EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss Jennifer Smith	v	**CPC Project Services LLP**

PUBLIC PRELIMINARY HEARING

Heard: BY VIDEOLINK **On: 14, 15 December 2020**
29 January 2021

Before: **Employment Judge JM Wade**

Representation:

Claimant: **In person**

Respondent: **Mr Lunat (solicitor)**

REASONS

Note: The reasons below were provided to the parties in draft shortly before judgment was delivered orally on 29 January 2021. A written request for written reasons was received from the claimant on 12 January 2021. The reasons below are now provided in accordance with Rule 62, corrected for typographical error, and elegance of expression, only, and in accordance with Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the judgment sent to the parties is repeated below:

“

JUDGMENT

The claimant was an employee of the respondent at the material times, within section 230 (1) and (2) of the Employment Rights Act 1996 and section 83(2) of the Equality Act 2010 and within the Working Time Regulations.”

Introduction

1. The claimant presented unfair dismissal, Equality Act and holiday pay complaints on 30 December 2019 in the Manchester Tribunal. After transfer to Leeds, three case management hearings, the claimant’s applications to postpone (refused) and an unless order in relation to her disclosure, there comes before me the determination

of preliminary issues, set out in an Order sent to the parties on 13 August 2020 as follows:

"*There shall be an open preliminary hearing which shall be determined the following issues:*

1.1. Whether the claimant is an employee within the meaning of section 230(1) and (2) of the Employment Rights Act 1996 (for the unfair dismissal claim).

1.2. Whether the claimant is an employee within the meaning of section 83(2) of the Equality Act 2010 (for the victimisation and harassment claims).

1.3. Whether the claimant is a worker within the meaning of section 230(3) of the 1996 Act and/or Regulation 2(1) of the Working Time Regulations 1998 (for the holiday pay claim).

1.4. Whether the claimant should be permitted to amend her claim in order to join Mr Hastie and Mr Stringer into the proceedings as individual respondents.

1.5. (If still pursued by the respondent) whether the claimant should be ordered to pay a deposit as a condition of continuing with any part of her claim.

1.6. (If still pursued by the respondent) whether any part of the claimant's claim should be struck out as having no reasonable prospect of success."

2. The claimant is the former life partner of Mr Hastie, one of the business partners in the respondent LLP. In this judgment I refer to "life partner" and "business partner" to avoid confusion.

3. It was not in dispute that there was a written contract of employment between the claimant and the respondent partnership signed by the claimant and the respondent's Mr Stringer (its finance partner) on or around 1 August 2016.

4. The response to the claims said this: "the claimant did not actually perform any work", and at paragraph 5 of the Grounds of Resistance ("GOR"): "The claimant was nominally "employed" from a tax perspective in order to ease the tax liability of Mr Hastie under a sham contract. At no time did the claimant ever actually undertake any work on behalf of the respondent or Mr Hastie, nor was she under any obligation to do any actual work, nor did she have a work email address, a work mobile phone, or a business direct dial number. Further at no time did the Claimant ever work with any other staff of the Respondent or have any communication with them….6: In the premises, the Claimant was not in reality an employee of the Respondent for the purposes of the Employment Rights Act."

5. It is accepted that the claimant had no respondent email address, or landline, or mobile telephone, or laptop, nor did she attend the respondent premises for work, nor was she allocated work by any business partner or employee of the respondent, other than Mr Hastie. Mr Hastie disputes that he required "work" from the claimant, being the matters she relies on in her submissions and correspondence (and now in her witness statement) in the capacity of employee, or on some matters, at all. The respondent's position relies also on an appeal letter sent by the claimant in which she said this:

I consider there is no genuine redundancy situation. My contract of employment was created knowing full well that I was not required to attend work or carry out any duties. It is my understanding that CPC in collaboration with Graham Hastie created this position for Graham Hastie's benefit. I was never required to carry out any duties even though I was officially on the payroll as an administrator. In my view this should never have been allowed by CPC. As you are aware the salary was paid into the account that was a joint account with Graham Hastie. In my view this arrangement was set up to benefit Graham and I was used as a pawn and was not the real beneficiary in any event. According to Graham the purpose of this arrangement was to repay the money Graham owed me however with this going in the joint account the purpose was defeated. You are aware that from January 2019 the salary was not being paid into the joint account but the payment was being made in the pension account on Graham's instructions. All through this process CPC has been aware that although I was technically employed by CPC, this was in fact an employment where I was not required to carry out any duties or attend work. I therefore do not understand how such a position can become redundant. In my view the reason for my dismissal is not redundancy but the relationship breakdown between me and Graham Hastie. Once again CPC has acted in the interest of Graham Hastie and I believe that it is a situation created by him to try and put pressure on me, deprive me of the money he owes me and to make me suffer."

6. This letter was drafted by the head of employment at a firm of solicitors instructed by the claimant and sent to her on 14 August at 18.10, on the basis of the claimant's instructions at the time, and at a time when the claimant was also advised by a well known firm of family lawyers. The claimant copied that firm with the draft of the appeal letter because she was, around the same time, seeking a non molestation order against Mr Hastie.

7. The claimant's case before me was that when she gave the instructions which informed that letter, she had been coerced by interactions between her and Mr Hastie and Mr Stringer on or around 9 August, when Mr Hastie is alleged to have said to her, and asked her to agree or repeat to him that, she "hadn't" or "didn't do a day's work in 3 years". The claimant had refused to do so, that is repeat or admit that fact. This conversation was alleged to have occurred in the context of Mr Hastie and Mr Stringer allegedly offering, in return for this concession, that the claimant could retain a vehicle leased by Mr Hastie for her use for an extra week.

8. It is convenient to set out the relevant law because it is those principles that govern the focus the Tribunal has given to the evidence in the case. The only disputes between the parties in this case were, at the material times (namely the summer of 2019): 1) had the claimant entered into a valid and binding contract of employment (the claimant's case was that she had); or 2) was there no contract of employment at all because the written document signed by the parties was a sham - the claimant did no work and was not obliged to do any work (the respondent's case). There was no dispute between them about the type of relationship – worker, employee, self employed etc – this was an all or nothing case (employment or sham).

The Law

9. Section 230 of the **1996 Act** provides:

"*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.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"–

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly."

10. Section 83(2) of the Equality Act 2010 relevantly provides: “”Employment” means – (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work”. The 1998 Working Time Regulations’ definition of “worker” adopts almost wholesale the definition of worker at subsection (3) of the 1996 Act above.

11. The fundamental ingredients of a contract in law are: there must be an intention to create legal relations; there must be offer and acceptance of terms; and there must be “consideration” passing between the parties, that is, a mutuality of promises between the parties – “in return for this from you, I will do that”.

12. In contracts of employment, consideration, typically, involves a promise to perform work, and a promise to pay for that work. It is not[1] for the Courts and Tribunals to enquire into the sufficiency of that consideration (typically how much is paid, nor what quality or quantity of work is provided for that pay).

[1] The exceptions are the Minimum Wage/Equality provisions

13. In the judgment of McKenna J in Ready Mixed Concrete (South East Limited) v Minister of Pensions and National Insurance [1968] 1 QB 497 he summarised the essential elements of the contract of employment as follows (p.515)*:*

"A contract of service exists if these 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 the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) The other provisions of the contract are consistent with its being a contract of service."

14. In *Stephenson v Delphi Diesel Systems [2003] ICR 471* (paras 11-14), this was said: "11. *The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract."*

15. Since Ready Mix, there are limited examples of consideration in employment contracts of a different kind to the typical wage/work bargain: where a director agrees to waive salary for a time; where an employee agrees to do no work, but the consideration for the employer is that the employee is not working for a competitor, or there is a stable workforce to call upon when the need arises.

16. "Work" in The Oxford English Dictionary is, "application of effort to a purpose…a task…employment esp. as a means of earning money…".

17. In *Snook v London & West Riding Investments Ltd [1967] 2 QB 786, CA* a commercial case, Diplock LJ defined a 'sham' transaction in terms of a common intention by *both* parties to misrepresent the true position to the outside world.

18. In *Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA Civ 98*, *[2009] IRLR 365 , an employment case,* Smith LJ (giving the leading judgment) held that 'the case of *Snook* is not of uniform assistance in determining whether an agreement is in fact a 'sham'. In *Autoclenz Ltd v Belcher [2011] UKSC 41*, *[2011] IRLR 820*,*[2011] ICR 1157* at paragraphs 34 -35 Lord Clarke said this:

"I respectfully agree with the view, emphasised by both Smith and Sedley LJJ, that the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so. ..."... and …

"So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description".

19. The Tribunal does not readily accept that adults with capacity to deal with their own affairs do not mean what they say in written terms agreed between them. There must by cogent and compelling evidence to suggest that their true intentions were different to those contained in the written terms; this can be derived from the way in which the parties operated in practice, taking into account the relative bargaining power.

Evidence, the Hearing, and whether to postpone

20. The start of the oral evidence was delayed in this case to the afternoon of the first day (two days being set aside for determination of the matters identified above). Part of that delay was taken up with further witness statements and documents provided by the claimant which related to why she had been delayed in providing disclosure for today, and the extent of her work for the respondent.

21. Some of those statements and documents gave an unusual account of her interactions with the police and lawyers by friends and others, related to the course and conduct of her criminal complaints against Mr Hastie. They were relevant to why she had believed the Tribunal would look favourably on her original postponement application. Had I been called upon to consider relief from sanctions, had the claims been struck out, then I would have needed to consider that material. For the reasons below, I did not. This material was therefore only relevant as background to my management of a hearing in which there was much between the protagonists beyond this Employment Tribunal dispute.

22. The material from friends and contacts about the nature of the claimant's work for Mr Hastie was broadly consistent with her own case, and mostly free from exaggeration. It was disproportionate and unnecessary (and there was insufficient time) to hear from those witnesses and I took into account that their evidence was untested.

23. Due to the compressed timetable for preparation, the respondent had been unable to index completely the claimant's disclosure in its index for the bundle. Nevertheless, that material was before me in the second half of an electronic file running to over three hundred pages. The claimant, acting as a litigant in person, also provided further documents by email both before and during the course of the hearing, which I accepted were relevant, and which she believed to have been missing from that file. They included, for example, Mr Hastie's partnership terms document from 2017, annotated with his and her comments.

24. Discussion of the hearing file and relevant documents took time.

25. The claimant had presented two very detailed written statements of her evidence (labelled 1a and 1b) and I had short written statements form Mr Hastie, Mr Stringer and Ms Delany, the respondent's HR partner.

26. Delay in hearing oral evidence arose for further reasons. Firstly, there was a potential issue of relief from sanctions, there being doubt as to whether the claimant had fulfilled the terms of the unless order in giving disclosure, and whether in fact her Employment Rights Act complaints had already been disposed pursuant to the unless order. Mr Lunat confirmed that she had achieved substantial compliance and that issue did not arise.

27. There was also the issue of postponement because of related criminal proceedings, the claimant reasserting that there was a second criminal investigation involving allegations against Mr Hastie in connection with their former relationship (a first prosecution for assault had been discontinued and Mr Hastie acquitted). I directed that I would consider that matter, and whether it was just for this hearing to continue, after I had done some preliminary reading.

28. The claimant's position was that she had withheld some documents from disclosure, which might have helped her case, because the investigating police officer considered that disclosure to Mr Hastie in these proceedings may prejudice the criminal investigation. Such documents, relevantly, appeared to be limited to notes she made on 10 August 2019 of telephone conversations with Mr Hastie on 9 August 2019, which she reported to the police on 11 August. The subject matter included that referred to at paragraph 7 above. The claimant said she was prepared to take responsibility for the decision (not to make those notes available to the Tribunal), although she felt under tremendous pressure, the Tribunal Orders requiring disclosure, and the investigating officer being against that.

29. I explained to the parties and witnesses that if the hearing continued, I would, in any event, need to caution them that any evidence they gave may be taken into account in criminal proceedings, both in relation to the relationship allegations against Mr Hastie and the potential fraud on the revenue indicated by the respondent's response. However, I would, if the hearing went ahead, confine my findings to those necessary to determine only the dispute before me.

30. The respondent's position was that it wanted the hearing to go ahead. Mr Hastie held the view, on advice, that nothing would come of the criminal investigation into the relationship allegations. Mr Stringer's position (emerging later in his evidence but apparent from the instructions to Mr Lunat to press on), was that HMRC was not troubled by the arrangements in place so long as it received amounts in national insurance and tax in respect of the claimant and other wives/partners.

31. The discussions of these matters resulted in Ms Delany (the respondent's HR partner of 18 years) withdrawing that part of her witness statement which described the claimant's employment contract as a sham. That was also indicated to be the position of Mr Stringer, the finance partner (the wish to withdraw his evidence on the matter), but Mr Lunat wished to take instructions overnight.

32. The claimant was a litigant in person, connected to the hearing by video link from home with a friend supporting her. The respondent was represented by solicitors. The issues were those I set out above – this was an all or nothing case. Either the contract was a sham, or it was a valid contract of employment.

33. The relevant disputed issues of fact in this Tribunal appeared to be limited to the extent, if any, of activities or work required of, or performed by, the claimant, for Mr Hastie. The extent of the differences between them in the family court or as a result of criminal proceedings (on which there had been yet no decision to charge) were not helped by the Tribunal decision being delayed.

34. The identified prejudice to the claimant appeared to be the missing "notes" referred to above, but that was only material to the issues in this hearing, if I did not accept the claimant's evidence about what was said to her on the August calls. Her evidence on that discreet point seemed entirely likely (as it was consistent with the respondent's case); the notes were therefore unlikely to change my findings.

35. The second potential prejudice was the strain on the claimant of this hearing and her mental ill health, for which there was some medical evidence. The practical arrangements to reduce strain included that Mr Hastie was happy to agree to switch his camera off, on the request of the claimant, and breaks could be taken. My own observations of the claimant in these preliminary discussions was that she had prepared carefully for the hearing, was supported by a friend at home, and was very able to conduct the hearing. This was also a hearing which, although originally ordered in person, had benefitted from being able to take place by video link. That provided helpful distance between the claimant and Mr Hastie.

36. Taking all the circumstances into consideration I considered the balance lay in conducting the hearing and determining such issues as were able to be determined in the time available. I considered the hearing could be conducted fairly, and with the parties on an equal footing. The hearing proceeded in a calm and orderly manner, despite the unavoidable strain for the parties from their circumstances.

37. I heard Ms Delany's evidence on the first afternoon, and released her. On the morning of the second day, Mr Stringer chose not to withdraw his statement that the contract was a sham. I considered Ms Delany a witness of truth in her oral evidence. I considered Mr Stringer a witness of truth in his oral evidence on matters of fact (as opposed to opinion). I consider that the oral evidence of both the claimant and Mr Hastie was affected by the breakdown in their relationship and the other disputes between them and was therefore to be treated with some caution. I have, in areas where there was doubt, considered what is more likely than not, taking into account the available contemporaneous documentation, industrial knowledge (or perhaps in this case better put as worldly wisdom) and the context in which evidence has been given.

Findings of fact

38. The respondent is a limited liability partnership undertaking project and consultancy work in the property and construction sector. The partnership became an LLP with separate legal personality in or around 2012.
39. The claimant began a career in telesales in the 1980s progressing to publishing director for a vacancies publication. The claimant was in a relationship with Mr Hastie from 2000. She left her last full time post in 2006 and describes the years 2006 to 2013 as follows in her CV: "throughout this period of time I have worked on a variety of freelance projects.., supporting my partner's career in moving to live in Europe, Scotland and then returning to Yorkshire."

40. By 2013 Mr Hastie was a partner with a similar firm to that of the respondent in Leeds ("the first firm"). The claimant set up "Helping Out", a business undertaking dog walking and PA support. PA support involved the claimant undertaking various supportive tasks for Mr Hastie, particularly when he became managing partner of the first firm. Dog walking was for other clients (but very few).
41. Mr Hastie then joined the respondent as a fixed share partner in September 2014. Other partners included Mr Mole and Mr Stringer.
42. The partners are and were subject to the assessment of income tax by reference to their share of the partnership profits, irrespective of whether those profits were distributed to them. They completed tax returns each year, declaring to HMRC their share of the partnership profits. These returns were prepared by accountants acting on their behalf.
43. It was the respondent's practice before 2014 that wives of the business partners were employed by the respondent and received salaries as "administrators". The respondent employs a solicitor, Mr Sydenham, as general counsel, and his responsibilities included advising and drawing up forms of contract, and compliance. Various requirements prohibited the respondent from paying monies to any legal person (whether contractor, company or individual) without a corresponding contract, invoice or appropriate paperwork for audit purposes. The wives and the respondent signed employment contracts; the wives were declared employees to HMRC and received payslips, identifying income and tax and national insurance deductions, as required.
44. The total cost of each wife's employment to the respondent, was then allocated to the husband/business partner, and deducted in the finalising of profit share. The costs of the wives' employment was also declared as an allowable expense or cost of the business in the firm's profit and loss accounts, reducing the respondent's taxable profit accordingly.
45. The consequence of this arrangement was that HMRC received less tax and national insurance than it otherwise would, if the business partners had simply accounted for tax on the partnership profits without the ostensible employment of the wives. Mr Stringer agreed that HMRC's tax revenue from these arrangements was potentially hundreds of thousands of pounds less over the years of the operation of this practice.
46. Mr Stringer's belief was that HMRC was not concerned, nor likely to take any action, provided there were receipts of national insurance and income tax in respect of the wives' employment declared appropriately through the PAYE system (pay as you earn). Mr Stringer was adamant that he had not sought to defraud the revenue by these arrangements. He had not heard of the concept of a "sham" contract before these proceedings commenced and the response was discussed.
47. Mr Stringer is not a qualified or regulated accountant (but the respondent's auditors are regulated). Neither Mr Stringer, nor the auditors to his knowledge, nor Mr Sydenham to his knowledge, told HMRC that the partners' wives did no work for their salaries. The evidence of Mr Stringer and Ms Delany was to that effect and I accept that, like the claimant, there was no requirement for them to attend the office, nor did they have the respondent's IT equipment or email addresses. I have not heard from the partners' wives and it is not necessary for me to determine whether they, in fact, did any work of the kind asserted by the claimant.
48. When Mr Hastie joined the respondent in 2014, Ms Delany was asked to draw up a consultancy agreement (agreement for services) for the claimant. That was a unique request (all other wives/life partners, at that time, having employment contracts). The claimant had invoiced the first firm for PA services in assisting Mr Hastie, because she had her own business and had accounted to the revenue her profit from that

business. She wished that to continue with the respondent, and it did continue: Mr Stringer approved payment of invoices from the claimant. The respondent considered that a written agreement would have to be in place to reflect that arrangement.

49. The decision to bring Mr Hastie to the respondent as a partner coincided with its decision to set up a Leeds office – in effect they were one in the same decision. Mr Hastie had no Leeds personal assistant employed by the firm, but could access the respondent's head office staff in London to provide necessary administration, communications or marketing support. The setting up of the Leeds office was why the claimant "was on a sub consultant's contract", in contrast to the other wives/life partners - that was Ms Delany's evidence, and I accepted it. It was anticipated that she would provide assistance/work in connection with that set up.
50. The claimant visited two prospective office premises with Mr Hastie prior to the respondent's offices in Leeds being taken. That was the extent of her involvement in setting the office up; she did not have involvement in the hiring of Mr Hastie's team, nor their management. On occasions she discussed with Mr Hastie staff and performance issues.
51. The claimant was present at a golf event in early 2015 to "launch" the respondent's Leeds office, and handed out prizes to winners, and was involved in some organisation (but not any email invitations to clients which came from Mr Hastie). In February 2015, she booked an Edinburgh restaurant and commented on menus for clients of Mr Hastie, who were being taken to Murrayfield in March 2015 by way of corporate entertaining.
52. In June 2016 Mr Hastie emailed Ms Delany asking for the necessary paperwork "for Jen to go on the books". This change from contractor to ostensible employee was prompted by the respondent's need to put in place employment contracts for all sole trader contractors, because of changes to the previous "IR35" regime. The respondent had been advised that it was no longer prudent to treat contractors without other clients as self employed.
53. New employee starter forms and other paperwork was completed. Mr Hastie describing the claimant as "PA" in that documentation because that was the nature of any work she would be likely to provide (and had done when operating under "helping out" as a contractor). On or around 1 August 2016, the claimant and Mr Stringer signed a contract of employment ("the contract").
54. The contract contained a raft of provisions including: identifying a salary of £24,000 reviewable each year, the claimant's base or work location as "the Leeds area", holiday provision, restrictive covenants, an entire agreement clause, an English law clause, pension and dental and healthcare benefits, and so on. It did not contain a provision that the employer could provide no work to the employee (commonly known as a garden leave provision). The job title was "administrator". There is little about that contract to suggest it did not properly reflect the parties' intentions – administrator compared with personal assistant is a distinction without a difference in the context of this case.
55. That autumn (2016) the claimant accompanied Mr Hastie at his request to an Ascot race meeting at which clients and colleagues were entertained. On occasions after that the claimant had 1) researched potential clients of the respondent and conveyed information about them to Mr Hastie; 2) followed the respondent and its competitors on twitter and conveyed information to Mr Hastie;3) looked at and commented upon Mr Hastie's partnership deed of adherence (in late 2017/early 2018 when he was to become an equity partner), 4) attended the bank with him to discuss a personal loan to make his capital contribution at around the same time, 5) checked his partnership

profit share and pension information when asked; 6) driven him when accompanying him on journeys when he worked on the way; 7) driven him to or from the station on occasions when he travelled by train; 8) liaised with him on his plans and work commitments each week; and so on.

56. In short, whatever Mr Hastie asked her to do to help him meet his work commitments, she did. The claimant had no contact with Mr Stringer to discuss any needs of the respondent for work, nor Ms Delany.
57. Before 2019 Ms Delany sent any necessary communications about the claimant's pay or benefits to Mr Hastie, but this was limited to her salary and its destination and so on.
58. The claimant did not have direct access to the respondent's usual employee benefits: she received private healthcare as a family member of Mr Hastie, but not in her own right. Mr Hastie had the use of two cars through the respondent's car leasing scheme (he was unique in the partnership in this and it was a source of some tension), and the claimant commonly drove one of them, but she was not allocated a car benefit in her own right. Mr Hastie wrongly told the claimant she had life assurance of four times her salary, when he knew this was not the case (she was not included in the respondent's group policy); he told her this untruth "to get her off his back", because financial security was a source of strain and conflict in their relationship. When auto enrolment of staff into a pension became mandatory for the respondent, Mr Hastie and the claimant embarked on some pension planning and pension payments were made on behalf of the claimant to a pension plan provider to the extent of her full salary for a period.
59. Mr Hastie's evidence was that the activities described above were done, if they were done, in the claimant's capacity as his life partner. They were not done for the respondent or necessarily because he required them to be done. They were not work. The claimant's case was that these activities are exactly within the remit of the duties of a personal assistant and that she did, therefore, engage in work as an employee of the respondent.
60. At times from 2017 to 2019 the claimant had sought to look at gaining employment outside her home (even on her own case of working for the respondent she did this from home). Her 2017 CV represented her position in this way: September 2014 - present: PA [for the respondent] "Having worked freelance for this organisation I was asked to work for them on a permanent basis which I currently do on a part time basis alongside my business. My responsibilities are to support partners in the firm with general PA duties including diary organisation, report preparation, minutes of meetings and organisation of events." Mr Hastie was aware that the claimant was including this narrative in her CV as part of her efforts to find a role back within the media industry. At times he supported her efforts to look to resuming her previous career.
61. In 2018 the claimant and Mr Hastie were undertaking a building extension at their home. Mr Hastie arranged for the contractors to invoice the respondent at times. The respondent paid those invoices, with Mr Hastie then having deductions from his drawings for the costs; he also took his drawings early in order to pay the contractors directly. By early 2019 it appeared Mr Hastie and the claimant were overreaching themselves financially. The situation with the extension contractors was a source of tension between Mr Hastie and Mr Stringer. There was periodic reconciliation of Mr Hastie's drawings with all relevant deductions to be made, for cars, the claimant's salary and other costs, private contactors and so on. A document reflecting the drawings calculation was produced by the respondent in early 2019 which he asked the claimant to look over for him.

62. In the Spring of 2019 the claimant made a direct request to the respondent for a copy of her consultancy contract. The relationship with Mr Hastie was in difficulties. In May 2019 the claimant undertook some weekend work for a friend and Mr Hastie communicated his unhappiness about that. The relationship broke down and they separated that month.
63. On 10 July 2019 the claimant emailed Ms Delany and asked for her salary to be paid into a different bank account and for a copy of her contract of employment. Ms Delany's response was to send the copy of the contract and make the salary changes.
64. On 31 July the respondent's financial controller wrote to say there was a car policy change such that it would need to collect the BMW, which the claimant had continued to drive and keep after the separation.
65. On 1 August Ms Delany notified the claimant by letter of the risk of her redundancy. Ms Delany was instructed to dismiss the claimant because of the relationship breakdown and she adopted a standard redundancy template letter approach. There was, in fact, no review of administrator positions, as suggested in the letter.
66. On 6 August 2019 employment solicitors acting on the claimant's behalf communicated her position that this was not a genuine redundancy, but had come about because of the breakdown in her relationship with Mr Hastie. That email also passed on a letter from the claimant's GP about her mental health and support she had received as a result of alleged domestic abuse. Finally, the email sought clarity on the vehicle issue.
67. On or around 9 August there were telephone and calls and text exchanges between the claimant and Mr Hastie and Mr Stringer concerning the collection of the car. Mr Hastie said to the claimant that she had not done a full day's work in the last three years, in the course of those conversations, and she was asked to confirm that. Their contact or on around this time resulted in the claimant seeking a non molestation order against Mr Hastie and seeing lawyers to discuss those matters.
68. On 12 August Ms Delany wrote to the claimant informing her of the termination of her contract of employment on 13 August 2019.
69. To repeat the matters recorded above, at the time the claimant was taking advice from the head of employment at a firm of employment solicitors, as well as from a well known firm of family lawyers. The employment lawyer provided a draft appeal based on the claimant's instructions, and the claimant adopted this draft, when she wrote to Ms Delany in the terms set out above at paragraph 5.
70. Ultimately, these proceedings were commenced.

Discussion and Conclusions – applying the law to the facts

71. The first question is, was there a contract at all?
72. Was there an intention to create legal relations at the start of the alleged employment, August 2016? The answer to this question has to be yes: the respondent drew up a contract offering employment and the claimant signed that contract document, evidencing their intent to create a legal relationship between them. Without their being binding legal obligations the respondent could not pay monies to the claimant and Mr Stringer knew that; there had to be evidence of a legal obligation for audit purposes. Similarly, the claimant understood that without the contract, the respondent could not pay monies to her. There was an offer of the terms set out in the contract, and the claimant accepted those terms. At the start of the contract, there was clearly that intent.
73. Does any subsequent conduct suggest that there was no intention to create legal relations and/or a mutual intention to misrepresent the true position to the outside

world? On balance, it does not. The respondent made payments in accordance with the contract, paid notice on termination in accordance with the contract, gave the claimant information when she requested it, and made changes to the payment destination when requested. It did not put in place private healthcare separately for the claimant, but that is in the context of her being covered in any event. This does not suggest the respondent did not consider itself bound by the other terms. Equally the contract did not provide for life assurance (although a handbook may have done so).

74. I address below the fact that work was requested only by Mr Hastie (rather than other colleagues or partners). As to the lack of equipment or email addresses and so on, in the context described above, weighed against my other findings, and in the circumstances of this case, this does not displace the weight to be given to the parties' intent to create legal relations evidenced by signing a complex written document. And in doing so, accepting Mr Stringer's oral evidence and that of the claimant, there with no intent to defraud the revenue.

75. On the claimant side, she did anything Mr Hastie asked of her to help him focus on his role in the partnership; even if his requests were very few. The work she carried out is listed above, albeit some was on her own initiative, in the context of knowing she was paid a salary by the respondent and wanting to work to earn that salary. She did not have an intent to paint a misleading picture to the outside world. She did not, for example, ever represent that her role absorbed all of her time.

76. The contract contained implied terms as well – of mutual trust and confidence, and from the claimant, loyalty to her employer. Neither party conducted itself inconsistently with those obligations between late 2016 and the summer of 2019. The claimant demonstrated her loyalty by research to look out for the respondent's interests when she could. She drove Mr Hastie when asked. She attended the races at his request and so on.

77. There was offer, acceptance and the intention to create legal relations and that endured.

78. Was there consideration, the necessary mutuality of obligation in the form of mutual promises, the work/wage bargain? The respondent paid money to the claimant. The claimant undertook work or applied effort to a purpose – attending the races to support Mr Hastie, research, driving and admin as above.

79. Mr Lunat's submission, and his client's evidence, was that these activities were as Mr Hastie's "plus one" or because the claimant and Mr Hastie were in a relationship and all life partners/wives do the sorts of tasks the claimant did.

80. It is certainly true that these things take place in many couples, without there being any express or implied contract of employment. That, however, does not help Mr Lunat's submission: not all couples so structure their affairs that there is a written employment contract between one partner's firm, and the life partner or wife. The respondent chose this structure for all its business partners, and the claimant chose to accept it because she wanted to work. Mr Hastie may not have chosen to call for that work very often, and the other partners certainly did not require her to attend work or carry out any duties beyond those asked by Mr Hastie, but the claimant was under an obligation, when Mr Hastie did so ask, to assist with those tasks, for that is the bargain for which to she had signed up.

81. How do I reconcile this conclusion with the contents of the claimant's appeal letter, on advice? It seems to me that the balance of the evidence, taking into account that the spark which caused upset in May was the claimant undertaking other work, was that the claimant wanted to work - hence the weekend wedding working. The tasks for Mr Hastie were not enough for her. The appeal letter, read as a whole, protests

the idea that a redundancy had arisen following a review of administrators, when the claimant's employment did not require her to attend work or carry out any duties, *allocated by anyone other than Mr Hastie*. Had these words been added, perhaps this preliminary issue would not have been taken.

82. I apply the principles above as a whole. I have not found there was a mutual intent to mislead the outside world; nor applying the purposive approach can I find a sham in this case. I take into account that all that is required is the provision of work and skill in **some** service for the employer. The claimant has established the necessary components of a contract of employment and that she had entered into such a contract which endured at the time of her dismissal. She was an employee.

JM Wade

Employment Judge JM Wade

15 February 2021