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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM A DECISION OF THE FAIR EMPLOYMENT TRIBUNAL

JOHN McGREEVY

Appellant

v

NFU MUTUAL INSURANCE SOCIETY LTD

Respondent

Mr C Mallon (instructed by Francis Hanna & Co Solicitors) for the Appellant
Ms E McIlveen (instructed by Mills Selig Solicitors) for the Respondent

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Before: McCloskey LJ, Colton J and Kinney J

KINNEY J (*delivering the judgment of the court*)

Introduction

[1] This is an appeal from a decision of the Fair Employment Tribunal on a preliminary point. The tribunal decided that the appellant did not satisfy the definition of "employee" for the purpose of bringing claims under the Race Relations (NI) Order 1997 (the 1997 Order) or the Fair Employment and Treatment (NI) Order 1998 (the 1998 Order). As a result, the tribunal lacked jurisdiction to entertain the appellant's claims.

[2] The relevant statutory definitions are contained in both the 1997 Order and the 1998 Order. Article 2 of the 1997 Order provides:

> "employment" means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly."

[3] Article 2 of the 1998 Order similarly provides:

> ""employer" (except in Part VII) means—
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> (a) in relation to a person who is seeking employment, anybody who has employment available;
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> (b) in relation to a person employed under a contract of service or of apprenticeship or a contract personally to execute any work or labour, the person entitled to the benefit of the contract;
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> (c) in relation to a person who has ceased to be in employment, his former employer;
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> and "employee", correspondingly, means (except in that Part) such a person as is first mentioned in sub-paragraph (a), (b) or (c) of this definition;
>
> "employment" (except in Part VII) means employment under—
>
> (a) a contract of service or apprenticeship; or
>
> (b) a contract personally to execute any work or labour;"

Background

[4] The background facts are set out in the preliminary judgment issued by the tribunal. The facts are not in dispute.

[5] The respondent is an insurance company providing and selling insurance related products. The appellant had previously been directly employed by the respondent from 2016 to December 2020, working as the branch manager in charge of the respondent's Downpatrick branch. The respondent then carried out a restructuring of its business. The appellant and another employee, Mr Gault, were engaged in conversations with the respondent from early September 2020. At a joint meeting with the national flagship manager the appellant was informed of the decision to change the flagship branches to commissioned agencies run by self-employed insurance agents. The appellant and his colleague were offered three options at this meeting. The first option was for the appellant to resign as an employee and to then apply for the role of a self-employed insurance agent running a commissioned insurance agency. The second option was to decide not to resign but instead have his role transferred to the new employer running the commissioned agency in Downpatrick. The third option was not to apply for any further role and instead consider a settlement to bring his contractual relationship to an end.

[6] No objection was raised to the various proposals by the appellant. He decided to apply for the role of a self-employed agent in the new business in Downpatrick. He then had to go through a recruitment and selection process. The appellant, along with his colleague, Mr Gault, were successful in their selection process. The two individuals signed a detailed agency agreement and the new partnership commenced on 1 January 2021. The administrative staff in the Downpatrick office who had previously been directly employed by the respondent were transferred by agreement to the partnership. It became the employer of the administrative staff from 1 January 2021. Subsequently, in May 2021 the Downpatrick business merged with the Ballynahinch business. Moving forward there were four partners operating as a self-employed agency in Downpatrick and Ballynahinch. The agency agreement was amended from time to time and renewed on at least two occasions. The last agency agreement was signed on 16 June 2023.

[7] The new agency was set up on broadly the same basis as other agency businesses set up in the rest of the United Kingdom. The vast majority of the respondent's insurance-based work was carried out through these agencies. The appellant lodged his initial tribunal claim on 22 December 2023 along with a claim from Mr Gault. The appellant contended that he had been discriminated against on grounds of race and religion. The appellant contended that the respondent had a deliberate strategy to undermine him by withholding resources. As part of the arrangements between the appellant and the respondent, the partnership had in place appointed representatives (AR) monitoring. This was carried out by the respondent's Governance and Controls Manager (GCM). The appellant partnership received a series of "red" rated AR reviews in May 2023, September 2023 and January 2024. A red rating indicated material concerns relating to the partnership's processes and procedures. Two of the appellant's partners raised other concerns specifically about the appellant regarding certain practices of the appellant relating to the conduct of the partnership's business. The appellant raised concerns about the GCM who was responding to the alleged irregularities. A different GCM was then appointed. The appellant alleged that the original GCM's behaviour amounted to unlawful discrimination and alleged that one of the other partners in the partnership was appointed to spy on him. The appellant alleged that the reason for this treatment was on the grounds of his religious belief and/or political opinion. The appellant also alleged that the agency agreement itself was discriminatory as it sought to exclude the laws of Northern Ireland and sought to prevent agents relying on protection from discrimination on the grounds of religious belief or political opinion. The appellant had made an application under the Data Protection Act 2018. The respondent did not comply with that request in full as it claimed the benefit of exemptions under the legislation relating to the investigation of financial irregularities. The appellant contended that the failure to provide the information he sought amounted to discriminatory treatment.

The tribunal decision

[8] The tribunal set out its decision in a detailed and lengthy written judgment. Having set out a brief background the tribunal considered in considerable detail the relevant case law that required to be addressed. The tribunal noted that the appellant did not claim to be an employee employed under a contract of service or a contract of employment since December 2020. He argued that he was a worker and engaged in a contract to do work personally for the respondent. The question for determination at the preliminary hearing was whether the appellant had at the relevant times been in employment for the purposes of the 1997 Order or the 1998 Order and therefore whether the tribunal had jurisdiction to determine the claims before it. If the appellant had not been engaged on a contract to personally execute any work but instead was a self-employed insurance agent, then the tribunal would not have jurisdiction.

[9] The tribunal considered the appropriate statutory test. In particular, the tribunal noted that the question of whether a person is an employee, self-employed or a worker is to be determined by assessing whether the person falls within the relevant statutory provisions irrespective of what has been contractually agreed. Although the contractual documentation is relevant it is not the decisive feature. Indeed, a written agreement may be disregarded if it is shown that its terms do not represent the true agreement between the parties as ascertained by considering all of the circumstances of the case including how the parties conducted themselves in practice. The tribunal also noted that if there is no inconsistency between the terms of the written agreement and how the relationship operated in reality then there would be no basis for departing from the written agreement.

[10] The tribunal noted various factors to be addressed, at para [110], in the following self–direction:

> "110. The task of the tribunal is to consider the factual matrix underlying these claims, and to consider as a matter of statutory interpretation, whether the claimants were, since 1 January 2021, "self-employed workers" or self-employed individuals engaged in a business in their own right providing services for the respondent. This will involve considering and in particular applying the appropriate weight to:
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> (1) the terms of the written agreement;
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> (2) the intention of the parties when formulating, renewing and operating the agreement;
>
> (3) the way in which the parties operated that agreement;

(4) the way in which the agreement between the parties was initially put in place and then subsequently renewed;

(5) the degree of mutuality of obligation;

(6) the degree of personal service;

(7) the degree of control and subordination;

(8) the integration of the claimants into the respondent's organisation;

(9) the dominant purpose of the agreement."

[11] The tribunal then considered each of these factors individually. The tribunal acknowledged that in the financial industry, where there was a high degree of regulation imposed by the Financial Conduct Agency ("FCA"), a degree of oversight and control by the respondent was required. However, the tribunal determined that the partners operated their own business in their own right, incurring their own profit or loss and employing their own staff. The tribunal noted that there was nothing in the terms of the written agreement pointing towards the status of self-employed worker within the terms of the legislation. It concluded that it was clear that the claimants, as partners in the agency, were to run their own separate business providing a service to the respondent as their client or customer.

[12] The tribunal noted that there was no evidence at any stage that the appellant and the other partners had intended remaining either as employees or as self-employed workers with the respondent. They explicitly resigned their contracts of employment and held themselves out as self-employed contractors including to the HMRC. They acted appropriately as employers of their staff and deducted appropriate income tax and National Insurance (NI) contributions from the wages of the employees. There was no evidence of an intention that the appellant should operate as an employee. Had it been otherwise, the pre-existing arrangement would have continued.

[13] The tribunal further found that the appellant and the other partners billed the respondent for commission calculated in accordance with the agreement and accepted those payments. The partnership's profits and losses were its own. They were not entitled to employee benefits such as holiday pay, sick pay or pensions. The appellant was given a range of options and could have chosen a different course. The appellant knew exactly what he was entering into and was familiar with the basis on which self-employed contractors operated with the respondent.

[14] The tribunal also found there was a significant mutuality of obligation set out in the agreement between the appellant and the respondent. The tribunal found this

was not a factor which was determinative of the appellant being a self-employed worker but rather a factor consistent with many comparable agreements in different industries. The judge gave the example of a franchisor and franchisee in the fast-food industry where obligations are placed on one party or the other.

[15] The tribunal considered the question of the degree of personal service and again found that this issue was not necessarily determinative. The tribunal concluded that there was no specific requirement for personal service in this case for a significant portion of the business conducted by the partnership. Employed staff performed many of the functions of the business and those staff could be substituted with other employees to carry out significant parts of their work.

[16] The tribunal considered the degree of control and noted the nature of the highly regulated industry in which the partnership operated. The tribunal found that the high level of control did not detract from the fact that the partnership was able to and had agreed to operate as self-employed contractors. The tribunal noted the separation between the appellant's business and that of the respondent. The appellant's partnership employed its own staff and conducted its own financial and taxation affairs. It had separate banking and accountancy arrangements. It had distinct premises. Any use of the respondent's facilities was paid for. The partnership was responsible for its own profits and losses, and its financial records were not integrated in any way with the respondent.

[17] The tribunal considered that it was clear from the terms of the written agreement and the way in which the agreement was operated that the dominant purpose of the agreement was an independent commission insurance agency operating as a distinct entity and as a self-employed contractor operating in its own right with the respondent as a client or customer.

[18] The tribunal considered the terms of the contractual agreement entered into between the appellant and the respondent. Features of that agreement included the following:

- The respondent appointed the partners as joint agents to sell insurance products provided by the respondent.

- The partnership undertook to conduct the regulated activities of the respondent and agreed to comply with FCA regulations.

- The appointment of any new partners required the consent of the respondent and any such new partner had to be an approved person under the FCA.

- The respondent provided training, promotional materials and signage. The partners could use the call centre provided by the respondent for out of hours queries and paid an agreed fee for that service.

- The partners agreed to use the IT package provided by the respondent and to take out the employers and public liability insurance stipulated by the respondent.

- The partners agreed to observe regulatory requirements and also the requirements the agents licensing program maintained by the respondent.

- The partners agreed to prepare and share with the respondent a business plan setting out the strategic objectives of the partnership. The business plan would be reviewed at least every three years at a meeting held between the partners and the respondent.

- The agreement could be terminated by either party on three months' notice and could be terminated in relation to any individual partner if for example that partner ceased to be an approved person for the purposes of the FCA.

[19] In a short summary conclusion the tribunal stated at para [125]:

> "Having considered the documentation and the evidence given by the parties, having considered the purpose of the legislation which confers jurisdiction on the employment tribunals, and looking at the entire circumstances realistically, the clear answer is that the claimants were, from 1 January 2021, independent contractors operating a business in their own right; with the respondent as their client or customer. They were not, in any real sense, in a position analogous to, or essentially the same as, employees in the classic sense. Individuals in their position were never meant to come within the jurisdiction of employment tribunals under the 1997 Order or the 1998 Order. If they have a claim, it lies elsewhere."

[20] Having reached this conclusion the tribunal dismissed the claims for want of jurisdiction.

The legal framework

The appellate function

[21] The role of the Court of Appeal in relation to appeals from Industrial Tribunals has been set out in *Nesbitt v The Pallet Centre Ltd* [2019] NICA 67, where the court said:

> "[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary v Sergeant A* [2000] NI 261 at 273:

'Before we turn to the evidence, we wish to make a number of observations about the way in which Tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.

4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.

5. A Tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—

(a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the Tribunal (*Fire Brigades Union v Fraser* [1998] IRLR 697 at 699, per Lord Sutherland); or

(b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."

This approach is of long standing, being traceable to decisions of this court such as *McConnell v Police Authority for Northern Ireland* [1997] NI 253.

[61] Thus, in appeals to this court in which the *Edwards v Bairstow* principles apply, the threshold to be overcome is an elevated one. It reflects the distinctive roles of first instance Tribunal and appellate court. It is also harmonious with another, discrete stream of jurisprudence involving the well-established principle noted in the recent

judgment of this court in *Kerr v Jamison* [2019] NICA 48 at [35]:

> 'Where invited to review findings of primary fact or inferences, the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility … the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently …'

Next the judgment refers to *Heaney v McAvoy* [2018] NICA 4 at [17]-[19], as applied in another recent decision of this court, *Herron v Bank of Scotland* [2018] NICA 11, at [24] concluding at [37]:

> 'To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses.'"

Procedural unfairness

[22] Procedural fairness is central to lawful decision-making. The Tribunal must receive all relevant information and properly test that information. It is important that litigants are fairly treated and have no reason for any sense of injustice as a result of the process engaged by the Tribunal. However, what fairness requires of the Tribunal depends on the circumstances of the individual case. What does not change is that the Tribunal must be independent and impartial. In *TF v NI Public Services Ombudsman* [2022] NICA 17 the Court of Appeal said:

> "[88] It is also appropriate to reiterate unequivocally that in any case where procedural unfairness at first instance is canvassed as a ground of appeal, it is the function and duty of the appellate court to decide this issue for itself. This court must identify all material facts and considerations bearing on the issue of procedural unfairness and having done so, ask itself whether this ground of appeal has been established. There are no limiting mechanisms such as a margin of appreciation or a discretionary area of judgment with regard to the first instance court or Tribunal. In this discrete respect the role of an appellate court equates fully

> with that of a judicial review court determining a complaint of procedural unfairness on the part of the decision maker.
>
> [89] The immediately foregoing analysis also serves to highlight the improper intrusion of the principle of *Wednesbury* irrationality in cases where an appellate court is required to determine a ground of appeal complaining that the first instance decision is vitiated by reason of an adjournment refusal determination. That is not to say that irrationality or kindred touchstones such as taking into account immaterial facts or factors or failing to have regard to material facts or factors have no role to play in appeals to this court. Quite the contrary: the *Edwards v Bairstow* principles are as relevant today as they were when first enunciated almost 70 years ago, as the decision of this court in *Nesbitt v The Pallet Centre*, wherefrom substantial excerpts are reproduced at [43]-[44] above, demonstrates. However, the important consideration is that these principles belong to the exercise of determining whether a first instance decision is vitiated by an error of law of a kind other than procedural unfairness.
>
> [90] It is also timely to re-emphasise paras [47] and [48] of *Nesbitt* in this context. Within these passages there is a recognition that where the denial of a fair hearing, in particular denying a litigant or the subject of an administrative decision an adequate opportunity to put his case, is established, the enquiry for the appellate court or court of review will not invariably terminate at this point. That is because the central issue to be determined is whether the process as a whole deprives the person concerned of their right to a fair hearing. This conclusion will not necessarily follow in every case. However, as emphasised memorably by Bingham LJ, cases of this *genre* are likely to be "*of great rarity*" for the reasons articulated by the Lord Justice. Furthermore, as stressed by this court in *Nesbitt* at [48], the test at this judicial level is '*… whether the avoidance of the vitiating factor/s concerned could have resulted in a different outcome.*'"

The legal principles

[23] The essential task for the tribunal was to determine the question whether, in the factual matrix of this case, as a matter of statutory interpretation, the claimants

(including the appellant) were self-employed workers or self-employed individuals engaged in a business in their own right providing services for the respondent.

[24] The courts have struggled with the question of whether a person is a worker or not. However, considerable guidance has been provided recently by the Supreme Court. What is essential in determining the status of a claimant is to apply the words of the statute to the facts of the case. In *Clyde and Co LLP v Bates van Winkelhof* [2014] UKSC 32, Baroness Hale said at para [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 *Redcats*, a small business may be genuinely an independent business but be completely dependent upon 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*, 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."

[25] In *Uber BV v Aslam* [2021] UKSC 5, these words were echoed by Lord Leggatt at para [87] when he said:

> "In determining whether an individual is a 'worker', there can, as Baroness Hale said in the *Bates van Winkelhof* case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the

> purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a 'worker' who is employed under a 'worker's contract.'"

[26] The Supreme Court went on to say at para [118]:

> "It is firmly established that, where the relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed, the question of whether work is performed by an individual as an employee (or a worker in the extended sense) or as an independent contractor is to be regarded as a question of fact to be determined by the first level tribunal. Absent a misdirection of law, the tribunal's finding on this question can only be impugned by an appellate court (or appeal tribunal) if it is shown that the tribunal could not reasonably have reached the conclusion under appeal: see *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 384-385; *Clark v Oxfordshire Health Authority* [1998] IRLR 125, paras 38-39; the *Quashie* case, para 9."

[27] In *Uber*, Lord Leggatt also emphasised that to be identified as a "limb (b)" worker three elements must be present. At para [41] he said:

> "Limb (b) of the statutory definition of a "worker's contract" has three elements: (1) a contract whereby an individual undertakes to perform work or services for the other party; (2) an undertaking to do the work or perform the services personally; and (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual."

Grounds of appeal

[28] By an amended notice of appeal there were five grounds. These were:

(a) The learned judge incorrectly applied the correct legal test on personal service.

(b) The learned judge incorrectly applied the correct legal test on limb (b) worker status by concluding that the appellants were carrying on a business or profession and the respondent was a customer or client of the appellant. The established facts led to the inescapable conclusion that the respondents were not a client or customer of the appellant's business undertaking.

(c) The learned judge failed to take into account a relevant matter by failing to consider or give any or adequate weight to the appellant's main argument, namely, that their branch was controlled to a more significant degree by the respondent when compared with other branches in GB.

(d) The learned judge breached principles of natural justice and procedural fairness by failing to direct oral closing submissions/determining the dispute based on extensive written submissions given the complexity of the subject matter and the fact sensitive nature of the assessment.

(e) The learned judge erred in proceeding with the preliminary hearing given that the evidence and witness statements were extensive, there was no obvious "succinct knockout blow which is capable of being decided after a relatively short hearing" (*Boyle v SCA Packaging* [2009] NI 317) and the allegations of discrimination, forming the basis of the appellant's substantive claims, could not be divorced from the issues of control and integration and the assessment of employment status under the discrimination statutes.

Submissions of the appellant

[29] In his written submissions the appellant challenged the tribunal's findings on personal service. These were described as an error of law. The appellant argued that the tribunal had set out the dominant purpose test as an issue of particular relevance. He challenged the approach of the tribunal that the personal service test was not determinative and the dominant purpose test was preferred.

[30] The appellant further argued that the tribunal had misapplied the law in its consideration of whether work could be delegated to other staff in the agency. The appellant's ability to substitute or delegate was subject to significant fetters, in particular FCA regulation and the requirement for specific approval of certain matters by the respondent. The appellant argued that these fetters pointed irresistibly to the conclusion that the appellant could not substitute himself for another and this in turn pointed to personal service. The obligation to provide work personally applied not to all the work of an individual but any work of the individual and the tribunal had failed to recognise that the partial delegation of work to others did not prevent the personal service requirement from being met. Much of the delegated work was assisting the appellant in his specialist role and therefore the appellant was still

providing personal services, and the personal service requirement was in consequence met.

[31] The appellant also argued that the tribunal had incorrectly applied the correct legal test on "limb (b)" worker status in concluding that the respondent was a customer or client of the appellant. The appellant argued that the primary facts as found did not justify this conclusion.

[32] The third ground of appeal was that the tribunal had failed to take into account a relevant matter by giving inadequate weight to what was described as the appellant's main argument. This was that their business was controlled to a more significant degree by the respondent when compared to other such businesses in Great Britain. The tribunal was criticised for focusing on control due to the regulated nature of the insurance industry.

[33] The appellant then made two further procedural challenges to the tribunal decision. The first was that the tribunal had failed to direct oral closing submissions. Extensive written submissions were made and the appellant argued that oral submissions after the written submissions had been provided could have affected the outcome of the hearing.

[34] The second procedural matter argued by the appellant was that the matter of status should not have been decided at a preliminary hearing. The evidence and witness statements considered by the tribunal were extensive and there was no obvious "knockout blow." The allegations of discrimination could not be divorced from the issues of control and integration in the assessment of employment status under the discrimination statutes.

[35] At hearing and in oral submissions counsel for the appellant changed tack to some degree. The arguments advanced were that the dominant purpose test feeds into the test on personal service and the tribunal had misapplied the law by its emphasis on dominant purpose; the tribunal had not applied the correct test correctly (as per [26](b) above); the tribunal had applied the wrong test on personal service; in determining that personal service was not the critical issue the tribunal had materially misdirected itself in law; and, finally, that while the tribunal had recognised personal service as a relevant criterion it was argued that the tribunal had failed to give it the priority it required

[36] Counsel for the appellant at the hearing confirmed that neither party had requested the facility of oral submissions at the conclusion of the hearing and that the mechanism of written submissions had been agreed. Counsel also agreed that there was no inhibition or restriction on adducing any evidence at the preliminary hearing. There was no impediment to the evidence that could have been provided and there was no application to cross-examine witnesses on factual issues.

Respondent's submissions

[37] In written submissions the respondent contended that the tribunal correctly applied the test for personal service. The tribunal found the appellant delegated a significant part of the work of the partnership to employees and that the contract did not oblige the appellant to perform services personally in a way which was consistent with limb (b) worker status. It was not correct to contend that the performance of "any work" personally is sufficient. The question of personal service is a matter of contractual obligation and practical reality. Delegation that is substantive rather than incidental undermines the requirement. It cannot be said that the appellant's submitted conclusion was the only reasonable conclusion available to the tribunal.

[38] The respondent also argued that on the facts found by the tribunal it was entitled to conclude that the respondent was a client or customer of the appellant's business. It was further submitted that the tribunal was not required to conduct a comparative exercise between businesses conducted in Great Britain and those in Northern Ireland.

[39] On the procedural grounds the respondent highlighted that the parties were directed to provide written closing submissions and each had full opportunity to advance all of their arguments in writing. Furthermore, there was no unfairness in determining the issue at a preliminary hearing, this being a well-established and proportionate course. The tribunal conducted a two-day hearing, heard extensive evidence and considered extensive documentation.

[40] In oral submissions the respondent contended that the appropriate legal test was multifactorial and needed a structured approach. The overriding duty of the tribunal had been to apply the terms of the legislation. The tribunal correctly set out its task at paras 29 to 33 of its decision. The tribunal focused on the way in which the agreement between the parties had come into being. The appellant was an experienced businessman who had had the opportunity to take advice on the initial agreement and subsequent versions. The agreement was a factor to be taken into account. Personal service was fully considered by the tribunal.

Consideration

[41] It was accepted that the tribunal had available to it extensive bundles including a large number of witness statements. The tribunal allowed the calling of oral evidence, and the matter ran over two days. Oral evidence was permitted to expand on the evidence in the witness statements, and the written statements were only part of the evidence considered at the hearing. There was therefore no impediment to the hearing of evidence required for the preliminary hearing issues.

[42] The core issue to be determined was whether the appellant had established that he was a "limb (b)" worker. All three elements of the test in *Uber* must be satisfied. In this case there is no dispute that a contract exists between the parties. The appellant

undertook to perform work or services for the respondent. There is dispute as to whether there was a requirement for personal service. The tribunal correctly identified that the question of the degree of personal service is not necessarily determinative of the issue of the status of the individual. The tribunal went on to say at para [120]:

> "In any event, it is clear that there was no specific requirement for personal service for a significant portion of the business conducted by the commissioned insurance agency. The claimants, as partners in that agency, employed staff to perform many of the functions of the agency. The claimants could, subject to FCA regulation and specific approval from time to time from the respondent have substituted employees to carry out significant parts of their work. This is not a factor which points in the circumstances of the present case towards the status of self-employed worker."

[43] In reaching this conclusion the tribunal made extensive findings of fact on incontestably material issues. Its findings of fact are not challenged. The tribunal considered the nature of the relationship between the appellant and the respondent before he entered into the agency agreement, during and after he commenced the initial partnership and, in addition, when subsequently he became involved in a new partnership with other individuals. The tribunal also considered the options available to the appellant before he entered into the agreement with the respondent. The tribunal considered in detail the terms of the contractual agreement. The partners were appointed as joint agents to sell insurance products provided by the respondent. The tribunal acknowledged that there were restrictions on the activities of the partnership because of FCA regulations and noted that such external restrictions were not unusual and did not necessarily mean that the status of limb (b) worker was created.

[44] The tribunal reminded itself on more than one occasion that its task was to apply the wording of the statute to the specific factual circumstances of the case. The tribunal considered the way in which the parties operated the agreement between them and the distinct status held by the appellant and his partners. The tribunal noted that the partnership was responsible for its own profits or losses, that the appellant did not enjoy any contractual rights such as holiday, pay sick pay or pensions and that the partnership took responsibility for its staff including salaries from which they deducted income tax and NI contributions and otherwise acted as the employer of its staff. The tribunal noted the partnership had an entirely separate banking and accountancy arrangement, enjoyed separate and distinct premises and when it used facilities of the respondent they paid for that use.

[45] The tribunal recognised there was a degree of control always present in a regulated industry and also noted a range of factors that the appellant asserted

demonstrated the control or subordination to the respondent. Control and subordination stemming from regulatory requirements is not an unusual requirement and does not inexorably lead to a conclusion of limb (b) worker status without more.

[46] The respondent pointed to the independent and commercial nature of the appellant's business and its autonomous control over various aspects including staff and financial risks. The tribunal carefully considered control flowing from regulation and distinguished this from control and subordination typical of employment. All the findings made by the tribunal were open to it on the evidence.

[47] This court can identify no material aberration in the analysis of the tribunal. It has properly addressed the correct legal test , made material findings of fact and applied the test accordingly. While we accept that some of the phraseology of the tribunal in its decision might be criticised, we consider this to be of no moment. This court must be slow to intervene or to focus on individual phrases or passages in isolation. The tribunal's decision must be read fairly and as a whole and the appellate court should not interfere with the tribunal's findings on matters of fact unless, as was stated in *Nesbitt*, there was no sufficient evidence to make the findings of fact or that the primary facts did not justify the inference or conclusion drawn but led irresistibly to the opposite conclusion. The appellate court will not overturn the tribunal's decision simply because it might have been decided differently by a different tribunal or court.

[48] On the second ground of appeal, namely whether the respondent was a client or customer, the appellant accepted that there was no suggestion the tribunal had failed to make appropriate findings of fact. The appellant's argument was that on the facts found the tribunal could not reach the conclusion it reached. Properly laid bare, this is an irrationality challenge. The third element of the test for a "limb (b)" worker is a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the appellant. This issue was again looked at closely by the tribunal and the conclusion reached was that the respondent was indeed a client or customer of the appellant's partnership. This aspect of the relationship between the parties was returned to at various points in the tribunal decision. We are satisfied that there was no error in law on the part of the tribunal and it was entitled to reach the conclusions it did on the facts that it found. The elevated irrationality threshold is manifestly not overcome.

[49] The appellant further criticises the fact that the tribunal did not look in detail at the distinctions between the equivalent business entities working with the respondent in Great Britain and the partnership of the appellant. In our view, that criticism is misconceived. The tribunal properly carried out the task of applying the statutory test to the facts as admitted or found in an intensely fact and context sensitive case. No basis for establishing that material evidence was disregarded has been established.

[50] The court, therefore, dismisses the first three substantive grounds of appeal.

[51] The two procedural grounds of appeal can be dealt with succinctly. There was absolutely no requirement for the tribunal to direct oral closing submissions in a hearing of this nature. The court did direct written submissions which both parties provided. Extensive written submissions were provided to the tribunal after the hearing which itself was a two-day hearing where the issues were clearly ventilated, explored and challenged. In any event the tribunal was not asked to allow oral submissions at any point.

[52] The tribunal was also entitled in the exercise of its case management powers to determine that the succinct legal point regarding the status of the claimants was appropriate and capable of being determined as a preliminary hearing. The point at issue was clearly capable of being a knockout blow as in fact it has transpired.

[53] The fundamental frailty shared by each of these grounds of appeal is that no procedural unfairness to the appellant has been demonstrated. Neither of these grounds of appeal has merit and both are dismissed.

[54] The court, therefore, dismisses all of the grounds of appeal brought by the appellant.

[55] We will now hear the parties on the questions of costs.