

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 31 January 2008
Judgment handed down on 10 October 2008

Before

HIS HONOUR JUDGE BURKE QC

MR D J JENKINS OBE

MRS M McARTHUR BA FCIPD

REDROW HOMES (YORKSHIRE) LTD

APPELLANT

1) MR C B BUCKBOROUGH
2) MR P SEWELL

RESPONDENTs

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

JURISDICTIONAL POINTS: Worker, employee or neither

WORKING TIME REGULATIONS: Worker / Holiday pay

As in *Redrow Homes (Yorkshire) Ltd v Wright* 2004 IRLR 720, the issue in this appeal was whether workmen engaged by Redrow to work on their building sites were workers for the purposes of Reg. 2(1) of the Working Time Regulations, or were self-employed contractors. The standard contract between Redrow and the workmen had been adapted by Redrow so as to remove the provisions which led to their losing on that issue in 2004; the men agreed to provide such labour as was necessary to maintain the required rate of progress but were not obliged to perform the labour themselves.

Held, upholding the Employment Tribunal's decision in favour of the men, that:

(1) the Employment Tribunal's finding that the obligations provision in the contract was a sham did not contain any error of law in the light of **Consistent Group v Kalwak** in the EAT and the CA.

(2) In any event the obligations provisions imposed on the men a duty either to provide the required labour themselves or to find someone else to do so; and thereby the men were under a contract personally to execute work and thus fell within Reg. 2(1).

HIS HONOUR JUDGE BURKE QC

The nature of the appeal

1. This is an appeal by Redrow Homes (Yorkshire) Ltd (“Redrow”) against the judgment of the Employment Tribunal, sitting at Leeds, chaired by Employment Judge Grazin and sent to the parties with written reasons on 29 August 2007. By that judgment the Tribunal found that the two Claimants, Mr Buckborough and Mr Sewell, from March 2006 to January 2007, during which period they both worked as bricklayers on Redrow’s construction site at Malton, Yorkshire, were “workers” within the meaning of that expression in Regulation 2(1) of the **Working Time Regulations 1998** and that they were, therefore, pursuant to those Regulations entitled to compensation in respect of accrued holiday entitlement.

2. Regulation 2(1) of the 1998 Regulations provides as follows:

“ “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 expressed or implied and (if it is expressed) 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.”

3. Redrow’s case is that the Tribunal erred in law in reaching the two crucial conclusions on which they based their decision and should have held that the two Claimants were not workers within the above terms.

4. As will be seen from our analysis of the Tribunal’s judgment below, central to the first of the two bases on which the Tribunal found in favour of the Claimants was the decision of the Employment Appeal Tribunal, Elias J sitting alone, in **Consistent Group Ltd v Kalwak** [2007] IRLR 560 (“**Consistent Group**”). Soon after the parties had completed their submissions upon this appeal and we had reserved judgment, we became aware that **Consistent Group** had been very recently considered by the Court of Appeal. It appeared to

us, having regard to the importance attached to the Employment Appeal Tribunal's decision in **Kalwak**, that it would be more sensible not to give judgment on this appeal until the parties and we, with the assistance of the parties, had had an opportunity to consider the Court of Appeal's decision in **Consistent Group**. We therefore informed the parties that we intended to hold back our judgment until they had provided written submissions upon the effect of the Court of Appeal's decision. The Court of Appeal handed down their decision on 29 April 2008. The parties thereafter, as asked, sent us written submissions and responses to each other's submissions, for which we are grateful. We have of course taken those submissions into account together with the Court of Appeal's decision before given this judgment. Neither party has asked for a further oral hearing before us.

5. Some of Mr Samson's further submissions went beyond comments upon or arguments derived from the Court of Appeal's decision in **Consistent Group**. Mr Reade QC on behalf of Redrow complained of this; but it has not been necessary for us to consider any submissions which were not properly responsive to the Court of Appeal's decision.

The previous Court of Appeal decision

6. This appeal raises again –in the context of different written contractual provisions – the issue addressed by the Court of Appeal in **Redrow Homes (Yorkshire) Ltd v Wright** and **Redrow Homes (North West) Ltd v Roberts** [2004] IRLR 720. Because the differences between the contractual provisions which the Court of Appeal was then considering and those considered in the present case were, not surprisingly, prominent in the arguments before us and because Redrow have openly accepted that the standard terms and conditions on which they offered work to the Claimants in the present case had been redrafted in the light of the Court of Appeal's earlier decision so as to seek to produce the result that the Claimants were not workers within Regulation 2(1), it seems to us to be sensible to go to that decision first before turning to the relevant facts and documents in the present case.

7. In those two appeals the Claimants were bricklayers who worked as such for substantial periods, each on a different Redrow site. They were offered work at rates stipulated by Redrow; Redrow provided materials, labourers and forklift trucks; the men provided their own hand-tools. They were given a set of drawings and were subject to Redrow's building programme. Each Claimant performed his services as a bricklayer personally throughout the relevant period. Subject to the obligation to comply with the building programme and not to seek to work outside site opening hours, the men were free to work when they wished.
8. In the case of the first appeal Mr Wright worked with another bricklayer, Mr Milner, who was not a Claimant. Mr Milner made claims for payment which set out how much was said to be due to him and how much to Mr Wright. Each man had a CIS4 certificate which obliged Redrow to deduct tax at 18 per cent from payments made weekly. In the case of the second appeal there were two gangs of workers; otherwise the facts were broadly the same.
9. The Tribunal found that the Claimants accepted the offer of work in accordance with a document which was the same or not materially different in the case of each. The document consisted of an official order accompanied by "conditions and acceptance of order". The order stated:

"Please undertake, execute, carry out and complete the under-mentioned work subject to (a) the under-mentioned conditions and (b) the terms and conditions of business of Redrow Group plc. Acceptance of this order will be deemed to be acceptance to all the said conditions."
10. The order included a provision that the contractor was to ensure that a copy of its current health and safety policy together with a method statement for the work was forwarded to Redrow's offices before commencement on site.
11. The conditions and acceptance of order document provided as follows, *inter alia*:

“(1) that the Contractor having had an opportunity of inspecting our Conditions of Contract shall be deemed to have noted its provisions, and hereby agrees to be bound by them insofar as they are applicable to his subcontract.

(6) LABOUR

In respect of all operatives employed by the Contractor, the Contractor is responsible for and shall keep the Company indemnified against any claim or liability for National Insurance, Graduated Pension Contributions, Pay-As-You-Earn, Holiday Pay, Construction Industry Training Board levy, Travelling Expenses and other emoluments payable, all other payments required by Law or otherwise which may be necessary for the proper execution of the contract work whether current or introduced during the period of the contract.

The Contractor must at all times provide sufficient labour to maintain the rate of progress laid down from time to time by the Company, and shall supply such labour with all necessary tools and equipment.

On each site where the work is in progress the Contractor must maintain a competent foreman or chargehand who has complete control of all labour engaged on the work. Any instructions given to such foreman or chargehand shall be deemed to have been given to the Contractor.

Condition 20, which Redrow submitted was readily reconcilable with Condition 6, stated that:

(20) SUBLETTING

No order, nor any part order issued by the Company shall be assigned, sublet or transferred without the prior consent in writing of the Company. In the event of any such assignment, subletting or transfer, the Contractor shall be responsible for securing compliance with these conditions in every respect.”

12. As in the case of the present appeal, it was not suggested on behalf of the Claimants that they worked under a contract of employment; nor was it suggested on behalf of Redrow that they carried on a profession or business undertaking. The Tribunal had to decide whether they

13. undertook to do or perform personally work or services for Redrow. In the case of Mr Wright the Tribunal concluded as follows:

- “25. Furthermore, in construing the contract, we are entitled to have regard to all the circumstances. They include the fact that the contract was performed personally throughout the period of engagement. We find that that reflected the parties' expectation that it would be so performed.**
- 31. "Looking at the above factors, we are left with the clearest impression that the applicant was in a subordinate and dependent position vis-à-vis the respondent, similar to that of an employee. We find accordingly that the respondent's status was not by virtue of the contract with the applicant that of a customer of a business undertaking carried on by the applicant. The applicant and Mr Milner were not a firm. They were two individual workers who worked together and personally provided their service as bricklayers to the respondent.**

14. In the case of Mr Roberts and his colleagues the Tribunal held that it was:

- “8. the common intention and understanding of the parties that all the applicants would undertake to work personally,”**

and

- “17. there was mutuality of obligation for the purposes of whether the applicants were workers because of the factual matrix in this case.”**

15. Redrow’s central submission was that the terms of condition 6 were such that there was no contractual obligation on the part of the Claimants to perform the work personally; it was expressly contemplated that the work could be carried out by others; the bricklayer was required only to supply sufficient labour, whether by himself or otherwise.

16. The Court of Appeal upheld the decision of the Employment Appeal Tribunal (HHJ Peter Clark presiding) rejecting Redrow’s submissions. In his judgment, with which Latham LJ agreed, Pill LJ said this at paragraph 21:

- “21. In my judgment there is force in the submission that employment tribunals should not be deflected from a consideration of the definition of "worker" and from a consideration of terms of the contract in that context by general policy considerations as to the nature of employment and self-employment. The reasoning of the tribunal in *Roberts*, with its long citation from *Byrne Brothers*, appears to come close to saying that, because the applicants ought to come within the definition of worker, it follows that they do. The Regulations leave parties free to enter contracts and, whether or not the contract includes an obligation to do the work personally, is a matter of construction. The tribunal in *Wright* appears to have regarded the ‘subordinate and dependent position... similar to that of an employee’ of the applicants as justifying a conclusion that they came within the definition. Moreover, it does not necessarily follow from the fact that the work was done personally that there was a contractual obligation to do it personally.”**

17. Having thus made it clear that policy considerations are not relevant and what has to be considered is the correct construction of the relevant contract in the context of the circumstances in which it was made, Pill LJ continued at paragraph 23 as follows:

“23. The tribunals were entitled to construe the contracts in the light of the circumstances in which they were made. An important issue is whether, in those circumstances, condition 6 was a term of these particular contracts. Light may be thrown on that issue by considering, for example, the agreement as to how the contract was to be performed, the method of payment. It is not a question of looking at prior negotiations but ‘absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man’. (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912H, per Lord Hoffman). While respecting the tribunals' findings of fact, and admitted facts, this court is in as good a position as the tribunals to consider that question.”

He then set out his conclusions at paragraphs 24 – 26 in these terms:

“24. Relevant considerations are:

(a) Redrow's printed form of contract was plainly intended to cover a wide range of situations, from contracts with substantial contractors to contracts with applicants such as the present applicants.

(b) Arrangements between housebuilders such as Redrow and small gangs of workers, such as the bricklayers in these cases, are common in the housebuilding industry. Both Redrow and the present applicants were accustomed to them.

(c) Condition 1 binds the applicants to the conditions ‘insofar as they are applicable to [his] subcontract’. Having regard to the wide range of contracting parties by whom the conditions were intended to be used, that provision is totally unsurprising.

(d) There is no evidence that Redrow sought to enforce, or intended to enforce against these parties the conditions relating to depositing a current health & safety policy and relevant VAT registration. It can be inferred, as an illustration of the flexibility permitted by condition 1, that these provisions were not considered appropriate to the contracts with these applicants, as distinct from bigger contractors.

(e) The items of work specified were not beyond the capacity of the men to do it themselves.

(f) The agreed method of payment was not payment to the named contractor, Mr Wright, but to each individual doing the work. The suggestion that, by agreeing to pay Milner, Redrow was acting as agent for Mr Wright, produces an unnecessary and unlikely complexity. While Mr Milner is not an applicant, it is difficult to discern an intention that his position be different from that of Mr Wright.

(g) In *Roberts*, it was not suggested by Redrow that the other members of the gang were in a position different from that of Mr Roberts.

(h) The requirement in condition 6 for a ‘competent foreman or chargehand’ is foreign to arrangements made, and customarily made, with members of a small gang of bricklayers and it is difficult to conclude that the parties intended it to be included in these contracts.

25. Against that background, each of the tribunals was in my judgment entitled to find that there was ‘a mutuality of obligation’ (*Roberts*), or ‘a personal provision of services’ (*Wright*). Criticism can be made of the reasoning in each case but, in context, the conclusion was correct and should be upheld in this court upon a consideration of the evidence. In these contracts, condition 6 was not intended to be included so as to permit others to do the work. (When the tribunal in *Wright* used the word ‘expectation’ in paragraph 25, already cited, I believe they meant to convey the state of mind of intention but that finding is not essential to my general conclusion upon condition 6.)
26. In my judgment, the intention of the parties when the contracts were made involved, in each case, an obligation on the applicants to do the work personally. That makes sense of Redrow’s decision to contract with bricklayers individually. The scheme for payment points strongly in the direction of contracts with individual bricklayers to do the work personally. Had the intention been otherwise, Redrow would have been likely to make arrangements with Mr Wright and with Mr Roberts alone and arrange for the payments to be made to them. On the evidence, the finding that the obligation to Redrow of each of the men was personal was justified. An analysis has not been attempted by the parties as to what the position would, on my conclusion, be as between members of the gang, or as between one of them and Redrow, if a member failed to do his share of specified work, and that does not need to be determined in this case.”

18. Holman J agreed with Pill LJ’s reasons but added, in his own reasons, the following:

- “31. I also agree with Mr Stafford that the language of, and duties under, clause 6 of Redrow’s standard ‘Conditions and Acceptance of Order’ are inconsistent with an obligation to do the work personally. The first and third sentences of clause 6 contemplate operatives employed by the contractor and the need to maintain a foreman or chargehand in control of them. The second sentence contemplates the provision of sufficient labour to maintain the rate of progress laid down by the company, and there is an absolute obligation under clause 16 rigidly to adhere to that rate of progress. So if clause 6 forms part of the actual contracts between the applicants and Redrow, the applicants could not have ‘undertaken’ or been required to do the work personally and they might well have required to engage the assistance of others.
32. However, the whole of the conditions are governed by and subject to clause 1: the contractor agrees to be bound by the conditions ‘insofar as they are applicable to his sub-contract’. The words ‘insofar as they are applicable to his sub-contract’ are quite neutral in their effect or onus. There is neither a presumption that any particular clause applies unless in some way expressly disapplied, nor a presumption that a clause does not apply unless expressly applied. The conditions were described by the Employment Tribunal in the *Wright* case as ‘all embracing’ and by the Employment Appeal Tribunal in the conjoined appeals as ‘one size fits all’.
33. In short, the effect of clause 1 is to make the remaining clauses of the printed conditions a ‘menu’ and it is necessary to determine which particular clauses or conditions were applicable to the actual sub-contracts under consideration. This is a different exercise

or task from that of construing the meaning of the words used. Rather, it requires the tribunal or court to determine which clauses the parties themselves intended to select, and did select, as applying to their contract. In that task the ‘matrix of fact’ is, in these cases, predominant and, indeed, the only guide as to which clauses or conditions were applicable. Nothing was said or written expressly to apply or not apply any particular clause. The subjective intent of the parties is not admissible, nor do we know it. The question has to be: would reasonable people, in the position of these parties and having all the background knowledge which would reasonably have been available to them in the situation in which they were at the time of the contract, intend to apply or not apply clause 6?

34. At paragraphs 33 – 36 of their judgment the Employment Appeal Tribunal gave their reasons for concluding that clause 6 did not apply to the contracts with these applicants. In my view their reasoning is permissible and their reasons are cogent and we should not interfere with their conclusion that it did not.”

Clause 6 being thus eliminated, he held that the Employment Tribunal had been entitled to find that the parties intended that the Claimants must perform their work personally.

The present facts

19. In the present case the relevant facts, as found by the Tribunal, can be swiftly summarised.

On 6 March 2006 the two Claimants, aware of Redrow’s need for bricklayers at their Malton site, approached the site manager, Mr Edwards, for work. They produced their CIS4 cards and evidence of their public liability insurance cover; they were taken on and started to work. At the end of their first week they each signed a document entitled ‘Sub Contract for a LABOUR ONLY BRICKLAYER Conditions and Acceptance of Offer’, having been told that unless they did so they would not be paid. Nothing now turns on the delayed signing of this document.

20. The document is lengthy; it contains 17 clauses each of which is sub-divided into sub-clauses.

For present purposes the relevant provisions are the following:

“2. THE CONTRACTOR

- “2.1. The Contractor is a self-employed bricklayer, or in the case of a Contractor consisting of more than one individual a gang of self employed bricklayers.**

2.2. The Contractor has been retained by the company as a sub contractor to carry out brick laying and associated tasks either upon a day rate or a measured rate for bricks laid as specified by the Company's site management, referred to hereafter as the "Works".

2.3. The Contractor is not required to accept any Works specified by the Company's site management but if he, or they, does so they, by their signature to these conditions of acceptance of offer, do so upon the following conditions. The Contractor's obligation arising upon acceptance of the offer to carry out the Works upon these terms and conditions being referred to hereafter as "the Contract".

5. LABOUR

5.1 The Contractor is responsible for ensuring that there is sufficient labour to maintain the rate of progress laid down from time to time by the Company for completion of the Works and shall provide such labour as is necessary to comply with that rate of progress. For the avoidance of doubt the obligation to perform the work is not personal to the Contractor and their obligations may be performed by other labour. Further the Contractor is required to provide other labour if it is necessary to carry out the Works or to maintain the rate of progress stipulated by the Company.

5.2 In respect of any labour supplied by the Contractor to perform their obligations the Contractor is responsible for and shall keep the Company indemnified against any claim or liability for National Insurance, Graduated Pensions Contribution, Pay as You Earn, Holiday Pay, Construction Industry Training Levy, Travelling expenses, other emoluments payable and all other payments required by Law or otherwise which might be necessary for the proper execution of the Works.

16. PAYMENT

16.1. The Company shall pay the Contractor for Works properly executed.

16.2. Payment will be made on a weekly basis in accordance with the agreed rates for the Works.

16.3. The Contractor must submit and agree with the Site Manager the claim for payment no later than 3pm on Friday in the week during which the Works have been executed. Payment will be made by cheque issued or by BAC's payment initiated on or before the Thursday of the week following submission. Applications received after this date may result in payment being delayed or held over to the following week."

21. It is apparent that these provisions differed from those considered by the Court of Appeal in 2004 in the following material respects:

1. They were not expressed so as to cover a wide range of situations. They covered only the cases of an individual self-employed bricklayer or a gang of bricklayers; there was

therefore not the same element of “one size fits all” or of a “menu” as in the document considered by the Court of Appeal in 2004. They were, on the other hand, not intended only for individuals.

2. There was no longer any provision requiring the deposit of VAT registration or of a health and safety policy.
3. Payment was to be made to individual contractors (but not excluding a gang if the contractor were a gang).
4. There was no requirement for the provision by the contractor of a foreman or charge-hand.
5. Although the obligation in Clause 6 of the document before the Court of Appeal “the Contractor must at all times provide sufficient labour to maintain the rate of progress laid down from time to time by the company” was repeated, almost word for word, in Clause 5.1 of the new document, there are in the new document the additional words “For the avoidance of doubt the obligation to perform the work is not personal to the Contractor and their obligations may be performed by other labour”; those words are followed by “Further the contractor is required to provide other labour if it is necessary to carry out the works or maintain the rate of progress stipulated by the Company”.
6. There was no requirement such as that in Clause 20 of the earlier document for Redrow’s consent before assignment, sub-letting etc.

The Tribunal’s decision

22. At paragraph 18 of their judgment the Tribunal referred to the Court of Appeal’s earlier decision and in particular to paragraph 23 in the judgment of Pill LJ and paragraph 33 of the judgment of Holman LJ which we have set out above. They said:

“We have taken the view that we should decide this matter by reference to the terms of the new document, without in any way being bound by the terms of the original document.”

Having so directed themselves they found in favour of the Claimants on two separate bases.

23. They firstly found, at paragraph 20:

“We are entirely satisfied, on the evidence which both parties presented as to their respective intentions at the time that the contract was signed (which we take to be the relevant test), that it was never expected by either side, seriously or otherwise, that either of the Claimants would seek to provide a substitute or refuse the work offered. That was not the manner in which the Claimants had worked in the past and they could not be expected to work in that manner for the future. It was not the manner in which the Respondent had used labour of this sort in the past nor could the Respondent expect that to be the position in the future. Whatever “armies of lawyers” had worked upon the Respondent’s standard contract, those were not matters which were in the mind of Mr Edwards at the time he made the arrangement with the Claimants. Mr Edwards, was, for these purposes, the agent of the Respondent. All that Mr Edwards intended was that the Claimants should sign the standard document as a condition of being paid. The terms of that document were entirely outside his knowledge or understanding. He simply adopted the Respondent’s company policy.”

They made those findings and those which followed in paragraph 21 having adopted the reasoning of Elias J in the Employment Appeal Tribunal in **Consistent Group**. Applying those principles they said, in paragraph 21:

“That is Mr Samson’s primary submission and one which we accept. Since the document was a sham, we can adopt the position taken by the Tribunal and by the EAT in Kalwak. Paraphrasing the judgment of the Tribunal Chairman in Kalwak, we find that the provisions as to the right to provide a substitute and to provide other labour if necessary to carry out the works or maintain the rate of progress were a sham inserted into the document to give the appearance of relieving the Respondent of contracting with the Claimants as workers and did not seriously reflect the relationship between the parties. The Respondent in effect wanted workers but did not want to incur the obligation to pay holiday pay.”

24. Alternatively they concluded, at paragraphs 22 and 23, that the words of paragraph 5.1 of the relevant document contained an obligation of personal service which was sufficient to bring the Claimants within the statutory definition of “worker”; despite the words of the second sentence, they held that the dominant purpose of the contract between the Claimants and Redrow was located in the field of dependent work relationships rather than in an arrangement between two independent business undertakings.

25. Issues of quantum were adjourned with a view to agreement between the parties.

The sham ground

26. In **Consistent Group** the Claimants were Polish nationals with, for the most part, limited English who, while in Poland, entered into agreements with the Respondent agency whereby they were to be placed in work in hotels or food processing factories in the UK. Having been engaged in such work in the UK, they made various claims to the Employment Tribunal under the **Employment Rights Act 1996** and the **Trade Union and Labour Relations (Consolidation) Act 1992**; the Employment Tribunal had to decide, as a preliminary issue, whether they were employees, workers or neither.

27. The Claimants signed contracts with the Respondents the material terms of which, so far as relevant, were

“Term

This agreement shall run from [date] until termination [the term] by either party giving two weeks’ notice but if the subcontractor breach or persistently fail to fulfil this agreement, Consistent may terminate it forthwith. ...

Obligations.

The subcontractor shall provide services on an ad hoc and casual basis from the date as required by Consistent. While Consistent will try to give the sub-contractor as much notice as possible when offering work, there is no obligation upon Consistent to provide such work nor upon the sub-contractor to accept any work so offered and Consistent may use the services of the sub-contractor only when mutually agreed with no obligation by the party other than to honour a specific pre-agreed period of engagement. The sub-contractor is not an employee of Consistent and is not entitled to any fringe benefits such as sick pay, holiday pay or pension rights.

Substitution

Where the sub-contractor has agreed to provide service to Consistent he shall perform the services himself or if he cannot he shall inform Consistent and shall ensure that the services are performed by the personnel whom the sub-contractor warrants and undertakes will be competent, suitable and sufficiently experienced."

"Personnel" is defined as "the sub-contractor's servants or agents."

Circumvention.

...The sub-contractor may provide services to any other person if, in Consistent’s reasonable opinion, there is no conflict with or circumvention of the sub-contractor's ability to provide services for Consistent or to clients."

28. The Tribunal found that the Claimants were employees of the Respondent agency. The agency appealed. The Employment Appeal Tribunal dismissed their appeal. At paragraphs

29 – 38 of his judgment Elias J concluded, as a matter of law, that a limited or occasional right to delegate is not inconsistent with the existence of an obligation to perform work personally. On the terms of the relevant agreement the right to delegate arose only if the claimants were unable to work; the basic duty personally to perform services was established. Accordingly the claimants were, at least, workers. To that part of his judgment we will have in due course to return. He then, at paragraphs 52 to 61, considered the Employment Tribunal’s conclusion that the provisions relating to the right to refuse work or to work for someone else, called subsequently by the Court of Appeal the “obligations term” were a sham. He referred to the definition of a sham given by Diplock LJ (in a wholly different factual and legal context) in **Snook v London and West Riding Investment Ltd** [1967] 2 QB 786 at p802 in these terms:

“53. I was referred to the following definition of a sham given by Lord Diplock in *Snook v London and West Riding Investment Ltd* [1967] 2QB 786,802 as an arrangement:

‘intended to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create’.”

And he continued as follows:

- “55. There is a difference between a sham and a variation. Where the court finds that the contract or certain terms within it are a sham it is making a finding that they never did reflect what the parties’ true intentions were. Where there is a variation, the agreement as originally entered into is valid and properly reflects the intentions of the parties but subsequent words or conduct create new rights and obligations which may even contradict the original terms.
56. The possibility that the express terms may be dismissed as a sham was recognised by Peter Gibson LJ in *Express and Echo v Tanton* [1999] ICR 693. That was a case which concerned whether there was an obligation personally to perform the work. The Court of Appeal emphasised that the answer to that question had to be determined by asking what legal obligations bind the parties rather than by focusing on how the contract was actually carried out. So in that case the fact that in practice the individual had always personally carried out the work would not demonstrate that there was a contractual obligation to do so, and the employment tribunal decision was overturned for wrongly drawing such an inference.
57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p.369):
- ‘Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham, it will want to say so.’
58. In other words, if the reality of the situation is that no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
59. Applying this principle here, in my judgment the tribunal was entitled to say that this was a situation where there was no realistic possibility that these claimants, as heavily dependent as they were on the economic power of the agency, would be free to accept work as and when offered, or to work for someone else whilst the contract they had signed remained in place. They had come from Poland expecting to work for the agency, their continued accommodation depended on doing such work, and there was no realistic chance of their working elsewhere, at least whilst the agency needed their services. On these matters the formal document bore no relationship to reality. Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance, and this is precisely what this chairman did. I detect no error of law.”

Accordingly Elias J concluded that the provision of personal service was the essential feature of the relationship and that the claimants were workers for the purposes of s230 of the **Employment Rights Act 1996** – which contained the same definition of “worker” as Regulation 2(1) of the **Working Time Regulations 1998**.

29. The Court of Appeal, however, allowed Consistent Group's appeal. Fundamental to its conclusion, set out in detail in the judgment of Rimer LJ, with which Wilson LJ agreed, was that the Employment Tribunal had made insufficient findings and had given insufficient reasons to support the conclusion that the obligations term was a sham and did not truly reflect the nature of the parties' contract; see per Rimer LJ at paragraphs 46 and 51-52 and per May LJ at paragraphs 57 – 61. In particular there were insufficient reasons as to the acceptance by the Tribunal of the evidence of Ms Bachorska who gave evidence on behalf of the claimants, of which she was one, in preference to the evidence given on behalf of Consistent Group. The Court of Appeal therefore remitted the claim for rehearing before a differently constituted Tribunal.

30. It is clear from the judgment that the arguments before the Court of Appeal were focussed on the sufficiency of the Employment Tribunal's findings and reasons and not upon the legal principles which apply where it is alleged that a contractual document or part of it is a sham. Thus, at paragraphs 28 and 29, having set out the Employment Tribunal finding, Rimer LJ said:

“28. That is the finding the Chairman made that the "Obligations" term was a sham. He provided no overt reasoning for that conclusion. He ought properly first to have identified the principles by reference to which a contract, or a term in it, can be regarded as a sham and then provided at least a summary of his findings as to why the "Obligations" term fell within those principles. The former is an important consideration because a finding that the contract was in part a sham required a finding that *both* parties intended it to paint in that respect a false picture as to the true nature of their respective obligations (Snook v. London and West Riding Investment Limited [1967] 2 QB 786, at 802; *Shalson and others v. Russo and others* [2005] Ch 281, at 341 ([187] and [188]). The Chairman recorded that he was referred to *Snook*, but provided no indication that he had had regard to the applicable principle. Was there any evidence on which he could have found that the "Obligations" term was a sham? The judgment does not identify any.

29. I have yet to come to the criticisms that Mr Stafford levelled at the Chairman's reasoning but I have said enough to indicate that I regard it as having been deficient. It involved a misinterpretation of the contract; the making of a finding that its true nature was a contract of service, with no explanation as to how that finding was arrived at beyond the unexplained, and ostensibly fallacious, assertions in paragraphs 5.6 and 5.7; and the assertion that the "Obligations" term was a sham, without any reasoned finding as to the basis for, or justifying, that conclusion.”

May LJ at paragraph 57 said:

“57. The burden of the appeal as it was reformulated by Mr Stafford QC is that the Tribunal's judgment was inadequately reasoned, because there was no attempt to weigh conflicting evidence and to give reasons for rejecting the important parts of that relied on by Consistent. In my judgment, this ground of appeal is made out, so that the appeal should succeed for this reason.”

31. In the Employment Appeal Tribunal Elias J based his reasoning as to what may constitute a sham on **Snook**; see the above quotations. We will return to the question whether the Court of Appeal differed from Elias J's description of what may constitute a sham in cases such as this.

32. In the present case, on behalf of Redrow, Mr Reade submitted that the Employment Tribunal, in concluding that the contract between Redrow and the Claimants or the relevant part of it (i.e. the substitution provision in Clause 5.1), was a sham, fell into error for the following reasons:

1. The factual conclusion reached by the Tribunal that neither side expected, seriously or otherwise, that either of the Claimants would seek to provide a substitute or refuse work offered was insufficient; the Tribunal could only find that the relevant provisions were a sham if they found that the parties intended that the Claimants would be obliged to carry out the work personally. Diplock LJ's definition in **Snook** required a joint intention to give to third parties or a court a false impression as to the legal rights and obligations which they were creating. There must at least be a finding that the parties intended their obligations to be different from those set out in the contract; see per Peter Gibson LJ in **Express & Echo Publications Ltd v Tanton** [1999] IRLR 367.

2. A finding of a sham is to be made only in the exceptional circumstances where it is plain that there was always recognition that the relevant terms were not intended to reflect the

reality; see the Employment Appeal Tribunal's decision (Elias J presiding) in **National Grid v Wood** (EAT/0432/07 judgment 24 October 2007) at paragraph 38. The circumstances in the present case were not exceptional.

3. The Tribunal did not focus on the question of intention but on how the contract was actually performed.
4. The Tribunal found no more than that the site manager wanted the Claimants to sign the Redrow document as a condition of being paid; that was insufficient; and it was impermissible to take into account that construction companies had notoriously sought to avoid paying holiday pay.
5. The effect of the Court of Appeal's decision in **Consistent Group** is that, for a sham to be found, the Tribunal must go further than as set out by Elias J in the Employment Appeal Tribunal and must find that the parties intended to paint a false picture as to the true nature of their respective obligations to a third party and to the Court; see paragraph 28 of the judgment of Rimer LJ; but the Tribunal in the present case had not made that essential finding which the evidence could not have supported in any event.

33. Mr Samson on behalf of the Claimants submitted that:

1. The Tribunal's findings of fact at paragraph 20 were sufficient to support their conclusion and should not be open to review on appeal.
2. It was sufficient, and consistent with **Consistent Group**, for the Tribunal to have considered and decided upon the reality of the situation; see per Bingham LJ in **Street v Mountford** [1985] AC 809 in the Court of Appeal "... a sham exists where the parties say

one thing and intend another”.

3. **Snook** is distinguishable from the present case in that the defendant there was innocent of and ignorant of the pretence whereas in the present case the Respondent was the creator of the sham provision; and in any event the findings were sufficient to satisfy the requirements in **Snook**.
4. The Court of Appeal in **Consistent Group** did not address the key issues which arise in the present case. The substitution clause in the present case was different from the obligations clause in **Consistent Group**; and the Court of Appeal’s decision was based wholly on the appellant’s case that the Employment Tribunal’s decision was insufficiently reasoned and had insufficient findings of fact.
5. In so far as the Court of Appeal could be taken to have indicated a confining of the circumstances in which a sham could be found to those described in **Snook**, there had been no consideration of the wider concept of sham as set out by the House of Lords in **Street v Mountford**.
6. In any event the Tribunal had made findings of fact which satisfied the relevant test.

The sham ground: our conclusions

34. In our judgment the authorities demonstrate that there are two differing contexts in which the word “sham” may legitimately be used in respect of a contract or a contractual provision. One such context is that of a case in which the parties have a common intention and the documents which they have created in some material respect appear to give rise to legal rights and obligations which both parties intend not to exist, in order to deceive third parties or the court. It was a sham of that nature which had been found by the County Court judge to have

existed in **Snook**. However, it is clear that there is another context in which a court may find that a contract or contractual provision is a sham or can be disregarded as not intended by the parties to have any binding effect as between them – although it is not found that the parties were together intending to deceive a third party or the court - , namely where in reality neither party intends the contract or the relevant provision of it to be effective or to constitute an effective obligation between them.

35. While the subject matter before the House of Lords in **Street v Mountford** was wholly different from that of the present case, their Lordships had to decide whether the contractual document which described what had been granted by the respondents as a licence, truly represented the legal effect of the parties’ transactions. – Lord Templeman, with whom the remainder of their Lordships agreed, said at page 884

“both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of the tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.”

While their Lordships did not describe the relevant written provisions as a sham, they based their decision on the correct legal effect of the parties’ transaction in contrast to the manner in which both parties had described that effect.

36. While it is correct, as Mr Reade has pointed out, that **Snook** was not cited in **Street v Mountford**, that cannot undermine the thrust of their Lordships’ approach which was that substance should prevail over form.

37. In **Snook** itself Diplock LJ did not confine sham to the limited context which we have described; the relevant paragraph of his judgment, at page 802 C – F is as follows:

“ As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a “sham”, it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I appreciate that, if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v Maclure and Stoneleigh Finance Ltd. v Phillips*), that for acts or documents to be a “sham”, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a “shammer” affect the rights of a party whom he deceived. There is an express finding in this case that the defendants were not parties to the alleged “sham”. So this contention fails.

C
D
E
F

38. We derive from that paragraph the proposition that a sham may be found where the parties to a contract have a common intention that the contractual document or a provision of it is not intended to create the legal rights and obligations which they set out (whether or not there is a joint intention to deceive third parties or the court).

39. That approach (albeit without reference to **Snook**, which was not cited) was taken up in **Express and Echo Publications v Tanton** in which, in considering the crucial clause of the contract between the claimant and the respondents, in order to decide whether the claimant was an employee under a contract of service or a self-employed contractor under a contract for services, the clause providing an unlimited right in the claimant to appoint a substitute, Peter Gibson LJ, with whom Hirst and Auld LJJ agreed, said at paragraph 25:

“25. Clause 3.3, to my mind, vividly illustrates the difficulty in approaching the identification of the terms of the agreement by concentrating on what actually occurred rather than looking at the obligations by which the parties were bound. Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham, it will want to say so. But to concentrate on what actually occurred may not elucidate the full terms of the contract. If a term is not enforced, that does not justify a conclusion that such a term is not part of the agreement. The obligation could be temporarily waived. If there is a term that is inherently inconsistent with the existence of a contract of employment, what actually happened from time to time may not be decisive, given the existence of that term. For example, if, under an agreement, there is a provision enabling, but not requiring, the worker to work, and enabling, but not requiring, the person for whom he works to provide that work, the fact that work is from time to time provided would not mean that the contract was a contract of service: consider *Clark v Oxfordshire Health Authority* [1998] IRLR 125. For my part, therefore, I think

that the chairman went wrong at that point in concentrating on what occurred rather than seeking to determine what were the mutual obligations.”

40. In that case the Employment Tribunal had found that that clause was not a sham; and the Court of Appeal reversed the decision of the Employment Tribunal, upheld by the EAT, that the claimant was an employee; but Peter Gibson LJ’s words support the view that, had the intention of the parties (rather than what they subsequently did) been that the substitution clause was not to have effect, a different result would have followed.

41. That approach was adopted by the Employment Appeal Tribunal (His Honour Judge Peter Clark presiding) in **A D Bly Construction Ltd v Cochrane** (EAT/0243/05) (judgment handed down 23 November 2005) in an appeal in which, as in the present case, the central issue was whether the claimant was a worker under Regulation 2(1) of the 1998 Regulations and

therefore entitled to holiday pay. At paragraph 14 the Employment Appeal Tribunal said:

“The Terms of the Contract

We accept the submission of Mr Hogarth QC, based on high authority cited to us, including *Street v Mountford* [1985] AC 809 and *A G Securities v Vaughan* [1991] 1 AC 417, both decisions of the House of Lords, that in considering the terms of a written agreement made between the parties the Court or Tribunal must look at the overall circumstances in being astute to detect and frustrate sham devices and artificial transactions. Those cases were concerned with attempts to circumvent the protection afforded to tenants under the Rent Acts. However, the principle is equally applicable to employment protection: see *Express & Echo v Tanton* [1999] ICR 693, 697G, per Peter Gibson LJ. By extension, we think that the same principle applies to workers’ contracts. Thus, if an Employment Tribunal finds as fact that the words of a written contract do not truly reflect the intentions of the parties when entering into the contract, they may say so and go on to find that the Claimant is a worker as defined in the Regulations.”

42. While in the 2004 **Redrow** decision the Court of Appeal did not expressly consider the concept of a sham, they concluded that the parties did not intend that the substitution clause in the relevant document was to be part of their contractual relationship; see per Pill LJ at paragraph 25 and per Holman LJ at paragraphs 34 and 35.

43. The passages in Elias J’s decision in **Consistent Group**, under the heading “Was the relationship a sham?”, which we have set out extensively above, are, in our judgment, consistent with **Snook** and with the line of authority to which we have referred. Does the judgment of the Court of Appeal in **Consistent Group**, however, have the effect of narrowing the circumstances in which a contract or contractual provision may be found to be a sham or not to bind the parties because it was not intended to have contractual effect, as Mr Reade submits? Our conclusion is that it does not. As we have said earlier in this judgment, the ratio of the Court of Appeal’s decision is that there were insufficient reasons and findings of fact to support the Employment Tribunal’s conclusion that the relevant term of the contractual document was a sham; see paragraphs 29, 51/2 and 57-60. At paragraph 28, which we have set out above, Rimer LJ was not, as we read his judgment, seeking to confine the sham doctrine to circumstances narrower than those contemplated in the quotation from Diplock LJ in **Snook**, which we have also set out, or than those set out in the Employment Appeal

Tribunal by Elias J. On turning to consider what Elias J had said under the heading “Was the

relationship a sham?" Rimer LJ said at paragraph 40:

“40. I do not find that passage easy. The observations in [55] are not in point because the Chairman did not find that the parties either expressly or impliedly *varied* the terms of the contract following its signing. The observations in [56] indicate that, in order to identify the true nature of the parties' contractual obligations, it will or may *not* be sufficient merely to look at what the parties have done under the contract (which is all the Chairman appears to have done). It will instead be necessary to determine what their legal obligations were. In this case, for example, the fact that, let it be assumed, the claimants always accepted work when it was offered to them, did not mean that they were obliged to; and the "Obligations" term indicated that they were not. As for [57] and [58], the points made there, in particular in the observations of Peter Gibson LJ, are that there will be cases where the contract, or certain of its terms, can legitimately be regarded as a *Snook* sham, in which event the tribunal's task will be to find what the true nature of the contract, or the relevant terms, was or were. If, however, Elias J was saying that it is or might be enough for a court or tribunal simply to look at a particular contractual term and substitute for it a different one that it regarded as reflecting a more likely bargain between the parties, then I question the correctness of that. It is not the function of the court or an employment tribunal to re-cast the parties' bargain. If a term solemnly agreed in writing is to be rejected in favour of a different one, that can only be done by a clear finding that the real agreement was to that different effect and that the term in the contract was included by them so as to present a misleadingly different impression.”

44. That paragraph appears to us to support rather than undermine the view that a sham can be held to exist if it is found that the parties both intended that a contract or contractual provision was not intended to have effect between them. In any event, while we of course regard the Court of Appeal's words as important and persuasive, paragraph 40 is not, as we see it, part of the ratio of the Court of Appeal's decision and should not be taken as having the normative effect for which Mr Reade contends.

45. For these reasons we regard it as having been open to the Tribunal in the present case to ask whether the reality of the situation was one in which the express provision under examination provided for unrealistic possibilities on the one hand or genuinely reflected what might realistically be expected to happen on the other. As paragraph 59 of the Employment Appeal Tribunal's judgment in **Consistent Group** indicates, the answer to that question is one of fact for the Tribunal; and that approach is supported in our judgment, by paragraphs 23 and 25 of the judgment of Pill LJ and paragraph 34 of the judgment of Holman J in **Redrow**. If the Tribunal has applied the correct principle, the answer to the question which we have just set out, taken from paragraph 58 of **Consistent Group** in the Employment Appeal Tribunal, is

likely to be one of fact.

46. We do not regard **National Grid** as imposing any limitation upon the entitlement of a tribunal to answer that question on the basis of the facts of the individual case. It almost goes without saying that a finding that an express term or express terms of a contract was or were not intended to reflect reality will be rare or exceptional in the field of litigation as to contracts for the provision of work or services in particular and of contracts generally; but it is clear from the reference in paragraph 38 of the Employment Appeal Tribunal's judgment in **National Grid** to **Consistent Group** that the EAT was not seeking in that decision to narrow the test set out in **Consistent Group** or the circumstances there set out in which the tribunal may find that a contractual provision is not intended by the parties to apply to their relationship.

47. We do not accept Mr Reade's submission that the Tribunal's findings go only to the parties' expectation and not to their intentions. Paragraph 18 of the Tribunal's judgment, in which the Tribunal said that the manner in which the contract was performed is, and was, relevant only to the intentions of the parties -and correctly so said - indicates that the Tribunal were focussing on the need to ascertain what were the relevant intentions of the parties. In paragraphs 20 and 21, which should be read as a whole, it can be seen, in our judgment, that the Tribunal were considering and making a factual determination as to the parties' intentions. It is significant that they start their application of the principle set out by Elias J in **Consistent Group** by saying

“We are entirely satisfied, on the evidence which both parties presented as to their respective intentions at the time that the contract was signed (which we take to be the relevant test), that it was never expected by either side, seriously or otherwise, that either of the Claimants would seek to provide a substitute or refuse the work offered.”

When the Tribunal went on to make findings as to the parties' expectations and to speak of how the Claimants had worked in the past and would work in the future and of the understanding of

Mr Edwards, the site manager, and his intention, the Tribunal were reaching factual conclusions

on the evidence which went directly to the parties' intentions. At paragraph 21 they found that the substitution provision "did not seriously reflect the relationship between the parties" in the context they were referring to what the parties intended to be their relationship and not to how that relationship was evidenced by practice. The ordinary commonsense meaning of the Tribunal's words is that the parties when they entered into their relationship did not intend the substitution clause to have any effect and intended that the work was to be carried out personally. Those were findings of fact which are not said to have been perverse.

48. The Court of Appeal in the earlier **Redrow** appeal said that policy considerations should not affect the decisions of tribunals in cases such as these. Mr Reade submits that the terms of the Tribunal's judgment in the present case, in particular at paragraph 2, indicate that the Tribunal failed to adhere to that principle. However, in paragraph 2 the Tribunal appear to have been as critical of trade unions or workers who bring claims for holiday entitlement although the workers were told (at the outset, no doubt) that no holiday pay would be paid; and at the end of paragraph 2 the Tribunal stated the question which they had to decide in neutral terms. Nowhere in the relevant part of their judgment, i.e. paragraphs 18-21, did they say anything which suggested that, in posing and answering the question which we have identified above, they took policy considerations into account.

49. For these reasons, although we accept that there are substantial differences between the contractual documents in the present case and those before the Court of Appeal in 2004 - which differences we have identified earlier in so far as they may be relevant - in our judgment the Tribunal were entitled to reach the conclusion which they reached on the facts at paragraphs 18-21 and applied the right test in law. This ground of appeal must, therefore, fail.

Obligation to perform personally

50. Although it is strictly unnecessary to do so, because we have heard full argument and in case this litigation goes further we have thought it right to express our views on the Tribunal's alternative finding, namely that if the contracts were not - or did not contain in paragraph 5 an element of – sham they nonetheless contained in the case of each Claimant an obligation to do or perform personally work or services.

51. It is, in our judgment, important to identify the precise basis on which the Tribunal decided that issue. They recorded at paragraph 22 Mr Samson's submission that the Claimants had undertaken personally to ensure that sufficient labour was provided to carry out the works or to maintain Redrow's stipulated rate of progress and that thereby they were obliged personally to provide services.

52. The Tribunal at paragraph 22 accepted that submission.

53. They then, in paragraph 23, went on to apply the dominant purpose test derived from **Mirror Group Newspapers v Gunning** [1986] IRLR 227 and to find that the dominant purpose – or, as they called it, 'the essential nature of the contract - was that of the personal execution of work or services. They describe the essential nature of the contract as located in the field of dependent work relationships and not a contract between two independent business undertakings.

54. Mr Reade's submissions on this issue were (in summary form):

(1) The contract permitted the Claimants to sub-contract or give to others all of the bricklaying if they so wished.

(2) While the Tribunal had been correct to apply the dominant purpose test they should have

held that the dominant purpose of the contract was not the personal provision of work or services by the Claimants but the laying of bricks. If the dominant purpose test had been correctly applied the fact that the Claimants were not obliged to carry out any bricklaying at all themselves must lead to the conclusion that the dominant purpose was not that of the personal provision of work or services but was bricklaying.

(3) By basing their conclusion on the contrast between dependent work relationships and a contract between two independent business undertakings the Tribunal had substituted an erroneous test for that set out in the relevant words of Regulation 2(1).

55. Mr Samson submitted, (again in summary form):

(1) Clause 5.1 of the contract imposed upon the Claimants the obligation either personally to lay bricks as required by Redrow or personally to secure alternative labour to ensure that such bricks were laid. The Tribunal were entitled to find and correctly found that that obligation required of the Claimants personally to perform work or services for Redrow. If finding alternative labour was not the performance of work, it was the performance of a service.

(2) The dominant purpose of the contract was thus correctly assessed by the Tribunal.

(3) The Tribunal in referring to the contrast criticised by Mr Reade were doing no more than reflecting in different words the contrast to be found in the relevant words of Regulation 2(1) between a contract whereby one party is obliged personally to perform work or services for another on the one hand and a contract between a person carrying out a profession or business undertaking and his client or customer on the other.

56. We prefer Mr Samson's submissions. Paragraph 5.1 of the contract did not merely entitle the

Claimants to provide a substitute or, to use the contractual words, “other labour” to carry out bricklaying in their place; it expressly obliged the Claimants to provide such labour as necessary to carry out that work and to comply with the rate of progress laid down by Redrow. If the Claimants were not themselves carrying out the work or carrying it out as required by the contract they were bound to provide such other labour.

57. Surprisingly there is, we were told, no authority which addresses the difference between “work” and “services” in the definition of “worker” in Regulation 2(1). We take the view that the obligation to provide other labour to Redrow could not, on any ordinary understanding of those words, be described as an undertaking personally to do or to perform work; but Parliament must be taken to have intended by the relevant words of Regulation 2(1) that the alternative – to perform services – should embrace a wider concept than that of work; and in our judgment the obligation on the Claimants to provide labour, while not an obligation personally to perform work, was justifiably and correctly described by the Tribunal as an obligation personally to perform a service for Redrow, relieving Redrow in the absence of a Claimant from having to find other labour or to find other labour if a Claimant was not able to maintain the required rate of progress.

58. We should add that Mr Reade did not seek to base any submissions on the words “for the avoidance of doubt the obligation to perform the work is not personal to the contractor”. Those words could not, of themselves, lead to the conclusion that the Claimants were not workers within Regulation 2(1). The Tribunal had to look at and did look at paragraph 5.1 of the contract – and indeed the other relevant provisions of the contract – as a whole.

59. In the light of Mr Reade’s acceptance of the principle established in **Mirror Group Newspapers v Gunning** we do not need to enter upon a detailed examination of that authority. The Court of Appeal allowed an appeal from the Employment Appeal Tribunal

which has upheld the decision of the Employment Tribunal in favour of Mrs Gunning. The issue was whether Mrs Gunning was an employee of Mirror Group within the extended definition of “employment” in Section 82(1) of the **Sex Discrimination Act 1975**, namely

“**Employment means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour ...**”

60. Mrs Gunning originally worked for her father who held an area distributorship in Sheffield for the supply of Mirror Group Sunday newspapers. When her father retired, she wanted to take over the distributorship; Mirror Group decided instead to divide the supply of their Sunday newspapers between two other businesses.

61. The appellants argued that either the sole or the dominant purpose of the contract between the parties had to be the execution of work or labour; it was argued for Mrs Gunning that any more than a minimal, even if subsidiary, element of obligation to perform work or labour personally should suffice. The dominant purpose test emerged from these arguments. It was decided that there was no evidence that there was any personal obligation at all; see per Balcombe LJ at paragraph 39, but the facts were very different from those of the present case.

62. In the present case, unlike **Gunning**, there was material which justified the Tribunal’s conclusion – and in so far as it was a matter of law it was in our judgment a correct conclusion – that there was an obligation personally to perform at least services. Indeed the obligation was to perform work or services.

63. We do not accept Mr Reade’s description of the contract as one the dominant purpose of which was bricklaying. The desired result was, no doubt, in the case of each Claimant the achievement of whatever bricklaying was properly allocated to him and accepted by him; but

each Claimant had, by provision of work or services, personally to ensure that that bricklaying was achieved.

64. As to Mr Reade's third point, in our judgment the Tribunal, in using the words which it did in paragraph 23, was doing no more than drawing a distinction between a contract the dominant purpose of which was the personal provision of work or services, which would fall within the definition in Regulation 2(1) and a contract between a person carrying on a profession or business undertaking and his client or customer which would not. That is a distinction clearly marked out by the relevant words of Regulation 2(1), to which the Tribunal were entitled and, indeed, bound to pay heed. We conclude that the Tribunal did not apply any erroneous test.

Conclusion

65. For the reasons we have set out above this appeal is dismissed.