whether or not there was a "global", "over-arching" or "umbrella" contract of employment, such that periods when an individual did not do any remunerative work were nonetheless to be counted as periods of time when he or she was subject to a contract of employment. Thus Sir Christopher Slade expressly distinguished the position when the nurse was actually working during the course of an assignment. The issue in **Carmichael** was not directed to whether, when the power station guides were actually engaged in guiding visitors around the power station, they were acting as employees or not.

22. In **Montgomery v Johnson Underwood Ltd** [2001] ICR 819, the issue was whether or not Mrs Montgomery was an employee of an employment agency by whom she had been placed to work for well over two years with a local company. Buckley J was inclined to accept (at paragraph 40) that an offer of work by an agency, even at another's workplace, if accepted by the individual for a remuneration to be paid by the agency could satisfy the requirement of mutual obligation, but, held that for a contract to be one of employment it is necessary that control by the putative employer should also be demonstrated, and that in that case it had not been, and rejected her claim to be an employee of an agency. Longmore LJ said, at paragraph 46 that:

> **"Whatever other developments this branch of the law may have seen over years, mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment: see Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623 per Stevenson LJ approved in Carmichael v National Power Plc [1999] ICR 1226, 1230 per Lord Irvine of Lairg LC."**

23. In **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471, Elias J, giving the judgment of the Employment Appeal Tribunal drew these strands together in a passage which deserves repetition:

> **"11 The significance of mutuality is that it determines whether there is a contact in existence at all. The significance of control is that it determines whether, if there a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.**
>
> **12 The issue of whether there is a contract at all arises most frequently in situations where a person works for an employer, but only on a casual basis from time to time. It is often necessary then to show that the contract continues to exist in the gaps between the periods of employment. Cases frequently have had to decide whether there is an over-arching contract or what is sometimes called an "umbrella contract" which remains in existence even when the individual concerned is not working. It is in that context in particular that courts have emphasised the need to demonstrate some mutuality of obligation between the parties but, as I have indicated, all that is being done is to say that there must be something from which a contract can properly be inferred. Without some mutuality, amounting to what is sometimes called the "irreducible minimum of obligation", no contract exists.**
>
> **13 The question of mutuality of obligation, however, poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must, in our view, clearly exist. For that duration the individual clearly undertakes to work and the employer in turn undertakes to pay for the work done. This is so, even if the contract is terminable on either side at will. Unless and until the power to terminate is exercised, these mutual obligations (to work on the one hand and to be paid on the other) will continue to exist and will provide the fundamental mutual obligations.**
>
> **14 The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work if available is irrelevant to the question whether a contract exists at all during the period when the work is actually performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not."**

24. These paragraphs were explored by the Court of Appeal in **Dacas v Brook Street Bureau (UK) Ltd** [2004] IRLR 358 in a decision which may yet be reviewed by the House of Lords. At paragraph 60 Mummery LJ referred to Elias J's judgment as certainly being the most fully reasoned to be found in the authorities on this point, but commented somewhat delphically that he did not find all of the submissions of Counsel for the end user in the **Stephenson**'s case as persuasive as the Employment Appeal Tribunal found them, or as Munby J (who was part of the constitution hearing the appeal of Mrs Dacas), found them.

The Submissions of the parties in overview

25. Mr Gordon, who appeared for Cotswold pointed out that the Tribunal did not appear to have analysed the relationship between the parties as being one in which each time the Claimant agreed to work a shift there was a new contract under which she was "employed" for the duration of the shift. Rather, paragraph 7.2 of the Reasoning showed that they had found that there was a standing contract governing the terms under which the Claimant would work his shifts, and under that contract he was a "worker". Against that background he made two essential points. First, he submitted that in order for the Tribunal to find that there was an over-arching contract as a worker it was necessary for the Tribunal to be satisfied that the Claimant was under an obligation to work personally for Cotswold when asked to do so, and the finding in paragraph 7.6 that there was no mutuality of obligation contradicted this. Secondly, he rejected the cross appeal, based as it was on paragraph 7.7, upon the basis that the Tribunal had there been examining the position that applied on those occasions when the Claimant actually worked, and were not addressing any over-arching contract. He added, thirdly, that the Employment Tribunal had been in error in failing to hold that the Claimant was in business on his own account, Cotswold being his customer and he offering them his labour so that they became a client or customer of his. Therefore he could not be a worker because the proviso to the definition applied.

26. Mr Lemer, who appeared before us as he had below for the Claimant, also sought to identify the context within which his submissions were to be seen. It was one in which the Claimant worked regularly, with few breaks, and given the Employment Tribunal's findings at paragraph 7.7 must have done so, when he did so, as an employee. Accordingly, those rights to which he was entitled under the Employment Rights Act 1996 by virtue of continuity of employment would have been accessible by him even if there had been no over-arching contract of employment. (see Section 212, Employment Rights Act 1996).

27. Against this background, he submitted first that there was no need to show an over arching contract for a worker to claim the benefit of the Working Time Regulations. He recognised that there was no provision for continuity of employment which permitted a worker to claim rights under the Regulations (whether an employee under the definition of "worker" in Regulation 2, Limb (a) or whether under Limb (b)). Since the purpose of the Directive (EC93/104) was to set down minimum health and safety requirements in the field of working time, pursuant to the framework Health and Safety Directive 89/391/EEC, the principle of effectiveness demanded that a worker who worked under a succession of individual short contracts should not be denied the minimum break from work which the Regulations recognised as necessary to ensure the health and safety not only of the worker himself, but those around him at the work place. The concept of "stable employment relationship" which featured in **Preston v Wolverhampton Healthcare NHS Trust** [2000] ICR 961 case (see paragraphs 78/98) should apply. Put shortly, that case considered an employment relationship as subsisting where an employee was engaged on a series of contracts punctuated by breaks. Where the periods of employment were regular, a stable employment relationship could be inferred. In the present context, if it were otherwise, it would be open to a would be employer to avoid the payment of holiday pay by providing that labour should be provided to him by a worker under a series of short term assignments.

28. Alternatively, he submitted that if each individual assignment were regarded as such, then at the conclusion of each the worker would be entitled to compensation calculated in accordance with Regulation 14 of the Working Time Regulations 1998. That provided that where a worker's employment is terminated during the course of his leave year and on the date on which it ended the proportion he had taken of the leave to which he was entitled was less than from the proportion of the leave year which had expired (Regulation 14(1)) he would be entitled to a payment in lieu of leave (Regulation 14(2)). He argued that given the provisions of Regulation 15A(2)(3) each short assignment as a worker would bring with it the entitlement to be paid holiday pay under Regulation 14: and if the period of work were so short as to be a day, it would by virtue of Regulation 15(A)(3) entitle the worker to receive a further half day's pay as compensation for the failure by the employer to provide holiday.

29. As a further alternative submission, he argued that there must be some form of over-arching contract. "Mutuality of obligation" should be construed widely, and flexibly.

30. Finally, he submitted that given the finding in paragraph 7.7, the Tribunal were here bound to uphold that there was an over-arching contract of employment.

Appellant's Submissions: Greater Detail

31. Mr Gordon relied upon **Mingeley v Pennock and Ivory t/a Amber Cars** [2004] IRLR 373 EWCA Civ 328. Mr Mingeley was of black African origin, and worked as a private hire taxi driver in Leeds. He owned the car he used for that purpose. By contract with Amber Cars, he paid £75.00 a week for access to its radio and computer system, which allocated calls to drivers. It was entirely a matter for him what hours he worked, or whether he worked at all. Although he was obliged when he worked to wear the uniform of Amber Cars and to adhere to a scale of charges set by Amber Cars, he kept the fares he collected. He was not required to

give notice that he was going to work on any particular day. When Amber Cars terminated the agreement, he sought to claim that he had been discriminated against on the grounds of race. This led to a preliminary issue as to whether his relationship with Amber Cars fell within the Section 78(1) of the Race Relations Act, which defines "employment" as "employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour." It was argued unsuccessfully on Mr Mingeley's behalf before the Court of Appeal that for a person to be employed under a contract personally to execute any work or labour there need not be any mutual obligations to offer or accept work, and that providing there was an obligation personally to execute the work to which the contract related it was irrelevant whether the personal carrying out of work and labour was, or was not, the dominant purpose of the contract.

32. Mr Gordon pointed out that the Court of Appeal rejected those submissions. Accordingly, he submitted that where, as here, a Tribunal determined that there was an absence of mutual obligation the Tribunal must necessarily have decided that there was no obligation resting on the employee personally to provide work. By finding that there was no such obligation (paragraph 7.6) the Tribunal were recognising that as a matter of fact the Claimant could not satisfy the definition of "worker" within the Working Time Regulations, the definition wherein was similar (though not identical) to that in the Race Relations Act considered in **Mingeley**.

33. Next, Mr Gordon referred us to the opening words of paragraph 25 in the judgment of the Employment Appeal Tribunal (Mr Recorder Underhill QC) in **Byrne Brothers (Formwork) Ltd v Baird** [2002] IRLR 96, which had been followed in **Cavil v Barratt Homes Ltd** EAT/0208/03/SM, 1 July 2003 (HHJ Clark); **Firthglow Ltd t/a Protectacoat v Descombes and Lamont** UKEAT/0916/03/ILB, 19 January 2004 (Rimer J) see paragraph 30 and **Bamford v Persimmon Homes NW Ltd** UKEAT/0049/04/DM, 3 August 2004 (HHJ

Peter Clark, see paragraph 11). These cases demonstrated that mutuality of obligation (not simply an obligation to work personally) was required before the definition of "worker" could be satisfied.

34. It is quite clear that the Claimant was not an employee bearing in mind the absence of mutuality (there was no obligation to provide him with work), work was not offered when not available, nor was he obliged to accept it, and in practice he chose to refuse work and told the company that he needed long weekends to supervise the building of a bungalow in Cornwall. He also refused to work back to back shifts on occasion and the number of shifts worked in a week varied.

35. Moreover, he could not be said to be an employee because he was paid the same sum gross per shift yet could leave early when the work was done. If he did not work a shift he was not paid. He was paid under the CIS Scheme seemingly of his own volition, and there was no written contract of employment.

36. To hold that someone in the position of the Claimant was a worker would not be beneficial to the building industry, in particular to small employers such as Cotswold who had based their margins and practices upon the supposition that he was not.

37. The Tribunal appear to have regarded the relationship between the Claimant and Cotswold as arising under one contract: but that still raised the question what type of contract that was.

Respondents' Submissions in further Detail

38. For the Claimant, Mr Lemer further developed the submissions which we have set out above by relying further on **Cornwall County Council v Prater** (UKEAT/0055/05, 8 June 2005 HHJ Serota QC), a case in which this Tribunal held that where a Claimant teacher had accepted a succession of short term special teaching assignments, in circumstances where the Respondent employer was not obliged to offer further assignments and the teacher was not obliged to accept them, she was to be regarded nevertheless as having been continuously employed by the Respondent by virtue of Section 212 of the Employment Rights Act 1996. On the particular facts of that case, any gaps between the assignments were to be disregarded because the Claimant was only absent on account of a temporary cessation of work. The lack of "mutuality of obligation before the and start after the completion of assignments" did not of itself prevent those assignments from constituting contracts of employment.

39. He was constrained to accept, however, that in the present case the Employment Tribunal had made no finding as to the applicability of Section 212. He accepted that Section 212 had not been referred to in the skeleton argument of either party before the Tribunal, and had no recollection that Section 212 had actually been argued before the Tribunal. In the circumstances, we felt unable to regard the Employment Tribunal's failure to deal with Section 212 as an error of law. We cannot determine this case on a point which was not argued below.

Discussion

40. In **Byrne Brothers** at paragraph 25 Mr Recorder Underhill QC indeed said:

> **"We accept that mutuality of obligation is a necessary element in a 'limb (b) contract' as well as in a contract of employment."**

Had he stopped there, this would have supported Mr Gordon's submissions, though we should have wondered why it was necessary to place a gloss upon the wording of the statutory definition of 'worker', which is quite clear. However, Mr Recorder Underhill continued:

> **"The basis of the requirement of mutuality is not peculiar to contracts of employment: it arises as part of the general law of contract."**

It is plain that Mr Recorder Underhill could not here have been talking of 'mutuality of obligation' in the restricted sense used in respect of contracts of employment and adopted specifically in cases which we have cited above. It is no part of the general law of contract for instance that one party to a contract (for the sale of goods, for work and services, or of carriage) must offer either work or payment, and the other party to the contract agree to work if asked to do so. That would be a requirement of mutuality specific to contracts of employment, but not specific to the general law of contract. In short, we consider that Mr Recorder Underhill here was making much the same point as was Mr Justice Elias in **Stephenson** at paragraph 11, where he is referring to an exchange of promises (or consideration) as being a prerequisite of any contract. So understood, Mr Recorder Underhill is saying no more than that there has to be a contract between the putative worker and the putative employer. He is not defining the necessary content of the terms of that contract.

41. In **Cavil v Barratt**, HHJ Clark considered 'mutuality of obligation' between paragraphs 29 and 35. The EAT asked (paragraph 32) what the relevance of the mutuality of obligation requirement was in relation to a contract for the purposes of Regulation 2 of the Working Time Regulations. At paragraph 33, the Employment Appeal Tribunal quoted the first sentence of paragraph 25 from the **Byrne Brothers'** judgment and commented "we are not wholly convinced that this is so, but in the absence of full argument we do not propose to depart from what was said in **Byrne Brothers**."

42. In our view, this gives no support to a suggestion that to be a worker there must be mutuality of obligation in the sense of a requirement to provide or pay for work on the one hand, and an obligation to perform it on the other. The first sentence is directed to the presence of absence of some mutual obligations sufficient to establish a contract, and not to the proper categorisation of any such contract as is established.

43. In **Firthglow** the judgment of Mr Justice Rimer, for the Employment Appeal Tribunal said that (at paragraph 30):

> **"The need for a mutuality of obligation in the case of someone claiming to be a worker was recognised by the decision of this appeal tribunal in Byrne Brothers (Formwork) Limited v Byrne and Others, at paragraph 25 of the judgment delivered by Mr Recorder Underhill QC, and we did not understand (Counsel for the employee) to submit that that expression of view was wrong as a matter of law."**

44. This amounts to an uncritical acceptance of a passage from Byrne Brothers, which assumes (see the earlier parts of the judgment) that by "mutuality of obligation" Mr Recorder Underhill was dealing with the requirement to provide work on the one hand, as against the agreement to perform it on the other, which, as we have already pointed out, he was not.

45. Finally, in **Bamford** at paragraph 18 the Employment Appeal Tribunal (HHJ Clark) dealt with the submission by leading Counsel for the employees to the effect that the Employment Tribunal had misunderstood the significance of mutuality of obligation in the context of that case. He had argued (see paragraph 8) that the principle of mutuality of obligation was not a criterion for determining whether an individual was an employee or worker in the extended sense. Rather, it was a criterion for determining whether there was a contract at all. The Employment Appeal Tribunal rejected that submission (despite Counsel's reliance before it on **Stephenson v Delphi Diesel** and **Dacas v Brook Street Bureau**) by reference to **Mingeley v Pennock** (see paragraph 11).

46. The Employment Appeal Tribunal were not, as we see it, considering in **Bamford** whether mutuality of obligation was a necessary feature of any contract under which someone claimed to be a worker and had to be established before he could be held to be so. This is clear by their reference specifically to paragraphs 8 and 14 of **Mingeley v Pennock**. Although in paragraph 8 the argument of Counsel for **Mingeley** was set out in terms of a mutual obligation to offer and accept work, the law applied by Maurice Kay LJ focussed simply upon the proposition that Mr Mingeley had to establish that his contract with Amber Cars placed him under an obligation "personally to execute any work or labour". He commented that the Tribunal found there was no evidence that he was ever under such an obligation. The question whether Amber Cars also owed an obligation to Mr Mingeley to provide him with work in addition was not addressed. Further, it seems to us that that case was examining whether or not for the purposes of Section 78 of the Race Relations Act a contract "personally to execute any work or labour" had to have as its dominant purpose (not merely as an ancillary aspect) the obligation to do so. When at paragraph 18, the EAT rejected the broad submission that mutuality of obligation went solely to the question of whether there was a contract, we think that the focus was upon the word "solely".

47. Mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary then to determine what type of contract it is. If it is a contract of employment, consequences will follow of the greatest significance – not only in terms of whether the employee is entitled to, and the employer subject to, those rights and duties conferred by statute upon employees and employers alike, but also common law considerations such as whether the employer may be, for instance, vicariously liable for the torts of the employee. The concept may be essential in determining whether there has been actionable discrimination on the ground of sex, race or disability. These matters are determined by the nature of the mutual obligations by reference to which it is to be accepted that there is a contract of some type.

48. We therefore do not see any necessary inconsistency between paragraph 18 of the judgment in **Bamford** when contrasted with paragraphs 11-14 of **Stephenson** or paragraphs 60 and 86 in **Dacas**. It cannot simply be control that determines whether a contract is a contract of employment or not. The contract must also necessarily relate to mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the "wage-work bargain".

49. Mr Lemer argued that the obligations which identified a contract as one of employment, on this approach, were flexible. They differed according to the context. He relied upon that part of the judgment of Buckley J in **Montgomery v Johnson Underwood** at paragraph 23 where he said:

> **"Clearly as society and the nature and manner of carrying out employment continues to develop, so will the Court's view of the nature and extent of "mutual obligations" concerning the work in question and "control" of the individual carrying it out. In the nature of things the lead in this process will be taken by Employment Tribunals and the Employment Appeal Tribunal."**

Later he referred to the **Ready Mixed Concrete** test as permitting a Tribunal "appropriate latitude in considering the nature and extent of mutual obligations in respect of the work in question and the control an employer has over the individual." Although we accept that there is room for the obligation resting upon an employer to vary, as between the provision of work, payment for work, retention upon the books, or the conferring of some benefit which is non-pecuniary, we cannot see that such elastic as there may be in the idea of mutuality of employment obligations can be stretched so far that it avoids the necessity for the would be employee to be obliged to provide his work, personally. The old fashioned description of a contract of employment as one of service (still retained by Section 230 of the Employment Rights Act) puts "service" (ie the obligation to work, personally, for another) at the heart of the relationship. We do, however accept that when considering a statutory definition such as that of "worker" what matters are the words of the statute. They focus not upon any obligation

owed by the employer (save sufficient to ensure that there is a contract between the "employer" and the "worker"), but upon the nature of the obligation resting upon the worker.

50. We are much less confident than was HHJ Clark in **Bamford** in regarding the statutory definition in Section 78 of the Race Relations Act (and the test of dominant purpose which developed from it) as being definitive when considering "worker". For a reason best known to the legislature the contract referred to in Regulation 2 is not one "to work personally" but it is one "whereby the individual undertakes to do or perform personally any work or services …". However, it is unnecessary for present purposes to resolve the question whether there is any difference in approach as between the two statutory provisions. What is plain is that for an individual to be a worker he must be: (a) subject to a contract; (b) whereby he undertakes to perform work personally (c) for someone who is not a client or customer of a profession or business of his.

51. Mr Gordon argued that the Tribunal should in any event have found that the work done by the Claimant was for a customer of a business undertaking of his. This contention was to the effect that Mr Williams was an independent contractor when he worked for Cotswold, and not an employee and that he did not fall into the intermediate category identified in **Byrne Brothers**.

52. Neither party referred the Tribunal to **Redrow Homes (Yorkshire) Ltd v Wright** [2004] ICR 1126 in which at paragraphs 19-22 some hesitation was expressed about aspect of the guidance in **Byrne Brothers** and the language with which it was expressed, but this fell short of rejecting it and was in any event obiter.

53. It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that "other" is neither a client nor customer of theirs – and thus that the definition of who is a "client" or "customer" cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shopowner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls. It is not necessary for this decision to examine more closely the individual cases which may fall much closer to the dividing line, and the principles upon which those cases should be determined, because in the present case the Tribunal determined that Cotswold was not in the position of a client or customer of any profession or business undertaking carried on by the Claimant reason of "the nature of the Claimant's relationship with the Respondent" (paragraph 7.3). They did not elaborate further. However, it seems to us that they were entitled to draw that conclusion, in particular because no finding of fact suggests that the Claimant operated as an independent tradesman, and much of it is suggestive if not determinative of the fact that Cotswold recruited him to work for it. Accordingly, we reject that submission on behalf of Mr Gordon.

54. Since "mutuality of obligation" may be used in either the Elias J or Recorder Underhill QC 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. 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. Stevenson LJ in **Nethermere** put it as "… an irreducible minimum of obligation …". He did so in the context of a case in which home workers were held to be employees. Mrs Taverna refused work when she could not cope with any more. She worked in her own time. It is plain, therefore, that the existence and exercise of a right to refuse work on her part was not critical, providing that there was at least an obligation to do some. The Tribunal had accepted evidence (see 619B-C) that home workers such as she could take time off as they liked. Although Kerr LJ dissented in the result, he too expressed the "inescapable requirement" as being that the purported employees "… must be subject to an *obligation to accept and perform some minimum*, or at least reasonable, amount of work for the alleged employer." Dillon LJ said at 634G-H):

> **"The mere facts that the out workers could fix their own hours of work, could take holidays and time off when they wished and could vary how many garments they were willing to take on any day or even to take none on a particular day, while undoubtedly factors for the Industrial Tribunal to consider in deciding whether or not there was a contract of service, do not as a matter of law negative the existence of such a contract."**

He added – of particular relevance for the present appeal at 635B:

> **"I find it unreal to suppose that the work in fact done by the Applicants for the company over the not inconsiderable periods which I have mentioned was done merely as a result of the pressures of market forces on the Applicants and the company and under no contract at all."**

Conclusions in Present Case

56. In paragraph 7.6 of its reasoning in the present case, the Tribunal does not appear to be focussing upon whether the facts demonstrated what Dillon LJ would refer to as the effect of "market forces", nor do they appear to be addressing the real question which is whether or not there was some *minimum* amount of work which the facts demonstrated that the Claimant had obliged himself to do. The fact that there was regular contact as to whether the Claimant wished to work on a particular day does not answer the question whether the relationship was

such that on a sufficient number of days he was obliged to do so; the fact that on occasion he declined to work is no more than the home workers did on occasion in **Nethermere**, or, for that matter, in the preceding case of **Airfix Footwear Ltd v Cope** [1978] ICR 1210 to which it referred. The fact that there was a variation in the shifts worked proves nothing, nor does the fact that on occasions there was no work available and the Claimant was not paid. The earlier finding (in paragraph 4.7) that there were occasions on which the Claimant was paid a sum equivalent to half a shift (the implication of the paragraph is that this is when he did not work at all) raises the question why this should be, which in the absence of alternative explanation probably was because the employer recognised some obligation to pay when work was not available. That may pre suppose an obligation on the part of the employee to hold himself available for such work.

57. The lay members would emphasise, further, that the process upon which the Employment Tribunal were engaged was one of deriving terms of a possible contract from what had happened between the parties in practice. An important element of that, they emphasise, is that Cotswold plainly needed the services of the Appellant for the particular skills which a tradesman such as he would offer. An emphasis by the Tribunal on a refusal to work back to back shifts was misplaced: it did not appear to recognise that such shifts (one worked immediately after the other, upon a normal understanding of the term) were not only onerous but also in apparent breach of the Working Time Regulations in the first place (and this would be so whether or not there was an overriding contract, or whether each individual engagement was a separate incident).

58. Finally, paragraph 7.7 is puzzling. The Tribunal in the last two sentences thought that the Claimant was subject to the Respondent's control to an extent sufficient to constitute him an employee, and give reasons for that. They did not identify any feature which negated the

existence of a contract of employment, save only for the absence of "mutuality of obligation". What it was addressing in the final two sentences was the position that pertained when the Claimant actually did work. When he did work there was no suggestion (nor could there be given that the Tribunal were deriving the facts from the practice) that the Claimant did not feel obliged to complete his shift, or shifts, and that the quid pro quo for this was the payment to him by the employer of money. There would, accordingly, be a minimum of obligation on such occasions. The first sentence must necessarily be addressing here a different situation – whether there was an overall contract of employment, linking the individual assignments. Yet there is no suggestion in paragraph 7.7 that the Tribunal looked at what had happened as a succession of individual assignments rather than one complete engagement held under one contract. Indeed, to do so would be inconsistent with the apparent finding in paragraph 7.2 that there was one contract for the entirety of the time during which the Claimant worked. In respect of 7.2, the contract derived by the Tribunal was one which required him to perform such work as he did personally. That may, or may not, amount to a recognition that there was an undertaking to work personally. If so, again this may be inconsistent with the lack of "mutuality of obligation" referred to in paragraph 7.7: but it all depends upon what the Tribunal understood as being the relevant mutuality of obligation. When this is explored at paragraph 7.6 it is far from clear how the exploration relates consistently to what is said at paragraph 7.2, and it is far from clear what the Tribunal had in mind, or that the Tribunal had in mind that the object of their consideration was not to determine whether the Claimant could, if he wished, refuse some work, but was rather to decide whether he was obliged to accept some work (even though he might reject the rest).

59. Because we have come to the conclusion that the Tribunal's reasons are inconsistent, and that they did not clearly adopt the proper test, we are satisfied that this Appeal must be allowed. It is unnecessary for us to decide the interesting question what the consequence would

be if the Tribunal's conclusion were to be read as meaning that there had been a succession of individual assignments, each of which would be as a worker, each of which was under a separate contract. Whether this would have produced a separate claim for arrears of holiday pay in respect of each assignment upon the termination of each, or whether the principle of effectiveness, (coupled with the recognition that the Working Time Regulations implement a directive which looks for a reduction of risks to health and safety in part by ensuring that employees are allocated sufficient holiday) would require the definition of "worker" to be read in line with the concept of "employment relationship" which has, for instance, surfaced in part time workers' pension cases such as **Preston** are interesting questions we must leave for others to resolve. As to this latter point we would simply observe that the Regulations must be applied as they are unless they can be interpreted consistently with European jurisprudence to produce a result more consonant with the purpose of the Directive. It is not at all obvious to us, having heard argument, how that interpretative effect will permit a Claimant to succeed in a claim for, say, a year's worth of holiday pay after a year in which he had been engaged in successive short term contracts as a worker. Mr Lemers' suggested adaptations of the wording of the Regulations to achieve such a result seemed to us to be far fetched.

60. It is also unnecessary for us to decide whether in trades such as the construction industry the protection for regular workers envisaged by the Working Time Directive might be avoided by structuring work as a series of short terms assignments rather than one overall engagement.

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 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?

(c) if so, was there such control as to make it a contract of employment so as to give rise to rights of unfair dismissal, as well as a right to holiday pay?

(d) if there was insufficient control, or any other factor, negating employment, whether the Claimant was nonetheless obliged to do some minimum (or reasonable) amount of work personally?

62. Accordingly, for those reasons we allow the appeal, and direct remission.