Appeal No. UKEAT/0475/06/DM

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

sitting at Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET

At the Tribunal
On 5 February 2007
Judgment handed down on 21 February 2007

Before

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

(SITTING ALONE)

MRS P JAMES — APPELLANT

REDCATS (BRANDS) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Andrew Stafford (One of Her Majesty's Counsel) and Mr Edward Mallett (of Counsel) Instructed by: Bar Pro Bono Unit High Holborn LONDON
For the Respondent	Mr Paul Rose (One of Her Majesty's Counsel) and Mr Adam Solomon (of Counsel) Instructed by: Messrs Walker Morris Solicitors Kings Court 12 King Street LEEDS LS1 2HL

SUMMARY

National Minimum Wage

Who is a "worker"?

Was the Appellant who worked as a courier for the Appellant company, providing her own vehicle, a worker or home worker within the meaning of ss.54(3) and 35 respectively of the **National Minimum Wage Act 1998**? The Employment Tribunal held that she was not. The EAT held that in reaching that conclusion the Tribunal had erred in law in various respects and remitted the case to a fresh tribunal. Observations on the approach tribunals might adopt when considering whether someone is a worker, and also on the significance of mutuality of obligation in this context.

THE HONOURABLE MR JUSTICE ELIAS (PRESIDENT)

1. The Appellant worked as a courier for the Respondent company, initially being engaged in April 2002. She delivered parcels to private addresses. She alleged that she was a worker within the meaning of s.54(3) of the **National Minimum Wage Act 1998**, alternatively that she was a home worker within the meaning of s.35 of the same Act, and that accordingly she was entitled to the national minimum wage.

2. The company contended that she was not a worker, but rather was providing services under what was termed a "self-employed courier agreement". It is common ground that she was not an employee. The Tribunal agreed with the Respondent and she now appeals that decision.

The law

3. The definition of a worker under the **1998 Act** is found in s.54(3) and is as follows:

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

4. The definition of a home worker is found in s.35, which is as follows:

> **"(1) In determining for the purposes of this Act whether a home worker is or is not a 'worker', section 54(3)(b) shall have effect as if for the word 'personally' there were substituted "whether personal or otherwise.**

> **(2) In this section 'home worker' means an individual who contracts with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person."**

5. Section 28(1) establishes a presumption that an individual who claims to be covered by the Act does fall within its terms. It thereby places the burden of proof on the putative employer to rebut that presumption by showing that the individual is not a worker or home worker within the meaning of the Act:

> **"Where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage unless the contrary is established."**

6. The definition of a worker is very wide, no doubt intentionally given the purpose of the legislation. It is to be noted that it is identical to the definition found in s.230 of the **Employment Rights Act** and the **Working Time Regulations 1999**. There are three elements to the definition. First, there must be a contract to perform work or services. Second, there must be an obligation to perform that work personally. Third, the individual will not be a worker (or indeed a home worker) if the provision of services is performed in the course of running a profession or business undertaking and the other party is a client or customer. In practice the last two are interrelated concepts, as I explain below.

7. There are two aspects of the definition of "home worker" which deserve notice. First, a home worker need not work at home although typically he or she will do so; the only requirement is to work in a place not under the control or management of the other party. Second, unlike the worker, it is not necessary that the home worker should personally carry out the work at all. It is the provision of services that is enough, irrespective of who provides them, as long as they are not provided in the course of running a business or profession. This is because frequently the work will

involve, for example, making shoes or clothes, and that work is typically carried out by members of a family or a group of friends. (The growth of computer technology has also spawned many workers operating from home (so called "teleworkers") although they are more likely to do the work personally.)

The facts

8. The Tribunal heard evidence and made a number of findings, which it set out in paragraph 5 of its decision:

> **"5.1 The Claimant is responsible for dealing with her liability or otherwise for Income Tax and National Insurance.**
>
> **5.2 The Inland Revenue has previously found that couriers working for the Respondent are self-employed.**
>
> **5.3 The Claimant has limited discretion as to when she effects delivery of parcels and, because of family commitments, prefers to deliver on days of her choice.**
>
> **5.4 The Claimant uses her own vehicle for the purpose of making deliveries and pays an additional insurance premium required, because of this activity, from her own resources. She also pays her other expenses.**
>
> **5.5 The Claimant has the right to sub-contract the work of delivery by finding alternative persons to effect deliveries and has on occasions exercised this right, arranging for substitute persons to receive instruction from the Respondent.**
>
> **5.6 The Respondent has the right to deliver parcels for other enterprises but chooses not to do so on the ground that it is not worth her while to do so.**
>
> **5.7 The claimant is not entitled to paid holidays but is required to let the Respondent know when she intends to take holidays so that alternative arrangements can be made, either by the Claimant, or in default by the Respondent.**
>
> **5.8 The remuneration earned by the Claimant is determined by the number of parcels she is sent for delivery. There is no minimum number of parcels guaranteed by the Respondent and, on one occasion, an administrative failure resulted in no parcels being sent to her for delivery.**
>
> **5.9 The Claimant regularly delivers to persons she has come to know and is encouraged by incentive to collect from customers of the Respondent parcels returned, thereby saving the customer expense.**

5.10 The Courier Agreement is in place for an indefinite term and requires no notice from the Respondent to determine it. The Claimant is required to give one week's notice to enable alternative arrangements to be made.

5.11 The language used in the Courier Agreement is not entirely consistent with it being a contract with a self-employed person in that it refers to the Claimant 'leaving' to 'pay rates' and to 'job'.

5.12 Parcels arrive for delivery every morning Monday to Friday and are stored at the Claimant's house pending delivery. They could be stored elsewhere if the Claimant chose to do so. The Respondent has no control over the location of the parcels once they reach the Claimant except insofar as they insure them at the Respondent's expense.

5.13 There is no entitlement to receive maternity benefit or statutory sick pay.

5.14 The vehicle used for delivery has no markings to associate it with the Respondent and the Claimant is not required to wear a uniform.

5.15 Financial advantage accrues to the Respondent in treating the Claimant as a contractor as opposed to an employee or a worker.

5.16 No disciplinary procedure or grievance procedure has any application to the relationship between the Claimant and the Respondent.

5.17 The Claimant does not submit invoices in order to receive payment, payment being calculated by the Respondent by reference to the number of parcels which the Claimant has delivered or returned."

9. The Appellant contended before the Employment Tribunal that the contractual terms of the agreement did not reflect the actual conduct of the parties. She submitted that there were various ways in which the company controlled her activities, which would not readily be apparent from the contract, and that this control rendered her a worker. The company set deadlines for delivery, they required certain paperwork to be done, occasionally provided supervision, and they gave detailed instructions set out in a training manual as to how the task was to be carried out. She conceded, however, that she could work for another delivery service simultaneously with her work for the company and also that she was entitled to find a substitute if she was unable to do the work herself, either because of illness or because she wished to take holidays.

10. The Tribunal concluded that none of these factors was inconsistent, and many of them were consistent, with there being a contract to provide services. Moreover, they noted that certain other features of the arrangement, such as the lack of exclusivity, its indeterminate duration, and the provision by the claimant of a vehicle were all consistent with it being a contract to provide services.

11. The Tribunal considered that the account given by the claimant as to how the work was in fact carried out was not inconsistent with the language of the document itself which identified the relationship as one of providing services. They found that there was "no mutuality of obligation as the Respondent gives no guarantee as to the volume of work. The claimant could decline work."

12. The Tribunal's conclusion was as follows:

> **"12. Overall the circumstances of the arrangements between the Claimant and the Respondent point overwhelmingly to a Contract for the provision of services. The document supporting the arrangement specifically refers to the Claimant as self-employed, and, notwithstanding minor inconsistencies of language used in the agreement, the Claimant in her evidence has not displaced that description. The Claimant may not have considered herself as conducting a business or as the Respondent as a customer of that business but, when she entered into the contract with the Respondent, that is essentially what happened between the parties and the absence of some of the trappings of a business, such as the employment of accountants, does not alter that fact."**

13. The Tribunal then considered s.35 of the Act and concluded that it was misconceived for Mrs James to claim that she was a home worker since she did not in fact work at home at all, apart from occasionally using home as a short staging post for parcels she was contracted to deliver. It is common ground that this was a misunderstanding of the definition; as I have said, a home worker need not work at home at all.

The arguments on appeal: a summary

14. Mr Stafford challenges some of the particular conclusions of the Tribunal, but also submits that their general approach to the question of the status of Mrs James betrays an error of law. He submits that the Tribunal were wrong to conclude that there was no obligation personally to provide services. There was a limited power of delegation, but he contends that this is not inconsistent with the status of a worker. In particular, the obligation here was to work unless the individual was "unable" to do so; that indicates that she ought to work if she is able. He says that there was also an implied obligation that whilst there was no guarantee that there would be parcels, Redcats were impliedly obliged to provide parcels if there were any for delivery in Mrs James' postal area. Accordingly, the Tribunal had been wrong to say that there were no mutual obligations under the contract.

15. He also contends that in any event Mrs James was a home worker and that the Tribunal erred in law in concluding that she was not, simply because she did not work at home. The significance of this is that if she is a home worker, then the question of personal service is not material.

16. He accepted that the critical question remained whether Mrs James was contracting with Redcats as someone running a business and dealing with Redcats as a customer.

17. Mr Stafford QC contends that this requirement pre-supposes that the individual will be engaged in a pre-existing business and that the contract will be pursuant to that business. In this case the evidence of the Tribunal clearly established that Mrs James was not conducting a business undertaking at all. Although she could work for other potential clients or customers, she did not do so. Mr Stafford contends that whether she might have been able to run a business or not is immaterial. She distributed parcels only for Redcats and they could not sensibly be

described as a client or customer. She satisfied the statutory definition and there was no basis on which the Tribunal could properly have concluded otherwise.

18. He further submits that in any event when weighing up the various factors to determine whether Mrs James was a worker or whether she was carrying on a business on her own account, the Tribunal approached the matter in the wrong way. He identified various passages in the Tribunal's decision where they state, in terms, that certain features of the arrangement were either consistent with, or at least not inconsistent with, the provision of services. Mr Stafford contends that this tells us nothing; the statutory definition of a worker in terms envisages the provision of services. The question is not whether she is providing services, for she manifestly is. Rather it is whether she is providing them to a customer in the context of operating a business undertaking or in her capacity as a worker.

19. Finally, he points out that the Tribunal do not appear to have appreciated the potential significance of the presumption in s.28. In marginal cases in particular it could be a matter of significance.

20. Mr Rose QC, Counsel for the Respondent, has asserted that the Tribunal were entitled to find that there was no obligation personally to provide services, given the extent of the permissible delegation; and although he accepts the Tribunal erred in its approach to the issue of home worker, he contends that Mrs James was plainly not a home worker in any event.

21. His argument is that in order to fall within that definition it is necessary for her to operate in a place of work which is outside the control of the employer. He contends that this envisages a specific place of work, rather like somebody who will be working from home, and that the

concept would not naturally encompass either the vehicle which she used or indeed the postal code districts in which she operated.

22. He contends in any event all these findings do not alter the fundamental conclusion of the Tribunal. Even if the Tribunal did err in their analysis of the personal obligation and home worker, their fundamental conclusion, having weighed up all the relevant factors, was that Mrs James was engaged in business on her own account. That was a clear and unambiguous conclusion- the Tribunal described it as "overwhelming" which the Tribunal was entitled to reach, and was decisive of the case

23. He emphasises that it is trite law that the finding of the Employment Tribunal on this matter is a question of fact, and the EAT can only interfere with its decision if it betrays a manifest error of law or if its decision is perverse: see **Carmichael v National Power plc** [1999] ICR 1226. It is not for the EAT to re-evaluate the strands in the evidence and to give them different weight. Here there were striking features which supported the Tribunal's conclusion, in particular that Mrs James provided her own vehicle, had significant control over when she did the work, was paid by the number of parcels delivered, was free to work for others, and could on occasions appoint a substitute.

24. Nor does he accept that the Tribunal erred in its approach. In focusing upon whether the employee was providing services, the Tribunal clearly meant the provision of services pursuant to a business undertaking rather than in her capacity as a worker. They analysed the case in the way they did because the issue as presented by the Respondent's counsel was whether she was a worker or self employed. Mr Rose recognised that there is no specific reference to burden of proof, but contends that the conclusion of the Tribunal was manifestly sustainable and right, and would be the same however the burden were cast.

25. I will deal with each ground of appeal in turn, but will leave the issue of mutuality of obligation, which I believe has been given undue significance in this case, to the end. Logically, the issue of providing personal services does not arise if Mrs James falls into the homeworker category, but I will deal with the issue of personal services first since that is how it was argued before me.

Was there an obligation personally to provide services?

26. The relevant clause of the courier agreement is as follows:

> **"You need to ensure that a suitable alternative courier is available to carry out the terms of this agreement when you are unable. This might happen during holidays or if you are ill. You can have more than one alternative. You will need to discuss and agree the identity of your replacements with your courier link contract."**

27. It is common ground that the fact that there may be limited or occasional acts of delegation is not inconsistent with the contract to perform work personally. Some of the relevant authorities supporting that proposition are brought together in the judgment of Mr Recorder Underhill in **Byrne Brothers (Formwork) Ltd v Baird & Ors** [2002] IRLR 96 paras 13-14**.**

28. Similarly, both parties accept that the question whether there is an obligation to do work personally is a matter of construction of the contract: see the observations of Pill LJ in the case of **Redrow v Wright** [2004] 3 All ER 98 at para 21. The fact that the individual chooses personally to supply the services is irrelevant; the issue is whether he is contractually obliged to do so.

29. Mr Stafford submits that here there was sufficient personal obligation to work under the contract. Mrs James did not have a "blanket licence to supply the contractual services through a substitute" to use the language of Mr Recorder Underhill in the **Byrne** case (para 12).

30. Mr Stafford relies in particular upon the decision of this Tribunal (Lindsay P presiding) in **McFarlane v Glasgow City Council** [2001] IRLR 7. In that case two gymnastics coaches who worked for the Council were entitled to have their classes taken by a substitute if they were "unable" to take classes. Such limited delegation was held not to prevent the coaches being treated as employees who personally provided their services. Similarly here; the fact that the worker has on occasions found other persons to substitute for her when ill or on holiday is not inconsistent with a personal obligation

31. He contrasts the case with the decision of **Express & Echo Publications v Tanton** [1999] IRLR 367 where the relevant term of a contract between a driver and the other party was the right to appoint a substitute at his own expense when he was "unable or unwilling" personally to perform the services. In those circumstances the Court of Appeal held that it was entirely up to the employee whether he provided a service or not and there was therefore no obligation of personal service. Peter Gibson LJ observed that "[the clause] entitling Mr Tanton not to perform any services personally is a provision wholly inconsistent with the contract of services".

32. That case raised the issue whether the driver was an employee, but the lack of any personal obligation would also have prevented Mr Tanton being treated as a worker within s. 54. Here, contends Mr Stafford, the position is different. There will be not only an expectation but also a legal obligation to provide the delivery service personally, save where there is an inability

to do so. The basic contractual obligation was to provide personal service but with certain exceptions.

33. Mr Rose contends that there is no duty for Mrs James to work. Holidays and sickness are merely examples of inability; they are not exhaustive of situations where delegation may occur. He contends, and I accept, that if the individual is free to work or not at his own whim or fancy, then that would be inconsistent with his being a worker at all. He relied in support both on the **Tanton** case and on the Court of Appeal decision in **Mingeley v Pencock and Ivory t/a Amber Cars** [2004] IRLR 373 at para 14, per Maurice Kay LJ. Here there was no duty to work because there was no restriction on the right of Mrs James to take holidays. Every day could be a holiday; and therefore she could in theory at her own whim choose never personally to do anything.

34. That submission gets full marks for creative ingenuity but has little else to recommend it. If the parties had intended for Mrs James to work or not as she wished, they would surely have said so in clear terms and not in such an obfuscatory way. In my judgment there is plainly an obligation to perform the work personally. The critical feature here is that the substitute is to be provided when the individual is unable to provide work. That is narrower than the phrase "unable or unwilling" which was the term used in the **Tanton** case, as the EAT recognised in the **MacFarlane** case. If I need not perform the work when I am unwilling, then there is never any obligation of any kind to perform it. It is entirely my will and therefore my choice. But if I can only be relieved of the duty when I am unable, then I must do the work personally if I am able.

35. I recognise that there is some artificiality in saying that someone who chooses to take holidays when not obliged to is unable to work, but even if the contract had entitled Mrs James

to use a substitute whenever she was "unable to work or unwilling because taking holidays" there would still in my view have been a personal obligation to work.

Was Mrs James a home worker?

36. Mr Stafford contends that the definition of home worker is wide. It simply means that the individual is working in a place outside the control or management of the putative employer. Here the place of work was the postal districts in which Mrs James operated. Alternatively, it could be described as the vehicle in which she delivered the parcels. Either way, it was entirely independent of any control by the employers.

37. Mr Rose contended that in order to be "in a place of work" within the meaning of s.35 some clearly identifiable and specific place had to be identified. If Parliament had intended to cover anywhere save where the employer had control or management, she would have said something like "anywhere other than where the employer has control or management."

38. I recognise that this argument has some merit but I am not persuaded by it. Given the purpose of this legislation, I consider that the concepts should be broadly construed. I do not in principle see why the function of distribution should be treated differently to making up articles merely because it involves moving from place to place. Accordingly, I would accept that Mrs James would satisfy this aspect of the definition of home worker. It follows that even if there is no obligation to provide personal service, she would still be caught by this definition. However, this is subject to the question whether she is contracting with Redcats as a customer of her business.

Is she contracting with Redcats as a customer of her business?

39. This is the central issue in this case. Mr Stafford submits that in order for this exception to apply, Mrs James had to be running a business at the time she entered into the contract. The fact that she could act for others consistently with her contract with Redcats was irrelevant. She did not do so, as the Tribunal found.

40. Mr Rose submitted that it was immaterial whether she was acting for a number of customers. The Tribunal found that she was essentially in business on her own account and that was a finding open to them.

Discussion

41. There is no question here of Mrs James falling within limb (a) of the statutory definition of worker; it is conceded that she is not an employee. The only issue is whether she falls under limb (b).

42. Traditionally, when courts have had to determine whether a person is employed under a contract of service or not, they tend to contrast such employees with others who are described in various ways: they are either self-employed, or working in business on their own account (**Lee v Chung and Shun Shing Construction and Engineering Co Ltd**. [1990] ICR 409 P.C.) or working pursuant to a contract for services, or operating a small business (**Market Investigations Ltd v Minister of Social Security** [1969] 2 QB 173.)

43. The cases are replete with these terms, which are often used inter-changeably. No doubt that is because when the issue in question is whether there is a contract of employment, it is not necessary to classify with any precision those who fall outside that definition. For example, in

the **Lee** case the Privy Council approved the following observation of Cooke J in the **Market Investigations** case (p. 412D):

> **"The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?"**
>
> **If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the answer is a contract of service"**

44. Plainly if the dichotomy were always that simple, all those who are found not to be employees under a contract of employment will perforce be in business on their own account. If that were so, then limb (b) would have nothing to bite on. The exception for those contracting as a business undertaking would swallow everyone potentially falling within the clause. That obviously cannot be right.

45. Accordingly, the requirement to distinguish between employees, workers, and those engaged in a business undertaking of their own demands a more sophisticated analysis than some of the earlier cases have provided. It follows that Tribunals analysing whether someone is a worker or operating his business must be very careful when considering the decisions which have looked at the question whether a person is an employee, because of the loose way in which all non-employees are often described as being in business on their own account.

46. To put it another way, not all those who might properly be described as self employed are engaged in a business undertaking. As Mr Recorder Underhill QC (as he then was) noted in **Byrne Brothers (Formwork) Ltd v Baird & Ors** [2002] IRLR 96, para 17:

> **"The intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business…."**

> **It is sometimes said that the effect of the exception is that the regulations do not extend to the "genuinely self-employed"; but that is not a particularly helpful formulation since it is unclear how "genuinely" self-employment is to be defined."**

47. **Byrne Brothers** was a case involving the **Working Time Regulations** where the definition of worker is identical. Mr Recorder Underhill suggested that the purpose of that legislation must have been to recognise that there are persons who work for an employer and who are not employees but who are economically and substantively in the same position as employees. The degree of dependence is critical, he observed. He continued (para. 17(5)):

> **"Drawing that distinction in any particular case will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services – but with the boundary pushed further in the putative worker's favour. It may, for example, be relevant to assess the degree of control exercised by the putative employer, the exclusivity of the engagement and its typical duration, the method of payment, what equipment the putative worker supplies, the level of risk undertaken etc. The basic effect of limb (b) is, so to speak, to lower the pass-mark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers."**

48. I accept that in a general sense the degree of dependence is in large part what one is seeking to identify - if employees are integrated into the business, workers may be described as semi detached and those conducting a business undertaking as detached – but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self employed worker, particularly if it is a key or the only customer.

49. What the Courts must essentially try to do here, it seems to me, is to determine whether the essence of the relationship is that of a worker or somebody who is employed, albeit in a small

way, in a business undertaking. In **Cotswolds Developments Construction Ltd v Williams** [2006] IRLR 281, para 53, Langstaff J suggested that the focus is upon "whether the purported worker actively markets his services as an independent person to the world in general…..or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations."

50. I would agree that this will often assist in providing the answer, but the difficult cases are where, as in this case, the putative worker does not in fact market his services at all, nor act for any other customer even although Mrs James is not barred by her contract from so doing. In some cases the business is effectively created by the contract.

51. I would reject Mr Stafford's submission that the individual must have been in a pre-existing business, or one which is independent of the relevant contract, before the exception could apply. I note that a similar argument was expressly rejected by the EAT (Burton P presiding) in **Commissioners of Inland Revenue v Post Office Ltd** [2003] IRLR 199, paras 45-46. Burton P commented that "it is not….necessary that the business undertaking must antedate or be independent of the contract which falls to be construed."

52. The attempt to map the boundary separating workers from those in business dealing with a customer has proved elusive. If, to use Mr Recorder Underhill's metaphor, there has been a lowering of the pass mark, how can Tribunals identify where the pass mark is located? In answering that question I think that some assistance can be gleaned from cases which have analysed the definition of "employment" in the discrimination legislation. Much of that legislation is directed towards those in "employment" which is defined as "employment under a contract personally to execute any work or labour" (see for example s.82 of the **Sex Discrimination Act** and s.78 of the **Race Relations Act**).

53. On the face of it this might appear to be wider than the definition of "worker" since there is no exclusion for those operating a business undertaking and contracting with a customer. However, the Courts have effectively applied such an exclusion by another route. They have not treated the personal provision of *any* services as being sufficient to engage the legislation, however insignificant that may be under the contract. Rather they have asked whether the "dominant purpose" of the contract is the provision of personal services or whether that is an ancillary or incidental feature. It is only if it is the dominant purpose that the definition is engaged.

54. This approach was first adopted in **Mirror Newspapers Ltd v Gunning** [1986] 1 WLR 546. Mrs Gunning's father enjoyed an area distributorship for the Appellant, purchasing papers from the Mirror Group and selling them to other newsagents. When he retired she sought to take over the distributorship but she was not allowed to do so. She alleged that this was because she had been discriminated against on grounds of sex.

55. The Tribunal only had jurisdiction to hear her claim if she fell within the definition of employment within the meaning of s.82 of the **Sex Discrimination Act**. The Employment Tribunal held that she did fall within that extended definition and the EAT, by a majority, dismissed the Mirror Group's appeal.

56. The Court of Appeal reversed the EAT decision on the grounds that even if, contrary to their view, there was some degree of personal obligation on Mr Gunning personally to do work under the terms of the distributorship agreement, that was only a minor purpose of the contract. The dominant objective was to secure the effective distributorship of the newspaper.

57. Lord Justice Oliver in his judgment summarised the contending arguments of Counsel. Both had accepted that a contract would not fall within this definition merely because there was some obligation personally to execute work, but the employers had argued that this must be the dominant purpose of the contract whereas the worker had argued that it merely had to be significant. Oliver LJ agreed with the employers:

> **"In my judgment what is contemplated by the legislature in this extended definition is a contract, the dominant purpose of which is the execution of personal work or labour and I would allow the appeal on this ground, for quite clearly here the dominant purpose was simply the regular and efficient distribution of newspaper."**

58. Balcombe LJ expanded the point (para 36) as follows:

> **"However, I do accept Mr Irvine's alternative submission that the phrase in its context contemplates a contract whose *dominant* purpose is that the party contracting to provide services under the contract performs personally the work or labour which forms the subject matter of the contract. In the course of oral argument before us, Mr Beloff conceded that a single obligation to provide personal services in a contract is not of itself sufficient to bring the contract within the phrase; you have to look at the contract as a whole to see the extent to which that obligation colours the contract, which goes a long way towards accepting the 'dominant purpose' test. *In my judgment, you have to look at the agreement as a whole, and provided that there is some obligation by one contracting party personally to execute any work or labour, you then have to decide whether that is the dominant purpose of the contract, or whether the contract is properly to be regarded in essence as a contract for the personal execution of work or labour, which seems to me to be the same thing in other words."*** (italics added.)

59. As the italicised words at the end of the quote make clear, the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? The test does not assist in determining whether a contract is a contract of service or of services; it does not, in other words, help in discriminating between cases falling within limbs (a) and (b) of the definition of worker. Its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way.

60. **Gunning** has been cited with approval by the House of Lords in **Kelly v Northern Ireland Housing Executive** [1998] UK HL 33; [1999] 1 AC 428 and more recently by the Court of Appeal in **Legal Services Commission v Patterson** [2003] EWCA Civ 1558 and in **Mingeley v Pennock and Ivory t/a Amber Cars** [2004] EWCA Civ 28; [2004] IRLR 373.

61. As I have said, these cases concerned the definition of employment in various discrimination statutes. A critical question is whether the definition of worker in the National Minimum Wage Act and the other more recent statutes can be similarly analysed. Certain decisions of the EAT have assumed that it can: see **Bamford v Persimmon Homes NW Ltd** UKEAT/006/06 (HH Judge Peter Clark presiding), and **Green v St Nicholas Parochial Church Council** UKEAT/0904/04 (Rimer J presiding). I agree with them. Although the wording of the two provisions is different, in each case the crucial feature is an undertaking personally to perform work.

62. The older discrimination statutes talk of personally executing any work or labour whilst the more recent provisions talk of undertaking personally to perform work or services. It is possible that the concept of services is wider than the concept of labour, and to that extent the more recent definitions may be broader. But I do not think that this has any bearing on the application of the dominant purpose test. Mr Rose argued that it was a potentially applicable test, and I agree.

63. I recognise that the definition of "employment" in the discrimination statutes do not have the exception for those in business found in the recent definition of "worker". I do not, however, consider this very significant. In practice the application of the dominant purpose test in the discrimination statutes has the effect of excluding from their scope those found to be in business on their own account, as the **Gunning** case shows. I am inclined to think that even had the

exception not been present in the definition of "worker", the Courts would have applied a dominant purpose test when analysing that definition in a similar way, given both the similarity in the wording of the provisions and the fact that the objective in each case is to, to put it loosely, to determine whether the contract should be located in the world of work or not.

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

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

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

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

obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field.

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

69. The statutory provision relating to burden of proof found in s.28 of the **National Minimum Wages Act** must have some significance in the judicial balancing exercise when the definition in that Act is under consideration. It seems to me that the effect of the presumption is that when balancing the various features of the relationship, it is necessary to ask not whether the features of the contract are consistent with somebody working in business on his own account, but rather whether they are consistent with, or at least not inconsistent with, the performance of services by somebody who is self-employed but who does not conduct his or her own business.

70. Of course, not all features will necessarily be consistent or not inconsistent with that status. That will not of itself preclude finding that the person concerned is a worker. It will all depend on balancing all the relevant features, having regard to the burden of proof, and making a judgment overall as to where the predominant purpose lies.

Applying the principles to the facts

71. Both Counsel submit that there can only be one outcome to this case. Mr Stafford submits that since Mrs James was not running a business and was either a home worker or under a duty

personally to perform services, the only proper conclusion is that she is a worker. This, however, depends upon the submission that she had to operate a business independently of the relevant contract, and I have rejected that submission.

72. Alternatively, he submits that it is not apparent from the decision of the Tribunal that the Chairman did properly focus on whether Mrs James operating a business and contracting with Redcats as a customer. The Chairman frequently referred to the fact that the nature of the relationship was consistent with, or not inconsistent with, her being self employed, but nobody was disputing that she was self employed. That did not determine whether or not she was a worker. Although the Chairman did in terms conclude that she was in business on her own account, it may have been because he assumed that this followed from the fact that she was self employed.

73. Mr Rose says that it is unfair to make the assumption that the Chairman approached the matter improperly. He made an express finding that she was in business on her own account and did so having weighed all the relevant factors. Moreover, he submits that there was only one conclusion that could have been reached on the evidence and that the Tribunal was right to describe the evidence as "overwhelming."

Conclusion

74. I am not confident that the Chairman did properly direct himself on this matter, and he did not refer to the s.28 presumption (although in fairness to him, he does not appear to have had it drawn to his attention). His conclusion that the evidence did not displace the description of Mrs James as self employed suggests to me that he may have thought that this was all he had to decide. It would be unjust to deny Mrs James a proper analysis of the evidence, having regard also to the statutory presumption. It is not for me to assess the evidence, and I do not accept Mr Rose's

submission that the position is so obvious that it would be futile to remit the matter because only one outcome is possible. I refrain from expressing any view on the merits of the arguments. In the circumstances, it is appropriate to remit it to a fresh tribunal.

Mutuality of obligation.

75. Finally I turn to consider the issue of mutuality of obligation. Mr Stafford submits that the Tribunal erred in finding that there was no mutuality of obligation. He submits that Mrs James could not in fact decline work at will, and I agree for reasons I have given. He also says that properly analysed the contract did not entitle Redcats to withhold parcels at will. They did not promise any particular volume simply because they could not guarantee what parcels would be sent. I agree with that construction, and therefore I think that there was mutuality of obligations. However, for reasons I now explain, I consider that the issue is of only minor significance in this case.

76. I accept that the Tribunal appears to have treated the issue of mutuality of obligation- or more precisely the lack of it- as of some importance. Indeed, Mr Stafford appears to have assumed that the Tribunal had treated that this finding as of itself necessarily defeating Mrs James' claim. I do not in fact think that they did, but they referred to it and plainly gave it some weight in the conclusion that Mrs James was not a worker but was in business on her own account.

77. There is moreover a decision of this Tribunal, namely **A D Bly Construction Ltd. v Cochrane** UKEAT/02043/05 which suggests that a person who performs work from time to time but without any mutuality of obligations in the breaks, cannot be a worker as defined even when he is actually at work. Although the case was referred to me, Mr Rose did not in fact argue that

it was decisive of this case, but I think it would be if, contrary to my view, there was indeed no mutuality and if **Bly** is correct. So the significance of mutuality of obligations to the analysis of the individual's status needs to be considered.

78. As the EAT observed recently in the case of **James v Greenwich Council** UKEAT/0006/06 para. 54, typically the focus on mutuality of obligation arises in circumstances where a worker is employed intermittently by an employer and the question arises whether there is a contractual relationship in the period when the worker is not actually working. This is important for establishing continuity of employment (although sometimes s.212 of the **Employment Rights Act 1996** will assist in that regard). The only obligations which in practice are likely to arise are some duty on the employer to offer work and some duty on the worker to accept work if offered. If there are no mutual obligations of any kind, there can be no contract. That is a simple principle of contract law, not unique to contracts of employment.

79. There may also be situations where there is a contract in place but it is not a contract falling within the field of employment because the nature of the obligations under the contract do not impose any duty personally to work.

80. An example is provided by the decision of the Court of Appeal in the **Mingeley** case to which I have already referred. The Appellant worked as a private hire driver in Leeds. He had a contract with the Respondents under which he paid a monthly sum and in return had made available to him a radio and computer system which allocated calls to drivers. It was entirely a matter for him what hours he worked or whether he even worked at all.

81. The issue was whether he fell within the definition of employment within the meaning of s.78 of the **Race Relations Act**. It was held that he did not because he had no obligation

personally to do anything. In any event, the Court of Appeal also held that the Tribunal was entitled to find that even if there were any personal obligations, they were not the dominant purpose of the contract.

82. In my view, **Mingeley** has no relevance to this case. It cannot be doubted that whenever Mrs James is actually working she is doing so pursuant to a contract and she is providing a service for which she is entitled to be paid. If she were not paid for work done, she would obviously have a claim in contract. Mr Rose said that this would mean that each assignment would have to be treated as a separate contract. That would seem to be right, but there is no reason why each assignment should not be so treated. The only issue is whether she is entitled to receive the minimum wage for the work she does, and that depends on whether the nature of that contract makes her a worker or home worker within the statutory definitions.

83. Since when working she is plainly providing a service, the two potentially relevant questions are whether she is obliged to perform the service personally; and whether she is doing so in the course of a business. The fact that there is no contract in place when she is not working - or that if there is, it is not one which constitutes her a worker - tells us nothing about her status when she is working. At that point there is a contract in place. If the lack of any mutual obligations between engagements precluded a finding that an individual was a worker when carrying out work pursuant to an engagement, it would severely undermine the protection which the minimum wage legislation is designed to confer.

84. Many casual or seasonal workers, such as waiters or fruit pickers or casual building labourers, will periodically work for the same employer but often neither party has any obligations to the other in the gaps or intervals between engagements. There is no reason in logic or justice why the lack of worker status in the gaps should have any bearing on the status

when working. There may be no overarching or umbrella contract, and therefore no employment status in the gaps, but that does not preclude such a status during the period of work. If casual and seasonal workers were to be denied worker status when actually working because of their lack of any such status when not working, that would remove the protection of minimum wage and other basic protections from the groups of workers most in need of it.

85. Accordingly, I would respectfully dissent from the decision of the EAT in the **Bly** case. The facts were that a labourer was employed as what was termed a "self employed sub contractor". The employers employed some 220 such people. It was accepted that he was not an employee. He was subject to a carefully drafted contract under which he was under no obligation at any time to do anything for the employer and nor they for him.

86. The issue was whether he was a worker under the **Working Time Regulations 1998** when he was at work. A majority of the EAT considered itself bound by **Mingeley** to conclude that the contact did not confer upon him the status of a worker even when work was being performed. The employer was not obliged to offer work nor the worker to accept it and that was considered fatal to his status as a limb (b) worker. I respectfully disagree. For reasons I have given, I do not accept that **Mingeley** has anything to say about the status of the individual once work is actually being performed.

87. Furthermore, in my judgment the decision in **Bly** is inconsistent with at least two decisions of the higher courts. In the **Carmichael** case the question was whether certain guides could be said to be employed under contracts of employment when they were not actually at work. The House of Lords held that they could not since there was no mutuality of obligation in such periods. However, Lord Hoffmann observed in his speech (p.1235) that "it may well be

that, when performing that work, they were being employed." If **Bly** were correct, they could not be so employed.

88. Perhaps even more directly on point is the decision of the Court of Appeal in **McMeechan v Secretary of State for Employment** [1997] ICR 549. The question there was whether the worker was an employee of an employment agency. There was no obligation on the employee to accept any particular offer of employment that might be made or any obligation to offer work to him. The worker did, however, carry out engagements given by the agency. The agency went into insolvency and the question was whether he was an employee so as to recover against the Secretary of State pursuant to the insolvency provisions in the **Employment Rights Act**.

89. Waite LJ, with whose judgment Potter and McCowan LJJ agreed, held that there was no inconsistency in finding that there was a contract of employment for particular contractual stints even though there was no continuing overarching contract between the agency and the individual because of a lack of mutual obligations in the period between engagements. Waite LJ put the matter as follows (page 563):

> **"In a case like the present where the money claimed is related to a single stint served to one individual client, it is logical to relate the claim to employment status to the particular job of work in respect of which payment is being sought. I note that the editors of *Harvey on Industrial Relations and Employment Law* appear to take a similar view, where they suggest, at paragraph A53:**
>
> > **'The better view is not whether the casual worker is obliged to turn up for, or do, the work but rather *if* he turns up for, and does the work, whether he does so under a contract of service or for services.'"**

90. I think a useful analogy can be drawn with the decision of the Supreme Court of the United States in **US v Silk** (1946) 331 US 704. This case was considered by MacKenna J in the

seminal case of **Ready Mix Concrete (South East) Ltd v Minister of Pensions & National Insurance** [1968] 2 QB 497 at 521. Silk sold coal by retail. They used unloaders to move coal from railway vans into bins. The unloaders were under no obligation to do any work at all. They came to the yard when they wished. They were given a wagon to unload and somewhere to put the coal. They provided their own tools and they were paid by reference to the amount of coal shifted.

91. The issue was whether they had the protection afforded by the **Social Security Act 1935**. That depended on whether they were employees. All nine judges held that they were, thereby disagreeing with the two lower courts. The Court said this:

> **"That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid."**

92. The fact that the unloaders had no relationship with Silk when they were not working, and that they were entirely free to work or not, did not affect their status when working. Any other conclusion would have frustrated the operation of the Act. In my judgment that conclusion is equally apt here.

93. Accordingly, in my view the fact that there is a lack of any mutual obligations when no work is being performed is of little, if any, significance when determining the status of the individual when work is performed. At most it is merely one of the characteristics of the relationship which may be taken into account when considering the contract in context. It does not preclude a finding that the individual was a worker, or indeed an employee, when actually at work.

Disposal

94. For the reasons given, the appeal succeeds and the case should be remitted to a fresh tribunal to determine, in the light of this judgment, whether Mrs James was employed as a worker or not.