EMPLOYMENT TRIBUNALS

Claimant: **Miss E Millett**

Respondents: **(R1) Edward Hands and Lewis Limited**
(R2) Mr Jason Lee Hathaway
(R3) Mr Paul Stuart Stubbs

Heard at: **Nottingham** **On:** **Tuesday 18 June 2019**

Before: **Employment Judge Blackwell (sitting alone)**

Representatives

Claimant: **Ms R Wedderspoon of Counsel**
Respondents: **Mr S Doherty of Counsel**

RESERVED JUDGMENT

1. The Claimant was an employee within the meaning of Section 230(1) of the Employment Rights Act 1996 from 14 February 2012 to the effective date of termination on 28 March 2018. It therefore follows that the Claimant has sufficient continuous employment to pursue a claim of constructive unfair dismissal.

2. The Respondents' applications pursuant to Rules 37 and 39 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are both refused.

RESERVED REASONS

1. Ms Wedderspoon represented the Claimant and called the Claimant to give evidence. Mr Doherty represented the Respondents and he called Mr Kujawinski, a consultant with the first Respondent, Mr J C Smith, a former partner of Sheltons, Mrs D T Archer, a Practice Manager for the Respondents, Mr J Hathaway, a Director and shareholder of the first Respondent and his wife Mrs L Hathaway, also a Director and shareholder of the first Respondent.

2. There was an agreed bundle of documents and references are to page numbers in that bundle.

3. I am grateful to both Counsel for their conduct of the case and for their very helpful skeleton arguments and closing submissions.

4. The issues were set out in a case management summary held before Employment Judge Ahmed and sent to the parties on 16 October 2018 as follows:-

> 4.1 Whether the Claimant was an employee, worker or self-employed independent contractor of the first Respondent and if necessary to identify the date she was an employee or worker.
>
> 4.2 Whether pursuant to Section 108 of the Employment Rights Act 1996 the Claimant has the necessary qualifying period of service to bring a complaint of unfair dismissal.
>
> 4.3 Whether the Claimant was at the material times a disabled person within the meaning of Section 6 of the Equality Act 2010. This no longer remains an issue; disability having been conceded by the Respondents.
>
> 4.4 Whether any of the complaint should be struck out as having no reasonable prospect of success under Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. Alternatively to consider whether any deposit order should be made in respect of any allegation or argument which has little reasonable prospect of success under Rule 39 of the Employment Tribunal Rules of Procedure 2013.

5. Dealing with the first two issues. First it is common ground that if I find Ms Millett to have been an employee throughout her period with Sheltons then it follows as a consequence of her employment with the first Respondent that she has sufficient continuous employment to bring a claim of constructive unfair dismissal having regard to Section 108 of the Employment Rights Act 1996. The relevant statutory provision is Section 230 of the 1996 Act:-

> "(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" (except in the phrases "shop worker" and "betting 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."

6. There is a plethora of case law and I am grateful to Counsel for their respective skeleton arguments which I accept draw my attention to those authorities relevant to the issue in this case.

Findings of Fact

7. Ms Millett was employed as a solicitor in the private client department of Sheltons Solicitors and her employment began at that firm on 14 February 2012.

8. Sheltons were a small firm of solicitors having at that time 3 equity partners. Mr Smith and Mr Kujawinski (both of whom gave evidence) and a Mr Watkinson.

9. Ms Millett and her colleague Ms Grewal were young and commendably ambitious. The 3 equity partners were nearing the end of their careers and were looking for exit strategies. One such strategy was a merger with another firm of solicitors. In the relevant period, ie between 2012 and 2016 there were discussions with Hopkins and with the first Respondent. Sheltons became an LLP at some point prior to 2013.

10. Early in 2013 Ms Millett approached Mr Smith who was at that time regarded as the senior partner concerning a promotion.

11. What then transpired sews the seed of the current dispute between the parties.

12. Those discussions led to an exchange of e-mails beginning at page 164 which is a lengthy e-mail from Mr Smith to Ms Millett and Ms Grewal and is dated 19 July 2013. The opening paragraph reads:

> "You are aware by now that the structure of the partnership which you joined in April is somewhat informal. We have simply carried over the terms of partnership agreements from many years ago. I believe that you have a copy of one."

13. It is common ground that the copy referred to is a partnership agreement of 1 January 2009 which begins at page 163(aa).

14. Mr Smith then makes reference to the fact that the partnership is now an LLP and says:

> "it was not intended that it would make any difference to the partnership agreement itself which I believe in law continues to run along-side the LLP."

He then says:

> "With the admission of you both as salaried partners, it is accepted that things have changed and so a new modern form of agreement is appropriate based as closely as possible on the existing one."

15. Ms Millett had drafted such an agreement but it was never adopted save insofar as the maternity provisions from that document were accepted as applying. Unfortunately that document can no longer be found.

16. The e-mail goes on as follows:

> "Therefore we agreed that we would simply exchange e-mails to record the main terms of the new partnership and most importantly to record the specific agreement which we reached yesterday in relation to maternity leave because that is entirely new to us – for obvious reasons we have never had to have such provisions hitherto. We have agreed the entitlement to maternity leave is in accordance with Section 14 of your draft.
>
> Therefore the other main terms of the agreement between us taken from the pre-existing agreement between the other 3 partners is as follows:-
>
> > Brian, George and I will continue to share profits equally after your salaries as agreed from time to time are taken.
>
> The partnership will continue upon the usual express and implied terms as set out in the earlier agreement unless determined by any of the usual events which are then listed."

It goes on:

> "Can we all agree therefore that the terms of the old agreement are extended to include Ella and Harpreet and that this will for the time being form the basis of our current partnership mutatis mutandis and subject to the contents of this e-mail and any other variations which we agree which should be recorded as special resolutions of the LLP."

17. I should note that there is no record of any such special resolutions.

18. Ms Millett confirmed her agreement to that e-mail. Two matters which are not recorded within the exchange of e-mails is the level of the salary then set; nor is it recorded that neither Ms Millett or Ms Grewal were required to make a capital contribution in accordance with. Thus Ms Millett was not at that point an equity partner, though it is clear that it was everybody's intention that she should become one in due course.

19. From April 2013 Ms Millett was no longer paid through the PAYE payroll. She was in fact paid through the partnership's office account. Such payments were clearly drawings and were described as such. Much was made of the fact that such payments were net of income tax and national insurance contributions. In one sense they were since the partnership prudently set aside sums sufficient to pay tax and NI contributions. In my view nothing turns on this point. It is clear that from a tax and national insurance point of view from the tax year 13/14 Ms Millett completed tax returns on the basis of self-employment. Again Ms Millett appears to believe that there was no advantage to her in that arrangement. Again in my view that is irrelevant.

20. She appears to have been paid consistently the sum of £2,480.00 per month together with a car allowance equivalent to £3,000 per annum.

21. From early 2013 onwards it is clear that Ms Millett was held out as a partner to the outside world.

22. there is a conflict of evidence as to whether Ms Millett and Ms Grewal were effectively equal partners with the 3 equity partners in terms of the management and running of the partnership.

23. I do not believe that there is a black and white answer. I accept Mr Smith's evidence that Ms Millett was entirely responsible for her own area of expertise ie will drafting and that she took an active hand in the management of the firm, see for example page 177(p). It is clear that Ms Millett had at all times her eyes on the future and her career and was thus actively engaged in matters which would affect the future of the partnership and thus her own future.

24. Nonetheless I accept her evidence that she was not involved in discussions with the partnerships' accountants save in respect of her personal returns.

25. Further the 3 equity partners own the premises from which Sheltons practiced and she did not share in any benefits consequent upon that either in the period when Sheltons existed or as a consequence of the subsequent acquisition of the business of Sheltons by the first Respondents.

26. On 31 March 2014 Mr Smith wrote to all partners an e-mail at page 172(u) as follows:

> "This e-mail is to confirm the agreement between us concerning the arrangements for basic drawings and profit share from April 2014 in relation to Sheltons Solicitors LLP.
>
> All partners will take basic monthly drawings as agreed between them from time to time.
>
> In addition there will be the following allocation of profit to be determined by reference to the audited accounts at the end of the tax year:-
>
> JUNIOR PARTNERS
>
> Ella Millett - 3% of the net profit in addition to monthly drawings."

27. The e-mail then went on to deal with Ms Grewal's allocation of 2% of the net profit and the distribution of the remaining 95% of the net profit as between the 3 equity partners.

28. The penultimate paragraph of the e-mail reads:

> "For the avoidance of doubt the guaranteed income of the junior partners, namely Ella and Harpreet will not exceed 80% of the anticipated annual profit and their monthly drawings will be set by agreement accordingly."

29. At 174 is an e-mail from Mr Smith dealing with what appears to have been a not entirely favourable final account for the year 2015. He ends the e-mail as follows:

> "Welcome to the uncertain world of the self-employed."

30. At 177(e) is an e-mail of 9 September 2015 again with reference to the 2015 accounts. It makes a reference to an e-mail from the partnerships' accountants which appears at the bottom of 177(e) and the top of 177(f).

31. The contents of Mr Smith's e-mail are not entirely clear and neither Mr Smith nor Ms Millett could throw much light onto the subject save to say that the paragraph which read as follows:

> "Therefore the equity partners propose an ex-gratia payment for this year to Harpreet of £1,750 and to of Ella £1,000. The latter to take some account of Ella's maternity absence. I must stress that this is a goodwill gesture and not a profit share as such as that has already been accounted for."

32. It seems to me that it is likely that these ex-gratia payments were made either to top up either the profit share or the salary element. It clearly cast doubt on whether or not Ms Millett and Ms Grewal were genuinely taking the risk of profits being insufficient to pay their agreed monthly drawings.

33. In 2016 discussions began with the first Respondent with a view to the acquisition of Sheltons. This eventually led to the acquisition by the first Respondents of the trade of Sheltons on 1 October 2016.

34. It is common ground that Ms Millett became an employee for the first Respondent on that date.

35. Prior to that agreement it was acknowledged by both sides that there would be a relevant transfer within the meaning of Regulation 3 of TUPE Regulations 2006.

36. As a consequence "appropriate representatives" were appointed pursuant to Regulation 13(3)(b)(i) of the 2006 Regulations and Ms Millett was one of those appropriate representatives.

37. Both Mr Smith and Mr Kujawinski were aware that Ms Millett had been so appointed but the obvious contradiction between her appointment and their assertion that she was not at that point an employee (because she had ceased to be so once she acquired the status of partner in 2013) does not seem to have registered with them.

38. As with all such agreements there is a list of employees who are to transfer. The commercial agreement between the parties begins at page 259(m) and is dated 28 September 2016. Transferred employees are defined at page 259(o) as being those listed in Schedule 3. Schedule 3 appears at pages 259(x) and (y). At page 259(y) there is an entry relating to Ms Millett under the heading of salaried partners. Her salary is recorded at £2,480 per month with a car allowance of £3,000 and added is the following:

> "Actual drawings salaried £38,000 pa, plus 2.5%."

39. My attention was drawn to an earlier such schedule at page 202 which describes Ms Millett as self-employed. There was a suggestion, though it was not put to Ms Millett that she was responsible for the change between page 202 and 259(y) ie the deletion of the term self-employed. I do not accept that suggestion.

40. As a consequence of that entry in the schedule of transferred employees Mr Hathaway quite understandably at the time of transfer believed that Ms Millett was an employee. His views were later changed by matters which I need not go into save insofar as they are described above.

Conclusions

41. I am reminded of the old adage that a solicitor who acts for himself has a fool for a client. Ms Millett did not take advice and Mr Smith appears to have believed that any disagreement between the partners would be resolved by discussion between the partners.

42. He may well have been right had Sheltons continued as a legal entity. However they did not and the 3 equity partners ceased to have influence post the transfer to the first Respondents.

43. As to the law I begin with a case cited by Ms Wedderspoon, namely that of the decision of the Employment Appeal Tribunal in **Kovats v TFO Management LLP and another** [2009] ICR beginning at page 1140. Paragraph 17 of the decision reads as follows:

> "We agree with Whittaker and Machell: The Law of Limited Liability Partnerships Second Edition, paragraph 8.27:-
>
> > "If the limited liability partnership was a partnership and a person was held out of the partner for the purposes of Section 14 of the Partnership Act 1890 but was actually an employee of the partnership rather than a partner, the same criteria which determined his status as between employee and partner will apply to determine whether or not he is an employee of the limited liability partnership.""

44. Thereafter as I indicated before Counsel began their closing submissions I intended to adopt paragraphs 23 to 31 inclusive of Mr Arnold's skeleton argument of 7 January 2019 which had been adopted in turn by Mr Doherty.

45. Ms Wedderspoon drew me to other authorities including the case of **Williamson and Soden Solicitors v Mr JJR Briers** a decision of the Employment Appeal Tribunal UK EAT/0611/10/DM. That case also concerned the status of **Mr Briers** who was "a salaried partner" of the appellants in that case. There are some similarities with the facts of this case but as always no two cases are ever identical. There is never a magic key which unlocks the key to the status of the Claimant. As I have already indicated Mr Doherty has drawn to my attention the case of **Morrison against Aberdein Considine and Co** which again has similarities to the current facts but which drew a different conclusion to that in the **Briers's** case.

46. Most status cases are difficult to determine and this is no exception. However adopting the words of Lady Wise in the **Morrison** case as follows:

> "Combining the concepts of a salaried employee and a profit sharing partner in one individual relationship with the firm results in the need for very careful scrutiny of all the circumstances where the status of that individual vis-à-vis the firm is unclear or is challenged as in the present case."

47. I do not think that Mr Smith and Ms Millett were even ad idem as to what the agreement reached in 2013 meant. That however is not relevant. I must decide the issue on the basis of the facts found above. No single fact is determinative. However it seems to me that it was the intention of Mr Smith and his fellow partner that Ms Millett and Ms Grewal would have a guaranteed salary.

48. I am of the view that Ms Millett had the status of employee throughout her period with Sheltons, notwithstanding the agreement that was come to in 2013. It therefore follows that she has sufficient continuous employment to bring a claim of constructive unfair dismissal against the Respondent.

Strikeout/Deposit

49. The relevant provisions are Regulations 37 and 39 of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

> "Regulation 37:-
>
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:-
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Regulation 39:-

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order:-

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

50. As to case law I again gratefully adopt the paragraphs 38 to 43 of Messrs Doherty/Arnold's skeleton arguments as being the correct approach as set out in the relevant authorities.

51. The Respondent's application is set out in an e-mail to the Tribunal of 13 November at page 117.

52. Turning first to detriments 1-14. In that regard Mr Doherty refers me to **St Helens Metropolitan Borough Council v Derbyshire and Others** to the effect that merely suffering mental distress is insufficient it would have to be reasonable in all the circumstances. Perhaps the most widely adopted definition is that which emerges from the case of Shamoon against the Chief Constable of Royal Ulster Constabulary [2003] ICR 337 to the effect that a detriment exists if:-

> "A reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work."

53. It seems to me that it would be necessary to hear the Claimant's evidence in relation to detriments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 14. They need to be heard in context and by a full Tribunal. Having said that it is clear that the documentary evidence is overwhelmingly in the Respondent's favour. As to detriments 11, 12 and 13 these are matters that will be determined at the full hearing having regard to the decision I have reached as to the Claimant's status.

Direct pregnancy or maternity leave discrimination under Section 13 of the Equality Act 2010

54. As I understand the position Section 13 can apply where the less favourable treatment occurs out with the protected period as defined in Section 18(6) of the Equality Act 2010. See also subsection (7) of Section 18.

The alleged breach of an express term of contract

55. As I understand Ms Wedderspoon's submission and the pleading there is an allegation that the role of branch manager was taken away from the Claimant. Again this is a matter that will depend on the evidence.

The Section 15 discrimination arising from disability

56. Again this is now to be determined in the light of my finding as to the Claimant's status.

57. Any freestanding cause of action of disability detriment has been withdrawn by the Claimant.

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Employment Judge Blackwell

Date 21 June 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE