IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Appeal No. EAT 32/82

Royal Courts of Justice

Thursday, 3rd May 1984.

Before:

LORD JUSTICE STEPHENSON

LORD JUSTICE KERR

and

LORD JUSTICE DILLON

IN THE MATTER OF AN APPEAL UNDER S.36(4)(a) OF THE EMPLOYMENT PROTECTION (CONSOLIDATION) ACT 1978 FROM THE RESERVED JUDGMENT OF THE EMPLOYMENT APPEAL TRIBUNAL GIVEN ON THE 12TH DAY OF NOVEMBER 1982

BETWEEN:

NETHERMERE (ST. NEOTS) LIMITED — Appellants (Appellants)

and

MARIA TAVERNA

and

LINDA ANN GARDINER — Respondents (Respondents)

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(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd, Room 392 Royal Courts of Justice and 2 New Square, Lincoln's Inn, London WC2A 3RU. Tel: 01 405 9884/5)

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MR. E. TABACHNIK QC and MR. C. JEANS (instructed by Messrs. Polden Bishop & Gale, Solicitors, London W1M 2BP) appeared on behalf of the Appellant (Appellant)

MR. G. JONES (instructed by Messrs. Wilkinson & Butler, Solicitors, St. Neots PE19 1BH) appeared on behalf of the Respondents (Respondents)

JUDGMENT

LORD JUSTICE STEPHENSON: This appeal arises from the decision of an industrial tribunal in November 1981 unanimously deciding a preliminary issue in favour of the applicants, Mrs. Taverna and Mrs. Gardiner, that they were both employees of the respondent company. The Employment Appeal Tribunal - by a majority - upheld that decision in November 1982 and gave leave to appeal: 1983 Industrial Cases Reports 319. The appeal tribunal thought the company's appeal should come on for hearing in this court at the same time as the appeal in the case of O'Kelly & Others v. Trusthouse Forte plc, which was decided on the same preliminary issue but quite different facts and allowed by a majority decision of this court in July last: (1984) 1 Queen's Bench 90. Would that this appeal had come on with that. Unhappily it did not and we have to decide, in the light of this court's decision in O'Kelly's case, the difficult question whether, in agreement with the minority opinion of Mr. Justice Tudor Evans in the appeal tribunal but contrary to the opinion of all the other members of both tribunals, the preliminary issue should have been decided in favour of the company, and whether we can and should reverse the industrial tribunal's determination of the preliminary issue and hold that the applicants were not employees of the company.

S.54(1) of the Employment Protection (Consolidation) Act 1978 provides:

> "In every employment to which this section applies every employee shall have the right not to be unfairly dismissed by his employer".

S.153(1) provides that "employment" means "employment under a contract of employment"; "employee" means "an individual who has entered into or works under a contract of employment" and "contract of employment" means "a contract of service or

apprenticeship, whether express or implied, and (if not express) whether it is oral or in writing". It is hardly necessary to add that "employer" means "the person by whom the employee is (or..... was) employed".

Therefore to be an employee with a right not to be unfairly dismissed you must be employed under a contract of service or apprenticeship. These applicants complained to the industrial tribunal under s.67 that they had been unfairly dismissed by the company. The company's answer was in one case that "the applicant was not an employee", in the other that she "was not an employee but was self-employed and therefore was not capable of being dismissed". Hence the preliminary issue. If the applicants were not employed under a contract of service - there is no question of apprenticeship here - the industrial tribunal would have no jurisdiction to entertain their complaints of unfair dismissal. If the applicants were employed under a contract for services the industrial tribunal would have no jurisdiction. But it should be pointed out that the only question of jurisdiction which the industrial tribunal had to determine was whether they were employed under a contract of service; unless they were it did not matter whether they were employed under a contract for services, or self-employed (if that is different) or employed under any other contract (if that is possible) or under no contract. They had no right to complain of unfair dismissal unless the industrial tribunal was satisfied that they were employed under a contract of service. This is important, because I think that the formulation of the preliminary issue as a choice between alternatives led the industrial tribunal into error, at least in its approach to deciding that the applicants were employed under

a contract of service. It may also have led the appeal tribunal into a similar error; but that tribunal's approach to its decision has been condemned by the majority in O'Kelly's case for a more radical error which I shall have to consider later.

First I must state shortly the facts, and I gratefully take them from the judgment of the appeal tribunal given by Mr. Justice Tudor Evans:

> "The Appellants manufacture boys' trousers in a factory where they employ about 70 employees from whose wages they deduct tax and national insurance contributions. The Tribunal found that the Appellants also made use of the services of a number of home workers from whose remuneration it was not the practice to make such deductions.
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> "Mrs. Taverna had worked in the factory until she left to have a baby in 1977. Before leaving, she arranged with the factory manager that, when her child was old enough, she would do home work for the Appellants. She started in January or February 1978. Her work consisted mainly of putting pockets into trousers for which she used a machine provided by the Appellants. The Tribunal accepted her evidence that she worked for about 4 or 5 hours a day and put on 100 pockets. Later, the work changed and she put artificial flaps on to trousers. She then worked for about 6 or 7 hours a day. Mrs. Taverna had no fixed hours for doing her work. In the financial year 1979/1980 she did no work for 12 weeks. In the year 1980/1981 she did not work for 9 weeks. The arrangement came to an end in July 1981 in circumstances which we shall describe later. During the shortened period of the financial year 1981/1982 she worked every week. The Tribunal found that the arrangement between the Appellants and Mrs. Taverna was such that she was paid according to the number of garments she did. She was paid weekly and her remuneration was determined from time sheets sent to her by the Respondents which she filled in weekly. The garments were delivered to her daily and sometimes twice a day. According to paragraph 10 of the Tribunal's decision:
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> > "When cross-examined by Mrs. Taverna, Mr. Weisfeld (the Appellants' Managing Director) agreed that he had never told them that they were self-employed, but he had told them that he was not deducting any tax or national insurance. He agreed that the work which the home worker was doing was similar to what was being done in the factory and they were

generally paid the same rate'.

"Mrs. Gardiner had also worked in the factory as an employee. She left in 1976. In September 1979, she was asked by the Appellants if she would do home work. She began about Christmas 1979. At first, she used her own machine but after a month or so the Appellants supplied a machine. In paragraph 6 of the decision, the Tribunal say that:

> 'In general work was delivered to her and collected twice a day or daily. She usually put 200 pockets on trousers per day which took her 5 hours. If she wanted less she would say so. She asked the van driver about tax and he told her that he did not think she was eligible (perhaps liable would have been a more appropriate word)'.

"After she had started home work at about Christmas 1979, Mrs. Gardiner worked all 15 weeks in the financial year 1979/1980. In the next financial year, she did not work for 4 weeks and in the financial year until the arrangement came to an end in July 1981 she worked all but one week".

In July 1981 a dispute about holiday pay led to the termination of the applicants' employment by the company.

The appeal tribunal called attention to the difficulty created by the industrial tribunal not having clearly set out its findings of fact, but decided that the industrial tribunal was accepting as fact the whole of paragraph 8 of its decision. That paragraph reads:

> "Mr. Weisfeld in evidence has told us that he made no stipulation as to what hours they should work and no stipulation as to how many garments they should complete in any specific period. It was up to the home workers to decide how much work they did, but subject to making it worthwhile for the driver to call. He did not consider that he was under any obligation to the home workers or they to him. They could take time off as they liked and we accept that evidence".

After referring to further evidence by Mr. Weisfeld, including his agreement that the work the home workers were doing was similar to what was being done in the factory and they were generally paid the same rate, the industrial tribunal stated its

conclusion thus in paragraph 11 of its decision:

> "Those are the facts on which we have to determine whether or not these ladies are employees. We understand that the fundamental test laid down by the Court of Appeal in Young and Wood Ltd. v. West (1980) Industrial Relations Law Reports 201 (Court of Appeal) is whether the person who has engaged himself to perform services performed them in business on his own account. If the answer is 'Yes' then the contract is a contract for services; if the answer is 'No' then the contract is a contract of service. Quite clearly the ladies in this case were not in business on their own accounts and according to that fundamental test they are employees. It appears to us that the case is very much on all fours with Airfix Footwear v. Cope (1978) Industrial Relations Law Reports 396. In that case over 7 years and generally 5 days a week an employer had delivered to a home worker 12 dozen pairs of shoe heels to be glued, together with materials provided by him; she was an employee. The Employment Appeal Tribunal said that where work is done consistently over a substantial period a tribunal would be entitled to reach the conclusion that a contract of employment had been created between the parties. Our unanimous decision is that both the applicants were employees".

This conclusion is open to criticism. It adopts what Mr. Justice Cooke in Market Investigations v. Minister of Social Security, (1969) 2 Queen's Bench 173, at p.184 had called "the fundamental test". Lord Justice Megaw and Lord Justice Browne had found that test "very helpful" in Ferguson v. Dawson (1976) 1 Weekly Law Reports 1213. In West's case I adopted it and Lord Justice Ackner obtained much assistance from it. But to accept it as the "fundamental" test is I think misleading, for it is no more than a useful test. Furthermore, it can only be applicable at all where there is nothing but a choice between the two kinds of contract, of service or for services. Here the form of the preliminary issue made the test apposite, though not fundamental; but, as I have indicated, it ruled out the question whether on the evidence there was a third kind of contract or even no contract at all, which would be as effective to deprive the industrial

tribunal of jurisdiction as a contract for services.

The appeal tribunal treated the industrial tribunal's decision as "based on the answer to the question whether the applicants were in business on their own account", and all the members of the appeal tribunal treated West's case as authority for the proposition that all the indicia have to be considered, leaving Mr. Justice Cooke's test as perhaps fundamental because of what had been said about it in Ferguson's and West's cases. But the lay members answered "No" to the question: "Were the applicants in business on their own account?" and held that they were "upon the business of the party for whom the work was being done;" and the other member held that they were in business on their own account: "the inference which should be drawn is that there was not a contract of service".

Whether or not there was any error in the modified emphasis which the appeal tribunal put on the "business on their own account" test, there was, as I have indicated, a fundamental error in its approach to the industrial tribunal's decision. It was agreed by both counsel and accepted by the appeal tribunal that the question whether the applicants worked under a contract of service - or for services - was a question of law and not of fact. "We have to determine what was the true nature of the arrangement between the parties", said Mr. Justice Tudor Evans, "and this seems to us to be a conclusion of law"; and they had to exercise their own independent judgment on the facts as found. In this the appeal tribunal was unfortunately following an error of mine in West's case, which has since been corrected, not without dissent by Lord Justice Ackner, in O'Kelly's case.

In O'Kelly's case the industrial tribunal had directed itself to

> "consider all aspects of the relationship (between casual catering staff who were regularly offered employment at an hotel and the hotel company), no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account".

That Sir John Donaldson, Master of the Rolls, described as "wholly correct as a matter of law". On that correct direction the industrial tribunal decided (by a majority) that the applicants were in business on their own account as independent contractors,not employees under a contract of employment. The appeal tribunal considered that what I had said in West's case was authority for the proposition that

> "the question was one of pure law, so that the appellate court can, and indeed must, reach its own view on whether or not, on the findings of fact made by the lower court, the true analysis was that there was a contract of employment".

Mr. Justice Browne-Wilkinson, interpreting in that way what I had said as laying down

> "that the question is a question of law on which we must make up our own minds on the basis of the facts found by the industrial tribunal whether the relationship between the parties is or is not a contract of employment",

gave the appeal tribunal's decision to allow the appeal and to hold there was a contract, or rather contracts, of employment and not a contract for services.

The Master of the Rolls was so kind as to say that I cannot have intended to lay down the law as interpreted by Mr. Justice Browne-Wilkinson because that would be a sudden and unexplained departure from the law as laid down by this court in Simmons v. Heath Laundry, (1910) 1 King's Bench 543. It may seem ungrateful, but in fairness to the appeal tribunal in O'Kelly's case, and in this, I must confess that I did intend what Mr. Justice Browne-Wilkinson understood me to intend - and I think Lord Justice

Ackner in his dissenting judgment understood me to intend - and I can explain, though not excuse, my intention by my failure to have in mind that venerable decision and my belief that I was following other authorities such as the judgments of Mr. Justice MacKenna in Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions & National Insurance, (1968) 2 Queen's Bench 497 (where Simmons' case was cited in argument but not in the judgment) and of Lord Justice Megaw in Ferguson's case (where it was not cited). This court allowed the hotel company's appeal against the appeal tribunal's decision and restored the industrial tribunal's, holding that the question was a question of law but (applying Simmons' case) that the answer included questions of degree and fact which it was for the industrial tribunal to determine and (applying Edwards v. Bairstow, (1956) Appeal Cases 14) that the appeal tribunal was not entitled to interfere with the industrial tribunal's decision unless the industrial tribunal had misdirected itself in law or its decision was one which no tribunal, properly directing itself on the relevant facts, could have reached.

(I might add that the law laid down in Simmons' case was supported before us by a decision of the House of Lords not cited either in O'Kelly's or any other case to which we have been referred: Smith v. General Motor Cab Co. Ltd., (1911) Appeal Cases 188).

This court has therefore to do what the appeal tribunal should have done: apply Edwards v. Bairstow as this court applied it, for instance, in Coates v. Modern Methods & Materials Ltd., (1983) Queen's Bench 192 and the House of Lords applied it in Melon v. Hector Powe Ltd., (1978) Industrial Cases Reports 43, and to decide whether the industrial tribunal misdirected itself in

law or reached a decision which was unreasonable to the point of perversity. We must not ourselves decide what is the right inference to draw from the facts as found so as to determine the true nature of the arrangement because we may be in that "grey area", as Lord Justice Fox called it in O'Kelly's case, where it may be a contract of service or a contract for services and either the majority opinion or the minority opinion of it may come "within the band of possible reasonable decisions" which excludes a court from judging whether they are right or mistaken: see the observations of Lord Hailsham of St. Marylebone, Lord Chancellor, in In re W., (1971) Appeal Cases at p.700.

Was there then any misdirection in law on the part of the industrial tribunal?

I do not see how it could be submitted that the tribunal erred in directing itself by the "business on her own account" test in the light of the approval given to the similar direction in O'Kelly's case. The appeal tribunal thought that the industrial tribunal had mistaken the ratio decidendi of the Airfix Footwear case, but in my judgment it was the appeal tribunal who misunderstood it and erred in correcting the industrial tribunal on the point. Mr. Justice Tudor Evans said:

> "It was argued for the employers in the Airfix case that they were not obliged to provide work for the applicant nor was she obliged to perform it and that, in such circumstances, no reasonable Tribunal acting judicially could find that there was a contract of service. The Employment Appeal Tribunal acknowledged that the absence of mutual obligations, where work is offered and performed sporadically, might lead to the conclusion that there was a series of contracts of service or a contract for services but that the answer would depend on the facts of each individual case. The court then reviewed the evidence as found by the Tribunal, including the fact that the work had been done for 7 years and for 5 days a week and concluded that, on the

material before it, the Tribunal was well entitled to come to the conclusion that there was, by reason of the duration of the relationship, a continuing contract of employment. We do not read the judgment as establishing the proposition that before a contract of service can exist there must be the mutual obligations for which Mr. Blair contends".

Mr. Blair had contended for the company that there must indeed be mutual obligations before a contract of service can exist; that is, a continuing obligation on the employer to provide work and pay and a continuing obligation on the employee to do the work provided. But he also submitted that a true analysis of the Airfix Footwear case shewed that "when the same quantity of work is accepted and performed over a long period, the proper inference is that there may be a mutual obligation to provide and perform it"; that "crucial prerequisite" was not, however present in this case.

Does the law require any and what mutual obligations before there can be a contract of service? If the law as to contracts of service is that there must be mutual obligations which were not found by the industrial tribunal or cannot be inferred from the evidence, then the industrial tribunal misdirected itself in law and its determination can and should be set aside. That was Mr. Tabachnik's main contention for the company before this court. I at first thought that Mr. Tabachnik's test had been made easier by a concession, but that concession has been withdrawn, and I have come to the conclusion that his interesting and forceful argument must fail and that no misdirection on the point can fairly be attributed to the industrial tribunal.

For the obligation required of an employer we were referred to old cases where the courts had held that justices had jurisdiction to convict and punish workmen for breaches of contracts

to serve masters under the statute 4 Geo. 4 Chapter 34. For that purpose the court had to decide that there was mutuality of obligation, an obligation on the master to provide work as well as wages, complementing an obligation on the servant to perform the work: R v. Welch, (1853) 2 Ellis & Blackburn, 357; Re Bailey and Collier, (1854) 3 Ellis & Blackburn, 607; Whittle v. Frankland, (1862) 2 Best and Smith, 49. But later cases have shewn that the normal rule is that a contract of employment does not oblige the master to provide the servant with work in addition to wages: Collier v. Sunday Referee Publishing Co., (1940) 2 King's Bench 647, 650 per Mr. Justice Asquith. An obligation to provide work was not implied by this court in a salesman's contract: Turner v. Sawdon, (1901) 2 King's Bench; it was in a pieceworker's contract: Devonald v. Rosser, (1906) 2 King's Bench 728.

The obligation required of an employee was concisely stated by Mr. Justice Stable in a sentence in Chadwick v. Pioneer Telephone Co., (1941) 1 All England Reports 522 at p.523: "A contract of service implies an obligation to serve, and it comprises some degree of control by the master". That was expanded by Mr. Justice MacKenna in the Ready Mixed Concrete case, (1968) 2 Queen's Bench at p.515 as follows:

> "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".

Of (iii) the learned judge proceeded to give some valuable examples, none on all fours with this case. I do not quote what he

says of (i) and (ii) except as to mutual obligations:

> "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".

There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of services. I doubt if it can be reduced any lower than in the sentences I have just quoted and I have doubted whether even that minimum can be discerned to be present in the facts as found by the industrial tribunal, particularly in paragraph 8 of its decision, and what the appeal tribunal said about it and counsel's interpretation of it. Mr. Justice Tudor Evans said:

> "At the end of the argument, we asked counsel for further submission as to whether, in paragraph 8, the Tribunal clearly refer to the lack of mutual obligation or whether the findings were that there was no obligation as to the number of hours the Respondents should work or how many garments they should complete with the implication that the Respondents were obliged to do some work. Both Counsel agreed that there was a reference to a lack of mutual obligations in the sense for which Mr. Blair contends".

Mr. Blair's contention had been, as I have indicated, that on the evidence the company were not obliged to supply the applicants with work and that the applicants were not obliged to do it. If the decision of the industrial tribunal is to be understood in the sense apparently given it by the appeal tribunal, there was a misdirection in law, for there could have been no contract of service, and perhaps no contract at all. The position of the applicants would have been that of the casual "regulars" as found by the industrial tribunal in O'Kelly's case, namely that they had the right to decide whether or not to accept work, and the company had no obligation to provide any work: see (1984) 1 Queen's Bench

at p.105 G.

Paragraph 8 of the industrial tribunal's decision in the instant case can be read as accepting that position, or a relationship between the company and the applicants which was even more nebulous, if the industrial tribunal was accepting Mr. Weisfeld's opinion of their obligations. They were non-existent; there was no mutuality. And if there was no contractual obligation, either on the company to offer work or on the applicants to do work, there was no contract of service, as I think all the judges in O'Kelly's case held: Sir John Donaldson, Master of the Rolls, at pp. 124 F - 125 A, Lord Justice Fox at p.121 F-G, and Lord Justice Ackner at pp. 115 F - 116 C. But having looked at the industrial tribunal's decision I conclude that it did not involve a complete rejection of mutual obligations but must be taken to have followed the Airfix Footwear case in finding that there was an "overall" or "umbrella" contract obliging the company to continue to provide and pay for work and the applicants to continue to accept and perform the work provided. Considering paragraph 11 of the industrial tribunal's decision and its reference to the Airfix Footwear case, I do not feel driven to hold that the industrial tribunal was making the error made by the appeal tribunal of deciding that no such mutual obligations were necessary and the Market Investigations case test provided a contract of service when there were no such obligations. I know that counsel agreed with the appeal tribunal that that was the correct interpretation of paragraph 8 and the appeal tribunal went on to hold on the basis of that concession that the paragraph so interpreted involved no error in law. But Mr. Jones for the applicants has rightly withdrawn that concession before us, in

part at least, and has submitted (1) that an obligation to accept work is a prerequisite of a contract of service but an obligation to provide it is not; (2) that the industrial tribunal was entitled to find that there was an obligation on the applicants' part to accept a reasonable amount of work and an obligation on the company's part to provide a reasonable amount of work, and the company had not shewn that the industrial tribunal had held that the company had no such obligation. It accepted Mr. Weisfeld's statement of his opinion, but did not adopt it as a correct interpretation of the parties' relationship.

Mrs. Cope had worked for Airfix Footwear Ltd making heels for their shoes for seven years, generally five days a week with a good deal of their equipment which they had trained her to use. The industrial tribunal held that there was a continuing relationship which in practice prevented her carrying on business on her own account, that she impliedly agreed to be subject to the company's control when such control was necessary and that the prime object of the bargain between her and the company was to ensure a satisfactory production of shoe parts which their inworkers were unwilling to assemble within the factory: "she was in reality a manual employee working in her own domestic environment as a matter of convenience to both sides". The company on appeal argued that she was employed on a casual outwork basis and only when required or requested, and that there was either no contract of employment or a series of contracts each of which naturally came to an end each day; there was no obligation to provide work, the company could provide it or not as they chose; there was no obligation to take work; Mrs. Cope could at any time refuse it.

The appeal tribunal upheld the decision of the industrial tribunal, Mr. Justice Slynn saying this ((1978) Industrial Cases Reports at 1214):

> "We are of the view that, if the arrangements between a company and a person are such that work may be provided and may be done at the will of either side - in other words, that the company may provide or not, as it chooses and the other person may accept the work or not, as he pleases - it may well be that this is not properly to be categorised as a contract of employment. If in such a situation the company only delivers work sporadically from time to time, and from time to time the worker chooses to do it, so that there, e.g. is a pattern of an occasional week done a few times during a year, then it might well be that there comes into existence on each of those occasions a separate contract of service, or possibly a contract for services, but that the overriding arrangement is not itself a contract of employment, either of service or for services. But these matters must depend upon the facts of each particular case. We say nothing about the general position which may arise in connection with outworkers, and we say nothing about the facts or principles to be applied in any other case. We are concerned only to see whether in this decision the tribunal has come to a conclusion which it could not possibly reach.....
>
> "It is to be borne in mind that the definition of 'contract of employment' in the Act is a contract of service whether express or implied. We read the decision of this tribunal as meaning that having considered all the facts, including the fact that for seven years, generally five days a week, this company had delivered 12 dozen pairs of heels each day to the applicant for her to work on, except when lesser quantities were available, they found that there had by conduct been established a continuing relationship, a continuing contract of employment. We consider that the tribunal was, on the material before it, well entitled to come to that conclusion on the particular facts of this case. We also consider that on the material before them the tribunal was entitled to conclude that that was a contract of service and not a contract for services. We consider that in deciding that the overriding contract was a contract of employment in this particular case the tribunal must have implicitly decided that there was not on each day that the shoes were delivered to the applicant's house a separate contract of employment. Indeed, whatever may be the position in regard to other facts, a contrary conclusion would appear to be highly artificial on the facts of the present case".

I read those paragraphs as rejecting the company's argument that there were no reciprocal obligations.

It has not been argued in the present case at any stage that the applicants were employed under a series of separate contracts. It was not argued, until we gave Mr. Tabachnik leave to re-amend his notice of appeal, that they were working under no contract at all. The issue was an overriding contract either of service or for services. There are obvious points of difference between the position of Mrs. Cope and the position of the applicants; for instance the shorter periods of consistent work and the smaller amount of equipment provided. But the points of similarity stand out and in my opinion entitled the industrial tribunal to hold - and entitles the court to assume that the industrial tribunal held - that the work done by the applicants for the company had created a continuing contract of service.

There must, I accept, be evidence to support that contract, otherwise there would be an error of law or a decision which no reasonable tribunal could have reached. I think that means evidence at least of an obligation to accept work offered by the company, and on the authority of Devonald v. Rosser the obligation to accept piecework would imply an obligation to offer it. I agree that the evidence of these obligations is tenuous, so tenuous that the industrial tribunal's decision comes dangerously near the ill-defined boundary which separates the grey area of possible reasonable decisions from the jurisdiction of an appeal court to declare the decision wrong and to put it right. According to the chairman's note Mrs. Taverna said: "I worked whenever needed" and that was understood in paragraph 3 of the industrial tribunal's decision as meaning whenever needed by the company. She refused

work when she could not cope with any more, but she let the company know in advance when she was taking a holiday; and Mr. Amos, the company's van driver, agreed that she very rarely refused work and gave good warnings when she did not want it. Both Mrs. Taverna and Mrs. Gardiner submitted weekly "time sheets" regularly to be paid the same rate as the workers in the factory. Mr. Weisfeld described how dependent the company were on their eleven home workers; the 70 employees in the factory could only do about 1,000 trousers per week which left about 5,000 to go out to home workers. The work they did was "an essential part of the production", and it was the "van driver's duty to be as fair as he could" - presumably in distributing the 5,000 trousers among the eleven home workers. There emerges from the evidence a picture of the applicants' doing the same work for the same rate as the employees in the factory but in their own homes - and in their own time - for the convenience of the workers and the company. If that is a reasonably possible picture, the industrial tribunal's decision can only be upset if the Airfix Footwear case was wrongly decided, and I do not think it was. I cannot see why well founded expectations of continuing homework should not be hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more, and why outworkers should not thereby become employees under contracts of service like those doing similar work at the same rate in the factory.

If then the industrial tribunal reached their unanimous decision, approved by a majority of the appeal tribunal, without any ascertainable misdirection in law, is Mr. Tabachnik's second submission right that the decision is one which no reasonable tribunal could have reached, if properly directed on the evidence

before it?

I have already answered that question. On the evidence there was just enough material to make a contract of service a reasonably possible inference in favour of the applicants. In refusing to interfere with that view of these two contracts I follow Mr. Justice Slynn in refusing to say anything about the general position of outworkers; and I do not attempt to determine what particulars of the contracts the company would have to give to comply with s.1 of the Act of 1978, or whether if they were reduced to writing their nature would be a question of construction to be decided by the appeal tribunal or this court as a question of "pure" law. But for the reasons I have given, which are not those of the appeal tribunal but are those required by the majority judgments in O'Kelly's case, I would dismiss the appeal.

LORD JUSTICE KERR: I find myself differing on a narrow ground from Lords Justices Stephenson and Dillon, whose judgments I have had the advantage of reading in advance. The issue, for the reasons which they have stated, is whether the decision of the industrial tribunal ("the tribunal") can withstand the tests laid down in Edwards v. Bairstow, (1956) Appeal Cases 14 and in the many authorities which have followed it, including O'Kelly v. Trusthouse Forte, (1983) Industrial Cases Reports 728 in the present context. In my view the tribunal erred in law in concluding, on the facts which they found and for the reasons which they gave for their decision, that the respondents were working for the appellants under a contract of employment, because there is every indication that the tribunal reached this conclusion without considering whether the parties were subject to any mutually binding contractual obligations, and indeed probably

proceeded on the basis that there was none.

This narrow ground of difference stems from paragraphs 8 and 11 of the tribunal's decision. These have been set out by Lord Justice Stephenson and I need not repeat them.

Taking paragraph 8 first, which contains a two-fold unclarity in its wording, two concessions were made on behalf of the respondents before the Employment Appeal Tribunal ("EAT") in relation to its wording. First, that the concluding phrase "and we accept that evidence" applied to the whole paragraph and not only to the last sentence. I think that this is still conceded. Secondly, and of much greater importance, that these words were also intended to convey that the tribunal accepted that the appellant company was under no obligation to the home workers and that they were under no obligation to the company.

The latter concession was withdrawn on the hearing of the appeal before this court. What is now said, I think, is that the tribunal merely accepted that this was Mr. Weisfeld's view of the legal position, which admittedly accords with the construction of the wording. I accept that this is how the matter must now be judged in this court. But I doubt whether it represents the reality of the tribunal's view. Mrs. Gardiner said in her evidence that she always considered herself to be employed by the company, but the tribunal's findings contain no reference to her evidence on this point. They merely referred to the evidence of Mr. Weisfeld in this regard. This express acceptance of (at least) Mr. Weisfeld's view of the legal position should also be considered in the light of the chairman's note of the hearing, which shows that the submission made by Mr. Blair on behalf of the company was precisely in line with what Mr. Weisfeld said and

what the tribunal accepted as being his view, namely that none of the parties was under any obligation to the others. Finally in this connection, it is significant that we were told by Mr. Jones on behalf of the respondent workers that he conceded Mr. Blair's submission before the EAT, because the argument before it proceeded on the basis that the existence or non-existence of mutually binding obligations was not essential to the fate of the appeal. The crucial issue in contention was whether the home workers were to be regarded as having worked under a contract of service, as they contended, or under a contract "for services", as the company contended, which again echoes what appears to have been the only issue before the tribunal at first instance.

If this is an accurate account of the course of the proceedings, as Mr. Tabachnik Q.C. submitted on behalf of the company on this appeal, then I think that it must follow that the tribunal and the majority of the EAT erred in law in reaching their conclusions. The determination of the statutory issue whether the respondent home workers were "employees" under s.54(1) of the Employment Protection (Consolidation) Act 1978 involves a two-stage process. The first stage requires the determination of the question whether there was any contractually binding nexus between the alleged employees and the alleged employer in relation to the "employment" in question. This must be a question of law. The existence or non-existence of a binding contract cannot be anything else. It cannot be a question of fact or of degree. The second stage, if some binding contract exists as a matter of law, is then to classify or define the nature of the contractual relationship. Some contracts which require a person to work for another will be "contracts of employment" or "contracts of service",

to use the statutory definitions in s.153(1) of the Act which derive from "employment" and "employee" in s.54(1) and which Lord Justice Stephenson has set out in his judgment. Other such contracts will be contracts "for services" or to be classified still more succinctly in some other way. Illustrations of this process of classification were given by Mr. Justice MacKenna in the Ready Mixed Concrete case, (1968) 2 Queen's Bench 497, at p.515, et seq. We were also referred to the decision of Mr. Justice Webster in WHPT Housing Association v. Secretary of State for Social Services, (1981) Industrial Cases Reports 737, in this connection, but I do not find much assistance in the differentiation between cases where the employee provides himself to serve and where he provides his services for the use of the employer (at p.748).

However, at this second stage of classification, the correct analysis of the contractual relationship between the parties does involve questions of fact and degree: see Simmons v. Heath Laundry (1910) 1 King's Bench 543 (Court of Appeal) and Smith v. General Cab Co. Ltd., (1911) Appeal Cases 188 (House of Lords). But all these cases must necessarily have proceeded on the basis that the requirement of the first stage - the existence of some contract binding as a matter of law - had been established.

It was the non-establishment of this first stage requirement which caused Mr. Justice Tudor Evans to differ from the majority of the EAT in the present case. However, I think that he went too far, because he regarded both stages to involve questions of law. This was the approach favoured by Lord Justice Ackner but rejected by the majority of this court (Sir John Donaldson, Master of the Rolls, and Lord Justice Fox) in O'Kelly v. Trusthouse Forte,

(1984) Queen's Bench 90, after the present case had been decided by the EAT. However, no issue arose in O'Kelly, as it does in the present case, on the requirement of some legally binding contract at the first stage, because the decision of the tribunal in that case had been that there was in any event no "umbrella" contract of employment, and the majority of this court merely held that this was a conclusion of fact and degree which the tribunal was entitled to reach.

The present appeal differs from all these cases, because the issue is fairly and squarely whether the requirement, at the first stage, of some legally binding "umbrella" contract has been satisfied, and whether the tribunal took into account that some mutually binding legal obligations must exist before they were entitled to go on to consider whether, as a matter of fact and degree, these gave rise to a "contract of employment" or a "contract of service" at the second stage. For this purpose it is unnecessary to decide whether the alleged employer's obligation is to provide a reasonable amount of work (as Mr. Tabachnik contended) or whether it is merely to pay an agreed and reasonable sum for whatever work is done. The inescapable requirement concerning the alleged employees however - as Mr. Jones expressly conceded before this court - is that they must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer. If not, then no question of any "umbrella" contract can arise at all, let alone its possible classification as a contract of employment or of service. The issue is therefore whether the tribunal's findings and conclusions show that they took account of this essential requirement.

I have already referred to paragraph 8 of the tribunal's findings. In my view this points in the opposite direction for the reasons already stated. One must then turn to paragraph 11, the tribunal's conclusions prefaced by the sentence: "Those are the facts on which we have to determine whether these ladies are employees". These conclusions are founded on two, and only two, reasons; but neither of these bears upon the requirement that the ladies were under any legally binding obligation to accept or perform any work for the company.

The first was "the fundamental test.....whether the person who has engaged himself to perform services performed them in business on his own account". Having regard to the contents of paragraph 8, I cannot treat the words "who has engaged himself to perform services" to imply any conclusion that the respondents were regarded by the tribunal as having accepted any legally binding commitment of any kind; nor did Mr. Jones suggest this. As it seems to me, the tribunal plunged straight into the second stage on the basis of what it regarded as "the fundamental test". This is a somewhat misleading adjective, as explained by Lords Justices Stephenson and Dillon, and it has no bearing on what I have referred to as the crucial first stage of determining whether there was any binding contract. It is no more than a useful means of classifying the nature of the necessary contractual relationship at the second stage.

On the basis of this test the tribunal reached its primary conclusion: "Quite clearly the ladies in this case were not in business on their own accounts and according to that fundamental test they are employees". But this could only be a correct conclusion if the tribunal had first addressed its mind to the

question, and had concluded, that the ladies were under some legally binding obligation to accept and perform some minimum, or at least reasonable, amount of work for the company.

The same considerations appear to me to apply to the second reason given by the tribunal in paragraph 11. They said that the present case is very much on all fours with Airfix Footwear v. Cope (1978) Industrial Relations Law Reports 396 and that the EAT had there held that "where work is done consistently over a substantial period a tribunal would be entitled to reach the conclusion that a contract of employment had been created between the parties". However, this would only be so if it can also be inferred that some underlying binding contractual relationship had been created between the parties. The need for some obligations is recognised in the first sentence of the extract from the judgment of Mr. Justice Slynn which Lord Justice Stephenson has quoted. A course of dealing can be used as a basis for implying terms into individual contracts which are concluded pursuant thereto, but I can find no authority for the proposition that even a lengthy course of dealing can somehow convert itself into a contractually binding obligation - subject only to reasonable notice - to continue to enter into individual contracts, or to be subject to some "umbrella" contract. The nearest analogy appears to be Brogden v. Metropolitan Railway, (1877) 2 Appeal Cases 666. But the parties in that case had concluded a contract in principle which only lacked formal signature, and their course of dealing within its terms was treated as an acceptance of its terms by conduct. There is nothing of a similar nature in the present case.

In saying this I am not suggesting that it might not have

been open to the tribunal to conclude in the present case that some binding contractual nexus had come into existence at the outset, or possibly during the currency, of the relationship between the home workers and the company. But they would have had considerable difficulty in determining the terms of any such contract. As matters stand, however, we have their findings in paragraph 8, which clearly appear to point in the opposite direction despite the withdrawal before us of the concession made in this regard before the EAT. It is this feature which appears to me to distinguish the present case from all its predecessors in which similar issues have arisen and which justifies the conclusion, following Edwards v. Bairstow, that the decision of the tribunal contains an error of law on its face. For myself, I would accordingly have allowed this appeal and - subject to hearing counsel on the appropriate order - would have felt compelled to remit the case to the tribunal for reconsideration.

LORD JUSTICE DILLON: Under the schemes of the Employment Protection Consolidation Act 1978, the fact-finding tribunal is the industrial tribunal and its decisions can only be interfered with by any appellate court on grounds of law; that is, as it is now clear from the decision of the majority of this court, Sir John Donaldson, Master of the Rolls, and Lord Justice Fox, in O'Kelly v. Trusthouse Forte plc (1983) Industrial Cases Reports 728, on Edwards v. Bairstow, (1956) Appeal Cases principles. This means, as explained by Lord Brightman in Furniss v. Dawson, (1984) 2 Weekly Law Reports 226 at p.243, not merely that the primary facts as found by the fact-finding tribunal must stand, but also that the inferences of fact drawn by that tribunal from the primary facts can only be interfered with by an appellate

court if they are insupportable on the basis of the primary facts as so found.

This approach appears to be entirely in line with the observations of Lord Fraser of Tullybelton in relation to a different aspect of the jurisdiction of industrial tribunals in Melon v. Hector Powe Ltd, (1981) Industrial Cases Reports 43, at 48 B-D.

In the present case the members of the Employment Appeal Tribunal, who gave their decisions before O'Kelly was decided in this court, misdirected themselves in that they erroneously supposed that as a matter of law they were entitled to draw their own conclusions or inferences from the primary facts found by the industrial tribunal, without first applying the Edwards v. Bairstow test to the findings and inferences of the industrial tribunal. I am thus unable to derive assistance from the views of the members of the EAT and I have to concentrate on the findings of the industrial tribunal.

The tribunal's conclusions which, as above indicated, are findings of fact, are set out in paragraph 11. Their findings of primary fact are set out in the earlier paragraphs of their reasons for the decision. The more important of these are taken verbatim from the chairman's notes of evidence. They record, for instance, the periods of the activities of the applicants Mrs. Taverna and Mrs. Gardiner and in the case of Mrs. Taverna they find, in paragraph 3, that she worked in the way described "whenever needed" - which appears to mean "whenever needed by the company" - "except on occasions when she was away from home". This comes from Mrs. Taverna's evidence. Then there are the findings in paragraph 8 which are taken from Mr. Weisfeld's

A evidence which, in these respects, was accepted. In its context in Mr. Weisfeld's evidence the statement, now relied on as crucial that "he did not consider that he was under any obligation to the home workers or they to him" was no more than a statement by Mr. B Weisfeld of his own understanding of the position.

In the course of the hearing in the EAT and against the background that what the members of the EAT were seeking to do was to draw their own conclusions from the primary facts found by the C industrial tribunal, rather than to consider whether the industrial tribunal's conclusions in paragraph 11 were insupportable on the basis of the primary facts found, counsel for both parties accepted or conceded that the passage in paragraph 8 which I have quoted D "was a reference to a lack of mutual obligations in the sense for which Mr. Blair" (then counsel for the company) "was contending", namely that there never was any obligation on the company to supply either of the applicants with work or on them to do any E work. This concession has been withdrawn by Mr. Jones, counsel for the applicants, in this court and he has explained that it was made in relation to what he understood to be a rather different argument in the EAT. This court has nonetheless to F take paragraph 8 into account as a part of the material which the industrial tribunal took into account in reaching its conclusions set out in paragraph 11.

G The main point on this appeal is that it is said for the company that this finding in paragraph 8, construed, even if it is not conceded, to be a finding that the company was never under any obligation to supply the applicants with work and they were never H under any obligation to do any work, vitiates the conclusions of the industrial tribunal altogether and shows inexorably that the

only permissible answer in law to the preliminary issue is that the applicants were never employees because they had never entered into or worked under any contract of service.

In Simmons v. Heath Laundry Company, (1910) 1 King's Bench 543 at p.547, Cozens-Hardy, Master of the Rolls, confessed his inability to lay down any complete or satisfactory definition of the term "contract of service". In Simmons the court held that the question whether an applicant in any particular case was employed under a contract of service within the Workmen's Compensation Act was a question of fact for the decision of the county court judge sitting as an arbitrator under the Act, whose decision could not be interfered with if there was any evidence to support it. The decision of the House of Lords in Smith v. General Motor Company, (1911) Appeal Cases 188, is to the same effect.

It is said nonetheless that there is one sine qua non which can firmly be identified as an essential of the existence of a contract of service and that is that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service. So it is submitted in the present case that there is no evidence of any mutual obligations.

It was mentioned in argument as a possibility - though not urged by either party - that there may have been a contract made each time one of the applicants, or any other outworker, accepted a load of garments to work on. There is no finding to this effect

by the industrial tribunal and I find it wholly unrealistic to suppose that the van driver made a daily contract on behalf of the company with an outworker each time he agreed with the outworker the number of garments he was to leave with her that day and left that number. I therefore disregard that possibility.

In paragraph 11 of their decision the industrial tribunal referred to "the fundamental test" as being whether the person who has engaged himself to perform services performed them in business on his own account. The tribunal concluded that the applicants in the present case were quite clearly not in business on their own accounts and so according to "the fundamental test" they were employees. The formulation of this as a "fundamental test" is first to be found in the judgment of Mr. Justice Cooke in Market Investigations v. Minister of Social Security, (1969) 2 Queen's Bench 173 at 184 G - H in a passage which was approved by members of this court in Young & Wood Ltd. v. West, (1980) Industrial Relations Law Reports 201, and has been found helpful in other cases. I do not therefore suggest that the industrial tribunal misdirected itself in seeking to apply such a test, especially as, as I read paragraph 11, the decision that the applicants were employees did not rest solely on this test but also on the analogy of the present case to Airfix Footwear Ltd. v. Cope, (1978) Industrial Cases Reports 1210, to which I shall refer later. I do, however, for my part, find the use of the word "fundamental" somewhat misleading. In some cases, as for instance, with a jobbing gardener or a carpenter or a music teacher, who is found to be carrying on the activities in question for several customers or clients as part of his or her own business, the test may be very helpful indeed, but in many other cases the answer to

the question whether the person concerned is carrying on business on his or her own account can only come as the corollary of the answer to the question whether he or she was employed under a contract of service. I note that in the Market Investigations case Mr. Justice Cooke had referred to a statement by Lord Wright in Montreal v. Montreal Locomotive Works Ltd., (1947) 1 Dominion Law Reports 161, that

> ".....it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior".

It is important to have in mind that each case must depend on its facts, and the same question, as an aid to appreciating the facts, will not necessarily be crucial or fundamental in every case.

The industrial tribunal also based their decision on the analogy of the Airfix case which they found very much on all fours with the present case.

The Airfix case was concerned with an outworker in the shoe-making industry who had for about 7 years been assembling shoes at home for the company using materials, tools and equipment supplied by the company. She was paid according to the number of shoes assembled and normally worked about five days a week. She was supplied with the materials every day, but she was apparently free to choose her own hours of work and to do work for any other employer if she wished. The quantity of work done varied with seasonal demand. The industrial tribunal had held that she was an employee and in the EAT it was strenuously argued that this conclusion was wrong and was indeed a conclusion which no tribunal acting judicially could have reached because there was no

obligation on the part of the company to provide her with work, and no obligation on her to take work if she did not want it.

The EAT read the decision of the industrial tribunal as meaning that, having considered all the facts, including the fact that for 7 years, generally five days a week, the company had delivered a certain number of pairs of heels each day to the applicant for her to work on, except when only lesser quantities were avaialble, they found that there had by conduct been established a continuing relationship which was a continuing contract of employment. The EAT considered that the industrial tribunal was, on the material before it, well entitled to come to that conclusion on the facts of that case, and to conclude that the contract which had thus been established by conduct was a contract of service and not a contract for services.

I see no objection to the decision of the EAT in the Airfix case. The real question is whether the industrial tribunal in the present case were entitled, on their findings and the evidence in the present case, including paragraph 8, to reach the similar conclusion in the present case that the applicants were employed by the company under a contract of service.

In the present case the activities of Mrs. Taverna as an outworker had gone on for over 3 years and there is the finding in paragraph 3 of the decision of the industrial tribunal that she worked whenever needed. She used a sewing machine provided by the company. There was also evidence from Mrs. Taverna that when work was there they brought it and she let them know in advance when she was taking a holiday. There was evidence from the van driver that Mrs. Taverna gave good warnings when she did not want work. Mrs. Gardiner had done outwork for the company for a shorter period

from Christmas 1979 to July 1981 though (like Mrs. Taverna) she had earlier been employed by the company in its factory. She was also provided with a sewing machine by the company. Her evidence was that she treated it as a job every day of the week, and that is in line with her weekly earnings. It has never been suggested that the conclusion in either applicant's case should be different from that in the other applicant's case.

There is also the finding in paragraph 8 that "it was up to the home workers to decide how much work they did, but subject to making it worthwhile for the driver to call", and there was a statement by Mr. Weisfeld that it was the van driver's duty to be as fair as he could, which I understand to mean "fair as between the various outworkers".

For my part I would accept that an arrangement under which there was never any obligation on the outworkers to do work or on the company to provide work could not be a contract of service. But the mere facts that the outworkers 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.

I see no reason in law why the existence of a contract of service may not be inferred from a course of dealing, continued between the parties over several years, as in Airfix. This is indeed a line with the decision in Brogden v. Metropolitan Railway Company, 2 Appeal Cases 666. The fact that machines were supplied by the company to each of the applicants indicates at the least an

expectation on both sides that the applicants would be doing work for the company which was provided for them by the company, and 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.

Mr. Weisfeld's evidence that it was up to the home workers to decide how much work they did subject to making it worthwhile for van drivers to call, is capable of being read as importing an obligation on the outworkers to take a reasonable amount of work once they have agreed to act as outworkers for the company. Conversely the statement of Mr. Weisfeld that it was the van driver's duty to be as fair as he could is capable of being read as importing an obligation on the company to provide a reasonable share of work for each outworker whenever the company had more work available than could be handled by the factory.

There was a regular course of dealing between the parties for years under which garments were supplied daily to the outworkers, worked on, collected and paid for. If it is permissible on the evidence to find that by such conduct a contract had been established between each applicant and the company, I see no necessity to conclude that that contract must have been a contract for services and not a contract of service.

In my judgment there was material to support the view of the industrial tribunal in paragraph 11 and it was entitled to reach the conclusion that a contract of employment had been

created between the parties and both the applicants were employees. Thus the court is not entitled to interfere with that conclusion and so I would dismiss this appeal.

(ORDER: Appeal dismissed with costs; leave to appeal to House of Lords granted)