



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Jones

Respondent: Home Start Greenwich

Heard at: London South via CVP **On: 15 and 16 July 2020**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Ms Alyamani, FRU

For the respondent: Mr Hussain, Consultant – Litigation, Croner

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

Decision

The claimant was an employee of the respondent within the meaning of S.230 (1) of the Employment Rights Act 1996.

Reasons

The claim, appearances and documents.

1. By a claim form presented on 4 October 2019, the claimant brought claims for unfair dismissal, failure to pay notice pay, holiday pay and unauthorised deductions. The unauthorised deductions claims was subsequently dismissed on 3 March 2020 upon the claimant's withdrawal of that claim.
2. The claimant was represented by Ms Alyamani, from FRU, the respondent by Mr Hussain of Croner.
3. The Tribunal had an agreed bundle comprising 2 lever arch files and there was an agreed list of issues in relation to the preliminary issue of the claimant's status. This was listed following a preliminary hearing on 3 March 2020.

4. The Tribunal heard from Mrs Hardcastle, former Chair of the Board of Trustees for the respondent and Mrs Brown, former CEO of the respondent.
5. The Tribunal heard from the claimant, Mr Macrae a former fundraiser and Ms Fitchett, employed by the respondent as the Business Administrator.
6. The respondent applied to submit and rely on a witness statement for Ms Cross. Following discussion this was refused. The statement was only produced that morning, witness statements had been exchanged on 9 June 2020. There was no good reason for its last minute production and having regard to the overriding objective, the comparative prejudice lay against the claimant as the statement was about how the respondent had arranged contract management after the termination of the claimant's engagement, which the claimant wished to test/challenge.
7. The Tribunal's decision was reserved at the conclusion of the evidence and the parties were invited to provide written submissions. The parties who were both professionally represented, were asked to address whether there was any statutory bar to the Tribunal finding employee status having regard to the respondent's articles of association and relevant provisions of the Charities Act 2011. Written submissions were subsequently received by both parties.

Relevant findings of fact

8. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.
9. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.
10. The claimant was working for the Royal Borough of Greenwich ('RBG') in 2013 and was instrumental in securing a successful bid for the respondent (for whom she had previously worked) to run a children's centre for RBG. The claimant was also a trustee of the respondent since 2009.

11. The respondent was required to seek permission of Home Start UK ('HSUK') for the bid.
12. HSUK had negotiated with the respondent to deliver part of the respondent's contract with RBG, namely project management and HR and Legal support.
13. The claimant was initially engaged by HSUK as a Contracts Manager under a contract for services from 1 April 2015. This was in the bundle at pages 98-101.
14. The claimant asserted that in fact her engagement with HSUK had commenced in October 2014 which Mrs Brown agreed with.
15. There was insufficient evidence before the Tribunal to determine the basis upon which the claimant was engaged and worked for HSUK from October 2014. There was also insufficient evidence about the nature of the claimant's working relationship with HSUK from 1 April 2015. The claimant was paid by HSUK and the contract stated that she would work 4 days a week, 7.25 hours per day but there was not enough evidence about the day to day activities and arrangements for the Tribunal to make a determination of the claimant's status otherwise than that recorded in writing from 1 April 2015 (contract for services).
16. Following a breakdown in the relationship between HSUK and the respondent, the claimant was engaged by the respondent following meetings between the claimant, Mrs Brown and Mrs Hardcastle. The claimant believed this occurred in March 2016. This was accepted. Both of the respondent's witnesses stated that there was no change in the nature of the claimant's work from that which she been performing for HSUK. The arrangement continued they said without any changes. It was common ground there was no (other) written agreement.
17. The Tribunal stopped short of making any finding regarding the potential application of TUPE (to the running of the Children's Centre from HSUK to the respondent). This was because it would not have assisted in determining whether the claimant transferred across as an employee or otherwise in circumstances where the evidence of the claimant's (true) working relationship with HSUK was insufficient to decide beyond the written agreement.
18. As the claimant was a trustee of the respondent, she declared a conflict of interest. This generated dialogue with the Charity Commission. Concurrently, the respondent sought to amend its articles of association ('AOA'). The amended AOA were passed by resolution on 8 May 2019.
19. It was agreed by both Mrs Brown and Mrs Hardcastle, that the contract management function was an essential element of the contract with RBG. They said however that that was not the same as requiring a contract manager role.

20. The claimant's schedule of services were attached to her contract for services. This included fulfilling the lead role in ensuring the children's centres were Ofsted compliant. Mrs Brown said in evidence that being the designated contact point for Ofsted was in her role as trustee and that was a requirement on part of Ofsted. The claimant disputes this and cited the previous CEO (Joan Edwards) as being a nominated person who was not a trustee. The Tribunal finds, in any event, that this was not the same as fulfilling the compliance function for Ofsted which would require services to be performed as included in her list of services within her contract for services. If it was solely a trustee function it could have been omitted.
21. The claimant was a regular attendee at the respondent's Senior Leadership Team meetings ('SLT'). These occurred every 4 to 6 weeks. The Tribunal finds this was not in her role as trustee but to report on and be engaged in day to day operations. The claimant confirmed in evidence that no other trustee attended a SLT.
22. The claimant's work for the respondent was regular. She generally did 4 days a week, 7.25 hours a day as contracted. Mrs Brown said the claimant had a pattern of 3 days on site and 1 day from home. Further, in pursuance of a desired culture of balance, the claimant was not generally contacted when she was not working, but that was the same for others too. The claimant's work was thus not intermittent or adhoc. The claimant's evidence on the occasions she worked from home was very different. She said she worked from home no more than 4 or 5 times throughout her whole period of engagement. The Tribunal finds that the claimant would be best placed to know the occasions she worked from home. She was sure of her evidence and explained it was not practical to work from home or off site. The Tribunal found her evidence credible and her evidence was preferred over Mrs Brown.
23. The claimant had limited periods of absence from work. The only certain example was her work with/for the Wimbledon Championship when she was not available for work. The Tribunal finds this was authorised leave, though the claimant did not receive pay for it.
24. The Tribunal heard evidence about other occasional periods of absence. One occasion cited by Mrs Brown was a cruise the claimant went on when her aunt was unwell. There were no other remarkable occasions of uninformed or sporadic absence.
25. The claimant was entrusted with matters of a highly confidential nature. This included HR matters, Payroll, Tax and NI matters. The Tribunal was taken to email exchanges at pages 820 (claimant being asked to conduct a return to work interview), 827/828 (signing off holidays for scheme staff) and page 832

(outstanding salary query and a breakdown of NI, tax and pension contributions) in January 2019. These portrayed the claimant as a 'go-to' for such matters. The full log of emails was between pages 820 and 904 and covered the period December 2018 and February 2019. Some of the emails referred to reference requests and grievance matters too being directed to/undertaken by the claimant. The respondent had ceased to engage its HR Consultant from about August 2017 onwards. Dawn Brown left the organisation in December 2018.

26. Mrs Brown said the claimant could have declined the additional responsibility; the Tribunal finds however that this did not happen on any occasion.
27. The claimant did not on any occasion send a person in her place to perform her role. Mrs Brown and Mrs Hardcastle said that they had never engaged a contractor to provide the claimant's services when she was not available. The Tribunal finds that this was because these occasions were very infrequent and because it was simply not practical to do so having regard to the nature of the services being provided. Mrs Hardcastle confirmed that simply getting a new designated Ofsted contact point when the claimant was suspended, was a long drawn out process with a whole series of steps required.
28. The respondent also engaged an IT contractor; Mrs Hardcastle confirmed in evidence, although slightly less certain, that she did not think that in his absence either the respondent sourced in another contractor.
29. The claimant appeared on the respondent's organisation chart. This showed that a reporting line into the CEO (Mrs Brown), which was contrary to the evidence of Mrs Brown who maintained that she reported into the Board of Trustees. The Tribunal finds her reporting line was as set out in the organisation chart which was a contemporaneous/pre-existing document. It could have showed a thick or dotted line reporting. The Tribunal finds that as trustee she reported in to the Board of Trustees but this was not to be conflated with her responsibilities when providing services.
30. In the same organisation chart, the claimant had 2 direct reports. One was the fund-raider who was not employed by the respondent. The other was the Business and Finance administrator who was an employee of the respondent. In addition, there was a direct report into the Business and Finance administrator (The Premises Manager) who was also an employee of the respondent. Thus, the Tribunal finds, the claimant had overall line management responsibility or authority over 2 employees and 1 non-employee. Mrs Brown also confirmed in evidence that all other individuals on this organisation chart were employees of the respondent with the exception of the volunteers, the

board of trustees and the fundraiser. Thus, the claimant appeared amongst/alongside 49 other employees.

31. The claimant was directed in relation to her work by Mrs Brown. This was stated more than once in Mrs Hardcastle's evidence. She said Mrs Brown had responsibility to direct the claimant on day to day operational activities. Mrs Brown was reluctant to accept she line managed the claimant but recognised that contractors do require some direction. Mrs Brown made reference to a partnership when describing how she worked with the claimant. The Tribunal finds that the respondent was conflating the claimant's role as trustee with the services she was providing which were at a senior level and regular.
32. The schedule of services on page 100 was not the only evidence of expected services from the claimant. There was also a job description setting out a series of responsibilities which all read as proactive (as opposed to reactive) duties. For example, there were positive obligations to review contracts, to develop standards, to conduct contract meetings, shape capture and test contractual compliance, to draft contractual provisions to engage relevant stakeholders, to maintain deadlines and to review contractual performance.
33. The respondent sought to seek approval to remunerate the claimant in correspondence with the Charities Commission. The Tribunal was referred to the email at page 184 dated 12 May 2017 from Mrs Brown to the claimant in which it was confirmed that the approval had not by then been given. The email subject was entitled "Getting Charity Commission approval to approve" and it was stated in the email "we are possibly not legal right now".
34. The Tribunal noted that the claimant had drafted a document, on behalf of the respondent, in support of the application to the Charity Commission specifically in relation to the employment of a trustee providing reasons/justification to the Commission to approve.
35. Further at page 220, the Tribunal noted the email from the charity commission wherein the Commission was referring to the respondent's request to pay the claimant trustee. The commission did not approve as it identified an ancillary issue with regard to the corporate status of the respondent. The Commission's understanding however, was on the basis that the claimant would be "employed".
36. The articles of association were changed on 8 May 2019 but there was no further evidence before the Tribunal that the Charities Commission approved the employment of the claimant.

37. The circumstances leading to the termination of the claimant's contract are beyond the scope of the Tribunal's factual enquiry relating to the preliminary issue of the claimant's status.
38. However, the Tribunal notes that the claimant was suspended from her work pending a full investigation in to alleged wrong doing on 15 February 2019 (page 418); she was then written to and invited to an investigation meeting on 14 March (the claimant was denied the right to be accompanied because it was an investigation meeting); that meeting then took place on 25 March 2019. The claimant was subsequently given notes of that meeting. The claimant's contract was terminated without a final disciplinary hearing. This evidence was supported by the documents, it was not challenged and was accepted by the Tribunal.

Applicable Law

39. There is extensive case law on the question of who is an employee. In ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 2 QB 497*** it was said that a contract of employment exists if three conditions are fulfilled:
- 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 of his master
 - he agrees expressly or impliedly that in the performance of that service it will be subject to the other's control in a sufficient degree to make that other master
 - the other provisions of the contract are consistent with it being a contract of service
40. Further, it was stated that freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service.
41. The Tribunal is not bound by the label the parties attached to their relationship although it carries some weight. See for example ***Autoclenz V Belcher 2011 UK SC 41*** a case which considered the significance of the terms of a written agreement and the extent to which it reflects the reality or not.
42. In ***Carmichael V National Power PLC 2000 IRL 43*** the House of Lords confirmed that there is an irreducible minimum of mutual obligation necessary to create a contract of employment. Mutuality of obligation is said to be the obligation of the putative employer to provide work and the obligation of the putative employee to accept it. Unless there is mutuality of obligation and a sufficient degree of control, there cannot be a contract of employment.

43. In ***Stephenson V Delphi Diesel Systems Ltd 2003 ICR 471***. The EAT stated that the significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of employment rather than some other kind of contract.
44. If the irreducible minimum is established the other considerations include the degree of control which the employer exercises over the individual, how the parties have labelled or characterised the relationship, the treatment of tax and national insurance and any other matters that form part of the working relationship all of which are relevant but not in themselves conclusive.
45. In some cases, an individual might be an employee while working but in the absence of an umbrella contract, not an employee when not working see ***Carmichael*** for example.
46. The Charities Act 2011 ('CA'), in particular S.105 and the Companies Act 2006 ('COA'), in particular sections 39 to 42 provide some governance around whether and how a trustee can be employed by a charity.

Conclusions and analysis

47. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

Articles of association & the Charities Act 2011

48. The AOA at the time the claimant was engaged, expressly prevented the employment of a trustee. This is made clear in Article 6.3 which states "*No Trustee or connected person may be employed by the charity except in accordance with 6 (2) (5).*"
49. Article 6 (2) (5) states "*in exceptional cases, other payments or benefits [may be received by the trustee] but only with the written consent of the Commission in advance and where required by the Companies Act the approval or affirmation of the members.*"
50. However, Article 6.3 did not prevent any trustee from entering into a written contract with the charity to supply goods *or services* (subject to 3 conditions).
51. As noted above, the AOA were changed; however post-change, the same prohibition remained regarding employing a trustee. It was not clear to the

Tribunal how the revised AOA enabled the respondent any more freedom in paying remuneration to a trustee for the provision of services. That power was always there. If the change was to enable employment, that change did not occur.

52. In the amended AOA, 4.3.2 states *“no trustee may be employed by, or receive any remuneration from, the charity or receive any other financial benefit from the charity unless the payment is permitted by Articles 4.4 or 4.5 or authorised by the Court or the Charity commission.”*

53. There is no enabling provision in Article 4.4 or 4.5 in relation to employment by the respondent of the claimant trustee. This is in fact expressly excluded again in 4.4.3 whereby remuneration is permitted to be paid to the claimant for services, except for services as a trustee and services under a contract of employment.

54. S.105 of the CA provides scope for the Charity Commission to make an order for employment under S.105 (3). It is common ground in this case that this did not happen, albeit because the Commission identified an issue with the corporate status of the respondent.

55. The Tribunal considered S.185 CA too which is an enabling provision for a person who is a trustee to receive remuneration for providing services to the charity if conditions are met. The provision is dis-applied by S.185 (3) which says:

“Nothing in this section applies to

(a) any remuneration for services provided by a person in the person's capacity as a charity trustee or trustee for a charity or under a contract of employment, or

(b) any remuneration not within paragraph (a) which a person is entitled to receive out of the funds of a charity by virtue of

(i) any provision contained in the trusts of the charity;

(ii) any order of the court or the Commission;

(iii) any statutory provision contained in or having effect under an Act other than this section

56. The Tribunal concludes that the effect of S.185 (3) is to take out of scope the enabling provision (to pay remuneration subject to conditions) to a trustee

providing services under a contract of employment. This view is supported by the operational guidance which the power “cannot be used to authorise payments related to the contracted employment of a trustee”.

57. In submissions, the claimant has drawn to the Tribunal’s attention provisions of the COA which do not automatically render void transactions entered in to by a Company Ultra Vires. S. 39 provides:

“A company's capacity

(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution.

(2) This section has effect subject to section 42 (companies that are charities).”

And section 40 says:

“Power of directors to Bind the Company

(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company’s constitution.

(2) For this purpose—

(3) (a) a person “deals with” a company if he is a party to any transaction or other act to which the company is a party,

(4) (b) a person dealing with a company—

(5) (i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so,

(6) (ii) is presumed to have acted in good faith unless the contrary is proved, and

(7) (iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company’s constitution”

58. Further, S. 41 provides a route for Companies to ‘void’ transactions which are only valid because of S.40; alternatively, to affirm the transaction (s. 41 (4) (d).

59. As noted above however, S.39 of the COA is subject to S.42 which applies to Companies that are charities. That section disapplies the above provisions relating to a company’s *binding powers* except where a person does not know at the time the act is done, the company is a charity OR gives full consideration in money or money’s worth in relation to the act in question and does not know

that the act is not permitted by the company's constitution or that the act is beyond the powers of the directors.

60. The Tribunal concludes, having regard to S.42, that the claimant was, obviously, aware of the charitable status of the respondent and was also aware that that the AOA prevented her being employed. That was the whole point and purpose of the written dialogue with the Commission. She confirmed this in evidence too. Mrs Brown's evidence was that it was "almost impossible" for a trustee to become an employee and thus BWB Solicitors were engaged to work on revising the Articles. Even if the Tribunal is wrong in its conclusion regarding S.42 (1), having regard to the Trustees expenses and payments guidance ('TEPG') (page 666) and S.42 (4), an ultra vires act of a charity would still not be capable of binding the charity without Charity Commission approval.
61. Having regard to the findings and conclusions above related to ultra vires, the Tribunal considered whether this could render any *purported* contract of employment illegal on the basis of statutory illegality. Namely, absent an express power, whether it was not permissible for a valid contract of employment to come in to being unless and until, statutorily, the Charities Commission had sanctioned this – in circumstances where it was not statutorily possible for a Charity's Directors to bind it to a contract of employment, ultra vires. The Tribunal will return to this in its further conclusions below.

Control

62. The Tribunal concludes that the respondent did exercise control over the claimant. That would be true even in non-employee and non-worker situation where contractors are still told what to do. The differentiation however is in the extent and degree of that.
63. It was accepted in evidence by Mrs Hardcastle that the claimant was directed by Mrs Brown. Both of the respondent's witnesses considered the contract management function essential. Whilst there may have been a reasonable degree of autonomy in the bid process leading up to the claimant's engagement by HSUK, the claimant was at the respondent's disposal thereafter. The claimant worked to a schedule of services she was expected to deliver. Mrs Hardcastle also stated in evidence that the respondent required effective contract management requiring someone to be working alongside Mrs Brown. This suggests, in the Tribunal's view, permanence and continuity.
64. She was shown, organisationally, as reporting into Mrs Brown, amongst other people in the organisation chart who were mainly employees. There could have been used dotted or thick lines; there could have been references to anyone considered to be a contractor. Anyone looking at such an organisation chart

would observe the claimant being subordinate to Mrs Brown. In addition or alternatively, this was strong evidence of integration.

65. The claimant also had, organisationally, line management responsibility over others, including employees. That is, in the Tribunal's view, evidence of control by the respondent. The claimant was directed to do that. There was no suggestion that this was, for example, just an arrangement on paper but not reality.
66. The claimant was also asked to perform additional functions relating to HR, payroll or tax which also indicates the sort of control an employer would exercise over an employee. If the claimant, was in reality a contractor, she would not been asked to perform such functions. An employer usually goes looking to its employee population to assist when for example another employee has left (as happened when Mrs Brown left and previously the HR consultant); alternatively it might seek to bring in *another* consultant for an interim period. The claimant also gave evidence of being asked to undertake an investigation in relation to another employee. Mrs Brown saw nothing unusual in this respect, acknowledging the claimant's decades of experience in staff management.
67. In evidence, Mrs Hardcastle was asked about control following the transition/transfer to the respondent from HSUK. She explained that after the transition there was more direct control and financial control. In re-examination, in seeking clarification of what she meant by this, she explained and elaborated that this was in relation to directing what work needed to be done, to deliver certain functions and that the claimant was expected to absolutely deliver what we asked her to deliver. The Tribunal's understanding of Mrs Hardcastle's evidence as supporting an elevated degree of control was left in no doubt as her evidence immediately following confirmed that Mrs Brown directly line managed the claimant's day to day work.
68. The respondent submits that the claimant's assertiveness with Mrs Brown is not consistent with or indicative of being subordinate or under control. The claimant was questioned about her dealings with Mrs Brown over the cashflow issue concerning the accounts and the September payroll. There was no general assertion that the claimant was regularly challenging Mrs Brown regarding decisions or the charity's affairs. The concern of the claimant had in fact been volunteered in her witness statement paragraphs 27 to 31. The Tribunal does not conclude that there was any inference to be drawn from the claimant's concerns about the Charity's finances/accounts and being forthright with Mrs Brown about it. The claimant had a senior role and was responsible for contract management. The shortfall information was volunteered to her by Mrs Brown. The Tribunal considers that the claimant was discharging her professional

concern. Provided respect is maintained, being strong and assertive to a person in a more senior position does not undermine that person's control.

69. There was in the Tribunal's conclusion sufficient employer control of the claimant by the respondent.

Mutuality of Obligation

70. The claimant's *contract for services* did not negate mutuality of obligation. That is unusual in a contract for services. It provides freedom for the claimant to undertake other work but that is not the same thing.

71. Moreover, the consultant's obligations clause states (positively) the claimant was to provide her services (at the time for a fixed term duration) by:

"...working 4 days a week (7.25 hours per day) at such times as agreed with the acting head of network funding."

72. The structured description of the claimant's days and hours is also atypical for a contractor. The reference to at such times as agreed is ambiguous and not consistent with the earlier part of the clause. The claimant did in fact work continuously without interruption (save for her time at the Wimbledon championship and limited other unpaid leave or sick leave).

73. There were no occasions when the claimant chose or opted not to work; neither was there any occasion when the respondent chose or opted not to provide the claimant with work. The seniority and importance of the claimant's position would make such a prospect, if it was real, unworkable.

74. The claimant was a persistent attendee throughout her engagement at the SLT meetings occurring every 4 to 6 weeks. The respondent says the claimant's attendance would be as trustee. That might have been persuasive if the meetings were less frequent or called something else. They were not, for example, 'a meeting of trustees'. They were called Senior Leadership Team Meetings for a reason. There was insufficient information or evidence before the Tribunal for it to conclude that these meetings were only attended by the claimant as trustee. The fact that there was an established need for the provision of contract management through a schedule of services is evidence in itself that the claimant was a senior manager and it was in that capacity she was taking part in regular leadership meetings. Even if the Tribunal is wrong in its conclusion in this regard, the Tribunal was satisfied that the claimant's presence was as a Senior Leader and as a trustee but not exclusively as a trustee.

Personal Service

75. The contract for service did not include any term allowing the claimant to provide a substitute either absolutely or on a qualified basis.
76. The claimant did not provide a substitute to perform her role on any occasion. This did not happen during the known absence for the Wimbledon Championships either.
77. Mrs Brown said in evidence and they could have engaged another contractor if the claimant had not done the work. The respondent also had an IT Contractor but there was no evidence before the Tribunal that a substitute was ever provided or sourced. The respondent had also used an HR consultant but again there was no evidence before the Tribunal that a substitute was ever provided or sourced.
78. The claimant's position was senior and not in the Tribunal's view, a role which could be performed intermittently, adhoc through the engagement of several contractors. That was never the intention or reality and for the respondent to suggest it could have happened was fanciful. The Tribunal also had regard to the claimant's evidence that she would often need to collate the quarterly report from 20 different sections. This evidence was not challenged.
79. The claimant was also the nominated person for Ofsted. Whether or not this was required to be someone who was a trustee, it was the claimant who did the related work. It was not delegated to somebody else.

Other factors viewed holistically

80. The Tribunal had regard to the evidence of Mr Macrae who worked alongside the claimant as a fund raiser and in relation to the bid. He was not in a position to give any evidence on what was or was not agreed between the claimant and the respondent regarding the claimant's terms but he gave evidence that he saw the claimant's role as central, extensive and that she was a consistent point of contact for him.
81. The claimant was not afforded the benefit of a full disciplinary procedure which would be consistent with an employment relationship. In contrast, contractors can be terminated at will without any process. In the claimant's case however, she was suspended. She was then invited to an investigation meeting. That then took place; she was provided with the minutes; she was denied the right to be accompanied *because* it was an investigation meeting. The respondent terminated employment without further process. That doesn't provide any

significant tilt regarding status one way or the other; however that there was a at least a quasi-disciplinary process does lend some weight towards the respondent feeling compelled or obligated to state the case against the claimant and afford her a right of reply – as a putative employer would. It is not sufficient in the Tribunal's conclusion for the respondent to explain this by virtue of her concurrent trustee role or that of her son. It has been the thrust of the respondent's case that that is separate.

82. The claimant did not claim for expenses (car parking, travel) unlike other contractors. This was not challenged. The claimant's remuneration was reflected in the monthly management accounts under the salary section though the respondent explained that that was different from payroll through which she was not paid.
83. The claimant was not in the respondent's pension scheme. However, she explained in evidence that this was because she was already beyond retirement age, thus it was not important for her.
84. Some factors weighed against employee status. The claimant did invoice the respondent in relation to her services. Further, the Tribunal concludes that the claimant was a co-signatory for banking purposes but as a trustee. In evidence Mrs Brown confirmed that even after the claimant ceased to be a treasurer, she remained a co-signatory as trustee. This was the same for Mrs Hardcastle and Mrs Brown too. The claimant utilised her own laptop (though she used a work email address). Her evidence was that Mrs Brown also used her own laptop which was unchallenged. In addition, that she counted only 13 occasions during the entirety of her engagement with the respondent when she had used her personal email.

Final conclusions

85. The Tribunal would conclude having regard to its findings and conclusions above, if it did not need to consider the issue of illegality, that the claimant was engaged as an employee of the respondent pursuant to the established tests in **Ready Mixed Concrete** and with regard to the reality of the working relationship (**Autoclenz**). There was a sufficient degree of control, mutual obligations and the claimant was not, in reality, able to provide a substitute and never did. In fact, the need to rely on the real working relationship was not absolute as following the analysis above regarding mutuality and personal service, the written contract did provide some support for employee status itself.
86. **In Autoclenz**, the Supreme Court quoted from the Court of Appeal's Judgment:

“... Once it is established that the written terms of the contract were agreed, it is not possible to imply terms into a contract that are inconsistent with its express terms. The only way it can be argued that a contract contains a term which is inconsistent with one of its express terms is to allege that the written terms do not accurately reflect the true agreement of the parties.

I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. ...”

87. The written agreement in this case was not between the claimant and the respondent but with HSUK. However, it was understood to ‘continue’ with the respondent. The terms of that agreement with the respondent however were not the true, full or accurate terms.

88. However, the Tribunal returned to its observations above regarding illegality and turned its attention to the Supreme Court’s Judgment in **Patel v Mirza 2017 AC 467 SC**.

89. That case is authority for the proposition that statutory illegality will not render a contract unenforceable in all cases. The question to determine is whether, in the circumstances, the relief claimed should be granted, (in this case, employee status to enable the claimant to have her unfair dismissal claim heard). The answer to this question requires consideration of the public interest in enforcing a claim if to do so would harm the integrity of the legal system. The following factors were put forward for consideration:

- The underlying purpose of the law that been breached and whether that purpose would be enhanced by the claim being refused
- Any other relevant public policy which might be affected by the denial of the claim
- Whether denial of the claim would be a proportionate response to the illegality

90. Taking these in turn, the claimant was a trustee of a charity around which there is governance. The AOA did not permit the employment. The claimant was never approved to be employed by the Charity Commission. The issue is one of protection and governance of a conflict of interest where a trustee of a charity is to become employed. The TEPG from the Charities Commission (page 666) states that without express authority, there may be liability for the employee-trustee to repay earnings to the charity or for the trustees who authorised the appointment to reimburse the charity. It states however that this does not happen very often. It can arise in the event of a third-party challenge or

following a commission enquiry. Neither occurred. There is no criminal sanction referred to. The claimant argues that the mischief which the governance seeks to guard against is abuse of power. The Tribunal considers that to be a key objective of the governance. In the circumstances of this case, that objective was not under threat. Put differently, if the claimant was permitted to get relief under this factor, there would be no concurrent endorsement of any actual abuse of position or power. The Charity Commission was already on notice of what the respondent was seeking to do, assuming it to be about payment under employment. There was no subsequent enquiry or challenge. The Tribunal also notes that the constitution itself could have contained an express power permitting employment which diminishes the legal realm of this issue.

91. There is a public policy to uphold employment protection to those who do comply with the requirements to be employed by a charity where an individual is a trustee. There is however in the Tribunal's view, also a public policy interest in providing a means of challenge to alleged unfair treatment to an individual following more than 3 years' service where the only impediment to do so is constitutional or commission approval. The context here is relevant. There had been an approach to the commission rather than any sort of cover up. The claimant's genuine belief was that matters were in hand. She was not actively participating in or instigating some sham arrangement. She could have done more to force the issue, but on balance the claimant relied in good faith on being told not to worry. To the extent that the claimant was misled about the nature of the respondent's application to the commission, (she was asked to submit a statement too), this does not assist the respondent's case. The report at page 139-140 was specifically headed/entitled "Report on the employment of a Trustee as a Contract Manager for Management of the Children's Centre Contract". The Tribunal accepts there were other changes being made but was puzzled by the respondent's purported need to change the AOA with regard to the power to remunerate *for services* - as that power pre-existed.
92. The claimant was engaged at a market rate price. She was not paid an inflated sum. Under cross examination the claimant said she had offered to resign as trustee on many occasions. This evidence was not challenged. That the claimant did not do so was because of the assurances she was given. However, it was indicative of the honesty of her intention to regularise her employment position. In continuing to work for and be paid by the respondent the claimant did not know her position remained unprotected. The Tribunal accepts that the claimant didn't see the Charity Commission response until she put in a subject access request.
93. In pursuance of the foregoing the Tribunal concludes that the illegality in the circumstances of this case did not preclude the Tribunal from concluding that the claimant was engaged under a contract of employment. She was an employee of the respondent and can advance her claim for unfair dismissal and other claims. Those claims requiring worker status (only) can proceed because

of the conclusion in relation to the claimant's status as employee. If the Tribunal had not found the claimant to have employee status, it would have concluded the claimant to have worker status by reliance on the same reasons (particularly with regard to mutuality and personal service) and for the avoidance of doubt it would not have concluded that the respondent was a client or customer of any business undertaking being carried on by the claimant. Further, the illegality issue analysed above only applies to engagement under a contract of employment, not otherwise.

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Employment Judge Khalil
3 September 2020