



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Hunter-Clarke  
**Respondent:** Mr Neil Hamilton  
**Heard at:** Pontypridd County and Family Court  
**On:** 3 – 5 June 2019  
**Before:** Employment Judge Moore

## Representation

**Claimant:** Mr S Tuppen, Lay Representative  
**Respondent:** In Person

# RESERVED JUDGMENT

The Respondent was the Claimant's employer for the purposes of S230 Employment Rights Act 1996.

# REASONS

## Background

1. The claim was presented on 7 June 2018. The Claimant brought claims of unfair dismissal contrary to section 103 of the Employment Rights Act 1996 (whistleblowing), wrongful dismissal, notice pay and holiday pay. The claim was brought against four separate Respondents as follows:

- a) First Respondent - Mr Neil Hamilton;
- b) Second Respondents – a group of individual Assembly members (“AMs”) who made up the UKIP Group in the Assembly at the material time namely Neil Hamilton, Caroline Jones, Michelle Brown, Gareth Bennett, and David Rowlands (“the Group”);
- c) Third Respondent - National Assembly for Wales Commission (“the Commission”);
- d) Fourth Respondent - Caroline Jones.

2. All four Respondents deny they were Claimant's employer. A Preliminary Hearing took place on 28 February 2019 before Employment Judge Frazer. There was insufficient time to determine the issue of employer identity and this further Preliminary Hearing was listed to decide this issue.
3. Prior to the Preliminary Hearing on 28 February 2019, the parties exchanged witness statements and agreed a joint bundle of documents. Prior to the this Preliminary Hearing, parties also exchanged skeleton arguments. The witnesses due to give evidence at this Preliminary Hearing were as follows; the Claimant, Neil Hamilton, Caroline Jones, Michelle Brown, Gareth Bennett, Mark Major (Senior Adviser to Caroline Jones) and Rebecca Hardwicke (Head of Members Business Support) for the third Respondent. David Rowlands did not attend the Preliminary Hearing nor did he present any witness evidence or skeleton arguments.

### **The Hearing 3 – 5 June 2019 – issues arising**

#### **Representation of the Claimant**

4. The Claimant sought to be represented by two representatives, Mr Tuppen, a lay representative and Mr M Ford of Counsel. I directed that the Claimant's representation was a matter for him but that I would not permit two representatives to cross examine witnesses and address the Tribunal as this would render the Hearing unwieldy and become potentially unmanageable. I asked the Claimant to nominate one person to primarily address the Tribunal although he would be free to consult with both representatives and he elected for Mr Tuppen.

#### **Withdrawal of claims on 4 June 2019**

5. The Claimant's evidence and that of Mr Bennett was heard on 3 June 2019. Mr Hamilton then gave evidence on 4 June 2019 after which the parties requested an adjournment. The Hearing reconvened at 1:00pm at which point Mr Roberts, Counsel for Caroline Jones, indicated that the Claimant wished to withdraw all claims against all Respondents save for the first Respondent, Mr Neil Hamilton, with no order for costs. I clarified with the Claimant's representative, Mr Tuppen, that the Claimant was withdrawing against all Respondents in these terms and he confirmed that to be the case. Mr Tuppen did not express a wish to reserve the right to bring a further claim. Mr Roberts applied for the claims to be dismissed on withdrawal and an oral judgement was given to that effect. The written judgement dismissing the claims upon withdrawal and dealing with the consent order in respect of costs was signed on 4 June 2019 and issued on 14 June 2019.

#### **Mr Hamilton's application for a stay in the proceedings – 4 June 2019**

6. As at 1.30pm on 4 June 2019 the claim continued against Mr Neil Hamilton (hereafter referred to as the Respondent) only. The Respondent made an application for an indefinite stay to the proceedings on the basis that he had not been party to the discussions between the Claimant and the other Respondents concerning the withdrawal of the claims against them and given the significant change in events he was exposed. This application was opposed by the Claimant on the basis that there had already been a delay of 12 months from the issue of the claim in reaching this Preliminary Hearing stage, all of the evidence that needed to be heard had been heard and all that remained was for the parties to make their submissions.

7. I refused the Respondent's application for an indefinite stay in the proceedings. All of the evidence that could have been heard had been heard at that stage. I did however adjourn the Hearing to restart on 5 June 2019 so as to enable the Respondent further time if required to amend or add to his submissions.

8. On reconvening the Hearing on 5 June 2019, the Respondent confirmed he was content to proceed to submissions and did not seek to make any further application for a stay in the proceedings.

#### Claimant's application under Rule 52 (b) – 5 June 2019

9. Following submissions on the morning of 5 June 2019, the Claimant's representative made an application that the Tribunal should not issue a judgment dismissing the claims against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents under Rule 52 (b). The Claimant's representative was informed that this application was too late as a judgment had already been given orally and later a written judgment signed on 4 June 2019 dismissing the claims following the unequivocal withdrawal on 4 June 2019.

10. The Claimant's representative indicated that depending on the outcome of this Preliminary Hearing, upon receiving the reserved judgment, they may seek to apply for one or more of the former Respondents to be added back into the proceedings under Rule 34 and or apply for reconsideration of the judgment to dismiss the claims upon withdrawal.

11. Following submissions on 5 June 2019 and I reserved my decision.

#### **The Law**

12. At the outset of the case there were a number of possible legal positions relevant to establishing the identity of the Claimant's employer. There was no dispute that the Claimant was an employee. The dispute was which, of the named Respondents was his employer?

13. Following the withdrawal of all claims against all Respondents save Mr Neil Hamilton, a number of the legal issues fell away and hence I did not hear evidence or submissions on the following:

- a) Whether there had been a TUPE transfer of the Claimant's employment;
- b) Whether the Group was an unincorporated association and or collectively or individually capable of employing the Claimant;<sup>1</sup>
- c) Whether Assembly Members act as agents for the Commission when entering into contracts of employment.

14. The starting point in this case was the common law rule of privity of contract. This provides that no-one but the parties to a contract can be entitled under it or be bound by it.

---

<sup>1</sup> Unincorporated associations were briefly mentioned in the Respondent's submissions – see paragraphs 58 and 60.

15. The definition of an employer is set out in S230 (4) Employment Rights Act (“ERA”).

16. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB 497**, the test for a contract of service was set out as follows (per Mackenna J):

(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.

17. There must be an ‘irreducible minimum’ of obligation on each side to create a contract of service, personal performance and control.

18. I was also referred to **Carmichael and another v National Power Plc [1999] ICR 1226** where it was held that it would only be appropriate to determine the issue (of whether there was a contract of service) solely by reference to documents if it appeared from their own terms and / or from what the parties said or did subsequently that such documents were intended to constitute an exclusive record of the parties agreement.

19. In **Autoclenz Ltd v Belcher & Others [2011] UKSC 41** it was held that in the context of employment relationships where the written documentation might not reflect the reality of the relationship that it was necessary to determine the parties actual agreement by examining all of the circumstances and identify the parties actual legal obligations.

#### The role of statutory provisions in respect of the contract of employment

20. The Claimant’s employment was indirectly subject to and derived from certain statutory authorities. Section 24 of the Government of Wales Act 2006 provides that the Assembly Commission must make to (or in respect of) political groups to which Assembly members belong such payments [as the Board from time to time determines] for the purpose of assisting Assembly members who belong to those political groups to perform their functions as Assembly members. Section 27 of the Government of Wales Act 2006 provided for the establishment of the National Assembly for Wales Commission who are required to provide to the Assembly, or ensure that the Assembly is provided with, the property, staff and services required for Assembly purposes.

#### The Remuneration Board

The National Assembly for Wales (Remuneration) Measure 2010 (“Remuneration Measure”) provided for the establishment of a National Assembly for Wales Remuneration Board (“the Board”). The Board’s functions are to make Determinations in relation to the remuneration of Assembly members, the First Minister, Welsh Ministers, the Counsel General and Deputy Welsh Ministers, and for connected purposes. The functions are set out in section 3 and require the Board to provide Assembly members with resources which are adequate to enable them to exercise their functions as Assembly members.

### Findings of fact

21. The Respondent was elected in May 2016 as Assembly Member (“AM”) for the National Assembly for Wales representing Mid and West Wales. He was also the leader of the UKIP Group in the Assembly from May 2016 until 17 May 2018 when he was replaced by Caroline Jones AM.

### Funding of Assembly member staff

22. In accordance with the Remuneration Measure, the Board makes funding available to AM’s for approved purposes connected with the role of AM. This does not include funds for campaigning or party-political purposes but is more in respect of funding for expenses, such as rental of office accommodation, equipment and travel as well as employment of AM staff.

### Determinations

23. Determinations are issued under the section 3 of the Remuneration Measure. These are set out in a document titled “Determination on Member’s Pay and Allowances”. The relevant Determination for the purpose of these proceedings was the 2018 – 2019 version. Provision for employment of staff is in Chapter 7 and Chapter 8.

24. The arrangements for AM’s pay and allowances (including funding of staff) are contained in the Determinations which are updated from time to time.

25. Chapter 7 of the Determination sets out the AM’s staffing expenditure allowances. The Determination contained elements of AM staff terms and conditions of employment namely salary scales and life assurance provision, date and frequency of salary payments, pension provisions and redundancy entitlements. Further, paragraph 7.6 provided as follows;

#### **“7.6 Contracts of Employment**

**7.6.1 Members are required to provide each of their employees with a standard written statement of the terms and conditions of employment that has been issued by the Members’ Business Support team. Members must provide a signed copy to the Members Business Support team within one month of the commencement of the employment.”**

26. Staff employed by AM’s are known as Assembly Members Support Staff with an official acronym of “AMSS”. AMSS are employed by the AM’s. Each AM enters into a contract of employment with his or her individual AMSS but within the confines of contracts, pay scales and policies set by the Board via the Members’ Business Support Team (“MBS”).

27. AM’s are able to agree individual job descriptions with AMSS but must use the MBS template. They can advertise and recruit staff (subject to below re family members) and decide where within the band and rate of pay set by MBS an individual staff member should be appointed to. They are free to dictate days and hours of work and location, organise staff on a daily and continuing basis, agree holidays and breaks (albeit the number of holidays provided is determined by the terms and conditions of employment). Absence and performance management,

appraisal, discipline are all managed by the AM but again within the policies set down by the Board via MBS.

### Role of MBS

28. MBS is a department falling under the control of the Assembly Commission. MBS advises AM's on management of office and staff and processes and approves expenses claims by AM's. They will manage recruitment for AM's where the proposed appointment is a family member of the AM. MBS also have a common set of terms and conditions of employment that must be used as well as a suite of documents and policies relevant to employment of AMSS that AM's are required to use. In order for the AM to receive funding for AMSS from the Board, the AM must agree to employ the AMSS staff according to salary scales set by the Board and use of the standard set of terms and conditions of employment and adherence to certain policies all set by the Board. There is no ability for an AM to deviate from the standard set of terms and conditions of employment set by the Board, unless the AM funds the staff from their own personal funds.

### AMSS employed by Political Groups

29. At the time of the 2016 election, the Board rules allowed three or AM's to form a political group. Chapter 8 of the 2018 – 2019 Determinations provided for Support for Political Parties. Claims can be made for political groups to employ staff for administration and research but they can only be authorised by the designated leader of a political party or such other member to whom authority may be delegated by the leader. Therefore, the Determinations provide that only the leader (or designated persons) may employ group staff. AM's may not employ group staff, unless they were so authorised by the designated leader.

30.8.1.5 of Chapter 8 also it provides that political parties and individuals are required to provide each of their employees with the standard written statement of the terms and conditions of employment that has been issued by MBS. This mirrors the requirement for AM's to use the contracts of employment provided by MBS.

31. Following the 2016 election, seven AM's of the National Assembly formed the UKIP group ("the Group") and qualified for the funding under Chapter 8 to employ a Chief of Staff and other group staff such as researchers.

32. A political group is entitled to £50,000 in core administration allowance and an additional pro-rata amount linked to the number of members comprised of it. The Chief of Staff will be employed on an enhanced paygrade to staff who are employed by AM's directly.

### Commencement of the Claimant's employment

33. On 11 May 2016 the Claimant entered into a contract of employment with the Respondent as a Special Advisor. It was common ground between all of the parties that in respect of this particular contract of employment, the Respondent was the employer in his capacity as AM.

34. On 1 June 2016 the Claimant's role changed to Chief of Staff. The Respondent accepted under cross examination that he did not discuss the Claimant's appointment as Chief of Staff with any other member of the group prior to making

that appointment . It was the Respondent's decision and his decision alone to employ the Claimant as Chief of Staff.

35. There were no internal rules or procedures within the UKIP group governing the status of the leader of the UKIP group in the Assembly. The Respondent agreed in evidence there were no formal rules and as Group Leader he had resisted attempts to create rules. I was not referred to any evidence of any statutory authority, measure or determination that the leader of the UKIP Group or indeed any political party within the Assembly was an office holder (in the context of employing staff) with express or implied authority to employ staff in reference to that office.

36. Within the bundle was a copy of the UKIP National Rules of Procedure but this did not deal with the status of the leader of the group in the Assembly.

37. Upon the Claimant's appointment to Chief of Staff, a new statement of main terms and conditions of employment was entered into with the Respondent. As set out above, the wording of the statement of main terms and conditions of employment was not drafted by the Respondent. The Respondent was obliged to use the template wording provided by MBS. On the first page there was a table as follows:

<b>Name of Employer (either AM or Party Group Leader)<sup>2</sup></b>	<b>Neil Hamilton or the Leader for the UKIP Group from time to time</b>
<b>Name of Employee</b>	<b>Robin Hunter-Clarke</b>

The footnote number 1 stated as follows:

**"Where AMSS is employed by a party group, provide the name of the Party Leader followed by the words '*... or Leader for X Group from time to time*'.**

38. This contract commenced on 1 June 2016 and it was signed by both parties on 14 June 2016. The contract was initially for 18.5 hours per week with the Claimant continuing with his contract with the Respondent as Special Advisor for the other 18.5 hours. In addition there was a job and person specification for Chief of Staff for which the template was provided by MBS (this could be changed by the AM if they so chose, although there was no evidence that the Claimant's was so amended). On the final page was a paragraph as follows:

**"Should the Assembly Member resign or following an election, not be returned, this position will be made redundant".**

39. On 21 November 2016 a letter was issued by the Respondent to the Claimant confirming the position was permanent. Thereafter the Claimant continued in the role of Chief of Staff. As part of his duties he attended weekly group meetings where priorities and issues for the UKIP Group were discussed and the Claimant would then ensure actions that have been agreed by the group were carried out. There was some dispute between the parties regarding the amount of work carried out by the Claimant for the other members in the group, however, following the

---

2

withdrawal of the claims, against all of the Respondents except Mr Hamilton, it was not possible to make findings on this point.

40. On 17 May 2018 Caroline Jones became leader of the UKIP Group in place of Mr Neil Hamilton.

41. Evidence was heard from the Claimant and the Respondent about events that ensued. I set this out for background context only. As the Claimant withdrew his claim against Ms Jones as a Respondent this evidence was not tested and I make no findings of fact. For the avoidance of doubt the following paragraphs at 42 and 43 are a record of the evidence I heard and not findings of fact.

42. The Claimant's evidence was that following Ms Jones becoming Group Leader, he attended meetings with her on 17 and 18 May 2018 and that Ms Jones confirmed to the Claimant she was his employer and commenced instructing him. There were a series of text messages before the Tribunal between the Claimant and Ms Jones in which Ms Jones sought advice about who was on leave, and also sought advice on a political matter concerning one of her constituents. The Claimant's pleaded case was that as far as he was concerned Ms Jones became his employer.

43. At 9:30am on 4 June 2018 Ms Jones invited the Claimant to a meeting following which the Claimant understood he was dismissed.

Findings of fact continued.

44. Ms Jones' response to the claim set out that she had the right, as advised by the third Respondent (the Commission) and under the Determinations to decide not to continue to engage the Claimant after she took over as leader.

45. Mr Hamilton could not continue to employ the Claimant as Chief of Staff as he was no longer Group Leader.

46. The Claimant sought advice from Mr John Chick (former Head of MBS) on 5 June 2018 as to who actually employed him. Mr Chick replied later that day as follows:

**"The wording set out in your contract is consistent with the other members of the group staff, but the legal reality is that your contract was with the party leader individually, ie. Neil Hamilton AM. This is because the party group does not have a legal personality and, although the contract specifies, 'Neil Hamilton or the leader of the UKIP group from time-to-time' that does no more than set out a statement of the intended state of affairs. It does not bind any future leader and there is no automatic transfer of employment to the new leader.**

**Therefore, the new Leader is free to choose whether or not to employ the individual members of the group staff. Where the new Leader chooses not to employ a member of the group staff, that person would be redundant. The only alternative is where the former Leader is able to offer alternative employment to be funded from their staffing allowance as an individual Assembly Member.**

**Therefore if Neil is able to offer you continuing employment, you will be offered a new contract for the new role and would maintain your continuous service from 1 June 2016 (your original start date).**

**The decision on continuing employment is clearly one that Neil has to take. There would inevitably however be a change of job and job title for you as individual Members do not**



have the ability to appoint Chiefs of Staff. Neil would however be able to consider appointing at the most appropriate pay point for the relevant new post.

**If Neil does not offer you employment then I am afraid you would be redundant as of the end of this week. You would be entitled to a redundancy payment, contractual notice and any accrued but untaken holiday.”**

47. Following this email Mr Chick met the Respondent who confirmed he would not be offering a new position to the Claimant. The Respondent was firmly of the view that the Claimant's employment had transferred to Ms Jones along with all of the other group staff. There was an impasse. Mr Chick informed the Respondent that the Commission will not be able to continue to make funds available for the Claimant to be paid as UKIP Chief of Staff and therefore he would be paid up until 10 June 2018 and no further.

48. There was a UKIP Group meeting on 18 June 2018 in which the Respondent proposed a vote to reinstate the Claimant. This was the first vote that had ever been taken in relation to a member of the group staff, there was a majority vote of 3 to 2 in favour of the Claimant's reinstatement, however, this did not take happen as only Ms Jones could employ a Chief of Staff and she chose not to as per the advice she had been given.

49. The Claimant did not receive any notice pay or redundancy pay. His access to the Assembly and IT facilities was withdrawn by Mr Chick.

#### Submissions for the Claimant

50. The Respondent had not denied entering into the contract of employment rather his position was that he ceased to be the employer when he ceased to be the Leader of the UKIP Group. The Respondent had acted alone when entering into the contract of employment and admitted not consulting any member of the Group before employing the Claimant. The Respondent directly managed the Claimant and determined his conditions of employment within the confines of the terms and conditions set by the Commission.

51. There was no formal rules or constitution governing the Group. Mutuality of obligations was not in dispute. Only the Respondent had day to day control over the Claimant. The Respondent had offered no evidence how it was technically or legally possible for the Claimant's employment to have transferred to Ms Jones upon her becoming leader of the Group.

52. The contract was agreed between the Claimant and Mr Hamilton and there was no term permitting termination upon Mr Hamilton ceasing to be a member of the group.

53. Mr Hamilton could have created a partnership or agency relationship with other members in the Group but did neither. It is impossible to see how he could have transferred his obligations to a third party with no implicit or complied consent of that third party.

54. The Respondent had been advised to make the Claimant redundant or offer him a new post and resources were available but he chose not to do so.

#### Submissions for the Respondent

55. The Claimant had abandoned his case as set out in his particulars of claim that Caroline Jones was his employer.

56. This is the first occasion where a new Group leader has refused to take on a member of the group staff.

57. The essence of the Respondent's case is that the Claimant was employed by Caroline Jones on the basis of her position as Group leader.

58. The Respondent had not asserted the Group was an Unincorporated Association; this was not for the Respondent to confirm or deny. The Respondent accepted he had not wanted to formalise the running of the Group with formal rules and he had sought to form consensus.

59. The Respondent accepted that as Group leader it was in a sense correct to say he was the only member of the Group to exercise control of the Chief of Staff, as the Claimant's job description states he reports to the Group Leader. However other members of the Group could require the Claimant to perform tasks and he frequently did so without seeking permission or authority from the Respondent to do so.

60. It is possible to characterise the Group as a "loose" unincorporated association and to adduce rules from the conduct of the parties.

61. The suggestion the Respondent could have formed a partnership was without merit as the purpose of a partnership was to pursue profit which he could not do as an AM.

62. The Respondent accepted he was the employer during his tenure in office as the Group leader but any obligations beyond that are refuted.

63. The contracts of all group staff are not terminated on the replacement of a Group leader. Mutuality of obligations ceased when the Respondent ceased to be Group leader. It was impossible for the Respondent to have continued to employ the Claimant as Chief of Staff once he was no longer Group leader as he did not have the authority. The overall factual matrix should be considered. It was a condition precedent of Caroline Jones assuming the office of Group leader that she assumed the obligations that went with that office including the obligations under the contracts of employment for the group staff including the Claimant.

64. This is demonstrated as follows. The National Assembly for Wales created the rules under which the groups are formed. Under Section 24 of the Government of Wales Act 2006 the Assembly has, through standing orders permitted political groups to be formed with 3 or more Assembly Members. This also provides a statutory authority to ensure that Assembly member's staff are paid and the Remuneration Board provides such mechanisms.

65. The Group leader is the only person with authority to authorise expenditure for the Group Budget. There should be an implied provision that a new Group leader should take over existing group staff.

66. What was the purpose of the words after the Respondent's name in the Employer box in the Claimant's contract ("leader from time to time") if not to imply

if the Respondent ceased to be leader the new Group leader's name would be inserted.

67. Mr Chick of the Commission confirmed that this was the Commission's "intended state of affairs" so it should be implied. Otherwise it makes no sense and would just be mere speculation / hope. The Respondent had no authority to amend the wording with the words of the Commission lawyers who drew up the contracts.

68. The interests of group staff are not protected as this could mean that every time a Group Leader changes the group staff could be instantly dismissed. It is inconceivable that the Commission is advancing a case that drives a coach and horses through the fundamental employment law rights and goes against all of their policies. The Commission has elaborate procedures to ensure employees are treated fairly and rights are fully protected.

69. The drafting of the terms and conditions was incompetent. The Commission argued that the Claimant must pay the price and the burden pass to the Respondent even though he played no part in the Claimant's dismissal, and did his best to repair the damage by seeking his reinstatement.

70. The Claimant began reporting to Caroline Jones from the date the Respondent ceased to be group Leader and she gave him various instructions via text.

71. The Commission rules provide for what should happen if an AM resigned, dies or is not re-elected but fails to deal with the position for group staff if there is a change in Group leadership.

72. The Respondent could not continue to employ the Claimant as a Group Chief of Staff once he ceased to be Group Leader. The Chief of Staff post was funded under a separate budget and was not even on a pay grade permissible for an Assembly member. There was no authority for the Respondent to maintain the Claimant's employment by virtue of the Remuneration Board Rules. The Respondent could not have made him redundant as he had no authority to employ him as Group Chief of Staff.

73. Caroline Jones offered the Claimant one week's pay. His P45 showed that his leaving date was 10 June 2018 one week after he was dismissed by Ms Jones. If Caroline Jones authorized the payment, she must have been his employer.

### Conclusions

74. I start by considering whether the parties intended the contract of employment to be an exclusive record of the parties' agreement. If so, **Carmichael** provides that it is only appropriate to determine the issue of whether there was a contract of service solely by reference to the documents. Although this is not a case about whether there was a contract of service in my view this is equally applicable when determining who the parties to the contract are.

75. If I conclude that this was the intention, I will generally be restricted to considering that document. If I find it was not the parties' intention, I can look at other materials to determine the terms of the contract, namely who were the parties to the contract?

76. I found that AM staff, whether employed by the AM or the Group are subject to other provisions outside of the contract of employment (see paragraphs 25- 27 above). The Determination governed matters such as AMSS pay scales, life assurance provisions, pension provisions and redundancy arrangements. The policies and procedures drafted by MBS all applied to the Claimant. For example, if the Claimant had wanted to know what his redundancy entitlement was, he would refer to the Determination.

77. In addition to the Determinations, MBS had issued a number of other documents that supplemented the contracts namely an AMSS Handbook and other policies and procedures including a Code of Conduct and disciplinary and grievance procedures.

78. Given the overarching nature and content of the Determinations and the AMSS Handbook and other policies, it must follow that the parties could not have intended the contract itself to be an exclusive record of the agreement. For these reasons I have concluded that I am not restricted to determining the issues solely by reference to the written contract and it was not an exclusive record of the agreement between the parties in this case.

79. I now turn to considering the terms of contract as to the identity of the employer, having regard to all of the relevant evidence namely the contract itself, the Determination and the AMSS Handbook, policies and procedures as well as the party's intentions as to the identity of the employer.

80. The Respondent's primary contention was that Caroline Jones, on becoming Leader, became the Claimant's employer.

81. In my judgment there are a number of reasons why this cannot have been the case.

82. Firstly, the test for a contract of service between the claimant and Ms Jones is not met. The Claimant's evidence about Ms Jones assuming identity as his employer was untested as the claim against Ms Jones was withdrawn. There was no evidence before me that could lead me to conclude the **Ready Mixed Concrete** test was satisfied.

83. Secondly, there was not at any time the 'irreducible minimum' of obligation between Ms Jones and the Claimant to create a contract of service. Ms Jones was not involved, directly or indirectly in entering into the Claimant's contract of employment. Neither was there any evidence that this changed after the contract had been entered into between the Claimant and the Respondent.

84. Thirdly even if I look outside the contract to examine what was the true nature and reality of the agreement between the parties as to the identity of the employer, there was no evidence that there was an intention or agreement that the leader of the UKIP Group was subject to a legal obligation to become a party to the Claimant's contract of employment. There was no sub agreement or agency agreement between the Respondent and Ms Jones to employ the Claimant. The Respondent's evidence was that there were no formal rules within the party governing how the group would operate. I was not referred to any authority that provided the leader of the UKIP Group in the Assembly was an office holder (in the context of employing staff). The Respondent referred to S27 of the Government of Wales Act 2006, but this does not assist the Respondent. S27 provides the

Commission must ensure the Assembly is provided with staff required for Assembly purposes. It does not create a statutory office holder as submitted by the Respondent. Office holders' rights and duties are defined by the office held. The Respondent has not shown that the Group leader was an office holder.

85. S230 ERA 1996 provides that the employer means the person by whom the employee or worker is (or, where the employment has ceased, was) employed. Having regard to the terms of the contract, it was plain that this was either the Respondent or the Leader for the UKIP Group from time to time. The Respondent entered into the contract with the Claimant. There were no other parties to the contract other the Respondent or the Claimant.

86. Fourthly the term of the contract that actually specified who the employer is conclusive. The contract terms states "Neil Hamilton or Leader of the UKIP Group from time to time. The wording "or Leader for the UKIP Group from time to time" is, in my judgment a contractual nullity. It is fundamentally at odds with the doctrine of privity of contract. There was no ability to bind a future Leader to the contract in the absence of any underlying agreement or rules by which a future leader could be privy to that contract.

87. As I have decided the wording after the word or is a nullity, the only correct interpretation of the contract is that the Respondent was the employer.

88. This wording was drafted by MBS. Some light is shed on the peculiarity of this wording in the email from Mr Chick to the Claimant as set out above. Mr Chick refers to the wording being a 'statement of the intended state of affairs'. The Respondent was bound to use the wording if he was to access Assembly funding to employ his Chief of Staff. There was no choice to deviate from the form of words under 8.1.5 of Chapter 8 of the Determination. The Respondent focused on how he could not have been the employer as he could not continue to employ the Claimant when his position as leader ended. With respect this cannot be correct as it conflates how the Claimant's employment ended with how it began (or who were the parties).

89. For these reasons I agreed with the Claimant's submissions.

90. I recognise the potential wider consequences of my conclusions regarding the construction of the contract. On the wording of the contract the employer of any group staff within the Assembly will be the named Assembly member. The employment relationship cannot transfer to the new leader. This is regardless as to the political group or party involved. Under Chapter 8 of the Determinations the Assembly member who is no longer group leader can no longer employ an employee employed as group staff. Where this leaves that employee is a matter that will need to be determined at a further hearing.

Employment Judge Moore

Date 19 June 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....20 June 2019.....

.....  
FOR EMPLOYMENT TRIBUNALS