EMPLOYMENT TRIBUNALS

Claimant: **Mr R. Somerville**

Respondents: **(1) Medical Practitioners Tribunal Service**
(2) Nursing and Midwifery Council

Heard at: **East London Hearing Centre**

On: **13-15 November 2019, 14-15 February 2020**
27 February 2020 (in chambers)

Before: **Employment Judge Massarella**

Representation:

Claimant	In person
First Respondent	Mr I. Hare QC (Counsel)
Second Respondent	Ms C. Darwin (Counsel)

RESERVED JUDGMENT

1. **The claim against the First Respondent of age discrimination under the Equality Act 2010 is dismissed, because the Tribunal lacks jurisdiction to hear it: it was presented out of time, and it is not just and equitable to extend time.**

2. **The claim against the First Respondent of unauthorised deduction from wages under the Employment Right Act 1996 is dismissed, because the Tribunal lacks jurisdiction to hear it: it was presented out of time, when it was reasonably practicable for it to be presented in time.**

3. **The Claimant was not an employee of the Second Respondent for the purposes of s.230(1) Employment Rights Act 1996, and Reg 2(1)(a) of the Working Time Regulations 1998.**

4. **The Claimant was a worker of the Second Respondent for the purposes of s.230(3)(b) Employment Rights Act 1996, and Reg 2(1)(b) of the Working Time Regulations 1998.**

REASONS

1. By a claim form presented on 20 July 2018, the Claimant claimed unpaid statutory holiday pay against both Respondents, and age discrimination against the First Respondent ('the MPTS') only.

2. The ACAS early conciliation process took place between 30 June and 11 July 2018 in respect of the MPTS and between 17 and 20 July 2018 in respect of the Second Respondent ('the NMC').

3. The Respondents are professional regulatory bodies: the MPTS for doctors, the NMC for nurses and midwives. The Claimant was a Tribunal Member with the former and is a Panel Chair with the latter. The relationship (to use a neutral term) with the MPTS ended in April 2018; with the NMC it was, at the time of the hearing, continuing.

4. The Claimant contended that, notwithstanding the terms of the contract between him and both Respondents, which characterise him as an independent contractor, he was either an employee within the meaning of s.230(1) Employment Rights Act 1996 ('ERA'), alternatively a worker within the meaning of s.230(3)(b) ERA; for the purposes of his age discrimination claim against the MPTS, he contends that he was an employee within the meaning of s.83(2) Equality Act 2010 ('EqA').

5. The MPTS presented its ET3 on 24 August 2018: it raised limitation issues in relation to both of the claims against it, and denied that the Claimant was an employee or a worker. The NMC presented its ET3 on 24 August 2018: it too denied that the Claimant was an employee or a worker. The NMC was content for any limitation issues in respect of the claim against it to be held over for the final hearing, should the claims proceed.

Procedural history

6. The case was originally to be heard in the Manchester region. The Claimant applied for it to be transferred to London; neither Respondent objected, and on 25 October 2018, Regional Employment Judge Parkin ordered that it be transferred to the London East region.

7. The NMC asked that the two cases be heard separately; the Claimant objected, and they remained joined. The MPTS asked that the matter be listed for an open preliminary hearing to determine the jurisdictional issue.

8. In London East, a closed preliminary hearing took place on 24 January 2019, listing a further, open preliminary hearing to deal with the issue of employment status in respect of both Respondents, and limitation in respect of the MPTS. Orders were given, including one for disclosure by 9 May 2019. On 25 September 2019, the NMC made an application for specific disclosure.

The issues in the case

9. Regional Employment Judge Taylor directed that the parties send the Tribunal a draft list of issues by 18 January 2019. That was not done. Nor were the issues clarified at the preliminary hearing. At the beginning of the hearing before me, I asked the parties to use the time while I was reading into the case to agree a list of factual and legal issues for the Tribunal, including the preliminary issues before me. The parties made several attempts to do so, and a workable version was eventually achieved by the morning of the third day.

10. The Claimant alleges that both Respondents failed to pay him in respect of his statutory annual leave entitlement, contrary to Regs 13, 13A and 16(1) Working Time Regulations 1998 ('WTR'), and had thereby made unauthorised deductions from his wages, contrary to s.13(1) ERA. He confirmed, both orally and in the final agreed list of issues, that he was not advancing his claim under Reg 14 WTR: his case was not that he was not permitted to take annual leave, rather that a payment should have been made in respect of annual leave each time he was paid; his was solely a claim under Reg 16 WTR.

11. The Claimant made reference to the Working Time Directive 2003/88/EC, but acknowledged in his closing submissions that there is no material difference between the ECJ and domestic definitions of 'worker'.

12. Against the MPTS only, the Claimant alleges direct age discrimination in relation to:

    12.1. comments received from a Panel Member of the MPTS, following a hearing held on 16-20 February 2015, to the effect that he should be more deferential to more experienced Panel Members;

    12.2. the MPTS's alleged failure to deal with the Claimant's complaint about this treatment between August and October 2015;

    12.3. the MPTS's failure to appoint him to the position of Tribunal Chair.

The Hearing

13. I had a separate bundle of documents relating to the cases against each Respondent: the MPTS bundle ran to 1237 pages, the NMC bundle to 651 pages, to which a further 200 or so pages were added after I allowed the NMC's disclosure application. The volume of documentation produced the parties was disproportionate to the issues in dispute; I was referred to a small fraction of those documents in evidence and submissions. There seems to have been little cooperation between them to produce more focused, and manageable, bundles.

14. I spent the first day of the hearing reading into the case; the second and third days were sufficient to hear the evidence; a further two days were listed in February to hear submissions and for deliberation; orders were made for the exchange of written submissions and the preparation of a joint bundle of authorities. In the event, two other case were listed before me on those days, leaving no time for deliberation. I took a further day to deliberate at the end of February. There was a then a delay in producing this judgment and reasons, for which I apologise to the parties; it was caused by the competing demands of

other cases, with additional complications arising from the circumstances of the Covid-19 pandemic.

15. For the case against the MPTS I heard evidence from the Claimant; on behalf of the MPTS I heard evidence from Ms Tamarind Ashcroft (Head of Tribunal Development, MPTS), and Ms Kate Goodridge (Head of Resourcing and Associate Services at the General Medical Council ('GMC')).

16. The Claimant gave evidence separately in relation to his case against the NMC; on behalf of the NMC I heard evidence from Ms Clare Padley (General Counsel, NMC), and Mr Paul Johnson (Assistant Director within the NMC Fitness to Practice Directorate).

17. Although the Claimant is himself a barrister, because he was representing himself at this hearing, he was effectively a litigant in person.

18. I had extensive written submissions from all three parties: the Claimant's ran to 128 pages, Ms Darwin's to 23 pages, and Mr Hare's to 21 pages. They supplemented their written submissions orally. I was grateful to all three of them for their assistance, and mean no disrespect to them by not summarising their arguments in what is already a long judgment; their written submissions set out their respective positions, and are a matter of record. I will refer to specific points raised by the parties in context.

19. Although I asked the parties to cooperate in producing a proportionate bundle of authorities, avoiding repetition and uncontroversial cases, I was provided with a double-sided, lever-arch file of 45 authorities, running to 759 pages. I will not list them here.

20. The Claimant also told me that he had hand-delivered to the Tribunal a text book on employment status, which he intended that I should read. It had not reached me; in any event, I explained that it would not be appropriate for me to do so, nor would it be necessary, given the volume of other material which had been provided.

21. Submissions were made by both the Claimant and Ms Darwin, inviting me to have regard to the possible wider implications of my decision on employment status: for the Claimant's fellow Panel Members, and for the NMC as an organisation. Although the outcome of this case might have implications for others, this is not a group action, and I reminded them that my focus must be solely on the Claimant's status, and based on the evidence before me.

The NMC's application for specific disclosure

22. By an application sent to the Tribunal on 4 October 2019, the NMC sought specific disclosure from the Claimant. That application was resisted by the Claimant in a letter dated 7 October. On 21 October 2019, the application came before EJ Lewis who ordered as follows:

> 'The application for specific disclosure made on 4 October 2019 is noted and the subsequent correspondence of 7 and 9 October 2019 is noted. The remaining aspects of the disclosure application will be considered at the start of the hearing on 13 November 2019.

> The Employment Judge notes that the Claimant is asserting that he is/was an employee or a worker. If the Claimant is pursuing the claim on that footing, then at least some of the documents requested in the Respondent's letter dated 19 October 2019 appear to be relevant to the issues. Whilst the parties are only required to disclose documents that exist and are not required to create documents, the Claimant will need to provide evidence in respect of his professional activities, whether for the Respondents or others, or on his own account, during the relevant period.

23. The Claimant submitted that EJ Lewis had refused the NMC's application, which was clearly not the case; the matter was left for determination at today's hearing.

24. The NMC narrowed its application to four categories of documents relevant to the question of employment status, and a category relating to holidays taken, to which I will return (numbers refer to the points in the original application).

    24.1. Point 2: the Claimant's income tax returns relating to the period from 16 April 2012 until today.

    24.2. Point 3: any information that the Claimant had provided to his accountants relevant to his claim that he was employed by and/or worked for the NMC during this period.

    24.3. Point 4: any information that the Claimant provided to HMRC relevant to his claim that he was employed by and/or worked for the NMC during this period.

    24.4. Point 12: any other information relating to his claim that he was not an independent contractor, and/or did not have clients or customers between 16 April 2012 until today.

25. The request in relation to information provided by the Claimant to his accountant was further narrowed to the period 2009 onwards. The Claimant was concerned that the type of documents required by Point 12 was unclear; Ms Darwin (Counsel for the NMC) provided examples.

26. There was an additional category relating to details of holidays taken. I agreed that this was information which may be required, if the Claimant succeeds on the preliminary issue, when it could be dealt with by way an order for further information or for disclosure; no order was necessary at this stage.

27. I accepted Ms Darwin's submission that the documents relating to the Claimant's tax status were relevant to, though not determinative of, the employment status issue, and ought to have been disclosed. Equally, statements made by the Claimant about his employment status within the categories of documents identified were also potentially probative: how a person markets or presents himself to the world at large may be a relevant factor.

28. It was not sufficient for a party to offer to agree facts, as the Claimant did, in relation to issues of this sort. The other party cannot agree facts, without having

the opportunity to verify matters independently, by reference to the relevant documents.

29. I considered that the four categories of documents were relevant to the status issue, and necessary for its fair disposal. The ambit of the request, as narrowed, was reasonable and not onerous.

30. I ordered that if, as a matter of fact, there were no documents within any of the categories, the Claimant should state this, when providing those documents which clearly did exist, such as his tax returns.

THE CASE AGAINST THE MPTS

31. I will deal first with the Claimant's case against the MPTS. Although I heard evidence and submissions on the issue of employment status in relation to the MPTS, a limitation issue arose in respect of both the Claimant's claims which, if decided in its favour, would determine the Claimant's case in its entirety, and I will consider it first.

Time limits: the law

Age discrimination

32. S.123(1)(a) EqA provides as follows:

> **(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment Tribunal thinks just and equitable.**
>
> **[…]**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

33. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

34. The Tribunal's discretion to extend time under s.123(1)(b) EqA is a broad one. In exercising it, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his right to bring a claim and of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

35. Awaiting the outcome of an internal grievance procedure before making a complaint is a matter which may be taken into account by the Tribunal, although it is not determinative (*Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713 CA at 719).

36. In the context of discrimination cases, the importance of recalling not only what is done, but the thought processes involved, make it all the more difficult, and more likely that memory fade will have an impact on the cogency of the evidence (*Redhead v London Borough of Hounslow* UKEAT/0086/13/LA *per* Simler J. at [70]).

Unauthorised deduction from wages

37. S.23 ERA provides (as relevant) that:

> **(1) A worker may present a complaint to an employment Tribunal—**
>
> > **(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),**
> >
> > **[…]**
>
> **(2) Subject to subsection (4), an employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—**
>
> > **(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or**
> >
> > **[…]**
>
> **(3) Where a complaint is brought under this section in respect of—**
>
> > **(a) a series of deductions or payments, or**
> >
> > **…**
>
> **the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.**
>
> **[…]**
>
> **(4) Where the employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.**

38. Reg 30(2) WTR Regs provides, as relevant:

> **(2) […] an employment Tribunal shall not consider a complaint under this regulation unless it is presented –**
>
> > **(a) before the end of the period of three months […] beginning with the date on which it is alleged that […] the payment should have been made;**
> >
> > **(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three […] months.**

39. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

40. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

41. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> **'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial Tribunal hat he behaved reasonably in not making such enquiries.'**

Findings of fact and conclusions

42. The Claimant notified ACAS on 30 June 2018 of his intention to issue proceedings; the EC certificate was issued on 11 July 2018; the ET1 was presented on 20 July 2018.

<u>The unauthorised deductions claim</u>

43. Under the WTR, the worker has three months from the date of each non-payment to bring a claim. Time limits are more favourable for claims brought as claims for unauthorised deduction from wages, because of the 'series of deductions' provision in s.23(3) ERA, although any claim presented on or after

1 July 2015 will be limited to two years' backdating, by reason s.23(4A) ERA (subject to the *King* case referred to below).

44. The Claimant agreed in cross-examination that the MPTS made its last payment to him on 5 March 2018, in relation to an invoice of 23 February 2018 for a hearing which had been cancelled. If, as Mr Hare submitted, time ran from 5 March 2018, the claim was presented six weeks and four days outside the three-month time limit. Because the Claimant did not contact ACAS until 30 June 2018, he did not gain any extension because of the conciliation process.

45. The Claimant contended that time ran from the date of the termination of the agreement with the MPTS. In his written closing submissions the Claimant gives a date of 4 April 2018. If time ran from that date, because he contacted ACAS within three months of it, the extension afforded to him by reason of the conciliation process means that time expired on 11 August 2018, and his claim was in time.

46. In his submissions, the Claimant asserted that 'the starting point for limitation is the date of the termination of the employment relationship' (para 94). However, in the next paragraph, he asserted that 'pursuant to s.23(3) ERA each failure is a deduction'. He submitted that there was 'no reference to last payment date in any statutory provisions or authority identified by the First Respondent' and relied on the fact that the Respondent could have engaged him to sit on a hearing at any time up to the termination of the agreement.

47. I asked him in the course of his oral submissions to explain in greater detail what the basis was for his submission that time ran from the termination date. He confirmed again that his case was that an additional payment should have been made to him in respect of holiday pay each time he was paid by the Respondent. He accepted that the last payment made to him was on 5 March 2018. However, he argued that 'the right survived the payment in March 2018, it was not extinguished'; he argued that all of the accrued holiday pay, unpaid throughout his time with MPTS, and including the amount not paid on 5 March 2018, 'crystallised' at the termination of the contract. The Claimant identified the 'unauthorised deduction' on which he was relying for the purposes of his claim as the failure to pay all the outstanding holiday pay on termination.

48. In support of his argument the Claimant referred me to *King v The Sash Window Workshop Ltd* [2015] IRLR 348 EAT, [2018] ICR 693 ECJ. I do not consider that case assists the Claimant: the worker brought his claim in time; it was not a case about limitation, rather it concerned the extent to which the entitlement to take annual leave can be carried over from one period to the next.

49. I am not persuaded by the Claimant's analysis. At no point in his evidence or submissions did he suggest that there was any restriction on his ability or willingness to take annual leave during his time with MPTS, only that the Respondent had not included payment in respect of annual leave when it discharged his invoices.

50. If the Claimant was a worker of MPTS, and entitled to holiday pay, I conclude that he should have received that pay for the final time on 5 March 2018: that was the last occasion on which it could be argued that any 'wages were

deducted' (for the purposes of s.23(2)ERA), and the last date on which any such 'payment should have been made' (for the purposes of Reg 30(1)(b) WTR).

51. There is nothing in the ERA or the WTR, or indeed in *King*, to suggest that the termination of employment gives rise to a fresh cause of action, which sets the clock running again in respect of a claim brought by reference to Reg 16. I accept Mr Hare's submission that, if the Claimant's claim is to proceed any further with this claim, he requires an extension of time, and I go on to consider whether I should exercise my discretion to grant such an extension.

52. Was it reasonably practicable (i.e. reasonably feasible) for the claim to be presented in time?

53. As for the reasons for the delay, the Claimant does not suggest that he was unaware of his right to bring a Tribunal claim for holiday pay. In his closing submissions the Claimant relied in part on a genuine and honestly-held view that time ran from termination, and in part on the handing-down (on 13 June 2018) of the Supreme Court's judgment in *Pimlico Plumbers v Smith* [2018] ICR 1511. In his oral submissions, he elaborated that it was not so much that he did not realise that he might have a claim against the MPTS until the *Pimlico Plumbers* decision was handed down; rather, he preferred to wait before issuing proceedings until the legal position had been 'finally decided'. He asked rhetorically why he would put himself, and indeed the Respondent and the Tribunal, to the trouble of litigation, if the Supreme Court's decision in *Pimlico Plumbers* was unfavourable to him.

54. The debate as to worker status long predated the Supreme Court decision in *Pimlico Plumbers*. The Claimant alluded in his closing submissions to the long line of authority in recent years on the subject. All of it was binding on the Tribunal, and could have been relied on by him, had he issued proceedings earlier, including the decisions of the EAT and Court of Appeal in *Pimlico Plumbers* itself, both of which held that Mr Smith was a worker for the purposes of the ERA.

55. I conclude that the Claimant was aware at the material time of his right to bring proceedings, but elected not to do so. I do not consider that waiting for the last word on the subject provides good grounds for extending time.

56. As for the Claimant's belief that time ran from the date of termination, I considered whether he behaved reasonably in forming and holding to that belief. Given his legal training, which I refer to below, he was well placed to make his own enquiries, to consult the relevant practitioner textbooks, or to do his own research online (I note that he did an employment law module during his BPTC in 2011/2012). I heard no evidence that he did so. Nor did I hear any evidence that that he took steps to obtain legal advice. I conclude that the Claimant did not act reasonably in not making further enquiries to establish the position.

57. In my judgment, it was reasonably practicable for the Claimant to present his claim in time. Consequently, the Tribunal lacks jurisdiction to hear the claim of unauthorised deduction from wages, and it is dismissed.

<u>The discrimination claims</u>

58. With regard to the Claimant's claim in relation to written feedback from fellow Panel Members, suggesting that he should show more deference to more experienced Members, that took place in around February 2015. It was a single incident, and time ran from the date of the incident. His claim was brought over three years out of time.

59. The Claimant then complains about an alleged failure to deal satisfactorily with his grievance about this incident, between August and October 2015. That claim was presented over two years out of time.

60. As for the Claimant's two applications to be a Panel Chair, the first decision not to appoint him was notified to him on 17 September 2014. He asked for feedback, which was provided on 19 September 2014. The reasons given included the fact that he had scored one point below the minimum threshold for appointment. The letter informed him that no appeal lay against the decision. Nonetheless, he lodged an appeal on 21 September 2014 and he received a response on 26 September 2014. The Claimant agreed that he took the matter no further on that occasion.

61. The Claimant applied again the next year, but was informed on 1 May 2015 that he had been unsuccessful. He asked for feedback, which he received on 14 May 2015: although he met the threshold in relation to a case study exercise, he fell short of it (by 1.5 points) in relation to the interview.

62. He raised a grievance on 15 May 2015, which he addressed to the Chair of MPTS, HHJ David Pearl. The Claimant was notified on 5 June 2015 that his grievance was not upheld. The Claimant agreed that this concluded the matter so far as the MPTS was concerned, while maintaining that it was 'not closed in my eyes.'

63. Mr Hare submits that the last possible act on which the Claimant can rely is the rejection of his request for a reconsideration of the decision not to appoint him as a Chair: 5 June 2015.

64. The Claimant submitted that the fact that the MPTS never appointed him to the position of Panel Chair meant that the discrimination persisted until the termination of his agreement, and amounted to 'conduct extending over a period' within the meaning of s.123(3)(a) EqA.

65. I do not accept the Claimant's argument. Firstly, I do not consider that the 'deference' feedback, and the associated complaint, form a continuum with the decisions not to appoint the Claimant as Chair: they are acts/omissions of a different character, and there was nothing before me to suggest a *prima facie* case that the two groups of allegations were linked.

66. As for the failure to appoint the Claimant as Chair, even if those two groups of allegations were linked, the statutory language (s.123(3)(b) EqA) is clear: a failure to do something is to be treated as occurring when the person in question decided on it. Accordingly, time ran from the point at which the Respondent decided not to appoint the Claimant as a Panel Chair, which was 1 May 2015. He presented his claim some three years out of time. Even if the refusal of his request for a reconsideration is treated as a fresh act, his claim was still just short of three years out of time.

67. Accordingly, the Claimant requires an extension of time, if the Tribunal is to accept jurisdiction.

68. In considering whether it would be just and equitable to extend time in respect of any of the three claims, I had regard to the following factors.

    68.1. The extension of time sought is very substantial indeed: some three years.

    68.2. The fact that the Claimant was seeking redress internally by way of a grievance would only be relevant for the duration of the grievance process; that argument does not assist him.

    68.3. In oral evidence the Claimant agreed that the reason he did not complain of discrimination earlier was because he did not wish to prejudice the income he received from the MPTS; that is not a satisfactory explanation for the delay.

    68.4. The Claimant again argued that his honestly held view was that time ran from the end of the relationship; and that his timing was influenced by the Supreme Court decision in *Pimlico Plumbers*. Dealing with the second of those factors, the same considerations arise as under the unauthorised deduction from wages claim: there was ample authority before that point, by reference to which the Claimant could have advanced an argument that he was an employee within the extended definition of the EqA. As with the unauthorised deduction claim, the Claimant had every opportunity to seek advice as to time limits; there was no evidence that he did so; his own research would have revealed to him that his 'conduct extending over a period' argument was unsound.

    68.5. Turning to the balance of prejudice, plainly the Claimant would suffer prejudice by not being able to pursue these matters to a final hearing, if time were not extended. However, insofar as I could make a preliminary assessment of the potential merits of the case, they did not appear to me to be strong. There was nothing before me which went beyond a bare assertion that age was a material factor in the matters complained of; I was not taken to anything which might assist him in making good that assertion.

    68.6. On the other hand, there is clearly identifiable prejudice to the Respondent, if time were extended: by the time the Claimant issued proceedings, the allegations were historic. Discrimination claims are fact-sensitive, and the mental processes of the alleged discriminators are always subjected to close scrutiny. In my judgment, the effect of the passage time on the ability of witnesses to recall the matters in question, and the minutiae of their reasons for acting as they did, would inevitably have an impact on the cogency of the evidence. I conclude that the prejudice to the Respondent outweighs the prejudice to the Claimant.

69. Weighing all these factors in the balance: the very long delay, the absence of a satisfactory explanation for it, and my conclusion as to the balance of prejudice, I consider that it is not just and equitable to extend time in relation to the

Claimant's claims of age discrimination. Accordingly, the Tribunal has no jurisdiction to hear them, and they are dismissed.

THE CASE AGAINST THE NMC

Findings of fact

The Claimant's portfolio of work

70. The Claimant describes his career as a 'portfolio career'. His CV shows that since 2012, when he was first appointed by NMC, he has been (among other things): an ombudsman at the Financial Ombudsman Services; an accredited mediator and mediation advocate; an arbitrator in a variety of different types of dispute; an independent disciplinary member/chair of employee disciplinary and grievance hearings; and an independent investigator into serious disciplinary matters, usually relating to senior figures in organisations.

71. In 2010/11 the Claimant did a postgraduate diploma in law; in 2011/12 he did the Bar Professional Training Course, both at the College of Law. In July 2012 he was called to the Bar. In 2013/14 he studied for an LLM in Dispute Resolution at Queen Mary University of London. He completed pupillage in February 2018 and now practises as a barrister in a range of areas of law, including professional regulatory law and employment law.

72. In addition to his work as a Panel Member for the MPTS, and as a Panel Chair for the NMC, he has also sat as a Member for the Chartered Institute of Management Accountants and the Construction Industry Council. As for his work for the MPTS, the Claimant was engaged for four years from April 2014 to April 2018. During that period, he sat in hearings on 98 days.

73. In 2014 he made an application to sit as a Chair of the Professional Conduct Committee of the Health and Care Professions Council, in which he described himself as 'self-employed' and gave his job title as 'Lay Regulatory Panel Chair'.

74. Throughout this period he also sat as a Magistrate. In 2019 he was appointed as a Judge of the First Tier Tribunal (Social Entitlement Chamber).

The structure of the NMC

75. The NMC was established under the Nursing and Midwifery Order 2001, SI 2002/253 ('the Order'). Its function is to regulate nurses and midwives in the UK, establishing standards of education, training, conduct and performance. Its governing body is referred to as the Council. By article 3(9) of the Order, the NMC has two committees: the Investigating Committee and the Fitness to Practise ('FTP') Committee ('the Practice Committees').

76. The NMC is under a statutory duty to investigate any allegations made against a registrant (a nurse, midwife or nursing associate) that their fitness to practise is impaired because of misconduct, lack of competence, a conviction or caution, their physical or mental health, or not having the necessary knowledge of English. Where such an allegation is made, NMC Case Examiners conduct an investigation and, where they consider there is a case to answer, the allegation is referred to the FTP Committee for a hearing.

77. The Order provides (sch. 1, Part 1, para 15(3)):

> **The Council may not employ any member of the Council or its committees, or sub-committees.**

78. Schedule 1 of the Order empowers the NMC to 'pay its staff such salaries, allowances and expenses as it may determine […]'. By contrast, it is empowered 'to make such provision in respect of its […] members of its committees and sub-committees […] for the payment of fees and allowances'. Similarly, it is empowered to make arrangements for pensions for staff, but there is no equivalent for committee members.

79. The Schedule to the Nursing and Midwifery Council (Practice Committees) (Constitution) Rules 2008, made under the Order, ('the Rules') provide that the NMC shall determine the duration of the term of appointment of FTP Committee members (usually four years), but their appointment is limited to a maximum of two terms. As at October 2019 the FTP Committee was made up of around 300 appointed Members.

80. There are four types of FTP hearings: interim order hearing, where the panel considers whether to vary an interim order; substantive hearings, where an allegation is considered; substantive order review hearings; and restoration hearings, where the panel considers an application by a registrant for restoration to the Register. Chairs of the FTP Committee also sit on pre-meetings, to issue case management directions to the parties.

81. Under the Rules a FTP panel must be composed of three people, at least one of whom must be a registrant, and one a non-registrant; the Panel Chair may be either. The panel is supported by a Panel Secretary, who provides administrative assistance, and by an independent Legal Assessor, who attends to give legal advice.

82. The number of Panel Members appointed at any given time varies in response to levels of work. Mr Johnson's role is to ensure that there are sufficient members at any given time to attend all FTP hearings and meetings. The requirement for new appointments (or reappointments) varies from time to time, usually depending on external circumstances.

83. The Rules provide that members of the NMC's Council may not be appointed to its Practice Committees.

<u>The appointment process</u>

84. The process of appointing members is overseen by the Appointments Board, which was established under the Rules. The Board consists of up to five people; they are appointed for a maximum of two fixed terms and are independent of the NMC.

85. The Board must ensure that only suitably qualified individuals are recommended to the Council for appointment as Panel Members. In his witness statement Mr Johnson described the requirements as follows:

> 'Panel Members are required to have the skills and attributes necessary to act as fair, impartial and independent members of a fitness to practise panel. The skills and attributes include having a genuine interest in

> protecting the health and well-being the public, having a high level of integrity with a strong sense of public responsibility as enshrined in the 'Seven Principles of Public Life', and the ability to assimilate complex evidence in a fair and balanced way in order to arrive at objective and reasoned decisions.'

86. The NMC uses specialist external agencies to assist with the appointment of members. The agency advertises the position and conducts an initial paper sift against competencies provided by the NMC: values and motivation, analytical skills and decision-making, relevant knowledge and working with others. Based on their assessment, the agency recommends candidates for interview and provides support during that process. Following the interview candidates attend an induction event and a list of appointable candidates (with reasons) is then provided to the Appointments Board, which scrutinises the process and the recommended candidates, before providing the Council with a final list of recommended appointees. The Council then sends letters of appointment to the successful candidates,

87. The NMC advertised for 100 Panel Chairs in around 2011. The advert contained the following statement.

> '**Time commitment**
>
> You will be expected to be able to serve the NMC for at least 30 days a year […]'

88. The Claimant was appointed as a non-registrant, Panel Member Chair of the FTP Committee (known at the time as the 'Conduct and Competence Committee') for four years from 16 April 2012. He was reappointed in 2016 for a further four years, ending on 5 April 2020. As might be expected, Chairs generally take the lead at hearings, and also complete a case preparation questionnaire for those hearings in which they sit, the purpose of which is to inform the NMC of any administrative issues which are have arisen. He also sits as a Chair in registration appeal hearings, dealing with appeals by people who have been refused registration by the Registrar.

<u>The written terms of engagement</u>

89. On 9 May 2012 NMC wrote to the Claimant confirming his appointment and saying:

> 'You are not an employee or an office holder of the NMC. Your appointment as a Practice Committee member makes you eligible to provide services, as an independent contractor, to the NMC, as a panellist or a Panel Chair.'

90. The terms of the appointment were set out in the Panel Member Services Agreement ('PMSA') of 16 April 2012.

91. Clause 8 of the 2012 PMSA provided as follows:

> 'The Panel Member shall provide the Services to the NMC as an independent Panel Member and nothing in the Agreement shall create a

relationship of employer and employee between the NMC and the Panel Member'.

92. Clause 9 provided as follows.

> 'Nothing in this Agreement shall render the Panel Member an employee, partner or agent of the NMC […]'

93. The inclusion of this wording reflected the terms of the Order. It also reflected the view of HMRC, following engagement between it and the NMC in 2011 as to whether members were office holders. By letter dated 4 May 2012, the HMRC concluded that 'from 6 April 2012, the individuals scheduled to sit on a FTPP would not be classed as employees of the NMC for tax and NIC purposes, but would instead consider them to be self-employed based on the information supplied.'

94. By letter dated 5 May 2016 the Claimant was reappointed; that letter included the following paragraph:

> 'I am required to remind you that as a Panel Member you are not an employee or an office holder of the NMC. You are appointed as a Practice Committee member who is eligible to provide services, as an independent contractor, to the NMC as a fitness to practice Panel Member. The terms upon which you will be invited to provide services as a Panel Member following your appointment are set out in the PMSA.'

95. The terms were set out in a further PMSA, signed and dated by the Claimant 7 May 2016.

96. Clause 11 of the 2016 PMSA provided (in identical terms to Clause 7 of the 2012 PMSA):

> '**Supply of Services**
>
> 11. The Panel Member shall provide the Services as requested from time to time by the NMC.
>
> 11.1 The NMC shall provide the Panel Member with reasonable notice of any request to provide the Services. If the Panel Member cannot provide the Services on the dates and at the time so notified, the Panel Member shall promptly inform the requesting person or department at the NMC of that fact.
>
> 11.2 The NMC and the Panel Member agree and acknowledge that:
>
> 11.2.1 the NMC is not obliged to request the Panel Member to provide the Services;
>
> 11.2.2 the Panel Member is not obliged to provide the Services if so requested by the NMC;
>
> 11.2.3 the Panel Member has no right to provide the Services; and

> 11.2.4 where the NMC requests the Panel Member to provide the Services in respect of the case and the Panel Member agrees to provide those Services the Panel Member will use all reasonable endeavours to attend the hearing of that case on each and every day on which it is heard including where it is adjourned for any reason and concluded later than originally anticipated.
>
> 11.3 The Panel Member agrees to travel within the United Kingdom as may be reasonably necessary for the proper provision of the Services.
>
> 11.4 The Panel Member shall be available on reasonable notice to provide any information advice or assistance about the Services as the NMC may reasonably require.

97. Clauses 12-14 of the 2016 PMSA provided:

> ’12. In performing the Services the Panel Member shall operate, and have the status of, an independent contractor and nothing in this Agreement shall create a relationship of employer and employee between the NMC and the Panel Member’.
>
> […]
>
> 14. The Panel Member is an independent contractor and accordingly shall be responsible for accounting in full to the appropriate authorities for any income tax and national insurance contributions and any other levy (if any) in relation to any Fees or Expenses paid to the Panel Member under this Agreement.’

98. Clauses 17 to 21 set out the obligations on the Panel Member. By way of example:

    98.1. Clause 17.4 required the Claimant to ‘comply with all procedures of the NMC relevant to Panel Members in force at the time’, including the Code of Conduct and Service Standard for Panel Members, the Conflict of Interest policy, the performance feedback process, and the NMC’s procedure for addressing complaints against Panel Members.

    98.2. Clause 18 required him promptly to provide any assistance and information (in writing if so required) required of him by the NMC.

    98.3. Clauses 36 to 43 imposed obligations on the Claimant in respect of dealing with confidential information.

99. Clause 22 set out the obligations on the NMC. By way of example:

    99.1. Clause 22.2 required it to provide to the claimant with regular communications in relation to NMC guidance and procedures, and feedback in relation to the Panel Member’s performance;

    99.2. Clause 22.3 required it to provide the Panel Member with ‘such training in the performance of the Panel Member role as it considers appropriate, which may include refresher training from time to time or

> compulsory training for Panel Members not performing to the required standard.'

100. Clause 38 of the agreement gave the NMC the power to suspend the Panel Member from performing any services, if he breached the Code of Conduct. Clause 39 gave the NMC the power to terminate the agreement in prescribed circumstances, for example if he committed a serious breach of the agreement, or any obligation under it. By Clause 46, the Panel Member could terminate the agreement on three months' written notice.

101. The main body of the PMSA was then supplemented by a series of Schedules, Appendices and Annexes, to the terms of which the Claimant confirmed his acceptance by signing the PMSA.

102. Schedule 1 set out the services to be provided by the Panel Member. Some were merely descriptive of the work ('reading, listening to, considering and testing the evidence and submissions presented to the panel to reach appropriate decisions and outcomes'). Others imposed specific requirements, such as keeping up-to-date with Council policies, providing feedback following provision of the Services when requested to do so, and participating in all required Panel Member training events. The Claimant put to Mr Johnson in cross-examination that this list was 'directive'. Mr Johnson agreed that, as a Panel Chair, he was required to do all of the things in the list, but maintained that the manner in which he chose to do them was a matter for him.

103. Annexe 1 contained the 'NMC Practice Committee Panel Members, Code of Conduct and Service Standards'. As might be expected, the Code contains statements of ethical principle; for example, it incorporates the Seven Principles of Public Life, including the principle of objectivity:

> 'Act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias'.

104. Paragraph 6.4 of the Code reiterates that Members must:

> 'carry out their work on the practice committees in a fair and impartial manner'.

105. Paragraph 5 provides:

> 'In providing their services, Panel Members are expected to maintain high standards of conduct and behaviour at all times. This Code of Conduct and the Service Standards set those requirements or the required standard of conduct and behaviour.'

106. Later provisions provide that Panel Members must:

> 'work collaboratively with panel colleagues, other parties to the proceedings and NMC staff administration' (paragraph 10.1);
>
> 'participate in the training programmes provided for Panel Members' (paragraph 11.1); and
>
> 'conduct their role in accordance with the NMC's competencies (attached as Appendix A) for panel members and participate in the panel member

feedback process, complying with any agreed outcomes' (paragraph 11.2).

107. Paragraph 16 provides that Panel Members 'should ensure' they:

> 'are available to provide their services as set out in their terms and conditions of appointment in the PMSA;
>
> inform the Panel Support Team at the earliest opportunity if they have to withdraw from a panel to which they have been booked. It is expected that this would be for exceptional reasons only;
>
> inform the Panel Support Team at the earliest opportunity if they become unable to provide their services for any period of time.'

108. In paragraphs 17 to 19, the Code provides that compliance with the Code is 'obligatory'; that the NMC will take 'appropriate action' to deal with any breach of the Code including, where the breach is serious, termination of the appointment; and that such breaches will be dealt with 'in accordance with the Procedure for addressing concerns about Panel Members of the NMC's practice committees … the NMC will ensure that a fair process is followed'.

109. Appendix A to the Code sets out the core competencies of Panel Members, the purpose of which is 'to guide panellists in their role'. Annexe 2 contained the NMC's conflict of interest policy; Appendix A to that Annexe sets out in some detail the legal principles relating to conflict of interest and bias, including the well-known guidance in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

110. Annexe 3 contains the 'performance feedback process for Panel Members of the NMC's Practice Committees'. This includes the following provisions:

> '8. The NMC has a responsibility both to seek to improve performance, and also to ensure that any concerns relating to the conduct or performance of Panel Members which are brought to its attention and which could impact adversely on public protection or public confidence in the NMC, are addressed in a timely and effective manner.
>
> 9. The NMC, in common with other health professionals regulators, has put in place a performance feedback process for panel members who sit on its practice committees. It is intended to be a light-touch process which respects the independent nature of Panel Members' roles and decision-making. It does not include any individual appraisal process.
>
> […]
>
> **Outcomes of the feedback process**
>
> […]
>
> 16. Issues relating to individual performance:
>
> 16.1 where appropriate any such issue will be addressed initially by the panel support team manager in accordance with paragraphs 16 to 19 of this policy.'

111. Paragraphs 17 to 21 then set out how issues relating to individual performance members will be dealt with in more detail: the Panel Support Team Manager is empowered to raise performance or conduct concerns with the individual; s/he will instigate action at the level s/he decides is appropriate; s/he might require the individual to undergo further training, attend further meetings or submit to 'ongoing monitoring'; where an issue is regarded as serious, persistent or deliberate, the matter may be considered 'as a complaint under the Process for addressing complaints against Panel Members of the NMC's Practice Committees, which may in serious cases lead to removal or suspension of panel membership'. That complaints procedure is contained at Annexe 5.

The induction process

112. The Claimant was required to attend two days of induction training. Originally this formed part of the appointments process (although I accept Mr Johnson's evidence that no candidates were filtered out as a result of the induction training), more recently after formal appointment. The training provided an introduction to the statutory framework which governs the NMC and FTP hearings. The roles and responsibilities of participants in the process (legal assessors, case presenters, registrants' representatives and so forth) were explained.

113. The Claimant was also required to attend one day's training per year, for which a fee was paid. The purpose of the training was to pass on feedback which the NMC had received from the Professional Standards Authority (the body which regulates all healthcare regulators), registrants and witnesses. Mr Johnson explained in his statement that, because the material covered is unique to the NMC, it was not training which Panel Members could be expected to source themselves from a third-party supplier. Attendance at the training day was mandatory.

The system of booking, cancelling and withdrawing

114. Hearings took place in a number of regional hearing centres, including Edinburgh, Cardiff and Belfast; the location was determined by the home address of the registrant. If the Claimant did not wish to travel to one of those centres, for any reason including distance, he was free to decline the offer.

115. The Panel Support Team requested the Claimant to provide his availability over a six-month period. The NMC then notified him when he would be required ('block booking'). About a month before a particular hearing, it was allocated to Panel Members whose availability had previously been secured. If there were not enough block-booked members to cover all the hearings, the Panel Support Team sent round an extra availability request; the hearings were then distributed between those Members who indicated that they were available.

116. Under the original block booking system, if a hearing was cancelled or went short, the Claimant would still be paid in full. In October 2017, that system was changed and a payment of 50% of the fee was paid, if less than 14 days' notice was given of cancellation. If the hearing went short, or was cancelled once it had started, the NMC paid the hearing fee in full.

117. The number of days on which the Claimant sat for the NMC varied greatly over the years. It was at its highest (129 days) in 2013, around the time he was

studying for his LLM. Between 2014 and 2017, it varied between 61 and 98 days. In 2018, once the Claimant had begun to practise as a barrister, it reduced substantially to 17 days; and in 2019 he had sat only 7 days by the beginning of the hearing in November.

118. There was ample evidence of occasions on which the Claimant turned down sitting days. On 26 January 2016 he was asked if he had the availability to cover hearings longer than a week the following month, two of which were in London, one in Scotland. The Claimant replied the same day that he could do any of the London hearings; a few minutes later he wrote to say that, in fact, he could not do any of the dates, because he had another commitment.

119. On 30 June 2016 the Claimant replied to a query about his availability in July by providing details of his non-availability over the whole of the summer, including by reason of the fact that he had a two-week case for the GMC, before going on holiday for three weeks, returning to sit on another GMC case for two weeks.

120. The Claimant could withdraw from a case even after he had been booked, without a requirement to provide an acceptable reason; the only requirement was that he notify the allocation team. By way of example, on 26 February 2019, the Claimant wrote a single line email to the Panel Support Team ('Please could I be released from my booking for Tuesday and Wednesday 19th and 20th March?'). In 2014/14 he withdrew from a number of dates in order to go to New Zealand. There was no evidence that he was penalised for withdrawing in this way.

121. Mr Johnson accepted that there was an 'expectation' that Panel Members would offer dates each year. I was referred to a 'Report on Panel Members performance' by the Appointments Board, which recorded as part of the discussion that a number of Panel Members:

> 'have not provided sufficient sittings, the Panel Support Team have discussed this with each Panel Member and gained assurances that sitting numbers will increase over the next six months'.

122. The Claimant relied on this as an indicator that, at the very least, pressure was brought to bear on Panel Members to increase the number of sittings they were offering. Mr Johnson on the other hand said that this was consistent with the fact that there was an expectation, and that the discussion would be likely to be along the lines of 'is there anything we can do to help?' On the evidence available to me, I find that members were spoken to if they were not offering dates, and encouraged to do so. However, members were not required to offer a specific number of dates, and were not sanctioned if they did not do so. I heard no evidence that pressure was exerted on them.

123. As for any purported obligation on the part of the NMC to offer a certain number of dates per year, the Claimant was unspecific as to what that number was. I was referred to correspondence in 2015, when the number of days for which members were block-booked was reduced because too many members were being booked for the number of hearings available. The Claimant wrote to the NMC on 3 March 2015, expressing his dissatisfaction [*original format retained*].

> 'As you will know over the last three years I have been a loyal and one of your most active chairs. When the NMC were in need of help on

> numerous occasions and for many CHRE initiatives to get back logs cleared to hit key performance indicators I have played a role in you achieving these. I have never let you down or called in sick etc.
>
> The quid pro quo is that the NMC has provided me with plenty of work and I haven't tried too hard to find other work. I have prioritised NMC work over others like the GMC and others that I do, often turning them down to the benefit of the NMC.
>
> The system of working was mutually very beneficial and it was one that suited me very well.
>
> I must say that I was very disappointed therefore only to get 15-ish days for the entire next six-month period. I also responded to the call for assistance for the recent 30th March and am disappointed I got nothing despite the great big long list of hearings and me responding that I was available for all of them including a long case that spanned two weeks.
>
> Regrettably, if this becomes a permanent feature of the new allocation model, I can't afford to continue to prefer the NMC and potentially have big gaps in my diary. It will be sad but I'll have to switch my strategy to prioritise other work. I know I'm not alone in this regard especially for those for whom this kind of work is an important part of their personal or family income.'

124. In an email several days earlier (3 March 2015) to another member the Claimant had written:

> 'I do understand that the NMC is under no obligation to provide any defined volume of work, that it is free to allocate work on any basis it wishes to. It is the recent 'change' of approach and its abruptness which I question.
>
> If the NMC would prefer, as you suggest, that I prioritise working elsewhere then that is its free choice. I think it is sad to ask that of those who responded to the organisation when it needed help most. I also struggle to see in whose interest that lies. Similarly, it seems a very abrupt policy change to view matters in that way and to prefer to allocate work to those who have the lowest number of dates.'

125. The Claimant went on to express his view that it was inappropriate for the NMC to favour the allocation of work to those who had sat less, rather than those (like him) who had sat a great deal. He concluded:

> 'As long as the NMC are cognisant of the consequences of pursuing the policy then of course it can do what it thinks best but it can't expect those like me to be there to the same extent once we have taken your suggestion of prioritising work elsewhere.'

126. On 23 March 2015 Mr Johnson replied to the Claimant at some length including the following passage:

> 'I realise that the reduction in available work may mean that you choose to sit less for the NMC and take on other work to fill your diary with work

> that gives you a high degree of certainty, if that is the case then that is very much your decision and one which the NMC would not wish to seek to influence.'

127. The Claimant relied on the fact that there was always a throughput of cases which would need to be allocated to Members. Mr Johnson did not disagree, although he made the point that the workload varied greatly from year to year.

Limits on the Claimant's ability to work for others

128. The parties in the proceedings before the Claimant are the registrant and the NMC itself. The Claimant was not permitted to represent nurses and midwives in his capacity as a barrister. Otherwise the NMC placed no restriction on the type or amount of work which he undertook for other organisations, including other regulators. That the Claimant understood this is apparent from an email which he sent to Mr Johnson on 27 March 2014 in which he wrote to Mr Johnson as follows:

> '[…] I was wondering if I might ask some advice. I noted your previous experience within a financial regulator and was wondering if you had any tips on how I might pick up panel work in that sector? I seem to have picked up healthcare regulatory work quite well (BACP and more recently GMC too) but haven't had much luck with Pensions/FCA etc. I did previously work in the City as a trader for 4 years and then ran a number of businesses for 15 years and so do have broader commercial experience'.

'Pressure to toe the line'

129. Members had an obligation to act impartially, and independently of the parties. The evidence of Mr Johnson was that 'at a hearing Panel Members retain unfettered autonomy and independence and are not subordinate to the NMC'.

130. The Claimant disagreed with that proposition and stated that he:

> 'always felt pressure to toe the line and make decisions in accordance with the Second Respondent's world view. I chose to ignore that pressure and do what I thought was right regardless, but I felt this would impact on how I was perceived within the organisation, limit the likelihood that I would progress and be allocated to particular cases'.

131. The Claimant drew my attention to an email he received from Ms Claire Davidson (Communications Officer) on 10 January 2013. He had received a 'learning point' about a specific case from the Council for Healthcare Regulatory Excellence ('CHRE'), the NMC's regulator at the time; he had then contacted the Legal Assessor on the case to discuss the point. In her email Ms Davidson pointed out that there should be no contact between NMC Panel Members and legal assessors outside the hearing room, 'as they are independent of both the NMC and the panels.' The Claimant suggested that this contradicted the NMC's case 'that I was free to decide how to discharge my duties'. I find that it does not: Ms Davidson was simply reminding him of an ethical principle. Moreover, the point she was making itself emphasised the separation of functions as between Members, Legal Assessors and the NMC.

132. In his oral evidence the Claimant said that he was 'entirely subordinate to the NMC and it takes great strength of character to resist.' I found that evidence to be implausible. I have no doubt that, if he had felt that the NMC was interfering in any way with his impartiality as a decision-maker, he would have had no hesitation in saying so. I was not satisfied that there was any evidence that the NMC sought to interfere with the independence of its Members.

133. In his witness statement Mr Johnson referred to an email from the Claimant to a third-party, whose name had been redacted, but who appeared to be connected with Swansea University, and was writing to the Claimant to introduce him to a criminologist with an interest in professional regulation, who had worked with organisations including the NMC. The correspondent observed that the Claimant and the criminologist might have interests in common. The Claimant expressed enthusiasm and the correspondent wrote to the criminologist to introduce him to 'Robin, who is from the NMC'. Later the same day the Claimant replied to both:

> 'Delighted to have been included in this correspondence. Just for the record, I am a Panel Chair at the NMC but that is an independent role and I don't hold myself out to be "from the NMC".'

Payment and expenses

134. Clause 23 of the 2016 PMSA provided that the relevant fees were to be 'determined by the NMC from time to time'. Fees were fixed and non-negotiable: a Panel Member was paid £310 for attending a full day hearing/meeting; a Panel Chair £340. Members were paid £260 for attending a training day. Some Members worked on a voluntary, unpaid basis, although at the time of the hearing, only one Member did so.

135. The day rate has remained the same throughout the material period, but some terms have changed over time. Those changes were imposed unilaterally: for example, around 2014 the pre-hearing reading fee of £290 was reduced to £100; Members were originally provided with lunch at no cost, since around 2017 this benefit was withdrawn.

136. Members invoice the NMC for work done at the end of the month; there is no set format for invoices.

137. The NMC reimburses Members' travel and accommodation expenses. The PMSA at Clauses 30 to 32 provides that expenses will be paid 'in accordance with the policy in force at the time of the request for Services.' The policy to which I was referred, which was dated October 2017, requires that all travel and accommodation arrangements should be booked online via Click Travel, a travel arrangement company which the NMC had appointed as its travel specialist. The policy sets out what expenses will and will not be covered; rail or air travel are reimbursed; subsistence and incidental expenses are included in the attendance fee. So, for example, meals (other than breakfast after an overnight stay) may not be reclaimed.

138. There is guidance as to what type of ticket can be booked. By way of example, a Member may book a sleeper train between London and Edinburgh, where this provides better value for money than a flight and overnight hotel. Overnight accommodation will only be authorised in specific circumstances; the member

is required to book the most cost-effective hotel option using the Click Travel system. Mr Johnson's unchallenged evidence was that the Claimant had claimed expenses on limited occasions only, when conducting hearings outside London, for example in Cardiff and Scotland.

Ability to substitute

139. Mr Johnson's evidence for NMC was that it does not permit Panel Members to provide a substitute, if they are unable to perform work which they had previously accepted, whether through ill-health or for any other reason. If the Claimant became unavailable, he contacted the Panel Support Team, which contacted other Panel Members and arranged for one of them to cover the work. The Claimant would not be entitled to charge the NMC a fee in those circumstances.

The working day

140. When booked for a hearing, papers were sent to the Claimant in electronic form before the hearing, and he was required to do any pre-reading, for which he was paid a set fee of £100. He could do this wherever and whenever he wished. If he required equipment to conduct that pre-reading, whether a desktop computer or tablet, he would have to provide it himself. Mr Johnson's evidence was that, if the papers are particularly onerous, members may negotiate an enhanced reading fee, although he acknowledged that this occurs rarely.

141. All FTP hearings are scheduled to start at 9:30 a.m. on the first morning. After April 2016, the facility to start on subsequent days at 9 a.m. was made available, but this was expressly at the discretion of the Chair. The Claimant was expected to attend the hearing centre in good time, to ensure a prompt start. He was required to sign in and out of the building for health and safety purposes (for example, in case of fire); the log was not monitored for timekeeping purposes. Thereafter, he ran and controlled the hearing: he set the timetable and determined the hours on which it sat, when it took breaks, when the parties were required to attend and so on. If he wished, he could decide on Day 3 of a 5-day hearing to finish at 3.30 p.m. If a hearing went part-heard, it was listed to resume on dates convenient to the panel and the parties. The panel notified the NMC of the new dates, and the NMC took steps to arrange a hearing room.

142. Chairs, including the Claimant, were asked to read out a standard form of words when opening a Substantive Order Review Hearing. Mr Johnson's evidence was that a number of Chairs declined to do so, and the NMC did not insist. When the Claimant had completed a hearing, he was sometimes assigned duty work, known as 'stored' or 'cupboard' work.

143. In his statement the Claimant stated that he was 'restricted in not being able to use my telephone, email or messaging.' He gave no examples of this, and agreed that professional courtesy prevented him from using his phone during hearings. The Claimant wore a suit when sitting as a Panel Member, which he characterised as a 'uniform'.

144. The Claimant stated that he was 'provided with all tools and resources required to do the work by the Second Respondent'. The only example he gave was 'a Panel Secretary to draft our decisions'.

The Panel Member forum

145. Panel Members established a Panel Member Forum in 2013. They elect representatives to discuss issues affecting their roles. Other than the fact that the NMC circulates information to Panel Members on behalf of the forum (primarily for data protection reasons), all the other activities of the forum are carried out by Members. The forum occasionally invites members of the Appointments Board to feed back information to the Forum and vice versa.

The applicability of policies and procedures

146. Policies relating to family friendly leave and pay, disciplinary and grievance procedures, annual leave request and sickness absence which apply to employees of the NMC do not apply to Panel Members. Panel Members have no involvement with the NMC's HR department; their contact is with the Listing, Hearings and Panel Support teams.

147. Panel Members do not attend the staff conference which takes place annually, nor are they invited to social events, such as the Christmas party.

148. The Claimant did not have an NMC email address or access to the NMC's IT systems, including the intranet and internal chat board, which are available to employees. He was issued with a security pass by the NMC.

Performance monitoring and feedback

149. In mid-2013 the Claimant enquired about the criteria for reappointment and these were sent to him.

> 'The criteria listed below allow us to fairly and transparently manage the expertise, skill sets and commitment of panel members that is compatible with current and future business need. This criteria needs to have sufficient flexibility to ensure that we match numbers required with the Fitness to Practice workload.
>
> **Criteria – Panel Members**
>
> - Compatible availability
> - Number of sittings and completion of sittings
> - Training attendance and e-learning completion
> - PSA and Decision Review Group learning points and appeals
> - Positive feedback and concerns raised
> - 360° post panel feedback
> - Any other pertinent information available to the PST/NMC at the time of any appointment review.

Criteria – Business Need

- Number and type of panel members required to match FTP workload
- Number and type of panel members required to match changing business needs of the NMC.

150. On 24 December 2015 Ms Gina Sherma wrote to the Claimant, attaching what she described as his 'Activity and Engagement report for 2014 and 2015'. This was a chart which set out his results against various criteria, with a separate column showing the average results of his peer group (Panel Chairs recruited in 2012). She wrote: 'we have included the average results of this group to allow you to compare your own results with your peers which you may find useful for your own continuous development plan'.

151. The statistics in the report included:

151.1. 'rate of withdrawal' from cases to which the individuals had been allocated: the Claimant scored 16.05% against a peer group average of 6.84%;

151.2. 'exceptional feedback provided in 2014 & 2015': the Claimant had a 'concern count' of zero against an average of 0.2%.

152. Based on this report, Ms Sherma confirmed that she would be recommending that the Appointments Board consider reappointing him for a second term.

153. In February 2016 the NMC introduced a performance benchmark process for Panel Members. Mr Johnson described the purpose of that process in his witness statement:

> 'The purpose of this process was to provide Panel Members with an overview of their own performance for them to consider, to provide assurance to the Appointments Board and the Council that Panel Members were providing a quality service and to provide the Appointments Board with an evidential basis for proposing Panel Members for reappointment. Additionally, we had been contacted by a number of Panel Members requesting feedback on their performance.'

154. In 2018 metrics for 'hearing completion' and 'sitting days' were removed from the performance benchmark. The Claimant contended that this was after he brought this case, indeed because he brought his case; there was no evidence to that effect. Mr Johnson's evidence, which I accepted, was that the removal of those metrics was because it was recognised that some of the factors which cause a hearing not to complete were beyond the control of Panel Members (for example, if a registrant became unavailable). The removal of the 'sitting days' metric was based on the recognition that the number of days sat by a Panel Member was not a true measure of performance, and the fact that there was no obligation for Panel Members to accept a minimum number of hearings each year.

155. Mr Johnson accepted in evidence that one Member's appointment had been terminated before the end of his/her term for 'insufficient days'; eight had not

been reappointed since 2013. There was no evidence before me as to the reasons why those eight Members were not reappointed.

156. At the end of each hearing the Claimant was asked to complete a 360 degree Feedback report about his fellow Panel Members, the legal assessor and the panel secretary; they also provided feedback about him.

157. The Claimant also received feedback from the Decision Review Group. I reject his evidence that this feedback put limits on his independence; the purpose of the feedback was to ensure that written decisions properly articulated the panel's reasons.

158. Panel Members are now requested to complete a peer review questionnaire form in relation to hearings they have attended every six months. Mr Johnson's evidence, which I accept is that:

> 'this provides the Panel Members with the opportunity to provide any feedback to the NMC regarding how the hearing has been organised, but also any concerns regarding fellow Panel Members. Any feedback received is taken into account as part of the revised benchmark framework.'

Income tax and national insurance

159. The Claimant was responsible for accounting to HMRC for any income tax and national insurance contributions due on the fees paid to him by the NMC.

160. On 23 January 2013 the Claimant wrote to his accountant, seeking advice as to whether he could offset the cost of legal training against income on his tax returns. He explained that before 2010 he had done a limited amount of panel sitting for professional disciplinary hearings, and had applied for other roles as a Panel Member or chair, but perceived that he was not getting more work of this kind because he was not a lawyer. For that reason, he explained, he undertook a one-year postgraduate Diploma in Law ('PGDip'), which he completed in 2011 at a cost of £8,600. He then did the Bar Professional Training Course ('BPTC'), which he completed in July 2012 at a cost of £16,000. He wrote:

> 'in April 2012 (after I completed the PGDip but prior to completing the BPTC) I was appointed to the Nursing and Midwifery Council as a Panel Chair.
>
> As previously described this is a freelance/self-employed role paid as a contractor on a day rate. I'm keen to offset the cost of the legal training against income. I understand that the basic rule is that you can't claim for training undertaken prior to starting an activity, but although the activity was low, it was undertaken before I did the training. I undertook the course to do 'more' and the strategy has worked.
>
> Since completing the PGDip course I have earned just over £30,000 in mediation and professional discipline of which just over £25,000 was earned since completing the BPTC course.'

161. In his tax return for 2012/2013, the Claimant gave his business name as 'R Somerville' and the description of his business as 'consultancy and professional

disciplinary'. In oral evidence he confirmed that he offset expenses of £12,190; he thought it 'likely' that that figure included an element of his legal training. He agreed that thereafter he continued to offset substantial expenses, including further legal training and the cost of a website template, against the business which he called 'consultancy and professional disciplinary'. The Claimant's explanation for this was that there was only one form that he could complete, if he was not treated as an employee. Each year he described his business in slightly different ways, essentially as an amalgam of his various activities (for example, 'Consultancy and Professional Disciplinary', or 'Prof. Regulatory Panel Chair/Ombudsman'). The Claimant agreed that he paid National Insurance at the lower, self-employed rate.

The law to be applied

Statutory definitions

162. S.230 ERA, so far as relevant, provides:

> **(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.**

163. Reg 2(1) WTR 1998 adopts the same definition of worker as the ERA.

164. There are thus three categories of relationship, conveniently summarised in *Bates van Winkelhof v Clyde & Co. LLP* [2014] ICR 730 (*per* Baroness Hale at [24] and [25]):

> **'24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.**
>
> **25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj (London Court of International Arbitration intervening)* [2011] ICR 1004 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2013] ICR 415, who also provided his**

> **services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of section 230(3)(b) of the 1996 Act.'**

165. A worker who meets the definition in s.230(3)(b) ERA is now commonly referred to as a 'limb (b) worker' or 'an employee under the extended definition'.

Employee status

166. The definition of employee in s.230(1) ERA turns on the meaning of the phrase 'contract of service' in s.230(2) which, impliedly, is to be contrasted with a 'contract for services'.

167. The usual starting-point is the passage in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2QB 497 at 515, in which MacKenna J. said:

> **'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.**
>
> **I need say little about (i) and (ii).**
>
> **As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. 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: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.**
>
> **As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.'**
>
> **…**
>
> **I can put the point which I am making in other words. An obligation to do work subject to the other party's control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). He may, in performing it, take into account other matters besides control.'**

168. As for personal performance, the Supreme Court in *Pimlico Plumbers v Smith* [2018] ICR 1511 endorsed the principles set out by Sir Terence Etherton MR in his judgment in the same case in the Court of Appeal ([2017] ICR 657 at [84]:

> **'84. In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute**

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

169. No contract of employment can exist in the absence of 'mutual obligations subsisting over the entire duration of the relevant period': *Clark v Oxfordshire Health Authority* [1998] IRLR 125 at [22]. In *Carmichael v National Power plc* [1999] ICR 1226 (at 1230) Lord Irvine cited this passage with approval, in support of the proposition that, if there were no obligation on the employer to provide work, and none on the putative employee to undertake it, there would be 'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service.'

170. In *Quashie v Stringfellow Restaurants Ltd.* [2013] IRLR 99 at [12] Elias LJ held:

> **'In order for the contract to remain in force, it is necessary to show that there is at least what has been termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work engagements: see the judgment of Stephenson LJ in *Nethermere (St Neots) v Gardiner* [1984] IRLR 240, 245, approved by Lord Irvine of Lairg in *Carmichael v National Power plc* [2000] IRLR 43, 45. Where this occurs, these contracts are often referred to as 'global' or 'umbrella' contracts because they are overarching contracts punctuated by periods of work. However, whilst the fact that there is no umbrella contract does not preclude the worker being employed under a contract of employment when actually carrying out an engagement, the fact that a worker only works casually and intermittently for an employer may, depending on the facts, justify an inference that when he or she does work it is to provide services as an independent contractor rather than as an employee.**

171. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, Langstaff J concluded at [47, 48 and 54]:[1]

> **'Mutual obligations are necessary for there to be a contract at all. If there is a contract, it is necessary then to determine what type of contract it is. If it is a contract of employment, consequences will follow of the greatest significance – not only in terms of whether the employee is entitled to, and the employer subject to, those rights and duties conferred by statute upon employees and employers alike, but also common law considerations such as whether the employer may be, for instance, vicariously liable for the torts of the employee. The concept may be essential in determining whether there has been actionable discrimination on the ground of sex, race or disability. These matters are determined by the nature of the mutual obligations by reference to which it is to be accepted that there is a contract of some type.**

[1] An approach subsequently approved by the Court of Appeal: in *James v Greenwich LBC* [2008] ICR 554 at [45]; and in *Quashie v Stringfellow Restaurants Ltd.* [2013] IRLR 99 at [42].

> **…**
>
> **It cannot simply be control that determines whether a contract is a contract of employment or not. The contract must also necessarily relate to mutual obligations to work, and to pay for (or provide) it: to what is known in labour economics as the "wage-work bargain".**
>
> **…**
>
> **Regard must be had to the nature of the obligations mutually entered into to determine whether a contract formed by the exchange of those obligations is one of employment, or should be categorised differently.'**

172. As for the nature of the obligations, in *Nethermere (St Neots) Ltd v Taverna* [1984] ICR 612, Dillon LJ held (at p.634G):

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

Kerr LJ held (at p.629D):

> **'The inescapable requirement concerning the alleged employees however … is that they must be subject to an obligation to accept and perform some minimum, or at least reasonable, amount of work for the alleged employer.'**

173. In the recent case of *Varnish v British Cycling Federation*, UKEAT/0022/20/LA, Choudhury P. reviewed the authorities and held at [38]:

> **'The relevant obligations as encapsulated in *Cotswold* involve an obligation upon an individual to undertake some minimum or at least some reasonable amount of work, and some obligation upon the other party to provide or pay for it. Whereas under the *Ready Mixed Concrete* approach, there is no quantification of the amount of work that is to be provided by the putative employee, and the putative employer's obligation comprises pay and remuneration, it is clear now that a contract of service may exist where the putative employee agrees to some reasonable minimum amount of work and the putative employer's obligation may be discharged by merely providing the work to be done.'**

174. A mere expectation that an individual will undertake a certain amount of work is not the same as an obligation to do so. In *Hafal Ltd v Lane-Angell*, UKEAT/0107/17 Choudhury P. held at [29] that:

> **'The Tribunal's findings indicate that the Claimant was expected to provide dates of availability to the Respondent. The Claimant would then be placed on the rota. There was an expectation that the Claimant would be able to provide work should she be contacted whilst on the rota. However, there is no finding that the Claimant was obliged to provide any or any minimum number of dates of availability, certainly not for the period before 1 May 2015. It is a trite observation that an expectation that the Claimant would provide work is not the same as an obligation to do so. I recognise that there may be cases where, as a result of a commercial imperative or market forces, the practice is that work is usually offered and usually accepted and that such commercial imperatives or forces may crystallise over time into legal obligations. That was the case in *Haggerty*. However, in that case, there were no express terms negating such obligations. I consider that to be a significant distinguishing feature. On the facts, this case is closer to the situation in *Stevedoring* and *Carmichael* than that in *Haggerty*.'**

175. If there is sufficient mutuality of obligation that the contract might be one of employment/service, the next question which falls to be determined is control. Although not the sole means of identifying a contract of employment, control

remains an essential element of the test. The question is not whether the employer controls the way the putative employee does the work, rather whether the employer can, under the terms of the contract, direct him/her in what s/he did (*Wright v Aegis Defence Services (BVI) Ltd*, UKEAT/0173/17/DM at [35]). That is distinct from showing that the employer controls the way that the employee does the work. Even an absence of day to day control may not be relevant, if the employer retains the ultimate contractual power to direct what work should be done (*White v Troutbeck SA* [2013] IRLR 949, CA).

176. As for the third element of the test in *Ready-Mixed Concrete*, there is no definitive list of the features of any agreement which point towards, or away from, its being a contract of employment. In *Hall (Inspector of Taxes) v Lorimer* [1994] ICR 218, the Court of Appeal upheld Mummery J, who in the High Court ([1992] ICR 739) held that it was necessary to consider many different aspects of the person's work activity, and that this was not to be done by way of a mechanical exercise of running through items on a check list to see whether they were present in, or absent from, a given situation. Not all details are of equal weight or importance in any given situation.

Worker status

177. As to the requirement for personal performance, the principles referred to in the summary of Sir Terence Etherton MR in *Pimlico Plumbers v Smith* (above at para 168) apply equally to worker status.

178. The individual will not be a limb (b) worker if the status of the party for whom s/he works is 'that of a client or customer of any profession or business undertaking carried on by the individual'. In *Bates van Winkelhof*, at [34] onwards, Baroness Hale summarised a number of the authorities which have considered that provision:

> **'34. In *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181, para 53 Langstaff J suggested:**
>
> > **"a focus on 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."**
>
> **35. In *James v Redcats (Brands) Ltd* [2007] ICR 1006, para 50 Elias J agreed that this would "often assist in providing the answer" but the difficult cases were those where the putative worker did not market her services at all. He also accepted, at para 48:**
>
> > **"in a general sense the degree of dependence is in large part what one is seeking to identify—if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached—but that must be assessed by a careful analysis of the contract itself. The fact that the individual may be in a subordinate position, both economically and substantively, is of itself of little assistance in defining the relevant boundary because a small business operation may be as economically dependent on the other contracting party, as is the self-employed worker, particularly if it is a key or the only customer."**

36. After looking at how the distinction had been introduced into the sex discrimination legislation, which contained a similarly wide definition of worker but without the reference to clients and customers, by reference to a "dominant purpose" test in *Mirror Group Newspapers Ltd v Gunning* [1986] ICR 145, he concluded, at para 59:

> **"the dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationships, or is it in essence a contract between two independent business undertakings? … Its purpose is to distinguish between the concept of worker and the independent contractor who is in business in his own account, even if only in a small way."**

37. The issue came before the Court of Appeal in *Hospital Medical Group Ltd v Westwood* [2013] ICR 415, a case which was understandably not referred to in the Court of Appeal in this case; it was argued shortly before the hearing in this case, but judgment was delivered a few days afterwards. Hospital Medical Group Ltd ("HMG") argued that Dr Westwood was in business on his own account as a doctor, in which he had three customers: the NHS for his services as a general practitioner, the Albany Clinic for whom he did transgender work, and HMG for whom he performed hair restoration surgery. The Court of Appeal considered that these were three separate businesses, quite unrelated to one another, and that he was a class (b) worker in relation to HMG.

38. Maurice Kay LJ pointed out, at para 18, that neither the *Cotswold* "integration" test nor the *Redcats* "dominant purpose" test purported to lay down a test of general application. In his view they were wise "to eschew a more prescriptive approach which would gloss the words of the statute". Judge Peter Clark in the appeal tribunal had taken the view that Dr Westwood was a limb (b) worker because he had agreed to provide his services as a hair restoration surgeon exclusively to HMG, he did not offer that service to the world in general, and he was recruited by HMG to work as an integral part of its operations. That was the right approach. The fact that Dr Westwood was in business on his own account was not conclusive because the definition also required that the other party to the contract was not his client or customer and HMG was neither. Maurice Kay LJ concluded, at para 19, by declining the suggestion that the court might give some guidance as to a more uniform approach: "I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his 'integration' test will often be appropriate as it is here." For what it is worth, the Supreme Court refused permission to appeal in that case: [2013] ICR 415, 427.

39. I agree with Maurice Kay LJ that there is not "a single key to unlock the words of the statute in every case". There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of "subordination" to the concept of employee and worker. The experienced employment judges who have considered this problem have all recognised that there is no magic test other than the words of the statute themselves. As Elias J recognised in the *Redcats* case [2007] ICR 1006, a small business may be genuinely an independent business but be completely dependent on and subordinate to the demands of a key customer (the position of those small factories making goods exclusively for the "St Michael" brand in the past comes to mind). Equally, as Maurice Kay LJ recognised in Westwood's case [2013] ICR 415, one may be a professional person with a high degree of autonomy as to how the work is performed and more than one string to one's bow, and still be so closely integrated into the other party's operation as to fall within the definition. As the case of the controlling shareholder in a company who is also employed as chief executive shows, one can effectively be one's own boss and still be a "worker". While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker.'

179. The relevance of mutuality of obligation to worker status was considered by the Court of Appeal in *Windle and another v Secretary of State for Justice* [2016] ICR 721 (*per* Underhill LJ at paras 23–24), by reference to the guidance given in *Quashie*, cited above:

> **'23. […] I accept of course that the ultimate question must be the nature of the relationship during the period that the work is being done. But it does not follow that the absence of mutuality of obligation outside that period may not influence, or shed light on, the character of the relationship within it. It seems to me a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status even in the extended sense. Of course it will not always do so, nor did the employment tribunal so suggest. Its relevance will depend on the particular facts of the case; but to exclude consideration of it *in limine* runs counter to the repeated message of the authorities that it is necessary to consider all the circumstances.'**

The true agreement

180. In *Consistent Group Ltd v Kalwak* [2007] IRLR 560, cited with approval by Lord Clarke JSC in *Autoclenz v Belcher* [2011] ICR 1157 in the Supreme Court, Elias J. said this:

> **'57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work, in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p 697 g) 'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham it will want to say so.'**
>
> **58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.**
>
> **59. … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance …'**

181. In *Uber BV v Aslam* [2019] ICR 845, the majority of the Court of Appeal held (at para 66):

> **'The effect of *Autoclenz Ltd v Belcher* [2011] ICR 1157 in our view is that, in determining for the purposes of section 230 of the ERA 1996 what is the true nature of the relationship between the employer and the individual who alleges he is a worker or an employee, the court may disregard the terms of any documents generated by the employer which do not reflect the reality of what is occurring on the ground.**

and at para 73:

> **[…] 'The parties' actual agreement must be determined by examining all the circumstances, of which the written agreement is only a part. This is particularly so where the issue is the insertion of clauses which are subsequently relied on by the inserting party to avoid statutory protection which would otherwise apply. In deciding whether someone comes within either limb of section 230(3) of the ERA 1996 , the fact that he or she signed a document will be relevant evidence, but it is not conclusive where the terms are standard and non-**

> **negotiable and where the parties are in an unequal bargaining position. Tribunals should take a "realistic and worldly-wise", "sensible and robust" approach to the determination of what the true position is.'**

Judicial/quasi-judicial independence and status

182. Although the Claimant is not, in relation to his work for the NMC, a judicial office-holder or an arbitrator, I was referred to a number of authorities in those areas. They are relevant, insofar as they consider the issue of the requirement for independent decision-making, which is a common feature of judges, arbitrators and Panel Members.

183. In *Ministry of Justice v O'Brien* [2013] ICR 499, the Supreme Court held that the claimant, a part-time recorder, was a worker for the purposes of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and as such was entitled to pension rights on a *pro rata* basis. The Court held as follows (*per* Lord Hope and Baroness Hale at [34]):

> **'The argument for the Ministry of Justice is that there is no obligation to provide Mr O'Brien with a pension under EU law as he was a judicial office holder, not a worker. As Mr David Staff of the then Department for Constitutional Affairs explained in a statement that was shown to the employment tribunal, judicial office holders were seen as being in a distinct category with an entirely separate status. Fundamental to the concept of judicial independence was the fact that judicial office holders exercise their function wholly independently of influence or direction by any minister, government department or agency. The Court of Justice has, however, made it clear that the principle that judges are independent in the exercise of the function of judging as such is not called into question by extending to part-time judges the scope of the principle of equal treatment to protect them against discrimination as compared with full-time workers: [2012] ICR 955, paras 47–49. In these paragraphs the court was, in effect, endorsing the observations of Advocate General Kokott, where she said in paras 50–51 of her opinion:**
>
> > **"50. In this connection, I would also point out that it is difficult to determine how the rights granted by the framework agreement in general, and an entitlement to a retirement pension in particular, can jeopardise the essence of the independence of a judge; on the contrary, an entitlement to a retirement pension strengthens the economic independence of judges, and thus ultimately also the essence of their independence.**
> >
> > **"51. Independence in terms of the essence of an activity is not therefore an appropriate criterion for justifying the exclusion of a professional category from the scope of the framework agreement."**

184. In *Gilham v Ministry of Justice* [2019] ICR 1655, the Supreme Court held that a district judge was not a 'worker' within the meaning of s.230(3) ERA for the purpose of the statutory protection given to whistle-blowers. In that case it was not in dispute that the claimant undertook personally to perform work or services, and that the recipient of those services was not a client or customer of the judge. She was not a worker because she did not work under a contract with the Respondent; she was an office-holder. The Supreme Court held at [20] (*per* Baroness Hale) that:

> **'Finally, and related to that, there is the constitutional context. Fundamental to the constitution of the United Kingdom is the separation of powers: the judiciary is a branch of government separate from and independent of both Parliament and the executive. While by itself this would not preclude the formation of a contract**

> **between a Minister of the Crown and a member of the judiciary, it is a factor which tells against the contention that either of them intended to enter into a contractual relationship.'**

185. In *Hashwani v Jivraj* [2011] ICR 1004, the Supreme Court considered the status of arbitrators, holding (*per* Lord Clarke at [40-41]):

> **'If the approach in *Allonby* is applied to a contract between the parties to an arbitration and the arbitrator (or arbitrators), it is in my opinion plain that the arbitrators' role is not one of employment under a contract personally to do work. Although an arbitrator may be providing services for the purposes of VAT and he of course receives fees for his work, and although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties as contemplated in para 67 of Allonby. He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services, as described in para 68.**
>
> **The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. As the International Chamber of Commerce ("the ICC") puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a "quasi-judicial adjudicator": K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd [1992] QB 863, 885.'**

Conclusions: was the Claimant an employee of the NMC?

186. It was agreed between the parties that the Claimant's claim against the NMC was solely a claim in respect of holiday pay. In order to pursue a claim of that sort, he need only be a limb (b) worker. However, submissions were made by both parties on the issue of employment status, and accordingly I have considered it.

<u>The existence of a contract</u>

187. The Claimant contended that there was an overarching (or umbrella) contract, subsisting between assignments; alternatively, that there was a series of individual contracts in relation to the hearings on which he agreed to sit.

188. The NMC contended that there was no contract *of employment* at all between it and the Claimant, whether characterised as an overarching contract, or a series of individual contracts.

189. I accept the Claimant's submission that there was both an overarching contract between him and the NMC, and a series of individual contracts.

190. In relation to the former, the NMC offered to appoint the Claimant to the FTP panel as a Chair for a period of four years; the Claimant accepted in writing. The terms of that contract are to be found in the letters of appointment, the PMSAs and its Schedules and Appendices. Those terms undoubtedly included some provisions which amounted to legally enforceable rights and obligations. These are set out in my findings above (at paras 98 and 99).

191. In relation to the latter, each time the NMC offered the individual, and the Claimant accepted, he agreed to sit on the hearing, for which the NMC agreed to pay him a fee.

192. The question then is whether these were contracts of employment.

Personal performance

193. In her submissions, Ms Darwin accepted that the Claimant 'did not have an unfettered right to substitute another person. However, he did have a conditional right of substitution or delegation'. She relied on the passage in the judgment of Etherton MR in *Pimlico Plumbers*, in particular his fourth example of 'rights of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work'. She submitted that the Claimant fell into this category, because he could withdraw from a booking for any reason, even at short notice, and the Registrar had the power to appoint a substitute panel member. She characterised this as the Claimant's 'ability to delegate his work'.

194. In dealing with this submission, the Claimant referred me to Clause 7 of the PMSA, which provides that 'the Panel Member shall provide the services', and reminded me that Mr Johnson said in his witness statement that it was not permissible for Panel Members to provide a substitute, the onus of identifying a replacement falling on the NMC itself. The Claimant submitted that any right to substitute another Member was the NMC's right, not his. I accept that submission: the Claimant could not send someone else to perform the work on his behalf, retain the income from the NMC and pay the substitute out of it. There was not even a mechanism by which he could nominate a replacement, let alone substitute him/her; that process was carried out exclusively by the NMC's Panel Support Team.

195. I conclude that the Claimant has no right of substitution of any sort, fettered or unfettered; under the contract, he undertook to perform work personally for the NMC.

Overarching/umbrella contract: sufficient mutuality of obligation to give rise to a contract of employment

196. The Claimant's evidence was that he was:

> 'under a contractual duty to make myself available for a minimum number of days. I was regularly required to identify my availability'.

197. As for the obligation on the Respondent, he maintained that there was:

> 'never a time when there was an absence of all work such that no one was given any work'.

198. The starting-point must be the contractual terms (above at para 96). They unambiguously provide that the NMC was not obliged to ask the Claimant to provide services, and the Claimant was not obliged to provide them, if asked to do so. I went on to consider whether those terms were consistent with the evidence as to how the arrangements worked in practice.

199. Mr Johnson accepted in evidence that there was an expectation that the Claimant would make himself available for work. But, as Choudhury P. held in *Hafal*, an expectation is not the same as a legal obligation. Was this a case where 'expectations' crystallised into legal obligations? The Claimant, in his

closing submissions, compared the offering by Members of dates of availability to the logging-on to the system by private hire drivers in *Addison Lee Ltd v Lange* [2019] ICR 637. The Tribunal in that case found that they were then obliged to accept bookings allocated to them, despite a clause in the contract which expressly stated that there was no obligation on the driver to provide services. If the reason the drivers provided for not accepting the booking was considered unacceptable, a sanction might follow, including being removed from the system.

200. The Claimant's position was quite different: he controlled how many dates he offered to the NMC; if the NMC then offered assignments within those dates, he was free to refuse them. Not only was there no contractual obligation on him to offer dates, there was no obligation on him to honour them once he had accepted; he was free to withdraw, and the NMC was obliged to arrange a replacement.

201. The contract did not provide for any sanction if work was not accepted, or was returned; nor was there evidence before me that the Claimant had been subjected to sanctions when he did not offer dates, or withdrew from work which he had previously accepted. He did not identify how many days the purported contractual duty required of him. If it was the 30-day 'expectation' referred to in the original advertisement, he fell below that in 2018 (when he sat for only 17 days), without any sanction being applied to him. As for his rate of withdrawal, I note that in 2015 the Claimant's rate of withdrawal from cases (16.5%) was significantly higher than average, yet no sanction was imposed on him; on the contrary, he was reappointed in 2016.

202. I also considered the significance of the benchmark process, I accept Ms Darwin's submission that this was a 'light touch' process aimed at assisting with learning and development, but also monitoring the quality of Members' work. For part of the material time it included metrics in relation to sitting days. That was removed in 2018; the NMC acknowledged that there was a tension between its use and the fact that there was no obligation under the PMSAs for panel members to accept a minimum number of events each year.

203. The fact that the NMC monitored sitting and withdrawal dates did not, in my judgment, give rise to a legal obligation on the Claimant to accept work. Even an independent contractor may find his/her availability and reliability being monitored by his/her client, without the relationship evolving into one of employment. Although such monitoring may give rise to an incentive to offer dates, and accept assignments, it does not create a legal obligation to do so. The fact that the NMC engaged in discussions, and sought assurances from Members who offered little or no availability, did not, in my judgment, suggest the existence of a contractual obligation to do so: mere assurances lack contractual force. In any event, there was no suggestion that the Claimant had ever been approached in this way.

204. There was a reference to a single Member whose contract had been terminated before the end of his appointment; in his statement Mr Johnson said that this was 'due to providing insufficient sitting days'. I heard nothing further about the circumstances of that termination; the termination may itself have been in breach of contract. In any event, my focus must be on the relationship between

the Claimant and the NMC, not the relationship between another Member and the NMC, unless I am satisfied that this single instance, in itself, demonstrated that the relevant contractual terms did not apply in practice; I am not.

205. In my judgment, the fact that the NMC has not renewed eight appointments since 2013 takes the matter no further forward. It is a remarkably low number. I would have been more surprised if all appointments had been renewed, as it might suggest a worrying lack of scrutiny and quality-control.

206. As for any contractual obligation on the NMC to offer work, it was the Claimant's own evidence that, given the number of registrants and the volume of work passing through the NMC, Members could expect a certain amount of work each year. The fact that there was a likelihood that the Respondent would offer work each year did not create a contractual obligation on it to offer a minimum amount of work to the Claimant. As Ms Darwin put it in her oral closing submissions, 'it is wrong to conflate flow of work with mutuality of obligation'. Nor did the fact that the NMC sought to distribute work equitably give rise to a contractual obligation on it to offer the Claimant a minimum amount of work; that was something it did voluntarily.

207. From the evidence before me, I do not conclude that, in practice, the Claimant considered himself obligated to offer dates. On the contrary, it is plain from the correspondence I have quoted from above (at para 123 onwards), that he felt able to warn Mr Johnson that he might reduce his commitment to the NMC and offer his services elsewhere; in his reply, Mr Johnson acknowledged his right to do so. As for any purported obligation on the NMC, in the same correspondence the Claimant expressed his 'disappointment' not to have been offered more work on that occasion, but there was no suggestion by him that this amounted to a breach of his rights under the contract. On the contrary, he expressly acknowledged the NMC's right to 'allocate work on any basis it wishes to'.

208. I reject the Claimant's contention that the express exclusion of obligations to offer and accept work did not reflect the true agreement, or were overridden by the parties' conduct, or the practical realities of the situation. Nor was I persuaded, on the evidence before me, that mere expectations on either side had crystallised into legal obligations. In my view, the most that can be said is that the NMC encouraged Members to offer sitting days, and did so more actively at some times than at others.

209. Accordingly, I conclude that the overarching contract was not a contract of employment.

<u>Individual assignments: contracts of employment?</u>

210. Once an agreement that the Claimant would undertake a particular hearing had been concluded, if the Claimant did the hearing, the NMC was obliged to pay him; even if the hearing was cancelled, there was an obligation on the Respondent to pay him: 100% of the fee (pre-2017); or 50% of the fee (post-2017). However, as I have already found, there was no equivalent obligation on the Claimant: he was free to withdraw from the hearing, even after the agreement had been concluded.

211. The Code of Conduct speaks of an 'expectation' that this would be 'in exceptional circumstances'; as I have already observed, an expectation is not an obligation. The only obligation on him was to notify the NMC 'at the earliest opportunity', a provision which did not exclude a late withdrawal.

212. I find support for that conclusion in the fact that, in practice, no explanation was required for withdrawing from a hearing: see for, example, the Claimant's withdrawal email at para 120. I heard no evidence that any sanction was applied for that, or any other, withdrawal; the Claimant was simply not paid. There was no obligation on him to find a replacement, that was the NMC's responsibility; his right to withdraw was not even contingent on the NMC's ability to find a replacement. Nothing in the contractual documentation, or in the parties' own conduct, was consistent with a decision by the Claimant to withdraw from an assignment amounting to a breach of contract.

213. *Clark v Oxfordshire Health Authority* is authority for the proposition that an employment contract cannot exist in the absence of 'mutual obligations subsisting over the entire duration of the relevant period'. In respect of each individual assignment, that period began when the Claimant accepted the offer of the assignment. The NMC was not free to cancel without incurring all or part of the fee; to that extent there was some obligation on it. But because the Claimant could withdraw, without sanction, after the conclusion of the agreement and before the hearing, I conclude that there was insufficient mutuality of obligation to give rise to an employment relationship by reference to the individual assignment contracts.

214. In my judgment, the position is analogous to that identified in the UTT case of *Commissioner for her Majesty's Revenue and Customs v PGMOL* [2020] STC 1077, concerning part-time match referees. In considering whether each individual engagement amounted to a contract of employment, Zacaroli J. held as follows at [111-114]:

> **'We accept that a referee's right not to attend the match in the case of illness, injury or (the other example given) inability to make it through traffic in time is no different from the implied qualification in many employment contracts that the employee is not in breach of contract if he or she is unable to turn up to work. In this case, however, it is common ground that referees could also withdraw from an engagement if their other work commitments precluded it. That is a qualitatively different right to that of a typical employee. Indeed, as we state above, we consider that the FTT found that the only contractual fetter on the referee's right to withdraw from an appointment was his obligation to notify PGMOL.**
>
> **...**
>
> **in our judgment, the FTT was entitled to find that the right of the referee, who accepted an engagement to officiate at a single match, to withdraw from that single engagement, was inconsistent with the obligations of an employee.'**

215. Although not binding on me, I find the analysis in that passage persuasive.

216. Accordingly, the Claimant was not an employee of the NMC.

217. Because I have reached that conclusion, there is no need for me to go on to consider the other elements of the test for employment status.

Conclusion: worker status

218. To qualify as a worker, three conditions must be satisfied:

    218.1. there must be a contract between the Claimant and NMC;

    218.2. the contract must be one in which he undertakes to perform work personally for NMC;

    218.3. and the NMC must not be a client or customer of a profession or business carried on by the Claimant.

219. I have already found that there was an overarching contract between the Claimant and the NMC, as well as individual contracts when work was assigned, under which the Claimant agreed to provide his services personally, although I have concluded that neither were contracts of employment.

Was the NMC a client or customer of a profession or business carried on by the Claimant?

220. In determining whether the relationship between the Claimant and the NMC was one of a business undertaking/profession and customer/client, I kept in mind that none of these expressions are terms of art.[2] Although it might seem counterintuitive that a regulatory body could be described as the client/customer of one of its Members, the term 'client' may apply to any individual or organisation, which purchases services from another individual or organisation. It might also be unorthodox to assign the label of 'profession' to the occupation of sitting as a member of a regulatory panel. Although it does not share some characteristics of more traditional professions (institutionalised training and a licensing system, for example), it undoubtedly shares others (work of an intellectually demanding nature and the requirement for independence of judgment).

221. Accordingly, I did not exclude the possibility that, on these facts, the NMC's status might come within the client/customer exclusion.

222. I turned first to the guidance of Langstaff J. in *Cotswold Developments*, who suggested that the following considerations may demonstrate on which side of the independent contractor/worker line a self-employed individual falls: did the Claimant actively market his services as an independent person to the world in general, or was he recruited by the principal to work for that principal as an integral part of its operations? As Elias J. held in *James v Redcats*, it is the degree of integration which is significant.

223. Portfolio careers are not uncommon; few, I imagine, are so wide-ranging as the Claimant's. However, I regarded his work outside the area of acting as a regulatory panel member/chair as a neutral indicator in this exercise: the fact that he also practices as a barrister, mediator and arbitrator does not assist me in identifying the character of his relationship with the NMC. If the Claimant is 'in business on his own account' when he is working for the NMC, in my opinion it is a different business from the one by which he does his other work, just as in

[2] See the observations of HHJ Serota QC in *Smith and Hewitson,* EAT, unreported, 17 September 2001, cited in *Westwood* at [12].

the *Westwood* case at [11], the claimant had a number of different 'businesses or outlets for his professional skills', which were unrelated to each other.

224. On the other hand, there is a strong similarity between the work that the Claimant did for the NMC and the work he did as a Panel Member for other regulators, such as MPTS. There was no contractual requirement that he do this type of work exclusively for the NMC; that was reflected in the way the relationship worked in practice. It is apparent from the email exchange I have quoted above (at para 128) that the Claimant had no qualms about seeking Mr Johnson's advice as to how to secure similar work in another sector; Mr Johnson was similarly untroubled by the Claimant's warning (quoted above at para 126) that he might start favouring other regulators over the NMC.

225. The only restriction on the Claimant was the prohibition on offering his services as a barrister to nurses or to the Royal College of Nursing. However, as I have already indicated, that is a different kind of work from the work the Claimant did for the NMC; furthermore, the reason for the prohibition is so plainly based in ethical considerations that it says nothing about the question of status.

226. However, to characterise the Claimant's seeking work with other regulators as 'marketing his services' would be wrong. The Claimant did not market his services to the NMC; he was recruited by it via a structured exercise. Although it is possible to think of examples of independent contractors submitting to structured processes to secure work (architectural competitions come to mind), for a genuine independent contractor, that is not the sole route to obtaining work; s/he may also advertise and approach potential clients. Work as a Panel Member cannot be solicited by direct approach, nor generated through advertising.

227. I then considered the third element, which Langstaff J. suggested might be a significant identifier: given that the Claimant was recruited, was he recruited to work 'as an integral part of [the NMC's] operations'?

228. Some matters relied on by the Claimant as indicators of integration into the NMC appear to me to be fanciful. I do not accept that the wearing of a suit amounted to a 'uniform'. A uniform is specific to the organisation which requires it to be worn; nothing about a suit is specific to the NMC, it is a conventional form of dress across a wide range of occupations; the Claimant accepted that it would not have occurred to him to wear anything else. Nor do I regard the fact that he carried a security pass, issued to him by the NMC, as an indicator of integration; it was a practical measure to allow him to access the building, such as might also be provided to independent contractors (maintenance engineers or cleaners, for example). Both are, in my opinion, neutral indicators.

229. Some factors might be regarded as pointing away from integration into the NMC: the fact that the Claimant had no contact with HR, did not have an NMC email address, and was not invited to NMC social events. Furthermore, neither the NMC, nor the Claimant himself, held him out as its representative or agent. Indeed, the email quoted above (at para 133) shows him being careful to clarify that he was not 'from the NMC'. However, in my opinion, these factors are more reflective of the scrupulousness with which both the Claimant and the NMC maintained a degree of public distance from each other, in order to avoid any

misleading impression that the Claimant was not free to make independent judgements. I return to that issue below.

230. Turning now to the factors which point towards integration, the first of these is the centrality of the work itself: without the work of the Claimant and his fellow Members, the NMC would not be able to discharge one of its principal functions: to ensure the maintenance of the standards of conduct and performance for nurses and midwives.

231. There is then the fact that that the NMC provides mandatory training for Members. With an independent contractor, the onus would usually be on him/her to maintain necessary knowledge and skills. Although I accept Mr Johnson's evidence that the training was of a kind which the Claimant might not be able to source himself, there might be other ways of making that information available, other than through mandatory attendance at a training day. As for the requirement to do duty work if a hearing went short, I consider that an independent contractor would be unlikely to accept additional tasks, once the assigned work had been completed. Both these factors suggest to me a degree of integration.

232. Turning to the question of the procedures which applied to the Claimant, it will be apparent from my earlier conclusions that I do not consider that the procedures designed to monitor and assess Members against broad criteria to be indicative of integration; employers may assess the performance of independent contractors for quality control purposes, including for the purposes of deciding whether to offer further work, without their becoming integrated into the operation.

233. However, the procedures for dealing with individual performance/conduct concerns and complaints, which I have set out above (at paras 110-111), go beyond mere monitoring or assessment, or the provision of informal and supportive feedback. They provide for a mechanism whereby the NMC can formally raise, investigate and determine performance and conduct concerns with individual Members, with a view to taking action, including requiring them to undergo specific training and, in appropriate circumstances, leading to the termination of their appointment. The fact that this procedure is separate from the procedures applied to employees does not make it any less a procedure of the NMC's. In my opinion, it indicates a degree of subordination, to which an independent contractor would be unlikely to submit.

234. I next considered the question of remuneration. I do not consider the fact that, for part of the time at least, the Claimant derived a high proportion of his income from the NMC as an indicator of dependence or integration; I regard it as neutral. As Elias J. recognised in *Redcats*, an independent contractor may be completely dependent on a key customer, yet remain genuinely an independent business. I consider it likely that the Claimant chose to do a high proportion of his work for the NMC during a particular period, because it was convenient work for him to do at a time when he was studying to be a barrister. When he began to practise, he reduced his commitment to the NMC almost immediately.

235. The mechanism by which the Claimant was paid (by way of fees for which he invoiced) might be regarded as a marker of independent contractor status. However, the setting of those fees is a different matter: for an independent

contractor, the starting-point would usually be a scale of fees which s/he proposes, which is then the subject of negotiation. Here, by contrast, the Claimant had no control over, or input into, the level of remuneration: fees were fixed and non-negotiable, and the NMC had the power, which it exercised, unilaterally to reduce/vary those fees (see above at para 135). I consider that the absence of negotiation, and the NMC's power of unilateral variation, carry greater weight than the mere mechanism of payment, and point towards a degree of integration/dependence.

236. Turning to the issue of tax, the Claimant was responsible for accounting to HMRC for any income tax and national insurance contributions due on the fees paid to him by the NMC. I accept his submission that, because NMC did not pay him through PAYE, he had no choice but to fill in a self-assessment form. Both workers and independent contractors would complete such a form and, to that extent, it is a neutral factor. The descriptions of the 'business' which the Claimant gave appear in his tax returns appear to me to be little more than short-hand for his various activities, which I have already found cut across a range of quite different professional activities.

237. I turn now to the issue on which Ms Darwin placed considerable reliance: can the fact that the NMC is always one of the parties in the proceedings before the Claimant be reconciled with his being a worker of the NMC? Is it not essential that his independence as a quasi-judicial decision-maker be reflected by a commensurate independence of status?

238. The *Gilham* case may be distinguished: the district judge in that case was held not to be a worker because she did not work under a contract; that is not an issue here. *O'Brien* leaves open the possibility that the requirement for judicial (or quasi-judicial) independence is not incompatible with worker status. On the other hand, in *Hashwani* the Supreme Court held (at [41-42]) that the functions of an arbitrator required him to rise above the partisan interests of the parties and that he was 'in no sense in a position of subordination to the parties; rather the contrary.' In my opinion, that case may also be distinguished. The Court went on to find that 'once an arbitrator has been appointed … the parties effectively have no control over him … [he] may only be removed in exceptional circumstances'. The same cannot be said of the Claimant, at least to the same extent: see my findings above in relation to the NMC's procedures for dealing with concerns about individual Members' performance/conduct, which included powers of suspension and termination.

239. In the present case, I have concluded that the various structural precautions which are in place themselves provide the necessary guarantee of independence. Firstly, there is the statutory prohibition on the NMC engaging Members/Chairs as employees: employees have rights and obligations which workers do not, and which might well give rise to conflicts of interest (or the appearance thereof). Secondly, there are the ethical 'walls' provided for within the structure: the recruitment process is conducted by an external agency; recommendations for appointment are made by an independent panel; and there is a prohibition on members of the NMC Council sitting on FTP panels. Finally, independence is required and guaranteed by the provisions of the contract itself, including the obligation to act impartially and without bias (see above at paras 103 and 104). I have concluded that, taken together, these

provisions create the necessary degree of detachment, which is consistent with quasi-judicial independence, but is not, in itself, inconsistent with worker status.

240. For the avoidance of doubt, I reject the Claimant's contention that the NMC controlled his decision-making process: he was an independent decision-maker, who was free to reach such conclusions as he considered justified by the evidence before him. As a Panel Chair he controlled the conduct of the hearings assigned to him.

241. I do not consider that the fact that the Claimant did not receive sick pay or holiday pay, and was not entitled to participate in the NMC's pension scheme, health care or other benefits to be determinative of the question of status; they are merely reflective of the label of 'independent contractor' which the parties themselves attached to the relationship. Nor do I consider that label determinative of the question of the Claimant's status.

242. I also considered the relevance of mutuality of obligation. Although I have concluded that there was insufficient mutuality of obligation to give rise to a contract of employment, there were legal obligations on each side sufficient to create the necessary contractual relationship in the context of worker status. In the circumstances I have described, I do not consider that the absence of mutual obligations to offer/accept a minimum amount of work to be incompatible with worker status.

243. I have already concluded that the Claimant entered into a contract with the NMC, whereby he undertook personally to perform work/services for it. Standing back and looking at the overall picture, when I have regard to the method of recruitment, the factors I have identified above which, cumulatively, suggest a significant degree integration into the operation, together with the element of subordination in the conduct/performance procedure and the absence of any negotiation in respect of pay, I am satisfied that the NMC's status was not by virtue of that contract that of the Claimant's client or customer. I have concluded that he was sufficiently integrated into the NMC's operations, such that he was, to borrow the language of Elias J in *James v Redcats*, 'semi-detached' rather than 'detached', as an independent contract would be.

244. Accordingly, I conclude that the Claimant was a worker of the NMC within the meaning of s.230(3)(b) ERA and Reg 2(1)(b) WTR.

The Claimant's credibility

245. Ms Darwin made much of the dispute about disclosure, which I dealt with at the beginning of the judgment, and suggested that it undermined the Claimant's credibility. Although I concluded that the Claimant ought to have disclosed the material, I did not consider that he was being wilfully obstructive in not doing so, and the omission did not materially affect my view of his credibility. I found him to be a thoughtful and conscientious individual, who argued his case with tenacity, while avoiding personal criticisms of the Respondents' witnesses. In any event, this was not a case which turned to any great extent on credibility: there was little in dispute between the parties as to the facts and events in question; it was in the interpretation of those facts that they differed fundamentally.

246. I was grateful to the Claimant, and to both Counsel, who provided helpful submissions, for their constructive approach to the management of the hearing.

Next steps

247. The case against the NMC will be listed for a short preliminary hearing for case management to clarify the issues, list the final hearing, and give directions. The parties are asked to provide their dates to avoid for such a hearing within seven days of the date on which this judgment is sent out.

Employment Judge Massarella
Date: 20 July 2020