EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4114216/2019 (V)

Hearing held remotely on 24 and 25 November 2020

Employment Judge D Hoey

Ms Gwendo Minto	**Claimant** **Represented by:** **Mr Hardman (Counsel)** **Instructed by Messrs Kippen Campbell**
Perth and Kinross Council	**Respondent** **Represented by:** **Mr McGuire (Counsel)** **Instructed by Respondent**

JUDGMENT

1. **As the claimant was not an employee in terms of section 230 of the Employment Rights Act 1996, her claim of unfair dismissal is not well founded and is dismissed.**

2. **The respondent was not in breach of contract by ending the relationship and so the claim of wrongful dismissal (notice pay) is not well founded and is dismissed.**

3. **The claim for holiday pay is not well founded and is dismissed.**

REASONS

1. The claimant lodged a claim for unfair dismissal, holiday pay and wrongful dismissal/notice pay on 10 December 2019 with early conciliation being commenced on 14 October 2019 with a certificate issued on 14 November 2019.

2. The hearing was conducted remotely via CVP with the claimant and the respondents' counsel attending the entire hearing, with witnesses attending as necessary, all being able to be seen and heard, as well as being able themselves to see and hear. There were a number of breaks taken during the evidence. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

3. The issues to be determined were agreed to be firstly whether the claimant was an employee in terms of section 230 of the Employment Rights Act 1996. Secondly, if so whether she was unfairly dismissed and thirdly, if so, what remedy should be ordered. The claimant confirmed that she was seeking reinstatement which failing reengagement and compensation.

4. The parties agreed that the claims for wrongful dismissal and holiday pay were both contingent upon the success of the unfair dismissal claim.

Facts

5. I am able to make the following findings of fact from the evidence presented to the Tribunal. The following findings are only in respect of the facts necessary to determine the issues.

Background

6. The respondent is a local authority which is responsible, on behalf of the Registrar General for Scotland, for the conducting and registration of marriages within the local authority area. Until 2002 civil marriages had to be conducted within the respondent's offices but the law changed to allow marriages to be conducted elsewhere.

Registration team

7. The registration team within the respondent is responsible for ensuring statutory functions in relation to births, deaths, marriages and citizenship issues are properly dealt with. The team comprises 7 registrars (who are each employees, 4 of whom are full time and 3 part time) and a clerical assistant. Some of the registrars are also on the casual worker list and assist with ceremonies outside the office. The casual worker list is often known as the "supply list". There are 26 marriage officers and 6 attendants on the supply list. Marriage officers are able to conduct the marriage attendant role (but not vice versa).

8. Ms Lorimer was registration services officer, to whom the 7 registrars report and Ms Lorimer reported to Ms Flynn, democratic services manager.

Casual worker list

9. Given the changes introduced 2002 that allowed ceremonies to be conducted in other places (aside from the registry office), the respondent decided to recruit a team of what it considered to be casual workers onto a casual worker list. Those individuals would be recruited and trained to become marriage officers (and marriage attendants) and could be called upon as needed by the respondent, and if available, to conduct marriage ceremonies.

Claimant recruited as casual worker – 2002 contract

10. On 22 November 2002 the claimant was recruited as a marriage attendant for the respondent ostensibly as a casual worker and on 30 November 2002 the claimant signed a document entitled "Supply Worker's Agreement" which stated that: "This document confirms that you have been accepted onto Perth and Kinross Council's Supply Register. Acceptance onto the list does not guarantee a work placement within the Council. However, any placement

offered is under the following conditions". The document then narrates a number of conditions which included date of acceptance (which was "the date this signed agreement is received by the Council."), pay (which was "dependent on the substantive grade for the job undertaken. You will only be paid for the hours actually worked") and hours of work (which were to "vary according to the needs of the Service.").

11. Under paragraph 7 entitled "Special Conditions" the document stated: "You will work on a supply basis by mutual agreement, whenever required by the needs of the Service. There is no obligation on the Council to provide you with work and likewise there is no obligation on you to accept any work offered."

12. Under "Discipline" the document stated that "Any misconduct during a period of work will be deal[t] with in accordance with the Council's procedure in relation to Discipline at work." And under "Grievance" the document stated that "If you have a grievance relating to your work you should initially discuss it with your immediate supervisor. If the matter is not settled at this level, you may pursue it through the Council's formal grievance procedure. "

13. Under "Notice" the document said: "Should the placement be found unsuitable to either of the parties, then termination of the placement will be without notice on either side. The Council will monitor its supply lists quarterly. If you have not been offered or been available for work over the previous 3 months, you may be removed from the list."

14. Above the claimant's signature the document stated that "I accept the terms and conditions stated in the above Agreement dated 1 November 2002". Her signature was dated 30 November 2002.

15. The claimant was given work pursuant to that agreement which she undertook when she was available.

Updated contract in 2007

16. The claimant was presented with an updated document in 2007. This was entitled "Supply Worker's Agreement". The Introduction was identical to that in the previous agreement. The changes were relatively minor. Under clause 7 "Special Conditions" it stated: "You will work on a supply basis by mutual agreement, whenever required by the needs of the Service. There is no

obligation on the council to provide you with work and likewise there is no obligation on you to accept any work offered. Therefore, this document does not constitute a contract of employment." Under the clause entitled "Notice" the period when the respondent would review the position had been increased to 6 months. The claimant signed this document, accepting the terms and conditions on 27 October 2007. She continued to work pursuant to this contract when she was available and if work was offered.

2013 contract update

17. The casual work position was reviewed again by the respondent and the documents were updated in 2013. The claimant was issued with a document entitled "Casual Worker Register Agreement – non-teaching and ad hoc work assignments". That document confirmed that "upon receipt of your acceptance of this agreement, your name will be added to the Council's Register of Casual Workers".

18. Paragraph 2 of the document stated: "Inclusion on the Register means you will be eligible to be offered casual work ("Assignments") for the Council. There is no guarantee that you will receive any work, and its frequency and duration will fluctuate according to the requirements of the Council. It is at the Council's discretion whether to offer you an Assignment and it is under no obligation to provide Assignments to you at any time. Equally there is no obligation on you to accept any Assignment offered. Inclusion on the Register of Casual Workers alone brings no employment rights."

19. Paragraph 3 stated "Each offer of work by the Council that you accept shall be treated as an entirely separate and severable Assignment, the terms of this agreement shall apply to each Assignment. There will be no relationship between the Council and you after the end of one Assignment and before the start of any subsequent Assignment."

20. Paragraph 4 stated "The Council reserves the right to terminate an Assignment at any time. You will be paid for all work done during the Assignment up to the time it is terminated."

21. Payment was to be in accordance with the work done, via a separate payment form. Paragraph 8 stated "As you will not be an employee of the Council, occupational benefits offered to employees of the Council will not apply. This includes but is not limited to occupational sick pay, occupational maternity

pay, flexible working, maternity and paternity leave unless under exceptional circumstances you meet the eligibility criteria under the relevant employment policies."

22. Paragraph 9 stated that under the Pension Scheme Regulations the individual was entitled to join by the giving of written notice. The individual was required to comply "with all aspects of the Council's code of conduct." (under paragraph 12).

23. Paragraph 14 stated that "This agreement constitutes the entire agreement and understanding between you and the Council and supersedes any previous agreement between you and the Council relating to casual work (which shall be deemed to have been terminated by mutual consent).

24. Paragraph 15 stated: "The Council may review its requirement for casual workers from time to time and/or the terms on which it offers such work. In the event of any changes the Council may terminate this agreement by giving you notice in writing and you may, at the Council's discretion, be offered a new agreement for casual work."

25. Paragraph 16 stated: "Your name will be held on our Register of Casual Workers for a period of 12 months form the date of this letter when it will be removed unless you have undertaken an Assignment with the Council in the intervening period. Any subsequent 12 months period in which you do not undertaken an Assignment will also result in your name being removed. You may, however, be able to apply to rejoin the Register at a later date."

26. Paragraph 17 stated: "If you wish to accept this agreement on the above terms and conditions please sign and return this letter."

27. On 21 November 2013 under the words "I accept the terms and conditions for inclusion on the Casual Worker Register Agreement" the claimant signed her name on 21 November 2013. The claimant worked pursuant to this agreement, when work was offered and when she was available.

Claimant becomes marriage officer

28. The claimant had been initially engaged as a "marriage attendant" which was to assist the marriage officer during the ceremony. In 2007 she became

"marriage officer" (and was able to continue to work as marriage attendant too). The purpose of that role was to perform marriages at locations within the respondent's geographical area. The responsibilities included performing marriages and ceremonies at locations within the respondent's area, liaising with the respondent on the arrangements for the delivery of ceremonies, ensuring all legal requirements are complied with prior to, during and after the performance of the ceremony, supervising the conduct of those involved in the ceremony and supervising the marriage attendant, if applicable. The Job Profile stated that "As ambassadors of the Council it is important that staff involved in conducting civil ceremonies convey a professional image. There is an onus on you to be appropriately dressed to reflect the importance of the occasion to the couple and the reputation of the Council." There was also a responsibility to "attend ongoing relevant training as and when required."

Payment

29. Payment was at a flat rate for each ceremony which was the same rate regardless of the time spent and the rate included preparation, pre-meetings, the ceremony, travel time and holiday pay. The fee was fixed by the respondent and was paid pursuant to terms of the contract (which documents were fixed and non-negotiable).

Importance of the written contract

30. The claimant accepted that if she did not sign the contract, no work would be offered to her by the respondent. That was because the offer of work was subject to the terms within the relevant agreement.

Other terms

31. If statutory sick pay was payable, officers would receive it. Thus when the claimant was absent from work she received statutory sick pay.

32. For each hour worked, an element of pay is attributed to holidays. Holiday pay is included as a separate element of gross pay within the payslip. For the claimant, no tax or national insurance contributions were deducted from gross pay as set out in the payslip

System of offering work

33. Two of the Council's permanent registration officers had been tasked with allocation of work on a rotational basis. It took around a half day a week to deal with allocations.

34. An email would be sent to all the marriage officers on the list around 6 weeks before the month for which ceremonies were being allocated together with a spreadsheet. That spreadsheet had a list of the ceremonies to be conducted that month. Each of the officers would reply with their availability by email. The allocating officers would allocate ceremonies to individuals. It was entirely at the discretion of the allocating officer who gets allocated which ceremony (if any). The spreadsheet would be sent out again a few times until each of the ceremonies had been allocated and then a final position would be arrived at by which stage the officers know which ceremonies there were conducting.

35. There was no requirement on marriage officers to accept any ceremony that was offered. It was also possible to indicate that there was no availability for any of the days in question. There was no obligation on the respondent to offer any particular ceremony to any marriage officer. There was no pressure on individuals to be available and availability differed amongst the time and often at different times. Following that process, each ceremony would eventually be assigned to a particular officer. It was the responsibility (and sole decision of) the allocating officer to determine who carries out which ceremony.

36. If the allocated officer's position changed and they were no longer able to conduct that ceremony, the officer would advise the respondent and the respondent would ask someone else on the list to deal with it. Thus sometimes officers would be asked to conduct a ceremony that had been against another name but, as with the other assignments, there was no obligation requiring the officer to accept any such offer

The work to be done

37. Once a marriage officer had been allocated to the couple, the preparation for the ceremony would commence. The way in which the preparations are dealt with is entirely a matter for the officer's discretion. The couple (or bride) would be contacted by the marriage officer. Either a telephone discussion or meeting would take place with the officer and the couple to discuss and

finalise the arrangements. The officer would decide how (and when) to contact the bride (or couple) and how to progress the preparations. They would do so in their own time (and there was no script or requirements as to how the preparations were done).

38. The respondent had prepared a draft script that could be used by the couple which was included within a folder of papers that contained information about the process that all officers were given by the respondent. While there were certain minimum legal requirements that had to be present, there was considerable discretion given to couples for their ceremony. The marriage officer would work with the couple to finalise the script and ceremony. There was no requirement to use the script, which was to give the couple a starting point (and ensure the legal minimum was followed).

39. The marriage schedule would require to be finalised and collected. This required to be collected 7 days before the ceremony and returned, completed, following the ceremony.

40. The respondent's policy was that a copy should be sent to the respondent to ensure that in the event of the allocated marriage officer being unable to attend on the day in question, there was a backup available.

41. The ceremony itself could last from 10 minutes up to an hour. Travel time would obviously vary depending upon location.

Dress

42. The respondent had required all marriage officers (and attendants) to be professionally dressed. There was no set uniform.

Equipment

43. The only equipment needed to perform the role was a black fountain pen which the respondent had provided (with ink). While replacements were ordinarily the responsibility of the officer themselves, on occasion the respondent would purchase a replacement if needed.

44. The respondent had also provided the officers with a folder that contained copy correspondence needed for the ceremony, including the letter

confirming the ceremony had taken place. The folder also contained the ceremony booklet which contained ideas for the ceremony that had been provided by the respondent.

Training

45. The officers were provided with training usually once a year or where there was some significant change in the law that required re-training.

Claimant's work

46. While a number of the marriage officers had other employment, including full time employment, the claimant did not. This meant that she was able to accept more assignments and had greater availability, albeit she did manage a portfolio of properties and had a place in France. She would not accept an assignment at a time that was not convenient to her.

47. During each month of her time with the respondent the claimant would, by and large, conduct at least one ceremony. The most she conducted per month would be 5 but there were months, such as at the start of the year, where the claimant would only conduct one ceremony. Very occasionally there could be a month where the claimant would not conduct any ceremonies.

48. The time the claimant spent on each assignment would vary given it depended upon the couple in question, the extent to which the ceremony would differ from the "norm" and the location of the venue. The claimant could be working with a number of couples each month.

49. Once she had been allocated a couple and spoken to them, which could last for 10 minutes, she would require to collect the draft marriage schedule and then final marriage schedule. The discussion with the couple varied in length from around 30 minutes to an hour and sometimes more. The schedule would be collected from the office. After the ceremony the completed schedule had to be taken back to the office. There was no requirement to spend any time in the office.

Relevant interactions between Ms Lorimer and the claimant

50. Ms Lorimer oversaw the supply list and took control of training and other issues arising in connection with ceremonies outside the office. The relationship between Ms Lorimer and the clamant had not been good and a number of interactions had taken place between the claimant and Ms Lorimer which were relevant.

Incident in May/June 2014

51. Following a change to pay rates in 2014 the claimant had asked Ms Lorimer to confirm that the rates she had submitted were correct. Ms Lorimer was awaiting a call from payroll (and was having a busy morning) but the claimant had telephoned payroll and asked Ms Lorimer again to confirm. She was waiting a return call from payroll. The claimant contacted Ms Lorimer's line manager to allege Ms Lorimer had been condescending to her. While that had been disputed by Ms Lorimer, her then managed suggested she call the claimant to apologise. Ms Lorimer did so.

Training session November 2015

52. The claimant had asked that a session take place to discuss changes to the fees payable to officers. The claimant challenged Ms Lorimer openly during this session as the claimant believed that Ms Lorimer had not been correct in some of the information that was being communicated. Ms Lorimer perceived that she was being (openly) undermined by the claimant and believed that the way in which the claimant had conducted herself created a tense atmosphere in the room. Ms Lorimer believed the claimant was aggressive to her during the meeting. The claimant believed she was identifying errors and wanted to ensure the correct position was set out.

Issue at public counter

53. On one occasion when the claimant attended the office to obtain papers she was at the public counter. There were no staff able to assist the claimant and the claimant was asked by Ms Lorimer to take a seat. The claimant did not sit down as requested and remained standing. She was in a rush and believed the papers she was seeking were about to arrive. Ms Lorimer believed that the claimant had been hostile towards her.

Wedding complaint February 2016

54. A wedding had taken place at a well-known local venue. The ceremony had not been perfect and a number of issues had arisen, including the claimant mispronouncing the bride's surname and other concerns. The owner of the venue had spoken to the bride and the owner contacted Ms Lorimer to complain. The owner stated that she would prefer not to have the claimant back at the venue and had asked Ms Lorimer to call the bride (which is what the bride had been told). Ms Lorimer contacted the bride who told Ms Lorimer that she was unhappy with how the ceremony had been conducted in some respects, including in relation to what the claimant had told the bride.

55. Ms Lorimer advised the claimant as to what she had been told. The claimant replied with what Ms Lorimer considered to be a rude email (copied to the then head of department) which Ms Lorimer believed was "totally over the top".

56. Ms Lorimer believed that the claimant was unwilling to accept any assistance offered by her and believed that the claimant was trying to undermine her. Ms Lorimer was upset by how the claimant had replied and felt it was becoming impossible for Ms Lorimer to communicate with the claimant.

May 2016 issues

57. Ms Lorimer received a positive email from a couple about a ceremony the claimant had conducted. Ms Lorimer decided to send the email to the claimant as it was good news. The respondent was looking at ways of marketing the service and was considering publishing photographs. That email had included a photograph Ms Lorimer wanted to use and sent the positive email with the 2 photos. The claimant sent an email to Ms Lorimer on 19 May 2016 raising issues with Ms Lorimer. The claimant referred to "being singled" out by the email regarding publishing photographs and stated: "On 21 April 2016 you again elected to single me out regarding the publication of photograph data. I again challenged your apparent lack of knowledge or research concerning Council policy on such a mainstream legal issue you unwisely decided to respond with a flippant email retort." Ms Lorimer had not "singled out" the claimant, although that was the claimant's belief. Ms Lorimer wished to use the photograph which she believed was positive.

58. The claimant in the email of 19 May 2016 stated that she (the claimant) had "publicly challenged" Ms Lorimer on her "preparedness to deliver incorrect information on stated changes to pay rates." She stated that "At the time I

was concerned that a Council employee with managerial responsibility was prepared to voice opinion rather than fact. Since that meeting I have received a number of disturbing emails from you. I have collated the various items and decided this special attention is focused directly on me personally and constitutes a breach of employment law. "

59. The claimant then referred to the above ceremony and issue. She complained that rather than consult with the claimant, contact had been made with the bride. The claimant stated (in relation to her perception as to what Ms Lorimer did); "I consider your insensitivity to the bride unforgiveable and frankly reprehensible."

60. She concluded her email stating: "In the meantime may I suggest you refocus your attention away from me. You are spoiling a job that I enjoy and destroying any confidence I had in your legitimacy as a manager."

61. Ms Lorimer was concerned by the claimant's response and disappointed the claimant's relationship with her had reached such a low point. Ms Lorimer contacted Ms Flynn, her line manager, to discuss how to deal with matters. HR were asked to assist. She believed that she could not work with the claimant who appeared to challenge Ms Lorimer in the way she carried out her work and in a way that made it difficult to deal with matters. Before matters could progress, a further incident occurred on 3 June 2019.

Incident in the office on 3 June 2019

62. Ms Lorimer had been concerned that marriage officers had been forgetting to send wedding scripts to the respondent. This created an issue since if there was an unforeseen reason why the marriage officer was unable to attend the ceremony, there was no back up available. An update had been issued to all marriage officers reminding them of the need to send the script to the office, which had been sent via newsletter by Ms Lorimer on 9 May 2019. That communication stated: "Please ensure your scripts are submitted. A list of missing scripts is kept and I will contact you directly if you miss doing this".

63. Ms Lorimer also sent emails to those officers who had forgotten to do so. On 3 June 2019 Ms Lorimer sent the claimant an email stating "I'm monitoring the scripts coming in at the moment in a drive to ensure everyone in the team follows the same practise [sic], we need the scripts to ensure we can meet our recovery procedures. If anything had happened nit he lead up to your

wedding we would not have been able to pick up your script. In line with messages sent to other officers I would ask that you try your best to get your scripts in as early as possible. Many thanks."

64. Near identical emails had been sent to other colleagues before and after the email the claimant received.

65. Upon receipt of that email the claimant believed that she had been singled out. She had checked with a couple of colleagues whom she believed had also forgotten to return their scripts and they indicated that they had not received the email. She did not check with others (who had in fact been sent the same email).

66. Later that day the claimant was attending the office to pick up paperwork in connection with a ceremony. She approached the public counter. There was a member of the public at another booth who was being served by another officer.

67. Ms Lorimer was at the desk and saw the claimant and decided to ask what she needed which was to collect papers which were given to her. The claimant stated that she had received the email from Ms Lorimer. She was unhappy as she perceived she had been singled out. She asked Ms Lorimer if she was insinuating that the claimant was not doing her best. Ms Lorimer said that this was not the case and it needs to "work both ways". The claimant then said that Ms Lorimer "should be very careful". As the claimant was leaving the room, she repeated, at the door, "be very careful" to Ms Lorimer.

Ms Lorimer believes relationship had been irretrievably broken down

68. Ms Lorimer felt threatened by the claimant's behaviour on this occasion. She was very upset and contacted Ms Flynn to report the incident. She believed that the claimant had threatened her and she was very distressed. A meeting was subsequently convened with HR and it was decided that the working relationship had broken down to such an extent that the claimant would not be offered any more assignments until the matter had been further examined. Ms Lorimer was very anxious in leading a team with the claimant being present. She believed that the claimant had shown she was not willing to work with her nor accept any communication from her. She believed that the claimant sought to find fault in all communications sent by Ms Lorimer and

that she was undermined. She could no longer work with her which she believed had impacted upon the team. She believed that other members of the team were anxious when the claimant would attend the office.

69. From mid 2016 to 2019 the claimant had avoided Ms Lorimer as much as possible. She wished to have as little interaction that she could. She had concerns in her managerial abilities.

Claimant not be given further assignments

70. Ms Flynn decided that the claimant would no longer be placed on the casual worker list given the breakdown of the working relationship

71. On 19 July 2019 the claimant emailed the employee she thought was responsible for issuing the allocations list as she had not heard as to the position for August. The claimant telephoned and was told that no more weddings were to be allocated to her.

72. The claimant contacted Ms Flynn around 22 July 2019 and was told that due to her attitude and conduct on 3 June 2019 no further weddings were being allocated to the claimant. The claimant was to conduct the 2 ceremonies she had left in July and no further work would be given to her. The claimant's final ceremony was on 27 July 2019 which she conducted.

Claimant lodges a complaint

73. On or around 24 July 2019 the claimant lodged a grievance. This ran to 5 pages. Her grievance was headed "bullying and intimidation" and referred to Ms Lorimer and Ms Flynn. The document referred to incidents in 2015 which the claimant said: "showed a pattern of conduct which has continued since 2015".

74. Her grievance referred to the training event in November 2015. The claimant stated that since Ms Lorimer had been "put in position" "the training events have been irregular unstructured and with no real purpose". She stated that she felt compelled to question Ms Lorimer relating to rates of pay and that "it was as a direct result of my challenge that she began to single me out for her special, passive aggressive, attention."

75. The claimant stated that "as a direct response to an email she sent me on 1 February 2016 I was forced to bring to the attention of Ms Lorimer's line manager that she was using bullying and intimidating words and behaviour towards me."

76. She then referred to being singled out regarding the publication of photographic data in April 2016. She stated that "I now realised that Ms Lorimer was singling me out and he behaviour was unprofessional and becoming predatory in nature."

77. She continued that "From late 2016 until mid 2019 I managed to conduct my business by avoiding Ms Lorimer. On collecting and depositing paperwork within the office I have managed to conduct these tasks without any interaction with her. I was careful and avoided times I knew she would be in the office. I would position myself at the counter so she could not see me."

78. The claimant referred to the incident on 3 June and her belief that Ms Lorimer had singled her out in sending the email reminder about sending scripts. She stated that Ms Lorimer had "shouted across that "it works both ways Gwenda." I still do not understand what she meant by this but her tone and demeanour were clearly a warning. I sensed this immediately and replied to her "be careful Hazel"."

79. The claimant noted that she did not receive any further allocations following 19 July regarding the August wedding list. She explained that she had been told upon calling that the allocation officers had been told not to allocate her any more weddings. She also referred to Ms Flynn telling her upon calling her to discuss that it was because of her "bad attitude" and how she had spoken to Ms Lorimer. She stated that: "This was the final act in a long history of clear abuse of position and power by Ms Lorimer and Ms Flynn."

80. The claimant noted that her bad attitude had not been explained and it was unclear why no further work had been given to her despite the lengthy and successful work she had done. She referred to a number of legal cases and argued that she was an employee and that as an outcome she wished Ms Lorimer to cease bullying and intimidating her and that management should support her. She also wanted a contract of employment reflecting her proper employment status and for her "normal" pattern of hours to be reinstated and for her to compensated for any lost hours.

Respondent seeks further information

81. On 1 August 2019 Ms Simpson, Head of Legal and Governance Services, wrote to the claimant in a letter headed "Grievance". She stated that the claimant's grievance had been passed to her and as the claimant had was a "casual worker" she did not have access to the grievance procedure but can access the Fairness at Work procedure which would result in the complaint being considered and an outcome notified in writing. Further detail was sought as to the complaint the claimant was making.

Respondent considers the issues arising

82. Ms Flynn asked that the claimant's complaint be considered and a response prepared. In her view there was a tension in the office when the claimant came into the office which she believed was because of the relationship issues between both staff. Ms Flynn does not work in that office.

Respondent provides written response

83. Ms Lorimer prepared a 4 page summary document together with a number of appendices, which included emails and documents bearing to be from colleagues that appeared to support Ms Lorimer's position. While the comments from other staff had not been signed, some were emails from the colleague or typed statements (with the colleagues' name typed at the bottom). These suggested that the individuals had been present on "several occasions" when the claimant's attitude and manner towards Ms Lorimer had been "rude intimidating and hostile" which was sometimes in front of customers. This was stated to have had an unpleasant and stressful effect on Ms Lorimer and on the rest of the team.

84. The claimant had not been given the opportunity to consider or comment on the material that had been obtained and she denied the allegations. No formal issue had been taken with the claimant's conduct prior to this point.

85. On 30 September 2019 Ms Simpson sent another letter to the claimant stating that she had the opportunity to assess the information the claimant had provided. She stated that she had spoken to the claimant to arrange a meeting but the claimant had asked that the matter be put in writing before a discussion.

86. The letter stated that "in relation to your complaint, you are classed as a casual worker and consequently you do not have access to the Council employee grievance procedure." The claimant had challenged her designation and had maintained that she was an employee. That was denied by the respondent but the letter stated "Recognising that as a causal worker you have provided a service on behalf of the Council for many years, it is appropriate that I afford you the due courtesy of looking into your complaint in detail."

87. She referred to the main thrust of the complaint being that Ms Lorimer, in her capacity as Team Leader with the Registrar's office, had bullied and harassed the claimant and that some examples had been cited, as far back as 2015.

88. Ms Simpson stated that "I would advise that in the course of my investigation I have received informant in relation to the allegations from a number of other people that contradicts your particular view and interpretation of certain actions and events which I had hoped to explain to you. I am therefore struggling to find evidence which supports your allegations of bullying and harassment."

89. Ms Simpson stated that she had spoken with Ms Flynn who conceded that it would have been preferable for an earlier meeting to have been concerned. Ms Simpson stated that there were issues in relation to the claimant's attitude and behaviour towards others, Ms Lorimer in particular, that should have been addressed. The letter concluded: "In terms of my investigation I can find no evidence to substantiate your allegations of bullying and harassment on the part of Ms Lorimer. From the information I have gathered it is clear that she has treated you in the same way as any other marriage officer; the difference being in the way that you have chosen to interpret and react to any advice or instruction given. It would appear that you have no respect for Ms Lorimer in her role, with many others providing examples of your inappropriate and disdainful attitude towards her. It is clear that you are unable or unwilling to accept Ms Lorimer's advice and guidance and that your working relationship has broken down irretrievably. As such, in the interests of the smooth running of my service and the duty of care that I owe to my wider staff group, I would advise you that your services as a marriage officer will not be called upon by the Council going forward. In terms of your ability to fulfil your professional remit as a Marriage Officer I am satisfied that your performance of those duties has been acceptable and I am therefore willing to provide a positive reference for you to enable you to take opportunities elsewhere."

Meeting to discuss issues

90. A meeting was arranged for 6 November 2019 which the claimant attended together with Ms Simpson and Ms Clerk (an HR team leader). The claimant was told at that meeting that she was a casual worker and not an employee and as such her complaint had been dealt with via the fairness at work procedure, and not the employee grievance procedure.

91. The claimant stated that she had sought legal advice and wanted to know why her complaint of bullying had not been progressed sooner and she wanted information as to who had given the information that led to the outcome letter. The claimant was told that the individuals' details would not be disclosed. The claimant did not see any point in continuing with the meeting which was ended after under 10 minutes.

Pandemic reduces work

92. The pandemic resulted in there being no ceremonies offered by the respondent to marriage officers for around 3 months (April to July). The position had not returned to normal by October and there was still less work being offered. There were very few in July. No work was offered to those on the supply list and the work has significantly reduced.

Income

93. The claimant was 53 at her dismissed with 16 complete year's service. Her average income from the respondent during the last 12 weeks of her employment was £80.98 net and £85.70 gross. With regard to pension contributions, 17% of gross pay was paid towards pension. If the last 12 weeks was used, pension loss was £14.57 per week. As holiday pay had been rolled up into gross pay, the claimant had received the holiday pay to which she was entitled up to her final date of work.

Mitigation

94. The claimant commenced new employment from 22 September 2020 at a retailer in Perth earning a similar (if not higher) income from that gained from the respondent.

95. The claimant had done some work as at St Andrews golf course in October/November 2019 earning attracting income of £182.48 with work as a mystery shopper earning £38.

Observations on evidence

96. In this case there were a few conflicts in evidence which I required to resolve. The main conflict was in relation to what had occurred on 3 June 2019 as between the claimant and Ms Lorimer. It was necessary to determine this as, had the unfair dismissal claim been successful, I would have had to have made separate findings as to the claimant's conduct and assessed contribution and considered the practicability of reinstatement or reengagement.

97. The claimant was articulate and intelligent. Unfortunately it was clear that the claimant had a low estimation of Ms Lorimer which she made clear following Ms Lorimer's appointment. While the claimant may have been correct in identifying errors that were made, the claimant had not quite appreciated how the way in which these matters were raised would be perceived by Ms Lorimer and how it could impact upon their working relationship.

98. The claimant accepted that she sought to avoid dealing with Ms Lorimer but that did not assist in building up a working relationship. The words used by the claimant, which were clearly words that explained how strongly the claimant felt, were not received well by Ms Lorimer who reasonably believed that she was being undermined. While the claimant was identifying errors, the way in which this had been done left Ms Lorimer concerned as to the working relationship.

99. The claimant's approach was that it was possible to continue with her role despite the significant issues that existed between her and Ms Lorimer. Ms Lorimer did not believe that it was possible to continue in that regard. While the contact between the two had been relatively little, both parties had reached a view on the nature of the relationship. Ms Lorimer wanted to ensure the relationship worked but was concerned about how the claimant had

viewed her and as a result how she would conduct herself when communicating with her.

100. The key dispute was in relation to what happened on 3 June 2019. The claimant was clear that she only said: “be very careful” on her way out of the room and that there were no others present. Ms Lorimer was clear that there were customers present and that the claimant had said be very careful twice. I found Ms Lorimer more credible in relation to this issue. I found this as the claimant was angry as to the insinuation that she believed Ms Lorimer had been made. She concluded that she had been singled out when in fact the same email had been sent to others. The claimant was angry and was focused on her interaction with Ms Lorimer. That, in my view, resulted in her not being clear on what else was happening around her, and in particular the presence of others at the time. Her focus was on Ms Lorimer and not on others. She was also in a rush given where she had parked and her focus was on obtaining the papers and making her point to Ms Lorimer.

101. Ms Lorimer’s evidence was corroborated to an extent by Ms Flynn who spoke with Ms Lorimer shortly following the altercation. Ms Flynn confirmed that after the altercation between the claimant and Ms Lorimer Ms Lorimer spoke with Ms Flynn. Ms Flynn was able to relay how Ms Lorimer had felt and what she said. That was broadly consistent with what Ms Lorimer had said had happened.

102. The information that Ms Flynn and Ms Lorimer had obtained broadly supported what Ms Lorimer had said.

103. Balancing the evidence I found the position set out by Ms Lorimer to be more credible but that did not detract from the strength of the claimant’s beliefs and the hurt she felt in having been dismissed (in her eyes) without a fair procedure having been followed.

104. The evidence before the Tribunal that showed the relationship between the claimant and Ms Lorimer had been seriously damaged.

Law

Employment status

105. An employee is defined at section 230 of the Employment Rights Act 1996 as an individual who has entered into or works under a contract of employment, namely a contract of service or apprenticeship, whether express or implied, whether oral or in writing. Determining whether a contract of service exists or not has been the subject of many years of litigation.

106. The current position is to consider the entirety of the relationship - the multi factorial or multiple test as initially set out in **Ready Mixed Concrete v Minister of Pensions** [1968] 2 QB 497. In this case Mackenna J stated (at page 515):

107. "A contract of service exists if three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in performance of some service for his master. (ii) He agrees, expressly or impliedly, that in performance of that service he will be subject to the other's control in a sufficient degree to make the other his master. (iii) The other provisions of the contract are consistent with its being a contract of service."

108. In **Hall v Lorimer** 1994 ICR 218 the Court of Appeal confirmed that this is not a mechanical exercise but instead the Employment Tribunal must paint a picture from the accumulation of all the relevant facts and then standing back viewing the matter from a distance to make an informed qualitative appreciation of the whole relationship. That case noted that not all factors are of equal importance nor should they be given the same weight. It is for the Employment Tribunal to assess the factors and reach a judgment applying the law.

109. The essential ingredients in an employment relationship are therefore that a contract exists (express or implied), that there is an obligation to work personally, that there is sufficient "mutuality of obligations" for the duration of the relationship (ie that both parties are under legal obligations towards each other) and that there is a sufficient degree or framework of control by the employer. These are essential ingredients that must exist, otherwise the relationship will not be one of employment. I shall deal with them in turn.

110. Firstly there must be a contract between the parties, which can be express or implied. In Scots law, that means there should be some form of offer in relation to the basic essential requirements to carry out the role met with an unequivocal acceptance of those terms. A contract can be express

(such as in writing, from one or various sources) or implied (gleaned from the actions of the parties). That was not disputed in this case.

111. Secondly there must be "mutuality of obligation" between the employer and the employee. This has been subject to a large amount of judicial consideration but the (then) House of Lords in **Carmichael v National Power** 2000 IRLR 32 said that the existence of mutuality of obligations is an "irreducible minimum" of a contract of employment. Lord Irvine accepted that if there was no obligation on the putative employer to provide casual work and no obligation on the putative employee to undertake it, there would be an absence of the irreducible minimum of mutuality of obligations necessary for there to be an employment relationship. In essence it means that for the duration of the contract in question both parties are under obligations to each other. It goes beyond the existence of a contract (which is obviously a mutual agreement – See **Cotwold Developments v Williams** 2006 IRLR 181)). The nature of the obligations require to be such as to amount to an employment relationship. Normally the obligation is that the employee carry out work and that payment is made therefor and if there are periods when no work is offered, pay a retainer and it has been suggested that in the absence of a retainer in periods when no work is offered, there will be no employment contract (see **Clark v Oxfordshire** 1998 IRLR 125).

112. In **Clark** the only issue was whether a nurse who worked as "bank staff" did so under a global contract of employment. She was offered work when it arose. There was no entitlement to any guaranteed or continuous work. There was therefore no obligation to offer work and no obligation on the individual to accept work which was offered. There was insufficient mutuality of obligations in that case.

113. Buckley J in **Montgomery v Johnson** 2001 ICR 819 stated (at paragraph 23): "As society and the nature and manner of carrying out employment continues to develop, so will the court's view of the nature and extent of "mutual obligations" concerning the work in question."

114. In **St Ives v Haggerty** 2008 All ER (D) 317 following **Nethermere v Gardiner** 1984 IRLR 240 and **Airfix v Cope** 1978 IRLR 378 the court held that there may, exceptionally, be circumstances where the pattern of work is such that it may be possible to infer an obligation to work simply from the continual repetition of working being offered and accepted. The issue in that case was given there was no duty to work any particular shift or a minimum number of shifts, was the expectation of being given work, resulting from the

practice over a period of time, of itself constitute a legal obligation to provide some work or to perform the work provided, even where there is no duty to undertake any particular work offered or a minimum amount of work?

115. The court considered **Airfix v Cope** where a homeworker fixed heels to shoes. The evidence was that she had done the work five days a week for several years. The Employment Appeal Tribunal held that it was plainly open to the Tribunal to find that there was an umbrella contract regulating the relationship. However, in that case there was no evidence that the employee could refuse to do the work if it was offered.

116. The Employment Appeal Tribunal decided that a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided. The question was whether there was a "sufficient factual substratum" to support a finding that such a legal obligation has arisen. It was a question of fact, not law. The Court recognised that commercial imperatives may over time crystallise into legal obligations.

117. If the terms of the contract expressly negate mutuality of obligations, that would prevent there being a contract of employment (see **Stevedoring v Fuller** 2001 IRLR 627). In that case the Court held that in the facts of that case the worker had worked under a series of individual contracts each of which recorded that there was no obligation to offer or accept any further contract. It was not possible on the facts of that case to imply any overarching or umbrella contract.

118. In assessing whether or not a written contract properly records the agreement of the parties, the guidance given by the Supreme Court in **Autoclenz Ltd v Belcher** 2011 IRLR 820 should be applied. This emphasised that employment contracts differ from normal commercial contracts given the bargaining position of the parties (in the normal situation). The Tribunal must therefore look at the reality of the arrangements between the parties as opposed to concentrating on the written agreement when working out what the true agreement between the parties was.

119. The Employment Appeal Tribunal in **Hafal v Lane-Angell** UKEAT/107/17 (Choudhury J presiding) considered a situation whereby a casual worker had been removed from the register. There was a letter of appointment but there was nothing in it, or in anything said between the parties, to suggest that all aspects of the relationship were to be determined

solely by reference to the letter. The Employment Appeal Tribunal found that in that kind of case where the intention of the parties, objectively ascertained, has to be gathered partly from the documents and partly from the facts surrounding the relationship. The Tribunal had erred by focussing only on the facts surrounding the relationship with little or no regard to the terms of the appointment.

120. The Tribunal in that case did not expressly set out the terms in the letter stating that there were no guaranteed hours and that the claimant's services would be used on an "as and when required" basis and only if she is available which appeared to negate any mutuality of obligation. The claimant could indicate that she was not available and was not, therefore, obliged to work when requested to do so.

121. The position in that case was not dissimilar to that in **Stevedoring** where there was also no obligation on the part of the employer to offer work and no obligation on the part of the employee to accept work that was offered. Whilst the language used in the letter is not as definitive about the absence of obligation as in Stevedoring, it had the same effect. The letter created a framework pursuant to which successive engagements would be carried out. Thus, if the claimant says she is available, is placed on the rota and then accepts work, she will be paid in accordance with the terms of the letter and will accrue the benefits set out. The Employment Appeal Tribunal found that the terms of the appointment therefore indicated that there was no mutuality of obligation.

122. The Court stated that it was still necessary to consider whether the way in which the work was offered was such as to indicate the existence of such obligations notwithstanding what is stated in the terms. There was an expectation that the claimant would be able to provide work should she be contacted whilst on the rota. However, she was not obliged to provide any or any minimum number of dates of availability. The Court stated that "It is a trite observation that an expectation that the claimant would provide work is not the same as an obligation to do so."

123. The Court recognised that there may be cases where, as a result of a commercial imperative or market forces, the practice is that work is usually offered and usually accepted and that such commercial imperatives or forces may crystallise over time into legal obligations. That was the case in **Haggerty**. However, in that case, there were no express terms negating such obligations. The Court considered that to be a significant distinguishing

feature and on the facts, this case was closer to the situation in **Stevedoring** and **Carmichael** than that in **Haggerty**.

124. The Tribunal's original conclusion was that whilst she may not have been offered particular work for a short period of time: "the overall pattern shows that the claimant was utilised and offered and was expected to take a substantial amount of work. There was a continuing overarching contract which had the necessary elements of mutuality of obligation." Choudhury J found that the fact that the claimant may have been "utilised" for much of the period or that she was "expected" to accept work, does not establish the existence of an obligation over the whole period. He found that the absence of any finding of fact that there was some degree of obligation between periods when the claimant was on the rota was, in his judgment, fatal to the conclusion that there was some sort of continuing overarching contract for the whole of the period. Absent sufficient mutuality of obligations, the Court dismissed the claim.

125. The Upper Tribunal in **Commissioners for HMRC v Professional Game Match Officials** 2020 UKUT 0147 reviewed the authorities in this area and set out what the current law was in relation to mutuality of obligations. That case reiterated that each case is fact sensitive and the facts must be carefully considered. The following propositions as to the required content of mutuality of obligations were set out (from paragraph 68): "First so far as the obligations on the employee are concerned, the minimum requirement is an obligation to perform at least some work and an obligation to do so personally. It is consistent with such an obligation that the employee can in some circumstances refuse to work, without breaching the contract. It is inconsistent with that obligation, however, if the employee can, without breaching the contract, decide never to turn up for work. Second the minimum requirement on the employer is an obligation to provide work or, in the alternative, a retainer of some form of consideration (which need not necessarily be pecuniary) in the absence of work. It is insufficient to constitute an employment contract if the only obligation on the employer is to pay for work when it is actually done. Third, in both cases, the obligations must subsist throughout the whole period of the contract."

126. In that case the Upper Tribunal found that the First Tier Tribunal was correct to find that in the absence of an obligation to provide some work (or some form of consideration in lieu of work) or in the absence of an obligation to undertake some work, there was insufficient mutuality of obligation to characterise the overarching contract as an employment contract (see paragraph 71).

127. Thirdly the worker must expressly or impliedly be subject to a sufficiency of control by the putative employer. This means that in a general sense ultimate authority over the worker in the performance of the work must reside in the employer such that the employee is subject to the employer's orders and directions. It is not necessary that the worker is subject to day to day control. This a matter to be determined from a consideration of the facts of each case.

128. Finally the contract must impose an obligation on the worker to provide work personally. The worker must be under an obligation to personally provide their services. A limited power of delegation or substitution does not necessarily mean the obligation to work personally has been removed (see **MacFarlane v Glasgow** 2001 IRLR 7).

129. Even if the above essential elements are present, the Tribunal must then still look at all the relevant factors that exist in the relationship and decide if the relationship is one of employment or not. Relevant factors would include whether or not the claimant was an integral part of the business, whether she provides her own equipment or staff, the degree of financial risk taken and the ability to profit from sound management and responsibility for investment and management.

130. The label applied by the parties is relevant (especially if the legal status of the relationship is ambiguous – **Massey** 2007 IRLR 902). Similarly, the way in which the parties treat themselves, such as how they tax their earnings is a relevant factor. These factors would go into the balance and are not decisive.

Unfair dismissal

131. Section 98 (1) of the Employment Rights Act 1996: "In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show: (a) the reason (or if more than one the principal reason for the dismissal); and (b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

132. Section 98(2) of the Employment Rights Act 1996: "A reason falls within this subsection if it… relates to the conduct of the employee".

133. Section 98(4) of the Employment Rights Act 1996: "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and (b) shall be determined in accordance with equity and the substantial merits of the case".

134. In accordance with the tests set out in **British Home Stores Ltd v Burchell** 1980 ICR 303 the Tribunal must consider:-

(i) Did the respondent believe the claimant was guilty of misconduct?

(ii) Did the respondent have in its mind reasonable grounds upon which to sustain that belief? and

(iii) At the stage at which that belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances of the case?

135. Range of reasonable responses:-

(i) When assessing whether the Burchell test has been met, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

(ii) The starting point should always be the words of section 98(4) themselves. In applying the section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as

to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.

(iii) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. However, the band is not infinitely wide and is not a matter of procedural box ticking.

136. The Tribunal must not substitute its decision for that of the employer and must look at the matter through the lens of a reasonable employer: could a reasonable employer have carried out the procedure that was undertaken, and could a reasonable employer have dismissed for the reasons relied upon in this case? In other words, it is important not to substitute the Tribunal's decision for that of the employer, and the matter must be looked at in the round to decide whether or not the respondent acted reasonably: **Sainsburys v Hitt** 2003 IRLR 23 and **Secretary of State v Low**n 2016 IRLR 22.

137. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (**West Midland v Tipton** 1986 ICR 192).

Reinstatement and reengagement

138. The Employment Rights Act 1996 (ERA), the remedies it can award are set out in section 112, which says as follows:

"The remedies: orders and compensation (1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded. (2) The tribunal shall— (a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and (b) ask him whether he wishes the tribunal to make such an order. (3) If the complainant expresses such a wish, the tribunal may make an order under section 113. (4) If no order is made under section 113, the tribunal shall make an award of compensation for

unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee."

139. "The orders" are defined in section 113 as orders for reinstatement or reengagement and are further defined in sections 114 and 115 as follows: "114. Order for reinstatement (1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed. (2) On making an order for reinstatement the tribunal shall specify— (a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement, (b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and (c) the date by which the order must be complied with. (3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed. (4) In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of— (a) wages in lieu of notice or ex gratia payments paid by the employer, or (b) remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances."

140. Section 115 Order for re-engagement states: "(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment. (2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including— (a) the identity of the employer, (b) the nature of the employment, (c) the remuneration for the employment, (d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reengagement, (e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and (f) the date by which the order must be complied with. (3) In calculating for the purposes of subsection (2)(d) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any

sums received by the complainant in respect of the period between the date of termination of employment and the date of re-engagement by way of— (a) wages in lieu of notice or ex gratia payments paid by the employer, or (b) remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances."

141. The essential distinction between the two types of order is that an order for reinstatement requires the employer to reinstate the employee to the job from which she was dismissed whereas an order for re-engagement requires the employer (or an associated employer) to take the employee back into its employment to a post and on terms specified by the Tribunal. In addition to this the Tribunal has power to order payment of lost earnings and benefits in the period between dismissal and reinstatement or re-engagement. Critically, this element is not subject to the cap on compensation which applies to the compensatory award and can take account of increases the employee would have received had she remained employed.

142. Sections 114(2) and 115(2) set out matters which the Tribunal must specify in its order should it decide to order reinstatement or reengagement.

143. An order for re-engagement must be 'on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement' unless the employee has partly contributed to her own dismissal (section 116). This does not entitle a Tribunal to order re-engagement on specifically more favourable terms than would have applied if the employee had been reinstated to her original job (**Rank Xerox (UK) Ltd v Stryczek** 1995 IRLR 568).

144. The Tribunal has a wide discretion in deciding whether either order is appropriate but the legislation identifies three factors it must consider: the employee's wishes; whether it is practicable for the employer to comply with an order; and whether the employee has caused or contributed to her own dismissal (section 116).

145. When considering reinstatement or re-engagement, a Tribunal should not take into account any **Polkey** reduction as this concerns compensation and not reinstatement or re-engagement (**Arriva London Ltd v Eleftheriou** 2012 UKEAT/0272). The facts taken into account when making a **Polkey** deduction may nevertheless be relevant in deciding whether it is just to order reinstatement or re-engagement or in considering contributory fault.

146. The issue of practicability is a question of fact for the Tribunal (**Port of London Authority v Payne** 1994 IRLR 9) and is to be judged at the date when the order would take effect (that is, at the time of or shortly after the remedy hearing) (**King v Royal Bank of Canada Europe Limited** 2012 IRLR 280).

147. In **Port of London** Neill LJ said as follows about the assessment by Tribunals of practicability: "The standard must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer does not have to show that reinstatement or re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time."

148. Other factors which have been thought relevant in justifying a Tribunal refusing an order for reinstatement of re-engagement are: the fact that the atmosphere in the workplace is poisoned (**Meridian Ltd v Gomersall** 1977 IRLR 425, and **Coleman v Toleman's Delivery Service Ltd** 1973 IRLR 67); the fact that the employee has shown that she distrusts or lacks confidence in her employer and would not be a satisfactory employee if reinstated (**Nothman v London Borough of Barnet (No 2)** 1980 IRLR 65); where the employee has made allegations against the people with whom she would be working if reinstated or re-engaged which would make it impossible for them to work together, even though that was the inevitable result of fighting her case (**Wood Group Heavy Industrial Turbines Ltd v Crossan** 1998 IRLR 680).

149. However, the fact that an employee has made serious allegations against colleagues or managers at one workplace will not necessarily impact on the relationship which she will have with colleagues and managers at a different workplace: see Oasis **Community Learning v Wolff** UKEAT/0364/12 (Underhill J presiding) where the Employment Tribunal ordered re-engagement at a different workplace.

Contributory action by the employee

150. If the employee has caused or contributed to her dismissal, this factor must be taken into account by the Tribunal when considering reinstatement or reengagement. The test for contributory fault is the same whether compensation is ordered or an order made for reinstatement or re-engagement (**Boots Co plc v Lees-Collier** 1986 IRLR 485). A Tribunal will only order reinstatement of an employee who has contributed to the dismissal

in a blameworthy sense in exceptional circumstances but an order for re-engagement may sometimes be appropriate, with the Tribunal reflecting the employee's fault in the terms on which reengagement is ordered.

Compensation

151. In addition to a basic award (section 119 of the Employment Rights Act 1996), section 123(1) Employment Rights Act 1996 provides for a compensatory award which is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer (capped at a year's pay or the statutory cap, if lesser).

152. Contributory conduct is dealt with differently for both awards:-

(i) Section 122(2) Employment Rights Act 1996 states: Where the Tribunal considers that any conduct of the claimant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly

(ii) Section 123(6) Employment Rights Act 1996 states: Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion regard to that finding.

Polkey

153. Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

Wrongful dismissal

154. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a claimant can seek payment of contractual sums due which are outstanding upon termination of employment. That can include payment of notice pay. There is a cap of £25,000 in respect of this claim.

155. Notice to be given to an employee must not be less than the statutory minimum which is set out at section 86 of the Employment Rights Act 1996, which is 1 week for complete year of employment, up to a maximum of 12 weeks following 12 complete years' service and beyond.

156. If an employee is summarily dismissed without notice which would otherwise be contractually due, and the employee claims notice pay at Tribunal, the onus is on the employer to show, on the balance of probabilities, that the employee fundamentally breached the contract of employment (as a question of fact), and is thereby not entitled to notice pay.

157. If the Tribunal is not satisfied that as a matter of fact the employee did fundamentally breach the contract of employment, notice pay would be payable. The onus is on the respondent to show that the conduct in question was, as a matter of fact, of such a nature so as to entitle the respondent not to summarily dismiss or that the respondent did not breach the contract in ending the contract in the way it did.

158. Any sums earned by the claimant during the notice period require to be taken into account in the assessment of the sums due to the employee. This is because the claim for wrongful dismissal (pay during the notice period that ought to have been given) is a claim for damages for breach of contract.

Holiday pay

159. The law in this area stems from the Working Time Directive and is found in the Working Time Regulations 1998. Regulation 13 sets out the entitlement to annual leave, namely 4 weeks per year. Regulation 13A sets out the entitlement to the additional leave period of 1.6 weeks a year. All workers are entitled to 5.6 week's leave per year.

160. Regulation 14 deals with the calculation of pay where holidays have accrued and remain untaken as at the end of employment. It contains a formula to calculate what is due as at the end of employment (essentially the proportion of untaken leave that has accrued to the relevant date) and requires the employer to pay to the employee a payment in lieu of the leave that has accrued (where the amount of accrued leave is more than the amount taken).

161. It is possible to roll up holiday pay such that when a worker is paid an element of holiday pay is separated in the pay slip as amounting to holiday pay. See **Smith v A J Morrisons** 2005 ICR 596 and **Lyddon v Englefield** 2008 IRLR 198.

Submissions

162. Both parties submitted written submissions to which they spoke. The written submissions are contained on the Tribunal file and I provide below a summary of the points made but the full submissions have been taken into account.

Claimant's submissions

163. Counsel for the claimant submitted that the claimant was engaged for almost 17 years during which time she was an employee.

164. With regard to employment status, reference was made to the definitions in section 230 of the Employment Rights Act 1996 and **Ready Mixed Concrete** and the 3 conditions that require to be considered: control, personal service and an assessment of the other factors of the relationship.

165. The key issue was whether there was sufficient mutuality of obligation between the parties which means that there is agreement that the employer provide work or a retainer or some form of consideration, which need not necessarily be pecuniary and the employee carry out such work as is offered

166. These cases are often fact sensitive and a careful analysis of the facts is needed. The **Professional Game Match Officials** case can be distinguished because the facts are different, it was a tax case and the work undertaken was done as hobby a hobby and not as a profession.

167. Counsel for the claimant accepted that clause 2 of the 2013 Agreement suggested that there was no mutuality of obligations between parties since there was on the face of it express agreement that work need not be offered nor accepted. Counsel conceded that this is the position on the face of the document.

168. However, it was submitted that the contract cannot be relied upon of itself where the parties have a long unvaried course of dealings before and

after the document was entered into which counsel submitted flies in the face of its express terms.

169. It was argued that the document does not reflect the reality. The reality is evidenced by a course of conduct over many years. That was the position in **Autoklenz** and Judges should be "worldly wise to the reality of situation". In this case the reality the claimant worked every month 17 years, on overlapping marriages on a continuous rolling basis

170. Counsel conceded that if the contract did govern the parties' relationship the claimant would not be an employee since there would be an express absence of mutuality of obligations but it was argued the clause was not followed in practice. He argued there was a list of options sent out every month and the claimant would carry out 4 or even 5 weddings.

171. The principal submission was that the respondent had become subject to an obligation to offer the claimant work because of the passage of time, and not by reference to the written agreement. This had developed over 17 years.

172. The reality was that the claimant was offered work every month and she accepted.

173. Further the document was not subject to negotiation as it was presented to the claimant and the arrangements for conducting weddings had not changed. In short, the long-term regularity and frequency of what happened crystallised the relationship, such that the words of contract did not reflect the reality of the situation.

174. Counsel referred to the fact that employment contracts are different from normal commercial contracts and consideration needs to be given to what actually happens.

175. Counsel accepted that his reasoning would result in employment status differing depending upon how long the person (on *prima facie* identical terms) had worked. He argued this concept was similar to custom and practice.

176. He relied upon **Airfix** where work had been done in a certain way over time, the relationship had become one of employment. It was argued that an observer who had not read the terms of the agreement would be surprised by any suggestion that here was no requirement to offer work or accept work. This had occurred over a sufficiently lengthy period of time to become employment.

177. Counsel for the respondent argued that it is not necessary that the individual to accept all work offered but must accept some or the greater part of it. That is what happened. At the heart of his submission was that there is an obligation to offer work and accept some of it and offer it in exchange for some form of remuneration

178. Counsel also relied on **St Ives v Hagerty** to show that conduct over a long period of time resulted in there being an expectation of a reasonable amount of work.

179. It was suggested that the claimant's name could be removed from the register if she persistently refused work and that in fact she did some work most weeks, which was not just conducting a wedding, all within her flat fee.

180. Counsel accepted this is a question of degree and the facts are not easy to disentangle but the Tribunal must weigh up in common sense worldly wise way and identify what the reality of the situation was.

181. This was not a case of one assignment as the work was ongoing. It was a continuing and regular process. The label applied to the relationship and tax situation and payment was not particularly relevant to the issue.

182. In summary the contract did not reflect the reality of the situation since the evidence showed the claimant was provided with work for each month during her 17 years tenure unless she was ill or on holiday. The claimant was part of the respondent's organisation in the sense that she was part of the team of marriage officers. She was trained most years and was part of the organisation and controlled by the respondent in terms of how what weddings were offered and how they were done.

183. The facts showed an implied agreement established over many years that the respondent continually provided work to the claimant and she invariably did it, which did not alter despite written documents being issued.

184. The claimant was subject to sufficient control by the respondent. She obtained work from the respondent, they provided the script to be followed, they directed how she should act, she had to dress smartly, feedback on performance was given and addressed with her. Consent was needed to work outside the area.

185. Personal service was also clear since the claimant could not substitute another. She had to do the work herself which failing the respondent would allocate another.

186. Finally, all the other circumstances suggested it was employment. The respondent determined her pay and duties, allocated work to her, training, pension, annual leave, paid SSP, work materials such as pens and stationery, training and administrative framework. The respondent managed her work, discipline competence and grievances and while it was argued the respondent were not following the grievance policy, they did. The respondent did discipline her and assess her competence. She required to work to their code of conduct in terms of service as set out in the agreement.

187. If she was an employee it was argued that her dismissal was unfair. Whatever the reason, whether conduct or some other substantial reason. There was no procedure. No attempt was made to obtain the claimant's response to the suggestion the relationship had broken down. There had been no objective or fair consideration of the merits of the decision to terminate her contract.

188. The dismissal was procedurally and substantively unfair and wrongful.

189. Reinstatement was sought. It was reasonably practicable to reinstate the claimant. There was no doubt the claimant was competent and any other employee could be the point of contact, removing any contact with Ms Lorimer if that were an issue. The working relationship could in any event be repaired b mediation. Reengagement was also possible.

190. Reference was made to the schedule of loss with regard to compensation.

Respondent's submissions

191. Counsel for the respondent submitted that the starting point is to consider the written contract and look at its terms. This was derived from **Kettle** and **Carmichael**. If the document was intended to be an exclusive record of terms of agreement and that is found to be so, that is usually the end of the matter. Other cases have a number of letters relied upon but in this case there is one contract. Part of the factual matrix is the contract.

192. Counsel argued that ether was nothing from the facts of the claimant's engagements that was not in line with this agreement. She signed and accepted it as she had done with previous agreements. There was a history of agreement to the applicable terms.

193. Counsel referred to the paragraph which was clear. Inclusion on the register means the individual was eligible to be offered casual work: there was no guarantee the individual would receive any work and it would depend on the fluctuating requirements of the respondent. There was clear discretion and there was no obligation to provide or to accept work.

194. In response to the claimant's submissions that this did not represent the reality and the passage of time had altered the position, it was argued that there was no suggestion the contract or its terms were a sham or designed to avoid employment obligations. Its terms provided the reality of the situation

195. Counsel argued that just because the claimant had been free to undertake work and had done so did not mean there was an obligation to offer work. There were several periods where no work was done. There were months too where only 1 or 2 weddings were conducted. The claimant had accepted she would not put herself forward where she had other commitments or leave.

196. The reality of the situation is that there was a complete absence of obligations by both parties and cases such as **Haggarty** did not assist. In **Plymouth** there was nothing expressly to defeat mutuality. As the Employment Appeal Tribunal had said the agreement must be considered and if it reflects the reality of the situation it must be respected. The claimant could and did refuse work: she was not under an obligation accept any type of work.

197. It was also submitted that it was not correct to say if the claimant did not accept work she would not continue to be offered work. There was no real consequence if a casual worker did not accept work offered.

198. Counsel for the claimant referred to **Hafal** which refers to **Carmichael**. The Tribunal in that case did not fully take into account the written documents and its conclusions based on what it saw to be what happened in practice. The situation was similar to this case. That involved casual workers and the contract set out the terms of the relationship.

199. There was also an absence of control. The law set out the minimum requirements and marriage officers had a large degree of control. They chose how to conduct their role. A basic script was provided but it was for the couple to agree.

200. There was a question mark over personal service.

201. Finally the other adminicles of the relationship were not supportive of this being employment.

202. In short the contract set out the terms of the relationship and even if one looked at the relationship the reality was that there was no mutuality of obligations.

203. With reference to the argument that the position changed over time, that would mean it would be impossible to say when the claimant became an employee and thereby acquired sufficient service as an employee to claim employment rights. There was no evidence when her status changed to become an employee and it is not enough just to show that she had become an employee by the time of her assignments ending.

204. While it was not conceded that the dismissal was unfair, if the claimant was found to be an employee, it was accepted that there was no substantive procedure followed.

205. With regard to remedy, the evidence showed the claimant's behaviour impacted upon not just Ms Lorimer but on the team working in office. There was tension. Even if the issue was the effect on Ms Lorimer, the claimant was unable to work with a superior member of the team. Her behaviour led

to the relationship breakdown. Counsel for the claimant suggested the claimant's own evidence showed how the relationship had broken down and it was not practicable for the claimant to return in any capacity. The claimant had deliberately avoided her line manager for a lengthy period of time.

206. With regard to compensation none should be awarded from March 2020 on given the absence of work. At best from April onwards there was 20% the level of work offered.

207. Counsel accepted in calculating the basic award the previous 12 weeks wages had to be considered but an annual average for the compensatory award was fairer giving a weekly sum of £47.40 or a monthly sum of £379.30.

208. It was submitted that as a result of contribution and **Polkey** reduction, compensation should be reduced by at least 90%. The trigger point for the cessation of work, albeit not the only point, was the incident on 3 June. The claimant felt she was singled out when she had not been. The claimant's telling her manager that she needed to be careful was an outrageous thing to say

Claimant's counsel's response

209. Counsel for the claimant confirmed that he was relying on an overarching employment contract only which was punctuated by assignments. This was not a case whereby the claimant was relying on individual contracts of employment. In essence work was carried out over long number of years resulted in there being an overarching contract of employment with varying hours.

210. With regard to the submissions on the Employment Appeal Tribunal's dicta, **Autoclenz** should be applied in preference. When looking at the contract the surrounding factors and not just written terms should be considered. This was a contact put together by smart lawyers with no discussion or negotiation; it had nothing to do with what happened in reality.

211. With regard to contribution an uplift was sought for lack of procedure, the conduct that led to the dismissal was an innocuous exchange on 3 June and nothing cause great upset but if Ms Lorimer's evidence was accepted come contribution should be considered.

Decision and reasons

Employment status

212. In order to assess whether or not the claimant is an employee and thereby entitled to claim unfair dismissal, I must examine the relationship that existed between the parties. The law is not in dispute in this case. Each case is fact sensitive and the facts must be analysed to determine whether or not the individual is an employee as a matter of law. I shall consider the essential ingredients of an employee in turn.

Mutuality of obligations

213. The parties agreed that the first issue in this question is whether or not there is mutuality of obligations between the parties. The claimant's case is not that there were individual contracts of employment but rather that there was an overarching contact punctuated with different assignments, an overarching contract of employment.

214. In order to determine this I must consider what the contractual position between the parties was, in the sense of what was agreed between the parties. A contract of course does not just have to be (and in some cases will not be) the written document the parties have entered into. In looking at what the parties agreed I must apply the approach set out in **Autoclenz** and be "realistic and worldly wise" given the relationship. The context of an employment (or similar) relationship is not the same as a commercial contract situation. I have carefully considered the evidence led before the Tribunal.

215. I have also applied the reasoning of Elias J (as he then was) from the **Consistent v Kalak** case 2007 IRLR 560 at paragraph 58 which was approved by Lord Clarke in **Autoclenz** (at paragraph 25) when he said: "… if the reality of the situation is that no one seriously expected that a worker will seek to provide a substitute or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless."

216. While that was obviously in relation to the power of substitution, the current case centres around paragraph 2 of the 2013 Casual Worker Register Agreement. The respondent contended that this was a term of the relationship that existed between the parties. The claimant argued that while she accepted the contract, adopting a worldly-wise approach I should find that this clause did not represent what the parties had agreed not least given the passage of time and realty of the situation. It was conceded on behalf of the claimant that if that did properly represent the contractual position of the parties, there would be insufficient mutuality of obligations (and therefore she would not be an employee).

217. The claimant's agent argued that the regularity of being offered work and the claimant's approach at accepting work was such that this clause did not in fact have the effect that it purported to have.

218. I have considered this carefully but I do not find it to be sound. Having taken a step back and looked carefully at the relationship between the parties I have concluded that this clause did in fact mean what it says and that the parties understood and accepted that it be so.

219. I have reached this conclusion for a number of reasons.

220. Firstly the suggestion that the respondent is not under any obligation to offer work and that the claimant is not under any obligation accept any work that is offered has been a constant and consistent feature of each of the agreements the parties have entered into. This is seen at paragraph 7 in the 2002 Agreement and paragraph 7 of the 2007 Agreement.

221. Clause 2 of the 2013 agreement reflects what had originally been agreed when the parties entered into the contract.

222. The express term was not something that was introduced years after the relationship had started. It had, in fact, featured in the contractual matrix between the parties throughout their entire relationship. It was not new and it was an important term of the relationship between the parties.

223. Secondly I do not accept that simply because the claimant says she accepted every assignment offered to her resulted in a *contractual* obligation to provide work. It was very clear from the evidence that the respondent intended the arrangement always to be dependent upon their discretion. If

they wished to offer work (and had work to offer) they could do so but there was no suggestion they believed (nor indeed that the claimant believed) the claimant could insist that work be offered.

224. The reality of the arrangement was that the claimant would be offered work if the respondent decided to offer her work. It could choose (and had the contractual power to choose) not to do so. It could may decide to retain work for permanent staff or may give a particular officer work (in preference to the claimant or the others).

225. The respondent was not under any obligation to offer the claimant work. There was no retainer or other consideration in place when no work was offered (and in fact there were no relevant obligations between the parties during such periods).

226. Equally the claimant was not under any obligation to carry out work that was offered. She candidly accepted that she could choose not to provide availability or limited availability and there were some months where no work or limited work was done. The respondent was clear that it was a matter for the claimant as to whether on a month by month basis she was available for work or not.

227. The claimant accepted that she could refuse to put herself forward for work. There was no consequence of her doing so. If she did not provide any service for a period of time she may have been removed from the register, but that would be because she was not carrying out work (and would only be considered after 12 months of no work having been provided).

228. The fact that work was ordinarily available and that the claimant was also ordinarily available to do work does not by itself result in the contractual position set out by the parties in writing not being representative of what was agreed. The work that was offered and accepted by the claimant occurred against the backdrop of the written terms agreed between the parties.

229. That agreement dealt not just with the parties' obligations towards each other as to providing and refusing work but also dealt with payment and other provisions, such as the Code of Conduct. Both parties acted in a way consistent with those terms applying. Indeed the claimant's agent's submissions noted that as part of the relationship, the agreement contained an obligation the code of conduct should be followed.

230. Had a reasonable observer been asked to comment on the contractual position in light of the full factual matrix, I have no doubt they would conclude that the terms of paragraph 2 of the Agreement were as much part of the agreement the parties had reached as payment arrangements and rules as to complying with the Code were.

231. As set out in the dicta from **Hafal**, the fact that the worker was utilised and even expected to be utilised did not of itself result in there being a contractual obligation to provide work. In this case I find that although the claimant was utilised she was not expected to work; that was entirely a matter for the claimant and her availability. If she was not available for work (even for no good reason) that was entirely a matter for her and something that did not amount to any breach of contract. As a matter of fact, there were no obligations between the parties when the assignment (ie each ceremony) had been completed. That was what the contract had said (see paragraph 3) but also what had happened in practice. The claimant's role was to conduct each ceremony. Those were individual assignments, the duration of which varied and it was for the claimant to determine how to carry each assignment out. Once the ceremony had been conducted and the schedule returned, her task was complete, there being no other obligation on her or the respondent.

232. In my judgment paragraph 2 of the contract (and its predecessors) genuinely reflected what the parties might reasonably be expected to occur (such that the respondent was under no obligation to offer work and the claimant was under no obligation to accept any such work that was offered).

233. This is tested when considered against the prevailing pandemic. While the claimant is no longer in a relationship with the respondent, it is clear that had the relationship been extant, no work would have been offered to her and she would have had no right to insist on such work (nor any payment). The fact the respondent chose to offer work to others (and no one) is entirely a matter for the respondent in the exercise of its discretion.

234. The claimant was clear in her evidence and stated that had she not signed the agreement which was issued to her, she would not have been provided with work. That underlined the significance of the written document and that it was relevant to the parties' respective obligations. I take into account that it was not the subject of any negotiation (and was presented to her for agreement) but it represented what the terms of the relationship were to be. She did not require to agree to its terms but she did so. If she wished

to receive the income for work done, she required to agree to the terms governing the relationship. She did so.

235. I carefully considered the terms of **St Ives**. I accept the respondent's agent's submission that this case can be distinguished given the different facts and in particular the absence, in that case, of any contractual provision that casual workers could decline particular work. That contrasts markedly with this case where not only did the contract between the parties make this clear but the claimant accepted she could do so, and had done so. There was no obligation on the claimant to provide any availability and if she was unable to conduct any particular ceremony someone else from the list would be identified.

236. In **St Ives** (and **Airfix** 1978 IRLR 378) there were exceptional circumstances whereby the pattern of work was such that it was possible to infer an obligation to work simply from the continual repetition of working being offered and accepted. I do not find that such an obligation arose from the facts of the present case. Just because the claimant had done work over time did not by itself create a legal expectation. The written terms that governed the relationship and had done since its inception made it clear that the provision of work was a matter for the respondent's discretion and had not crystallised into a legal obligation to provide work.

237. I considered the terms of the contract agreed between the parties in a worldly-wise way. From the facts I concluded that the written agreement did accurately reflect those terms.

238. I note in passing that the contract also contained an "entire agreement clause" whereby it was stated that the terms governed the parties' relationship (and no others), seen at paragraph 14. That could potentially defeat the argument that the parties' conduct had resulted in the contractual terms changing. However, applying **Autoclenz**, I have looked at the relationship as a whole in assessing what reasonably the parties were taken to have agreed.

239. While there was a contract between the parties, I do not consider that there was a "sufficient factual substratum" in this case to support a finding that sufficient mutuality of obligation had arisen to result in the relationship being one of employment. I accept that commercial imperatives may over time crystallise into legal obligations, but in this case from the nature of the parties' relationship I do not find such an obligation to have arisen nor to have overtaken what was agreed between the parties in writing.

240. The absence in **St Ives** of an express provision that entitled the worker to decline work is significant. Moreover there was no consideration given by the respondent, absent the provision of work and none was suggested by the claimant. She may have believed she was entitled to work, but that belief was not sustainable given what had been agreed between the parties and the reality of the relationship.

241. The situation in this case is more akin, from a factual perspective, to that applicable in **Stevedoring** and **Hafal**. Looking at the agreement from a worldly-wise perspective the respondent was under no obligation to offer work and the claimant was under no obligation to accept any work offered and no obligation to offer work had crystallised.

242. The evidence of Ms Lorimer was clear that there was no real consequence of an officer declining to provide availability or work. The claimant believed that if she did not provide any availability for a period of time she could be removed from the register. That did not, however, result in there being any obligation requiring her to provide work.

243. In fact the contract specifically stated that the respondent would review the position and if no assignments had been provided or carried out within a 12 month period, it was possible that the worker could be removed from the register. That was a method of assessing which workers wished to remain on the register for logistical reasons. It did not affect the obligations the parties had towards each other as I have found above, demonstrated by the fact that the clause specifically recognised that it was possible for the worker to return to the register even after an absence of work of more than 12 months.

244. While the issue was whether or not the claimant was an employee at the date she was no longer offered work, the respondent's agent's submission that it was necessary to know when the claimant became an employee was sound. It was submitted on behalf of the respondent that if the creation of employment status depended upon what happened over time, it would be necessary to know when the claimant became an employee since she required to be an employee for at least 2 years and there was no evidence pointing to when the position changed such that any obligation had crystallised to become a contractual obligation to provide work. It is not necessary to determine this since from the evidence I have found an absence of the necessary mutuality of obligations, but had she been an employee at the relevant time, absent any evidence on when the position changed, this would have been an issue that would have been difficult to resolve in the

claimant's favour, since it was not axiomatic that the claimant would have been an employee for at least two years from the evidence before the Tribunal.

245. Taking a step back and assessing the relationship that existed between the parties in a worldly-wise and realistic way, I conclude that the respondent was under no obligation (whether express or implied) to offer the claimant any work (nor to pay any retainer) and that the claimant was under no obligation to undertake any work that was offered.

246. From my assessment of the facts, the required content of the mutual obligations was such in the relationship between the claimant and respondent that the relationship was not one of employment. That would result in the claimant not being an employee and her claim should be dismissed. For completeness, I also consider the other irreducible requirements.

Control

247. Turning to the question of control, the issue is whether or not there is a sufficient framework of control. In this regard the issue is not the practical day to day control but whether ultimate authority over the performance of work was such that the individual was subject to the employer's order and directions. The test requires the putative employer to have the contractual right to direct the manner in which the worker is to perform their obligations and that there is an effective sanction for breach. The existence of an effective sanction is sufficient to ensure the employer's directions constitute enforceable contractual obligations.

248. In this case the facts relied upon by the claimant are: the flow of work came from the respondent; they provided a script and directed that she should act in a manner appropriate to her representing the Council; she was told to dress smartly; feedback was sought and address as to performance and permission was needed if she wished to conduct a wedding outwith the area.

249. To some extent, as the respondent's agent submits, these aspects of control are fixed by law. There are certain prescribed words that require to be used during a ceremony and a marriage officer cannot operate outwith their area without the Registrar General's consent.

250. It is also fair to say, as the claimant accepted, that she was given a very large measure of discretion in the carrying out of her duties. She was able essentially to carry out her duties with only limited interaction with the individual she considered to be her manager, Ms Lorimer.

251. Where there was some control, such as the requirement to send scripts to the respondent, there was limited ways in which that was enforced, seen by the emails sent by Ms Lorimer to the claimant and others.

252. The marriage officers were essentially given the basic tools to do the job and left to conduct their role as they saw fit. There was no prescription over how the marriage officer communicated with the couple or how much time was spent with them or where this was. There were only very limited requirements, some set by law and others set by the respondent who had to ensure there were some basic requirements in place to ensure consistency of approach and that they remained able to attract other couples.

253. I do not find that the respondent issued work of itself evidence of control. That is neutral in this regard. Equally the fact a script was provided was not indicative of control since that script was guidance only. Other than the legal requirements, there was no obligation whatsoever upon the marriage officer to follow it. On the contrary as it was the couple who chose what they wanted to say.

254. I also do not consider that the requirement to dress smartly was indicative of control. It is common sense and is neutral with regard to employment status.

255. The fact the respondent's code of conduct governed the claimant was an example of control and something I have taken into account but I did not consider that the code by itself resulted in the level of control being such as to render the relationship one of employment.

256. The couple had contracted with the respondent with regard to their ceremony. It was not surprising that the respondent required a basic level of service from those it engaged to deliver the service for the couple but that degree of control was not such as to result in the relationship becoming one of employment. The requirements of the respondent with regard to how the ceremony was conducted and what the claimant did not indicate a sufficiency

of control for the relationship to be one of employment. The respondent had very limited control over the claimant.

257. I take into account the fact that the claimant's "performance" was taken into account by the respondent but that was essentially to ensure a professional service was provided, rather than control and direct how the work was to be done. There was no suggestion, for example, that the claimant was subject to any performance management policy of the respondent. It was also clear that the respondent did not consider there to be any disciplinary or grievance policy that applied to the claimant (which were applicable to employees). The respondent believed such policies did not apply to the casual workers.

258. The respondent acted in a way that was consistent with there being a limited degree of control over the claimant. There were, in fact, very little contractual requirements that supported the assertion that the respondent could, in a general sense, control the claimant or that there was a sufficiency framework of control in place.

259. That limited ability to monitor the claimant's performance does not, by itself, result in the individual being an employee nor does it show sufficiency of control in this area. The level of control in this regard was to ensure the legal requirements had been met and a professional service was given (and by and large to ensure legal requirements were met). The control was limited. For example, there was no suggestion that the disciplinary process would be applied to the claimant. Provided the worker conducted the ceremony professionally, the claimant was able to discharge their duties in a way that was entirely within their discretion.

260. The terms of the relationship as set out in the contract between the parties showed the limited degree of control the respondent had.

261. Balancing all of the facts of this case and taking a step back I was not satisfied that the level of control exercised by the respondent over the claimant would have been such that the relationship would have been one of employment, had there been a sufficiency of mutuality of obligations.

Personal service

262. I was, however, satisfied that there was a requirement for the claimant to provide personal service in the discharge of her duties. The claimant's agent's submissions in this regard were well founded. The claimant could not substitute another herself to provide the service and if she was unable to carry out a ceremony to which she had been allocated, the matter would be reallocated by the respondent.

Other factors

263. Given the absence of sufficient mutuality of obligations and/or control (essential ingredients, without which there can be no employment relationship) I do not consider whether on balance the other provisions of the relationship support the assertion that this was an employment relationship.

Claimant is not an employee

264. In all the circumstances the relationship between the claimant and respondent was not one of employment as required by the Employment Rights Act 1996. In those circumstances the claimant is not entitled to claim unfair dismissal following the respondent's ending of the relationship. The unfair dismissal claim is accordingly dismissed.

Wrongful dismissal/notice pay

265. With regard to wrongful dismissal, the parties had agreed that this (and indeed the claim for holiday pay) was contingent upon success of the unfair dismissal claim.

266. The respondent was entitled to end the contract in the way it did and complied with the contract when it chose not to offer any further assignments to the claimant. The respondent was not therefore in breach of contract in so doing and the claim for wrongful dismissal (notice pay) is not well founded and is dismissed.

Holiday pay

267. The claim in respect of holiday pay is also not well founded. The claimant accepted that for each hour she worked she was paid holiday pay

and that this had been set out in her payslip separately. That claim is therefore not well founded and is dismissed.

268. The claims are therefore dismissed.

Employment Judge: **David Hoey**
Date of Judgment: **11 December 2020**
Date sent to parties: **15 January 2021**