Trinity Term
[2018] UKSC 29
On appeal from: [2017] EWCA Civ 51

JUDGMENT

Pimlico Plumbers Ltd and another (Appellants) *v* Smith (Respondent)

before

Lady Hale, President
Lord Wilson
Lord Hughes
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

13 June 2018

Heard on 20 and 21 February 2018

Appellants	*Respondent*
Thomas Linden QC Akash Nawbatt QC (Instructed by Mishcon de Reya LLP)	Karon Monaghan QC David Stephenson (Instructed by TMP Solicitors LLP)

LORD WILSON: (with whom Lady Hale, Lord Hughes, Lady Black and Lord Lloyd-Jones agree)

INTRODUCTION

1. Between August 2005 and April 2011 Mr Smith, the respondent, who is by trade a plumbing and heating engineer, did work for Pimlico Plumbers Ltd ("Pimlico"), the first appellant, which conducts a substantial plumbing business in London. Mr Mullins, the second appellant, owns Pimlico.

2. In August 2011 Mr Smith issued proceedings against Pimlico and Mr Mullins in an employment tribunal ("the tribunal"). He alleged

> (a) that he had been an "employee" of Pimlico under a contract of service within the meaning of section 230(1) of the Employment Rights Act 1996 ("the Act") and as such he complained, among other things, that Pimlico had dismissed him unfairly contrary to section 94(1) of it; and/or
>
> (b) that he had been a "worker" for Pimlico within the meaning of section 230(3) of the Act and as such he complained that Pimlico had made an unlawful deduction from his wages contrary to section 13(1) of it; and
>
> (c) that he had been a "worker" for Pimlico within the meaning of regulation 2(1) of the Working Time Regulations 1998 (SI 1998/1833) ("the Regulations") and as such he complained that Pimlico had failed to pay him for the period of his statutory annual leave contrary to regulation 16 of them; and
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> (d) that he had been in Pimlico's "employment" within the meaning of section 83(2)(a) of the Equality Act 2010 ("the Equality Act") and as such he complained that both Pimlico and Mr Mullins had discriminated against him by reference to disability contrary to section 39(2) of it and had failed to make reasonable adjustments in that regard contrary to section 39(5) of it.

3. By a judgment dated 16 April 2012 delivered by Employment Judge Corrigan ("the judge"), the tribunal decided that Mr Smith had not been an "employee" of Pimlico under a contract of service; and, by a judgment dated 21 November 2014

delivered by Judge Serota QC, the Employment Appeal Tribunal ("the appeal tribunal") dismissed Mr Smith's cross-appeal against that decision. He has not sought further to challenge it. The result is that he cannot proceed with the complaints referred to in para 2(a) above.

4. Nevertheless, by that same judgment dated 16 April 2012, the tribunal made three further decisions: (a) that Mr Smith had been a "worker" for Pimlico within the meaning of section 230(3) of the Act; (b) that he had been a "worker" for Pimlico within the meaning of regulation 2(1) of the Regulations; and (c) that he had been in Pimlico's "employment" within the meaning of section 83(2)(a) of the Equality Act. Were the decisions on these three threshold issues to be upheld, the result would be that Mr Smith could proceed with the complaints referred to in para 2(b), (c) and (d) above. Indeed the tribunal made directions for their substantive consideration.

5. Pimlico brought an appeal against the tribunal's three further decisions to the appeal tribunal, which dismissed it by that same judgment dated 21 November 2014. Pimlico thereupon brought an appeal against the appeal tribunal's decision to the Court of Appeal, which on 10 February 2017, by substantive judgments delivered by Sir Terence Etherton MR and Underhill LJ and by a judgment of Davis LJ which agreed with both of them, dismissed it ([2017] ICR 657).

6. Today this court determines Pimlico's yet further appeal, which is in form a challenge to the decision of the Court of Appeal but which is in substance a further inquiry into the entitlement of the tribunal to have made the three decisions referred to in para 4 above. Pimlico argues that the tribunal's reasoning in support of them was inadequate and it asks the court to set them aside and to direct the tribunal to reconsider the three threshold issues.

7. It follows that the tribunal held that, although Mr Smith was not an "employee" under a contract of service, he was an "employee" within the meaning of section 83(2)(a) of the Equality Act. It is regrettable that in this branch of the law the same word can have different meanings in different contexts. But it gets worse. For, as I will explain, different words can have the same meaning.

8. As long ago as 1875 Parliament identified an intermediate category of working people falling between those who worked as employees under a contract of service and those who worked for others as independent contractors. For in that year it passed the Employers and Workmen Act, designed to give the county court an enlarged and flexible jurisdiction in disputes between an employer and a "workman"; and, by section 10, it defined a "workman" as, in effect, a manual labourer working for an employer under "a contract of service or a contract personally to execute any work or labour".

9. From 1970 onwards Parliament has taken the view that, while only employees under a contract of service should have full statutory protection against various forms of abuse by employers of their stronger economic position in the relationship, there were self-employed people whose services were so largely encompassed within the business of others that they should also have limited protection, in particular against discrimination but also against certain forms of exploitation on the part of those others; and for that purpose Parliament has borrowed and developed the extended definition of a "workman" first adopted in 1875.

10. Thus in 1970 Parliament passed the Equal Pay Act which obliged employers to offer to any woman whom they "employed" terms equal to those upon which they "employed" men for the same or equivalent work; and, by section 1(6)(a), it defined the word "employed" as being under "a contract of service or of apprenticeship or a contract personally to execute any work or labour". Then, in section 167(1) of the Industrial Relations Act 1971, we find the birth of the modern "worker", defined there as a person who works "(a) under a contract of employment, or (b) under any other contract … whereby he undertakes to perform personally any work or services for another party to the contract who is not a professional client of his …".

11. Now we have section 230(3) of the Act, in which a "worker" is defined to include not only, at (a), an employee under a contract of service but also, at (b), an individual who has entered into or works under

> "any other contract … whereby the individual undertakes to … 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 …"

Other subsections of section 230, to which thankfully it will be unnecessary to refer, proceed to extend the words "employee", "employment" and "employed" to the situation of a worker falling within subsection (3)(b) and conveniently described as a limb (b) worker.

12. Regulation 2(1) of the Regulations defines a "worker" in terms identical to those in section 230(3) of the Act.

13. On its face section 83(2)(a) of the Equality Act defines "employment" in terms different from those descriptive of the concept of a "worker" under section 230(3) of the Act and under regulation 2(1) of the Regulations. For it defines it as

being either under a contract of employment or of apprenticeship or under "a contract personally to do work". Comparison of the quoted words with the definition of a limb (b) "worker" in section 230(3) of the Act demonstrates that, while the obligation to do the work personally is common to both, the Equality Act does not expressly exclude from the concept a contract in which the other party has the status of a client or customer.

14. As it happens, however, this distinction has been held to be one without a difference. Part 5 of the Equality Act, which includes section 83, primarily gives effect to EU law. Article 157(1) of the Treaty on the Functioning of the European Union requires member states to ensure application of "the principle of equal pay for male and female workers for equal work or work of equal value". In *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328 the Court of Justice of the European Communities, at paras 67 and 68, interpreted the word "workers" in what is now article 157(1) as persons who perform "services for and under the direction of another person in return for which [they receive] remuneration" but excluding "independent providers of services who are not in a relationship of subordination with the person who receives the services". In *Hashwani v Jivraj* [2011] UKSC 40, [2011] 1 WLR 1872, the Supreme Court applied the concepts of direction and subordination identified in the *Allonby* case to its interpretation of a "contract personally to do … work" in the predecessor to section 83(2)(a). In *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] 1 WLR 2047, Lady Hale observed at paras 31 and 32 that this interpretation of the section yielded a result similar to the exclusion of work for those with the status of a client or customer in section 230(3) of the Act and in regulation 2(1) of the Regulations. She added, however, at para 39 that, while the concept of subordination might assist in distinguishing workers from other self-employed people, the Court of Appeal in that case had been wrong to regard it as a universal characteristic of workers.

15. Notwithstanding murmurs of discontent in the submissions on behalf of Mr Smith, this court is not invited to review its equation in the *Bates van Winkelhof* case of the definition of a "worker" in section 230(3) of the Act with that of "employment" in section 83(2)(a) of the Equality Act. I therefore proceed on the basis that the three decisions of the tribunal referred to at para 4 above stand or fall together; and that it is conceptually legitimate as well as convenient to treat all three of them as having been founded upon a conclusion that Mr Smith was a limb (b) worker within the meaning of section 230(3) of the Act.

MR SMITH'S AGREEMENTS WITH PIMLICO

16. Mr. Smith made two written agreements with Pimlico, the first dated 25 August 2005 and the second (which replaced the first) made on 21 September 2009

and wrongly dated 21 September 2010. No one has argued that, for the purposes of these proceedings, the agreements have different legal consequences. In places they are puzzling. In his judgment in the appeal tribunal Judge Serota QC concluded that, on the one hand, Pimlico wanted to present their operatives to the public as part of its workforce but that, on the other, it wanted to render them self-employed in business on their own account; and that the contractual documents had been "carefully choreographed" to serve these inconsistent objectives. But the judge rightly proceeded to identify a third objective, linked to the first, namely to enable Pimlico to exert a substantial measure of control over its operatives; and this clearly made development of the choreography even more of a challenge.

17. The first agreement was on a printed form but there were manuscript amendments. The print described it as a "contract"; but the manuscript substituted the word "agreement". Against Mr Smith's name the print explained that it was "name of contracted employee"; but the manuscript added the prefix "sub" to the word "contracted". Against the date of 25 August 2005 the print explained that it was "date of commencement of employment"; but the manuscript deleted the word "employment". The agreement provided that its terms were as set out in a manual entitled "Company Procedures & Working Practices" ("the manual") but since, as I will explain, the manual was again incorporated into the second agreement, it is convenient to address it in that context.

18. In the second agreement, drafted so as to refer to Pimlico as "the Company" and to address Mr Smith as "you", the terms material to the issue before the court were as follows:

> (a) "the Company may … terminate [the agreement immediately] if you commit an act of gross misconduct or do anything which brings … the Company into disrepute …"
>
> (b) "You shall provide such building trade services as are within your skills … in a proper and efficient manner ..."
>
> (c) "You shall provide the Services for such periods as may be agreed with the Company from time to time. The actual days on which you will provide the Services will be agreed between you and the Company from time to time. For the avoidance of doubt, the Company shall be under no obligation to offer you work and you shall be under no obligation to accept such work from the Company. However, you agree to notify the Company in good time of days on which you will be unavailable for work."

(d) "You warrant … that … you will be competent to perform the work which you agree to carry out [and] you will promptly correct, free of charge, any errors in your work which are notified to you by the Company ..."

(e) "If you are unable to work due to illness or injury on any day on which it was agreed that you would provide the Services, you shall notify the Company …"

(f) "You acknowledge that you will represent the Company in the provision of the Services and that a high standard of conduct and appearance is required at all times. 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."

(g) "... you shall be paid a fee in respect of the Services equal to 50% of the cost charged by the Company to the client in relation to labour content only, provided that the Company shall have received clear funds from the client ..."

(h) "If an invoice remains unpaid [by the client] for more than one month, the fee payable to you will be reduced by 50%. If an invoice remains unpaid for more than six months, you will not receive a fee for the work."

(i) "You will account for your income tax, value added tax and social security contributions to the appropriate authorities."

(j) "You will provide all your own tools, equipment, materials and other items as shall be required for the performance of the Services, except where it has been agreed that equipment or materials will be provided through the Company. The Company may, at a rental price to be agreed with you, provide a vehicle for use in providing the Services … If you provide your own materials …, you will be entitled to up to 20% trade mark-up (pre-VAT) on such materials provided [their] cost … is at least £3,000 (pre-VAT) [and otherwise] up to 12.5% ..."

(k) "You will have personal liability for the consequences of your services to the Company and will maintain suitable professional indemnity cover to a limit of £2m …"

(l) "You shall at all times keep the Company informed of your other activities which could give rise to a direct or indirect conflict of interest with the interests of the Company, provided that … you shall not be permitted at any time to provide services to any Customer … other than under this Agreement."

(m) "… you will not … for three months following [termination of the agreement] be engaged … in any Capacity with any business which is … in competition with [the business of the Company nor] for 12 months … solicit … the business … of [any customer of the Company nor] be involved with the provision of goods or services to [him] in the course of any business which is in competition with [that of the Company]."

(n) "You are an independent contractor of the Company, in business on your own account. Nothing in this Agreement shall render you an employee, agent or partner of the Company and the termination of this Agreement … shall not constitute a dismissal for any purpose."

(o) "This Agreement contains the entire agreement between the parties …"

19. The manual was incorporated into the second agreement by virtue of the term recited at para 18(f) above. It obliged him to comply with the manual "[w]hile 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. Its relevant provisions are as follows:

(a) "[Y]our appearance … must be clean and smart at all times … The Company logo-ed uniform must always be clean and worn at all times."

(b) "Normal Working Hours consist of a five day week, in which you should complete a minimum of 40 hours."

(c) "Adequate notice must be given to Control Room for any annual leave required, time off or period of unavailability."

(d) "Engineers on-call between 12.00pm (midnight) - 6.00am will qualify for the 100% rate, providing the office has not taken the job booking [or] for the 50% rate if the office takes the job booking."

(e) "On-Call Operatives will be given preference for:

- Overtime.
- Better jobs.
- Newer vans."

(f) "Any Operative requiring assistance on any job must inform the customer of the additional charges involved ... and obtain the customer's approval for such charges."

(g) "Callbacks [for remedial work] must be treated as a matter of absolute priority by all Operatives. No further work will be allocated to any Operative until his Callbacks are attended to … Until all issues have been settled and all callbacks resolved any outstanding money will be held back for the last month ... No payment will be made to that Operative, unless the customer is completely satisfied … Any claim made against the Company as a result of the Operative's incompetence/negligence … will be passed on to the Operative and his … Insurers."

(h) "No payment will be made to the Operative until payment in full has been received by the office … A 50% deduction will be made from the Operative's percentage if payment is received by the office later than one month from the job date … Invoices which remain unpaid after six months from the date of the job will be written off."

(i) "Pimlico Plumbers' ID Cards are issued to every Operative … Your ID card must be carried when working for the Company."

(j) "Operatives will be issued with a mobile telephone system … The mobile telephone charges, plus VAT, will be deducted from wages on a monthly basis."

(k) "Any individual undertaking private work for or as a result of contacts gained during your working week and contravening the signed contract will be dismissed immediately …"

(l) "Operatives who fail to observe the rules outlined in this working practice manual in respect of procedures or conduct, will be given a warning and may thereafter be subject to instant dismissal."

(m) "Wages will be paid directly into the Operative's designated bank or building society account …"

(n) "The following standard rate of Van Rental Charges, payable monthly in advance, allows Operatives to work on a Self-employed basis: £120.00 + VAT. This figure will increase if the Operative is involved in consistent vehicle damage."

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.

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.

26. Having found that Mr Smith had the right to substitute another Pimlico operative to perform his work, the tribunal unfortunately saw fit to turn its attention to the terms of a revised contract between Pimlico and its operatives which was introduced following the termination of Mr Smith's contract. The tribunal quoted two of the new terms. One of them gave the operative a right to assign or subcontract his duties "subject to the prior consent of the Company". The other obliged him either to perform his duties personally or to "engage another Pimlico contractor to do it". The two terms appear to be inconsistent, unless they can be reconciled on the basis that Pimlico's prior consent would always be necessary but would not be given unless the assignee of the duties were to be another Pimlico operative. At all events the two new terms led the judge to comment:

> "In my view this clarifies that [Mr Smith] was contracted to provide work personally with, at most, only a limited power to substitute either to other internal operatives or with the prior consent of [Pimlico]."

My view, with respect, is that the two new terms did not clarify anything at all. The judge's qualification reflected in the words "at most" seems to indicate an element of uncertainty on her part about their meaning. At all events her comment leads Pimlico to argue either that the judge found Mr Smith to have been entitled to substitute not only another Pimlico operative but also, with its consent, any other plumber or that her findings are so confused that the exercise should be directed to be conducted again.

27. So Pimlico there put before the tribunal an irrelevant contract, cast in highly confusing terms, and now complains that the tribunal's interpretation of them was highly confused. Irrespective of whether a wider right of substitution would have been fatal to Mr Smith's claim, this court can in my view be confident that the tribunal found, and was entitled to find, that Mr Smith's only right of substitution was of another Pimlico operative. Such is the judge's express finding both in the central part of her judgment and again in her conclusion. Ambiguous terms of a contract to which Mr Smith was not a party cannot widen it.

28. So the question becomes: was Mr Smith's right to substitute another Pimlico operative inconsistent with an obligation of personal performance? It is important to note that the right was not limited to days when, by reason of illness or otherwise, Mr Smith was unable to do the work. His own example of an opportunity to accept a more lucrative assignment elsewhere demonstrates its wider reach.

29. The judge concluded that the right to substitute another Pimlico operative did not negative Mr Smith's obligation of personal performance. She held that it was a means of work distribution between the operatives and akin to the swapping of shifts within a workforce.

30. In challenging the tribunal's conclusion Pimlico relies heavily on the decision of the Court of Appeal in *Halawi v WDFG UK Ltd (t/a World Duty Free)* [2014] EWCA Civ 1387, [2015] 3 All ER 543. Mrs Halawi had been working as a beauty consultant in a duty-free outlet at Heathrow airport, managed by World Duty Free. It was the latter's practice to grant space in the outlet to cosmetic companies, in which consultants in the uniform of the companies would sell their products. Shiseido, a Japanese cosmetic company, took space in the outlet; and Mrs Halawi's role was to sell Shiseido's products there. But her contract was not with Shiseido, still less with World Duty Free. Her contract, or rather her service company's contract, was with a management services company which sold her services on to Shiseido; and then there was a contract between Shiseido and World Duty Free for an accounting between them referable to sales. Notwithstanding the absence of a contract between it and Mrs Halawi, World Duty Free controlled the outlet and in a handbook purported to impose certain rules upon those who worked there. One was that, instead of working personally, a consultant could appoint a substitute provided that she had both an airside pass and the approval of World Duty Free to work in an outlet. In due course World Duty Free withdrew its approval of Mrs Halawi to work in the outlet and thereby prevented her from continuing to do so; but she was held not to be entitled to bring a claim of unlawful discrimination against World Duty Free in that regard.

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.

32. The case of *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145 concerned the right to distribute that company's Sunday newspapers around

Sheffield. Mrs Gunning's father had held the distributorship but, on his retirement, the company refused to renew it in her favour. She alleged that its refusal was discriminatory and to that end she needed to establish that her father's contract had required personal performance of it on his part. In allowing the company's appeal the Court of Appeal held at pp 151 and 156 that Mrs Gunning had failed to show that the dominant purpose of her father's contract had been that he should perform it personally; instead the purpose had been that the company's Sunday newspapers should be efficiently distributed around Sheffield. But in *James v Redcats (Brands) Ltd* [2007] ICR 1006 Elias J, as president of the appeal tribunal, convincingly suggested at paras 65 to 67 that an inquiry into the dominant purpose of a contract had its difficulties; that, even when a company was insistent on personal performance, its dominant *purpose* in entering into the contract was probably to advance its business; and that the better search might be for the dominant *feature* of the contract. In the *Hashwani* case, cited in para 14 above, Lord Clarke of Stone-cum-Ebony, at paras 37 to 39, referred to the suggestions of Elias J in the *James* case with approval but stressed that, although it might be relevant to identify the dominant feature of a contract, it could not be the sole test. The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.

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.

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.

CLIENT OR CUSTOMER?

35. It is unusual for the law to define a category of people by reference to a negative - in this case to another person's lack of a particular status. It usually attempts to define positively what the attributes of the category should be. In *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 at para 16 Mr Recorder Underhill QC (as Underhill LJ then was) described as clumsily worded the requirement that the other party be neither a client nor a customer. It is hard to disagree.

36. In determining whether Pimlico should be regarded as a client or customer of Mr Smith, how relevant was it to discern the extent of Pimlico's contractual obligation to offer him work and the extent of his obligation to accept such work as it offered to him? The answer is not easy. Clearly the foundation of his claim to be a limb (b) worker was that he had bound himself contractually to perform work for Pimlico. No one has denied that, while he was working on assignments for Pimlico, he was doing so pursuant to a contractual obligation to Pimlico. Does that not suffice? Is it necessary, or even relevant, to ask whether Mr Smith's contract with Pimlico cast obligations on him during the periods between his work on its assignments?

37. In the event both of the specialist tribunals and the Court of Appeal all chose, albeit with difficulty, to wrestle with whether Mr Smith's contract with Pimlico was an umbrella contract, in other words was one which cast obligations on him during the periods between his work on assignments for Pimlico; or whether it was a contract which cast obligations on him only during his performance of such successive assignments as were offered to him by Pimlico and accepted by him.

38. The difficulty arose - again - from Pimlico's apparently inconsistent contractual provisions. The 2009 contract provided (see para 18(c) above):

> "… the Company shall be under no obligation to offer you work and you shall be under no obligation to accept such work from the Company."

But the manual stated (see para 19(b) above):

> "Normal Working Hours consist of a five day week, in which you should complete a minimum of 40 hours."

Pimlico suggests that, to the extent that its contract and its manual are inconsistent, the former should prevail.

39. But the tribunal found that a purposive construction of the two provisions enabled them to be reconciled. It found, in accordance with Mr Smith's evidence, that Pimlico

> "had no obligation to provide him with work on any particular day and if there was not enough work [it] would not have to provide him with work and he would not be paid."

40. The Court of Appeal construed this finding, in my view legitimately, as being that, if by contrast it did have enough work to offer to Mr Smith, Pimlico would be obliged to offer it to him. In other words Pimlico's contractual obligation was to offer work to Mr Smith but only if it was available; indeed, if the work was available, it would seem hard to understand why in the normal course of events Pimlico would not be content to be obliged to offer it to him. Mr Smith's contractual obligation by contrast was in principle to keep himself available to work for up to 40 hours on five days each week on such assignments as Pimlico might offer to him. But his contractual obligation was without prejudice to his entitlement to decline a particular assignment in the light (for example) of its location; and of course it did not preclude Pimlico from electing, as seems to have occurred, not to insist on his compliance with the obligation in any event.

41. So the tribunal found, legitimately, that there was an umbrella contract between Mr Smith and Pimlico. It is therefore unnecessary to consider the relevance to limb (b) status of a finding that contractual obligations subsisted only during assignments. The leading authority in this respect is now *Windle v Secretary of State for Justice* [2016] ICR 721, in which Underhill LJ suggested at para 23 that a person's lack of contractual obligation between assignments might indicate a lack of subordination consistent with the other party being no more than his client or customer. The energetic submission of Ms Monaghan QC on behalf of Mr Smith that, on the contrary, it might indicate a greater degree of subordination to that other party must await appraisal on another occasion.

42. Mr Smith correctly presented himself as self-employed for the purposes of income tax and VAT. His accounts for the six years ending on 5 April 2011 were put in evidence. Mr Smith clearly took advantage of the facility to purchase materials himself for use on each assignment and to charge the customer, albeit funnelled through Pimlico, 20% more than he had paid for them. His accounts for the year ended 5 April 2011 showed turnover of about £131,000, cost of materials of about £53,000 and, following deduction of motor and other expenses, a net pre-tax profit of about £48,000.

43. These accounts are the starting-point for Pimlico's submission that the tribunal fell into appealable error in holding that its status was not that of a client or customer of Mr Smith. By reference to what considerations should an inquiry into the existence or otherwise of this status be conducted? In *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005, [2013] ICR 415, Maurice Kay LJ observed at para 20 that there was no "single key with which to unlock the words of the statute in every case". How could there be? If there was a single key, it would amount to a gloss. But there are in particular two authorities which may prove to be of some assistance in the conduct of the inquiry.

44. The first is the judgment of Langstaff J, sitting with others in the appeal tribunal in *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181. At para 53 he said

> "… a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."

45. The second is the judgment of Lord Clarke in the *Hashwani* case cited at para 14 above. A contractual provision for disputes to be resolved by arbitration provided that all the arbitrators should be members of the Ismaili community. One party proposed to appoint Sir Anthony Colman, a retired High Court judge, as one of the arbitrators. He was not a member of the Ismaili community. Would an arbitrator be a worker, entitled to protection from discrimination on religious grounds? There was no doubt that an arbitrator would be obliged to perform his work personally. But there was a further question, which we in the present case are casting as an inquiry into the status of Pimlico as a client or customer. In para 34 Lord Clarke, with whom the other members of the court agreed, identified the question (already summarised in para 14 above) as being

> "… whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services."

At para 40 Lord Clarke proceeded to address that question in relation to the obligations of an arbitrator. He concluded that an arbitrator would not be subject to the direction of, nor be subordinate to, those with whom he contracted and so would not be a worker entitled to protection against discrimination.

46. To these two authorities, Pimlico would add a third, namely the decision of the Court of Justice of the European Union ("the CJEU") in *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13) [2015] All ER (EC) 387. A Dutch union negotiated terms for the minimum remuneration of self-employed musicians when engaged as substitutes to play in Dutch orchestras. But were the terms anti-competitive under EU law? Not (so held the CJEU) if the musicians were "false self-employed", being a concept which seems to equate to that of a limb (b) worker. The court held:

> "33. … a service provider can lose his status of an independent trader … if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the … commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking …
>
> 36. It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person 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 …"

The CJEU's examples of relevant considerations are helpful but should be applied cautiously. In *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28, the question was whether Ms Percy, a former minister

of the Church of Scotland, was entitled to claim that the Church had unlawfully discriminated against her on grounds of sex. The appellate committee held that she was a worker so was entitled to present her claim. Lady Hale observed at para 146 that "[t]he fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition".

47. In support of its contention that it was a client or customer of Mr Smith, Pimlico makes four substantial points:

(a) Without prejudice to his overall obligation (which Pimlico has to accept for this purpose) to make himself available to accept work, if offered, for up to 40 hours each week, Mr Smith was entitled to reject any particular offer of work, whether because of the location or timing of it or for any other reason.

(b) Subject to that overall obligation, Mr Smith was free to take outside work albeit not if offered by Pimlico's clients. In a concluding paragraph the tribunal observed that he did not elect to take outside work; but, as Pimlico rightly objects, the analysis must be of his contractual entitlement rather than of his election not to exercise it.

(c) Pimlico reserved no right to supervise, or otherwise interfere with, the manner in which Mr Smith did his work.

(d) There were financial risks, as well as advantages, consequent upon Mr Smith's work for Pimlico. He was bound by the estimate for the price of the work which he had given to the client. Pimlico did not pay him, not even for any materials which he had supplied, until the client had paid it; if a client paid more than one month late, its payment to him was halved; and, if a client failed to pay within six months, it paid him nothing, not even for his materials, and irrespective of whether the client made payment thereafter. If a client complained about his work, even about work done by another Pimlico operative whom he had substituted to do it, it was Mr Smith who was responsible for remedying it and who received no payment referable to it until he had done so.

48. On the other hand, there were features of the contract which strongly militated against recognition of Pimlico as a client or customer of Mr Smith. Its tight control over him was reflected in its requirements that he should wear the branded Pimlico uniform; drive its branded van, to which Pimlico applied a tracker; carry its identity card; and closely follow the administrative instructions of its control room.

The severe terms as to when and how much it was obliged to pay him, on which it relied, betrayed a grip on his economy inconsistent with his being a truly independent contractor. The contract made references to "wages", "gross misconduct" and "dismissal". Were these terms ill-considered lapses which shed light on its true nature? And then there was a suite of covenants restrictive of his working activities following termination.

49. Accurate though it would be, it would not be a proper disposal of this issue to describe this court's own conclusion to be that Pimlico cannot be regarded as a client or customer of Mr Smith. The proper disposal is, of course, for it to declare that, on the evidence before it, the tribunal was, by a reasonable margin, entitled so to conclude. At the end of its submissions Pimlico appends a thin point, into which not even Mr Linden QC on its behalf has proved able to inject substance, namely that the tribunal had failed to address the factors upon which, in relation to this second issue, Pimlico had in particular relied. The complaint turns out to be little more than that the judge had not in her conclusion repeated references to factors which she had addressed earlier. I will not lengthen this judgment by elaborating upon the poverty of this particular complaint.

CONCLUSION

50. I would dismiss Pimlico's appeal. The result of doing so would be that the substantive claims of Mr Smith as a limb (b) worker could proceed to be heard in the tribunal.