Case No: EA-2019-000259-JOJ (previously UKEAT/0118/20/JOJ)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 December 2021

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

(1) Mr M STOJSAVLJEVIC (2) Mr T TURNER **Appellants**

- and -

DPD GROUP UK LIMITED **Respondent**

- -

- -

Ms H Williams QC (instructed by TMP Solicitors) for the **Appellants**
Mr J Galbraith-Marten QC (instructed by Browne Jacobson LLP) for the **Respondent**

Hearing date:9 & 10 March 2021

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JUDGMENT

SUMMARY

EMPLOYEE, WORKER OR SELF EMPLOYED

All grounds of appeal would be dismissed. The Tribunal had correctly analysed the contractual obligations between the parties, consistent with the principles set out in **Autoclenz Ltd v Belcher and others** [2011] ICR 1157, SC and in **Uber B.V. and others v Aslam and others** [2021] UKSC 5 (albeit that the latter had not been decided at the time of the preliminary hearing). It had made no error of law in concluding that the terms of the written franchise agreement between each Appellant and the Respondent reflected the true agreement between the parties and that, properly construed, that agreement did not require either Appellant personally to perform the services for which it provided. Its having been common ground that personal performance was required in order to establish both employee and worker status, the Tribunal had been right to conclude that (1) the First Appellant had been neither an employee nor a worker for the purposes of the **Employment Rights Act 1996** ('the ERA') and (2) the Second Appellant had been neither an employee nor a worker for the purposes of the ERA, or the **Equality Act 2010**.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE:

Judgment

1. In this judgment, I refer to the parties by their respective statuses before the employment tribunal. This is the full hearing of the Claimants' appeal from the reserved judgment of Watford Employment Tribunal (EJ Henry, sitting alone), sent to the parties on 18 January 2019, by which it found that neither of the Claimants was an employee, or a worker, as defined, respectively, by section 230(1) and 230(3)(b) of the **Employment Rights Act 1996** ('the ERA'); that Mr Stojsavljevicj was not a worker within the meaning of section 43K(1) of the ERA; and that Mr Turner was not in the employment of the Respondent, for the purposes of section 83(2)(a) of the **Equality Act 2010** ('the EqA').

2. The Respondent is a large parcel collection and delivery company by which each Claimant was engaged between 2013 and 2017. Both Claimants had entered into the Respondent's standard form written franchise agreement, relating to the provision of parcel delivery and collection services ('the Franchise Agreement'). Before the Tribunal, it was the Respondent's position that each had been an independent contractor who had not met the relevant statutory definitions of employee or worker. Each Claimant contended that the reality of his agreement with the Respondent had been that he had contracted as an individual driver, who had been solely responsible for the delivery and collection services which he had agreed to undertake.

3. Paragraphs 17 to 19 of the Tribunal's reasons record the ambit of the issue which was before the Tribunal:

> "17. It is not in dispute that the claimants, having entered into the Franchise Agreement, operated their franchise as an owner driver, and that for Inland Revenue, and Customs and Excise purposes, the claimants were treated as self-employed contractors. It is also not in dispute that the claimants attended training provided by the respondent, and as the respondent puts it before the tribunal, that: *"it is accepted that pursuant to the owner driver franchise agreement the respondent exercises a not insignificant degree of control over the way in which the services are provided"* however, they advance that this is typical of a franchise agreement and not indicative

> of an employment relationship.
>
> 18. It is also fair to here note that, the operation of Franchise Agreements were integral to the respondent's business, and would on the face of operations, have all the hallmarks sufficient to satisfy the criteria for employee and/or worker status pursuant to s.230 and s.43K of the Employment Rights Act 1996, and section 83(2)(a) of the Equality Act 2010, to personally do the work.
>
> 19. In respect hereof, it was agreed at the outset of the hearing that the issue for the Tribunal's determination was one of personal performance only, namely, whether there was an unfettered right of substitution. Accordingly, while stating the above, the Tribunal has not addressed the further issues as to control, integration, economic reality, mutuality of obligation, financial considerations or organisational factors, relevant to the relationship existing between the claimants and the respondent." (sic)

4. Three, amended grounds of appeal were permitted to proceed by HHJ Auerbach. In essence, the same substantive contention is made by each of them — the Tribunal erred in law in failing to find that there had been a fetter on the right of each Claimant, as the named franchisee, to use a substitute driver, as a result of which he had been obliged to undertake work personally, for the purposes of each relevant statutory definition. Before me, the Claimants were represented by Ms Heather Williams QC, as she then was (who did not appear below) and the Respondent by Mr Jason Galbraith-Marten QC (who did). I am grateful to them both for their clear and focused written and oral submissions.

The Franchise Agreement

5. Over 11 pages, the Tribunal set out various clauses of the Franchise Agreement (in which the Respondent was referred to by its then name of GeoPost UK Limited and the relevant Claimant was referred to as 'the Franchisee'). In addition, clause 26 of the Franchise Agreement provided as follows:

> '26. This Agreement and the Vehicle Hire Agreement supersedes all prior agreements, arrangements and undertakings between the parties and constitute the entire agreement between the parties relating to the subject matter thereof. Any variation of this Agreement and/or the Vehicle Hire Agreement shall only be effective and binding if it is in writing and signed by the duly authorised representatives of each party to this Agreement and provided further in the case of GeoPost that the variation is signed by the Chief Executive or Director of Technical Operations or Director of

Technical Services or such other person as GeoPost may nominate from time to time.'

6. Franchisees were provided with an Owner Driver Franchise Operating Manual, to which the Franchise Agreement referred, in a number of clauses. Section 18 of that manual provided (emphasis original):

> '**18. DRIVERS**
>
> Under the terms of your Franchise Agreement you are required to supply a Driver to perform parcel delivery and collection services for GeoPost. It is YOUR responsibility to inform us of the identity of all Drivers you intend to use.
>
> **UNDER NO CIRCUMSTANCES CAN A PERSON EMPLOYED BY GEOPOST BE USED BY YOU AS A DRIVER.**
>
> FRANCHISEE'S RESPONSBILITIES
>
> a) You must supply the Franchise Department with a copy of the driving licence for each Driver you use ensuring that the serial numbers are visible on all sections.
>
> b) The Franchise Department will then issue an application form for each Driver and it is YOUR responsibility to ensure that it is returned.
>
> c) You will not be able to use the services of any Driver until the completed application form for that Driver has been returned to GeoPost and GeoPost have issued a formal letter of authorisation in relation to that Driver.
>
> d) You will be responsible for any breaches or non-compliance with the Franchise Agreement or this manual by your Driver(s).
>
> **This is not applicable for 7.5t ODFs as cover drivers are not accepted.**'

7. At paragraphs 52 to 58 of its Reasons, the Tribunal recorded the parties' evidence as to the forms which a franchisee would need to complete, respectively, when applying for authorisation of (1) a permanent driver; in addition, or as an alternative to, the franchisee; and (2) a temporary driver, who could provide cover for a permanent driver for up to ninety days at a time. At paragraph 65, it found:

> '65. The Tribunal accepts the evidence of the respondent that the "Application for Additional Driver - Existing ODF[1]" forms relate to those permanent drivers for a

[1] "ODF" is an acronym for Owner Driver Franchisee.

> franchise, beit the franchisee themselves or additional individual divers, and that the "ODF Cover Driver" form is the form used by ODFs for the provision of temporary cover of up to ninety days, it not being in dispute that the documents were working documents, and the ODF Cover Driver forms were used for cover drivers; there then being no evidence before the tribunal to challenge the respondent's -account of their operation.'

8. At paragraph 100 of its Reasons, the Tribunal found that the Franchise Agreement *'was a genuine agreement representing the terms on which the claimants' and the respondent's relationship would be found"*, going on to make the following findings:

> '101. The Tribunal finds that the Franchise Agreement clearly sets out the body with whom the franchise is agreed, and who is the franchise holder, defined by the parties clause of the agreement, which is clearly then identified as being a separate body from that of the driver, who is defined under the recital clause of the agreement, and who would then drive under the Franchise Agreement.
>
> 102. With regards the nominated driver, the Tribunal accepts the claimants' submission as to the degree and formality in respect of permanent drivers, that without further, would suggest a degree of control beyond that of an individual carrying on business in their own capacity, however, to the extent that provision is made for temporary drivers referred to as "Ninety Day Drivers"; the criteria then for the driver to satisfy being that they are conversant with the respondent's practices, which the Tribunal accepts, pursuant to clause 8.1.5 of the franchise agreement, was the obligation of the franchisee, despite the respondent stepping in to provide the necessary training where the franchisee had failed so to do, which the Tribunal finds was directed by business efficacy where this happened, and not by obligation, the further requirements then being that the individual was legally entitled to drive in the UK. The tribunal finds that this was not such as to amount to a fetter on the claimants' contractual entitlement to engage a driver of their choice.
>
> 103.The Tribunal finds that the criteria for "ninety-day drivers" was a minimum requirement to enable the service to operate, where the respondent's business required the franchise to operate therein, in providing the wider service to the customer, and was a genuine term for business needs.
>
> 104. The Tribunal finds that in these circumstances, where the franchisee was contractually entitled to provide such individuals of their choice as drivers, despite the claimants' practices of utilizing other ODFs and ODFs' drivers, this does not detract from the true terms of the Franchise Agreement, enabling the franchisee to substitute personal performance to a person of their choice, subject to, as the Tribunal has found, the minimum requirements necessary for the service to be delivered to customers, and was not such as to amount to a fetter thereon.
>
> 105. With respect the distinction sought to be drawn between a Franchise Agreement entered into where the franchisee is a limited company, and franchisees who are individuals, the Tribunal finds this to be without merit. The agreement entered into is

> an agreement establishing a franchise, where the agreement makes no distinction between the entities engaging therein with the respondent. The terms and operation of the franchises have no distinction, which operation are not challenged by the claimants as not then evincing a full ability of substitution.
>
> 106. The Tribunal accordingly finds that the claimants, Mr. Stojsavljevic and Mr. Turner, were not employees for the purposes of section 230 of the Employment Rights Act, neither were they workers as defined by section 230(3)(b) of the Employment Rights Act. Neither was Mr Turner a worker within the extended meaning defined by section 43K(1) of the Employment Rights Act 1996 or otherwise in employment for the purposes of section 83(2)(a) of the Equality Act 2010; the claimants having the right to substitute drivers under the franchise agreement by which they were engaged, which on the claimants being the specified driver under their respective Franchise Agreement, this was a decision solely within the remit of the claimants who were free to nominate, as they chose.'

The reference to 'ninety-day drivers', at paragraph 103, was to the temporary cover drivers to which reference had been made at paragraph 65 of the Tribunal's Reasons.

The Claimants' grounds of appeal

9. In summary, by their three grounds of appeal the Claimants contend that the Tribunal:

9.1. misconstrued the parties' contractual obligations when finding that the terms of the Franchise Agreement entitled the franchisee to perform the Services by a substitute of his own choosing, by relying upon the arrangements for ninety-day cover drivers (ground one);

9.2. in concluding that there was an unfettered right of substitution, failed to take account of section 18 of the Operating Manual, which it ought to have found to have been incorporated in the Franchise Agreement (ground two); and

9.3. failed to take account of relevant matters, or give adequate reasons, when finding that the Franchise Agreement represented the genuine agreement between the parties (ground three).

The parties' submissions

The Claimants' submissions

Ground Three

10. Ms Williams began her submissions by addressing ground three, on the basis that the Tribunal's starting point ought to have been a consideration of the true agreement between the parties. She drew attention to the Claimants' pleaded case, to the effect that the Franchise Agreement had not reflected the reality of the situation, or the parties' relationship. All parties had acknowledged that, in all the circumstances, resolution of the issue of personal performance would be determinative of the Claimants' status. It was the Claimants' position that the Franchise Agreement had not provided for an unfettered right of substitution; a driver franchisee could only access a substitute driver from the Respondent's existing pool of drivers; akin to shift-swapping or shift cover.

11. At paragraphs 28 and 44 of their joint witness statement before the Tribunal, the Claimants had stated:

> '28. We operated as an "owner driver" which meant that we performed the work or services personally. The operating manual said that DPD had to be informed of the identity of all Drivers. A copy of the driving licence for each driver had to be supplied. An application form had to be completed. We were not allowed to use the services of any Driver until the completed application form had been returned to DPD and a formal letter of authorisation issued to that Driver.
>
> …
>
> 44. There was only a limited power to substitute to other internal DPD drivers. This was limited to days when, by reason of illness, holiday, or otherwise, the driver was unable to do the work.'

12. By the time of the hearing before the Tribunal, submitted Ms Williams, the Respondent had ceased to challenge mutuality of obligation, contrary to clause 2 of the Franchise Agreement. Thus, it was already clear that the Franchise Agreement did not reflect the true position, in at least one respect, which ought to have put the Tribunal 'on alert'.

13. The Tribunal erred in confining its analysis to the terms of the Franchise Agreement, rather than determining the actual agreement by examining all the circumstances, as required by **Autoclenz Ltd v Belcher and others** [2011] ICR 1157, SC. The Claimants had alleged that the Franchise Agreement did not reflect the true agreement between the parties, yet the Tribunal made no factual finding regarding the parties' competing positions as to whether cover drivers had to be drawn from those already approved by the Respondent and could only be substituted when the owner driver franchisee was unable to work. Its analysis had begun and ended with the express wording of the Franchise Agreement, albeit that, curiously, at paragraphs 102 and 104 of its Reasons, it went on to read terms into that agreement without identifying the legal basis upon which it considered it appropriate to do so.

14. There were four points to be made in answer to the Respondent's contention that the Tribunal had found that the Franchise Agreement had not obliged the Claimants to carry out the contractual duties themselves:

14.1. No such finding had been made: the high watermark was its finding at paragraph 101, but that was to be read subject to its further findings at paragraphs 102 and 104;

14.2. In particular in the opening four lines of paragraph 102, the Tribunal accepted the Claimants' submissions to the effect that the degree of control exercised by the Respondent over its permanent drivers was beyond that suggestive of an individual carrying on business in his or her own capacity;

14.3. The Tribunal had ignored clause 18 of the Operating Manual, which applied to all drivers (of whichever species); and

14.4. Reliance on the express terms of the Franchise Agreement was circular; in the absence of a prior conclusion as to whether the latter reflected the true agreement between the parties, it cannot afford the basis for a conclusion as to the nature of the entitlement to substitute other drivers.

15. If ground three were well-founded, the matter would need to be remitted to a differently constituted Tribunal in order that the relevant findings of fact could be made.

Ground One

16. Ms Williams contended that the starting point for ground one was the identification of the matters which had been decided by paragraphs 102 and 104 of the Tribunal's reasons. The Claimants' position was that the Tribunal's decision rested on the position identified for temporary cover drivers only. If that were right, it was necessary to identify the source of that (implicitly and necessarily) contractual entitlement. The Tribunal had not done so and the Franchise Agreement itself referred to a single definition of Driver which did not distinguish between different types of driver; there was no separate class of cover drivers who were subject to less extensive controls. The Tribunal's decision derived from the franchisee's unfettered right to substitute temporary cover drivers, but no basis upon which a term could be implied into the Franchise Agreement so as to confer such a right had been identified. In any event, the importation of such a clause ran contrary to the entire agreement clause, such that the Tribunal ought to have declined to give it effect (see **MWB Business Exchange Centres Ltd v Rock Advertising Ltd** [2019] AC 119, at paragraph 14). It also ran contrary to clause 18 of the Operating Manual (if incorporated – see ground two) and could not be implied for that reason. Furthermore, a term could be implied into a detailed contract only where that was necessary to give the contract business efficacy, or was so obvious as to go without saying: **Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another** [2016] AC 742, SC. This was not such a case and no reasons had been given by the Tribunal for any conclusion to the contrary. The Claimants' use of temporary cover drivers (Reasons, paragraph 71), on occasions, did not equate with their unfettered contractual right to do so, in particular where the express terms of the parties' agreement provided to the contrary.

Ground Two

17. Ms Williams contended that references to the Operating Manual in the Franchise Agreement were legion. It was a document 'heavily embedded' within the latter, as was apparent, in particular, from clauses 6; 8.1.2; 12 and 15. Clause 8.1.2 required that the Business be operated strictly in accordance with the Operating Manual and clause 15 made it clear that the Franchise Agreement could be terminated with immediate effect for the breach of any condition or obligation contained in the Operating Manual, in the circumstances specified[2]. Those clauses indicated that, at least, section 18 of the Operating Manual had been incorporated into the Franchise Agreement, whether or not all sections of the manual were apt for incorporation. Whilst recording its existence (at paragraph 50 of its Reasons), the Tribunal had at no point returned to consider its meaning and significance. The Claimants' placed particular reliance on paragraph 18(c), which made clear that the franchisee could not use the services of any Driver until the Respondent had issued a formal letter of authorisation in relation to that Driver. There was no qualification of the circumstances in which such authorisation could or would be withheld by the Respondent, meaning that the contractual right to use a substitute Driver was not unfettered. Section 18 applied to all Drivers (be they permanent or temporary), as defined in the Franchise Agreement.

The law

18. In support of the submissions summarised above, Ms Williams referred to the following authorities. She submitted that **Autoclenz** provided an example of an express substitution clause which had been held not to reflect the reality of the parties' bargain. At paragraphs 18 to 20, Lord Clarke of Stone-cum-Ebony JSC, had held:

> '18. As Smith LJ explained in the Court of Appeal at para 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgment of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515C:
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> > "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

[2] By way of example, submitted Ms Williams, sections 9; 11; 12 and 16 of the Operating Manual themselves made clear that their breach could result in termination of the Franchise Agreement, reinforcing the Claimants' position that the manual was intended to have contractual effect.

> 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. … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

19. Three further propositions are not I think contentious: (i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service". (ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express & Echo Publications Ltd v Tanton* ("Tanton") [1999] ICR 693, per Peter Gibson LJ at p 699G. (iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at p 697G.

20. The essential question in each case is what were the terms of the agreement….'

19. Ms Williams emphasised the requirement that a right of substitution must be genuine. She further relied upon Lord Clarke JSC's analysis of the critical difference between contracts relating to work or services and commercial contracts agreed between parties of equal bargaining power, culminating, at paragraph 35, with the following dictum:

> '35. So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description.'

20. Ms Williams submitted that the approach to be taken to written agreements was clear from **Uber B.V. and others v Aslam and others** [2021] UKSC 5, albeit that personal performance was not in issue in that case (which had not been decided at the date of the preliminary hearing in these proceedings). **Uber** expanded upon the ratio of **Autoclenz** and supported the submission that a 'reverse **Autoclenz**' approach should not be applied. By that phrase, Ms Williams referred to the implication of terms to the benefit of the putative employer, which it could have chosen to incorporate within the written agreement but which it had not in fact incorporated. The position was encapsulated, she submitted, by paragraph 85 of **Uber**:

> '85. ... The *Autoclenz* case shows that, in determining whether an individual is an employee or other worker for the purpose of the legislation, the approach endorsed in the *Carmichael* case is appropriate even where there is a formal written agreement (and even if the agreement contains a clause stating that the document is intended to record the entire agreement of the parties). This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.'

21. Ms Williams submitted that, whilst she did not criticise the Tribunal for taking the contract as the starting point (having regard to the law as then understood), she did criticise it for treating the contract as both the start and end points. Further, **Uber** could not be read as authority for increasing the scope of employer protection; it created no gateway through which putative employers could seek to rely upon terms which they had not included in the written contract. The bases upon which a term could be implied were as set out in **Marks & Spencer Plc**, at paragraphs 18 and 21. Where business necessity was invoked, *'it may well be that a more helpful way of putting* [it] *is …that a term can only be implied if, without the term, the contract would lack commercial or practical coherence'*[3].

22. Ms Williams submitted that a helpful summary of the applicable principles was to be found at paragraph 84 of the judgment of the Court of Appeal, in **Pimlico Plumbers Ltd v Smith** [2017] ICR 675, per Sir Terence Etherton MR:

> '84. … In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and

[3] Per Lord Neuberger of Abbotsbury PSC, at paragraph 21.

> degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'

23. In Ms Williams' contention, the instant case falls within the fifth principle. Had the Respondent's intention been to limit the right of substitution only to the extent contemplated by the fourth principle, that could have been spelled out in the Franchise Agreement. In this connection, paragraphs 87 and 89 of the same judgment were instructive and demonstrated that standard contractual principles applied to the implication of a term:

> '87. Unlike each of those cases cited above in which it has been held that an express right of substitution or delegation was incompatible with an obligation of personal performance, within the meaning of the relevant statutes, neither the 2009 Agreement nor the Manual contains an express right of substitution or delegation.
> …
>
> 89. There is no scope for an implied term conferring an unfettered contractual right to substitute another operative of PP. In the light of the factual findings of the ET about the practice of substitution, such a right was not so obvious that it went without saying; nor was such a right necessary to give the 2009 Agreement commercial or practical coherence: *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.'

24. Ms Williams also pointed to the dictum of Underhill LJ, at paragraph 130: *'The only right, if it was one, which would be inconsistent with an obligation of personal performance is...the right to pass on an entire job…'*, emphasising his further conclusion that, *'The fact that an operative has help in doing the work which he has contracted to do does not mean that he is not also working.'* In **Pimlico Plumbers**, she observed, Mr Smith had been held to have been a worker at every stage of the proceedings, notwithstanding the tribunal's finding that the company's operatives could swap jobs.

25. In the Supreme Court, the status of the company manual had been considered at paragraph 19 of the judgment of Lord Wilson [2018] ICR 1511, 1519:

> '19. The manual was incorporated into the second agreement by virtue of the term recited at para. 18(f). It obliged him to comply with the manual "While providing the services". My view is that the quoted words are apt to have made the manual govern all aspects of Mr Smith's operations in relation to Pimlico; in any event, however, the case proceeded before the tribunal on the basis that even after 2009 the manual remained as much a part of the contract as, on any view, it had previously been…'

Paragraph 18(f) had recorded the following term of the second agreement: *'…While providing the services, you also agree to comply with all reasonable rules and policies of the company from time to time and as notified to you, including those contained in the company manual'*. In the instant case, submitted Ms Williams, there were many more express terms on which the Claimants relied for incorporation of the Operating Manual.

26. Ms Williams further relied upon paragraphs 20 to 25 of Lord Wilson's judgment (with emphasis added), under the heading *'Personal Performance?'*:

> '20. If he was to qualify as a limb (b) worker, it was necessary for Mr Smith to have undertaken to "perform personally" his work or services for Pimlico. An obligation of personal performance is also a necessary constituent of a contract of service; so decisions in that field can legitimately be mined for guidance as to what, more precisely, personal performance means in the case of a limb (b) worker.
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> 21. *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 was a clear case. Mr Tanton contracted with the company to deliver its newspapers around Devon. A term of the contract provided: "In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services." The Court of Appeal held that the term defeated Mr Tanton's claim to have been employed under a contract of service.
>
> 22. Nevertheless, in his classic exposition of the ingredients of a contract of service in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, Mackenna J added an important qualification. He said at p 515: "Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be ..." He cited Atiyah's *Vicarious Liability in the Law of Torts* (1967), in which it was stated at p 59 that "it seems reasonably clear that an essential feature of a contract of service is the performance of at least part of the work by the servant himself".
>
> 23. Where, then, lie the boundaries of a right to substitute consistent with personal performance?

> 24. Mr Smith's contracts with Pimlico, including the manual, gave him no express right to appoint a substitute to do his work. There were three passing references in the manual to his engagement of other people, of which the most explicit was the reference, quoted at para 19(f) above, to his requiring "assistance". The evidence was indeed that some of Pimlico's operatives were accompanied by an apprentice or that they brought a mate to assist them. But assistance in performance is not the substitution of performance. Equally the tribunal found that, where a Pimlico operative lacked a specialist skill which a job required, he had a right to bring in an external contractor with the requisite specialism. But again, since in those circumstances the operative continued to do the basic work, he is not to be regarded as having substituted the specialist to perform it.
>
> 25. But the tribunal found that Mr Smith did have a limited facility to substitute. For he had accepted that, if he had quoted for work but another more lucrative job had subsequently arisen, he would be allowed to arrange for the work to be done by another Pimlico operative. The tribunal rejected Pimlico's contention that there was a wider facility to substitute and concluded that there was no unfettered right to substitute at will. The Court of Appeal interpreted the tribunal's findings to be that Mr Smith's facility to substitute another Pimlico operative to perform his work arose not from any contractual right to do so but by informal concession on the part of Pimlico. In circumstances in which the contract provided no express right to substitute and included a clause that it contained the entire agreement between the parties, there is much to be said for such an analysis. In the absence of escape from it by the construction of a collateral contract, an "entire agreement" clause is likely to be effective in preventing extraneous contractual terms from arising: *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, para 14. But the Court of Appeal's analysis does not sit easily with some of the words chosen by the tribunal to describe the facility; and in what follows, I will assume (without deciding) that it is the product of a contractual right.'

27. Lord Wilson's conclusion on the point, which Ms Williams contended to be equally applicable in this case, was set out at paragraph 34:

> '34. The tribunal was clearly entitled to hold, albeit in different words, that the dominant feature of Mr Smith's contracts with Pimlico was an obligation of personal performance. To the extent that his facility to appoint a substitute was the product of a contractual right, the limitation of it was significant: the substitute had to come from the ranks of Pimlico operatives, in other words from those bound to Pimlico by an identical suite of heavy obligations. It was the converse of a situation in which the other party is uninterested in the identity of the substitute, provided only that the work gets done. The tribunal was entitled to conclude that Mr Smith had established that he was a limb (b) worker – unless the status of Pimlico by virtue of the contract was that of a client or customer of his.'

28. Regarding the earlier caselaw on personal performance, to some of which Lord Wilson had referred, there were two general points to be made, submitted Ms Williams: (1) in those cases in

which there had been found to have been no obligation of personal performance, the contract had represented the parties' true bargain; and (2) there was a distinction to be drawn between those cases which had been held to fall within Sir Terence Etherton MR's fourth principle in **Pimlico Plumbers**, in which the extent of the right had been clearly expressed, and the wording with which this case is concerned. With those points in mind, Ms Williams reviewed the earlier caselaw.

29. Ms Williams submitted that, in **Tanton**, unlike the position in this case, there had been an express limitation on the right to use a relief driver; the relevant clause, had provided, *'In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services.* In a supplementary schedule, the following further provision appeared, '*In the event that the contractor provides a relief driver, the contractor must satisfy the company that such a relief driver is trained and is suitable to undertake the services'.* The Court of Appeal's conclusion, at page 698C, was, *'On its face, clause 3.3 enabled the applicant, if he were at any time unwilling to perform the specified services personally, not to perform those services himself, but to obtain the performance of the services through an acceptable substitute. That is a remarkable clause to find in a contract of service…'*.

30. In **MacFarlane and another v Glasgow City Council** [2001] IRLR 7, EAT, the tribunal had found the relevant obligation to have been [3], *'If for any reason, one of the applicants was unable to take a class she would contact a replacement from the register of coaches maintained by the respondents and arrange for her class to be covered by a member on the register.'* The EAT observed, *'It is to be noted that it was the applicant who was enabled to select the replacement coach rather than the council, but that the substitute had to come from the council's list. The arrangement for the replacement was made by the applicant, not the council. It is to be noted, too, that this provision for substitution would only be available where an applicant was "unable" to take a class, albeit that the inability could be "for any reason"'.* **Tanton** was distinguished at paragraphs 11 and 13:

> '11. The *Tanton* case is in our judgment distinguishable from that at hand for at

> least the following cumulative reasons. Firstly, the Appellants in our case could not simply choose not to attend or not to work in person. Only if an Appellant was unable to attend could she arrange for another to take her class. Secondly, she could not provide anyone who was suitable as a replacement for her but only someone from the Council's own register. To that extent the Council could veto a replacement and also could ensure that such persons as were named on the register were persons in whom the Council could repose trust and confidence. Thirdly, the Council itself sometimes organised the replacement (without, it seems, protest from the Appellant concerned that it had no right to do so). Fourthly, the Council did not pay the Appellants for time served by a substitute but instead paid the substitute direct. There is no finding as to what the substitutes were paid nor that they were paid the same as the Appellants nor that the Appellants had any say in what the substitutes were paid. These four grounds in our view provide ample reasons for the *Tanton* case to be distinguished but unfortunately only the last of the four was considered by the Tribunal in our case.
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> …
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> 13. The relevant clause in *Tanton* was extreme. The individual there, at his own choice, need never turn up for work. He could, moreover, profit from his absence if he could find a cheaper substitute. He could choose the substitute and then in effect he would be the master. Properly regarded, *Tanton* does not oblige the Tribunal to conclude that under a contract of service the individual has, always and in every event, however exceptional, personally to provide his services. The Tribunal, in a passage we have already cited, said:-
>
> "The last mentioned case [Tanton] makes it clear that a contract of employment must necessarily contain an obligation on the part of the employee to provide his services personally."
>
> That citation is justified by *Tanton* as that very sentence appears in *Tanton's* paragraph 30 but we have no reason to think that the Court of Appeal was there meaning to depart from the observation of MacKenna J in *Ready Mixed Concrete* as to limited delegation. Indeed, that very passage had been quoted by Peter Gibson LJ only three paragraphs earlier in *Tanton*. *Tanton* indicates that if a contract contains a provision that the individual need not perform any services personally then it cannot be a contract of service – see paragraph 32 – and, so regarded, it does not deal with a limited ability to delegate such as that in the case before us. *Tanton* was a case where the individual could at his own will perform his contract by sending along someone else. Our case, by contrast, is a case in which, in limited circumstances, it would not be a breach of the individual's contract if, the individual being unable to attend, she arranged for another person approved by the employer to attend in her place. The Tribunal erred in law in regarding *Tanton* as driving them to the conclusion which they reached. We are therefore entitled to, and do, set aside their decision.'

Ms Williams submitted that the provision under consideration in **MacFarlane** was analogous to section 18 of the Operating Manual in this case and fell to be distinguished from a **Tanton**-style clause, for the same reasons.

31. In **Premier Groundworks Ltd v Jozsa** [2009] 3 WLUK 425, EAT, the clause under consideration had provided, *'The Supplier shall have the right to delegate the performance of Services under this Agreement to other persons whether or not his employees provided that the Firm is notified in advance and provided that any such person is at least capable experienced and qualified as the Supplier himself".* The EAT's conclusions were set out at paragraphs 13, 16 and 19:

> 13. In our view, those conditions do not prevent Clause 13 being regarded as a right to delegate the performance of the agreement and to nullify any suggestion that the claimant is a "*worker*". In reaching this conclusion we are bound by and we follow the decision and the reasoning of the Court of Appeal in **Express and Echo Publications Ltd v Tanton** [1999] IRLR 367. In that case, there was a contract between the parties which provided that:-
>
> **"3.3 In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services".**
>
> …
>
> 16. It is noteworthy that there is a crucial similarity between that case and the present one because in both cases the person claiming to be an employee or a worker could for any reason delegate his functions subject to the other party being satisfied about the qualifications of that other person. Indeed in both cases there was no need for the person said to be an employee or a worker ever to do the work even if he was able to do it.
>
> …
>
> 19. In the present case, the claimant, like the claimant in the **Tanton** case, could of his own will and at his own expense perform his contract by sending someone else along. So the present case is distinguishable from the facts in **MacFarlane** because in that case unlike the present case, first the claimants in that case "*could not simply choose not to attend or not to work in person*" [11] and second the substitutes would be paid directly by the entity for whom the work was performed and not by the person for whom the substitute was standing in.

32. The above analysis had followed the employment tribunal's conclusion that the relevant agreement had not been a sham (to use pre-**Autoclenz** language). Any similar finding in the instant case could not be upheld, submitted Ms Williams, because it had not followed an **Autoclenz** analysis; the Tribunal had simply accepted the Franchise Agreement to represent the true bargain between the parties.

33. Ms Williams next turned to **UK Mail Ltd v Creasey** [2012] 9 WLUK 438, EAT, in which the clause in question had provided, *'You may at any time provide the Services through the Personnel on condition that the Personnel are approved by us in writing prior to such person commencing any of the Services (such consent not to be unreasonably withheld) and where such approval is provided, you agree to procure that the Personnel will be bound by the same obligations as you under this Agreement. For the avoidance of doubt, we are reserving the right to approve any Personnel simply to ensure that they have appropriate driving qualifications and that they will not adversely affect Mail integrity…"*. The employment tribunal had found that the contract represented the parties' true agreement. At paragraph 24, the EAT held:

> '24. The critical point is that there is no fetter on Mr Creasey's right to invoke the alternative provider in the agreement and have the work done by the Personnel. That there are conditions on who that person is – that is, skill, qualifications and passing the tests the Respondent is recorded as having in paragraph 28 of the Judgment – does not mean that Mr Creasey's right to send him or her along is fettered. Unlike the majority of the authorities to which I have been referred, there is no requirement that the Claimant be unable to perform his duties or that he is sick; the simple issue is one of choice for him. That as a matter of fact for 10 or 15 years he did himself do the work does not change the nature of the right he has to send someone else. That others did choose to do so, the 7 or so of the group of 56, does not affect that either; it simply illustrates that some people took advantage of their right to provide a substitute and most did not. The starting point, therefore, is the contract itself; the contract provides an unfettered right, as I construe it, to send someone else, provided that they have the qualifications.'

34. Ms Williams submitted that the right of substitution in the instant case could have been similarly drafted. Acknowledging that no reference had been made in **Creasey** to the words *'such consent not to be unreasonably withheld'*, that wording had gone to the heart of the EAT's reasoning because it was that which had conferred the unfettered right of substitution, she contended. The fact, if it be the case here, that, in practice, the Respondent did not unreasonably withhold consent would not entitle the Tribunal to imply such wording, to the Respondent's benefit. The practice adopted was relevant only to a consideration of whether the express wording of the Franchise Agreement reflected the parties' true bargain.

35. The clauses under consideration in **Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)** [2018] IRLR 84, CAC, a case concerned with union recognition, had provided [59]:

> '8.1 Deliveroo recognises that there may be circumstances in which you may wish to engage others to provide the Services. Deliveroo is not prescriptive about this and you therefore have the right, without the need to obtain Deliveroo's prior approval, to

> arrange for another courier to provide the Services (in whole or in part) on your behalf. This can include provision of the Services by others who are employed or engaged directly by you; however, it may not include an individual who has previously had their Supplier Agreement terminated by Deliveroo for a serious or material breach of contract or who (while acting as a substitute, whether for you or a third party) has engaged in conduct which would have provided grounds for termination had they been a direct party to a Supplier Agreement. If your substitute uses a different vehicle type to you, you must notify Deliveroo in advance.
>
> 8.2 It is your responsibility to ensure your substitute(s) have the requisite skills and training, and to procure that they provide the warranties at clause 5 above to you for your benefit and for Deliveroo's benefit. In such event you acknowledge that this will be a private arrangement between you and that individual and you will continue to bear full responsibility for ensuring that all obligations under this Agreement are met. All acts and omissions of the substitute shall be treated as though those acts and/or omissions were your own. You shall be wholly responsible for the payment to or remuneration of any substitute at such rate and under such terms as you may agree with that substitute, subject only to the obligations set out in this Agreement, and the normal invoicing arrangements as set out in this Agreement between you and Deliveroo will continue to apply.'

Ms Williams pointed to the breadth of those clauses, whereby substitution did not require Deliveroo's approval. The CAC's rationale for concluding that Deliveroo riders were not workers, for the purposes of section 296 of the **Trade Union and Labour Relations (Consolidation) Act 1992**, or 230(3)(b) of the **ERA**, was set out at paragraphs 100 to 103:

> '100. The central and insuperable difficulty for the Union is that we find that the substitution right to be genuine, in the sense that Deliveroo have decided in the New Contract that Riders have a right to substitute themselves both before and after they have accepted a particular job; and we have also heard evidence, that we accepted, of it being operated in practice. Deliveroo was comfortable with it. We did not find the Deliveroo witnesses to be liars. One answer to the substitution conundrum was given by Mr Munir when he eventually explained that he was engaged in subcontracting for a 15-20% cut.
>
> 101. In light of our central finding on substitution, it cannot be said that the Riders undertake to do personally any work or services for another party. It is fatal to the Union's claim. If a Rider accepts a particular delivery, their undertaking is to either do it themselves in accordance with the contractual standard, or get someone else to do it. They can even abandon the job part way having only to telephone Rider Support to let them know. A Rider will not be penalised by Deliveroo for not personally doing the delivery her or himself, provided the substitute complies with the contractual terms that apply to the Rider.
>
> 102. Some Riders do few and intermittent jobs for Deliveroo but many Riders do as much work as possible insofar as they can given any other commitments, and place themselves as close as possible to restaurants so they will be offered work by the Deliveroo algorithm. They rely on it as their main source of income. But that is not the applicable test under s.296 of the Act. The delivery has to be undertaken by a person,

> however it does not have to be the Rider that personally performs it: Riders are free to substitute at will. We also appreciate the high level of trust required in the substitute by the Rider – both because the substitute has to have either the Rider's phone, or Deliveroo passwords to download the Rider's App onto her or his phone, and because of the contractual commitments borne by the Rider on behalf of her substitute (particularly in light of Deliveroo's right to end the contract for any reason on one week's notice), which limits the attractiveness of sub-contracting, coupled with the lack of incentive for doing so. But that does not make the substitution provisions a sham. The factual situation in this case is very different from, for example, that of Uber private hire drivers, or Excel or City Sprint.
>
> 103. It is therefore unnecessary to dissect the other features of the contractual relationship between Deliveroo and its Riders: they are insufficient to compensate in the Union's favour in light of the substitution finding. Nor do the facts of this case require a more detailed analysis of whether the subtly different wording of s.296 to the worker definition in Employment Rights Act 1996 amount to a distinction without a difference. The Panel was concerned about public safety and food hygiene and the way the New Agreement seeks to place all risk and responsibility on the shoulders of the Riders... But the absence of control and supervision of substitutes and the non-delegable health, safety and food hygiene obligations on Deliveroo, does not mean that the substitution provisions are not genuine. By allowing an almost unfettered right of substitution, Deliveroo loses visibility, and therefore assurance over who is delivering services in its name, thereby creating a reputational risk, and potentially a regulatory risk, but that is a matter for them. The Riders are not workers within the statutory definition of either s.296 TULR(C)A or s230(3)(b) Employment Rights Act 1996.'

36. Ms Williams submitted that the position in **Deliveroo** was very different from that in the present case. Refusing permission for judicial review of the relevant aspect of that decision[4] [2018] IRLR 914 (Admin), Simler J (as she then was) had held [25]:

> '25. The approach to the question of worker status accordingly remains that the contractual terms are the critical starting point and that an obligation of personal performance is the sole test and is required. A right to substitute may be inconsistent with personal performance but is not necessarily so. Where the right to substitute is significantly limited, it is unlikely to be inconsistent with the obligation of personal performance. On the other hand, however, a general right of substitution in which the employer party is uninterested in the identity of the substitute provided, only that the work gets done, will negate an obligation of personal service.'

Accepting that the question was one of degree, Ms Williams submitted that there was a marked contrast between the position in **Deliveroo** and the position in this case, in which the Respondent

[4] Simler J permitted a separate ground for judicial review to proceed, which is not material to the instant appeal. The substantive claim was dismissed by Supperstone J on 5 December 2018, the appeal from whose judgment was dismissed by the Court of Appeal on 24 June 2021.

was interested in the identity of the substitute and had the right to withhold authorisation.

The Respondent's submissions

37. Mr Galbraith-Marten's starting point was the principle set out at paragraphs 118 and 120 of **Uber**:

> '118. It is firmly established that, where the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual as an employee (or a worker in the extended sense) or as an independent contractor is to be regarded as a question of fact to be determined by the first level tribunal. Absent a misdirection of law, the tribunal's finding on this question can only be impugned by an appellate court (or appeal tribunal) if it is shown that the tribunal could not reasonably have reached the conclusion under appeal: see *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 384-385; *Clark v Oxfordshire Health Authority* [1998] IRLR 125, paras 38-39; the *Quashie*[5] case, para 9.
>
> …
>
> 120. It does not matter in these circumstances that certain points made by the employment tribunal in the reasons given for its decision are open to criticism, nor is it necessary to discuss such particular criticisms, since none of the errors or alleged errors affects the correctness of the tribunal's decision. I agree with the majority of the Court of Appeal that there are some points made by the employment tribunal which are misplaced (see in particular para 93 of the Court of Appeal's judgment). I also agree with the analysis set out at paras 96 and 97 of that judgment of the 13 considerations on which the tribunal principally based its finding that drivers work for Uber. I agree with the majority of the Court of Appeal that those considerations, viewed in the round, provided an ample basis for the tribunal's finding.'

38. To similar effect, he relied upon the well-known dictum of Lord Denning MR, in **Hollister v National Farmers' Union** [1979] ICR 542, 552:

> '…In these cases Parliament has expressly left the determination of all questions of fact to the industrial tribunals themselves. An appeal to the appeal tribunal lies only on a point of law: and from that tribunal to this court only on a point of law. It is not right that points of fact should be dressed up as points of law so as to encourage appeals. It is not right to go through the reasoning of these tribunals with a toothcomb to see if some error can be found here or there — to see if one can find some little cryptic sentence. I would only repeat what Lord Russell of Killowen said in *Retarded Children's Aid Society Ltd. v. Day [1978] I.C.R. 437*, 444:
>
> "I think care must be taken to avoid concluding that an experienced industrial tribunal by not expressly mentioning some point or breach has overlooked it, and care must also be taken to avoid, in a case where the Employment Appeal Tribunal members would on the basis of the merits and the oral evidence have taken a different view from

[5] **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 999, CA

> that of the industrial tribunal, searching around with a fine toothcomb for some point of law."'

It was Mr Galbraith-Marten's position that the majority of the Claimants' case constituted the approach deprecated by such authorities.

39. In overview, submitted Mr Galbraith-Marten, the Tribunal's essential finding was that the Franchise Agreement had been a genuine commercial agreement; not a sham used to describe what had been, in truth, an employment relationship. The Tribunal distinguished between the franchise holder and any driver supplied by the franchisee. Franchisees were able to substitute personal performance with performance by a nominated driver of their choice (Reasons, paragraph 104). That finding reflected the, largely unchallenged, evidence of the Respondent to the effect that franchisees were not required to carry out any work themselves, recited at paragraphs 60; and 68 to 70 of the Tribunal's Reasons:

> 60. With regards training, the tribunal was referred to the franchisee Mr. Diyan Nikolov, based at the Southall Depot, holding three franchises and using his own vehicles, driving one route himself and using two further drivers who he had himself trained, and did not take advantage of the respondent's Business Start Training facility, in respect of those drivers.
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> …
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> 68. Each Franchise Agreement broadly equates to a route. Franchisees may operate multiple routes, each then having its own separate Franchise Agreement. Within the Southall Depot, there were forty[6] Owner Driver Franchise Agreements operating thirty-three multiple routes. In respect hereof, the Tribunal was referred to Diyan Courier Services Limited, operating three routes from the Southall Depot. The claimants have challenged this position arguing that Diyan Courier Services Limited are a company whereas the claimants are individuals. The Tribunal notes that the Franchise Agreement is the same in respect of both the claimants and Diyan Courier Services Limited; the respondent draws no distinction between them, their respective relationships governed by the single franchise agreement.
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> 69. With respect franchisees using and operating multiple routes and drivers, the Tribunal was further referred to a number of franchisees holding numerous franchise agreements and engaging numerous drivers, one of which being an individual called Mr. Khan, who operates four routes for the respondent, leasing two vehicles and supplying two vehicles of his own. The Facebook entry for Mr. Khan's company (Mr.

[6] This should have read '14'.

> Khan being the sole Director), depicts DPD Drivers in DPD uniform, identifying some twenty drivers. The claimants do not challenge this fact; the franchises being held with Mr. Khan as an ODF.
>
> 70. The Tribunal was also informed of the ODF, Harpreet Singh Sehgal, operating his own courier company called Sant Couriers Limited, holding six Franchise Agreements with the respondent, for which he contracts with self- employed drivers on all routes, using a mixture of permanent and temporary (ninety day) drivers. The Tribunal was informed that Mr. Harpreet Singh Sehgal, only drives if his drivers were unavailable to do so. Mr. Harpreet Singh Sehgal had four of his own vehicles and leased three vehicles from the respondent, and in respect of which, the respondent states that, he also provided courier services to their competitors; APC and Hermes. The respondent has not been challenged in respect hereof.'

40. Mr Galbraith-Marten also pointed to the unchallenged evidence of Mr Dan Turner, Associate Director of the Respondent, responsible for the ODF scheme and recruitment of ODFs in all of its depots, at paragraph 53.7.2 of his witness statement:

> 'Some 380 ODFs are currently party to multiple ODF Agreements and service those agreements by providing a number of drivers. Others provide their services through registered companies. You can see from page 265 of the bundle that, as at 14 May 2018, we had 21 ODFs recorded as having registered a company at the Southall depot. There are many more registered companies nationally (pages 266-290). These are only the ones that have been notified to us and so there may well be many more than this.'

41. Before the Tribunal, the Claimants had not contested the Respondent's evidence as to the approach taken by other franchisees, said Mr Galbraith-Marten. Their case had been that, to the Respondent's knowledge, they, personally, had never intended to use substitute drivers and that the way in which other franchisees behaved was irrelevant. The Tribunal's approach to its findings and conclusions reflected that case.

42. Thus, submitted Mr Galbraith-Marten, unless the Claimants can succeed on ground three of their appeal, the question is whether the Franchise Agreement was properly construed by the Tribunal, which the EAT is itself in a position to determine: the central question in this appeal is whether the Claimants were obliged to provide personal service. It is clear that the Tribunal was right in its construction of the Franchise Agreement and in its related conclusion that they were not.

43. In construing the Franchise Agreement, Mr Galbraith-Marten's primary submission was that the Operating Manual was not incorporated. In employment contracts, it was not unusual for employees to be instructed to comply with the employer's policies, works rules etc, without such documents thereby being incorporated. The initial contract in **Pimlico Plumbers** had expressly incorporated the company manual, as was clear from paragraphs 6 and 7 of the judgment of Sir Terence Etherton MR, in the Court of Appeal. Paragraph 109 of the same judgment made clear that neither party had suggested that the manual had ceased to apply when the later agreement had come into being. Thus, incorporation had not been an issue before the Supreme Court, and no weight validly could be placed upon the observation at paragraph 19 of Lord Wilson's judgment, made almost in passing. The position in the instant case was very different.

44. It was also instructive to consider the Operating Manual itself, which, as the foreword comprising section 1 made clear, did not purport to have contractual effect: *'…In keeping with our commitment to communicate proactively with all GeoPost Franchisees we have produced this Manual which will provide you with the information and guidance you need, covering the most significant aspects of our Franchise operation…'* (emphasis added). The manual contained many provisions which were not apt for incorporation into a contractual document, submitted Mr Galbraith-Marten, such as the way in which a driver ought to respond to a robbery, or aggravated robbery (section 7). It was noteworthy that the Claimants placed reliance upon emboldened wording such as that which appeared within section 12 of the manual: '*NOTE: Non-compliance by you with any of the requirements set out in this Section may result in termination of your Vehicle and Equipment Leasing Agreement and/or Franchise Agreement'*, yet no such wording appeared within section 18. Thus, if and in so far as any sections of the Operating Manual were apt for incorporation in the Franchise Agreement, submitted Mr Galbraith-Marten, section 18 was not amongst them. Furthermore, he contended, nothing in the Franchise Agreement itself indicated that section 18 had been incorporated. The best that Ms Williams could do was to point to clause 15, which required the breach of a condition

or obligation, which section 18 was not. Clause 8.1.2 was no different from a typical clause in a contract of employment which provides that the employee is obliged to comply with the policies and procedures of the company. The breach of that obligation is constituted in the failure to comply with the policy; but such an obligation does not lend the policy itself contractual status, or result in its incorporation within the contract of employment, nor had any such argument been advanced by the Claimants before the Tribunal. The Respondent accepted that there was a process by which drivers were authorised; a process which was entirely consistent with the express term of the Franchise Agreement, in which 'Driver' was defined. It was implicit in that definition that the Respondent was entitled to check that any substitute driver met all specified conditions.

45. Mr Galbraith-Marten submitted that the Respondent acknowledged that temporary cover drivers were a sub-set of Drivers and that there was no contractual distinction between species of driver. As a matter of law, it mattered not whether there were different application forms to be used; what mattered was the Tribunal's finding that there had been at least one class of driver to whom minimal application criteria had applied. Whilst it had been the Respondent's case that there was an unfettered right to substitute any type of driver, the Tribunal's finding that such a right attached to one class of driver only sufficed, because that afforded a route to unfettered substitution, given that a franchisee could use such drivers on a rolling basis, if desired. Reading its judgment in the round, submitted Mr Galbraith-Marten, the Tribunal accepted that there was, both on paper and in practice, an unfettered right of substitution. That disposed of ground three of the appeal.

Grounds One and Two

46. In Mr Galbraith-Marten's submission, grounds one and two formed opposite sides of the same coin, predicated on the Claimants' contention that, under the terms of the Franchise Agreement, the Claimants did not have an unfettered choice of Driver. This, he submitted was misconceived; there was a distinction to be drawn between the right to substitute per se and the right to choose the

particular person who will be the substitute. It was the former right which, as a matter of law, dictated employee and worker status, but the Claimants' appeal related to the latter. Section 18 of the Operating Manual was not concerned with the right of substitution per se, but with the identity of the individual substitute. The authorities were clear that a right to object to a particular named individual does not equate with a fetter on the right of substitution. The question before the Tribunal was whether the Claimants had been obliged to perform collection and delivery services themselves and the facts as found fell within the fourth principle outlined by the Court of Appeal at paragraph 84 of **Pimlico Plumbers**, '*whether or not that entails a particular procedure'*. Once the Tribunal had identified any category of individuals who could be substituted, that was an end to the matter.

47. On a plain reading of the Franchise Agreement, submitted Mr Galbraith-Marten, the Claimants had not been under an obligation personally to carry out collection and delivery services, as was clear, in particular, from clauses 1 and 2. The Franchisee was appointed to operate the Business in the Territory (all as defined), not to collect and deliver parcels, or drive a van. As clause 8 made clear, the obligations there set out fell upon the Franchisee, not a Driver. None of them required the Franchisee to be a Driver, though he could be, at his election. There was no obligation of personal service falling on the Franchisee at all. The Claimants themselves used substitute drivers from time to time, as the Tribunal found, at paragraph 71 of its Reasons. The Claimants' case was not that they used only other ODFs: it was that they used other ODFs and Drivers. That constituted a critical point of distinction from the circumstances in **Pimlico Plumbers**, in which only another Pimlico operative could be used, who was bound by an identical suite of heavy contractual obligations. In this case, a Driver had no contractual obligations to the Respondent at all: he could be employed or engaged by another ODF. As was made clear by Lord Clarke JSC, at paragraph 19(iii) of **Autoclenz**, and Lord Wilson JSC, at paragraph 47(b) of **Pimlico Plumbers**, in the Supreme Court, the relevant question was not what the Claimants had elected to do in practice, but what they had been contractually entitled to do. In any event, the Tribunal found that the Claimants had chosen to use drivers engaged by other

ODFs. Even if section 18 of the Operating Manual had been incorporated in the Franchise Agreement, nothing in it imposed an obligation upon franchisees personally to carry out work. That section required a Driver to be supplied, reinforcing the Franchise Agreement.

48. Mr Galbraith-Marten submitted that, whilst the right to substitute had become the 'lingua franca', the term was not apposite in this case, because there were a number of franchisees who used other drivers who could not properly be considered to be substitutes, because the franchisee was not himself/itself a driver. If anything, in such circumstances, the franchisee became the substitute when the permanent driver could not drive. As a matter of law, it was irrelevant whether a franchisee elected to operate as a sole trader in practice (whether or not to the knowledge of the Respondent); he need not do so. The Respondent had made that submission before the Tribunal. It was obvious that the Tribunal had accepted that submission in finding that the Franchise Agreement reflected the true agreement between the parties. The Claimants' criticism of the Tribunal's analysis was pernickety and ill-founded; on the facts as found, the Claimants' **Autoclenz** submission could not get off the ground and, in any event, properly analysed, that is the only conclusion which can be reached, such that the EAT can itself so hold. Furthermore, whilst the unfettered ability to substitute a cover driver suffices, the EAT can and should hold that, the Franchise Agreement was clearly a contract under which franchisees are never under an obligation to render personal service.

49. Mr Galbraith-Marten observed that it was common ground between the parties that personal service is as much a requirement of worker status as it is of employee status and that decisions relating to contracts of service legitimately can be mined for guidance as to the meaning of personal performance in the case of a worker (paragraph 20 of **Pimlico Plumbers**, SC). As personal service is a statutory requirement, the approach in **Uber** applies: it is inherent in the statutory definition that there must be a contract of personal service, though **Uber** had nothing to say about personal service itself, because it had been conceded in that case. There were two points to note from **Pimlico Plumbers**: in that case, (1) there had been no express right of substitution; the company had been

reliant upon an implied term, adopting the principles in **Marks & Spencer Plc**; and (2) the employment tribunal can consider the parties' conduct in order to determine whether the written terms reflect their true agreement (echoed in paragraph 85 of the judgment of Lord Leggatt JSC, in **Uber**, on which Ms Williams relied). In this case, the Respondent relied upon the facts as found, or as unchallenged by the Claimants, to identify the parties' true agreement (in the context of the **Autoclenz** submission advanced by the Claimants); it did not seek to imply any term into the Franchise Agreement.

50. Mr Galbraith-Marten contended that a review of the caselaw in this area was instructive and supported his construction of the test to be applied:

> 50.1. **Ready Mixed Concrete** was cited in every employment status case and it had never been suggested that the outcome was other than correct. The salient facts were remarkably similar to those of the instant case. The drivers were known as owner-drivers [509C]. Mr Latimer had purchased his vehicle from a company linked to Ready Mixed Concrete and painted with its livery [510-511]. His primary obligation was to make the vehicle, with a competent driver, available [525G-526]. The terms on which a competent driver could be appointed in his place were set out at 510G. Clause 10 [528D] was in the following terms (emphasis added): *'The owner-driver shall with the consent of the company be entitled (subject to clause 12 ...) to appoint a competent and suitably qualified driver to operate the truck in place of him. lf any such other driver is so appointed the owner-driver shall ensure that such other driver complies with all the terms conditions and obligations of this agreement applicable to the operation and use of the truck. If the company has reasonable grounds for dissatisfaction with any driver appointed by the owner-driver it shall be entitled to give notice of this to the owner-driver and the owner-driver shall forthwith provide a suitable and acceptable driver in lieu of such driver and shall not permit such driver to operate the truck.'*

A few owner-drivers had an interest in more than one truck [501A] and some drivers were employees and owner-drivers [502]. No consideration had been undertaken of, or relevance attached to, the difference between their circumstances. The conclusion drawn by MacKenna J [526D] was that Mr Latimer had been free to use the services of another to drive the vehicle when he was away because of sickness or holidays, or, indeed, at any other time when he had not been directed to drive himself. He had been free, again, in his choice of a competent driver to take his place at those times, and whomever he appointed would be his servant and not the company's. The fact that the company could object to a particular individual was of no consequence, submitted Mr Galbraith-Marten. The origin of Sir Terence Etherton MR's fourth principle, in **Pimlico Plumbers** might be thought to emerge from 526E-F: *'I find nothing in these or any other provisions of the contract inconsistent with the company's contention that he is running a business of his own. A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence.'*

50.2. In **Tanton**, but for the right of substitution, the facts appeared to point quite strongly in favour of an employment relationship: the applicant's duties as a driver had been to pick up newspapers and deliver them at various points on a fixed run, in an order dictated by the company, in a vehicle provided by the company, and to wear the company uniform, which it had provided [696A]. The Court of Appeal held that it was necessary for a contract of employment to contain an obligation on the part of the employee to provide his services personally. Without such an irreducible minimum of obligation, it could not be said that the contract was one of service [699G-700A]. **Deliveroo** afforded a more recent statement of the same principle (at paragraph 101 of the CAC's decision and paragraph 24 of the Administrative Court's decision).

50.3. **MacFarlane** was frequently cited as being a case falling on the other side of the line, but had been decided consistent with the above principles. The facts were very different from those of the instant case: in **MacFarlane** [11], the claimants could not simply choose not to attend, or not to work in person. Only if a coach was unable to attend could she arrange for another to take her class. She could not provide anyone who was suitable as a replacement for her; only someone from the council's own register. To that extent, the council could veto a replacement and also could ensure that such persons as were named on the register were persons in whom the council could repose trust and confidence. Thirdly, the council itself sometimes organised the replacement (without, it seems, protest from the coach concerned that it had no right to do so). Fourthly, the council did not pay the coach for time served by a substitute, but instead paid the substitute directly. There was no finding as to what the substitutes were paid, nor that they were paid the same as the claimants, nor that the claimants had any say in what the substitutes were paid. Those four grounds were held to provide ample reason for distinguishing **Tanton**. Even on those facts, the EAT had not felt able to determine that the claimants were not obviously workers, or employees, remitting the matter for that purpose. All that **MacFarlane** established, submitted Mr Galbraith-Marten, is that **Tanton** was distinguishable and did not dictate the answer in that case. The salient facts of **Tanton**, as explained at paragraph 13 of **MacFarlane**, were akin to the facts of this case: at their own choice, the Claimants need never turn up for work, could profit from their absence if they could find a cheaper substitute; and could choose the substitute, in that event rendering them 'the master'.

50.4. In setting out all such cases as the precursor to the five principles identified in **Pimlico Plumbers**, Sir Terence Etherton MR had approved them, such that they were all good law. In simple terms, it was the Respondent's case that the Claimants fell within the fourth principle and the Claimants' case that they fell within the fifth. The latter was confined to circumstances

in which an employer has an unqualified discretion regarding the right to substitute per se, which was not the case here. That could be demonstrated by reference to those cases in which a right to approve a particular individual was held not to have operated as a fetter on the right of substitution. The senior courts had adopted the pragmatic view that it was legitimate to consider whether a particular person was right for the job:

50.4.1. In **Jozsa**, the EAT had held [12-13, 16]:

> 12. Another point made by Mr Bishop is that Clause 13 is a limited and conditional one because there are two important pre-conditions before it can be invoked. They are the requirements first of advance notification presumably to allow the respondent to decide whether or not the substitute is sufficiently qualified and experienced and second that the person delegated is as "*capable, experienced and qualified as the [claimant] himself*".
>
> 13. In our view, those conditions do not prevent Clause 13 being regarded as a right to delegate the performance of the agreement and to nullify any suggestion that the claimant is a "*worker*". In reaching this conclusion we are bound by and we follow the decision and the reasoning of the Court of Appeal in **Express and Echo Publications Ltd v Tanton** [1999] IRLR 367…
>
> …
>
> 16. It is noteworthy that there is a crucial similarity between [Tanton] and the present [case] because in both cases the person claiming to be an employee or a worker could for any reason delegate his functions subject to the other party being satisfied about the qualifications of that other person. Indeed in both cases there was no need for the person said to be an employee or a worker ever to do the work even if he was able to do it.

It was clear that the need for the company to be satisfied about the substitute's qualifications presented no bar to a conclusion that the claimant had an unfettered right for any reason not personally to perform the contractual obligations.

50.4.2. Similarly, in **Creasey**, the EAT made clear the distinction between conditions imposed upon the substitute and conditions imposed upon the right to send such

a person. In addition to paragraph 24 (set out at paragraph 33, above), at paragraphs 28 and 29, the EAT had held:

> '28. In conclusion, I make the following comments. Maurice Kay LJ said in **Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005 "Employment Tribunals spend a great deal of time taxonomising borderline cases in these areas". Generally speaking, the finding of the facts is for the Judge, and only if there is an error of law or misdirection should the EAT intervene. But in this case, the starting point, and really the end point, has been the construction of the subcontractor agreement. The usage of the parties – that is, the conduct of them – is relevant, and the passages in paragraph 28 that I have cited come into that category, but they do not assist [the claimant], because they are simply examples of the qualifications needed for a suitable substitute. As we use the word "substitute", as indeed this Employment Tribunal did, it implies someone who is a suitable alternative for the person under the contract. No one would have envisaged that a person could be sent along by the subcontractor in the agreement without an insured vehicle, who could not drive, who could not read and operate the scanner or who had a bad criminal record, since there is a high degree of trust.
>
> 29. Even accepting all of those, to which there has been no challenge, they are the conditions imposed upon the substitute, and they are a different matter to conditions imposed upon the right to send such a person, which is available to the Claimant at any time, for any reason or for none.'

In the instant case, submitted Mr Galbraith-Marten, even if section 18 of the Operating Manual had been incorporated within the Franchise Agreement, it imposed conditions upon the substitute, not the right to send such a person. It was also worthy of note that the claimant in **Creasey** had not been aware of the substitution clause in the relevant agreement and had not himself appointed a substitute [9]. Both such matters were considered to be irrelevant.

50.5. All of the above cases had been approved by Sir Terence Etherton MR in **Pimlico Plumbers** and were the source of his five principles. Those principles must be taken to recognise the distinction between a fetter, respectively, on substitution per se and on the identity of the substitute proffered. The distinction drawn in **Creasey** was also apparent from **Halawi v WDFG UK Ltd (trading as World Duty Free)** [2015] 3 All ER 543, CA, to which reference was made at paragraph 83 of **Pimlico Plumbers**. In that case, the claimant had

worked as uniformed beautician consultant in a duty-free outlet, operated by the respondent on the airside of Heathrow Terminal 3, for which the claimant needed an airside pass. The Court of Appeal upheld the decision of the employment tribunal to the effect that, under the arrangements for substitution, the claimant could change shifts or withdraw from shifts and could send a substitute; in selecting a substitute she had to choose someone who had store approval and an airside pass and she had to tell the respondent the name of the substitute, but she did not have to give reasons for the substitution or seek approval for it. In **Halawi**, store approval by the company was unfettered; there was no requirement that it was not unreasonably to be withheld; thus the right reserved to the putative employer was more extensive than in the instant case. Nonetheless, neither the Court of Appeal nor the Supreme Court in **Pimlico Plumbers** considered it to have been incorrectly decided.

50.6. Finally, the facts of **Pimlico Plumbers** [33], leading to the conclusions of the Supreme Court, at paragraph 34, on which Ms Williams relied, fell to be contrasted with the facts as found in this case:

> '33. The terms of the contract made in 2009 are clearly directed to performance by Mr Smith personally. The right to substitute appears to have been regarded as so insignificant as not to be worthy of recognition in the terms deployed. Pimlico accepts that it would not be usual for an operative to estimate for a job and thereby to take responsibility for performing it but then to substitute another of its operatives to effect the performance. Indeed the terms of the contract quoted in para 18 above focus on personal performance: they refer to "your skills", to a warranty that "you will be competent to perform the work which you agree to carry out" and to a requirement of "a high standard of conduct and appearance"; and the terms of the manual quoted in para 19 above include requirements that "your appearance must be clean and smart", that the Pimlico uniform should be "clean and worn at all times" and that "[y]our [Pimlico] ID card must be carried when working for the Company". The vocative words clearly show that these requirements are addressed to Mr Smith personally; and Pimlico's contention that the requirements are capable also of applying to anyone who substitutes for him stretches their natural meaning beyond breaking-point.'

Ground Three

51. Mr Galbraith-Marten submitted that ground three was, fundamentally, a perversity challenge to the Tribunal's finding that the Franchise Agreement was genuine. Thus, it was for the Claimants to make out an overwhelming case that the Tribunal had reached a decision which no reasonable

tribunal, on a proper appreciation of the evidence and the law, would have reached, per **Yeboah v Crofton** [2005] ICR 1013, CA. This they could not do. The essence of the challenge was that all that the Tribunal had done was to look at what the Claimants had known and done. Such a contention was grossly unfair. In fact, the Tribunal had commented on such matters because that had been the basis upon which the Claimants had advanced their case, as was clear from paragraphs 20, 23, 92 and 96 of its Reasons. It was that which had led to the Tribunal's conclusions at paragraph 99:

> '99. The Tribunal finds that the Franchise Agreement was a commercial agreement which was entered into by the claimants, in the full knowledge that it contained the terms upon which the relationship between them and the respondent lay. The claimants were at all material times, from first interview with the respondent, through the respondent's induction training period and on signing of the Franchise Agreement, aware of the terms thereof, and indeed, the claimants were aware, from the first interview with the respondent that the facility for employment under a contract of employment with the respondent existed, and was distinct from the franchise arrangement they were entering into.'

52. Reading the judgment as a whole, as one must, it was clear that the Tribunal recorded the Respondent's case at paragraphs 52, 55, 56 and 58 of its Reasons, submitted Mr Galbraith-Marten. The rival contention by the Claimants was set out at paragraph 62, as was the Respondent's reply, at paragraph 63, following which, at paragraph 65, the Tribunal accepted the Respondent's evidence, as previously recited, as to the means by which Drivers were authorised. At paragraph 71, the Tribunal summarised the Claimants' case as to the limit of any right of delegation. The Respondent's case as to that issue was recorded at paragraph 77. The issue was then resolved at paragraph 104, in favour of the Respondent. The Tribunal had both considered what the Claimants and other franchisees did in practice and concluded that the Franchise Agreement was genuine. As a matter of law, the Claimants' choice not to exercise a contractual right was of no relevance. Accordingly, the **Autoclenz** argument had been resolved against them.

The Claimants' submissions in reply

53. Ms Williams submitted that the grounds of appeal did not fall into the category deprecated by cases such as **Hollister**. In this case, the entirety of the Tribunal's discussion and conclusions was

flawed. It was noticeable that Mr Galbraith-Marten had been unable to demonstrate a chain of reasoning, and had been forced to advance a submission that the judgment should be 'looked at in the round'. That was because the Tribunal had not shown its working and such reasoning as it had set out had been demonstrably flawed.

Ground Three

54. As to ground three, it had been an essential part of the Respondent's case that the unchallenged evidence before the Tribunal had been that individual ODFs did use other drivers. Ms Williams did not accept that to have been the case. Every other ODF to which the Tribunal had referred in its Reasons had been a limited company. The Claimants' argument had been that the position for individual owner drivers was different; they could only substitute other ODFs or permanent drivers. The Respondent relied on the findings at paragraph 104, which rejected the Claimants' case on that point. However, by that stage, the Tribunal had already concluded that the Franchise Agreement reflected the true bargain (paragraph 100). The **Autoclenz** argument had not been addressed before reaching that conclusion, such that the Claimants' case on that issue had been rejected by reference to the very agreement which had been impugned. None of the Tribunal's findings addressed the Claimants' case. That was a clear error of law which was the subject of ground three and did not constitute a perversity challenge.

Ground Two

55. Responding to Mr Galbraith-Marten's contention that at least parts of the Operating Manual were not apt for incorporation, Ms Williams submitted that the latter had been incorporated by express reference and contained clear mandatory obligations. In any event, all that the Claimants needed to establish was that section 18 had been incorporated. That section contained clear mandatory obligations, irrespective of the guidance to which the foreword referred. Wording such as that included within section 12, warning that the Franchise Agreement could be terminated for lack of

compliance, was unnecessary, given the provision made to that effect in the agreement itself. Section 18 was expressed in mandatory terms and the central consequence was spelled out, very clearly, at paragraph 18(c), non-compliance with which could lead to termination, given its mandatory nature.

56. As to the caselaw on which the Respondent relied:

56.1. The Respondent had emphasised that **Uber** demonstrated that a contract of personal service was a statutory requirement. That was not true for all statutes under consideration. The relevance of **Uber** lay in the Supreme Court's finding that the contract was not determinative, or, even, the correct starting point. That served to reinforce the errors with which ground three was concerned.

56.2. Mr Galbraith-Marten had been wrong in his central submission regarding the distinction to be drawn between a fetter on the right of substitution per se and a right to object to the identity of an individual substitute. The lodestar was Sir Terence Etherton MR's summary of the principles, at paragraph 84 of **Pimlico Plumbers**, CA, in which no such distinction had been made and which would be inconsistent with his framing of the fourth principle. Furthermore, the essence of his fifth principle is the putative employer's absolute and unqualified discretion, qualified only by the fourth principle. Simler J's reference, at paragraph 25 of **Deliveroo**, to *'a general right of substitution in which the employer party is uninterested in the identity of the substitute provided'* was incompatible with the Respondent's submission and was highly persuasive, if not binding.

56.3. The proviso contained in the clause under consideration in **Jozsa** limited the basis upon which objection could be raised to the claimant's choice of substitute, a fact noted at paragraph 16 of the judgment. There was no such limitation in the instant case.

56.4. In **Creasey**, the EAT's conclusions at paragraph 28 had related to the way in which it and the employment tribunal had defined the word 'substitute'. The clause there under consideration expressly and clearly limited the basis of the company's right to withhold consent to the approval of a proffered substitute.

56.5. In **Halawi**, there had been no written contract. Paragraph 18 of the judgment, referred to practical, not contractual, arrangements for substitution. Ms Halawi did not have to seek approval for the substitution per se. By contrast, in the instant case, there was an unfettered right of rejection by the Respondent. Furthermore, at paragraph 31 of **Pimlico Plumbers** in the Supreme Court, Lord Wilson had observed (with emphasis added):

> '31. The primary answer to Mrs Halawi's claim, most clearly given by the appeal tribunal but apparently adopted by the Court of Appeal, was that she had no contract with World Duty Free of any sort. But the Court of Appeal saw fit also to hold, secondly, that the necessary degree of subordination of Mrs Halawi to World Duty Free was absent: and, thirdly, that her power of substitution (which Pimlico suggests to be analogous to Mr Smith's right to substitute another operative) negatived any obligation of personal performance. But her so-called power of substitution was not a contractual right at all. World Duty Free's declaration that Mrs Halawi might appoint a substitute reflected its understandable lack of interest in personal performance on her part under her contract with her own service company and/or under its contract with the management services company. Its interest was only that someone sufficiently presentable and competent to have secured its approval to work in an outlet, and of course in possession of an airside pass, should attend on behalf of Shiseido each day. In my view Mrs Halawi's case is of no assistance in perceiving the boundaries of a right to substitute consistent with personal performance.'

56.6. All of the cases upon which reliance was placed by the Respondent had concerned an express term, where a written contract existed. That is what distinguished them and gave rise to the distinction between Sir Terence Etherton MR's fourth and fifth principles.

56.7. In **Ready Mixed Concrete**, it was to be noted that there had been no discussion of how the relevant clause was to be construed and no attempt to identify where a right of

substitution crossed the line into an unfettered discretion. At 515-516, MacKenna J identified the three conditions to be fulfilled if a contract of service is to exist, before turning his attention to the third such condition, said, for his purposes, to be the important one. Thus, the issue with which this tribunal is concerned was not the focus of that court, submitted Ms Williams, and the principles which it set out have been developed in subsequent cases. It was also to be remembered that, in Ready Mixed Concrete, both the putative employer and the putative employee had contended that the latter was an independent contractor; it had been the Minister of Pensions and National Insurance who had determined to the contrary, from which determination the company had appealed. It followed that both parties to the relevant contract had been arguing for the same position. On the facts, a lack of control by the company had also played into the position and the clause in question had required the appointment of a competent and suitably qualified driver.

Ground One

57. Finally, submitted Ms Williams, the Respondent contended that, if the Tribunal chose to base its decision on the position relating to temporary cover drivers alone, that sufficed. However, the first four lines of paragraph 102 created an insuperable hurdle to that submission. Given that there was only one class of defined Driver, that finding would apply equally to temporary cover drivers, in relation to whom the contractual restraints were identical. It operated to defeat the Respondent's case.

Discussion and conclusions

58. Before turning to address the Claimants' grounds of appeal, it is necessary to consider both what the Tribunal found as fact and, in consequence, decided.

59. At paragraphs 20 and 23 of its Reasons, the Tribunal recorded the Claimants' submission, by reference to **Autoclenz**, that the Franchise Agreement did not reflect the real relationship or agreement between the parties, inasmuch as, from the outset, each Claimant had made clear to the

Respondent that it was his intention to be the driver, and had since acted as such. He had contracted with the Respondent as an individual owner driver, had registered no additional drivers and been solely responsible for the delivery and collection service personally. Those submissions were set out in greater detail at paragraph 92 of the Tribunal's Reasons, and the Claimants' reliance both on **Autoclenz** and on **Pimlico Plumbers** recorded. At paragraph 93, the Tribunal summarised the competing submissions of the Respondent, to the effect that the Franchise Agreement was genuine and represented the full terms and conditions of the relationship between the parties, under which there was a genuine right of substitution. At paragraph 95 it identified the authorities to which it had been referred.

60. At paragraph 21, by reference to **Kalwak v Consistent Group Limited** [2007] IRLR 560, the Tribunal noted the distinction drawn by Elias P, as he then was [58], between clauses which do not reflect the reality of the situation, because no-one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, and those which genuinely reflect that which might realistically be expected to occur, in which event the fact that the rights conferred have not in fact been exercised will not render them meaningless. It further noted Elias P's statement [59] that tribunals should take a sensible and robust view of such matters in order to prevent form undermining substance.

61. The Tribunal set out 'the factual matrix on which the case has been presented' at paragraphs 27 to 90 of its judgment. Within its analysis, it found that:

> 61.1. [68] within the Southall depot at which both Claimants worked, there were 40 [in fact, 14] owner driver franchise agreements, operating 33 multiple routes and that the Franchise Agreement was the same in respect of corporate and individual franchisees;

61.2. [69 and 70] it had been referred to a number of franchisees holding numerous franchise agreements and engaging numerous drivers, one of which being Mr Khan, who operated 4 routes for the Respondent as an ODF, and another being Mr Sehgal, who held 6 franchise agreements with the Respondent, using a mixture of permanent and temporary (ninety-day) drivers;

61.3. [71] it was not in dispute that the Claimants had availed themselves of substitute drivers, albeit that each maintained that the latter were Respondent-approved drivers, operating as a fetter on any right to substitution;

61.4. [79] on the balance of probabilities, and contrary to the Claimant, Mr Stojsavljevic's, contention, the Respondent's rejection of his request that Mr Trendov act as a substitute driver had followed the termination of Mr Trendov's own franchise agreement on medical grounds and, more likely than not, been premised on his medical condition; and

61.5. [80] on signing the relevant Franchise Agreement, each Claimant had been issued with an identification badge in his own name, being the intended driver under the agreement, and a uniform. It was noted that, should further badges or uniforms have been required, the costs were to be borne by the relevant Claimant.

62. The Tribunal set out its conclusions at paragraphs 96 to 106 of its Reasons. In the usual way, the conclusions set out at paragraphs 101 to 106 (recited at paragraph 8 above) followed its analysis of the facts and are to be read in that context.

63. Against that background, I turn to consider the three grounds of appeal, beginning with ground three.

Ground Three

64. Whether or not each Claimant undertook personally to perform the Services (as defined) turns on the contract between him and the Respondent, in this case requiring consideration of whether the Franchise Agreement reflected the reality of the parties' agreement, in accordance with the principles articulated in **Autoclenz**.

65. Consistent with the approach subsequently set out by Lord Leggatt JSC in **Uber** (at paragraph 85), the Tribunal did not start from a legal presumption that the Franchise Agreement contained the whole of the parties' agreement, or that its signature by the parties itself served to connote as much. It did not take the Franchise Agreement as both its start and end points. In its analysis of the facts, the Tribunal had regard both to the written Franchise Agreement and the relationship between the parties as it operated in practice, concluding that there was no difference (material for current purposes) between its operation in relation to corporate and individual franchisees.

66. At paragraph 104 of its Reasons, the Tribunal found that, *'… despite the claimants' practices of utilizing other ODFs and ODFs' drivers, this does not detract from the true terms of the Franchise Agreement, enabling the franchisee to substitute personal performance to a person of their choice…'*. This was to accept the Respondent's evidence, earlier recorded at paragraph 77 of the Tribunal's Reasons, immediately following which the Tribunal had addressed the one asserted example to the contrary put forward by Mr Stojsavljevic (being Mr Trendov – see above), rejecting the Claimants' contention that it evidenced their ability to substitute only those drivers who had been approved by the Respondent:

> '77. It is the respondent['s] evidence in this respect that, whether the cover driver was an ODF or the driver for another ODF, this was not something they directed, submitting that the claimants were free to engage whomever they wished, and where they engaged other ODFs or an ODF's driver, or other third-party, so long as the nominated driver met the minimum requirement for cover drivers, they could be used.'

In essence, the Tribunal concluded that the substitution of other ODFs, or ODF drivers, as cover drivers by the Claimants (said to evidence the true position) had been no more than a 'practice' and did not detract from the Claimants' broader contractual entitlement. That analysis was consistent with the approach adopted in **Kawalak**, approved in **Autoclenz**, cited at paragraph 21 of its Reasons; and with Lord Clarke JSC's third proposition at paragraph 19 of **Autoclenz**.

67. Furthermore, having regard to paragraphs 58, 65 and 70 of the Tribunal's Reasons (set out below, with emphasis added), it is clear that the Tribunal rejected the Claimants' contention that cover drivers could only be substituted in the event of an ODF's inability to do the work:

> '58. The respondent maintains that [the form headed "ODF Cover Drivers at GeoPost UK.com"] is a form used by ODF's, where they seek driver cover for periods up to ninety days; the details in the form then being the only requirement that the franchisee presents for authorization to be given, and that it is the responsibility of the ODF to ensure that the driver is appropriately trained and conversant with the respondent's procedures.
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> 65. The Tribunal accepts the evidence of the respondent that, the "Application for Additional Driver - Existing Odf" forms relate to those permanent drivers for a franchise, beit the franchisee themselves or additional individual divers, and that the "ODF Cover Driver" form is the form used by ODFs for the provision of temporary cover of up to ninety days, it not being in dispute that the documents were working documents, and the ODF Cover Driver forms were used for cover drivers; there then being no evidence before the tribunal to challenge the respondent's account of their operation.
>
> …
>
> 70. The Tribunal was also informed of the ODF, Harpreet Singh Sehgal, operating his own courier company called Sant Couriers Limited, holding six Franchise Agreements with the respondent, for which he contracts with self-employed drivers on all routes, using a mixture of permanent and temporary (ninety day) drivers. The Tribunal was informed that Mr. Harpreet Singh Sehgal, only drives if his drivers were unavailable to do so. Mr. Harpreet Singh Sehgal had four of his own vehicles and leased three vehicles from the respondent, and in respect of which, the respondent states that, he also provided courier services to their competitors; APC and Hermes. The respondent has not been challenged in respect hereof.'

68. It follows that I reject Ms Williams' contention that the Tribunal did not make the requisite findings of fact in relation to the case advanced by the Claimants. Indeed, in the absence of any

challenge by the Claimants to the way in which the Respondent had asserted other franchisees to operate, the Tribunal's conclusion that there had been no difference in the Respondent's approach towards corporate and individual franchisees itself indicated that the Claimants' position as to the limitations actually imposed upon substitution had been rejected. I also reject Ms Williams' submission that, at paragraphs 102 to 104 of its Reasons, the Tribunal read terms into the Franchise Agreement. In fact, at paragraph 102 it was careful to find that, when provided by the Respondent, training for cover drivers was given without obligation; at paragraph 103 it referred to the limited criteria applied to cover drivers; and at paragraph 104 it explained why the Claimants' practice in relation to such drivers did not detract from their broader contractual entitlement.

69. In my judgment, it cannot be said, with any force, that, having referred to **Autoclenz** on three occasions, and to the Claimants' reliance upon the approach which that authority requires, the Tribunal then failed to adopt that approach in relation to the facts as found. Nor can Ms Williams derive assistance from the fact that the Tribunal's conclusions at paragraph 104 are set out subsequent to its conclusion at paragraph 100 of its Reasons; the former paragraph clearly informing the overarching conclusion set out in the latter. It follows that, absent a successful perversity challenge to those findings, the Tribunal's conclusion that the Franchise Agreement reflected the true agreement between the parties, will not be overturned by the EAT. It is axiomatic that perversity presents a high threshold and Ms Williams did not advance her case on that basis, or, in any event, establish that the threshold had been crossed.

70. Thus, the Tribunal asked itself the correct question and was properly able to conclude that the Franchise Agreement reflected the true agreement between the parties. Accordingly, Mr Galbraith-Marten is right to contend that the question was whether the Franchise Agreement was properly construed by the Tribunal, in turn requiring consideration of whether it incorporated section 18 of the Respondent's Operating Manual and, if so, to what effect. That question is one of law and, as such,

one which this tribunal is itself in a position to determine. I did not understand Ms Williams to suggest otherwise.

Grounds One and Two

The Franchise Agreement

71. So far as material for current purposes, I set out below the terms of the Franchise Agreement:

71.1. By clause 2:

> 'GeoPost appoints the Franchisee to operate the Business in the Territory in accordance with the System upon the terms and conditions set out in this Agreement. For the avoidance of any doubt, GeoPost is under no obligation to provide work for the Franchisee pursuant to the terms of this Agreement.'

71.2. Clause 1.1 was headed 'Definitions and Interpretation' and contained the following material definitions:

71.2.1. '"the Business" means the franchise business of supplying a Driver and Service Vehicle with Service Equipment to perform the Services in accordance with the System';

71.2.2. '"Driver" means the employee, agent, sub-contractor, partner or otherwise of the Franchisee who:

(i) has all appropriate qualifications to drive the Service Vehicle in the Territory including a full and not a provisional licence; and

(ii) who is not under the age of 21; and

(iii) who has undergone training by GeoPost or the Franchisee (as the case may be) in the standards, procedures, techniques and methods comprising the System;

AND who is engaged or employed or otherwise by the Franchisee, to drive the Service Vehicle and who may, if the Franchisee is an individual, include the Franchisee himself.';

71.2.3. '"Operating Manual" means the written description of the method, operational procedures and directions to be observed and implemented by the Franchisee or the Driver and by any employee, agent, sub-contractor or partner of the Franchisee in operating the Business and any amendment or variation to such description notified in writing by GeoPost to the Franchisee.';

71.2.4. '"Services" means the parcel delivery and collection services described in the Operating Manual to be performed by or on behalf of the Franchisee in accordance with the terms of this Agreement and the instructions given to the Franchisee by GeoPost from time to time and which for the avoidance of doubt includes the Quickstart Services'.

71.3. By clause 8.1.2 of the Franchise Agreement, the Franchisee agreed *'to operate the Business strictly in accordance with the Operating Manual …'*;

71.4. Clauses 8.1.5 and 8.16 obliged the Franchisee, respectively to train any Driver who had not received initial training from GeoPost in the standards, procedures, techniques and methods comprising the System and to procure that the Driver attend such further training as GeoPost might require;

71.5. Clause 8.1.9 required the Franchisee to ensure that the Driver at all times presented a neat and clean appearance; rendered competent, sober and courteous service to customers; and complied with any and all directions of GeoPost in that respect relating to dress, appearance and demeanour;

71.6. Clauses 8.1.11 to 8.1.13 obliged the Franchisee to ensure that the Driver carried the identification card supplied by GeoPost, wore the GeoPost uniform and used Saturn, at all times when performing the Services;

71.7. By clause 8.1.14, the Franchisee was required to ensure that the Service Vehicle, the Service Equipment and the Driver were available to perform the Services when requested by GeoPost;

71.8. Clause 12 of the Franchise Agreement provided:

> '**12. Operating Manual**
>
> 12.1 GeoPost will provide the Franchisee will full written details of any alterations or variations to the form of the Operating Manual to enable the Franchisee to keep the copy in its possession up to date.
>
> 12.2 GeoPost shall keep at its Head Office a definitive copy of the Operating Manual as revised and modified from time to time which in the event of any dispute as to the contents or import thereof shall be the authentic text.
>
> 12.3 In the event of any conflict between the terms of this Agreement and the terms of the Operating Manual the terms of this agreement shall prevail.
>
> 12.4 The Operating Manual shall at all times remain the sole and exclusive property of GeoPost and the Franchisee herby acknowledges that the copyright in the Operating Manual vests in GeoPost and the Franchisee will not take and will procure that no other person will take any copies thereof without GeoPost's prior written consent.'

71.9. Clause 15 of the Franchise Agreement contained its termination provisions. So far as material, they provided:

> '**15. Termination**
>
> 15.1 GeoPost may terminate this Agreement with immediate effect by giving notice in writing to the Franchisee if:
>
> …
>
> 15.1.2 the Franchisee commits any persistent breach of any condition or obligation contained in this Agreement which for the avoidance of any doubt shall include any condition or obligation contained in the Operating Manual;
>
> 15.1.3 the Franchisee is in breach of any of the terms and conditions contained in this Agreement which for the avoidance of any doubt shall include any condition or obligation contained in the Operating Manual and the breach is capable of being remedied and the Franchisee fails to remedy the breach within seven days of receiving notice in wiring to do so;

15.1.4 the Franchisee is in breach of any of the terms and conditions contained in this Agreement which for the avoidance of any doubt shall include any condition or obligation contained in the Operating Manual and the breach causes or may cause damage to the interests or reputation of GeoPost or any part of GeoPost's business and such damage cannot be remedied to the satisfaction of GeoPost.

…'

71.10. By clause 26 of the Franchise Agreement:

'**26. Entire Agreement**

This Agreement and the Vehicle Hire Agreement supersede all prior agreements and undertakings between the parties and constitute the entire agreement between the parties relating to the subject matter thereof. Any variation of this Agreement and/or the Vehicle Hire Agreement shall only be effective and binding if it is in writing and signed by the duly authorised representatives of each party to this Agreement and provided further in the case of GeoPost that the variation is signed by the Chief Executive or Director of Operations or Director of Technical Services or such other person as GeoPost may nominate from time to time.'

The Operating Manual

72. The relevant edition of the ODF Operating Manual ran to 53 pages and comprised 20 numbered sections. Within section 1 ('Foreword'), the following wording appeared: *'In keeping with our commitment to communicate proactively with all GeoPost Franchisees we have produced this Manual which will provide you with the information and guidance you need, covering the most significant aspects of our Franchise operation.'* The introduction (section 2) stated that, *'You should bear in mind that failure to meet the standards required could result in termination of your Franchise Agreement'*. Section 3 (quality management) stated, *'Failure to comply with company procedures at all times could result in termination of your Franchise Agreement'*. Section 7 set out provisions relating to security and concluded, ***'NOTE: Failure to follow the security instructions in this section could lead to your Franchise Agreement being terminated.'*** A similar warning was given, at section 8, in relation to anyone knowingly making a false declaration on the Franchisee Daily Services Sheet or Saturn Unit; and, at section 9, in relation to the drawing of fuel from GeoPost fuel tanks or oil drums. Section 11, which set out the 7.5 tonne vehicles operating procedures, stated, at the outset: 'NOTE: FAILURE TO FOLLOW ANY OF THE FOLLOWING POLICIES WILL RESULT IN

YOUR FRANCHISE AGREEMENT BEING TERMINATED', a warning repeated later in that section in respect of any failure to report vehicle defects via the specified procedure and to 'maintain legal compliance'. Section 12 (vehicle servicing) ended with the ***'NOTE: Non-compliance by you with any of the requirements set out in this Section may result in termination of your Vehicle and Equipment Leasing Agreement and/or Franchise Agreement.'*** Section 16 set out GeoPost's smoking policy, containing the ***'NOTE: If you/your Driver are convicted for smoking in a vehicle hired from GeoPost…or a Service Vehicle of GeoPost's which you have elected to use…, this will be a breach of your Franchise Agreement for which GeoPost may terminate your Franchise Agreement.'*** None of the remaining sections contained any similar warning. Section 18 of the Operating Manual is set out in full, at paragraph 6, above.

73. From the above, the following matters are clear:

73.1. The Franchisee is appointed to operate the Business (clause 2);

73.2. The Business is defined to include the supply of a Driver, as defined (clause 1.1);

73.3. The definition of Driver does not distinguish between different types of driver. It necessarily encompasses anyone who satisfies its requirements;

73.4. The Franchisee has a duty to operate the Business in accordance with the Operating Manual (clause 8.1.2) and to provide/procure training as required by clauses 8.1.5 and 8.1.6. The Franchisee has a duty to ensure the Driver's compliance with the further requirements embodied in the performance of the Services, for which the additional sub-clauses of clause 8.1, set out above, provide;

73.5. GeoPost will provide the Franchisee with full written details of any alterations or variations to the Operating Manual, so that the Franchisee can keep the copy in his/her/its possession up to date (clause 12.1);

73.6. Clause 15.1 of the Franchise Agreement (termination) distinguishes between (1) terms and conditions in the Franchise Agreement; (2) conditions or obligations in the Franchise Agreement; and (3) conditions or obligations in the Operating Manual;

73.7. The Operating Manual itself flags the circumstances in which non-compliance will, or may (as the case may be), result in termination of the Franchise Agreement. Section 18 is not amongst them;

73.8. Section 18 of the Operating Manual sets out the 'Franchisee's Responsibilities' under that section, which include a description (at paragraph (b)) of what the Respondent's franchise department will do — *'issue an application form for each Driver*', which it is the Franchisee's responsibility to return. Section 18 is silent as to the nature of the relevant form; does not state that the same form must, or will, be used in all circumstances and does not impose requirements which go beyond those set out in the definition of Driver for which the Franchise Agreement provides;

73.9. In distinguishing the position of 7.5t ODFs (which the Claimants were not, as the Tribunal noted at paragraph 51 of its Reasons), section 18 of the Operating Manual itself refers to 'cover drivers';

73.10. The entire agreement clause (26) in the Franchise Agreement is of no relevance to the question of whether section 18 of the Operating Manual is incorporated within the Franchise Agreement.

74. In my judgment, having regard to the above matters section 18 of the Operating Manual was not incorporated as a term of the Franchise Agreement. I accept Mr Galbraith-Marten's submission that the requirement imposed by clause 8.1.2 of the Franchise Agreement does not, without more, lend the Operating Manual, as a whole, contractual status, or establish its incorporation; rather, any material non-compliance with the instructions which the manual contained would constitute a breach of that clause. I note that Ms Williams' submission to the contrary was not advanced below on behalf of the Claimants. Amongst the manual's content are sections intrinsically unlikely to have contractual force (see sections: 14 ('running your own business') and 15 ('relevant contact and telephone numbers')), consistent with the wording in section 1, set out above. In so far as paragraph 19 of Lord Wilson's judgment in **Pimlico Plumbers** might be thought to compel a different conclusion, Mr Galbraith-Marten is right to point to the express and unequivocal incorporation of the relevant manual in that case at all material times (apparent from paragraphs 6, 7 and 109 of the judgment of Sir Terence Etherton MR, in the Court of Appeal), a matter not in issue before the Supreme Court, such that no argument to the contrary had been advanced for its consideration. In such circumstances, I do not consider that the observation made by Lord Wilson requires the conclusion for which Ms Williams contends, in this case.

75. The Operating Manual set out various requirements, noting that non-compliance with some of them would, or might, lead to termination of the Franchise Agreement. That, too, in my judgment, is insufficient, per se, to establish its incorporation. First, the manual itself cannot serve as the source of its own incorporation. In so far as reliance is placed upon clause 15 of the Franchise Agreement, that makes provision for the circumstances in which GeoPost might terminate the Franchise Agreement with immediate effect, requiring (for current purposes) the breach, or persistent breach, of any condition or obligation contained in the Operating Manual. Even if it were considered to have the effect of incorporating those sections of the Operating Manual which carried the related warning, section 18 was not amongst them.

76. In any event, and should I be wrong on the issue of incorporation, section 18 required that the Franchisee ensure that an application form for each Driver be returned to the franchise department and precluded that Franchisee from using the services of any Driver until it had been returned and a formal letter of authorisation had been issued. It did not prescribe the application form to be used, nor provide that a single form must be used in all cases. It said nothing of the circumstances in which authorisation would be given or withheld and, significantly, nothing to detract from the provisions of the Franchise Agreement itself. Per clause 12.3 of the latter, the terms of the Franchise Agreement would have prevailed in the event of any express or implied conflict. I accept Mr Galbraith-Marten's submission that, implicit in the contractual definition of 'Driver' is the Respondent's entitlement to be satisfied that a proposed driver fell within it. In my judgment, section 18 of the Operating Manual had that as its underlying purpose. In the context of that definition and in the absence of any clause within the Franchise Agreement or Operating Manual which otherwise broadened the Respondent's entitlement to decline to authorise someone who fell within it, in my judgment each Franchisee was contractually entitled to provide the Services by using a Driver, which might or might not include himself.

77. As the Respondent acknowledges, the Franchise Agreement drew no distinction between different species of Driver, albeit that the Tribunal considered there to be a material distinction between ninety-day drivers and 'permanent drivers'. Nevertheless, I reject Ms Williams' submission that the opening four lines of paragraph 104 of the Tribunal's Reasons are fatal to the Respondent's contention that the Tribunal's conclusions as to ninety-day drivers sufficed. That is because there is no challenge to the submission made by Mr Galbraith-Marten that it was open to a Franchisee to provide Drivers, via the ninety-day cover process, on a rolling basis. The Claimants do not contend that a cover driver would not satisfy the contractual definition of Driver. Thus, the Tribunal's findings in relation to 'permanent drivers' do not themselves change the reality of the contract so as to compel a conclusion that its express terms should be disregarded (in accordance with **Autoclenz**). The

Respondent is not seeking to rely upon an implied term, or a 'reverse-**Autoclenz**' analysis; it is seeking to uphold the Tribunal's conclusion in relation to drivers who satisfy the contractual definition, entirely through whom the Franchisee may perform the Services under the Franchise Agreement.

78. In those circumstances, against the background of the Tribunal's conclusion of fact (Reasons, paragraphs 103 and 104), to the effect that the requirements imposed in relation to such drivers were the minimum necessary to allow the service to be delivered to customers, no interpretation of the express terms of the Franchise Agreement inconsistent with their natural and ordinary meaning is required. The remaining question is whether, properly construed, that agreement imposed a fetter consistent with a requirement for personal performance by the Franchisee. In particular, in this case, the focus is on whether the right of substitution fell within the fourth or fifth principle identified by Sir Terence Etherton MR, at paragraph 84 of **Pimlico Plumbers**, in the Court of Appeal.

79. The Franchise Agreement appointed the named Franchisee to operate the Business in the Territory (clause 2). The Business was defined to include the supply of a Driver, a term which was separately defined and was not synonymous with the Franchisee (clause 1.1). The requirements imposed by the definition of a Driver were themselves limited and the further requirements, imposed on the Franchisee in relation to such a person by clause 8.1 of the Franchise Agreement, were to ensure that the Driver had received the requisite training, performed the Services appropriately and was available to perform them when requested by GeoPost. Nothing in that clause, or elsewhere in the Franchise Agreement (or, indeed, in section 18 of the Operating Manual), operated to fetter the right to substitute another Driver at his election.

80. Having regard to the caselaw on which the parties relied before me, in my judgment it is clear that the Franchise Agreement fell within Sir Terence Etherton's fourth principle in **Pimlico Plumbers**, for the following reasons:

80.1. The right to pass on an entire job is inconsistent with personal performance (**Pimlico Plumbers**, CA, per Underhill LJ, paragraph 130);

80.2. Nothing in the Franchise Agreement required that the Driver be of a particular type, or identity; the only requirement was that s/he satisfy the generic definition. In that sense, the Respondent was uninterested in the identity of the 'substitute' — unlike the position in **Pimlico Plumbers** (see paragraph 34, SC), there was no requirement that s/he come from the ranks of existing operatives who were bound by the same obligations as the Franchisee. It is in that sense that the Supreme Court used the term 'identity' and, in my judgment, Simler J (as she then was) used that same term in a similar sense, in **Deliveroo**. Whilst it was necessary that any driver satisfy the contractual definition of that term, it mattered not to the Respondent whether s/he was an ODF, a previously approved driver, or a particular individual; only that the Services were suitably performed, as set out in the Franchise Agreement, and that the driver was qualified and trained to undertake the relevant work. As in **Deliveroo**, that created a large pool of eligible people. The fact that it entailed an application procedure is, as a matter of law, irrelevant (see Sir Terence Etherton MR's fourth principle).

80.3. **Halawi** is not of assistance; as was noted in **Pimlico Plumbers**, SC, at paragraph 31, the so-called power of substitution in that case was not a contractual right at all and is of no assistance in perceiving the boundaries of a right to substitute consistent with personal performance.

80.4. The rationale in **Tanton**, **Jozsa** and **Creasey** equally applies in this case; the Claimants could, for any reason, delegate their functions as a Driver (or decline to drive at all), subject to the Respondent being satisfied of what the Tribunal termed, *'the minimum*

requirements necessary for the service to be delivered to customers' (Reasons, paragraph 104), namely, that the driver provided be conversant with the Respondent's practices and legally entitled to drive in the UK. As in **Creasey**, those were the conditions imposed upon the substitute and are to be distinguished from conditions imposed upon the right to send such a person, which was available to the Claimant Franchisees at any time; for any reason, or for none. Contrary to Ms Williams' submission, the Respondent had no absolute and unqualified discretion to withhold consent (as contemplated by Sir Terence Etherton MR's fifth principle in **Pimlico Plumbers**, CA) and Ms Williams pointed to no clause in the Franchise Agreement which provided or operated to that effect. At least in relation to cover drivers, the Tribunal rejected the Claimants' case that the contract did not reflect the true bargain, conferring a genuine right of substitution, and made no error of law in so doing. I reject the basis upon which Ms Williams seeks to distinguish **Creasey** — nothing in the Franchise Agreement affords a basis upon which a Driver who fulfils the definition cannot, or will not, be authorised. In such circumstances, an express limitation of the circumstances in which authorisation will be withheld is not necessary. Nothing akin to the restrictive features which were of concern to the EAT in **MacFarlane** was present. I note that, at paragraph 61 of its Reasons, the Tribunal recorded the evidence of the Distribution Manager at the Claimants' depot to the effect that he had not been faced with a cover driver who had not been authorised by the Respondent, or received the relevant training, consistent with the Tribunal's findings that the Franchise Agreement reflected the parties' true bargain.

Conclusion and disposal

81. As it is (rightly) common ground between the parties that a genuine right of substitution which is inconsistent with personal performance is inconsistent with both employee and worker status, the Tribunal was right to determine the preliminary issues which were before it in favour of the Respondent.

82. Each of the three grounds of appeal fails and is dismissed.