



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Parker

**Respondent:** LWS Interior Solutions Ltd

**Heard at:** In Chambers **On:** Friday 8 January 2021

**Before:** Employment Judge Matthews

**Representation:**

**Claimant:** Mr P O'Callaghan of Counsel

**Respondent:** Mr J Bromige of Counsel

## JUDGMENT

1. The Claimant was not an employee of the Respondent at any time relevant for these proceedings within the meaning of section 230 of the Employment Rights Act 1996.
2. The Claimant was not a worker of the Respondent at any time relevant for these proceedings within the meaning of section 230 of the Employment Rights Act 1996.
3. Accordingly, the Claimant's claims of unfair dismissal by reference to section 103A of the Employment Rights Act 1996, of breach of contract, for wages and for holiday pay (being, for the avoidance of doubt the only claims extant in these proceedings) are dismissed.

## REASONS

### INTRODUCTION

1. The claims that Miss Julie Parker brought in these proceedings were of disability discrimination, unfair dismissal by reference to section 103A of the Employment Rights Act 1996 (the "ERA"), of breach of contract and for wages and holiday pay. The disability discrimination

claim was withdrawn and dismissed, leaving the other claims before the employment tribunals. It seems clear from Miss Parker's claim form that the primary issue for her in this litigation is a dispute over the provision of a kitchen, allegedly to be supplied to her in lieu of wages (see page 13 of the bundle referred to below).

2. The Respondent Company defends the claims. As a preliminary issue the Company says that Miss Parker was neither an employee nor a worker of the Company. This preliminary hearing was listed by Employment Judge Roper on 16 July 2020 to deal with those preliminary issues.
3. If Miss Parker is neither an employee nor a worker of the Company, the parties agree that the employment tribunals will have no jurisdiction in respect of Miss Parker's outstanding claims and they should be dismissed.
4. Miss Parker gave evidence supported by a written statement. In support of Miss Parker, written statements were produced from Mr Simon King (former employee of the Company whose own claim against the Company in the employment tribunals is set down for hearing on 1 February 2021) and Mrs Karen Langdon (former employee of the Company's associated company, Southwest Kitchens Limited). Neither appeared and their statements were taken into evidence on the agreed basis that the Tribunal would read them but give them little, if any, weight. On behalf of the Company, the Tribunal heard from Mr Stuart Shaw (Managing Director of the Company) supported by a written statement.
5. There was an agreed "electronic" bundle of documentation delivered to the tribunals in three tranches. References in this Judgment are to pages in the bundle, unless otherwise specified. Mr O'Callaghan and Mr Bromige both produced written argument.
6. The hearing was listed for a day. Problems with the video conferencing platform meant that the hearing had to transfer to an alternative. The Tribunal is grateful to Counsel for both parties for presenting their respective cases within the considerably shortened time allowance. In the circumstances, the Tribunal reserved judgment.
7. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face-to-face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.

8. In deciding this case, it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. The main protagonists in this litigation are Miss Parker and Mr Shaw. In part, Mr Shaw's statement borrows heavily from the Company's response form, presumably prepared by the Company's advisers. Miss Parker's and Mr Shaw's accounts of key events are mostly irreconcilable. Within the bundle there is evidence that both Miss Parker and Mr Shaw use stratagems as negotiating tools. The Tribunal does not prefer the evidence of either over the other. There are some common evidential threads but, where possible, the Tribunal has relied on the contemporaneous documentation.

## **FACTS**

9. Mr Shaw describes the Company as a family run business. It is based on the Marsh Barton Industrial Estate, in Exeter. Mr Shaw says it specialises in kitchens and interior design. (Miss Parker takes issue with this in a document responding to the Respondent's response in these proceedings (40). However, that is of no consequence to the issues this Tribunal must decide.) In its response the Company reported 15 employees in one place and 22 in another.
10. Small businesses of this sort are often, of necessity, run in a state of organised chaos. They respond to events as they occur, rather than having time to plan for them. The Company appears to have fallen into that category.
11. Miss Parker describes herself as having "*a background in corporate sales*" and as a "*business analyst*" (WS 2 and 4). In fact, that rather undersells Miss Parker's background and skills. As the Tribunal understands Miss Parker's evidence, she had a background as a business analyst in a large corporate and then worked for a large firm of accountants based in Bristol. In the latter role Miss Parker would go into businesses as a forensic accountant and business adviser. Miss Parker confirmed that, in essence, she provided corporate finance advice, including advice on negotiations. These sorts of services sometimes include "interim management" where a person is given temporary managerial responsibility to sort out a particular problem. This sort of arrangement is one that Miss Parker will be familiar with. In addition to these skills, it seems that Miss Parker had experience of setting up and running her own businesses, although detail is scant.
12. It is common ground that, in or around May 2015 following a sales enquiry by Miss Parker, Miss Parker mentioned to Mr David Mehrlich

(Operations Manager with the Company) that she had the expertise to collect debts for the Company. The Company took Miss Parker up on this offer and Miss Parker collected some debts on its behalf. The Company appears to have thought this was part of a wider debt collection business of Miss Parker's but it seems that, in reality, its only customer was the Company. In the Tribunal's view this state of affairs is one of several examples within the bundle of a characteristic of Miss Parker's. Miss Parker appears to be an enthusiast with a pressing need, for reasons of her own, to become involved in businesses. Miss Parker finds this sort of involvement stimulating, diverting or both. The need, however, drives Miss Parker to take unusual steps. In this case, Miss Parker was content for the Company to hold the impression that the debt collecting business was something more extensive than it actually was.

13. Perhaps surprisingly to the outside observer, the only "payment" made by the Company for the debt collecting services was the supply of a bespoke lounge display cabinet to Miss Parker. This arrangement was unusual. Typically, debt collecting businesses take a fee or a percentage of recoveries.
14. It is also common ground that, some considerable time later, Mr Shaw (and others) met Miss Parker for the first time at The Shrubbery Hotel in Ilminster. Mr Shaw cannot remember the date, but Miss Parker puts the meeting on 11 January 2018. Miss Parker explained her background to Mr Shaw, who was impressed. Beyond that, there is no agreement about what happened at that meeting. Miss Parker, in short, says she was offered and accepted a job with the Company. Mr Shaw says that Miss Parker made it clear that *"due to her ill health she would not work full time but would be happy to provide advice and business services on a casual, ad hoc basis."* (WS 5).
15. The Tribunal's findings about this meeting, on the balance of probabilities, are these. Miss Parker, keen to pursue her interest in becoming involved in businesses, sold herself well to Mr Shaw. Mr Shaw was, no doubt, pleased to be offered the services of someone who had Miss Parker's background. The Company had *"been in a tough time financially"* (Mr Shaw – WS 7). Miss Parker thought she could help improve the Company's financial position in a number of ways. Both satisfied with what they saw, neither wanted to muddy the waters and talk about the harder subject of the basis on which Miss Parker would provide her services. Miss Parker almost certainly told Mr Shaw she didn't need and was not interested in money (that being the fact and part of the "sales" pitch). Miss Parker had time on her hands and her interest was in business for its own sake. It is, however, possible that providing a kitchen for Miss Parker was mentioned at this stage. If it was, it would not have been promised

unconditionally as, no doubt, it was to be provided in recognition of services yet to be performed.

16. Again, to the outside observer, this may seem strange and even unlikely. In the sense that it is an unusual business relationship, it is both those things. However, this sort of “business angel” involvement in businesses does occur, although it is often accompanied by a financial investment of some sort in the business in question. In this case the key to understanding it is to understand Miss Parker’s motivation as explained above.
17. As noted, at the meeting at The Shrubbery Hotel, there may have been some talk about Miss Parker receiving a kitchen if she helped the Company. At some stage, probably a few months down the line, this hardened into an agreement that Miss Parker should have the kitchen in recognition of her services. This was to be provided by the Company’s associated company, Southwest Kitchens Limited. Apart from that, Miss Parker received nothing from the Company for her services, although it appears her car was added to the Company’s insurance policy (Miss Parker - WS 17). Miss Parker says that there was a discussion about a future annual salary for her of £70,000. Mr Shaw says there was no such discussion and there is no corroborative evidence supporting Miss Parker’s contention.
18. It is common ground that there was no written contract of employment or contract for the provision of services. No aspect of the relationship seems to have been recorded in writing in any way at all.
19. Miss Parker seems to have worked both from home and from the Company’s premises. In her claim form Miss Parker records that she was employed to work predominately from her home (in Chard, Somerset) with “*agreed visits to the Exeter office as and when required*” (14). This suited both parties and was convenient for Miss Parker in light of her disability. (Miss Parker records in her claim form that she has been a Type 1 diabetic since the age of 5, which has resulted in other illnesses (21)). However, in practice, as Miss Parker records in later documentation, after the first week she normally worked in the Company’s Exeter office three days a week. To cover Mr Shaw’s absences, Miss Parker worked full time (42). Typically, Miss Parker would be driven to Honiton where she was picked up by a member of the Company’s staff and taken to Exeter. There is little doubt that Miss Parker worked long hours on occasions and there is plenty of evidence that Miss Parker was generally available for Mr Shaw to consult.
20. In understanding the relationship between Miss Parker and Mr Shaw it is instructive to look at the Company’s dealings with Mr Robert

Stone, Director of one of its suppliers, Deralem. Over a period of time the Company built up a considerable debt owing to Deralem. In or around November 2017 Deralem had capitalised £585,000 of the debt into shares in the Company. In January 2018 Mr Stone had become a Director of the Company.

21. As can be seen from an e-mail from Mr Stone to Mr Shaw dated 17 July 2018 (76-77) Mr Stone started to apply pressure on Mr Shaw for the Company to repay some of the remaining debt and suggested various ways this might be done. On pages 77-79 there is a string of emails between Mr Shaw and Mr Stone discussing various financing schemes. These would be well known to someone with corporate finance experience but less familiar to someone without that experience. It is clear from an e-mail exchange between Mr Shaw and Miss Parker that Miss Parker had more than a guiding hand in this (79-80). It included:

Mr Shaw copying Miss Parker in on his exchanges with Mr Stone: *"Just do you can smile and say ! Your correct well done Julie"*

Miss Parker: *"I am so happy, we now have the control. But we need to think really carefully how we progress this to the best result.*

*I am already thinking that after you come back from your break, we disclose that there is a lady that has shown a very clear interest in the company. We say that if Rob would like to speak with her we can arrange that.*

*That should scare him to death!*

*We could also make sure before I speak to him Neil and Steve make sure he is made aware that they don't trust me and think I am going to break the business up etc. We could play so hard on this and he would buckle before having to do anything."....*

*"If we get this right, the threat might be enough to move this on.*

*One thing I am sure of, he is shell shocked and on the back foot. Please do not respond to him no matter what he says or does this evening. I know that will be hard, but my god it could make the difference in a considerable sum of money.*

*LWS will be yours and Treena's" [Mrs Shaw] "very soon. You will then both be able to move on, and do what YOU BOTH want with your business, not what this nutter wants*

*Just hang in there it will be well worth it."*

22. It is Mr Shaw's evidence that it was to aid stratagems such as this that Miss Parker was given the title of COO (Chief Operating Officer - a term imported in recent years from the United States of America) of the Company (WS 15 -17).
23. There is contemporaneous paperwork corroborating this. An email exchange between Mr Mehrlich and Mr Shaw on 2 August 2018 includes this (83-84):

*Mr Mehrlich: "I hear Julie has introduced herself to the kitchen boys as the new coo for lws. I thought that was just for the deralem hoodwinking? If it is that going forward then we need to be singing off the same hymn sheet.*

*She's put the willys up the girls downstairs advising them that their jobs are safe..just had mo on saying she wasn't worried about that until now"*

*Mr Shaw: "I told the boys next doors, we have to have everyone believing. No slip ups.....If they didn't know and it got out causes issues"*

*Mr Mehrlich: "Yes but the coo was supposed to be Julia, not Julie. If the coo is for deralem then we need to have our facts right, if the coo is for lws then you need to be upfront with it. If someone from kitchens gets tied up with a conversation with deralem and mentions the coo as Julie Parker and not Julia Santorini it's not going to sound right."*

24. No doubt as a follow on from this, on the same day, 2 August 2018, Mr Shaw sent an email to his key managers, Ms Kate Brooks, Mr Mehrlich and Mr Neil Jones (85). It included this:

*Spoke to all three of you at certain times re Julie - and I feel it only right that you should know how much I think of you, Julie has come in for a short period time to sort out a lot of stuff out which I personally feel will work for us and my family.*

*That saying if at any time you feel there are things that have been said that you don't agree about please let me know, I am a phone call away or door open anytime.*

*There will be things that Julie wants me to implement which I may feel unconfutable about but I will do it to see if it works, but you three will be here for a very long time where Julie wont."*

25. A few weeks later, on 21 August 2018, Mr Shaw sent out an announcement by email. It included (93):

*"To Everyone*

*Julie has been enlisted as our new Chief Operating Officer. (COO)*

*She will be dealing with overseeing all company procedures and day-to-day activities. Keeping company operations under control and executing long-term and short-term organisational plans and systems to improve how we operate.*

*If you have any questions or wish to tell her about anything you are unhappy with she is happy to meet with you or you can call her."....*

*"We would like to convey to you that all your jobs are safe and the only changes that will be made are to systems, how we sell and the general running of the business."*

26. As far as the title of COO is concerned, the Tribunal can be reasonably sure of its conclusions because of the contemporaneous documentation it has seen. The exchanges above fit with the title being considered as part of the negotiating tactics with Mr Stone. The germ of what happened is contained in Miss Parker's statement (WS 42). Despite her obvious willingness to initiate stratagems when negotiating with Mr Stone, it appears that Miss Parker was not prepared to go as far as describing herself as COO when she was not. Miss Parker was only prepared to be represented as the Company's COO if she was so appointed. This explains why, on 21 August 2018, Mr Shaw announced the appointment.

27. Whilst Mr Shaw probably saw this as part of the ruse, the Tribunal has no doubt that it suited Miss Parker's purposes of formal recognition of her place in the Company and entrenching her authority within it. In Miss Parker's claim form, she records that she was given the title of COO within two weeks of her start date (14). That would be around the beginning of February 2018. Miss Parker says, however, that this was not communicated to staff until April 2018. Mr King's evidence (to the extent that it is right to give it any weight at all) is that he started work for the Company in May 2018



and always knew Miss Parker as the COO (King - WS 1). This evidence of Miss Parker's and Mr King's appears to contradict Miss Parker's assertion that she was not prepared to be referred to as the COO in the negotiations with Mr Stone. If, at that point, Miss Parker was the COO, she would not have objected to the title being used. It seems tolerably clear that Miss Parker did not take the title until sometime around 2 August 2018.

28. E-mail exchanges between Mr Shaw and Mr Stone and Miss Parker respectively, between 13 and 14 September 2018 (97-104), show that the ruse devised to negotiate with Mr Stone was still active, now with use of the COO title. It also shows that Mr Shaw, with Miss Parker's knowledge, was using Miss Parker's background to impress the Company's bankers and Miss Parker was directly involved with them. The exchanges leave no doubt that Miss Parker assumed a directive role in these negotiations.
29. If Mr Shaw had meant for Miss Parker to confine her use of the title "COO" to the ruse with Mr Stone, he failed. Miss Parker used the title of COO when dealing with Mr Stone (100-101) and others (see 96 for example). On 31 October 2018 Mr Mehrlich drew Mr Shaw's attention to what Miss Parker had put up on the Company's website (113). In the Management Structure Miss Parker had shown herself as COO, adding *"Deals with the day to day running and financials of the business."*
30. There is plenty of evidence in the bundle that others in the Company resented and resisted Miss Parker's interventions. Mr Shaw says that Miss Parker began to *"overstep the mark"* (WS 17). As an example, Mr Shaw refers to an incident documented in the bundle at 95-96 where Miss Parker appears to have lost a long-standing customer on 11 September 2018. There is another example at 107-109. Miss Parker had shouted at Ms Morgan Garnsworthy.
31. What probably happened is this. Miss Parker had, by design, default or both, had a free hand to dip into all aspects of the Company's operations. Over a period of time, Mr Shaw realised that he had no control over Miss Parker's actions. The website incident on 31 October 2018 (see paragraph 29 above) probably reinforced this. Perhaps more importantly, Miss Parker's actions were beginning to be counter-productive from Mr Shaw's point of view. As a result, Mr Shaw decided to let the relationship wither on the vine.
32. Mr Shaw says that he spoke to Miss Parker on the telephone around November 2018 and they agreed to end Miss Parker's involvement in the Company with immediate effect (WS 18). Miss Parker's account of how her relationship with the Company came to an end is

completely different (WS 39). Miss Parker says that she found out she had been dismissed through third parties on 12 February 2019.

33. In her statement, Miss Parker lists the work she did for the Company (WS 9-11, 14-15, 18, 19, 22, 25 and 28). Miss Parker worked on a website for a product (see 14), created an installations leaflet, contacted a photographer, wrote job descriptions, wrote letters and e-mails on Mr Shaw's behalf (probably Miss Parker is referring to drafting here, as evidenced in the bundle), worked on employment contracts and recruitment, sourced finance, wrote a data protection manual (117), discussed sales areas, prepared reports and e-mails for Mr Jones and introduced rotas.

34. The bundle throws further and probably better light on what Miss Parker says she did for the Company. There is a fulsome description in Miss Parker's claim form (14). There is no doubt that Miss Parker's involvement was in many and varied aspects of the Company's operations. There are numerous examples in the bundle.

### **APPLICABLE LAW**

35. Section 230 of the ERA, so far as it is applicable, provides as follows:

#### ***"230 Employees, workers etc***

*(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

*(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)-*

*(a) a contract of employment, or*

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

*and any reference to a worker's contract shall be construed accordingly."*

36. Although a fluid and developing area of law, the basic principles in relation to the status of "employee" are well established. There must be a contract. If there is a contract, it cannot be a contract of employment unless the "irreducible minimum" exists. This comprises an obligation to do work personally, mutuality of obligation and control to a sufficient degree. In relation to the obligation to undertake work personally, where it is asserted that a document does not describe the true relationship between the parties or there is no such document, it is for the tribunal to decide what the true relationship is. The tribunal will look to the reality of the arrangements between the parties. If the "irreducible minimum" exists it is necessary to stand back and look at the whole picture.
37. As far as the status of worker is concerned, the legal position is also fluid but the basics well established. If an individual is working under a contract of employment, the individual is a worker as well as an employee. If the individual is not working under a contract of employment but under any other contract to do or perform work personally, the individual may be a worker.
38. The Tribunal was referred to Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 AER 433 and [1968] 2QB 497, Market Investments Ltd v Ministry of Social Security [1969] 2 QB 173, Young & Woods Ltd v West [1980] IRLR 201, Nethermere (St Neots) Ltd v Gardiner and anor [1984] ICR 612, Hall (Inspector of Taxes) v Lorimer [1994] 1 WLR 209 and 1AER 250, Carmichael and anor v National Power plc [1999] ICR 1226, Byrne Brothers (Formwork) Ltd v Baird [2002] IRLR 96, Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471, Younis v Trans Global Projects Ltd and another UKEAT/0504/05, Cotswold Developments Construction Ltd v Williams [2006] IRLR 181 and UKEAT/0457/05, Jivraj v Hashwani [2011] IRLR 827, Quashie v Stringfellows [2013] IRLR 99, White & Anor v Troutbeck SA [2013] UKEAT/0177/12 and [2013] EWCA Civ 1171, Varnish v British Cycling [2020] UKEAT/022/20 and Miron v Adecco UK Limited UKEATPA/0409/20/AT.

## **CONCLUSIONS**

### **39. Was Miss Parker an employee of the Company?**

40. Applying the tests, the starting point is "Was there a contract?"

41. For there to be a contract there must be an agreement (usually an offer that is accepted), it must be made with an intention to create legal relations and it must be underpinned by consideration. Further, the terms of the contract on which a party seeks to rely must be sufficiently certain for the courts to be able to give them meaning.

42. Was there an agreement?

43. It seems to the Tribunal that there is considerable doubt about this. There is no contemporaneous written record or evidence, except some exchanges about the provision of a kitchen. Putting Miss Parker's case at its highest, it was agreed that Miss Parker should come into the business to see if she could help with its profitability. At some point, possibly at the meeting on 11 January 2018 but probably later, there was an arrangement that Miss Parker should receive a kitchen in return for her contribution to the Company. Whilst the Tribunal has considerable reservations on the point, its conclusion is that there is enough to find that there was an agreement, express or implied, that Miss Parker would provide services to the Company in return for a kitchen.

44. Was there an intention to create legal relations?

45. The Tribunal has little doubt that, during the relevant period (11 January 2018 to early 2019) neither Miss Parker nor Mr Shaw had any intention of setting down their understanding in writing. Miss Parker probably did not want to be committed. If she had, a person of her experience would surely have insisted on a written agreement. Miss Parker says that she took Mr Shaw at his word as far as the kitchen was concerned and Mr Shaw would have been happy to have Miss Parker's services, effectively, as a free resource. The possibility remains, however, that these two experienced business people intended to create legal relations, even though they were not recorded in writing. Taking account of all the evidence touching on the point and allowing for the fact that the heavy burden of proof is on the Company in this respect, the Tribunal's conclusion is that there was no such intention. Extraordinary as it may seem to someone not familiar with the detailed facts, this was a casual arrangement. It was casual because that suited both parties. It probably started out of respect on Mr Shaw's part for what Miss Parker had to offer and, on Miss Parker's part, in her desire to be involved in businesses, but not committed to them. The Tribunal has little doubt that, had the two been asked if they intended to create legal relations at any time in the relevant period (identified above) they would both have replied "No, of course not." It is difficult to avoid the conclusion that Miss Parker's now seeking to rely on a contract is a construct to enable her to

pursue her contractual dispute over the kitchen in the convenient forum of the employment tribunals.

46. The Tribunal's conclusion that there was no intention to create legal relations means that there was no contract between the parties. Therefore, the preliminary points must be decided against Miss Parker and her claims dismissed. However, the Tribunal has considered all the evidence and, if it was be wrong on the point, will proceed to consider the rest of the case before it.
47. Was there consideration underpinning the contract?
48. Here there is no room for doubt. If there was an agreement and an intention to create legal relations it was supported by the provision of services by Miss Parker on the one hand and the supply of a kitchen (albeit from the Company's associated company, Southwest Kitchens Limited) on the other.
49. Were the individual terms of the contract which Miss Parker seeks to rely on sufficiently clear for the courts to be able to give them meaning?
50. The two terms in play here are "What services was Miss Parker to provide?" and "What kitchen was she to receive?" The Tribunal sees no particular problem with the first. It is not uncommon for services to be understood to be a general brief to improve the financial position, as appears to be the case here. As to the kitchen, however, the position is far from clear. A "kitchen" can mean any number of things and will have some value. That value, however, is indeterminate without more. As far as the Tribunal can see, the Company agreed to provide a kitchen but beyond that there was no agreement. There was no agreement, for example, about how much work would have to be done to "earn" the kitchen and there was no timescale. Miss Parker's evidence that there was some discussion about benchmarking the value of the kitchen against a salary is unsafe. In the Tribunal's view, it cannot be said that this term of the contract is sufficiently clear for the courts to be able to give it meaning. For this reason, the Tribunal would find that there was no contract between Miss Parker and the Company and the preliminary points would be decided against her.
51. Did the agreement, in the context of what happened in practice, reflect the irreducible minimum?
52. For this purpose the Tribunal assumes that a contract has been made out.

53. This is not a case in which an argument about whether or not Miss Parker had a right to send a substitute in her place plays a part. Whatever was to be provided by Miss Parker in terms of services was to be done by Miss Parker. Miss Parker's skills were the essence of what she had to offer.
54. Mutuality of obligation is an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform it. The Tribunal can find no obligation either way. Miss Parker took a general brief to look into improving the Company's financial position. There was no written or implied obligation on the Company to provide that or more. In practice Miss Parker had a free rein. Mr Shaw did ask Miss Parker to do specific tasks as is evident in the bundle but there is nothing to suggest he was obligated to do so. Certainly, there was no obligation on Miss Parker to perform any work. In practice Miss Parker chose to follow a regular work pattern and worked some long hours. This was, however, driven by her own wish and not any obligation to do so, express or implied. Miss Parker may point to the legally dubious promise of a kitchen and say that, had she not done any work, the kitchen would be forfeit. However, it seems to the Tribunal that what Miss Parker did and how she did it was entirely in her own hands and that does not amount to mutuality of obligation. As the Tribunal has mentioned above, Miss Parker's role may be best seen as that of a "business angel" without an investment in the Company.
55. Miss Parker's case also faces problems in terms of the degree of control for pretty much the same reasons. In some of the dealings with Mr Stone it is difficult to say which of Mr Shaw or Miss Parker was in control. It is true that there are examples of Miss Parker deferring to Mr Shaw's wishes. That however, is not the same as Mr Shaw having express or implied contractual control over Miss Parker. Miss Parker did do some straightforward jobs for Mr Shaw. For example, Miss Parker produced a product website. Most of the time, however, Miss Parker had a free hand in what was, in essence, a trouble shooting role in the business. Miss Parker was largely autonomous. Autonomy does not rule out an employment relationship where it is founded on a particular skill. The pilot of an aircraft is an example. In such cases however, there are invariably other detailed contractual terms. Ultimately it appears that Mr Shaw decided to part company with Miss Parker because he had no control over her brief in the business.
56. The absence of day-to-day control may not be conclusive where the cumulative effect of other pointers is to an employment contract. Here that is not the case, as is explained below.

57. The Tribunal must stand back and look at the picture as a whole, taking account of other relevant factors. There are factors that point in both directions.

58. Pointers towards there being no employment relationship include:

- There was no written contract of employment and no express or implied terms save for a general brief to improve the finances and the legally dubious promise of a kitchen. None of the normal incidences of employment were expressly or impliedly present. For example, there was no provision for holiday, hours of work, place of work or job description.
- Miss Parker had previously collected debts for the Company in return for goods in a similar, if smaller scale arrangement. There was no question of that amounting to a contract of employment.
- There is no contemporaneous evidence that either Miss Parker or Mr Shaw intended to create an employment relationship. Whilst this is, of course a question of law, the consequence of now finding such a relationship would be unintended and unnatural.

59. Pointers towards there being an employment relationship include:

- Miss Parker was given the title of COO. On detailed examination, however, it is clear that this came about as part of a ruse of which both parties were fully aware.
- As far as the Tribunal is aware, Miss Parker did not do any significant work other than for the Company in the period in question. (There are examples of work done at Mr Shaw's request for other organisations and by the beginning of 2019 what look like hints at other businesses.)
- Miss Parker used Company equipment when at work such as a computer (she also used her own), and telephone. Miss Parker used two Company e-mail addresses as well as her own. One of these contained the word "support".
- Miss Parker did invest a considerable amount of time and energy in the Company.

60. Overall, the additional pointers are not of great assistance in looking at the picture as a whole. The overall picture remains straightforward, if unusual. Miss Parker had a loose and uncommitted role as a trouble shooter or “business angel” with the Company.
61. In conclusion, in the Tribunal’s view the “irreducible minimum” is not made out in terms of both the mutuality of obligation and the degree of control and the other factors do not disturb this conclusion. In light of that conclusion the Tribunal would find that Miss Parker was not an employee of the Company.

**62. Was Miss Parker a worker?**

63. The Tribunal has explained above why it has concluded that there was no contractual relationship between Miss Parker and the Company. A contract is a pre-requisite of being a “Limb B worker” within the provisions of section 230(3)(b) of the ERA. In the absence of that contract Miss Parker cannot be a Limb B worker.
64. If the Tribunal was to be wrong on the subject of the existence of a contract it would turn to the guidance set out in sub paragraphs (4) and (5) of paragraph 5 of the Judgment of Recorder Underhill QC (as he then was) sitting in the Employment Appeal Tribunal in Byrne. This is not a case where policy would encourage the Tribunal to extend the benefits of employment protection to a worker because the worker was in a subordinate and dependent position in relation to their employer. For all the reasons set out above that does not come near the relationship that Miss Parker had with the Company. Even if the “pass-mark” referred to in Byrne is lowered Miss Parker would not be a Limb B worker.

Employment Judge Matthews  
Date: 15 January 2021

Judgement and reasons sent to the parties: 27 January 2021

FOR THE TRIBUNAL OFFICE