Case number: 2601992/2018

# EMPLOYMENT TRIBUNALS

**BETWEEN:**

| **Claimant** | | **Respondent** |
|---|---|---|
| | And | |
| Mrs J Hamilton | | Birstall Social Club |

# AT A PRELIMINARY HEARING

Held at: Leicester On: 11 April 2019.

Before: Employment Judge Clark (Sitting Alone)

**REPRESENTATION**
**For the Claimant**: In Person
**For the Respondent**: Mr Perry of Counsel

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# RESERVED JUDGMENT

1. The Claimant was **not** an employee of the Respondent within the meaning of s.230 of the Employment Rights act 1996

2. The Claimant was **not** an employee of the Respondent within the meaning of s.83 of the Equality Act 2010

3. Accordingly, the claims against the Respondent are struck out in the absence of jurisdiction.

# REASONS

## **1.** Introduction

1.1 This is a hearing to determine jurisdiction. It relates to the Claimant's claims of unfair dismissal, for which her economic relationship with the Respondent had to be that of "employment" under s.230 of the Employment Rights Act 1996 ("the 1996 Act"), and discrimination and harassment, for which her relationship had to be that of "employment" within the wider definition set out under s.83 of the Equality Act 2010 ('the 2010 Act"). It appeared to me that the definition of contract worker within s.41 of the 2010 Act was also a live issue but on explaining the various legal routes to engaging jurisdiction with the parties at the outset, the Claimant was determined that this was not a contract worker case and that she advanced her case solely on the basis of her status as an employee under the aforementioned statutes only.

## **2.** Preliminary matters

2.1 Although the case was given what appeared to be a generous time estimate of one day, the parties each called 4 witnesses and submitted a bundle running to over 300 pages. The day was strictly timetabled and, even then, was concluded only shortly before the hearing centre closed. The decision was, therefore, necessarily reserved.

## **3.** Issues

3.1 The issue are whether the economic relationship between the parties satisfies either or both of the statutory definitions. That is, under the 1996 Act: -

> ***230***
>
> ***(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.***

3.2 The claims brought do not engage the worker definition set out later in sections 230 although the essence of that definition is engaged in respect of the discrimination claims but by reference to its own definition under the 2010 Act which provides: -

> ***83***
>
> ***(2)"Employment" means—***
>
> ***(a)employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;***

3.3 The Claimant's case was unusual in that she accepted the economic relationship started as a commercial contract arrangement under her own limited company but that her status evolved after it had commenced and, at some point in time, changed so that she

became an employee of the Respondent. Consequently, in order to engage jurisdiction for unfair dismissal, I had to be satisfied not only that she was an employee under the 1996 Act at the date of termination, but also that she had become an employee by no later than 26 May 2016 in order for her to have accrued the necessary 2 years' qualifying service to bring such a claim.

## **4.** Evidence

4.1 For the Claimant I heard from Mrs Hamilton, who appears throughout much of the contemporary evidence under her then married name of Scarfe; Mr John Goddard, life member of the club and Mr Les and Mrs Sheila Wilkinson, both members of the club. For the Respondent I heard from Anthony O'Reilly, the current Chairman of the Respondent club; Kelly Cockayne a manager at the club; Ian Morris, Committee Member of the Club and Ryan O'Reilly, Bar Manager at the club.

4.2 All witnesses adopted a written statement on oath and were questioned. I received a bundle running to 309 pages after additional documents were handed up. Both parties made closing submissions.

## **5.** Background Facts

5.1 The Claimant is a qualified professional with a finance and management background. She has worked in senior management roles, particularly in the NHS. She is professionally registered with, and regulated by, the Chartered Institute of Management Accountants. At all material times she was also a shareholder and director of a private limited company called Smart Move Consultancy Limited ("SMC"). That business was originally set up and run by her and her husband before they divorced. Their son was an employee. The company contracted to provide consultancy services to small businesses and the self-employed, particularly in the areas of accountancy and business coaching and development. The Claimant's husband and son left the business in or around April 2017. The Claimant retained her interest throughout the relevant period and the consultancy continued to actively trade. She described it as "her business". Throughout the material time, the Claimant also worked under a part time contract of employment as a Finance/Contracting Project Lead with an NHS clinical commissioning group.

5.2 I find she was a competent and organised administrator. She has an understanding of what is required by way of corporate governance and regulatory compliance. What she does not have full knowledge of, she is nonetheless able to recognise areas where a compliance need arises and she has the skills and intellect to research what is needed and make it happen. During her time with the Respondent she demonstrated this numerous times in areas relating to pension auto-enrolment, employment and licencing of the club's activities.

5.3 I find that the Claimant understood the nature of the various different economic contracting relationships and the respective status parties had under each. She knew the difference between a commercial contract and status as an employee.

5.4 The Respondent is a community focused social club. Its reason for existence is to provide a venue and facilities for social events for use by the local residents of Birstall. Like many such clubs, it operates through well intended volunteers under a committee structure. It adopts typical rules as its constitution in line with the scheme under the Friendly Societies Act 1974. Under rule 8(1), the officers of the executive committee were comprised of: -

> ***"Three trustees, a Chairman, Vice Chairman, a Treasurer, a Secretary and SEVEN committeemen who shall form the executive committee, and a Steward."***

5.5 Those committee members were previously drawn from the membership. All were voluntary although nominal payments were made from time to time. The executive committee members would each have a vote to make resolutions. The appointment to the role of secretary was on a three year term at the end of which it would be offered for re-election.

5.6 In the years prior to 2015, there had been a growing sense of dissatisfaction in the performance of the role of secretary. I find two factors were at play. One was the pool from which volunteer secretaries was drawn, i.e. the membership, did not necessarily generate candidates with the skills or time to devote to the role. The second was a sense that the regulatory landscape was becoming more complicated, particularly in areas such as employment, health and safety, licensing, gambling compliance and the HMRC. According to the Claimant, the club had also suffered a significant loss of members money, in the region of £15,000, due to the poor level of competence and unprofessionalism.

5.7 In 2015, the previous secretary did not wish to stand for re-election. The decision was taken that the role required a competent person and should be a remunerated position contracted from outside the club. That meant changes to the constitution, the individual would not vote on the executive committee although would of course attend and contribute. A Mr Bewley, a member, agreed to temporarily stand in whilst the post was filled. The available resources were slim. The role was estimated to take around 5 hours per week and the respondent set its budget at approximately £5200 per annum. The word was "put out" that it was looking for a suitable professional to appoint.

5.8 The Claimant lived locally and was known to one or two of the members by her professional reputation. They approached her to tell her of the role. One way or another, contact was made between the Claimant and the temporary secretary. She met with the secretary and the then chairman, now deceased. In the course of that interview the Respondent's representatives explained the role they wanted performing, their estimate of the time this would entail and that they had £100 per week available to fund the role. Significantly, they explained that this was to be a contracting arrangement and payment would be on the presentation of invoices. I find the Respondent's objective was, first and foremost, to appoint an individual with the necessary skills. Secondly, it was to appoint them as an external contractor, that is not as an employee. I suspect that if a person satisfying the first criteria indicated that they would only take the role on the basis of being directly employed, the club would have had to revisit that in its executive committee and it would then have had to come to a view about that objective. Similarly, the external contracting did not necessarily have to be through a limited company. In any event, in this case that did not arise

and the Claimant was content with a contracting relationship and explained how she traded through SMC, her limited company.

5.9 The way in which this relationship came about was challenged by the Claimant. It was suggested that the limited company was the only way for her to submit invoices and it was all simply a matter of convenience. I do not accept that. It was open to her to submit invoices in her personal capacity and to keep this activity separate from her limited company, although I accept that may have complicated her tax position. Equally, it was open to her to say no to contracting on a commercial basis at all and instead to insist on it being direct employment or nothing. She did not take that route and I find the notion of an independent contracting relationship was something she was perfectly happy with. Having considered the surrounding facts, it may be that the nature of the relationship was forged by the opportunities and circumstances presenting themselves in the moment, but it remains the case that the Respondent wished to contract on a commercial basis, the Claimant was quite content to do so as she was already well used to contracting on such a basis, and it is common ground that the parties then commenced their economic relationship on the basis of a commercial agreement between the Respondent and SMC. There is no basis for the Claimant being under any misunderstanding about the implications of this legal relationship.

5.10 At the time of the Claimant's appointment, the Respondent was still applying a gender restriction on membership of the executive committee so far as officers were drawn from the members. Although women could now become full members, election to the committee was not permitted until they had at least 12 months as a full member. As outdated as this rule is, it is a rule that the Claimant did not satisfy at this time. The committee varied its constitution to permit this although appears not to have published any variation to the rules. The committee minutes recording her appointment describe that she will report to the committee but is ***not*** a member of it. (original emphasis)

5.11 The relationship started from July 2015. The executive committee meeting on 6 August 2015 reported that the position had now been filled. I find on balance that a notice to members was prepared at the time which announced the appointment of the Claimant as the new club secretary [50]. It gives some brief background to the appointment, the Claimant and her skills. It described the role as working alongside but reporting to the committee. It concludes with :-

> ***"Judith now operates freelance where she contracts her services and is still actively engaged in strategically supporting some of the UK's Local Authorities in the care and health sectors"***

5.12 The Claimant had been consulted on the terms of the notice. Amongst other matters she was asked: -

> ***"If there is anything at all which misrepresents your professional status or you feel uncomfortable or not appropriate personally, please let me know (or better still, make any edits/changes for me)"***

The Claimant did not make any changes.

5.13 In seeking to undermine the commercial contracting relationship, the Claimant gave evidence that her charge out rate for her consultancy services was much more than the £20 per hour proposed by the club. I have no reason to doubt that is the case. There is some suggestion that this difference was known to the club as the temporary secretary made a report to the committee expressing his appreciation to Judith for volunteering her time and professional services "***especially at the remuneration which we were able to offer***".

5.14 I find the Claimant took her lead from the business of the executive committee and reported to it. Otherwise she worked autonomously although her work overlapped with others, particularly the managers and there were, necessarily, regular and various exchanges between her and them. I find the Claimant was not subordinate to any other manager in the sense of any organisational structure or reporting lines. Nor did she have anyone reporting to her.

5.15 The club had wished for its files and papers to remain on the premises and it was anticipated that the secretary would therefore be on site every week to support the cycle of the executive committee meetings. There were no set hours dictated although in practice, the Claimant would in due course fall into a routine of attending typically on Friday afternoons. This was a matter of convenience for her and her other work. She would also work on the Respondent's business as and when according to both the needs of the Respondent and to suite her own other commitments. Whilst she had the use of a shared office space at the club, and office supplies were available to her, this was not always convenient and in any event I find the Claimant preferred to be visible and sat in the bar on Friday afternoons to undertake some of her role. I find she frequently used an email address associated with SMC for communicating on the Respondent's business. On some occasions she would correspond using emails linked to her NHS employment. She was given use of the laptop previously bought by Mr Bewley for performing the role of secretary but I find it was not used to any meaningful degree.

5.16 From the very first 4 week period, the Claimant began to submit SMC invoices. I find thereafter she did so routinely every four weeks throughout her time involved in the club. Each invoice identified a "unit price" of £100 (later increased to £125) which was applied to each week in the invoice period. She charged expenses at a further £10. She applied VAT to the net sub-total to arrive at a total gross payable of £492 per 4 week period (later £612). At no time was she paid through the established payroll used to pay wages to the Respondent's directly employed staff. There was never any issue raised or suggestion that she should be paid through the payroll.

5.17 The Respondent does employ staff under contracts of employment, particularly in the provision of its bar and food facilities. The numbers of employees varied but was typically around 14. The Claimant did not have a contract of employment and did not at any time request one but I am satisfied was intimately aware of the employment status and terms of the staff and that their arrangements differed from hers.

5.18 I find the Claimant did not book annual leave nor was she entitled to receive any sick pay, whether statutory or contractual although there is no evidence she was ever absent due

to sickness nor what the Respondent expected would happen to cover her services during any such a period of absence. She was not required to pre-approve any holiday time away but did inform the committee as a matter of courtesy. She delegated some outstanding tasks to other committee members during any holidays. She organised herself and her obligations to the Respondent as far as possible so as not to interfere with the routine 4 weekly invoicing. In other words, there was no period when she did not invoice for any week.

5.19 I find as a fact that she performed all the work personally. Notwithstanding this, I am satisfied that there were some, very limited, elements of the administrative or clerical tasks not requiring presence at the Respondent's premises that she could have delegated to a substitute, an employee or agent, of her limited company such as typing up hand written committee minutes. Should this situation have arisen and been raised with the Respondent (and it may have been so insignificant as to not have prompted any notice of the fact to the Respondent) I find on the balance of probabilities that there would not have been any objection to that substitution by the Respondent. I find she was also able to engage others on particular work and did so in respect of setting up the detail of the autoenrollment scheme although this is more in the nature of commissioning a separate specialised contractor than substituting a third party to perform the role she was contracted to do. Nevertheless, it arose out of a recognition that this area or work was outside her specialism and she directed the club to an associate she had used in her business past. But beyond those limited matters, in respect of the core areas of the role I cannot be satisfied the Claimant could have sent a substitute. These core elements included matters relating to the attendance at committee meetings and particularly the confidential part of the meeting. She was also trusted with aspects of the Respondent's administration relating to banking which I find would not have been areas in which she would have had free and unconditional right to substitute someone else.

5.20 As was the intention, the Claimant attended the executive committee. She did not have a vote. The notes of the meetings show she was both responding to issues within the club and pro-actively bringing matters to its attention. Her input was put in terms of "professional opinion" and her "professional duty" in areas of governance, such as introducing a split between the open and confidential sessions of the committee. She would often, but by no means always, be recorded as the "owner" of any action points arising from the meetings in the sense of who was to do the work and report back at a later date.

5.21 In October 2015, the executive committee agreed that the Claimant and the then Chairman would be joint signatories for the club's benevolent account with the Nationwide Building Society. At some point the Claimant also became the named contact on a British Gas account. The reason for this was that the club does not have an independent legal status and the terms of this arrangement required a contract with a legal entity.

5.22 In June 2016, the claimant identified a need for the club, as an employer, to be compliant with the requirements of auto-enrolment pension provisions. She reported that she did not have the skills herself but could engage others she had used in the past. I find in due course she took the lead on ensuring compliance. I find that whilst she was not an expert, she was sufficiently aware of the qualifying status which engaged the right to pension

provision. At no time did she intimate that she should be entitled to a pension from the Respondent. It was suggested that she never met the qualifying earnings condition and that was the reason why. I did not find that determinative of her own view of her status at this time. It is clear that there were other staff who did not meet the earnings condition but who were nonetheless initially included in the autoenrollment but later removed. The Claimant was not included in that same initial error. Nor was I persuaded that she did not put herself forward because she already has a very good pension provision through the NHS and the benefits of auto-enrolment were minimal in comparison. The comparison may well be correct but I do not find it was an operative consideration explaining why she was not included with the "other" employees. I find at no point did she raise her employment status in the context of pension provision and it is clear that the Claimant still did not regard herself as being entitled as an employee as late as March 2017.

5.23 At the same meeting, about a year into the relationship, the Claimant sought a revision in the amount she could invoice. I find the notes were written by her. They record her informing the committee that she had recently been working in excess of the notional 5 hours she was contracted to do and she explained that: -

> ***"As she is self-employed, the additional hours worked at the club "for free" is detrimental to her business."***

5.24 She did two things, one was a plea for a greater distribution of some of the committee tasks amongst the committee members, the other was to obtain agreement for an increase in the amount being invoiced to £125 each week.

5.25 In June 2017, the Claimant was engaged in a sub committee to review the club rule book.

5.26 In February 2018, the Claimant was tasked with reviewing the position of the club's gaming licensing and renewing it as necessary.

5.27 In 2018 early 2018 the Executive committee began considering the secretary's 3 year term and the arrangements for the next term. A members notice was published. It set out the reason for the Claimant's engagement with the club in 2015 and the form that took. Whilst I am cautious about how far its contents should influence me, as there could be a risk of some rewriting of history , I am satisfied that it reflected the committee's genuine view of that relationship. It refers to:-

> ***"The … secretary would be an external position held by a qualified professional appointed by the committee to undertake the increasingly complex and demanding nature of the role for the… 3 year term."***

5.28 I find that the Claimant was aware of the 3 year "tenure" of the secretary position. I doubt that this was made clear during the appointment process but I am satisfied her familiarisation with the constitution, such as it was, brought this to her attention and she accepted it. In fact, it was the Claimant who was chasing for a resolution in advance of the 2018 AGM.

5.29 A members' notice calling for nominations for Club Secretary was published in March 2018. Two nominations were received. One from a member, Alan Coles. The other from the Claimant. I have no knowledge of whether Mr Coles was a qualified professional or in a position to undertake the role on a commercial contracting basis and I recognise some tension in the steps taken in 2015 to go external, and then on renewal to post an internal members notice. I suspect the reason for this goes to the underlying issues in this claim as by then some tension had developed between the Claimant and certain other members, employees and officials. At the AGM on 14 March, the nominations process for Secretary was discussed and it seems caused lively debate. I find that two schools of thought had emerged. One sought to go through a selection process between the nominations. I have deliberately avoided trespassing on matters irrelevant to this hearing and which go to the substantive dispute. I detect there was, within this split, matters relating to that. They related to the relationship between the Claimant and Mr O'Reilly, the bar manager who happened to be the then chairman's son. The other body of opinion was highly supportive of the good job the Claimant had been doing and wanted to simply vote on it at the AGM. The rule book was cited and acknowledged as being out of date and in need of revision and would not bind them at that meeting. A vote was taken in the Claimant's absence and she was voted in for a further term. She accepted. Despite the split in the opinion, the minutes record the vote being unanimous. I find that this renewal was on the same terms and basis as before, whatever that amounted to.

5.30 At the Executive Committee meeting on 9 April 2018, the Claimant raised the issue of the Secretary not having a vote and whether it should do. She recorded in her notes of the meeting that during the previous tenure of secretary she did not have a vote. Mr O'Reilly senior had reported that the position did not have a vote as the Secretary was not employed by the Respondent. The Claimant did not challenge Mr O'Reilly's characterisation of her employment statues and commented in reply that "*irrespective of the method of remuneration* the secretary is a member of the club's management team and has the same rights as other members and a right to vote."

5.31 The underlying tensions that form the basis of the substantive claim were present during the spring of 2018. In 14 May 2018 executive committee meeting, one item for discussion was the remuneration for the secretary. The rate had been the same for the previous two years. The Claimant indicated she was content with that at the time. Others requested an annual review. One member suggested no member of the committee should be paid.

5.32 On 25 May 2018, the Claimant resigned her position in a text message sent to the committee. Her resignation was with immediate effect and was stated as being "due to personal reasons". She set out some immediate and practical matters as there had not been a handover and indicated that she would contact the various relevant third party contacts to provide new contract details.

5.33 The Respondent took steps to recruit a replacement on like terms. The members' notice was published as an advert. It sought a professional with the necessary skills. It invited further discussion and requested any potential applicants to

***"include an expected monthly invoice price including VAT"***

5.34 On 22 June 2018 the Claimant followed up her resignation text with a detailed letter. The thrust of its contents was to raise issues which broadly become the substance of the claim to the employment tribunal. The only matters of relevance to status are the Claimant's reference to her rights. She wrote:-

> ***"As I had my own business it was decided for ease that I would invoice the club for my time. Although I may not be categorised as a direct employee with Employee Rights what I do have is the implied rights to a suitable and safe working environment, respect and not to be discriminated against."***

## **6.** Discussion and Conclusions

6.1 I have already set out the two relevant statutory provisions at the outset of these reasons. Before considering each, I set out some conclusions that are potentially relevant to both.

6.2 The first is that there is nothing in the nature of the function of a club secretary that inevitably points towards or away from employment status, or for that matter a commercial contract. It could be performed under either model. I do not find great force in the Claimant's submission that the services were not what SMC had provided in the past or the type of work that could be contracted for. There is a ready market for the provision of company secretary services on a commercial contracting basis, often provided by accountants. Whilst her role was not a secretary under the Companies Act, the essence of the functions of administration and governance are transferrable. I see nothing in the nature of the tasks and functions being performed that should be determinative of the status of those performing them.

6.3 The second is that I am satisfied that the contracting arrangement established between SMC and the Respondent was genuine and that the Claimant, as director and agent of that limited company, freely entered into that contractual arrangement. The fact that there could potentially have been a different relationship or status established does not alter my conclusion that the one that the parties did form was genuinely entered into. Nor is it disturbed by the fact that, to some degree, the relationship took the form that it did merely because the Claimant happened to trade through a limited company. I am satisfied that the Respondent did want an independent or external contractor, that is not an employee, if not a separate legal entity. If the Claimant had not wanted to contract through her limited company, there was ample scope during those initial discussions, or at any time thereafter, for her to express this. She didn't.

6.4 The third is that the Claimant accepts the agreement reached in this arrangement was one of self-employment. Her case is not that this contracting arrangement in itself amounts to one of employment as a matter of law. Her case is that the subsequent subtle changes in the relationship over time as she became more integrated into the club activities, meant at some later point in time, which she has not specifically identified, her status changed into one of employment. I return to that contention below, but for present purposes that contention arises from a retrospective analysis on her part. I am satisfied that throughout the relationship and continuing at the time of her complaint letter in June 2018, the Claimant

repeatedly described herself in terms that were either inconsistent with employment status, or expressly not one of employment. She was at the time otherwise in business on her own account.

6.5 The fourth is that, notwithstanding the commercial contracting foundation of this relationship, there are elements of the relationship which I have concluded do begin to satisfy elements of the various tests of employment. They are as follows:-

a) The main purpose of the role of secretary was to be performed by the Claimant herself. Whilst I am satisfied some limited clerical elements of the role could have been delegated to a substitute, albeit in practice it was not, the main functions of the role relating to the participation in the executive committee would never have been amenable to substitution. To that extent the Claimant is correct to say it was her that was appointed to the role, and not SMC. I have concluded this was a relationship where there was an expectation, from the outset, that the Claimant herself would personally perform the main work.

b) There was a degree of integration with the Respondent's business which did increase over time. Whilst I remain of the view that the role of secretary itself could be performed by a third party or external contractor, there were certain developments that occurred during the parties' commercial relationship which show a greater degree of integration occurred later in the relationship than was anticipated at the outset. This can be seen in the Claimant accepting an additional obligation of trust when she became a signatory to the club's benevolent fund bank account. Similarly, she personally took on a responsibility as a named individual in order for the club to benefit from a new energy supply contract with British Gas. Her role changed in 2018 from supporting the executive committee to being a voting decision maker on the committee. Whereas in order to facilitate the external nature of her appointment the club had removed the voting rights of the secretary, in 2018 that was reinstated and the Claimant became an equal voting member of the executive committee.

6.6 It is necessary to consider those conclusions and all other relevant considerations, against each of the two statutory tests of employment.

*Employment under the Employment Rights Act 1996.*

6.7 In the context of this claim, I am only concerned with the definition of employment, and not the definition of worker found later within s.230 of the 1996 Act. The burden rests with the Claimant to show that she entered into or worked under a contract of service.

6.8 Before considering the nature of any contract, it is an essential requirement of a contract of service that there is a contract between the parties. In this case, there is no contract between the parties as the Claimant's labour was provided through her limited company. This arrangement continued throughout the relationship.

6.9 I have considered whether it is possible that a contract could be implied between the parties but I must reject that. In order for me to imply such a contract, it must be necessary to

do so, see *The Aramis*[1989] 1 Lloyd's Rep 213, where it was said that to be necessary, it must be needed:-

> ***"in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."'***

6.10 There is nothing in the evidence that establishes such necessity. The relationship that the parties settled on was well understood and worked for their purpose. It was genuine and operated by both sides on a common understanding. The fact that other types of economic relationships could have been formed with equal efficacy does not make it necessary for me to interfere with what was implemented as a free choice of both parties. Similarly, the fact that the Claimant is now seeking to benefit from rights she accepted at the time she did not have does not create that necessity, especially where I am satisfied that she had sufficient understanding of the nature of the contracting relationship and its effect on what rights she personally would or would not have at the time she, on behalf of her company, entered into the commercial agreement.

6.11 The way the parties arranged their affairs, described the relationship and the financial arrangements between them were inconsistent with a relationship of employment. Personal service in isolation, is not inconsistent with a commercial contracting relationship. In order to determine whether the relationship falls within s.230(2) of the 1996 Act, it is therefore not necessary in this case to go on to analyse the relationship against the various applicable tests of employment. Without the direct contracting relationship, the Claimant could not be contracted under a contract of service to be an employee of the Respondent.

6.12 It follows that if the Claimant was not an employee at any time she cannot present a claim for unfair dismissal. The secondary issue of qualifying service does not, therefore, arise.

*Employment under the Equality Act 2010*

6.13 An obvious starting point in determining whether this statutory definition of employment is met is whether the absence of a direct contracting relationship is again fatal. There is authority for that proposition. In Muschett v HM Prison Service [2010] IRLR 451 the Court of Appeal held the absence of a direct contracting relationship between the parties in this case was fatal to a claim as an employee. Similarly, in Halawi v WDFG UK Ltd t/a World Duty Free [2015] IRLR 50 the first reason the Claimant lost was the absence of a relevant contract between her and the Respondent.

6.14 But the relevant law is potentially wider. There are also two significant differences between the two statutory provisions engaged in this case, notwithstanding that they both set out to define "employment". The first is that the definition of employment under s.83 of the 2010 Act is wider than the test in the 1996 Act. In fact, it is in all practical terms the same test as the "worker" test as defined in s.230(3)(b) of the 1996 Act (Pimlico Plumbers v Smith [2018] IRLR 872). The second significant difference is that it derives from EU law and the provision must, therefore, be interpreted in a manner which is, as far as possible, consistent with EU law. That imposes a test where the concept of relationship and status may weigh

greater than that of privity of contract between the parties. In Halawi, Arden LJ went on the say, at para 36 that:-

> ***There is no doubt that s.83(2) of the EA 2010 must be interpreted so as to be compatible with EU law, as the Supreme Court interpreted it in Hashwani. Likewise there is no doubt that there is an autonomous meaning in EU law of the term 'employee', and Member States' domestic legislation cannot diminish this meaning.***

6.15 Similarly, in Haswani v Jivraj [2011] ICR 1004 Lord Clarke had confirmed that the meaning of 'employee' is to be determined in accordance with EU law. At para 27 he said:-

> ***…the Court of Justice draws a clear distinction between those who are, in substance, employed and those who are 'independent providers of services who are not in a relationship of subordination with the person who receives the services'. I see no reason why the same distinction should not be drawn for the purposes of the Regulations between those who are employed and those who are not notionally but genuinely self-employed.***

And at para 34 :-

> ***The essential questions in each case are therefore those identified in … Allonby [2004] IRLR 224, namely whether, on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services. Those are broad questions which depend upon the circumstances of the particular case. They depend upon a detailed consideration of the relationship between the parties. As I see it, that is what Baroness Hale meant when she said that the essential difference is between the employed and the self-employed.***

6.16 In Allonby v Rossendale & Accrington College [2004] IRLR 224, the Court of Justice of the EU held that the term 'employee' should not be interpreted restrictively. That case concerned a lecturer who had previously been employed directly but who was required to set up a service company and agree to provide her services through a third party. In answering whether she was an employee or self-employed for the purposes of discrimination law the Court held: -

> ***66. Accordingly, the term worker … cannot be defined by reference to the legislation of the Member States but has a Community meaning. Moreover, it cannot be interpreted restrictively.***
>
> ***67. For the purposes of that provision, there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration***
>
> ***68… It is clear from that definition that the authors of the Treaty did not intend that the term worker, within the meaning of Article 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services…***
>
> ***69. The question whether such a relationship exists must be answered in each particular case having regard to all the factors and circumstances by which the relationship between the parties is characterised.***

> ***70. Provided that a person is a worker within the meaning of Article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article.***
>
> ***71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of Article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article***

This still requires some legal relationship between the parties.

6.17 In Halawi, Arden LJ said at para 4,

> ***The existence of the relationship of employment under the Equality Act 2010 does not turn on whether the parties entered into a formal contract which would be recognised in domestic law as constituting employment but on whether it meets the criteria laid down by EU law. The criteria includes a requirement that the putative employee should agree personally to perform services, and a requirement that the putative employee should be subordinate to the employer, that is, generally be bound to act on the employer's instructions***

Again, the "formal contract" need not be classed as employment in domestic law, but there is still a need for "it, that is the contractual relationship

6.18 In Danosa v LKB Lizings SIA [2010] All ER (D) 178 (Nov), the CJEU held that a sole director of a company could be an employee for EU law purposes even though she had no contract of employment and even though, under the national law (Latvian), the relationship was of agency. It observed that :-

> ***"… formal categorisation as a self-employed person under national law does not exclude the possibility that a person may have to be treated as a worker for the purposes [of the directive] if that person's independence is merely notional, thereby disguising an employment relationship within the meaning of the Directive."***

6.19 Some of these authorities look like there is an intermediate legal entity between Claimant and Respondent when in fact there isn't. Nevertheless, it seems to me that there could be circumstances where the presence of an intermediary legal entity does not prevent the employment arising in the context of EU rights. The issue is whether the putative worker is, in respect of the relationship in question, truly an independent contractor. However, the fact of an intermediate legal entity which is itself a trading entity of the putative employee is one which in many cases may well point towards independent contractor status, albeit that it will not necessarily prevent employment status arising if the weight of all the relevant factors surrounding the relationship sufficiently tips it in that direction. The definition is met in consideration of 3 questions:-

a) Is it an arrangement where the Claimant is required to personally do the work?

b) Is there sufficient subordination to the Respondent in that arrangement?

c) Is the Respondent a client or customer of the Claimant?

6.20 If the answer is “yes” to the first two, and “no” to the third, the Claimant was an employee of the Respondent for the purpose of s.83 of the 2010 Act.

6.21 The first question causes little difficulty. I have set out my conclusions on the requirement for the Claimant to perform personal work above. The relationship between the Claimant and Respondent in this case came about by personal referral where the only knowledge of the referring party was the Claimant’s personal qualities. The relationship was forged after a personal interview, and once engaged, the functions were performed only by the Claimant. She was given personal advantages by way of membership and occupied a personal position both as signatory to at least one bank account and was personally named as a contracting party for energy supply for the benefit of the Respondent. There was in fact no substitution and although I have found there could have been some in the margins of insignificant clerical functions, that falls into a de minimis class against the core function of the role which had to be performed by the Claimant. The Respondent’s desire for a professional secretary did not require an intermediary company to contract with, it could just as easily have been satisfied by an individual agreeing to contract personally, but still outside of a traditional “employment” relationship. It is only by serendipity that this particular Claimant happened to have her own limited company in existence for other purposes and moreover one where it operated in a market that was amenable to contracting out her services in this case as a means of the remuneration flowing to her. Had the company not existed, she would have had a direct contracting relationship with the Respondent as a contractor and therefore “worker” and possibly, even, that of employee.

6.22 I am therefore satisfied that there was sufficient requirement for the Claimant to do the work personally for the first question to be answered affirmative.

6.23 I move on to consider subordination. My conclusions on this factor are mixed. There is something of an analogy between subordination and the traditional control test in domestic law.

6.24 The Claimant did not tender for this work and the initial price for the role was set by the Respondent and was the same whether it was paid under this arrangement (for which VAT would be applied but the Respondent could account for that in its VAT returns) or, I suspect, whether it was paid as wages (for which employers NI and pension contributions would be added). The Claimant did, however, challenge the assessment of time being spent on Club work and the effect it was having on “her business” and as a result obtained agreement for the level of invoice fee to be increased.

6.25 The nature of the role was governed principally by the rules in the club’s constitution and the direction of the executive committee. That would suggest some subordination. Having said that, the actual performance of the role was left to the Claimant, and she had no line management to report to as such, she was only subject to the control of that committee to the extent the role of secretary reported to it. The extent to which the committee ultimately had a right to censure her performance is consistent with the management of an external contractor. Although the Claimant’s participation in that committee meant from time to time she would herself be the source of identifying necessary work to undertake, that was

consistent with the nature of the executive committee role. She could not press on with new work without first raising it with the committee. All this suggests the success of the relationship was better defined by output measures, such as maintaining compliance and governance, rather than input measures, such as the completion of defined tasks to a set standard. That factor may point away from subordination.

6.26 She would later acquire a vote on the committee which seems to diminish subordination in proportion to the extent it elevated her to the same status as the other voting members.

6.27 The arrangements for work were left to the Claimant in terms of both when and where she did it, save only in respect of the necessary attendance at meetings. The prior preparation and work on any subsequent action points were a matter for her amongst her other professional commitments. The Claimant had been appointed specifically because the Respondent recognised it did not have the expertise to perform the role. The Claimant was in large measure free to dictate how the outcome of compliance would be achieved. That points away from subordination.

6.28 The subject matter of the work itself was often of a confidential nature and in part explicitly described as such in the minutes. It could relate to staff or members or the business and the financial affairs of the Respondent. She was ultimately subject to appointment by the membership according to the rules and the three year tenure of the post of secretary. Those rules were the terms that bound all members of the club together. There is nothing in that which points one way more than the other to establish subordination.

6.29 There was an intention at least to restrict the handling of club matters and club paperwork so that it remained on the premises. In that regard the office facilities and laptop were made available but not used and there was no sanction for not using them. It is a factor which at least does not support subordination.

6.30 Looking at the intention and reality of this working arrangement between the parties, I am not satisfied that the force of it is sufficient to establish the necessary subordination to the Respondent.

6.31 In any event, even if it is, I have to consider whether the relationship was one where the Respondent was a client or customer. Again the picture is mixed. There are aspects of the relationship which might point against this, in particular, the integration with the executive committee and rules of the club. But the obvious factor in support is that the Claimant was in fact a director of an active trading company, the purpose of which was to contract out her personal professional skills. That points towards a client or customer relationship. The Claimant relies on the fact that this was not an area of expertise that the company held itself out as providing or had so contracted in the past. That might point away from a client relationship especially when considered alongside the manner in which the parties came together by referral at an informal interview, but why should that be? Many small private trading companies may be introduced to a potential recipient of their services by referral, based on the skill of a director and in an area that they may be competent in, but which was

not something they would normally market themselves for. I can envisage this may be even more likely in the broad areas of management and business consulting than other trading companies. The available price for the work may be less than such companies would ordinarily charge but none of that would prevent any contract that was then formed from being part of that businesses commercial activity with a new client.

6.32 Much comes down to whether the happenstance that the person the Respondent ended up interviewing happened to have their own consulting company. I have come to the conclusion that that is not as significant as I first considered in assessing whether this established a client/customer relationship. Significantly, the Claimant accepts in her case that that is how the relationship started. She continued to describe it as self-employment throughout which, as she had no other form of self-employment, can only have been in the context of her commercial activities through SMC. The surrounding tax and VAT treatments were consistent with a mutual understanding this was a commercial provision of professional services. I have concluded, therefore, that the balance of all the factors do establish that the Respondent was a client or customer of the services provided by the Claimant.

6.33 In conclusion, if I am wrong about the issue of privity of contract and there does have to be a direct contracting relationship between Claimant and Respondent, her claim fails for want of a relevant contract. If I am right that the law permits circumstances in which the absence of a direct contracting relationship is not fatal so long as the test under EU law is satisfied, then I am afraid to say the same result follows as I am not satisfied the test is satisfied.

6.34 The ultimate consequence of my decision is that the Claimant has not established jurisdiction for the claims presented which must therefore be struck out.

EMPLOYMENT JUDGE R Clark

DATE 31 May 2019

JUDGMENT SENT TO THE PARTIES ON

……...…….

AND ENTERED IN THE REGISTER

……...…….

FOR SECRETARY OF THE TRIBUNALS