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No. EAT/0442/01/RN ;EAT/0197/02/RN ;
EAT/0159/02/RN ;EAT/0591/02/RN

IN THE EMPLOYMENT APPEAL TRIBUNAL

London

Wednesday 18th December, 2002

B e f o r e:

THE HONOURABLE MR JUSTICE BURTON (PRESIDENT),

MR J R CROSBY,

MRS L TINSLEY

- - - - - - -

(1) COMMISSIONERS OF INLAND REVENUE
(2) MR K J HAYWARD
(3) MRS J TOOBY
(4) MRS J WOLSTENHOLME

Appellants

- v -

POST OFFICE LTD

Respondent

- - - - - - - - -

J U D G M E N T

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MR JUSTICE BURTON (PRESIDENT):

1. There are before us appeals in four cases, all brought by or in respect of sub-postmasters or sub-postmistresses, by way of claim against the company now called Post Office Ltd which, notwithstanding its various changes of names during the course of these proceedings, we shall call "the Post Office". They are as follows:

i) The appeal by Mrs Wolstenholme ("Wolstenholme"), for whom Ms Helen Mulholland has appeared, against the dismissal by the Manchester Employment Tribunal of her claim for unfair dismissal, on the ground that she was not an employee.

ii) The appeal by Mrs Tooby ("Tooby"), for whom Mr John Falkenstein appeared, against the dismissal by the Newcastle on Tyne Employment Tribunal of her claim for unfair dismissal, on the ground that she was not an employee, and of her claim for wrongful deduction of wages under s 13 of the Employment Rights Act 1996 ("the 1996 Act"), on the ground that she was not a worker within the meaning of s230(3) of the 1996 Act ("s230(3) ").

iii) The appeal by Mr Hayward ("Hayward"), who was represented by a friend, Mr Baker, against the dismissal by the Manchester Employment Tribunal of his claims under the Working Time Regulations 1998 ("WTR") on the ground that he was not a worker, within the meaning of Regulation 2 of the WTR (the wording of which is identical to that in s 230(3)), and under the National Minimum Wage Act 1998 ("the NMWA"), on the ground that he was not a worker within the meaning of s 54(3) of the NMWA (which again is in identical wording, with the proviso to which we shall shortly refer).

iv) The appeal by the Commissioners of Inland Revenue, which is represented by Mr Timothy Brennan Q.C., against the rejection by the Manchester Employment Tribunal of their case, on a successful appeal by the Post Office against an Enforcement Notice pursuant to s19 of the NMWA in respect of a Mrs Collins. Although Mrs Collins was not a party to this Decision we shall call this appeal "Collins". The Inland Revenue's case, rejected by the Employment Tribunal, was that Mrs Collins was a worker within the meaning of s 54(3)(a case, subject to reservation of the position on any further appeal, not pursued before us), alternatively a homeworker within the meaning of s 35(2) of the NMWA. The proviso to which we referred above is that the definition of a worker under the NMWA is widened by virtue of the inclusion of a homeworker as defined, and as to Mr Hayward, although he did not run the homeworker case before the Employment Tribunal, he has been permitted on appeal to run this case (on the Inland Revenue's coattails).

In each of the appeals the Post Office has been represented before us by Mr David Griffith-Jones Q.C. and Mr Andrew Burns.

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2. It can be seen therefore that these were the questions for us, in general terms:
i) Is the sub-postmaster an employee? (Wolstenholme and, in respect of one of her claims, Tooby.)
ii) Is the sub-postmaster a worker within s 230(3) and/or the WTR? (Tooby and, as a subsidiary point, Hayward.)
iii) Is the sub-postmaster a worker or a homeworker within the NMWA? (Collins [Inland Revenue], Hayward.)
3. The issues lying behind these questions become clearer if the statutory provisions are set out:
i) Employee
The question falls to be decided by reference to s 230(1) of the 1986 Act, which, as is well established, leaves matters to be decided by the common law:
"In this Act 'employee' means an individual who has entered into or worked under (or, where the employment has ceased, worked under) a contract of employment."
ii) Worker (other than by reference to the NMWA)
The definitions are, as set out above, identical in s 230(3) for the purpose of the 1996 and Regulation 2(1) of the WTR. In each, the definition is (ignoring the question of a contract of employment) that a:
" 'worker' means an individual who has entered into or works under ... (b) any ... contract, whether express or implied and (if it is expressed) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another person to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."
The definition of employment for the purposes of the operation of the Sex Discrimination Act 1975 s 82(1), the Race Relations Act 1976 s 78(1) and the Disability Discrimination Act 1995 s 68(1) is materially identical so far as concerns the wider definition of employment for such purpose by including a contract personally to do or execute any work, but does not include the additional client or customer limitation.
iii) Worker for the purpose of the NMWA is identically defined by s 54(3)(b), but the NMWA also applies to a homeworker, which is defined by s 35(2) as meaning:
"an individual who contracts with the person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person."
S 35(1) then provides as follows:
"In determining for the purposes of this Act whether a homeworker is or is not a worker, s 54(3)(b) ... shall have effect as if for the word 'personally' there were substituted '(whether personally or otherwise) '."

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Thus if a sub-postmaster is found to be a homeworker as defined, then, in order for him to amount to a worker under the NMWA, the requirement of undertaking of personal service is not necessary. There are two other provisions of the NMWA which have not in the event been determinative. Both relate to the onus of proof:
S 19(6):
"on an appeal [against an Enforcement Notice requiring an employer to remunerate a worker at a rate equal to the national minimum wage] the Employment Tribunal shall dismiss the appeal unless it is established ... (a) that, in the case of the worker ... to whom the Enforcement Notice relates, the facts are such that an officer who was aware of them would have had no reason to serve any Enforcement Notice on the appellant".
S28(1):
"where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the national minimum wage, it shall be presumed that the individual qualifies or, as the case may be, qualified at that time for the national minimum wage, unless the contrary is established."
4. It can be seen from the above, leaving aside the straightforward issue of 'employee or not' [Issue A], which was argued before us by Ms Mulholland in the Wolstenholme case (adopted so far as necessary by Mr Falkenstein for Tooby), that:
i) in the Tooby and Hayward cases, the first issue [Issue B] was whether the contract between the Post Office and the sub-postmaster/postmistress was one whereby the latter undertook to do or perform personally any work or services for the Post Office: and it was common ground that the test was whether the undertaking of such personal service was the 'dominant purpose' of the contract (as expounded in Mirror Group Newspapers v Gunning [1986] ICR 145 C.A., particularly at 151 and 156, and in Kelly and Loughran v Northern Ireland Housing Executive [1988] ICR 828 H.L., esp at 835-6, 840, 842, 844 and 845-6. This was argued before us by Mr Falkenstein for Tooby (supported by Mr Baker for Hayward). The Inland Revenue in the Collins case did not pursue this argument, subject to preserving its position for the purposes of any appeal.
(ii) In the Collins case, and in the Hayward case in the alternative, the first issue was whether a sub-postmaster is a homeworker [Issue C], namely whether he contracts with the Post Office, for the purposes of the Post Office's business, for the execution of work to be done in a place not under the control or management of the Post Office: if so, as discussed above, by virtue of s 35(1) and s 54(3), the question of personal service does not arise.
(iii) In the Tooby, Hayward and Collins cases, if they succeed on the respective first issues, they have also then to succeed on the second issue, namely whether the status of the Post Office is by virtue of the contract, that of a client or customer of any

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profession or business undertaking carried on by the sub-postmaster ("the client or customer limitation") [Issue D].

5. The relevant background was found by the Tribunal in Hayward in paragraph 10(b) of its Decision:

"The network of post offices in the country comprises Crown Offices, Sub-Post Offices and franchise Post Offices. These are manned in different ways. Crown Offices are staffed by employees of the Respondents, while franchise offices are operated under agreement with larger retailers, for example, supermarkets, who provide the facility within their larger stores. Sub-Post Offices, however, are operated by Sub-Postmasters and Sub-Postmistresses, who perform their services under a contract with the Post Office. Of the 18,000 Post Office outlets nationwide, 97%, or 17,800 are run by private business people who run their Post Office business alongside their other retail concern. A thousand of these Sub-Post Offices are run by large multiples, such as Spar, who may have a number of Sub-Post Offices in different branches. The remainder, the vast majority, are run by individuals, who employ in total around 40,000 assistants. The contract between the Respondents and Spar [is] exactly the same as those given to persons in the position of the Applicant. These contracts are of substantial size and run to 114 pages."

6. There are in fact three different kinds of contracts: the Subpostmasters' Contract ("SPMC")(entered into by Tooby and, I think, Hayward), the Modified Subpostmasters' Contract ("MSC")(entered into by Wolstenholme) and the Community Subpostmasters' Contract ("CSC")(entered into by Collins). The terms of these contracts differ slightly, both as between themselves, and as modifications are made from time to time, but in all material respects they are identical and/or have not changed, and insofar as there are any slight differences which may be of possible materiality, we shall refer to them below.

7. The circumstances in which the Appellants entered into their contracts obviously slightly differed, both as between themselves, and no doubt as between themselves and other people who have entered into such contracts with the Post Office, but in general terms they follow a simple pattern. They would see advertisements for, or learn from friends or family of the availability of, freehold or leasehold premises and a business - usually of a newsagent or general store - from which their predecessor would have been acting as sub-postmaster or sub-postmistress. Although there was no entitlement to assign or have assigned the office of sub-postmaster, during the negotiations for acquisition of the premises and business, appropriate enquiries would be made of the Post Office to ensure that, on acquisition, there would be an appointment as sub-postmaster: and the particulars of sale of the premises and business would be likely to be advertised on the basis of including reference to past

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revenue and/or estimated future revenue from a continuation of the sub-post office at the premises, on the basis of which the acquisition would then be completed.

8. Thus there are the following relevant findings of fact in relation to the four cases before us, into which we will interpose some reference to documents to which our particular attention has been drawn in the course of the hearing before us, insofar as those documents fill out the picture.

9. Hayward. The facts are briefly set out in paragraphs 10(a) and (b) of the Decision:

"The Applicant was a Sub-Postmaster at 8 Holden Street, Belthorn, Blackburn. The premises are the applicant's home and the Post Office business is in the downstairs front room. As well as a Post Office he also carries on the business of a general store and off-licence. He bought the premises in October 1986 from the previous sub-postmaster, was appointed by the Post Office to conduct their business their and he has conducted it ever since ... He also conducted in his premises the village stores. He had paid £40,000 for the building and £7,000 for the goodwill, fixtures and fittings of the shop."

10. Tooby. We refer to paragraph 5(a) of the Decision:

"The applicant was postmistress of the sub-post office situated at 3 Mill Street, Shildon. She took up this position on 11 May 1984. The business operated from premises she purchased and in which she also lived. She ran the business. She also sold stationery and cards from the same premises."

11. Wolstenholme. We refer to paragraphs 5 and 6 of the Decision:

"The applicant was appointed as Subpostmistress of the sub-post office situated in Runnymede Avenue, Cleveleys, Blackpool, in November 1999. Those premises comprise a small shop operation in addition to the post office. Both business have previously been run by the applicant's parents, who had agreed to sell the business and the premises themselves to the applicant and her partner, which they purchased with the assistance of a substantial loan from Yorkshire Bank, as well as a loan from the applicant's parents themselves, who in fact still remain living in the flat above the shop and post office premises .... The applicant would normally have been expected to make an introductory payment to [the] Post Office ... for the privilege of being appointed Subpostmistress, but in this particular case that was waived because of the fact that this was a family transfer."

12. The findings in Collins are somewhat longer, and we have more of the documents in our bundle. We refer to paragraph 7(2) of the Decision:

"(i) Mrs Collins responded to an advertisement holding out for sale a Sub Post Office and General Provisions Store;

(ii) Mrs Collins obtained sales particulars that showed a turnover of approximately £400 per week together with a Post Office salary [we interpose that those particulars

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were headed up "SUB POST OFFICE/GROCERS Trading as: "The Meadowbank Post Office"].

(iii) A purchase price of £11,900 was sought for the goodwill and lease on local authority-owned premises comprising a 3-bedroomed dwelling and annexed retail shop premises (described during the hearing as being similar to a garage attached to the side of a house);

(iv) The vendor was a Mrs Gleave who was then the SPM [sub-postmaster/mistress] and proprietor of the General Provisions Store operated in those retail shop premises;

(v) Mrs Collins approached the Post Office to establish that she would be appointed SPM if she completed the purchase from Mrs Gleave, apparently completing a signed application form in her own hand;

(vi) Given the nature of the work of a SPM, the Post Office satisfies itself of the suitability of those seeking appointment as SPM before making such an appointment;

(vii) Mrs Collins was interviewed by an official of the Post Office and it was during that interview that she first learned that the opening hours of Meadowbank SPO [Sub-Post Office] were to be reduced to 20 hours per week and that the Post Office salary would be less than that stated in the sales particulars;

(viii) The Post Office official conducting the interview made a contemporaneous note on a standard form to the effect that Mrs Collins would continue to employ a part-time assistant previously employed by Mrs Gleave [he also there recorded that "If successful, Mrs Collins has plans to alter the shop/po layout to offer a wider range of goods and better service and thus hopefully increase business"]. ... In her application form ... Mrs Collins answered the question "Can you provide a suitable assistant or assistants over school leaving age? If so state, if possible, the names and ages of all such persons" with the words "As existing".

(ix) Mrs Collins was offered an appointment as SPM ...

(xvii) The lease of the shop and dwelling was assigned to Mrs Collins, pursuant to which she covenanted [by clause 3(14)(a) of the lease] to use the shop premises for a SPO and General Provisions Store.

(xviii) The Post Office gave Mrs Collins some off-the-job training and two-weeks' on-the-job training when she first was appointed; thereafter she received periodic visits from officials of the Post Office.

(xix) Mrs Collins operated the General Provisions Store from November 1993 until 1997;

(xx) Mrs Collins saw the SPO as likely to draw into the shop customers who would purchase non-post office items from Mrs Collins and, conversely, the goods on sale were seen as likely to attract customers to the SPO.

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(xxi) Mrs Collins chose, as she was free to do under the contract made with the Post Office, to keep the SPO counter open throughout the General Provisions Store trading hours.
(xxii) In 1997, when she no longer considered the General Provisions Store viable, Mrs Collins ceased to engage in that trade."
13. Given the near identical nature of the three contracts referred to above, we set out in the main only the relevant clauses of the SPMC. We shall, for easier identification later, give each relevant clause a letter:
"SECTION 1: SUB POSTMASTERS' CONTRACT AND STATUS.
A. 1. The contract is a contract for services and consequently the Subpostmaster is an agent and not an employee of [the] Post Office ...
B. 3. The Subpostmaster must provide and maintain, at his own expense, reasonable office accommodation required by [the] Post Office ..., and pay also at his own expense, any assistants he may need to carry on Post Office ... business.
C. 4. The hours of attendance (liable to variation) are [we have Mrs Collins' contract filled out] ...
D. 5. The Subpostmaster is not obliged to attend the sub-office personally, but he is required, whether he is there or not, to accept full responsibility for the proper running of his sub-office, and the efficient provision of those Post Office services which are required to be provided there. Retention of the appointment of Subpostmaster is dependent on the sub-office being well managed and the work performed properly to the satisfaction of [the] Post Office.
E. 8. The terms of the appointment of Subpostmaster do not entitle the holder to be paid sick or annual leave, pension or to compensation for loss of office.
F. 9. If on resignation of his appointment the Subpostmaster disposes of his private business and/or premises in which the sub-office is situated, the person acquiring the private business and/or the premises exchanging contracts in connection with the purchase of the private business and/or premises will not be entitled to preferential consideration for appointment as Subpostmaster.
G. 15. Operational rules are intended for the instruction and guidance of both the Subpostmaster and the staff which he employs at his sub-office. The Subpostmaster must ensure that his sub-office Assistants carry out their duties in accordance with the rules and instructions affecting their respective duties.
H. 19. All instructions received from the Regional General Manager should be carried out as promptly as possible.
SECTION 2: REMUNERATION
I. 1. A Subpostmaster is paid according to the amount of work which is transacted at his sub-office [the CSC is somewhat fuller in this regard:

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"Upon his appointment, the Community Subpostmaster will be assigned to a particular rate of remuneration relative to the amount of business transacted or expected to be transacted at his Sub-Office. Subject to paragraph 4 hereof, this rate of remuneration will remain unchanged throughout the period of the contract, subject only to periodic uplifting of the Community Scale. In the event of a change of the number of standard hours on which service is required to be provided, the Retail Network Manager will have the opportunity to reassess the rate of remuneration accordingly".]

SECTION 3: SUBPOSTMASTERS' ABSENCE FROM OFFICE

J. A Subpostmaster, under the terms of his contract, is not obliged to render personal service and is therefore free to absent himself from the office, provided he makes suitable arrangements for the conduct of the office during his absence. He should notify the Regional General Manager on Form P2593 when he will be away for a period of more than three days, and give the name of the person substituting for him. A Subpostmaster's responsibility for the proper conduct of the office, or for any losses occurring during his absence, is in no way diminished by his absence from the Sub-Office. He must make proper provision, at his own expense, for the conduct of the office while he is away ...

SECTION 4: ABSENCE ON HOLIDAY: HOLIDAY SUBSTITUTION ALLOWANCE ("HSA")

K. 1. A subpostmaster is not entitled to annual leave as such, but subject to the following conditions he may claim for reimbursement of the necessary cost of his substitution when taking a holiday. To qualify for reimbursement, the subpostmaster must be able to certify that he renders on average not less than 18 hours personal service each week.

L. 2. The reimbursement of the costs of substitution is paid as HSA and the maxima payable are published annually in Counter News. The sum reimbursable is the net additional cost necessarily incurred by the subpostmaster in providing during his absence for the Post Office duties which he normally performs.

M. 3. To assist Subpostmasters to overcome the difficulties sometimes experienced in obtaining suitable substitutes in a particularly year, the HSA extends over a period of two years ...

N. 9. The Subpostmaster must submit a formal claim for reimbursement of the HSA ... within three months of the end of the period of substitution to which the claim relates ... He must certify:

9.1 that he has taken a holiday both from the Sub Post Office and from his private business during the whole period covered by the claim; and

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9.2 that in respect of the services he provided as subpostmaster, he has actually and necessarily incurred additional expenditure equating to the amount claimed, in respect of a paid substitute or substitutes ...

SECTION 7: SUBPOSTMASTER'S SICK ABSENCE SCHEME - SUBSTITUTION ALLOWANCE

O. 1. A Subpostmaster is not required to give personal service and is not entitled to sick leave as such. However, subject to certain conditions and limitations described below, he is entitled to claim sick absence substitution allowance ["SASA"], in respect of costs of substitution necessarily incurred, when he is absent from his sub-office through illness.

2. ... all Subpostmasters who give 18 hours or more personal service a week, who are absent from the sub-office through illness, are eligible to claim [SASA].

SECTION 13: PREMISES

P. 1. The Subpostmaster must, at his own expense, provide premises in which such reasonable office accommodation and fittings as [the] Post Office ... may require are made available for carrying on the Post Office ... business.

Q. 3. The Subpostmaster must also at his own expense:

· clean, decorate and maintain the sub-office premises to a good standard;.

· light and heat the sub-office premises;

· exhibit the sub-office title (i.e. '... POST OFFICE') in large painted letters in a prominent position outside the building ...

[The CSC is fuller in this regard (in Section 9):

R. 1. The Community Subpostmaster must, at his own expense, provide premises in which such reasonable office accommodation and fittings as [the] Post Office ... may require are made available for carrying on [the] Post Office ... business. Normally, these premises will be owned by the Community Subpostmaster or his spouse, or will be leased to him or his spouse on a tenancy. However, in certain instances, the Regional General Manager may authorise the establishment of a Community Sub-Office in premises which would normally not be acceptable in the case of a full-time Sub-Office, such as domestic premises, church hall, Community centre, etc., in which case the Regional General Manager may agree, on request, to bear the reasonable one-off cost of adapting such premises to make them suitable for the running of a Community Sub-office.

S. 2. The Community Subpostmaster must, at his own expense, ensure that the Sub-Office part of the premises is kept clean and maintained to a good standard, and provided with adequate lighting and heating. He may also be required to provide space for posting facilities.

T. 3. The Regional General Manager will decide on the security precautions to be taken at each Community Sub-Office, taking into account likely levels of cash

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holdings and possible risks in view of local circumstances. The Community Subpostmaster may therefore be required to provide facilities for the installation of such security equipment as the Regional General Manager considers necessary."]

U. 4. "The Subpostmaster must not, without the prior agreement of the Regional General Manager:

· move the sub-office to premises other than those in which it was situated at the time of his appointment;

· alter the accommodation for carrying on the work of the sub-office from that agreed at the time of his appointment.

SECTION 14: HOURS OF BUSINESS

V. 1. The actual hours of opening of any individual sub-office are set by the Regional General Manager in accordance with the following rules. The Subpostmaster must not without permission vary the hours of public business set by the Regional General Manager.

W. 2. The standard hours during which the Subpostmaster may be required to open his office in order to transact all kinds of counter business appropriate to his office are Monday - Friday 0900 - 1730, Saturday 0900 - 1230 or 1300 (depending on local circumstances).

SECTION 15: ASSISTANTS

X. 1. A Subpostmaster must provide, at his own expense, any assistance which he may need to carry out the work in his sub-office.

Y. 2. Assistants are employees of the sub-postmaster. A Subpostmaster will be held wholly responsible for any failure, on the part of his Assistants, to apply Post Office rules, or to provide a proper standard of service to the public. He will also be required to make good any deficiency, of cash or stock, which may result from his assistants' actions.

Z. 3. Wages, hours, holidays etc., are a matter to be settled between Subpostmaster and the assistants concerned. However they should be no less favourable than those enjoyed by shop assistants generally in the same district. [The] Post Office ... reserves the right to intervene if such conditions are considered inequitable.

AA. 4. The Subpostmaster is responsible, as employer of his assistants, for complying with the provisions of any legislation which imposes obligations on employers.

BB. 6. In the light of the Subpostmaster's responsibilities ... he is strongly recommended to satisfy himself of the character and suitability of an applicant for employment as Assistant before a firm offer of employment is made ...

CC. 12. In order to help prevent the employment of unsuitable or dishonest persons on Post Office work, a Subpostmaster must notify the Regional General Manager if he dismisses an employee on these grounds, or if his enquiries about an applicant for employment give him reason to believe that the applicant is an unsuitable person ...

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DD. 13. Where [the] Post Office ... has good reason to believe that it would not be in its best interests for a particular person to have access to [the] Post Office ... cash and stock as a Sub-Office Assistant it may call upon the Subpostmaster to:
(a) refrain from offering that person a post if not already employed
(b) ensure that the person is not further employed on Post Office business if employed.
SECTION 17: SUBPOSTMASTERS' PRIVATE BUSINESS ACTIVITIES
EE. 1. The appointment of a Subpostmaster confers on the individual concerned the right to transact, and to receive payment for, certain items of business on behalf of [the] Post Office ... at the premises specified. The conditions of the appointment also involve such restrictions on the private activities of the Subpostmaster as are necessary to ensure the continued viability of [the] Post Office ... nationwide network. [Restrictions relating to directly competitive operations are then set out.]
FF. 12. A Subpostmaster must not use the name 'Post Office' in connection with any of his private business activities or in such a way as to imply that the Post Office is in any way connected with these activities.
SECTION 22: QUALITY STANDARDS
GG. [The relevant obligation is more fully set out in the equivalent clause (s11(M)(2) in the MSC, namely:
"The Subpostmaster must make every endeavour to ensure that all customers start to be served ... within five minutes of the time that they join a queue to be served or within such other time which shall, from time to time, be prescribed. The normal standard is that the customer should expect to be served [within] this maximum time limit. The Subpostmaster will, in accordance with procedures advised by [the Post Office], regularly monitor the waiting time that customers experience in his office and will make all necessary adjustments to his staffing patterns. Persistent failure to meet the standards of service will be regarded as a breach of contract. Any failure by [the] Post Office ... to exercise this power should not be regarded as a waiving of its rights under the terms of this contract."
14. Before we turn to the resolution of Issues A to D, we should set out what might be called the 'judicial history' at the EAT, which intimately relates to the outcome of Issues A and B. There have been six relevant previous decisions of the EAT, all relating to the status of sub-postmasters/mistresses:
i) Hitchcock v Post Office [1980] ICR 100 (per Slynn P). Issue A was before the EAT, i.e. whether a sub-postmaster was an employee or not (for the purpose of unfair dismissal). The relevant contracts, which were similar if not identical to the present, were considered. Slynn P, giving the judgment of the EAT, concluded as follows (at 108-110):

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"We accept ... that there is here a substantial measure of control which relates to the conduct of the Post Office's business. It might be, if there were no other factors present, that that control would be sufficient to make the contract one of service rather than for services. But there are other factors present. The question in this case, it seems to us, is really whether the control that does exist is such that it prevents the contract being one for services rather than one of service. Accordingly we must look at the matter as a whole. We consider here that great importance has to be attached to the fact that the applicant provided the premises and a certain amount of the equipment at his own expense. The sub-post office came into what was his general store. It was a part of his own business. Moreover it is clear that even though, apparently, he chose to spend a great deal of his working week doing the sub-post office work at this particular premises himself, he had the right to delegate, and did in fact delegate. At the other two offices, we have been told, he delegated on virtually a full time basis; but even at Springfield Road there was some delegation. In addition it seems to us that on the terms set out in the rules he was obliged to be no more than responsible for the conduct of the office. He may have chosen either to do it himself or to supervise it; if he did not, then at most he was responsible for the performance of the duties. It was for him to decide whether to do it himself or whether to employ someone else to do it, as long as he retained the responsibility. We do not feel that the provision as to his giving notice if he is to be absent for more than three days is in any way inconsistent with his right to appoint other people to carry out the duties of the sub-post office. Moreover it seems to us that even though there may be less chance of making profit, or risk of loss, than in many businesses, there was still here the chance of profit and the risk of loss ... In our view, the essential position was that the applicant, although under control as to the way in which much of the work was done, was carrying on business on his own account. The economic reality of it was that this was his shop, his premises, and it was he who was conducting this sub-post office business even if on behalf of the Post Office. We do not consider that it can be said that he, although doing work for them, was so integrated into their business that he became a servant. The position of a head postmaster who is a full time employee of the Post Office, and who provides no premises, no employees of his own, seems to us to be entirely different. The very fact here that the applicant was carrying on this business with employees of his own seems to us to indicate very strongly that he was not employed under a contract of service. We do not consider that the element of control here - which, as the Industrial Tribunal found, is not so much of a managerial nature but is connected with the protection of the Post Office's own property and public interest - is such as to prevent this being a contract for services in the generally understood sense. Nor do we think that the fact that the applicant did carry on long hours here and signed a certificate to say that he was working for more than

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18 hours per week in the sub-post office - which had for him consequences in relation to National Insurance - means that he is to be treated as a servant."
(ii) Goraya v Post Office (EAT/409/89 unreported) per Wood P, after further consideration, resolved Issue A the same way.
(iii) Tanna v Post Office [1981] ICR 374, per Slynn P. Here the EAT considered Issue B - contract "personally to execute" - for the purposes of the Race Relations Act 1976 s 78(1), whose wording is, as we have set out in paragraph 3(ii) above, materially identical to the sections in consideration before us, and resolved it in favour of the Post Office.
(iv) Soni v Post Office Counters Ltd (EAT 425/96 unreported) per HH Judge Pugsley. Issue B was again considered by the EAT (again by reference to the materially identical wording of the Race Relations Act 1976). Specific reference was made to Gunning, the seminal Court of Appeal decision to which we referred in paragraph 4(i) above, in which, by reference to s 82(1) of the Sex Discrimination Act 1995 (again materially identical), the Court of Appeal had concluded that whether a contract fell within that section depended on:
"(a) whether, looking at the contract as a whole, it contained, on the part of the person who was contracting to provide services, any obligations that he or she would personally execute any work or labour; and
(b) whether that obligation was a dominant purpose of the contract."
Again the EAT resolved Issue B in favour of the Post Office.
(v) Sheehan v Post Office Counters Ltd [1999] ICR 73 per Morison P. Again the EAT resolved Issue B in favour of the Post Office, this time by reference to the (also materially identical) provisions of the Disability Discrimination Act 1995.
(vi) Chohan and Bains v Post Office Ltd (EAT 284/02) per Lord Johnston. Once again the EAT resolved Issue B in favour of the Post Office, in relation to the materially identical provisions in the Race Relations Act 1976.
For completeness, two other decisions were referred to before the Employment Tribunal in the cases of Hayward and Tooby. The first was a decision of another Employment Tribunal, that sitting at Inverness (ET S/200/521/99), where, in relation to Issue B, by reference to the NMWA, that Tribunal decided the matter against the Post Office, notwithstanding the EAT decisions we have referred to. No submissions were addressed during the hearing before us as to this first instance decision. The other decision was one of a Chairman of a VAT Tribunal in Patel v Commissioners of Customs and Excise and Post Office Counters Ltd (11/6/97), in which the Post Office had argued that a sub-postmaster, while not an employee for the purposes of other legislation, should be so treated for VAT purposes and thus not liable to VAT. The Chairman rejected that argument, concluding (at page 4) that he did not "consider that what is a contract of service in the industrial relations [context], any more than where

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the question arises for income tax or National Insurance, is something different from" what he was called upon to consider in that case. He concluded that the contract of the sub-postmaster was one of service, thus not following the EAT decisions. Although this was thus a decision, albeit in the VAT context, which did not support the argument being put forward by the Post Office on Issue A, Ms Mulholland did not base any argument upon it, and it is of course again not binding upon us.

15. Against this background we can now turn to deal more shortly with the issues themselves.

Issue A: Employee or not?

16. Ms Mulholland was faced with the following problems:

i) Findings of fact by the Employment Tribunal.

ii) An apparent correct application of the correct tests by reference to the appropriate authorities by the Employment Tribunal.

iii) The previous decisions of the EAT to which we have referred which, though not strictly binding upon us, are plainly extremely persuasive, not simply by virtue of the number of them (although four out of the six were strictly on Issue B) but in particular by virtue of the very lucid and convincing analysis by Slynn P in Hitchcock.

17. The Employment Tribunal in Wolstenholme carefully considered the evidence and the contract. The following paragraphs of its decision are relevant:

"9. ... The Tribunal was satisfied on the evidence of the applicant herself that she believed, when entering into that contractual arrangement, that she ... was embarking upon a business venture in which she would be a self-employed person running the post office operation under a 'franchise' type of operation, whereby she would be carrying out duties for and on behalf of [the] Post Office ... under a contract for services.

10. When entering into the arrangement, the applicant did not believe that she would become an 'employee' of [the] Post Office ...

15. Mr Owen on behalf of the applicant does not dispute the fact that the intention of the parties was not to enter into a contract of employment and the Tribunal is satisfied that that was the case. What he argues, however, is that the label attached to the arrangement between them is not conclusive, which of course is right as a matter of law, and that the reality of the relationship, including in particular the control exercised in practice by the respondent over the manner in which the applicant conducted the business of the sub-post office is such that, as a matter of law and fact, the relation of employer/employee was created or evolved ...

17. There is no doubt in the Tribunal's mind that the respondent did, in fact, insist on the applicant utilising the Horizon computer system, which all other sub-postmasters and mistresses throughout the country had also been instructed to do ...

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18. Mr Owen pointed in the contract to a number of other areas in which the respondent did or purported to 'dictate' the way in which the applicant conducted her day-to-day activities in the running of the post office.
19. It was argued by Mr Wright on behalf of the respondent that, in any commercial arrangement such as the one in this case, the 'franchisor' is perfectly entitled to insist that the 'franchisee' operates the franchise in a particular manner so as to achieve consistencies of operations and (particularly in a case such as this where important public functions are being administered) to ensure that efficiency, reliability, security and probity are maintained.
20. It is not proposed in these reasons to go into detail regarding the matters which the applicant maintains amounts to 'control' to the degree asserted, but [our underlining] the Tribunal accepts that the contract provides for a very comprehensive and firm regime under which the sub-postmasters or mistresses expected to operate.
21. It is, however, in the Tribunal's view of particular significance that the wording in the contract essentially provided for the applicant to be responsible for ensuring that the requirements of the respondent were carried out, rather than insisting that she personally should perform those tasks. The applicant did, in fact, employ a number of assistants to run the business and the Tribunal was satisfied that the contract did not provide for the applicant to be personally present at all times when the post office was open.
22. Having considered all the evidence, the Tribunal was unanimously satisfied that the applicant was not required personally to perform the services for which she was responsible under the contract. Provided the person she employed was suitable, she was entitled to delegate her duties under the contract to her employees and to provide them as 'substitutes' for herself when she was not performing those functions herself.
33. Having considered all the facts and law in relation to the matter, the Tribunal is satisfied that the dominant purpose of the contract between the applicant and the respondent was not the provision of personal services by her, but the regular and efficient carrying on of the Post Office services for which she was responsible."
The Tribunal makes reference to Express and Echo Publications Ltd v Tanton [1999] ICR 693, and the importance placed in that case on the presence or absence of an obligation to perform personally, and to Hitchcock, and expressly disagrees with Patel.
18. As for Tooby, the Employment Tribunal in its decision again gave careful consideration to the facts and to the terms of the relevant contract, and made express reference to the same authorities but also to a number of others, including Ready Mixed Concrete (South-East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497. The relevant paragraphs of its decision are as follows:

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"5(h) There is no doubt upon considering the contractual provisions that the Post Office exercises a considerable degree of control over the applicant's Post Office business [our underlining]. However the applicant provided the capital for the business, she owned the premises, she decided whether to employ assistance although such assistance, had to be approved by the Post Office, and she decided the extent to which she would give personal service, although there was no requirement that she should give any.

9. We are satisfied that Mrs Tooby well understood that she was applying to use premises which she was purchasing for use as a post office and could use that business for her own other business, namely that of selling stationery and cards. She was acquiring the outgoing private business of the previous sub-postmaster. She indicated that she wished to acquire the position in order to set up her own business. She acknowledged the post office rules. Whilst the label that the parties put on the relationship is not decisive, it can be relevant [see Massey v Crown Life Assurance Company [1978] IRLR 31 CA].

10. It is quite clear from the contractual documents that the sub-postmaster was not required to attend the sub-post office personally and could employ assistance.

14. In approaching the question asked in Lane v Shire Roofing [1995] IRLR 493 CA as to whose business it was, it can only be answered in one way in this case. This was Mrs Tooby's business. She was the one who stood to stand loss or profit, there was no day-to-day control in supervision of her, and this sub-post office business was in reality her own business, and part of the totality of the business carried on from those premises."

19. Ms Mulholland put her case in her skeleton argument as follows:

"(a) the degree of control on the Appellant was such that the only sensible conclusion is that she was an employee;

(b) whatever test is applied to the facts of the case, the conclusion must be that the Appellant was employed by the Respondent;

(c) the self-employed contract was and is merely a sham to hide the real status of the Appellant."

20. She made clear in oral argument that so far as concerned her submission (c) she was not in fact making a case of 'sham', but simply that the label placed by the parties on the relationship was not conclusive. That of course is not only common ground but was accepted by the two Employment Tribunals. Of course, as she also had to accept, and as was also set out by the Employment Tribunal in Tooby, it is clear from Massey that the label is nonetheless of significance. As for her submission (b), this puts her case very high indeed, particularly in the light of the findings of the Tribunals and the nature of the contract.

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21. As for submission (a) she refers to a number of terms of the contract, including those which enable control by the Regional General Manager to which we have referred above. Amongst the additional clauses to which she took us were to the equivalent, in the MSC, of Clause 8.7 in the SPMC, which provides that the sub-postmaster or his representative must inform his Regional General Manager that he is sick, but this is followed immediately afterwards by a clause (8.8) which appears entirely inconsistent with employment, providing as it does that "subpostmasters, including those nominated by limited companies, who hold more than one appointment, must" give various other notifications to the same Regional General Manager. The fact, as Ms Mulholland showed us, that there are obligations on the sub-postmaster to keep accounts in various specified ways, and, as set out in the clauses we have lettered as BB, CC and DD in paragraph 13 above, to involve the Post Office in the selection and verification of the sub-postmaster's own employees, and above all (because Ms Mulholland emphasised this clause lettered GG in particular) to "make every endeavour to ensure" a minimum waiting time for customers, with a contractual sanction for "persistent failure" is entirely consistent, if not more consistent, with a contract for services. In any event, as is clear from the passages we have underlined in our quotations from the relevant decisions of the Employment Tribunal, the Employment Tribunal recognised and took into account the fact that there was a substantial element of control by the Post Office. Insofar as she suggests that the degree of control is, or ought to have been found by the Employment Tribunal to be so overwhelming as to point only to a contract of service, this submission is plainly unarguable.

22. In order to seek to establish her submission (b) she addressed what she called the "organisational" test, by reference to Stephenson Jordan and Harrison Ltd v McDonald and Evans [1952] TLR 101, and asserted that Mrs Wolstenholme, and all sub-postmasters and mistresses, were integral to the running of the Respondent's business. She referred to what she called the "economic reality" test, to suggest that "the Appellant's business is part of a larger economic entity". She asserted that "there clearly exists some mutuality of obligation between the parties", and she referred, properly, to MacFarlane v Glasgow City Council [2001] IRLR 7, in which the EAT per Lindsay P emphasised that some ability to delegate did not inescapably lead to a conclusion that the contract was not a contract of service. All these submissions were in effect simply the repeat of submissions which no doubt were made, or could have been made, before the Employment Tribunal. However, given the correct way in which the Employment Tribunal approached their task, no error of law begins to be shown. In any event, particularly in the light of the previous EAT decisions, with which we entirely agree, the arguments against these contracts being contracts of employment appears overwhelming. There are not just the relatively limited ambit of

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control and the substantial absence of undertaking of personal service, but also the factors which were so influential with Slynn P in Hitchcock, including the fact that the sub-postmaster is providing his own premises and his own equipment and at least has the right to provide his own staff and to run his own business, subject to keeping separate accounts. Rather than adopting Ms Mulholland's submission (b), we would rather have suggested that the reverse applied, namely that whatever test is applied to the facts of the case, the conclusion must be that the Appellants were not employed by the Respondent.

Issue B: Undertaking of Personal Service

23. Mr Falkenstein for Tooby rested his case on this issue on only one point (the 'Tooby point'), to which we shall turn, but he made it clear that, but for that point, he did not pursue this argument. This meant that (subject to the preservation of position pending any higher appeal) only Mr Baker on behalf of Mr Hayward pursued the case simpliciter, and even he made no oral submissions. In the Employment Tribunal's decision in Hayward their conclusion (after disagreeing with the decision of the Inverness Tribunal in Bain) was contained in paragraphs 14 and 15 of their Decision:

"14. It seems to us that ... while in practice a Sub-Postmaster may well be wise to keep a close personal eye on many of the operations of his Post Office, we have to look at the contract. The words in the Act we are required to construe are "undertakes to do or perform personally any work". It is clear from the contract that the applicant is not required to render personal service. This is particularly set out in paragraph 1 of the contract and also under paragraph 5 and elsewhere, notably under Absence from office, a Sick Absence Scheme, where specifically it is stated that he is not required to render personal service. These are the legal realities of the contract and it is those that this Tribunal is required to construe, not how Sub-Postmasters, even the vast majority of Sub-Postmasters choose to perform the contract. They are not required to undertake the work personally and it would seem to us quite inappropriate for this Tribunal to decide that the situation is otherwise.

15. This is quite apart from the decision in the case of Sheehan, which in our view construes identical words, although in a different Act ... in a manner which in our view is binding on this Tribunal. We accept the interpretation of Morison P in that case that the word 'any' in the definition referred to cannot relate purely to minimal work, in that the Tribunal is required to look at the dominant purpose of the contract, and in this case, as we have stated, this was the efficient carrying out of Post Office services, and these clearly can be delegated, and in many cases are delegated, completely to another authorised person by the Sub-Postmaster. The fact that some other functions, not the dominant purpose, are required to be carried out by the Sub-Postmaster personally does not, it seems to us, created a foundation for deciding that the dominant purpose of the contract is personally to do any work."

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24. The Employment Tribunal in Collins at paragraph 28 of the Decision concluded as follows:

"28. The Tribunal concluded that the contract made between Mrs Collins and the Post Office is not a contract whereby she undertakes to do or perform work personally. She has a choice whether she does the work herself or not. The dominant purpose of the contract is the provision of retail facilities. Mrs Collins undoubtedly provides the premises at which the Post Office business is transacted. She may choose to do all of the work herself but she is free to choose not to do so and was required, before she was appointed to the office of SPM, to satisfy the Post Office that she was able to call upon adequate assistance to ensure the work was done."

25. With both these Decisions we agree. We are satisfied that but for the 'Tooby point', which neither Ms Mulholland for Mrs Wolstenholme, nor Mr Baker on behalf of Mr Hayward have been able, because they did not run it below, nor have sought before us, to adopt, there is no ground for challenge to the ET decisions on Issue B.

26. The 'Tooby point' arises in this way. We have referred in paragraph 13 above to the clauses lettered K, L, M and N relating to HSA, and although there was no specific reference to it in argument, we note that there is a similar allowance (SASA) for all sub-postmasters who give 18 hours or more personal service a week and are absent from their sub-office through illness, provided for in the clauses lettered O, which do not appear to refer to the need for a 'certificate'. As is set out in clause K, to qualify for reimbursement of the cost of being substituted when taking a holiday, the sub-postmaster must be able to certify that he renders on average not less than 18 hours personal services each week. As can be seen, he must also provide a further certificate in order to submit his formal claim for HSA in accordance with clause N. We do not appear to have in our documentation an example of the latter certificate, but we have a document which is presumably the certificate such as is provided for in clause K. The document, signed by Mrs Tooby on 14 May 1984 (the same day as she acknowledged receipt of her appointment as sub-postmaster), was signed in response to a request that she should "please opt for one of the statements below. This option is required for record purposes". She was asked to delete the one of the two options which did not apply, and she deleted the one relating to "LESS than 18 hours" and she did not delete, but signed, the other: "I certify that I perform MORE than 18 hours personal service to the Post Office". The same document appears to be for use in subsequent years because there is the opportunity to sign in relation to subsequent years, the words "I certify that the above statement is still correct".

27. Mr Falkenstein's case is as follows:

i) The signature of this document, simultaneous with receipt and acknowledgment of her contract, changed or fixed the nature of the contract between the Post Office and Mrs Tooby. She had not been obliged to give the certificate; its effect was only to

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qualify for HSA (and no doubt also for SASA), and the effect of non-compliance with it would only be disqualification to receive HSA and/or SASA, so that it could be unconditionally withdrawn. But while it was in place the contract was one by which Ms Tooby was undertaking to perform personal service of at least 18 hours: and thus the dominant purpose of the contract was of personal service, at least 18 hours being substantial, or at any rate as compared with the total hours, set out in her acknowledgment of appointment, of 36.5, there was sufficient to justify an argument of dominant purpose, which could be remitted to the Tribunal for further consideration if necessary. Whatever may be the nature of the contract without the certificate - and, as has been said, Mr Falkenstein did not pursue any other argument against the conclusion of the Employment Tribunals - the contract of Ms Tooby and those like her became one of 'personal service'.

ii) Alternatively even if the undertaking did not change the contract, nevertheless its existence meant that Ms Tooby worked under a contract whereby she undertook to do or perform certain services personally.

28. The relevant paragraphs of the Decision of the Employment Tribunal in Tooby were as follows:

"5(b) On page R1/11 of the bundle is a statement that the applicant was required to complete to certify whether she performed more or less than 18 hours personal service to the Post Office. She stated she performed more than 18 hours personal service. She now claims that she understood that this meant that she had to work on Post Office duties for 18 hours per week at least and in consideration of that commitment she would receive certain benefits to assist with the payment of a substitute.

15. We are satisfied ... [that] the applicant chose to carry out 18 hours personal service rather than being obliged to carry out work personally. She did so as part and parcel of her own business and is therefore not a worker within the terms of the definition."

29. Mr Griffith-Jones Q.C., in his skeleton argument, submits that the Employment Tribunal was right to find that:

"Although a sub-postmaster is entitled to a [HSA] if she elects to work personally, she is not contractually required to work personally."

30. He submitted that the document signed on 14 May 1984 was not an undertaking but a statement, and that it was of no contractual effect, save that it fulfilled a condition precedent for payment of allowances, that it could be changed at will, and that the only consequence of withdrawal or indeed non-continuation of the statement would be that HSA would not be payable.

31. Having heard Mr Griffith-Jones Q.C.'s submissions we are persuaded as follows:

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i) The certification is not and does not amount to an undertaking, but is a statement of intention. In our judgment, it was similar to what I suggested in the course of argument to Mr Falkenstein, namely a statement of what was necessary to qualify for an extra payment, such as if, for example, as a result of some local initiative an additional payment were provided to be made to someone who could prove or certify birth or habitation in that locality. Particularly as the statement can be withdrawn at any time, the only consequence being disqualification for HSA, it is much better described as an election than as some kind of revocable and unenforceable undertaking.

ii) In any event the making of the statement does not 'change' or even 'fix' the nature of the contract. It would be strange if this could be done at the option of the sub-postmaster, but in our judgment it plainly does not change the nature of the contract, because the provision of the certificate is an act pursuant to the contract. The taking up of one of the provisions of or options under the contract ('receive HSA if you do 18 hours') cannot change the substantive nature of the contract which always had the option within it, and thus:

a. The signing of a certificate as evidence of intention to perform 18 hours is no different from someone actually performing 18 hours when not otherwise obliged by the contract to do so. To that extent therefore the 'Tooby point' is not a separate point at all, but arises out of the very nature of the contract.

b. The fact that the contract contains such an 'option' within it did not (as the Employment Tribunals found, and as Slynn P concluded in the passage in Hitchcock at 110 which we have cited at paragraph 14(i) above) make the contract one for, or indeed for the dominant purpose of, the personal execution of services by the sub-postmaster.

32. We are satisfied that the 'Tooby point' adds nothing to the argument, and that the Appellants fail on Issue B on this basis also.

Issue C: Are Mr Hayward and Mrs Collins homeworkers?

33. The issue to be answered by the Employment Tribunal, as can be seen from s 35(2) of the NMWA set out in paragraph 3(iii) above, was whether such sub-postmaster has contracted with the Post Office, for the purposes of the Post Office's business, for the execution of work to be done in a place not under the control or management of the Post Office. If so, then by a combination of s 35(1) and s54(3) of the NMWA, the issue of personal performance does not arise. It is thus an alternative way in which, subject to the client or customer limitation, individuals may be workers for the purposes of the NMWA (it does not apply to the 1996 Act or the WTR or the discrimination legislation).

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34. The issue was, as explained in paragraph 1(iv) above, not before the Employment Tribunal in Hayward, though he has been permitted to run the point before us. It was dealt with by the Employment Tribunal in Collins as follows, at paragraph 26:
"The Tribunal concluded that Mrs Collins is not a homeworker, as defined in s 35 of the Act. That part of Mrs Collins' premises assigned to the SPO is under the control of the Post Office since, by paragraph 4 under s 9 of the contract made between Mrs Collins and the Post Office, Mrs Collins may not alter the accommodation for carrying out the work of the SPO without the agreement of the Post Office. By reason of that contractual position, Mrs Collins surrendered control, or at least, sufficient control of that part of her premises occupied by the Post Office counter at which Mrs Collins and/or any assistant works to provide Post Office services."
35. Mr Brennan Q.C. accepts that a sub-postmaster would not be the ordinary kind of homeworker who would, for example, pursuant to a contract with a clothing manufacturer, make up, together with family members or neighbours, garments at his or her own house from cloth supplied by the manufacturer, under their own domestic conditions, and provide the made-up garments back to the manufacturer. But he submits that the NMWA does not require the place of work to be the home of the worker or indeed home at all (although of course some sub-postmasters will live in or over the shop) but the Act applies simply if the work is to be done in a place not under the control or management of the Post Office, and he submits that the Employment Tribunal erred in its conclusion.
36. It does not seem to us that the finding of the Employment Tribunal was simply one of fact, so as to fall into that area which is difficult to reconsider on an appeal before the Employment Appeal Tribunal where only errors of law can be addressed. The Tribunal's conclusion was one by reference to the construction of the contract, and that has been the nature of the argument before us.
37. Before we can approach that exercise, it is necessary to see what is looked for. Is it enough if there was some control - e.g. that a sign is required to be placed outside, or in some part of, the premises, which the homeworker would not otherwise have wanted but is now under instructions to erect and retain?
38. It seems to us clear that this would not of itself be enough, but that what is intended is that the place of work is not materially under the control of the Post Office. Given that the onus is on the Post Office, as a result of Sections 19(6) and 28 of the NMWA, set out in paragraph 3(iii) above, the question before the Employment Tribunal was whether the Post Office had shown that it had some material control over or management of the place of work.
39. Mr Brennan Q.C.'s case for the Inland Revenue was as follows:

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i) Within the structure of the NMWA, a homeworker is one who controls access to the workplace, what can be done within the workplace and who has responsibility for dealing with the workplace (such as safety, repairs etc).
ii) The Employment Tribunal erred by looking at the personal contractual restrictions on Mrs Collins, and in particular concentrating on one of them, namely that which we have lettered as U in paragraph 13 above, relating to the restriction on Mrs Collins from altering the "accommodation for carrying on the work of the sub-office".
iii) The Employment Tribunal erred in concluding that Mrs Collins "surrendered control or, at least, sufficient control of that part of her premises occupied by the Post Office counter at which Mrs Collins and/or any assistant worked to provide Post Office services". It was, Mr Brennan Q.C. submitted, not the counter, but the Meadowbank Sub Post Office as a whole, which was the place where work was to be executed.
iv) It was common ground that the premises were Mrs Collins' premises, in which she had a leasehold interest, and the Post Office had no proprietary interest, of which she had exclusive legal possession and to which the Post Office did not even have a right of access. The limited right to require Mrs Collins personally to refrain without the Post Office's consent from making a particular sort of alteration to part of the workplace did not amount to control, or sufficient control over the place, but was simply a personal contractual right in respect of Mrs Collins. Mrs Collins carried on the business in her workplace, over which she had control and management, and responsibility for health and safety.
40. While supporting the Employment Tribunal's finding in Collins, Mr Griffith-Jones Q.C. referred to other clauses of the contract, and also asserted, if necessary, that the Post Office had management and control over the place through its agent Mrs Collins. Specifically he further submitted:
i) that it is a false dichotomy to suggest that there is no control because there is 'only' a contractual obligation placed upon Mrs Collins. If that contractual obligation is in respect of control and management of the place, and can be enforced, then there is control and management over the place, even if there is no proprietary interest.
ii) that such control and management does not need to be constituted and enforced by direct access or the entitlement to access, but can be effected by 'remote control' - if necessary and appropriate then by injunction.
41. It appears to us clear beyond doubt that the following clauses of the contract, set out in paragraph 13 above and identified by our lettering, establish that the Post Office had material control over the place of work: C, G, H, Q, R, S, T, U, V and W. We agree with Mr Griffith-Jones Q.C. that the absence of a right of access is irrelevant. It is entirely clear that work being carried out, at the Meadowbank sub-post office, on the terms imposed by the Post Office, is materially different from

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the case of work being carried out by a homeworker and members of his family in his or her own house. The Employment Tribunal was particularly concerned with one of these clauses which exemplified sufficient control over the premises, namely by reference to U. But in assessing the legal challenge by the Inland Revenue by reference to the contract as a whole, it is plain that the other clauses too are relevant. In our judgment, the Employment Tribunal was right in concluding that the Post Office satisfied the onus of showing that it had material control over the place of work, and that Mrs Collins, and indeed Mr Hayward insofar as he adopts the same case, was not an individual who contracted with the Post Office for the execution of work to be done in a place not under the control or management of the Post Office.

Issue D: The Client or Customer Limitation

42. Our decision on this issue is of course academic, given the failure of the cases of Tooby, Hayward and the Inland Revenue on Issues B and C. However, although the Employment Tribunals in Tooby and Hayward did not go on to deal with Issue D, the Employment Tribunal in Collins did and, in any event, having heard detailed submissions from Mr Brennan Q.C. and Mr Griffith-Jones Q.C., we shall resolve this issue also.

43. The Tribunal in Collins concluded as follows:

"20. The Tribunal considered that, when the contract was made between Mrs Collins and the Post Office, Mrs Collins sought to run a SPO and general Provisions Store. That was what was required by the lease of the premises that she acquired from Mrs Gleave, on payment of a substantial capital sum. Mrs Collins offered the Post Office not only labour but also retail premises within which Post Office business could be transacted.

21. It would be entirely artificial to seek to sever the operation of the SPO from the private retail business operated by Mrs Collins, since they both made use of Mrs Collins' shop premises, and Mrs Collins and any assistant were both free to provide any Post Office services and general provisions to such customers as came along. That is plainly the way the arrangement was seen by the EAT in Hitchcock v Post Office [1980] ICR 100, 108, 109.

22. The Post Office is properly to be regarded as Mrs Collins' client, as it purchased retail facilities (premises and labour) from Mrs Collins in order to enable the Post Office to meet the needs of its customers having recourse to Meadowbank Post Office."

44. Mr Brennan Q.C. asserted that this was a conclusion of law and not of fact, or at any rate a conclusion of mixed law and fact, with which the EAT is entitled to interfere. He submitted that the Employment Tribunal erred in the following respects:

i) It misunderstood the nature of Mrs Collins' business undertaking, which was retailing to customers, not the provision of labour and retail premises.

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ii) She was an agent of the Post Office, and the Post Office was her principal and not her client. The clients or customers were the purchasing public.
iii) There were two distinct arrangements, both upon acquisition, i.e. her purchase of the premises, and the goodwill and stock of the general store and the separate assignment to her of the sub-postmastership, and afterwards in relation to her management, with separate accounts required to be kept.
iv) The proper construction of s 54(3)(b) is that the business undertaking must have an existence independent of (and thus prior to) the relevant contract.
v) If the Post Office be right, then any non-employee can be excluded from s 54(3)(b) by characterising him as carrying on a business undertaking of providing whatever the service is. By reference to words of Mr Recorder Underhill Q.C. in Byrne Brothers (Formwork) Ltd v Baird [2002] IRLR 101 at para 17(4), Mr Brennan Q.C. submitted that the policy behind the formula used in the subsection was to extend the benefits of the protection of the NMWA to workers who are in the same need of that type of protection as employees, to cover those who are substantively and economically in a subordinate and dependent position vis-à-vis those who employ or engage them. Mr Brennan Q.C. submitted that Mrs Collins was in such a position, with a long term relationship with the Post Office and no economic bargaining power at all, and her provision of retail premises to which members of the public had recourse did not turn the essential character of her relationship with the Post Office into that of businesswoman and client.
In sum Mr Brennan Q.C. submitted that to describe the Post Office as being the client of the business of its sub-postmasters is a 'misuse of language'.
45. While asserting that the Employment Tribunal's finding, in relation to the particular sub-postmistress Mrs Collins, that she was a client of the Post Office, was a finding of fact, with which this Appeal Tribunal could only interfere on limited and well-established principles, Mr Griffith-Jones Q.C. wished to avoid any argument that this case was decided on its own facts; and he took up the challenge of arguing the issue on the basis that it was at the very least a question of mixed fact and law, and contending that there was no error of law in the Employment Tribunal's conclusion, and that it would be applicable to any other such sub-postmaster. He submitted:
i) The words client and customer in s 54(3)(b) are not used as terms of art. The important question is whether the contracting party is carrying on a profession or business undertaking. He submits that the sub-postmaster is doing the latter, and that the Post Office, in then contracting for the work or services of such a person, is entitled to be called a client. He refers to the recent decision of the EAT in Smith v Hewitson (EAT489/01 unreported), where self-employed stewards on coaches were providing to passengers (the customers) the catering services and stewarding services

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on the coaches which Executive Coach Catering Services ("ECCS") had contracted to supply to Durham Transport Services, and which Durham Transport Services was contracted to supply to National Express. The conclusion of the EAT (per HH Judge Serota Q.C.) was that the stewards were not workers within the NMWA. At paragraph 19 of the Decision, Judge Serota Q.C. concluded as follows:

"Prima facie, when someone purchases services from another, in common parlance, he can be regarded as a customer of the other. The terms 'customer' and 'client' in s 54 of the Act are not used as terms of art. In our opinion ECCS is a customer or client of the stewards, as it receives the benefit of the service provided by the stewards' business ... They provided, as we have said, the stewarding and catering services to ECCS, which ECCS was itself bound to supply to Durham Transport Services. On that analysis, as it seems to us, having regard to the fact that a major part of the contract, both in terms of time and in terms of remuneration, related to the catering, and having regard to the fact that the stewards were performing, personally, catering services for ECCS pursuant to a business undertaking carried on by the stewards, ECCS was a client or customer of that business undertaking. As such, it seems to us, on the material findings, the Tribunal should have held that the stewards were not workers within the meaning of s 54(3)(b)..., by reason of the fact that they were outside s 54(3)(b). They were carrying on, as we have said, a business undertaking for reward for ECCS, and were clients or customers of ECCS."

This, Mr Griffith-Jones Q.C. submits, is closely analogous to the present case, where the general public is the customer, and the stewards, similarly to the sub-postmaster, are providing ECCS services to the customer, in a situation in which (a fortiori to the sub-postmaster) the stewards are carrying on that business, if business it is, as their only business, and when it is also a business which had no existence independent of or prior to the contract.

ii) The sub-postmaster is in business on his own account, and thus conducting his own business undertaking. Part of his business is his retail business of selling his own (or perhaps others' franchised) goods or services, and part is his acting as the Post Office's agent in providing Post Office goods and services to the public. The fact that the accounts have to be kept separately (for good security reasons no doubt) does not affect that fact. Mrs Collins traded as a general store, though that was not in the event successful, but Mr Hayward, Mrs Tooby and Mrs Wolstenholme each offered and continued to offer other goods and services. Insofar as the dictum of Mr Recorder Underhill Q.C. is concerned, and his "distinction ... between ... workers whose degree of dependence is essentially the same as that of employees and ... contractors who have a sufficiently arms-length and independent position to be treated as being able to look after themselves in the relevant respects", the sub-postmaster, with his own premises, equipment and staff and his own business undertaking falls firmly, submits

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Mr Griffith-Jones Q.C., on the non-employee side of the line. Mr Griffith-Jones Q.C. sought to draw some further analogy from the definition of employee in Article 3(b) of Council Directive 89/391/EEC, as imported into the preamble to Council Directive 93/104/EEC, but this was hardly a central plank of his argument.

iii) The NMWA does not fit naturally with the concept of an individual who runs his own business from his own premises and simultaneously holds a position of sub-postmaster supplying Post Office goods and services from the same premises; certainly if the Act and the Regulations are to apply to his earnings as sub-postmaster irrespective of the quantum of his receipts from the rest of his business, and in circumstances in which he may apportion expenses of the business in such a way as to increase the amount payable to him pursuant to the Regulations. This he submits to be of itself a justification for construing the client or customer limitation so as to exclude someone running a business of his own in such circumstances.

iv) Because the NMWA carries criminal sanctions (by s31) any ambiguity should be resolved against the imposition of liability.

46. We are persuaded by the arguments of Mr Griffith-Jones Q.C. that the Employment Tribunal was right to find that the Post Office was a client of the business undertaking carried on by Mrs Collins. As to the submissions of Mr Brennan Q.C.:

i) The existence of the relationship of principal and agent does not in any way prevent the principal from being a client. Obvious examples are a solicitor or estate agent where the principal is the client. Equally, the same can be said of a franchisor and a franchisee, a manufacturer and a sales agent or a supplier and a dealer.

ii) This is the more so where, as here, the agent can contract with more than one principal: provided (see, among others, the clauses lettered in paragraph 13 above as EE and FF) the services to be offered or goods to be sold are not directly competitive.

iii) It does not seem to us to be the case at all that the business of Mrs Collins should be seen as only her general store, in some way 'severed' (as the Employment Tribunal put it) from her position of sub-postmistress, particularly as she, like her predecessor, was in effect trading as "The Meadowbank Post Office" in running her shop as General Store and Post Office. The findings of fact and relevant documents, in the case of Mrs Collins, appear from paragraph 12 above, particularly at (i), (ii), (iv), (v), (viii), (xvii), (xx) and (xxi).

iv) It is not, in our judgment, necessary that the business undertaking must antedate or be independent of the contract which falls to be construed.

It appears to us to involve no "misuse of language" to construe the Post Office, for the purpose of this section, as Mrs Collins' client, and we agree with and certainly find no error in, the conclusion of the Employment Tribunal, to that effect.

Conclusion

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47. For these reasons the appeals are dismissed.