Neutral Citation Number: [2024] EAT 105

Case No: EA-2022-000287-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 June 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

MR CHRISTOPHER WATSON

Appellant

- and -

1) WALLWORK NELSON JOHNSON
2) MR IAN JOHNSON

Respondents

- -
- -

Chelsea Brooke-Ward (instructed by direct access) for the **Appellant**
Paul Gilroy KC (instructed by Lockett Loveday McMahon, Solicitors) for the **Respondents**

Hearing date: Thursday 16th May 2024
- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 28 June 2024

SUMMARY

Employee, Worker or Self-Employed - section 230 ***Employment Rights Act 1996***

The Employment Tribunal ("ET") had found that the claimant (an experienced tax accountant, with expertise in advising on questions of employment status) had moved from being an employee of the respondent firm to being a partner for the purposes of the **Partnership Act 1890** ("PA 1890"), and that he was not an employee for the purposes of section 230 **Employment Rights Act 1996** ("ERA"). It had, however, also found that the claimant was a worker for the purposes of section 230(3)(b) **ERA**.

The claimant appealed against the ET's conclusion on the question whether he was an employee (there was no appeal against the finding on worker status). Although it was common ground that the existence of a **PA 1890** partnership would be inconsistent with the existence of a contract of employment (**Williamson & Soden Solicitors v Briars** UK EAT/0611/10), the claimant contended that the ET had erred in finding there was a partnership agreement; that it had failed to have regard to all relevant factors (including relevant provisions of the **PA 1890**); and that it had reached a decision that was inconsistent with its finding that the claimant was a worker.

Held: dismissing the claimant's appeal

Having adopted a multifactorial approach, the ET was nevertheless entitled to give weight to what it found to be the parties' genuine intention that their relationship should be one of partnership; it had taken into account all relevant factors and permissibly found there was a partnership agreement notwithstanding the parties' failure to agree all the terms originally proposed (including a term that would have avoided the claimant sharing joint liability for the debts of the firm). Furthermore, allowing that a salaried or fixed-share partner might be a partner for the purposes of the **PA 1890** or might in fact be an employee, the ET had had regard to the factors pointing for and against the existence of a **PA 1890** partnership, but had determined that the balance tipped in favour of such a partnership, and against the existence of a contract of employment. As for the finding on worker status, the appeal had been advanced on the basis that the ET's approach (and conclusion) in this regard was correct. As such, the ET had been entitled to find that the facts tipped in favour of the claimant being a worker notwithstanding its conclusion that he was not an employee.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:

Introduction

1. This appeal raises a question of employment status, involving what the Employment Tribunal ("ET") found to be a move from a contract of employment to a contract of partnership. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is my ruling on the claimant's appeal against the decision of the Manchester ET (Employment Judge Allen, sitting with Mrs Ashworth and Mrs Hillon, over five days in October 2021, with a further two days in chambers in December 2021), sent out on 21 January 2022. By that judgment, the ET held that, at the relevant time, the claimant was not an employee for the purposes of section 230 **Employment Rights Act 1996** ("ERA"), and could not therefore pursue claims of unfair dismissal or breach of contract. The ET did, however, find that the claimant had been a worker, as defined by section 230(3)(b) **ERA**, and upheld his complaint of unauthorised deduction of wages. By his appeal, the claimant challenges the ET's finding that he was not an employee and the consequential rejection of his claim of unfair dismissal.

2. The unfair dismissal case was pursued solely against the first respondent; the second respondent has played no part in this appeal. For convenience, for the purposes of this judgment, I have simply referred to "*the respondent*", by which I mean the firm of Wallwork Nelson Johnson (the first respondent). Representation before the ET was as it has been on the appeal.

The facts

The parties

3. The respondent is a regional accountancy practice, established in the 1960s. As at 6 July 2020 it had three equity partners and some 35 employees.

4. The claimant is an experienced tax accountant. He started his employment with the respondent on 4 October 2010 as a trainee tax consultant, although by then he had spent at least ten years advising on tax issues, including questions of employment status; he qualified as a tax adviser in July 2013. As an employee, the claimant was paid an annual salary (in monthly instalments), which, as at March 2019, stood at £54,000; he had an auto-enrolment pension (to which the respondent contributed), was paid overtime, and was treated as an employee for tax and national insurance purposes. Indeed, it was not in dispute between the parties that the

claimant had been an employee of the respondent up to 31 March 2019; what was in dispute was the nature of his engagement after that date.

The claimant's appointment as associate partner

5. As part of the respondent's succession planning, with effect from 1 June 2018, the claimant had been promoted to the role of associate. At that point, he remained an employee (during the course of 2018, he signed a new contract of employment with a three month notice period) but, as the ET found, his promotion was with a view to his ultimately progressing to equity partner. Two others were similarly promoted at this time and there had been a meeting with the three proposed associate partners on 18 April 2018, at which there was a discussion about the future of the firm and the proposed change in status, albeit not about individual terms or levels of drawings. Subsequently, in early March 2019, the claimant emailed the respondent's equity partners, raising the question of the increase in his remuneration once he became an associate partner.

6. As the ET found, no change in status could in fact take place before relevant accountancy accreditations and practising certificates had been obtained; specifically, in accordance with the rules relating to accredited accountancy practices, the claimant could not become a partner until his affiliate application with the Institute of Chartered Accountants in England and Wales ("ICAEW") was completed. On 9 April 2019, the ICAEW informed the respondent that it was proceeding with the claimant's affiliate application, and, on the same day, a draft agreement was circulated between the respondent's equity partners, although this was a template associate partnership agreement and did not include any name or details of salary or other benefits.

7. In any event, it was common ground that, as from April 2019, the claimant was receiving at least an additional £9,000 per annum (the respondent contended that the increase was in fact higher) and ceased to be on the respondent's payroll and to receive payments to the auto-enrolled pension scheme. At the same time, the claimant was issued with a P45, stating his leave date was 23 April 2019.

8. It was the claimant's evidence that he had said he would only become a partner if he could review the partnership accounts and had agreed all the terms. The respondent accepted that the claimant had said he wanted to agree to the terms of the partnership first, and it was not in dispute that, as at the time the respondent recorded a change in the claimant's status, there was no written agreement on remuneration, holidays, notice, and as to how gross salary was to be paid. Moreover, as the ET recorded, at no time was the claimant shown

details of the respondent's accounts, nor was he provided with information about income or liabilities; he was not a signatory to the respondent's bank account and did not make (and was not requested to make) any capital contribution. Equally, however, as from April 2019, the claimant ceased to have national insurance or income tax deducted and accounted for to HMRC by the respondent, which also ceased to make national insurance contributions in respect of the claimant after that time. Moreover, the claimant, who accepted that he understood the tax implications of becoming a partner, raised no issues regarding these changes, or about his status, until, at the earliest, November 2019, acknowledging in evidence that, after the P45 had been sent to him, he would have said he was self-employed.

The terms of the claimant's associate partnership

9. On 7 May 2019, the claimant emailed the respondent regarding his holiday entitlement and followed this up on 10 May 2019 with an email requesting confirmation of his income, saying he needed this for a meeting with his bank in respect of his mortgage. As the ET recorded, the claimant was in fact lying about this meeting; he had sent the follow-up email to obtain a response from the respondent. In any event, in the response sent to him, the figure of £67,500 was suggested and the claimant replied saying that he would use that for the (fictitious) mortgage meeting but was seeking an increase to £70,000, saying he would be happy to leave the increase in the business for the foreseeable future. Later on, in July and August 2019, the claimant picked up this email thread, and again asked for further confirmation of his income and, in the absence of a partnership agreement, for a letter confirming his gross income together with confirmation that the partnership would be paying his tax liability (as was the respondent's practice).

10. It was the respondent's evidence that the equity partners were experiencing a difficult year and this, together with poor administration, led to a delay in providing the claimant with a draft partnership agreement. There had also been negotiations regarding the profit share, but the ET accepted that, by January 2020 at the latest, this had been agreed in the sum of £69,000 (the ET noting that it seemed in fact to have been agreed by late August 2019, as the claimant had not challenged that amount after then).

11. On 5 November 2019, the claimant forwarded an email to one of the respondent's equity partners in which he expressed his sense of disillusionment that, while supposed to be an associate partner, there seemed to be no change from the time when he was an employee (citing an absence of partner meetings and the fact

he had never seen the accounts), saying that he (and the other associate partners) "*are still more like employees*". A partnership meeting was subsequently proposed for 18 November 2019, which would have been attended by all the equity and associate partners, but this was then cancelled and never re-scheduled. Before the cancellation, however, the claimant had emailed some of those who would have been in attendance, raising issues regarding the future management approach and proposing that additional points be agreed.

12. On 8 January 2020, the claimant emailed the respondent, raising his concerns over the lack of any partnership agreement or written confirmation that the respondent would pay his tax, proposing:

> "• A written partnership agreement to be agreed, and signed, before 24 January 2020 in order to remove the perceived risks that I see as having; otherwise,
> • Please include me on the payroll for January 2020 until such time that an agreement can be agreed and signed."

13. On or about 14 January 2020, the claimant was provided with a draft partnership agreement, which was proposed to be between him and the three equity partners. The ET found that this approach reflected how the equity partners viewed the position of the associate partners: they were required to agree matters with the equity partners but were not considered comparable, and it was not considered necessary for them to reach agreement with each other. The ET recorded the relevant parts of the draft partnership agreement as follows:

> "a. Clause 1 recorded that the parties "shall as from the 1st day of April 2019 carry on in Partnership under the firm name of Wallwork Nelson & Johnson";
> b. Clause 3 recorded that the claimant had no interest in the premises where the partnership practiced *[sic]*;
> c. All capital from time to time required was to be contributed by the Equity Partners (being defined in the agreement as the Partners, a definition which did not include the claimant or the other associate partners);
> d. Clause 7 provided that the claimant was entitled to a fixed profit share of £69,000 which should be reviewed annually. This was to be paid on a monthly basis, "less an estimate of the income tax and national insurance liabilities associated with the fixed profit share. The Partners undertake to settle the associated income tax and national insurance liabilities in January and July each year" (whilst the two sentences are not necessary *[sic]* consistent, the last sentence confirmed what had been agreed, which was that the equity partners undertook to settle the claimant's income tax and NI liabilities);
> e. Clause 8 provided that the claimant was not entitled to any share of the capital assets or goodwill of the Firm, was not liable to contribute to any loss, and was to be kept indemnified by the Equity Partners;
> f. The claimant was stated to be entitled to five weeks holiday plus statutory holidays each year;
> g. The claimant was to devote the whole of his time and attention to the practice and not to be engaged in any other business activity (without consent); and
> h. Six calendar months written notice was required to terminate the agreement, to be given on the first day of any calendar month." (ET, paragraph 75)

14. By email of 15 January 2020, the claimant raised various issues about the content of the draft

agreement, albeit he did not dispute the annual figure of £69,000. As the ET noted, many of the issues were about the detailed drafting, but the claimant also raised the point that the earliest date of the agreement was probably 6 April 2019, as he was only taken off the payroll during the 2019/20 tax year, and he was concerned about the leave entitlement, seeking that this be increased to 30 days.

15. In the event, the draft partnership deed was never accepted by the claimant, albeit the ET found:

> "77. … that some of the terms of the deed in any event reflected the agreement which had been entered into by the claimant with the first respondent and under which he had been working. Those terms included: the level of payment to the claimant and the fact that it would be paid on a monthly basis (less estimated tax and NI); and the equity partners' obligation to pay the tax and NI due in relation to the net monthly payments made to the claimant."

Although:

> "There was no evidence that some other elements of the terms of the deed were part of the terms agreed between the parties, including: the date when the arrangement commenced; the term as to notice; and the general indemnity provided by the equity partners. As the deed was never accepted or entered into, those terms were never in practice agreed."

Events in 2020 leading to the claimant's assertion of employee status

16. On 10 February 2020, the claimant emailed asking about the respondent making payments to his pension scheme to reduce his tax liability; in so doing, he referred to his "*tax bill*", acknowledging that this was his own personal bill.

17. On 24 February 2020, the claimant commenced a period of ill health absence, which he attributed to stress resulting from the situation with the respondent. On 25 February 2020, he emailed one of the equity partners in the following terms:

> "As there are no guarantees in life, and I am rather risk averse, relying on the partnership for my personal liabilities is a big risk for me. It doesn't sit comfortably and is one of the reasons I have been pushing for a signed agreement in order to mitigate some of the perceived risk. Due to having no agreement, this is primarily the reason I requested to be an employee again".

18. The equity partner responded on 2 March 2020, setting out the respondent's position as follows:

> "We acknowledge your preference to return to a position of employment and respect your views with regard to risk. You will appreciate that an element of risk is inherent to self-employment and becoming an associate will therefore carry significant risk and rewards. We will need [to] consider further before finalising our position with regard to terms and conditions and how it will affect your role in the future. Given that as a partnership we consider the role of associate to be a stepping stone to full equity partnership, carrying the risk to which you allude, we are prepared to re-instate

> your position prior to being an associate as at May 2018."

19. On the same day, the claimant replied, acknowledging the issues of risk and continuing:

> "Please note that I still have the view that taking me off the payroll without any agreement may still mean I am an employee. Being placed back on the payroll was only if no agreement could be actioned, as, prima facie, this would right the wrong of me being taken off the payroll in the first place. If this proposal is considered, therefore, the payroll records should be adjusted to show that the amounts I received from WNJ, since April 2019, are subject to PAYE. The current situation is that I have no agreement with the Partners and no access or visibility to the finances."

As the ET recorded, in cross-examination, the claimant accepted that this email represented a 180 degree manoeuvre on his part, from saying he was self-employed to saying he was an employee.

20. In any event, on 7 March 2020, the respondent responded in the following terms:

> "You have expressed a wish to revert to being employed and in the circumstances we think that this is the best way forward which is in no small part due to your health issues…We are of the view that history cannot be rewritten, a view which I am sure you will appreciate. With this in mind you could revert to the payroll in either March or April? We can then hopefully agree the Associate Partnership agreement for your period of self employment"

21. The claimant replied on 10 March 2020; in his email he stated:

> "This is a rather odd and bemusing situation to find myself in.
> I was taken off the payroll without any agreement. I seek to obtain an agreement. It isn't forthcoming even after eleven months of request. The lack of any agreement and the resulting uncertainty causes me to be off work. I further seek to obtain an agreement and clarify my position so that I may continue working and, prima facie, it appears you are attempting to demote me.
> It is not the work or job role that has caused any health issues but the risk to WNJ/myself by not having a partnership agreement in place. I don't think the Partners have fully considered what is at stake here. Are you aware of the potential consequences to WNJ and me from both a tax and employment law perspective??...
> We could be years down the line and it would only take a simple HMRC PAYE enquiry and they could deem all the payments to all 4 associate partners, since April 2019, to be subject to PAYE due to the fact that there are no agreements in place and the associate partners are only fixed profit shares (i.e. disguised salary)….
> This is what I mean by being risk adverse. I refuse to take unnecessary risk created by cutting corners. I would never allow a client to take this risk by not correctly documenting their transactions and being open to an easy attack by HMRC.
> Without any partnership agreement, based on the facts (never seen the business accounts, no capital introduced, fixed profit, no partner meetings), my professional view, and personal opinion, is that I am still an employee."

The claimant ended his email stating that he did not consider he needed to sign another employment contract, because his contract from May 2018 was still effective.

The deteriorating relationship between the parties and the termination of that relationship

22. The first national lockdown arising from the Covid-19 pandemic commenced in March 2020, which was a time of uncertainty for the respondent and gave rise to a number of workload issues, particularly given the need for payroll advice to clients. At this time, the claimant was working from home and, despite his objection to doing so, was instructed to take managerial responsibility for the respondent's payroll.

23. As the ET recorded, there were various communications from the claimant during March and April 2020 which were indicative of a deteriorating relationship between the parties. At the same time, the difficulties facing the respondent led the equity partners to decide that the drawings for each associate partner should be reduced for April 2020 "*until the situation returns to normal*". By email of 30 April 2020, the claimant sought to raise a formal grievance regarding what he characterised as a salary reduction, referring to having taken legal advice and to his view that he would be entitled to resign and, as an employee, to claim constructive dismissal and unauthorised deductions from wages.

24. The respondent's response to this email asserted that the claimant had been self-employed since 1 April 2019, instructing him not to attend the workplace until matters had been resolved (with the equity partners taking immediate control of the claimant's areas of work), and concluding:

> "For the record, it is our opinion that your current stance in asserting that you are an employee constitutes a breach of your fiduciary duties as a Partner. You have accepted drawings as a Partner and built up a Capital Account. Unless your statements are retracted your position within the firm will become untenable."

25. As the ET found, the claimant reasonably understood the respondent's response to mean that he was suspended. Thereafter, going into May and June 2020, the parties' correspondence effectively set out their respective positions. On 11 June 2020, a meeting took place between the respondent's equity partners at which it was decided that the claimant's correspondence should be accepted as communication of his intention to bring the agreement of April 2019 to an end, thus terminating his involvement in the partnership; that decision was communicated to the claimant by letter from the respondent's solicitors the same day, stating that the claimant's participation in the partnership would be treated as coming to an end with effect from 12 June 2020.

The ET's decision and reasoning

Credibility

26. The ET did not find the claimant to be a credible witness; as it stated:

> "113. … The Tribunal found him to be someone who was untruthful where he believed it was in his interests. He was somebody who admitted to lying when sending an email to the first respondent on 10 May 2019 …, in order to obtain a drawings figure. The claimant referred to that in evidence as a white lie. The Tribunal found the claimant's credibility to be entirely undermined by his willingness to tell an untruth in writing. Other evidence heard by the Tribunal demonstrated that the claimant was somebody who was focussed on paying less tax and NI if he was able to do so. The requested change to the dates of payment of his salary from April 2019 to May 2019 demonstrated to the Tribunal someone who had no qualms about taking steps to improve his own personal tax position, when the steps were not in the broader public interest. The claimant's approach to his negotiations with the first respondent were all about maximising his drawings. The claimant had been paid as a self-employed partner for almost twelve months without deductions for employee tax and employee NI having been made, when the emails were written. He was an expert in employment status and tax, a senior tax accountant, and yet it took him almost twelve months to raise any issues. Previously, at the end of tax year 2018/2019, the claimant had been quite prepared to work the system in order to minimise his tax exposure. …"

27. As for the arrangement entered into by the parties in 2019/2020, the ET rejected any suggestion that this had been anything other than genuine:

> "114. The Tribunal also found that: the first respondent did not appoint the claimant and the other associate partners to that role as a sham or as a means of reducing the NI costs; and the claimant did not genuinely believe that to be the case. The appointments were genuinely made by the first respondent as part of a process of planning for the future and succession planning for retiring equity partners. Whilst there might have been some contention about whether the arrangements put in place did, successfully and applying all the relevant factors, ensure that the associate partners appointed were genuinely partners (and not employees), the Tribunal did not find that there was any genuine evidence that the appointments were made as a sham or to reduce NI payable. The first respondent could certainly have introduced a partnership deed much earlier and could have taken other steps to ensure that the associate partners were more clearly partners not employees, but (based upon the evidence heard by the Tribunal) its failure to do so was not as a result of any sham or intent to deceive HMRC. The three appointments were made as part of a process of potentially transitioning those employees to ultimately be equity partners in the future."

The factors for and against employee status

28. In determining whether the arrangement agreed by the parties was consistent with a relationship of employment, the ET placed the relevant factors in this case into three main categories: those supporting the argument that the claimant was an employee, those that supported the contrary view, and those that were neutral or of limited value. In carrying out this exercise, the ET expressly stated that it:

> "178. … understood the importance of considering these factors in the context of a partnership setting or arrangement, when deciding whether the claimant was working under a contract of employment."

29. The following factors were seen by the ET as supporting the claimant's case that he was an employee:

> "179. …
> a. It was agreed that the claimant was an employee of the first respondent prior to any contended change in 2019 and, in practice, nothing much changed in terms of duties and responsibilities before and after the change in status/title in 2019;
> b. The claimant was required to provide personal service and could not provide a substitute. Whilst this would have been a significant factor had he been able to send a substitute, it was considered to be only a factor of very limited importance in the context of this case and when considering the status of a professional;
> c. There was an obligation on the claimant to undertake work for the first respondent, and there was an obligation on the first respondent to pay him for doing so;
> d. The claimant was paid a fixed amount each month. In terms of what was agreed between the parties this was agreed as a fixed amount, which was reflected in the terms of the draft agreement sent to the claimant by the first respondent, albeit that deed was not accepted and agreed by him;
> e. The claimant was not asked to, or required to, make any capital contribution to the partnership. There was no degree of risk for him in participating in the partnership in terms of money which he had paid. A capital contribution would be a common indicator of a fixed share partner who was genuinely not engaged under a contract of employment;
> f. The claimant had not seen the partnership accounts and there was no expectation from the equity partners that he would be involved in any decisions about the partnership's accounts or funding. Whilst not all non-employee partners necessarily have full visibility of such matters, the absence of any information was a factor supporting the contention that the claimant was an employee;
> g. There had been no partnership meetings (albeit it appeared one had been arranged or there had been an attempt to arrange one);
> h. The equity partners made all the most significant decisions about the first respondent about which the Tribunal heard evidence. The equity partners made the decision to reduce the payment of drawings to the associate partners. The equity partners made the decision to end the engagement of the claimant. Neither the claimant nor the other associate partners were involved in these decisions and there was no suggestion in evidence that they would be;
> i. As recorded in the factual findings above, the equity partners did not consider the associate partners comparable to equity partners nor did they consider that the associate partners needed to enter into agreement with each other when agreeing the partnership deed. The partnership deed was an agreement simply between one associate partner and the equity partners, not all the partners; and
> j. The claimant was provided with childcare vouchers for which deductions were made, something which can only be provided and deductions made on the basis undertaken for those who are employees."

30. The factors pointing the other way, however, were identified by the ET as follows:

> "180. …
> a. The first respondent paid the claimant without monthly deductions for pay as you earn income tax and national insurance. No employer's national insurance contributions were made. The claimant was taxed as an independent contractor and was aware that was the way he was being paid. The Tribunal accepted the respondents' contention that the parties' approach to tax, and the claimant's acceptance of the approach to tax, was a significantly more important indicator for these parties and this claimant (with his expertise), than it may have been in other cases;
> b. The claimant was issued with a P45 which he accepted and did not challenge. As identified, this was more significant for the claimant as a tax expert;
> c. There was no doubt that during the latter part of 2019 and early 2020 the parties believed that the claimant was a self-employed partner. The claimant's own evidence

> was that if he had been asked, on the day after the P45 had been issued to him, whether or not he was self-employed, he would have said that he was self-employed. His view of his status at the time was shown in the correspondence sent and the terminology used by the claimant (such as using the term drawings). As recorded above, the claimant accepted that when he said he was an employee in his email of 2 March 2020, he had executed a one hundred and eighty degree manoeuvre. The views of the parties are not determinative, but they were a significant factor, particularly in the light of the professional expertise of the parties;
> d. The claimant was no longer entitled to pay for overtime worked after the change in status/title;
> e. Prior to the change in status/title the respondent had been paying pension contributions for the claimant in accordance with auto enrolment requirements. It ceased to do so;
> f. The first respondent held onto sums of money for the claimant in order to subsequently meet his tax and national insurance obligations, the evidence being that there was a difference between the full drawings due and the amount of the drawings actually paid. That amount was held in a notional account, although no evidence was provided of where any monies were held or there being a separate named or designated account as such. The lack of account clarity or evidence regarding the reconciliation of amounts due after a particular tax year's tax and NI were paid, meant that this was a factor given limited weight;
> g. The first respondent did not require a written record or account of the holiday taken by partners ... no one counted the number of days holiday taken by a partner and therefore partners were able in practice to take the holiday they wished (provided the required work was undertaken). There was, however, a defined amount of holiday identified which was not enforced and the written document produced by the first respondent (albeit not agreed) spoke of a defined amount. There was a difference in terms of recording and enforcement for partners, when compared to employees;
> h. The claimant received consistent payment/drawings throughout his time as an associate partner even when he was absent on ill health grounds. Employees had no entitlement to sick pay above SSP, albeit that there was a discretion to pay full pay during sickness absence which was in practice usually exercised;
> i. …, associate partners were advertised to the outside world as holding partner status, a change which occurred from 6 April 2019 or shortly after;
> j. There appeared to be some involvement of the associate partners collectively in terms of pay decisions for other employees, albeit fairly limited;
> k. The Tribunal accepted the respondents' evidence about the future intentions for the first respondent and that the role taken by the claimant was genuinely part of a transition from employment to equity partnership. There was a confluence of circumstances during 2019 and 2020 which meant that the first respondent and the equity partners did not focus on this issue at the time and the changes required to the way the first respondent operated, but there genuinely was an intended process. The change was not just a paper exercise. The change was a stepping stone as part of a transition for the first respondent; and
> l. The claimant's exposure to financial risk…."

31. In addressing the issue of risk, the ET noted the concerns that the claimant had expressed in this regard:

> "181. … The claimant was clearly and understandably concerned about whether he might be personally liable for partnership debts or liabilities, if the first respondent had insufficient funds to meet its liabilities. That concern and the potential exposure was something which was indicative of the claimant not being an employee, but rather being a genuine partner. In the absence of an agreement, the claimant was correct to be concerned because under section 9 of the Partnership Act that liability existed."

32. Although the respondent's evidence was that it was not considered that the claimant would have been

liable for the debts of the partnership, the ET found that was a naïve view, that failed to take into account the effect of section 9 **Partnership Act 1890**:

> "182. … in practice and without an agreement having been reached, the default arrangements under the Partnership Act regarding liability applied irrespective of what the first respondent's equity partners assumed would have been the case in the absence of such an agreement having been concluded. The Tribunal did not find that, based upon the evidence heard, there was in place an agreement under section 19 of the Partnership Act 1890 which varied the provisions of section 9. Had the deed offered to the claimant been accepted by him, such a variation would have existed (and the claimant would not have had the same exposure to risk). On balance the Tribunal found that the respondents' evidence displayed a rather surprising naivety on the part of the equity partners about what the implications were under the Partnership Act of having the claimant as a partner without a written partnership agreement having been reached. The claimant was correct in his understanding of the real implications for him of being in partnership without an agreed indemnity. His fears, clearly expressed, demonstrated that no agreement existed which varied section 9 of the Partnership Act, and correctly reflected the true position regarding his exposure to liability and risk. As a result, the claimant's exposure to risk, was a factor to be weighed in the balance when considering whether the claimant was working under a contract of employment. It was a factor which was indicative of him not working under such a contract. For this factor the balance would have been different if an agreement had been reached, such as that proposed by the first respondent in the partnership deed."

The ET's conclusions

33. Balancing the various factors it had found to be potentially relevant in this case, and mindful of the need to look at the terms of the relationship, the ET concluded that:

> "184. … after the change in his status to an associate partner and after the essential terms upon which he was so engaged were agreed, the claimant was no longer working for the first respondent under a contract of employment. The Tribunal found the matters described above regarding the tax position and the views of the parties as having particular weight when reaching this decision in a case involving parties with their particular expertise. However, the decision was reached having considered all of the matters outlined above and taking them all into account."

34. On the question *when* the claimant's status had changed from employee to self-employed partner, the ET found as follows:

> "187. It is fair to say that the identification of the precise date of the transition by the first respondent was a somewhat shambolic process. There was certainly an ongoing disagreement until August 2019 about one of the central terms upon which the claimant would be engaged as an associate partner (that is pay), which the respondents' representative accepted was required for an agreement to be reached. However, by January 2020 (at the very latest and in all likelihood by much earlier) there was agreement about the essential terms of the claimant's engagement as an associate partner, albeit not about all the terms recorded in the proposed partnership deed. By that time the agreement was not so vague and uncertain that no definite meaning could be given to it without adding further terms. An agreement was in place for the claimant's engagement as an associate partner, albeit not a written agreement."

As for the claimant's earlier statements regarding the need for him to see the partnership accounts and to agree all terms before entering into partnership, the ET concluded:

> "188. The Tribunal does not find that the claimant's statement that he would only become a partner if he could review the partnership's accounts and if he agreed to all the terms, meant that what subsequently transpired was not an agreed change. In practice the claimant's role was changed by agreement and the claimant worked under the agreed terms and received an increased amount of pay as a result. He implicitly accepted those terms and the change in agreement (particularly exemplified by the change in the claimant's tax position and the claimant operating in accordance with that changed position, as a tax expert). The Tribunal also does not find that the claimant's concerns about the implications of there being no agreed deed in January 2020, or his change of view about his status in March 2020, meant that the claimant had not previously agreed the change in status by working under the terms which were agreed."

Unfair dismissal (in the alternative)

35. Addressing the claimant's claim of unfair dismissal, the ET noted that inevitably failed given its findings on employee status, but, in the alternative, went on to find as follows:

> "232. … Had he been found to be an employee, the (ordinary) unfair dismissal claim would inevitably have succeeded as a result of the absence of any procedure whatsoever being followed prior to dismissal, the claimant being dismissed by solicitor's letter. The reason for the dismissal was the breakdown in relations between the claimant and the first respondent and it is therefore possible that the first respondent would have shown that the principal reason for the dismissal was a manifest and irreparable breakdown in trust and confidence, being some other substantial reason capable of justifying dismissal. However, in all the circumstances of the case, any dismissal would have been unfair as the respondent did not act reasonably in treating that as sufficient reason for dismissing the claimant in the absence of any procedure having been followed. …. In the light of the decisions reached, the Tribunal has not reached a decision on *Polkey* or contributory fault …"

Worker status

36. The ET also considered whether the claimant was a worker, as defined by section 230(3)(b) **ERA**. Referring back to its earlier findings of fact (albeit noting that the factors relating to tax, and the parties' view of the tax position, had limited application on this issue), the ET concluded that the claimant had been a worker for these purposes; in particular, it reasoned:

> "194. The claimant did undertake to do or to perform personally work and services for the first respondent. It was not in dispute that the work he undertook needed to be undertaken by him personally.
> 195. The first respondent was not in any sense a client or customer of any profession or business undertaking undertaken by the claimant. The claimant did not carry on a profession or business undertaking, save for doing so as an integral part of the first respondent for clients of the first respondent. The first respondent was not in any sense

> a client or customer of any profession or business undertaking carried on by the claimant. The work he did for the first respondent was not in the course of such a profession or business. …"

37. Having found the claimant had been a worker, the ET went on to determine his claim of unauthorised deductions, upholding this in the sum of £2,865.60 (the total net sum to which the claimant was entitled but which the respondent had failed to pay for the months April to June 2020).

The legal framework

*Section 230 **ERA***

38. By section 230 **ERA**, the following definitions of the terms "employee" and "worker" are provided:

> "(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
> (3) In this Act "worker" …means an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.
> (4) In this Act 'employer', in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
> (5) In this Act 'employment'— (a) in relation to an employee, means … employment under a contract of employment, and (b) in relation to a worker, means employment under his contract; and 'employed' shall be construed accordingly."

39. Considering this provision in **Bates van Winkelhof v Clyde & Co LLP** [2014] UKSC 32, [2014] IRLR 641 SC, Lady Hale agreed with the view expressed by Maurice Kay LJ in **Hospital Medical Group Ltd v Westwood** [2012] EWCA Civ 1005, that there is "*not a single key to unlock the words of the statute in every case*", holding that:

> "39. … There can be no substitute for applying the words of the statute to the facts of the individual case."

Determining employee status in partnership cases

40. In determining whether a complainant is an "*employee*", in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 1 All ER 433, McKenna J explained:

> "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 …."

41. Considering the question of employment status in the case of a salaried partner, in **Williamson & Soden Solicitors v Briars** UK EAT/0611/10, the EAT (Langstaff J presiding) noted that:

> "25. The question to be determined for the purposes of jurisdiction is not whether a given individual is a partner; it is not whether he is self-employed. It is whether he comes within the definition of employee. The rights which he claimed were rights which could only be accessed by an employee, so defined by s 230 of the Act. Section 230 may have an element of circularity about it in that a contract of employment is defined as a contract of service, and "employee" defined in relation to contract of employment: but it is clear that, whatever the circularity may be, a contract is essential. Therefore the question is: what is the nature of the agreement? As to this, … it is worth reminding oneself of the requirements concisely stated as to a contract of employment by Stable J, using one sentence in **Chadwick v Pioneer Private Telephone Co Ltd** [1941] 1 All ER 522 at 523D: "A contract of service implies an obligation to serve, and it comprises some degree of control by the master." …"

Having referred to the guidance provided by McKenna J in **Ready Mixed Concrete**, in particular to the third condition, that "*The other provisions of the contract are consistent with its being a contract of service*", Langstaff J then continued:

> "26. The third of those requirements operates not so much by identifying those provisions which are consistent, but is in its practical application directed towards those provisions of the contract which are inconsistent and would therefore negate there being a contract of employment. Thus, for instance, a contract which required the contracting party to provide his services personally would be consistent with there being a contract of employment, but one that gave him full liberty to use substitute employees would in general negate the contract being one of service. So too, as it seems to me, would it negate there being a contract of service if the contract, properly construed, provided that the individual was a partner who was operating together with others in common with a view of profit, so as to come within the **Partnership Act 1890**.
>
> 27. The determination of those issues involves the determination of matters of fact. It has been established by **Carmichael v National Power PLC** [1999] ICR 1226, in the House of Lords, that if the entire relationship of the parties is contained in documents then the construction of those documents is a matter of law for the courts. But in so far as it is not, then it is a matter of fact for the determination by the Tribunal as to precisely what the relationship is. Thus the way in which the parties conduct themselves where the documentary evidence may not be full or clear is evidence upon which a Tribunal may properly found its conclusions, always provided that it has approached the matter correctly in law. I do not accept the primary submission of [the firm] that the only starting point here would be to address the question of partnership first. … I do not accept that there is a rule of law to that effect, and a principle that a Tribunal should generally have regard to the terms of the **Partnership Act 1890** in resolving any disputed question of employee status where that is relevant must not be elevated into a rule of law. It seems to me, rather, to be a matter of logic, whose appropriateness will vary depending on all the circumstances and on the particular context. It is up to the Tribunal how best logically to address the specific questions that arise for determination in its particular case upon

> the particular circumstances of that case when it is deciding whether the individual is or is not an employee, which is the overall question it has to resolve."

42. The view expressed by Langstaff J in the concluding sentence of paragraph 26 **Williamson & Soden** reflects the traditionally accepted principle that an agreement for a partnership within the meaning of section 1 of the **Partnership Act 1890** ("PA 1890") - that is, "*the relation which subsists between persons carrying on business in common with a view of profit*" - will be inconsistent with the existence of a contract of employment, because an individual cannot be their own employer; see **Ellis v Joseph Ellis** [1905] 1KB 324 CA *per* Lord Collins MR at p 329, **Cowell v Quilter Goodison Co Ltd** [1989] IRLR 392 CA *per* Lord Donaldson MR at paragraph 7, and **Tiffin v Lester Aldridge LLP** [2012] EWCA Civ 35 *per* Rimer LJ at paragraph 31. That principle was, however, the subject of some argument in **Bates van Winkelhof**, with sympathy being expressed by Lady Hale (with whom Lord Neuberger and Lord Wilson agreed), and Lord Clarke, for the suggestion that it might be legally possible for an individual partner to enter into a contract of employment with the partnership; Lady Hale summarised the issue in this regard as follows:

> "29. … There are some contracts which a partner may make with the members of the partnership, such as lending them money or granting them a lease or a tenancy. So why should it be legally impossible to be employed, under either type of contract, by the partnership? This question raises two subsidiary questions: (a) whether such a relationship can arise from the terms of the partnership agreement itself (as apparently suggested by Lord Clarke at para 52 of his judgment), or (b) whether it can only arise by virtue of a separate contract between the partner and the partnership (a possibility kept open by Elias LJ in the Court of Appeal, …). As it is not necessary for us to resolve any of these issues in order to decide this case, I express no opinion upon a question which is clearly of some complexity and difficulty."

Also addressing this question in **Bates van Winkelhof**, however, Lord Carnwath was clear:

> "59. … A contract treated as being between a particular partner and the other members of his firm may be effective in law for many practical purposes. But it cannot be equated with a contract between the partner and the firm as such, since each partner is an essential part of the firm. Furthermore, the reasoning of the Court of Appeal in *Ellis v Joseph Ellis* does not turn simply on the lack of capacity to contract. As Lord Collins MR said, the particular arrangements made in that case in relation to payment for work did not affect the workers' relation to the other partners, which was that of "co-adventurers and not employees". In my view this was a statement of principle about the fundamental difference between the relationship of partners and that of employer and employee, …."

43. In the present case, neither side has sought to argue against the principle thus accepted by Lord Carnwath, which the learned editors of ***Lindley & Banks on Partnership*** 21st edition consider to represent a correct statement of the law as it presently stands, at least in respect of the question whether a partner might also be an employee:

> "[5-98] What is currently certain is that, if the salaried partner is held to be and treated as a partner in law, he cannot also be an employee of the firm."

The position is, however, viewed as being less clear when considering whether a partner might also be a worker; in this regard the commentary in ***Lindley & Banks*** continues as follows:

> "[5-100] What has not, as yet, been tested is whether a salaried partner, though regarded as a partner in law, might still be classified as a "worker" within the meaning of section 230(3)(b) of the Employment Rights Act 1996 …
> The issue was canvassed, on an obiter basis, by the Supreme Court in *Bates van Winkelhof* … and Baroness Hale seemed confident that it was possible that a partner could, in an appropriate case, be regarded as a worker, notwithstanding the fact that, as the law currently stands, he cannot be an employee. She expressly rejected the notion voiced in the Court of Appeal, that "worker" status always involves a degree of subordination. ..."

44. The question in **Bates van Winkelhof** was whether a member of a limited liability partnership ("LLP") could be a "worker" within the meaning of section 230(3)(b) **ERA**. In determining that issue, Lady Hale held that section 4(4) of the **Limited Liability Partnerships Act 2000** was not to be construed as meaning that members of an LLP could only be "workers" if they would also have been "workers" had the LLP members been partners in a traditional partnership; as such, she did not consider it necessary to fully engage with what she described as "*subsidiary but important questions … of some complexity and difficulty*", as follows:

> "29. … (i) is it indeed the law, as held by the Court of Appeal in *Cowell v Quilter & Goodison* and *Tiffin v Lester Aldridge LLP* that a partner can never be an employee of the partnership; and (ii) if so, does the same reasoning which leads to that conclusion also lead to the conclusion that a partner can never be a "worker" …"

Returning to the particular question before the Court, Lady Hale then went on to expressly reject the argument that a member of an LLP could not be a "worker" because that term necessarily required that one party was in a subordinate relationship to the other (an argument that had found favour with Elias LJ in the Court of Appeal). Applying the definition of "worker" under section 230(3)(b) **ERA**, Lady Hale found that Ms Bates van Winkelhof fell within that definition, notwithstanding that she was a member of an LLP.

45. The present case does not involve an LLP but a more traditional form of partnership, as defined by the **PA 1890**. In this regard, however, the question whether or not a person is a partner may not always be entirely straightforward; problems may arise, in particular, where an individual is held out as a partner but does not receive a share of the profits (sometimes referred to as a "*salaried*" or "*fixed-share*" partner). As Megarry J observed in **Stekel v Ellice** [1973] 1 WLR 191:

> "It seems to me impossible to say that as a matter of law a salaried partner is or is not necessarily a partner in the true sense. He may or may not be a partner, depending on

> the facts. What must be done … is to look at the substance of the relationship between the parties … whether or not there is a partnership depends on what the true relationship is, and not on any mere label attached to that relationship."

And see, to similar effect, **M Young Legal Associates v Zahid** [2006] 1 WLR 2562 CA.

46. In **Tiffin**, having reviewed the relevant authorities, Rimer LJ made clear that:

> "24. In determining whether a partnership within the meaning of section 1(1) of the 1890 Act is created by agreement … it is … critical to ascertain their intentions as to whether or not such a partnership was to be created."

47. Referring to the case-law in this regard, in **Williamson & Soden**, Langstaff J went on to provide the following guidance:

> "30. … first, that what it is essential to focus upon is the true nature of the relationship; secondly, that will primarily be a matter for the determination evaluation of fact; thirdly, as to that, the labels that parties place upon the relationship may be relevant factors, but are in no sense determinative. … [I]n **Tiffin** Silber J described some of the "different types of partners" that could exist; demonstrating, again, that such are the differing roles that persons occupy within undertakings whilst being described as "partners" that the words are at best an unreliable guide to whether they fulfil the definition of "partner" under the Partnership Act or "employee" under the Employment Rights Act. There is no clearly defined litmus test; everything must necessarily depend upon all the facts and circumstances."

48. Before the ET, the respondent placed particular reliance on the decision in **Massey v Crown Life Insurance Company** [1978] 1 WLR 676, where the Court of Appeal accepted that parties might agree a change in status (from employed to self-employed) where there was a genuine intent to do so; as Lawton LJ observed, at p 682

> "[It is] … clearly established that the parties cannot change a status merely by putting a new label on it. But if in all the circumstances of the case, including the terms of the agreement, it is manifest that there was an intention to change status, then in my judgment there is no reason why the parties should not be allowed to make the change. In all the circumstances of this case, there seems to have been a genuine intention to change the status, and I find that the status was changed. It follows that there having been a change of status, the appellant cannot now say that there was not one."

The question of employment status is, however, always to be answered by an objective assessment of all the relevant facts. Even where there is a genuine intention that the relationship is one of self-employment, not employment, that cannot create some kind of estoppel, by which the putative claimant is prevented from subsequently asserting that they were in fact an employee; that would effectively permit the parties to contract out of the employment protections afforded to those who are properly to be defined as working under a contract of employment pursuant to section 230 **ERA** (see **Young & Woods Ltd v West** [1980] IRLR 201 CA).

My approach

49. As for my approach to the reasons provided by the ET, I bear in mind the guidance laid down by Popplewell LJ at paragraphs 57-58 **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672: the ET is entitled to expect its reasoning to be read fairly, and as a whole; it is not required to identify all the evidence it relied on, or express every step of its reasoning - the purpose of its written reasons is to tell the parties in broad terms why they have won or lost (**Meek v Birmingham City Council** [1987] IRLR 250 CA); it should not be assumed that a failure to refer to a particular matter means it was not taken into account - what is out of sight in the language of the decision is not to be presumed to have been out of mind; and where an ET has correctly stated the legal principles to be applied, absent express language to the contrary, the EAT should be slow to conclude it has then failed to apply those principles.

The appeal and the claimant's submissions in support

The grounds of appeal

50. After consideration at a preliminary hearing on 22 August 2023, His Honour Judge Auerbach permitted this matter to proceed to a full hearing on the following grounds of appeal (I summarise):

> Ground 2 (Ground 1 having been withdrawn): the ET erred in law in finding there had been a *de facto* agreement for the claimant to become a partner within the meaning of the **Partnership Act 1890** ("PA 1890").
>
> Ground 3: the ET failed to give adequate reasons as to why it found the claimant to be a partner, failing to apply or explain the relevant statutory tests and/or refer to the relevant case-law, and failing to address the inconsistencies between its finding of partnership status and its factual findings as to how the relationship ended.
>
> Ground 4: The finding that the claimant was exposed to financial risk (assuming he was a **PA 1890** partner) was contrary to the ET's finding that he was a worker.
>
> Ground 5: As a consequence of its finding as on employee status, the ET had erred in dismissing the claimant's claim of unfair dismissal.

Ground 2

51. It is the claimant's contention that the ET erred in law by finding that an agreement as to terms and method of pay was sufficient to create a **PA 1890** partnership. On the evidence, the claimant says there was no acceptance of the offer that had been made to him (nor could such acceptance be derived from his silence; **Felthouse v Bindley** (1862) 142 ER 103): (i) it was common ground he had wanted to agree "*all terms*" before

he would accept the offer; (ii) it was his evidence that he had said he would only become a partner if he could review the partnership accounts, which he was never shown; (iii) he had said a written partnership agreement should be agreed and signed before 24 January 2020, but he never signed the partnership deed and there was no evidence he had otherwise agreed to all other terms contained in the deed; and (iv) as the ET found, absent agreement to the contrary, the default position under the **PA 1890** was that the claimant would be exposed to the liabilities of the partnership, which was not the parties' intention, when the circumstances were such that the element of risk was a material term that needed to be agreed before there could be a contract for partnership. It is the claimant's case that the ET relied too heavily on the agreement as to pay, in particular given that pay is not determinative of partner status (section 2 **PA 1890**); moreover, the ET's inability to identify a date upon which the agreement took effect supported the view it was too vague and uncertain to have legal effect.

Ground 3

52. This ground is put as an adequacy of reasons challenge, but in fact incorporates various complaints to the effect that the ET failed to apply the correct legal tests for partnership. In this regard, the claimant contends the ET was required to consider (and apply) the tests for both types of status in issue: partner and employee. Although the ET referred to the definition of a partnership under the **PA 1890**, the claimant submits that it nevertheless failed to address how the parties were said to have come within the definition, having made no finding that it was ever intended that the claimant would be in a position to bind the partners (see **Stekel v Ellice** at p 473, and **Young v Zahid** at paragraphs 33 and 41). As for the ET's findings at paragraph 180(a)-(l), the claimant submits that these did not address the issue whether the parties were "*carrying on business in common*" but were directed at the question whether the claimant was self-employed. It is the claimant's case that the evidence accepted by the ET supported the view that the parties lacked any intention to carry on business in common: (i) key decisions were taken by the equity partners, associate partners were not seen as having similar authority; (ii) associate partnership was intended to be part of the process of promotion to equity partnership; (iii) the proposed partnership deed was to be between the claimant and the equity partners; (iv) the equity partners had not intended the claimant should be exposed to the liabilities of the partnership. Equally, the claimant contends the ET's failure to address the specific provisions of the **PA 1890** (sections 2, 5, 24, 25, 26, 28) amounted to a failure to take into account relevant factors.

Ground 4

53. By this ground the claimant returns to the question of his exposure to financial risk, contending that the ET's finding: (i) went against the weight of the evidence; (ii) amounted to an error of substitution; and (iii) was contrary to its finding that he was a worker.

Ground 5

54. The claimant accepts that this is entirely contingent on the preceding grounds.

The respondent's submissions

Ground 2

55. The respondent contends it is wrong to assert that the ET had found that an agreement as to terms of pay only was sufficient to create a partnership: (i) it had found that, by January 2020 at the latest, there was agreement about the essential terms of the claimant's engagement as an associate partner, albeit not about all the terms recorded in the partnership deed; (ii) having expressly acknowledged that the claimant had informed the respondent he wanted to agree all terms and to review the partnership accounts, it was for the ET to determine how much weight to give this aspect of the case; (iii) ultimately it had found as a fact that the claimant's earlier statements did not mean that what later transpired was not an agreed change; (iv) as for the question of risk, the ET expressly addressed this, but was entitled not to find this determinative, correctly focusing on the question whether the claimant came within the definition of employee (**Williamson & Soden**).

Ground 3

56. For the respondent it is said that the ET's reasons were plainly adequate to the task. It referred to the relevant case-law and was entitled to focus on the question of employee status rather than that of partnership. In any event, the ET had had regard to the relevant sections of the **PA 1890** (albeit that the claimant had not referred to section 26 so the ET could not be criticised for failing to have regard to that provision).

Ground 4

57. On exposure to risk, the respondent reiterated the points made under ground 2. The ET undertook an

objective assessment, applying a multi-factorial approach; there was no one tipping factor.

Ground 5

58. The respondent not only says this is parasitic on the earlier grounds, it further contends that, even if the claimant was successful on his challenge to the finding on employment status, the ET had not formally determined the substantive claim and this was a matter that would need to be remitted.

Analysis and conclusions

That which is not in dispute

59. In addressing this appeal, I bear in mind that which was not in dispute before the ET. First, this was a case where those involved were very aware of the significance of employee and self-employed status; they understood the relevant tests, laid down by the case-law, and advised others in this regard; and, in their dealings with each other, they were plainly alive to the legal implications arising from the determination of employment status. Second, although the claimant had been an employee of the respondent for nearly a decade, there was a desire on both sides that he should ultimately move to full equity partner status, albeit that transition would take place over time and by incremental steps, with the claimant, after an initial promotion to the position of "associate" as an employee, first taking up a more junior level of partnership, with a fixed share of the partnership profits. Third, it was common ground between the parties that the claimant could not be both an employee and a partner (this was not a case where the parties have ever sought to argue against the principle laid down in **Ellis v Joseph Ellis** and **Cowell v Quilter**), and it was mutually understood that the claimant would cease to be treated as an employee for tax purposes when he moved to partner status. Fourth, as a matter of fact, at the start of the new tax year, in April 2019, the claimant was taken off the respondent's payroll, was issued with a P45, and was then treated as self-employed for all purposes related to tax and national insurance. Fifth, from April 2019 until March 2020, the position of both parties was that the claimant was self-employed; it was only from 2 March 2020 that the claimant started to assert that he was in fact an employee, a stance that he accepted amounted to a 180 degree turn on his part.

Ground 2

60. Against this background, by his first ground of challenge, the claimant nevertheless contends that the ET erred in finding that there was a partnership agreement between the parties. Accepting there had been a mutual aspiration that he should move to partner status, the claimant stresses the various factors that would point away from a finding that the parties had actually entered into a partnership agreement, emphasising that silence on his part could not simply be taken to amount to acceptance of a new contractual arrangement.

61. It is trite law that, although it may be a relevant consideration, how parties choose to label their relationship will not be determinative of employment status (**Young & Woods v West**). In the present case, the ET rightly reminded itself that it was required to carry out an objective assessment of all factors, and that the description used by the parties was but one of those factors. It was, however, common ground that if the parties were in a relationship of partnership, for the purposes of the **PA 1890**, that would not be consistent with the continued existence of a contract of employment between them; as such, therefore, a key question for the ET was whether, objectively assessed, the claimant's status had indeed changed from that of employee to partner. In this regard, given the particular expertise of the parties, the ET permissibly gave weight to what it found to have been their intention at the time and their contemporaneous view of the position; that is, that the claimant had indeed moved from employee to partner, albeit that he was treated as junior to the three equity partners and was remunerated by way of a fixed share of the profits. Moreover, although the claimant was not treated as being in the same position as the equity partners, the case law recognises that there may be different levels of partner without falling outside the definition under section 1 **PA 1890** (**Stekel v Ellice**); it was a part of the ET's task to ascertain the parties' intentions as to whether or not such a partnership was to be created (**Tiffin**).

62. In reaching its conclusion, it is apparent that the ET took into account each of the matters emphasised by the claimant in support of this first ground of challenge. Thus, having expressly recorded the evidence regarding the claimant's statement that he would only become a partner if he could first review the partnership accounts and had agreed all terms, the ET did not accept that this meant that what subsequently transpired was not an agreed change (ET, paragraph 188); equally, while the ET had regard to the fact that the claimant had not signed the draft partnership deed, or expressed his consent to all its terms, it did not consider this fatal but found that the claimant's appointment to associate partner was the product of a genuine agreement between

the parties and that the terms relevant to the claimant's partnership were sufficiently certain such that it could be satisfied that "*an agreement was in place … albeit not a written agreement*" (ET, paragraph 187). These were conclusions open to the ET as the first instance tribunal of fact. It had the benefit of hearing the claimant's evidence, tested under cross-examination, and was entitled to form a view as to whether his position (that seeing the accounts was a precondition to agreement, and that he would need to agree all terms before he became a partner) remained constant; it was also able to take into account the opinion it had formed as to the claimant's credibility more generally (ET, paragraph 113), and to consider what was most likely, given its finding as to the genuine nature of the arrangements entered into by the parties in 2019/2020 (ET, paragraph 114). Moreover, its finding of an agreement between the parties was not limited to the issue of remuneration; as the respondent observes, on the evidence, the ET was satisfied that, by January 2020 at the latest, there was an agreement about the essential terms of the claimant's engagement as an associate partner, albeit that agreement did not encompass all the matters recorded in the draft partnership deed (ET, paragraph 187).

63. Thus accepting that the ET was plainly best placed to form a view as to whether the parties had entered into a partnership agreement, I was, however, initially troubled by its finding that, in the absence of an agreement to the contrary (as permitted by section 19 **PA 1890**), the arrangement between the parties meant that the claimant potentially faced joint liability for the debts and obligations of the partnership. If the parties were in a **PA 1890** partnership, then that, as the ET correctly observed, would be the necessary implication from the absence of any agreed variation of the position otherwise described by section 9. Equally, however, the ET had found that that was not the intention of the parties in this case; indeed, it was the position of the three equity partners (as provided by the draft deed of partnership; ET, paragraph 75 e.) that the claimant, as an associate partner, would not have been expected to contribute to any debt or other liability of the respondent. Although the ET was entitled to find that the parties had failed to enter into an agreement that properly provided for their common intention in this respect (and thus to vary the joint liability otherwise imposed by section 9 **PA 1890**), the question arises as to whether it was right to nevertheless go on to find that they had entered into a binding partnership agreement if that failed to give effect to this common intent. Moreover, given that the ET saw the shared liability for the debts of the partnership as a material factor pointing away from employee status (on this factor, it held that "*the balance would have been different if an agreement had been reached, such as that proposed by the first respondent in the partnership deed*"; ET, paragraph 182), the claimant raises

the question whether it was still open to the ET to find that the intention of the parties was properly to be understood as giving rise to a partnership as defined by section 1 **PA 1890**.

64. On this latter point, while the ET appropriately recognised that the question of shared liability was relevant to the issue of employment status, I do not read its reasoning as suggesting that it saw this as determinative (indeed, that would be contrary to its self-direction on the law, to the effect that no one factor would be conclusive). The statement made at the end of paragraph 182 of the ET's reasons was no more than an observation that the claimant's exposure to risk was a factor to be weighed in the balance: had the parties agreed to vary the position otherwise imposed by section 9 **PA 1890**, the absence of risk would have been a factor falling on that side of the balance pointing towards employee status; that they had failed to agree such a variation meant, however, that the claimant's exposure to risk was counter indicative of employment, and fell on the other side of the balance.

65. Returning to the ET's finding that, notwithstanding the failure to give effect to their common wish to remove the claimant from any joint liability for the debts of the partnership, the parties had entered into a binding agreement of partnership, the question for me must be whether that gives rise to an error of law? Although I do not underestimate the significance of the issue (and it is apparent that the claimant became increasingly concerned about this as one of the potential risks of the change in his status after April 2019), the ET was entitled to find that, in the absence of express agreement to the contrary, this was a matter that would be governed by the provisions of the **PA 1890**. On the ET's findings, it continued to be open to the parties to reach an agreement to vary this position - which might then have implications for the assessment of the claimant's status as employee or partner - but I cannot say that the ET was not entitled to nevertheless find that the absence of such an agreement was not fatal to the existence of a partnership between them. Whether or not I would have reached the same decision, ultimately I cannot say that was not a legally permissible conclusion.

66. Stepping back, so as to view the ET's reasoning in perspective, I am not persuaded that the finding of the existence of a partnership within the meaning of section 1 **PA 1890** discloses an error of law. On the evidence before it, the ET had found as a fact that the parties had entered into an agreement for partnership, intended to commence in April 2019. Although the process of agreeing all the terms of that partnership was somewhat shambolic, and took place over a number of months, the ET was satisfied that the agreement between

the parties was then sufficiently certain as to mean that a legally binding partnership existed between them; that agreement was not limited to the claimant's remuneration, although the amount of his drawings from the partnership had been a significant issue for the claimant. Moreover, although it had been intended that the terms between them would be contained within a formal document, which would include an agreement that the claimant would not be liable for partnership debts, the ET did not consider the parties' failure to agree such a document to be fatal to the existence of a partnership between them. Having regard to the parties' intentions at the relevant time, I cannot say that the ET was not entitled to reach the conclusion that it did. For all the reasons provided, I therefore dismiss this first ground of challenge.

Ground 3

67. By this ground of challenge, the claimant complains that the ET's reasons fail to demonstrate that it applied the correct legal tests for partnership; while ground 2 focused on the finding as to the existence of a partnership agreement, by this ground the claimant questions whether the ET properly engaged with the requirements of the **PA 1890** in its characterisation of the nature of an agreement between the parties. Specifically, the claimant contends that the ET failed to demonstrate that it had had regard to the following provisions of the **PA 1890**: (i) section 2 (by which it is provided that the existence of various factors (most relevantly, remuneration by way of a share of the profits of the business) do not, of themselves, create a partnership); (ii) section 5 (which provides that every partner is an agent of the firm and can bind the firm and the other partners, save where that partner has no authority to act for the firm in the particular matter and the third party either knows that, or does not know or believe them to be a partner); (iii) section 24 (which lays down various rules relating to the interests and duties of partners, subject to any (express or implied) agreement otherwise); (iv) section 25 (by which it is stated that no majority of the partners can expel any partner unless such a power has been conferred by express agreement between the partners); (v) section 26 (by which provision is made for the ability of any partners to retire from the partnership at will); (vii) section 28 (which lays down a duty on the partners to render accounts of all things affecting the partnership).

68. Accepting that the provisions of the **PA 1890** relied on by the claimant all identify matters relevant to the question of partner, as opposed to employee, status, I am not persuaded that a fair reading of the ET's reasoning should lead me to conclude that it has failed to have regard to these factors. As the ET had reminded

itself, its task was to have regard to all relevant circumstances; given its correct self-direction on the law, I should not readily infer that the ET then lost sight of the test it was to apply when considering the facts of this case (**DPP v Greenberg**). More specifically, although the question whether the parties had entered into an agreement of partnership was of particular significance (it being common ground that that could not be consistent with a contract of employment), the ET was not required to give special weight to each provision of the **PA 1890**, not least as section 19 provides that any partnership rights and duties defined by that Act "*may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing*".

69. As the case-law makes clear, there may be different types of partner, from full equity partner through to some form of fixed-share or salaried partner, and whether the arrangements in place in any particular case give rise to partner status in the true sense will always be fact-sensitive (**Stekel v Ellice**; **M Young v Zahid**; **Tiffin**). In the present case, on the ET's findings, at the relevant time there were two forms of partner within the respondent: the three full-equity partners, and the three associate partners. The ET expressly had regard to the differences between these two types of partner, acknowledging that these gave rise to considerations falling into that side of the balance supporting a finding of employee status (see e.g. ET, paragraph 179 f.-i.). Accepting that the ET did not make findings relevant to each of the provisions of the **PA 1890** referenced by the claimant, I cannot say that this demonstrates it thereby erred in law. The ET was entitled to take the view, for example, that it was not necessary for it to consider what agreement might have been reached in relation to the matters addressed by sections 5, 24, and 28 **PA 1890**. As for section 2, it seems to me that the ET took into account that the claimant was remunerated by way of a fixed profit share, but did not make the error of assuming that this could create a partnership (indeed it allowed that that might be seen as pointing towards employee status; ET, paragraph 179 d.).

70. I further accept that the ET did not engage in detail with what, if any, agreement had been reached as to the power of the equity partners (acting as a majority) to expel any other partner (section 25 **PA 1890**) but, having found that the claimant was not an employee, it was not strictly necessary for the ET to determine whether he had been expelled from the partnership (and whether this was pursuant to an express agreement for section 25 purposes) or whether he was to be treated (as the respondent contended) as having retired from the partnership at will (as allowed by section 26 **PA 1890**). More generally, the ET was not required to set out

every step of its reasoning to be **Meek**-compliant, and (*per* **DPP v Greenberg**) I do not assume that a failure to refer to each of the provisions of the **PA 1890** referenced by the claimant meant that the ET did not have these points in mind.

Ground 4

71. By this ground of appeal, the claimant returns to the question of exposure to risk. To the extent that the claimant contends that the ET's conclusion on this issue went against the weight of the evidence or amounted to an error of substitution, his criticisms are misplaced. Questions of weight are for the ET, as the tribunal of fact. The ET had regard to what it accepted had been the parties' original intention (that the claimant should not be liable for the debts of the partnership), and to the fact that they had been unable to reach an agreement that gave effect to that intention. It did not, however, find that to be fatal to the existence of a partnership between them. For the reasons I have already set out at paragraphs 63-65, I cannot say the ET thereby erred in law; rather, the flaw in the claimant's approach is revealed by his contention that the ET's error was to have substituted its own view in this respect. That was precisely what the ET was required to do: in determining whether or not the claimant was employed pursuant to a contract of employment, it had to undertake an objective assessment. The subjective intention of the parties was a relevant consideration - in particular as to whether it had been intended that the claimant should take on the status of partner as that term is defined under the **PA 1890** - but the ET was entitled to consider it was not fatal to what it found to be an agreement of partnership that the parties had not been able to specifically agree a term that would vary the position otherwise imposed by section 9 of that Act.

72. As for the question of worker status, there is a difficulty in that the point that really has to be addressed in this regard is not before me. In its self-direction on the law, the ET referred to Lady Hale's judgment in **Bates van Winkelhof** and to her observation at paragraph 29, that it was not necessary for the Supreme Court in that case to resolve the question whether a **PA 1890** partner (not a member of an LLP) might also be a worker for the purposes of section 230(3)(b) **ERA**. When then determining the question of worker status in the present case, however, the ET effectively assumed (in the claimant's favour) that the necessary contract could exist for section 230(3)(b) purposes, notwithstanding the relationship of partnership it had found. Its approach thus appears to have been to accept the distinction allowed in the commentary in ***Lindley & Banks***,

at paragraphs [5-98] and [5-100]. That was not a distinction for which the respondent had argued below, but it has chosen not to appeal the ET's finding on worker status.

73. The issue identified in **Bates van Winkelhof** was thus not the subject of any detailed argument before me; the appeal in these proceedings is advanced on the basis that the ET's approach to (and conclusion on) worker status was correct. If that is so, however, then the ET was entitled to see the facts of this case as tipping the balance in favour of the claimant being a worker for section 230 purposes notwithstanding its conclusion that those facts did not (on its assessment) allow for a finding of employee status.

Ground 5

74. Given my conclusions on the preceding questions, this ground of challenge does not arise.

Disposal

75. For all the reasons provided, I therefore dismiss this appeal.