



**Trinity Term
[2011] UKSC 41**

On appeal from: [2009] EWCA Civ 1046

JUDGMENT

Autoclenz Limited (Appellant) v Belcher and others (Respondents)

before

**Lord Hope, Deputy President
Lord Walker
Lord Collins
Lord Clarke
Lord Wilson**

JUDGMENT GIVEN ON

27 July 2011

Heard on 11 and 12 May 2011

Appellant
Thomas Linden QC
Patrick Green
(Instructed by Pinsent
Masons LLP)

Respondent
Timothy Brennan QC
Peter Edwards
(Instructed by Thompsons
Solicitors)

LORD CLARKE, with whom Lord Hope, Lord Walker, Lord Collins and Lord Wilson agree

Introduction

1. The appellant (“Autoclenz”) provides car-cleaning services to motor retailers and auctioneers. It has contracts with British Car Auctions (“BCA”) for cleaning vehicles at a number of different places. The respondents (“the claimants”) are 20 individual valeters who at the relevant time provided car-cleaning services at BCA’s Measham site in Derbyshire. In these proceedings the claimants say that they were workers within the meaning of the National Minimum Wage Regulations 1999 (“NMWR”) (SI 1999/584) and of the Working Time Regulations 1998 (“WTR”) (SI 1998/1833) and that, as workers, they were entitled to be paid in accordance with the NMWR and to receive statutory paid leave under the WTR. Their case is that they were paid neither.

2. The question is whether the claimants were workers within regulation 2(1) of the NWMR, which adopted the definition in section 54(3) of the National Minimum Wage Act 1998, and in regulation 2(1) of the WTR. The definition of worker is in materially identical terms in both sets of regulations as follows:

“... ‘worker’ ... means an individual who has entered into or works under ...

- (a) a contract of employment; or
- (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.”

Materially identical definitions of employee and worker appear in various other statutes and regulations concerning employment rights and protection against unlawful discrimination in the employment field.

The proceedings to date

3. Proceedings were issued in the Employment Tribunal (“ET”) by the claimants on 19 November 2007. The question whether the claimants were workers as so defined was determined by the ET as a preliminary issue. In a judgment sent to the parties on 1 March 2008 the ET (Employment Judge Foxwell) held that the claimants were workers within the definition on the basis that they were employed under contracts of employment within limb (a) of the definition and that they were in any event working pursuant to contracts within limb (b). Autoclenz appealed to the Employment Appeal Tribunal (“EAT”), which heard the appeal on 4 June 2008. The EAT (Judge Peter Clark) held that they were not within (a) but that they were within (b). Both sides appealed to the Court of Appeal. The Court of Appeal (Sedley, Smith and Aikens LJJ) restored the judgment of the ET, holding that the claimants were within both (a) and (b). Autoclenz was granted permission to appeal by this Court.

The written contract

4. In each case there was a written contract contained in or evidenced by two documents. I take as an example the position of Paul Huntington. His original contract was dated 18 June 1991, in which he was described as a sub-contractor. Clauses 1 to 3 of the contract provided:

“1. The Sub-contractor shall perform the services which he agrees to carry out for Autoclenz within a reasonable time and in a good and workmanlike manner.

2. The Sub-contractor hereby confirms that he is a self-employed independent contractor and that his tax affairs are handled by ... tax office under Schedule D ref No ...

3. The Sub-contractor and Autoclenz agree and acknowledge that the Sub-contractor is not, and that it is the intention of the parties that the Sub-contractor should not become, an employee of Autoclenz. Accordingly, the Sub-contractor is responsible for the payment of all income tax and national insurance contributions arising on or in respect of payments made to the Sub-contractor by Autoclenz and the Sub-contractor agrees that he shall indemnify Autoclenz in respect of any liability to tax and national insurance contributions for which Autoclenz may be held liable on or in respect of such payments.”

That contract did not contain any clause permitting Mr Huntington to provide a substitute to perform the services he was contracted to perform. Nor did it state that he was not obliged to perform services or that Autoclenz was not obliged to provide work under the agreement.

5. In 2004 the Inland Revenue carried out a review of the arrangements between Autoclenz and the valeters. On 20 May 2004 it said, somewhat enigmatically, that “it is felt that the balance of probability leans more towards self-employment than PAYE”.

6. In 2007 Autoclenz decided to produce two new documents, which formed the contract between it and the claimant in each case. The first document, which was not itself signed by the claimant, included the following:

“For the purpose of providing car valeting services to its client’s garages, Autoclenz wishes to engage the services of car valeters FROM TIME TO TIME on a sub-contract basis.

We understand that YOU ARE AN EXPERIENCED CAR VALETER and might be prepared to offer your services to Autoclenz. If so would you please complete and return to us the form of agreement set out below, which is intended to confirm that any contractual relationship between Autoclenz and yourself is one of client and independent contractor and not one of employer/employee and to protect Autoclenz against any claim on Autoclenz for Income Tax and/or National Insurance contributions in respect of payments made to yourself.

For the avoidance of doubt, as an independent contractor, you are entitled to engage one or more individuals to carry out the valeting on your behalf, provided that such an individual is compliant with Autoclenz’s requirements of sub-contractors as set out in this agreement...’

Those requirements were, in short, that the individual was capable of providing the services, had been fully trained and held a current full UK driving licence which he would make available to Autoclenz, that he complied with health and safety guidance and that he had permission to work in the UK.

7. The document asked the claimant to note the following. For security reasons the valeter would be obliged to wear protective overalls which would identify him as a contractor of Autoclenz and that such overalls could be purchased from Autoclenz. The valeter would be required to provide cleaning

materials for himself and those who worked for him. Given the nature of the work it might be necessary for the valet and those who worked for him to drive motor vehicles. Accordingly the valet would be required to hold a current valid driving licence.

8. The document concluded:

“If you wish to provide services to Autoclenz would you please sign and return to Autoclenz the form agreement attached.

YOU WILL NOT BE OBLIGED TO PROVIDE YOUR SERVICES ON ANY PARTICULAR OCCASION NOR, IN ENTERING INTO SUCH AGREEMENT, DOES AUTOCLENZ UNDERTAKE ANY OBLIGATION TO ENGAGE YOUR SERVICES ON ANY PARTICULAR OCCASION.”

9. The second document was a contract which Mr Huntington signed on 21 May 2007. A copy of the contract is annexed to this judgment marked A. It can be seen that Mr Huntington was described as a sub-contractor throughout. Moreover, by clause 3 it was expressly agreed that it was the intention of the parties that the sub-contractor was not and should not become an employee of Autoclenz. Further, by clause 7(a) Mr Huntington promised that he would ensure that those who worked for him in providing services to Autoclenz held a current driving licence as set out in the clause.

10. The ET held that both documents were put in front of Mr Huntington and that he signed the contract set out in Annex A, although he was not provided with a copy. The judge said that he strongly suspected that Mr Huntington signed it without reading it. It is common ground that both documents formed part of the contract between the parties. If the relevant contract was, as a matter of law, solely contained in those two documents, it would be impossible to bring the case within limb (a) of the definition and very difficult to bring it within limb (b).

11. However, the ET made certain further findings of fact, including the following. If the valeters had not signed the revised contracts, they would not have been offered further work. The valeters had no input into the negotiation of the terms, which were imposed by Autoclenz. However, as the ET put it at para 32, the claimants “went into their agreements ... with their eyes open as Autoclenz has made no secret of the fact that it regards the claimants as self-employed”.

The operation

12. The ET made further findings of fact in respect of the operation carried on by Autoclenz as follows. There was a relatively low turnover of personnel among the valeters. Mr Huntington started with Autoclenz in 1991 and continued right through almost on a full time basis apart from a few weeks in 2002 and 2003 when he tried working for a competitor. New valeters were recruited either by personal recommendation and word of mouth or through advertisements placed in the local press or at a job centre. Examples of such advertisements seen by the ET invited applications for well paid full time work and emphasised that Autoclenz was looking for “self-employed people”. The claimants all knew that they were being offered a role which was described and intended by Autoclenz to be one of self-employment.

13. The vehicles were required to be cleaned in accordance with a detailed specification set by BCA. The valeters generally worked in teams of four, with one valet as team leader. Each team took a batch of six vehicles at a time and the members shared the task between them. The more experienced valeters were able to get through more batches than others. On most days there was enough work to keep a group of 14 valeters busy. In the year before the hearing in the ET there was more work, although the ET also found that because of the fluctuations in the level of work there was occasionally no work to be done but that that was the exception rather than the rule.

14. The payments to the valeters were calculated on a piecework basis. The valeters kept records which were then passed to Autoclenz, first locally and then to head office. The valeters rendered weekly invoices which, although nominally from the valeters, were calculated and prepared by Autoclenz, being generated by Autoclenz at head office based on the information provided by the valeters. The valeters undertook responsibility for payment of tax and national insurance. This was done on a self-employed basis.

15. The arrangements for the provision of equipment and materials varied over the years but at the time the ET was considering, Autoclenz provided all the equipment and materials used by the valeters including jet washers, vacuum cleaners, sponges and chemicals. From 2007 Autoclenz introduced a 5 per cent charge for materials, which was contained in a separate invoice. The valeters were supplied with overalls bearing BCA’s logo for security reasons. The first two sets of overalls were free of charge but the valeters had to pay for subsequent sets.

16. The critical findings of fact are set out in paragraphs 34 to 40 of the ET's judgment. I will return to these after considering the correct approach in principle to issues of this kind.

The legal principles

17. It is common ground that the issues are (1) whether the ET was correct to find that the claimants were at all material times working under contracts of employment and were therefore workers within limb (a) of the definition and (2) whether in any event the ET was correct to find that they were at all material times within limb (b). This involves consideration of whether and in what circumstances the ET may disregard terms which were included in a written agreement between the parties and instead base its decision on a finding that the documents did not reflect what was actually agreed between the parties or the true intentions or expectations of the parties.

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

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

19. Three further propositions are not I think contentious:

i) As Stephenson LJ put it in *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623, “There must ... be an irreducible minimum of obligation on each side to create a contract of service”.

ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: *Express*

& *Echo Publications Ltd v Tanton* (“*Tanton*”) [1999] ICR 693, per Peter Gibson LJ at p 699G.

iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg *Tanton* at p 697G.

20. The essential question in each case is what were the terms of the agreement. The position under the ordinary law of contract is clear. It was correctly summarised thus by Aikens LJ in the Court of Appeal:

“87. ... Express contracts (as opposed to those implied from conduct) can be oral, in writing or a mixture of both. Where the terms are put in writing by the parties and it is not alleged that there are any *additional* oral terms to it, then those written terms will, at least prima facie represent the whole of the parties' agreement. Ordinarily the parties are bound by those terms where a party has signed the contract: see eg *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. If a party has not signed a contract, then there are the usual issues as to whether he was made sufficiently aware of the clauses for a court to be able to conclude that he agreed to the terms in them. That is not an issue in this case.

88. Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.

89. Generally, if a party to a contract claims that a written term does not accurately reflect what was agreed between the parties, the allegation is that there was a continuing common intention to agree another term, which intention was outwardly manifested but, because of a mistake (usually a common mistake of the parties, but it can be a unilateral one) the contract inaccurately recorded what was agreed. If such a case is made out, a court may grant rectification of a contract. See, generally, the discussion in the speech of Lord Hoffmann, [48] to [66], in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 with whom all the other law lords agreed. ...”

21. Nothing in this judgment is intended in any way to alter those principles, which apply to ordinary contracts and, in particular, to commercial contracts. There is, however, a body of case law in the context of employment contracts in which a different approach has been taken. Again, Aikens LJ put it correctly in the remainder of para 89 as follows:

“But in cases of contracts concerning work and services, where one party alleges that the written contract terms do not accurately reflect the true agreement of the parties, rectification principles are not in point, because it is not generally alleged that there was a mistake in setting out the contract terms as they were. There may be several reasons why the written terms do not accurately reflect what the parties actually agreed. But in each case the question the court has to answer is: what contractual terms did the parties actually agree?”

22. In this context there are three particular cases in which the courts have held that the ET should adopt a test that focuses on the reality of the situation where written documentation may not reflect the reality of the relationship: *Consistent Group Ltd v Kalwak* (“*Kalwak*”) [2007] IRLR 560 in the EAT (but cf [2008] EWCA Civ 430, [2008] IRLR 505 in the Court of Appeal), *Firthglow Ltd (t/a Protectacoat) v Szilagyi* (“*Szilagyı*”) [2009] EWCA Civ 98, [2009] ICR 835 and the Court of Appeal decision in the present case.

23. Those cases must be set in their historical context, which includes *Snook v London and West Riding Investments Ltd* (“*Snook*”) [1967] 2 QB 786 and *Tanton*. Although *Snook* was not an employment case but arose out of the hire purchase of a car, I refer to it because of the statement of Diplock LJ, which has been often referred to in the employment context. He said this at p 802 with reference to the suggestion that the transaction between the parties was a sham.

“I apprehend that, if it [ie the concept of sham] has any meaning in law, it means acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a ‘sham’, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.”

I would accept the submission made on behalf of the claimants that, although the case is authority for the proposition that if two parties conspire to misrepresent their true contract to a third party, the court is free to disregard the false arrangement, it is not authority for the proposition that this form of misrepresentation is the only circumstance in which the court may disregard a written term which is not part of the true agreement. That can be seen in the context of landlord and tenant from *Street v Mountford* [1985] AC 809 and *Antoniades v Villiers* [1990] 1 AC 417, especially per Lord Bridge at p 454, Lord Ackner at p 466, Lord Oliver at p 467 and Lord Jauncey at p 477. See also in the housing context *Bankway Properties Ltd v Pensfold-Dunsford* [2001] 1 WLR 1369 per Arden LJ at paras 42 to 44.

24. Those cases were examples of the courts concluding that relevant contractual provisions were not effective to avoid a particular statutory result. The same approach underlay the reasoning of Elias J in *Kalwak* in the EAT, where the questions were essentially the same as in the instant case. One of the questions was whether the terms of the written agreement relating to the right to refuse to work or to work for someone else were a sham. Elias J referred to part of the judgment in *Snook* quoted above at para 53. At para 56 he noted that in *Tanton* Peter Gibson LJ had recognised (at p 697G) that such terms might be a sham. He also noted that the Court of Appeal had emphasised that the question whether there was an obligation personally to perform the work had to be determined by asking what legal obligations bound the parties rather than by asking how the contract was actually carried out. The employer's appeal in *Tanton* was allowed on the ground that the ET wrongly drew an inference from the way the contract was carried out.

25. At paras 57-59 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 697G)

‘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...”

26. There is in my opinion considerable force in the approach set out in those paragraphs. Elias J dismissed the employer’s appeal from the ET but his decision was reversed by the Court of Appeal, comprising May, Rimer and Wilson LJ. The differences between the reasoning of Elias J and that of the Court of Appeal were discussed in some detail by the Court of Appeal in the later case of *Szilagyi* (comprising Sedley, Keene and Smith LJ) and indeed by the Court of Appeal in this case. In *Szilagyi* the court was considering similar questions. The principal question was whether written partnership agreements were a sham. The principal judgment was given by Smith LJ.

27. Smith LJ referred to the dicta of Diplock LJ in *Snook*. She also referred in detail to *Kalwak* in the EAT and in the Court of Appeal, and to *Tanton*. She quoted para 58 from Elias J’s judgment in *Kalwak* which I have set out above. At para 48 she noted that in the Court of Appeal Rimer LJ scrutinised Elias J’s judgment and was critical of the reasoning by which he had upheld the ET’s decision. However, she added that the court allowed the appeal on the ground that the ET’s decision was inadequately reasoned and remitted the case for rehearing. She then said that it did not appear to her that the court was critical of Elias J’s test and added that it seemed to her that Rimer LJ approved that test as being in compliance with Diplock LJ’s definition of a sham.

28. For my part, I am not persuaded that that is so. It appears to me that the reasoning of Rimer LJ and that of Elias J are not consistent. In this regard I agree with the view of Judge Clark to that effect in the EAT. See also a valuable article by Alan Bogg in (2010) 126 LQR 166, 167-168. Rimer LJ said at para 28 in *Kalwak* that a finding that the contract was in part a sham required a finding that both parties intended it to paint a false picture as to the true nature of their respective obligations. He was there applying the approach of Diplock LJ in *Snook* to this situation. In my opinion that is too narrow an approach to an employment relationship of this kind. In this regard I agree with the views expressed by ACL Davies in an illuminating article entitled *Sensible Thinking About Sham Transactions* in (2009) 38 ILJ 318, which was a note on *Szilagyi* published before the decision of the Court of Appeal in the instant case.

29. However, the question for this court is not whether the two approaches are consistent but what is the correct principle. I unhesitatingly prefer the approach of Elias J in *Kalwak* and of the Court of Appeal in *Szilagyi* and in this case to that of

the Court of Appeal in *Kalwak*. The question in every case is, as Aikens LJ put it at para 88 quoted above, what was the true agreement between the parties. I do not perceive any distinction between his approach and the approaches of Elias J in *Kalwak*, of Smith LJ and Sedley LJ in *Szilagyi* and this case and of Aikens LJ in this case.

30. In para 57 of *Kalwak* (set out above) Elias J quoted Peter Gibson LJ's reference to the importance of looking at the reality of the obligations and in para 58 to the reality of the situation. In this case Smith LJ quoted (at para 51) para 50 of her judgment in *Szilagyi*:

“The kernel of all these dicta is that the court or tribunal has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties, not only at the inception of the contract but, if appropriate, as time goes by.”

31. She added in paras 52, 53 and 55:

“52. I regret that that short paragraph [ie para 51] requires some clarification in that my reference to 'as time goes by' is capable of misunderstanding. What I wished to say was that the court or tribunal must consider whether or not the words of the written contract represent the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them.

53. In my judgment the true position, consistent with *Tanton*, *Kalwak* and *Szilagyi*, is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and

obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right.

...

55. It remains to consider whether the EJ directed himself correctly when he considered the genuineness of the written terms. I am satisfied that he directed himself correctly in accordance with, although in advance of, *Szilagyi*. In effect, he directed himself that he must seek to find the true nature of the rights and obligations and that the fact that the rights conferred by the written contract had not in fact been exercised did not mean that they were not genuine rights.”

32. Aikens LJ stressed at paras 90 to 92 the importance of identifying what were the actual legal obligations of the parties. He expressly agreed with Smith LJ’s analysis of the legal position in *Szilagyi* and in paras 47 to 53 in this case. In addition, he correctly warned against focusing on the “true intentions” or “true expectations” of the parties because of the risk of concentrating too much on what were the private intentions of the parties. He added:

“What the parties privately intended or expected (either before or after the contract was agreed) *may* be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the *Chartbrook* case at [64] to [65]. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed.”

I agree.

33. At para 103 Sedley LJ said that he was entirely content to adopt the reasoning of Aikens LJ:

“recognising as it does that while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm’s length commercial contract.”

I agree.

34. The critical difference between this type of case and the ordinary commercial dispute is identified by Aikens LJ in para 92 as follows:

“92. I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. ...”

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

The facts

36. With characteristic clarity and brevity Sedley LJ described the factual position as follows:

“104. Employment judges have a good knowledge of the world of work and a sense, derived from experience, of what is real there and what is window-dressing. The conclusion that Autoclenz's valeters were employees in all but name was a perfectly tenable one on the evidence which the judge had before him. The elaborate protestations in the contractual documents that the men were self-employed were odd in themselves and, when examined, bore no practical relation to the reality of the relationship.

105. The contracts began by spelling out that each worker was required to ‘perform the services which he agrees to carry out for Autoclenz within a reasonable time and in a good and workmanlike manner’ - an obligation entirely consistent with

employment. Notwithstanding the repeated interpolation of the word 'sub-contractor' and the introduction of terms inconsistent with employment which, as the judge found, were unreal, there was ample evidence on which the judge could find, as he did, that this was in truth an employment relationship.

106. His finding did not seek to recast the contracts: it was a finding on the prior question of what the contracts were. Rightly, it was uninfluenced by the fiscal and other consequences of the relationship, which were by no means all one way."

37. I entirely agree with those conclusions. They are in my opinion justified by the critical findings of fact in paras 35 to 38 of the judgment of Employment Judge Foxwell in the ET. They were these:

"35. In my judgment these claimants *are* employees. I do not think it can be said that Mr Huntington and his colleagues are businessmen in business on their own account. They have no control over the way in which they do their work. They have no real control over the hours that they work, save and except that they can leave when their share of the work on site has been completed. They do not have any real economic interest in the way in which the work is organised, other than the fact that the more work they do the more they earn. They cannot source materials for themselves. They are subject to the direction and control of the respondent's employees on site. They work in teams and not as individuals. It crossed my mind that each team might constitute a partnership, but it has never been suggested that these claimants are partners running businesses together and, whilst the makeup of each team seems to be fairly static, they can be adjusted to meet the respondent's needs. The claimants have no say in the terms upon which they perform work, the contracts which are placed before them are devised entirely by the respondent and the services they provide are subject to a detailed specification. The invoices which they submit are prepared by the respondent. The respondent determines the deductions which are applied to those invoices and the amounts charged in respect of insurance and materials. There has been no evidence to confirm that these deductions bear any real relation to the actual cost of the services to which they refer. Rates of pay are determined by the respondent and the respondent has felt able to increase or reduce those rates

unilaterally. Really there is nothing that these claimants can do to make their putative businesses any more profitable by the way in which they organise themselves.

36. I have noted that the claimants are required to wear company overalls and some of these are supplied free. I have also noted that they are provided with some training by the respondent. I do not think that either of these factors is determinative in this case. I accept that training must be provided to people who handle chemicals whatever their status for the purposes of health and safety. Equally I accept that requiring some badge of identification, in this case a uniform, is simply an incident of the fact that valeters are permitted to drive high value goods, motorcars and vans. That said, I accept the claimants' evidence that they are fully integrated into the respondent's business and that they have no real other source of work. I accept that occasionally individual claimants might work elsewhere but only on days when the respondent has no work for them to do. In Mr Huntington's case, for example, this occurred once in 17 years of service.
37. I am satisfied that the claimants are required to provide personal service under their agreements with the respondent notwithstanding the substitution clause that was introduced in 2007. I do not find that this clause reflects what was actually agreed between the parties, which was that the claimants would show up each day to do work and that the respondent would offer work provided that it was there for them to do. Mr Hassell confirmed in evidence that this was the true nature of the agreement between the parties and that his work could not have been done without an understanding that the valeters could be relied on to turn up and do the work put in front of them. I have of course noted that in 2007 the respondent introduced a clause saying that there was no obligation on it to offer work or on the claimants to accept work. I find that this clause was wholly inconsistent with the practice described in paragraph 18 of Mr Hassell's witness statement where he refers to a requirement for valeters to notify him in advance if they were unavailable for work. This indicates that there *was* an obligation to attend for work unless a prior arrangement had been made. In my judgment these factors place these new clauses within the proposition identified at paragraph 58 in the judgment [of Elias J] in *Consistent Group Ltd v Kalwak* (supra) and I find that the substitution clause and the right to refuse work were unrealistic possibilities that were not truly in

the contemplation of the parties when they entered into their agreements.

38. Accordingly, I find that the claimants entered into contracts under which they provided personal service, where there were mutual obligations, namely the provision of work in return for money, that these obligations placed the contracts within the employment field and that the degree of control exercised by the respondent in the way that those contracts were performed placed them in the category of contracts of employment.”

Mr Hassell was the Autoclenz manager at the Measham site.

38. These are findings of fact which Autoclenz cannot sensibly challenge in this Court. In short, they are findings which were open to the ET. It is true that, as Smith and Aikens LJ both observed, the reasoning of the ET could have been fuller, but I also agree with them (and Sedley LJ) that the ET was entitled to hold that the documents did not reflect the true agreement between the parties and that, on the basis of the ET’s findings, four essential contractual terms were agreed: (1) that the valeters would perform the services defined in the contract for Autoclenz within a reasonable time and in a good and workmanlike manner; (2) that the valeters would be paid for that work; (3) that the valeters were obliged to carry out the work offered to them and Autoclenz undertook to offer work; and (4) that the valeters must personally do the work and could not provide a substitute to do so. See in particular, per Aikens LJ at para 97. It follows that, applying the principles identified above, the Court of Appeal was correct to hold that those were the true terms of the contract and that the ET was entitled to disregard the terms of the written documents, in so far as they were inconsistent with them.

CONCLUSION

39. For the reasons given above, I agree with the Court of Appeal that the ET was entitled to hold that the claimants were workers because they were working under contracts of employment within the meaning of regulation 2(1) of each of the NWMR and the WTR. They were within limb (a) of the definitions set out in para 2 above. Since the question whether the claimants were workers within limb (b) would only arise if the claimants had not entered into a contract of employment, that question does not arise, although, like the ET, I would have held that they were in any event working under contracts within limb (b). It follows that I would dismiss the appeal.

ANNEX A

Agreement

“Autoclenz ... and

PAUL HUNTINGTON

(Name of Sub-contractor)

HEREBY AGREE as follows:

1. The Sub-contractor shall perform the services, which he agrees to carry out for Autoclenz within a reasonable time and in a good and workmanlike manner.
2. The Sub-contractor hereby confirms that he is a self-employed independent contractor and that he is responsible for payment of his National Insurance contributions and for making his returns to HM Inspector of Taxes paying his Income Tax under schedule ‘D’.
3. The Sub-contractor and Autoclenz agree and acknowledge that the Sub-contractor is not, and it is the intention of the parties that the Sub-contractor should not become, an—employee of Autoclenz. Accordingly, the Sub-contractor is responsible for payments of all Income Tax and National Insurance contributions arising on or in respect of payments made to the Sub-contractor by Autoclenz and the Sub-contractor agrees that he shall indemnify Autoclenz in respect of any liability to Income Tax and National Insurance contributions for which Autoclenz may be held liable on or in respect of such payments.
4. Sums agreed to be paid by Autoclenz to the Sub-contractor shall be net of VAT (if any). For as long as the Sub-contractor is, or becomes or remains liable to be, registered for VAT then Autoclenz shall, in addition, pay VAT on such sums.
5. Autoclenz shall, if requested by the Inland Revenue or the Department of Social Security, provide to those government departments details of payments made to the Sub-contractor.
6. The Sub-contractor confirms that he is not suffering and has never suffered from back trouble, skin rashes, eczema, dermatitis, asthma or epilepsy and has never been refused work or been terminated from work due to ill-health.
7. EITHER:

(a) The Sub-contractor confirms that he holds a current valid Driving Licence, free of endorsements...

And that he will ensure that those who work for him, in providing services to Autoclenz, hold the same.

OR:

(b) The Sub-contractor confirms that he DOES NOT hold a current valid Driving Licence.

PLEASE DELETE AS NECESSARY”

Although no deletions were made, details of Mr Huntington’s driving licence were included in clause 7(a). The agreement was signed by both Autoclenz and Paul Huntington. An agreement in the same or substantially the same form was signed between Autoclenz and each of the other claimants.