Neutral Citation Number: [2025] EAT 32

Case No: EA-2023-SCO-000087-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 12 March 2025

Before:

THE HONOURABLE LADY HALDANE

Between:

DR KEVIN CONNAUGHTON

Appellant

- and -

GREATER GLASGOW HEALTH BOARD

Respondent

- -

Mr Aiden O'Neill KC, (instructed by McGrade & Co.) for the **Appellant**
Mr Brian Napier KC, (instructed by NHS Central Legal Office) for the **Respondent**

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Hearing dates: 3 & 4 December 2024

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JUDGMENT

The Honourable Lady Haldane:

Introduction

1. The appellant is Dr Kevin Connaughton. He is a General Medical Practitioner in practice in Glasgow. The respondent is Greater Glasgow Health Board. It has a statutory responsibility to provide primary medical services in the Greater Glasgow and Clyde area. I shall refer to parties as the claimant and respondent, as they were below.

2. The claimant brought a claim against the respondent seeking compensation for leave taken on an unpaid basis in the period from 2011 until 2020, compensation for accrued but untaken entitlement to paid annual leave carried over from year to year, and a declaration of his entitlement to future paid leave. That claim is brought under § 230 of the **Employment Rights Act 1996** ("**ERA**"); Regulation 2 of the **Working Time Regulations 1998** ("**WTR**"), and the **EU Directive 2003/88/EC** on working time (**WTD**). His claim depends on whether or not he is a 'worker' in terms of any or all of the foregoing legislative provisions. A four day hearing on that Preliminary Issue was held before EJ Whitcombe on 15, 16 17 and 22 May 2023, with the Judgment dated 17 July 2023. He concluded that the claimant is not a worker in terms of any of the provisions relied upon. It is against that decision that the claimant appeals.

3. The grounds of appeal are four in number, and are stated as follows:-

- The tribunal misdirected itself and/or misapplied the law when considering the statutory construction of whether the claimant 'works under' a contract pursuant to s 230 **ERA** and Reg 2 **WTR**.
- The tribunal misdirected itself and/or misapplied the law when considering worker status in EU law and decided that the claimant did not satisfy the EU law definition of worker, enabling him to rely directly on **Working Time Directive** ("**WTD**").
- The tribunal misdirected itself and/or misapplied the law and/or it was perverse to determine that there was no personal service pursuant to § 230 **ERA**.

- The judge reached conclusions on facts and law that no reasonable tribunal on a proper appreciation of the evidence and the law would have reached (**Yeboah v Crofton** [2002] IRLR 634, CA). If the tribunal had not misapplied fact and law and properly weighed in the balance the evidence the tribunal would have concluded that the claimant was a worker and entitled to paid holiday.

It is only fair to record that those grounds of appeal were prepared on behalf of the clamant by counsel who represented him before the ET. By the time the matter came before the EAT for a Full Hearing, Mr O'Neill KC was representing the claimant. The arguments he sought to advance were not entirely on all fours with the terms of the grounds of appeal, perhaps fairly described as a difference in emphasis rather than a radical departure of substance, certainly so far as the first three grounds are concerned. However Mr Napier KC, who appeared for the respondents both below and before the EAT confirmed he did not consider himself to be at any disadvantage by the difference in approach, and the matter was therefore considered on the basis of the skeleton argument and oral submissions advanced by Mr O'Neill during the course of the hearing.

4. It remained the case that, at its heart, the question for determination is whether the claimant, on the unchallenged evidence found established by the tribunal, meets the statutory definition of worker under any of the legislative provisions relied upon, in order to benefit from the protections thereunder, particularly so far as paid leave is concerned. An equally fundamental, and perhaps logically prior question underpinning that issue is whether there requires to be a direct contract between the individual and the employer in order to be entitled to claim the status of worker, and any associated protections.

Background

5. The facts found established by the ET after hearing evidence are unchallenged. I therefore draw on those facts in providing the following relevant background. The claimant is a general

medical practitioner ("GP") practising from the Bridgeton Health Centre in the east end of Glasgow. Several GP practices are based at that health centre. The claimant is a partner in one of them, a partnership practice currently known as "Drs Connaughton and Sudomir".

6. The respondent is the largest Health Board in the UK and is commonly known as "NHS Greater Glasgow & Clyde". It has a statutory duty to provide primary medical services in the Greater Glasgow and Clyde area.

7. Under the **National Health Service (Scotland) Act 1947** and **The National Health Service (Scotland) Act 1978** Health Boards are required to provide or secure primary medical services to patients in their areas. That can be done by making arrangements with medical practitioners.

8. The functions of Health Boards, including the respondent, in relation to primary medical services are set out in section 2C(1) of the **1978 Act**, as amended. Every Health Board:

> "must, to the extent that they consider necessary to meet all reasonable requirements, provide or secure the provision of primary medical services as respects their area; and may, to such extent, provide or secure the provision of primary medical services as respects the area of another Health Board."

9. For the purpose of securing the provision of primary medical services a Health Board may make such arrangements for the provision of the services as they think fit and may make contractual arrangements with any person.

10. The **NHS (General Medical Services) (Scotland) Regulations 1995** set out arrangements for GPs to provide services within a Health Board area. That entailed an application process for admission to the list of qualified practitioners for the Health Board where that doctor intended to practise. It is now known as the "performers list". Each Health Board holds its own performers list. The claimant is on the relevant "performers list".

11. In 2004 negotiations between the BMA and the Scottish Government resulted in a Standard General Medical Services ("**GMS"**) Contract, issued by the Scottish Executive Health Department. Since then, as a result of changes made by section 4 of the **Primary Medical Services (Scotland) Act 2004**, Health Boards have had the power to enter into a contract under which primary medical

services are provided by a contractor. The terms of those contracts are defined by the **NHS (General Medical Services Contracts) (Scotland) Regulations 2004** ("**GMS 2004**").

12. The **GMS 2004** contract was a contract for the provision of primary medical services and other services. It sets out the terms of the relationship between the Health Boards and their GP contractors and incorporated the contents of an agreement reached at a national level on behalf of all four of the UK nations.

13. Guidance was issued by the BMA General Practitioners Committee. The guidance explained that the **GMS 2004** contract provided greater flexibility in the way that its contractors could be structured. Contractors could be single-handed GPs, partnerships or certain types of limited companies. That was very different from the previous arrangements, under which contracts were between the relevant primary care organisation and individual GPs, known as "principals".

14. Under the 2004 contract, patients were on a practice's list, not a particular GP's list. The 2004 contract also gave more power to contractors to run practices in the way that they wanted. After 2004, it was for the GP practice to decide what expenses and staff costs to fund. The 2004 contract did not specify any limit on the number of partners that a GP Practice could have. That was at the discretion of the practice. Practices no longer required the permission of the Health Board to hire staff, so practices could decide the types and numbers of staff they wished to employ and what they would be paid. Staff terms and conditions were decided by the practice. Practices did not need to inform the Health Board who they employed or what they were paid.

15. It was for the practice to decide what staff costs and other expenses to fund from the money received from Health Boards. The remaining funding represented profit. It became the Health Board's responsibility to provide an out of hours service and so practices could opt out of providing out of hours cover if they wished. That allowed practices to focus on providing services between 0800 and 1800 Monday to Friday.

16. Negotiations in anticipation of a new **GMS** contract took place between the BMA's Scottish General Practitioners Committee and the Scottish Government. While the Scottish Government

engaged with Health Boards to seek their views and to inform its negotiating position, Health Boards such as the respondent were not directly involved in negotiations.

17. In anticipation of what became the 2018 General Medical Services Contract, a memorandum of understanding was issued by the Scottish Government, the British Medical Association, the Integration Authorities and NHS Boards. It was jointly signed on 10 November 2017. There would be a move away from the Quality and Outcomes Framework introduced in the 2004 contract. The Scottish Government would also support a shift, over 25 years, to a new model for GP premises under which GPs would no longer be expected to provide their own premises. Proposals included the possibility of lease transfers and access to interest free loans of up to 20% of the use value of the property.

18. In relation to workforce, it was proposed that there would be an expansion of the capacity and capability of the "multidisciplinary team". Many of the staff working in those teams would be employed by the NHS Board. Some might be assigned to a single GP practice while others might work across a group of practices ("clusters"). Existing practice staff (for example, Practice Managers and receptionists) would continue to be employed directly by practices.

19. A booklet was sent out to every GP in Scotland in early November 2017 setting out the detail of the proposed new contract. It was a joint BMA and Scottish Government document. A series of "roadshows" were set up to inform GPs about the new contract and to allow them to ask questions about it. The booklet highlighted the fact that the contract was intended to preserve independent contractor status, highlighted the perceived benefits of that approach and indicated that both the BMA and also the Scottish Government proposed that the **GMS** contract would continue as an independent contractor model. The perceived benefits were said to be independence from line management and the GPs' ability to control and adapt their working day and environment, including their teams, to meet the needs of their patients under their contract. The booklet referred to the results of a ballot of BMA members across the UK in 2015. 82% favoured retaining an independent contractor model.

20. The BMA then balloted its GP members in Scotland in an exercise which ran from early

November 2017 until mid-December 2017. On 18 January 2018 the BMA announced that it backed the new General Medical Services Contract and the Scottish Government proceeded with implementation. So far, only Phase 1 has been implemented. Phase 2, which would be concerned with separating out GP pay and expenses, was to be subject to further negotiation and a further vote. At the roadshows, some GPs had been concerned that Phase 2 might undermine independent contractor status for tax purposes and that they might become subject to different tax arrangements.

21. The new **GMS** contract had several aims. One was to establish the roles of GPs in Scotland within the NHS. Another was to ensure that their workload was manageable and that they were supported with that. A third aim was to reduce the financial and legal risk to GPs through support from government, and a further aim was to make the profession more attractive to new GPs, to be achieved largely by investment by the Scottish Government. A new practice income guarantee was intended to ensure practice income stability. Significant new arrangements would be implemented in relation to GP premises, IT and information sharing. The effect was intended to be a substantial reduction in risk for GP partners in Scotland with a substantial increase in practice sustainability. Sustainable general practice was considered to be critical to ensuring better patient care.

22. In order to reduce GP and practice workload, some tasks would be spread out within wider primary care multidisciplinary teams instead of GPs. Those multidisciplinary teams would be employed by Health Boards. GPs would retain their role in the provision of those services if needed and would suffer no financial loss, but services such as vaccinations, pharmacotherapy, physiotherapy and community services would be handled to a far greater extent by the wider multidisciplinary team.

23. Following negotiations and agreement between the negotiating bodies of the BMA and the Scottish Government (outlined above), a new **GMS** contract was issued by the Scottish Government Health Department in 2018. It is a variation of the **GMS 2004** contract with effect from 1 April 2018. It was incorporated into a contractual document issued to GP practices by the respondent in the exercise of its powers under section 17J(1) of the **NHS (Scotland) Act 1978**, as amended by the **Primary Medical Services (Scotland) Act 2004**. Section 17J gave Health Boards the power to enter

into general medical services contracts for the provision of primary medical services. The legal framework for the contract is provided by the **NHS (General Medical Services Contract) (Scotland) Regulations 2018**, which set various preconditions which must be met before a Health Board can enter into a contract.

24. Clause 8 provides that if the Contractor is a partnership the contract is made with the Contractor as it is from time to time constituted, and shall continue to subsist notwithstanding the retirement, death, expulsion or addition of any one or more partners.

25. Clause 11 records that, "The Contract is a contract for the provision of services. The Contractor is an independent provider of services and is not an employee, partner or agent of the HB. The Contractor must not represent or conduct its activities so as to give the impression that it is the employee, partner or agent of the HB."

26. Clause 12 records that, "The HB does not by entering into this Contract, and shall not as a result of anything done by the Contractor in connection with the performance of this Contract, incur any contractual liability to any other person." Clause 13 provides that, "This Contract does not create any right enforceable by any person not a party to it."

27. Clause 17 prohibits a Contractor from giving, selling, or otherwise disposing of the benefit of any of its rights under the contract. However, the contract does not prohibit the Contractor from delegating its obligations arising under the contract where such delegation was expressly permitted by the contract.

28. In broad terms, in relation to partnerships, clauses 23.2 and 24.2 each provide that those partnerships must ensure that every member of the partnership has "sufficient involvement in patient care" for the duration of the contract. The expression "sufficient involvement in patient care" is defined by clauses 30 to 35 of the contract and regulation 11(5) of the **NHS (General Medical Services Contracts) (Scotland) Regulations 2018**. In essence, it means regularly performing, or being engaged in the day-to-day provision of, primary medical services in accordance with a **GMS** contract (or certain other defined arrangements which have no direct relevance to this case) for no

less than a total of 10 hours in each week.

29. No doctor in the partnership was obliged by the contract to provide anything by way of personal care beyond those 10 hours. Further, the contractual obligation was on the partnership, not upon the individual doctor. If a doctor failed to have "sufficient involvement in patient care" then that was a breach of the partnership's obligation rather than any owed to the Health Board by an individual doctor.

30. The contract does not specify when the 10 hours are to be done or precisely what must be done, other than the provision of "Primary Medical Services" which are not strictly defined. Practice partnerships must confirm in their annual return that they have complied with the terms of the **GMS** contract in this respect.

31. Clause 48 and schedule 4 set out the Contractor's and the Health Board's rights and obligations in relation to "essential services" to be provided in "core hours". The Contractor must provide services for the management of the Contractor's registered patients and temporary residents who are, or who believe themselves to be, ill with conditions from which recovery is generally expected, terminally ill or suffering from chronic disease. They are to be "delivered in the manner determined by the practice in discussion with the patient". The Contractor must also provide primary medical services required in "core hours" for the immediately necessary treatment of certain other defined categories of people. "Core hours" are defined by Section A of the contract and by regulation 3(1) of the **2018 Regulations** as beginning at 0800 hours and ending at 1830 hours on any working day.

32. The requirements of Schedule 4 are all imposed on "the Contractor" rather than on any individual GP and they do not prohibit delegation or substitution. Subject to the specific rules summarised above, it was for the partnerships to decide how essential services within core hours were delivered. At their discretion, they could use locum doctors. Further, the Health Board did not have the power to remove any doctor, including the claimant, from providing services under the 2018 contract provided that they were medically qualified and on the "performers list".

33. Schedule 10 provides that no medical practitioner may perform primary medical services under the contract unless they:

a. are included in the relevant Health Board's primary medical services performers list;

b. are not suspended from that list or from the Medical Register;

c. are not subject to an interim suspension order.

34. Schedule 11 prohibits the Contractor from sub-contracting any of its rights or duties under the contract in relation to clinical matters unless it has taken reasonable steps to satisfy itself that it is reasonable in all the circumstances and the proposed sub-contractor is qualified and competent to provide the service and has notified the Health Board in writing of its intention. However, the notification requirement does not apply to a contract for services with a health care professional for the provision of clinical services (clause 2).

35. While not strictly a term of the 2018 contract, regulation 3 of the **Primary Medical Services (Sale of Goodwill and Restrictions on Subcontracting) (Scotland) Regulations 2004** prohibits the sale of the goodwill of primary medical services provided by a **GMS** contractor.

36. Applying that factual framework to the present case, the claimant is a General Practitioner ("GP") who qualified in July 1983. He then spent several years working in hospitals and a year working as a GP trainee in Biggar in South Lanarkshire. He started working as a locum GP in September 1989 and started as a locum in his current practice on 4 December 1989. The claimant took over the practice on 1 September 1990.

37. The claimant was has been included in the Greater Glasgow & Clyde Performers List with effect from 1 September 1990. The claimant carried out his practice as a GP as a shared responsibility. The responsibility was shared with the other partners with whom he practised. The claimant has had 3 partners during his time at Bridgeton Health Centre, from 1994 to 1996, from 1997 until 2005 and from 2010 onwards. None of those partners was ever full-time and so there have always been periods each week for which the claimant was the sole doctor. When he did not have a partner the claimant

engaged several different doctors to do regular sessions on a locum basis.

38. On 23 March 2004 the claimant signed a **GMS 2004** contract. He did so as "Senior Partner", "on behalf of the Contractor". The Contractor was defined in Schedule 1 as the partnership of "Dr R K Connaughton and Dr E McLellan". In fact, the part of Schedule 1 completed by the claimant appears to have been intended to deal with "individual" or "single handed practices" rather than partnerships, but that was an error on the claimant's part and neither side suggested that anything turned on it either before the ET or for the purposes of the hearing before the EAT.

39. Entering into a contract as a partner was not the only way in which the claimant could have agreed to provide services as a GP. He actively chose not to continue single-handedly and chose to work in a partnership.

40. The claimant signed a copy of the contract on 18 December 2018. The title page described the "Contractor" as "Drs Connaughton & Sudomir Practice 46428". Every page is headed, "This Contract is between Greater Glasgow Health Board, commonly known as NHS Greater Glasgow & Clyde (The Board) and Drs Connaughton & Sudomir (Practice 46428)". Dr Sudomir signed under a section which said "(Note: Although not a contractual requirement, if the Contractor is a partnership, it is recommended that all of the partners comprising the partnership at the date the Contract is signed (whether these partners are general partners or limited partners) should sign the Contract)". The claimant signed the contract under the heading "Contractor Signature". Schedule 1 (Partnership) records the name and details of the respondent in part 1, and the details of the Contractor in Part 2. Part 2 states, "The Contractor is a partnership under the name of Drs Connaughton & Sudomir…". An updated contract was sent to the claimant on 28 February 2019.

41. The partnership agreement between the claimant and Dr Jolanta Sudomir was signed by both of them on 21 August 2012 and was effective from 1 September 2012.

d. The business of the partnership was described as being "to carry on a General Medical Practice at the Premises…".

e. The premises were defined as the Bridgeton Health Centre.

f. Clause 12.2 states as follows: "During the absence of a Partner on annual leave, the other Partner shall generally undertake his or her duties, and a locum shall be employed to provide at least 50% cover (or otherwise as agreed), the cost of which shall be borne by the Partnership."

g. The agreement defined the profit share. There were some transitional arrangements as Dr Sudomir joined the practice but in the long term the formula was for net profits to be divided between the partners in proportion to the number of sessions which each worked in a normal working week. Initially, that was to be 8 sessions per week for Dr Sudomir and 10 sessions per week for the claimant. In other words, a 44%/56% split in the claimant's favour.

42. The claimant's practice currently has about 4,500 patients in its list. The practice has a turnover of £589,143 on the latest available figures.

43. The claimant decided that he would enter into partnerships rather than continuing to practise single-handedly because Partnership made it easier to coordinate workload and to organise leave, including holidays. The claimant was able to take holidays, although he was not paid for them by the respondent.

44. The partnership made its own decisions regarding the staff directly employed by the practice, their numbers, specialisms and rates of pay. The partnership also decides how the practice is run administratively, how appointments are allocated, and whether to have a receptionist, practice manager or nurse at all. The partnership has considerable autonomy on those administrative matters, as well as on matters of clinical judgment. The practice IT system is provided and maintained by the respondent Health Board.

45. When the claimant takes time off locum cover is arranged as anticipated and provided for by the partnership agreement. The other partner in general undertakes the claimant's duties and additionally locum cover of at least 50% is be arranged. If for any reason the other partner cannot

offer any cover at all then the requirement to obtain at least 50% locum cover still applies. It is therefore the partnership that is obliged to obtain locum cover at the partnership's expense. Those expenses will reduce net profits. The obligation to provide services lies with the partnership, as the contractor under the **GMS** contract.

46. A partnership can engage a locum GP without seeking approval from or even informing the relevant Health Board. The locum must be appropriately qualified and on the Performer's List, but the Health Board has no other interest in or control over the identity of the locum selected by the Contractor. The Contractor is obliged to take reasonable steps to satisfy themselves that the locum is appropriately qualified and competent. That obligation derives from Schedule 11 of the **GMS 2018** Contract, which deals with "Sub-contracting of clinical matters" (also considered above).

47. The claimant took holidays as set out in paragraph 15 of his Grounds of Claim. His complaint was and is that the respondent did not pay him for those periods of leave. He also feels aggrieved that he has to arrange cover. The partnership agreement contained provisions dealing with the taking of holiday by a partner, including arranging cover.

48. Neither the claimant personally, nor the contracting partnership, are obliged to notify the respondent Health Board when a GP partner takes leave. There is no set leave entitlement and there is no obligation to inform the Health Board of leave planned or taken. There is no obligation to coordinate leave with nearby practices. The respondent has no knowledge of whether or when the claimant took leave, or whether it was unpaid. That is a matter entirely up to the partnership. The leave taken by the claimant or any other member of the partnership has no bearing on the funding which the practice receives.

49. For the whole of the time that the claimant has worked as a GP, whether single-handedly or in partnership, he has been taxed as an independent self-employed person. However, UK tax law recognises only two types of status in this situation: employed and self-employed. There is no equivalent of "worker" in the sense used in the **Employment Rights Act 1996** or the **Working Time Regulations 1998** so far as HMRC is concerned.

50. The primary care services provided by the Contractor are fully integrated into the NHS. The respondent Health Board is not a client or customer of the Contractor. General practice has always been fully integrated into the NHS. There is, for example, no line management relationship between the claimant or his partnership and managers employed by the respondent Health Board.

51. There is an appraisal scheme. A national standard scheme requires every doctor to have an annual appraisal as a national safeguard for standards of services. The scheme is overseen by NHS Education for Scotland. The appraisers are nominated by Health Boards. Health Boards then provide revalidation information to the GMC, who revalidate the doctor.

52. While the contract requires the claimant to work in the practice personally for a minimum of 10 hours in a normal working week, there is no obligation to do any greater degree of work than that personally. Those 10 hours do not all have to be done at the same practice. There is no direction regarding precisely when those hours must be done, other than over the course of a week. The obligation lies with the partnership to ensure that a minimum 10 hours of work is done by each GP in the partnership. If there were a persistent breach of that obligation then the respondent could take action against the partnership as the Contractor, but not against the individual doctor concerned.

53. If the respondent had concerns about an individual doctor, then they would almost always be raised with the practice, rather than directly with that individual doctor. The exceptions would be if there were concerns about clinical practice, or with continued inclusion on the Performers List. They might be raised directly with the GP concerned.

54. The respondent's Performer's List does not contain any information regarding any individual GP's days or hours of work.

55. The respondent has no power to direct which GPs should work at which times, or on what days, or for how many hours. The respondent has no power to remove a particular GP from providing services under the contract, provided that they were appropriately qualified and on the Performer's List.

56. As a Health Board, the respondent has no power to instruct GPs how to provide their services,

whether in terms of clinical judgment, or in terms of managing other services. Whereas regulation 119 of the **NHS (General Medical Services Contracts) (Scotland) Regulations 2018** states that Contractors must comply with all relevant legislation, it only requires Contractors to have regard to all relevant guidance issued by the Health Board and the Scottish Ministers. Contractors are not obliged to follow that guidance. That statutory provision is given contractual effect by clause 73 of the **GMS 2018** contract. It is a question of guidance rather than direction.

57. GP practices are free to decide who they wish to employ, how much those people are paid, their appointment procedures and all other administrative arrangements. The respondent does not have the power to instruct GPs how to do their jobs, either clinically or as managers of services within their practices.

58. The respondent had been notified in March 2021 that Dr Sudomir would be taking a break from the practice to care for family members in Poland. The respondent's view was that this would be a period of special leave or sabbatical such that there would be no breach of the Contractor's obligation to ensure "sufficient involvement in patient care" (i.e. the 10 hour rule). That was not an issue. However, the respondent received no news of Dr Sudomir's return. Attempts to contact her failed. By 3 May 2022 more than a year had elapsed since the respondent had any knowledge that Dr Sudomir had worked as a GP in the UK, which was a requirement of remaining on the Performer's List. GPs in Scotland may be removed from the Performer's List under regulation 10 of the **NHS (Primary Medical Services Performers Lists) (Scotland) Regulations 2004**.

59. The respondent therefore contacted the practice to ensure that the claimant, as the remaining partner, was aware of the implications for the partnership. If Dr Sudomir remained a partner then there was a risk that the respondent would terminate the **GMS** contract with the partnership. The respondent was seeking to work with the Contractor to avoid that consequence. Two possible options were offered:

a. to stay on as a partnership Contractor provided that an advertisement was placed to recruit another partner; or

b. to change to an individual **GMS** contract.

60. Ultimately, Dr Sudomir voluntarily withdrew from the Performer's List at the respondent's suggestion because she was unable to comply with its requirements. She also resigned from the partnership.

Applicable legal principles

61. Section 230 of the **Employment Rights Act 1996** defines the terms "employee" and "worker" for the purposes of the employment rights contained in that Act. It provides as follows.

> **230 Employees, workers etc**.
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.

62. Regulation 2 of the **Working Time Regulations 1998** defines 'worker' in similar language,

as follows:-

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

63. The **Working Time Directive (2003/88/EC)** contains a number of definitions of specific types of worker, for example a 'night worker', a 'shift worker' and a 'mobile worker'. Notably however, there is no definition of the more generic 'worker' in the Directive itself.

64. It was a matter of agreement between the parties that the claimant's cause of action arose at a time when EU law applied in full to this claim, that is to say before the end of 2023 and the coming into force of the section 5(A4) **European Union (Withdrawal)Act 2018**. His claim, and the rights asserted were, it was agreed, so far as derived from EU law, part of the corpus of retained EU law and retained general principles of EU law, which still applied (**British Airways v Rollett** [2024] EAT 131 [2024] IRLR 891 and **Ministry of Defence v Rubery** [2024] EAT 165). The overarching principle therefore remains that set out in **Marleasing SA v La Comercial Internacional de Alimentacio´n SA** (Case C-106/89) [1993] BCC 421, that:

> '8. … the member states' obligation arising from a directive to achieve the result envisaged by the directive and their duty under the treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of member states including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in

> order to achieve the result pursued by the latter …' (The 'Marleasing Principle')

65. As for the approach I am to take to the ET's decision, I keep in mind the guidance provided in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672:

> "58. … where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should … be slow to conclude that it has not applied those principles, and should generally only do so where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. ..."

66. That said, the EAT's role is not to strive to uphold a decision where the reasoning reveals a fundamental error of approach; as Sedley LJ observed in **Anya v University of Oxford** [2001] ICR 847 CA:

> "26. … The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."

The decision of the ET

67. The crux of the decision of the ET, upon which this appeal is focussed, may found at paragraphs 213, 217 and 221 to 223 as follows:

> '213. I therefore proceed on the basis that section 230(3)(b) of the Employment Rights Act 1996 and the equivalent elements of the Working Time Regulations 1998 require that the claimant and the respondent must be parties to the same contract. That approach is faithful to the language of HHJ Tayler's structured approach in **Sejpal v Rodericks Dental Limited** [2022] EAT 91 and consistent with the reasoning of Eady J in **Catt v English Table Tennis Association Ltd** [2022] EAT 125, referred to more recently by HHJ Tucker in **Plastic Omnium Automotive Limited v Horton** [2023] EAT 85…….

217. In summary, my finding is that it is fatal to the claimant's assertion of worker status under UK law that there was no contract at all between the claimant and the respondent. Both as a matter of form and also in reality, the 2018 GMS contract was between the partnership and the respondent Health Board, not between the claimant personally and the respondent Health Board. That partnership is and was a separate legal entity with its own legal capacity, distinct from the partners. It follows that whatever the work or services done by the claimant for the Health Board may have been they were not, as the statute requires, "for another party to the contract" since he was not himself a party to that contract. The obligation in clause 24.2 to provide patient care and all other relevant obligations were imposed on "the Contractor", the partnership. The obligation on the claimant personally to provide 10 hours of patient care also derived from an obligation owed by the partnership to the respondent. The claimant therefore failed to satisfy the definition in section 230(3)(b) of the Employment Rights Act 1996 and regulation 2 of the Working Time Regulations 1998…….

221. The respondent did not have any power to remove the claimant from providing services under the GMS 2018 contract. That would be a matter for the partnership and the partnership alone. Unless for some reason the claimant's involvement in the provision of medical services amounted to a breach of the practice's obligations under the GMS 2018 contract, the respondent would not have any basis upon which to object to his involvement. Even if the claimant's involvement did breach the partnership's own obligations, the respondent's remedy would be against the partnership and not directly or personally against the claimant. The theoretical possibility of a referral to the GMC under certain circumstances also demonstrates that the respondent had no power to act unilaterally to end or limit the claimant's involvement in the provision of medical services, but in any event a GMC referral would be a professional regulatory issue rather than an exercise of rights arising under contract.

222. Returning to the touchstones of worker status in EU law, my conclusion is that the independence of the claimant (through his partnership) was not "merely notional". It would not be accurate to characterise the relationship between the claimant and the respondent as one of "subordination" given the absence of contractual or other powers for the respondent to discipline or remove the claimant from involvement in the provision of services by the partnership. The respondent had no power to direct the claimant's work. I do not think that the relationship could properly be described as "hierarchical" in the absence of line management or something equivalent, giving rise to effective powers of direction and discipline. It would not be accurate to regard the claimant as "providing services for and under the direction" of the respondent, even if he received remuneration through his share of partnership profits.

223. For those reasons, I have concluded that the claimant did not satisfy the EU law definition of "worker", enabling him to rely directly on WTD. It is necessary for him to rely on domestic law.'

The claimant's submissions

68. Under the umbrella of a general submission that the meaning of 'worker' in the relevant UK legislation has to be interpreted in a manner which achieves the result intended by EU law, Mr O'Neill broke his arguments down into three chapters, posing different questions in respect of each:-

- Is there any need or requirement for there to be direct contract between an individual and an employer for that individual to obtain worker status and therefore to obtain right to annual leave under **WTD**? Mr O'Neill suggested that this question should be answered in then negative and therefore the ET had misdirected itself, and fallen into error in concluding that the claimant is not a worker in terms of the **WTD**.
- Did the ET interpretation of regulation 2 of the WTR fail to comply with duties to give indirect effect in accordance with Marleasing and in so doing fail to accord worker status to the claimant?
- Did the ET err in failing to give direct effect to claimant's right to receive paid annual leave from the respondent on the basis that it is an emanation of the state, and therefore the rights under the **WTD** had horizontal effect against which rights can be claimed?

The First Issue

69. Mr O'Neill focussed on the conclusion of the ET at paragraphs 213 and 217 as set out above. This conclusion was wrong in law, and failed properly to grapple with the issues. The reading that there has to be a direct contract in order to obtain Worker Status is contrary to the plain language of Regulation 2. A proper reading was that a worker was a person who had undertaken to perform work for a party to the contract to which the worker did not require to be a party. In the present case, the claimant was undertaking work for the health board under or in terms of a contract. He was in other words, 'working under' the relevant contract.

70. This interpretation, contended Mr O'Neill, was consistent with the analysis in **Uber BV v Aslam** [2021] UKSC 5 at paragraph 69 in which, under reference to the Autoclenz case (**Autoclenz**

v Belcher [2011]ICR 1157) Leggatt JSC opined:

> "Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation."

71. That said, Mr O'Neill accepted that the situation in the present case was not one which had been considered before, but that the proper approach was to look at the reality of the situation and ask the question, who was doing the work for whom? Mr O'Neill cited examples where individuals had been found to have the status of 'worker' despite not being in what might be regarded as 'subordinate' roles (**Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32**; **Hospital Medical Group Ltd v Westwood [2012] EWCA Civ1005**). Conversely, it was not a requirement that the individual claimant be seen as 'vulnerable' in some way in order to be afforded worker status. There was however no requirement when working 'under a contract' that the claimant be a party to the contract in question. Equally, it was possible to have a different status in employment law, depending on whether or not the employment right in question is derived from EU law or not (**Gilham v Ministry of Justice [2019] UKSC 44**). On that aspect of matters, the point taken against the claimant that if he were correct in his interpretation, that would open up the possibility of GP's being able to claim the national minimum wage, this was misconceived, since the right to the national minimum wage was not derived from EU law.

72. The authorities relied upon by the respondent were not in point, arising out of situation where there were contracts of employment. In the present case the question was one of statutory worker status, which were apt to encompass relationships outside of a classic employment relationship. Thus the respondent sought to rely on judgments of the EAT which were not in point, such as **Catt v Table Tennis Association [2022] EAT 125**; **Angliam Windows v Webb [2024] ICR 339**, **Catamaran**

Cruisers v Williams and others [1994] IRLR 386. Most weight was placed by the respondent upon the decision in **Plastic Omnium Automotive Ltd v Horton** [2023] EAT 85, which Mr O'Neill contended was not on all fours with the present either factually or legally, being concerned with § 230(b) rather that regulation 2 of the **Working Time Directive**. It was not at all clear that the decision in **Plastic Omnium** was based on EU law. That was a point of distinction, as well as the fact that **Plastic Omnium** was considering a contract freely entered in to, not one governed by complex regulatory provisions found in the present case.

73. Mr O'Neill recognised that although this Tribunal is not bound by its own decisions, they are nevertheless of persuasive authority and to be followed unless the decision is *per incuriam*, there were inconsistent decisions of the appeal tribunal or courts of co-ordinate jurisdiction, the decision was manifestly wrong, or there were exceptional circumstances **(British Gas Trading Ltd v Lock and another** [2016]ICR 503). However Mr O'Neill argued that he was not inviting this tribunal to depart from **Plastic Omnium**, rather to distinguish it. In any event Singh J in **Lock** had recognised that an 'exceptional circumstance' justifying departure from an existing decision of this Tribunal would be if failing to do so would lead to a result inconsistent with a requirement of EU law (**Lock**, paras 85 and 86).

74. Drawing these propositions together, the ET's conclusions at paragraph 217 that "[I]t is fatal to the claimant's assertion of worker status under UK law that there was no contract at all between the claimant and the respondent." was simply unsustainable as revealing a fundamental misdirection in law which vitiates its finding that the claimant could not claim "worker status".

75. In any event, once the relevant contract was embedded in its regulatory contest, it was clear that it was impossible for an individual GP to negotiate individual terms within the context of the NHS. There were practical restrictions imposed through that regulatory framework, the claimant's ability to work in the private sector for example. In similar vein there were restrictions on what he could charge prescribed by the regulations. These sorts of restrictions were indicative of worker status.

76. Mr O'Neill embarked upon a detailed examination of the regulatory framework governing the performance of the role of a GP. It is unnecessary to rehearse the detail of that analysis for the purposes of this judgment. Suffice to say that the key point emerging from that analysis was that in a number of instances there can be found references to working 'under the contract.' Thus, submitted Mr O'Neill, it is clear that the NHS regulatory framework applicable in this case expressly envisages that individual medical practitioners who, although not the signatory parties to general medical services contract entered into between the local NHS Health Board and the partnership of which they are partners, nevertheless are said to work under the contract to which they are not parties. The regulatory framework was also redolent of restrictions and controls being placed on how a GP such as the claimant could go about his business, which was equally consistent with the status of being a 'worker' as opposed to an independent contractor. On that analysis, the reasoning given by the ET that such individuals are not "workers" as defined in Regulation 2 **WTR** is 'perverse and unsustainable' since it is wholly inconsistent with the specific NHS regulatory framework under which the claimant in facts works.

77. In any event, the reading of the regulations put forward by the ET was inconsistent with the broader policy intentions of legislation designed to afford workers protections to providers of primary medical services within the NHS. Mr O'Neill cited the example of whistleblowing protectiosn in § 43K **ERA** extending the meaning of 'worker' to a person who 'works or worked as a person performing services under a contract entered into by him with a Health Board under section 17J or 17Q of the **National Health Service (Scotland) Act 1978**' as an example of this being done.

78. In similar vein, it was contended that ET reading was incompatible with the intention of the EU legislature to ensure that providers of primary medical care are covered by the **WTD 2003**. Mr O'Neill submitted that the CJEU has confirmed that doctors providing primary health care ervices are workers for the purposes of the directive, citing **Sindicato de Medicos de Asistencia Publica de la Comunidad Valenciana (Union of Doctors in the Public Health Service ("SIMAP") v Generalidad Valenciana-Conselleria de Sanidad y Consumo (Ministry of Health of the Valencia**

Region) [2001] ICR 1116, ECJ as authority for that proposition. The Grand Chamber ruled, in an action by a union seeking a declaration that the working hours of primary care medical practitioners should not exceed 40 hours a week, and that the length of their night work should not exceed 8 hours in any 24 hours period, that

> '38 The activity of primary care teams falls therefore within the scope of the basic directive.
>
> 39 Accordingly, it is necessary to consider whether such an activity comes within the scope of any of the exceptions provided for in Article 1(3) of the Working Time Directive 93/104. It does not. According to that provision, only the activities of doctors in training come within the exceptions to the scope of that directive .
>
> 40. .. Accordingly … an activity such as that of doctors in primary health care teams falls within the scope of the Framework Health and Safety at Work Directive 89/391 and of the working Time Directive 93/104'

The Second Issue

79. The second branch of Mr O'Neill's argument was that the ET's interpretation of Regulation 2 **WTR 1998**, specifically the definition of worker, failed to give indirect effect to EU Law in accordance with the Marleasing Principle. It had been recognised that the right to paid annual leave under the **WTD** is regarded as a fundamental right under EU law (Case C-214/16 **King v Sash Window Workshop and another** EU:C:2017:914 (Fifth Chamber, 29 November 2017) [2018] ICR 693) . In any event national courts had determined in the past that 'worker status' could apply in situatons where there was no contractual nexus (**Gilham v. Ministry of Justice** [2019] UKSC 44 [2019] ICR 1655; **Perceval-Price v Department of Economic Development** [2000] IRLR 380, NICA; **Percy v. Church of Scotland** [2005] UKHL 73, 2006 SC (HL) 1; **O'Brien v. Ministry of Justice** [2013] UKSC 6 [2013] ICR 499 (following the CJEU judgment in Case C-393/10 **O'Brien v Ministry of Justice** EU;C;2012;110 [2012] ICR 955); **Chief Constable of the Police Service of Northern Ireland v Agnew** [2019] NICA 32 [2019] IRLR 782.

80. The effect of the application of the foregoing principles, contended Mr O'Neill. was that working as a GP under a general medical services contract put in place by and NHS Health Board

was sufficient to afford worker status to a general practitioner such as the claimant, regardless of whether he had signed up to the contract as an individual or as a 'member of a qualified partnership.'

The Third Issue

81. The third and final issue was said to be that the ET had failed to afford direct effect to the right to paid annual leave. This argument was advanced on the basis that *esto* § 230 **ERA 1996**/ Regulation 2 **WTR 1998** cannot be read in accordance with the **Marleasing Principle**, then the appellant was entitled to rely against the respondent, as an emanation of the state, to disapply any purported requirement, in order to be able to claim 'worker status' that a 'worker' was required to show a direct contractual nexus with their 'employer'. Mr O' Neill cited Simler LJ (as she then was) in **Smith v Pimlico Plumbers Ltd (No. 2)** [2022] EWCA Civ 70 [2022] ICR 818 as reaffirming both that the provisions of the **WTD 2003** as regards workers' right to annual leave is sufficiently precise and unconditional to have direct effect; and separately that the duty of disapplication of any national provisions which preclude the granting of an effective remedy in relation to that EU law continues post-Brexit.

82. That being so, Mr O'Neill drew the following key propositions from the relevant CJEU cases, which are summarised as follows:-

(1) the term "worker" used in EU law (including in the **WTD 2003**) cannot be defined by reference to the legislation of the Member States but has an autonomous meaning in EU law EU law, which meaning is not to be interpreted restrictively;

(2) the nature of his legal relationship with the other party to the putative "employment relationship" is of no consequence in regard to the question of whether an individual is a worker for purposes of EU law;

(3) there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration;

(4) the formal classification or apparent self-description of a person as being self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of in our case **WTD 2003**, in particular where the supposed independence is merely notional, thereby disguising an employment relationship within the meaning of EU law;

(5) Even if hired as an independent service provider under national law, for tax, administrative or organisational reasons, EU law will classify as a worker a person who acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks and for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking.

83. Applying those principles to the present case, Mr O'Neill cited adminicles favouring the conclusion that the claimant is a 'worker', including the detailed regulatory framework governing the manner in which primary medical services were provided by the claimant, imposing duties and obligations upon him which were enforceable by the respondent; his inability to negotiate or vary the terms of the contract; his economic dependence upon the respondent; the requirement to remain on the Performer's List, as well as the associated obligation prescribed by regulations upon his as a member of that list; the restriction on his ability to provide private medical treatment; and the integration of his work with that of the respondent.

84. Reliance placed by the ET on the lack of vulnerability of the claimant, following **Uber BV v. Aslam** [2021] UKSC 5 [2021] ICR 657, and in particular the claimant's guaranteed level of income, as pointing against worker status, was misconceived. Drawing all of those strands together, Mr O'Neill submitted that having regard both to the nature of the activities concerned and the relationship of the parties involved, the ET had fallen into error in not concluding that the claimant was a worker for the purposes of EU law, regardless of the wording of Regulation 2 **WTR 1998**. It followed that

the appeal should be upheld, and the case remitted for determination of remedy.

The Respondent's submissions

85. The respondent summarised the claimant's position as being that it is enough, in order for him to be able to claim 'worker' status, and the protections associated with that status, that there was a contract between the respondent and the partnership to which the claimant belonged and that the claimant "worked under" that contract. On that basis he came within the statutory definition of "worker" although he was not personally a party to any contract with the respondent. Mr Napier submitted that this proposition raised a question of statutory construction that is to be decided first by reference to domestic (i.e. non- EU) law, while accepting that the result produced by such a process of construction under domestic law may, if necessary, be subject to change should EU law require a different outcome.

86. The claimant was critical of the decision in **Plastic Omnium Automotive Ltd. v Horton** [2023] EAT 85 and suggested that it should be distinguished from the present situation. In that case, the claimant claimed worker status when the contract in question was not one between the parties themselves, but rather between two personal service companies that the claimant had established. Before the ET, the claimant had succeeded. However, the EAT (HHJ Katherine Tucker) held that a conclusion that the claimant was a worker was unsustainable. Section 230(3) as it had been interpreted in several decisions, (e.g. **Catt v English Table Tennis Association and another** [2022] IRLR 1022) required that there be in existence a contract between the parties.

87. Mr Napier submitted that the approach in **Plastic Omnium** had been followed in several authorities. In **Anglian Windows v Webb** [2024] ICR 339 Eady P, citing **Plastic Omnium** and a number of other EAT decisions, explained the need for a structured approach in relation to the definition of worker and the need to keep in constant focus the words of the statute. Mr Napier suggested that it was clear from her acceptance of **Plastic Omnium**, that Eady P saw the words of section 230 as requiring the existence of a contract between the putative worker and the putative

employer. A similar approach could be found in **Groom v The Maritime and Coastguard Agency** [2024] IRLR 618. The EAT (Gavin Mansfield Deputy HCJ) held that the first question was whether here was a contract between the parties at all. That was, he said, a matter of construction of the documents. Although on the facts it was found that the ET had erred in concluding that there was no contract in relation to the carrying out of certain remunerated activities, that did not detract from the principle on which the EAT approached the issues – the need to identify a contract between the work provider and the end user if 'worker' relationship is to be established.

88. Mr Napier submitted that the first ground of appeal thus challenges not just **Plastic Omnium** but other decisions of the EAT that have preceded it and which have adopted the same approach, in stating the requirement for the existence of a contract. An example of that approach could be seen in **Catt v English Table Tennis Association** [2022] EAT 125 where the status of a non-executive director bringing a whistleblowing claim was in issue. There Eady J stated, "The task for the ET in this case was to determine one question: was there a contract between the claimant and the first respondent whereby the claimant undertook to perform work or services for the first respondent?" (para. 44).

89. Therefore the requirement for there to be in existence a contract between the putative employer and employee has long been recognised. The relationship is 'necessarily contractual' (**Revenue and Customs v Professional Game Match Officials Ltd** [2024] UKSC 29, at para 23, **Commissioners for Her Majesty's Revenue and Customs v Atholl House Productions Ltd** [2022] ICR 1059 at para. 123). The only exceptions to that principle arose firstly where parties had attempted to disguise or subvert the true nature of their employment relationship by 'putting a different label on it' (**Massey v. Crown Life Insurance [1978] ICR 590** per Lord Denning M.R; **Catamaran Cruisers Ltd v Williams & Ors** [1994] IRLR 386). The second exception arose in the context of those who, by the nature of their office, do not have a traditional contractual relationship, such as a District Judge, but who can nevertheless claim protections enjoyed by 'workers' such as whistleblowing protections under § 47B ERA (**Gilham v Ministry of Justice** [2019] ICR 1655).

90. Fundamentally, the proposition that the 'reality' of the situation required that the claimant be recognised as a 'worker' was misconceived. The ET did not err in concluding that, so far as domestic law, is concerned an individual is a 'worker' only if there is a contract of some sort between the parties to the litigation. The ET had correctly understood and applied leading authority such as **Uber BV v Aslam**. In similar vein the construction which the claimant sought to put on the wording "enters into or works under" in § 230 of the **ERA** was misconceived. The ET's reasoning in this respect at para. 209 was sound, and adopted by the respondent. The construction urged by the claimant had not been advanced previously and could lead to surprising results. Given the same definition of 'worker' appears in § 54 of the **National Minimum Wage Act 1998**, the claimant (and other similarly placed GPs) could be entitled to claim not just in respect of unpaid holidays but also in respect of unpaid minimum wage, given that at no point has the respondent paid anything in the nature of a wage to him. As recently observed in the Supreme Court (**Harpur Trust v Brazel** [2022] ICR 1380, at para. 72) a construction which leads to an absurd result is unlikely to be what Parliament intended. The conclusion of the ET was sound and the first ground of appeal should be rejected.

91. Having concluded that the absence of a contract was 'fatal' to the claimant's claim under UK law and also that he had failed to show worker status under EU law, Mr Napier submitted that the approach of the ET which followed, that is to say analysing the hypothetical situation had there been such a link was arguably otiose. That said, Mr Napier submitted that the analysis of the ET on this scenario between paras 224 and 248 leading to the conclusion that the essential features of an employment relationship were not present was sound. This approach only came into play however if the primary plank of the ET's decision – the absence of any contractual link between the parties – was rejected. Mr Napier contended it should not be. As a matter of statutory construction the status of 'worker' in § 230 of the **ERA** and the **WTR** requires, save in the exceptional cases set out above, the presence of a direct contractual link between the putative worker and the putative employer.

92. Turning then to the second ground of appeal, as now presented, Mr Napier accepted that as a matter of law, if the claimant comes within the scope of application of the **WTD**, then the limitation

on the concept of 'worker' by reference to "contract" found in the **WTR** may be avoided, since he is entitled to rely on the Directive as having direct effect. Alternatively, by reference to the **Marleasing Principle**, the **Bates** wording of the domestic definition of worker may be "read down" to give effect to the meaning required under EU law. As it had been expressed by Lady Hale in **Bates van Wilnkelhoff v Clyde & Co LLP**, subordination was not a 'magic ingredient' for the purposes of UK law, but it was needed for EU law to have direct effect.

93. The ET's finding in this respect had been criticised as 'perverse' . This set a high bar, and required more than a simple disagreement with conclusions reached by the ET on the basis of the evidence that it heard. The test was that set out in **Yeboah v Crofton** and was well understood, that the threshold would only be met "where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached'. That test had not been met in this case.

94. The claimant specifically challenged the ET's finding in relation to economic dependence, which he suggested was an adminicle supporting subordination. Mr Napier submitted that the claimant's approach to the question of subordination was not supported by the authorities. The "essential feature" of the employment relationship was that "for a certain period of time a person performs services for an under the direction of another person in return for which he receives remuneration." (**Union Syndicale d'Isère C428/09** [2011] IRLR 84, para 28). Properly understood, the claimant was a self-employed person, and as such outside the category of worker under EU law. The ET had been correct to find that the claimant was running an independent business, a conclusion supported by the decision in **O'Brien v Minster of Justice** [2013]ICR 499 where the concept was explained by Lord Hope and Lady Hale thus:-

> 'The self-employed person has the comparative luxury of independence. He can make his own choices as to the work he does and when and where he does it. He works for himself. He is not subject to the direction or control of others. Of course, he must adhere to the standards of his trade or profession. He must face the reality that, if he is to succeed, he must satisfy the needs and requirements of those who engage his services.They may be quite demanding, and the room for manoeuvre may be small. But the choices that must be made

are for him, and him alone, to take.'

95. Mr Napier submitted that the finding of the ET in this regard was 'unassailable', given its findings in relation to the 2018 contract at para 69. The reality was and is that the claimant and respondent did not owe each other legally enforceable mutual obligations and were not by virtue of the 2018 contract in a contractual relationship. That is accepted by the claimant himself who seeks to argue that he can rely on the **GMS 2018** contract as one which he "works under" rather than as a contract he has entered into. The obligation to enforce the 10 hour minimum is with the partnership (para. 88) and while it was the claimant who physically provided a minimum 10 hours of medical services he did not have any obligation to do so under the **GMS 2018** contract (para. 49). There was no personal obligation on the claimant to provide the 10 hours of minimum service to the Health Board.

96. Mr Napier observed that as originally drafted there had been four grounds of appeal, the last of which set out a number of specific conclusions of the ET which were said to be 'perverse'. In the result, having regard to the difference in approach actually adopted on behalf of the claimant before this Tribunal, no discreet submissions had been advanced under the separate head of perversity , although a detailed response to each allegation had been set out in the respondent's skeleton argument. In summary, Mr Napier submitted that each ground of appeal had not been made out, and the appeal should be refused.

Analysis and decision

97. Despite the elegance and complexity of the competing submissions, in the end of the day the question for determination for this Tribunal comes down to one of statutory interpretation. Only if the ET can be demonstrated to have erred in law in that respect can this appeal succeed (see, inter alia **Bates van Wilnkelhoff v Clyde & Co LLP** [2014] ICR 730 at paragraph 39). The starting point must be the domestic context, and in particular § 230 **ERA** and regulation 2 **WTR**. The wording of each, for present purposes, is identical. The key definition of a 'worker' is in the following terms:-

> '….An individual who has entered into or works under…..
>
> (a) A contract of employment; or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

The focus of the claimant's appeal was on the phrase 'works under'. The natural meaning of this phrase, it was argued, was habile to include a person such as the claimant, a GP who was not party to the relevant medical services contract, but who nevertheless 'worked under' it on a day to day basis. Viewed thus, the argument is superficially straightforward, and said to be supported by, amongst things, the language used in the Regulatory framework under which the primary health care model in Scotland is delivered.

98. However, viewing those words in isolation requires the reader to set aside or ignore that which follows, namely '…..whereby the individual undertakes to do or perform personally any work or services for **another party to the contract**…..'(Emphasis added). The only sensible reading of those words is that the context envisaged is where the 'worker' is in a contractual relationship with the putative employer. That is clearly the interpretation unquestioningly placed upon these provisions in cases such as **Plastic Omnium** and **Catt**. That is not the factual scenario in the present case. The contract in question has been entered into between the respondent and the partnership in which the claimant is a partner.

99. The claimant argues that a more expansive reading of the legislation is consistent with various authorities such as **Uber BV v Aslam** and **Smith v Pimlico Plumbers,** where employment relationships were found to exist despite the absence of a conventional employment contract. That submission however elides the fact that in each of **Uber** and **Smith**, there was found to exist a direct

relationship between each driver, in the case of **Uber**, and plumber in the case of **Smith**, the characteristics of each (such as the obligation of personal performance, the control exercised by the putative employer over the activities of the 'worker', the position of subordination and dependency of the 'worker', as well as adminicles of economic dependency and the lack of any power to delegate) pointed strongly in favour of an employment relationship such that the workers in question were entitled to assert the protections claimed by them in each case.

100. The present case lacks any form of direct nexus between the claimant and the respondent, as set out in the unchallenged findings of the ET summarised in paragraph 67 above. The plain language of the domestic legislation points against the interpretation contended for by the claimant. It follows that there is no requirement in the present case to distinguish, or to depart from other decisions of the EAT on this point such as **Plastic Omnium** or **Catt**. The ET has correctly understood and applied the relevant principles from those cases, and the others referred to in its Judgment. I can discern no error in the reasoning of the ET in this respect, and accordingly the first ground of appeal does not succeed.

The second and third issues

101. Turning to the second and third issues, it is convenient to address these together. In the second issue, the claimant argues that the ET has failed to apply the **Marleasing Principle** to give indirect effect to the **2003 WTD**, and in the third, on the *esto* basis that the domestic legislation cannot be read in the manner contended for by the claimant in accordance with **Marleasing Principle**, that the ET has failed to give direct effect to the **WTD**. The conclusions of the ET on this aspect of matters are to be found at paragraphs 218 to 223. There, the ET correctly self directs on the applicable law, including the definition of 'worker' provided in **Allonby v Accrington and Rossendale College** Case C-256/01) [2004]ICR 1328 at paragraph 67 as follows:-

> 'For the purposes of that provision, there must be regarded as a worker a person who, for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration.'

102. The ET notes that that definition has been adopted in other EU case law such as **Union Syndicale Solidaire Isere**. It also makes the point that cases such as **Allonby** make clear that if the independence of the individual is 'merely notional', then that does not preclude the possibility that a person may be classified as a worker for the purpose of EU law. It then proceeds, in paragraph 220 and 221, to list all of the adminicles of evidence pointing against the conclusion that the independence of the claimant was 'merely notional', before concluding, at paragraph 222 and 223, that the necessary indicators of worker status are absent in the case of the claimant. This is a conclusion that was permissibly open to the ET on the basis of the evidence it accepted, and impeccable self-direction on the applicable legal principles.

103. The claimant of course relies in his appeal on the complex web of Regulations governing the delivery of primary medical care services as indicating the requisite degree of control, or lack of independence, so as to bring the claimant within the definition of 'worker' in terms of EU law. He suggests that there is a 'mutuality of obligation' between him and the respondent. He argues that he was delivering a 'personal service' under the control of the respondent. Factors such as the requirement to be on the Performer's List, the payments made by the respondent in respect of GP services and so on were pointed to all as supporting the conclusion that the claimant is a worker. Those factors cannot answer the fundamental lacuna in the claimant's case in this respect, which is that EU authorities have consistently pointed to the requirement that the worker works for and under the direction of another, that an element of subordination is required. This is in contract to the position under domestic law (**Union Syndicale Solidaire Isere; Bates van Winkelhof v Clyde & Co LLP**). In the present case, the unchallenged factual findings that the respondent did not exercise any direct control over how the claimant, as an individual, carried out or delivered medical services on day-to-day basis, are fatal to this argument. The regulatory framework relied upon governs broader structural and regulatory issues governing the provision of primary medical care services. It does not support the contention that the requisite level of direction, control and subordination as

between the claimant personally, and the respondent, exists so as to satisfy the characteristics of worker under EU law.

104. Thus the criticism encapsulated in the second and third 'issues' advanced at appeal, namely that the ET failed to give either indirect or, in the alternative, direct effect to EU principles in favour of the claimant is not made out. Although not directly the subject of any of the three issues advanced at appeal, for completeness I agree with the observations made by Mr Napier that the exercise carried out by the ET in paragraphs 224 to 248 in addressing the hypothetical scenario had a contract between the claimant and the respondent existed, is otiose, standing the primary finding that no such contract existed. The primary findings in relation to the necessity for a contract between the claimant and the respondent to come within the ambit of domestic legislation, and the alternative analysis of whether the claimant is a worker indirectly or directly under EU law are sufficient to dispose of the Preliminary Issue.

105. Finally, the question of perversity as addressed in the grounds of appeal, was not ultimately insisted on by the claimant, although some indirect suggestions of perversity were made in the course of Mr O'Neill's submissions. On the basis of the arguments that were advanced, and for the avoidance of doubt, I was not satisfied that the high threshold for a finding of perversity was made out.

Conclusion and disposal

106. The Judgment of the ET, that the claimant was not the respondent's worker for the purposes of section 230 **ERA**, regulation 2 **WTR** or the **WTD** was one that was permissibly open to it on the facts which it found established. I can discern no error of law in the approach of the ET to these questions. The appeal is accordingly dismissed.