Case No:2204680/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Ms J Souliman		Cred Investments Holdings Limited Jonathan Carr-Harris Malcolm Ferguson Matt Maclean Robert Campbell Daniel Stridsberg

Heard by: CVP **On:** 21, 22 April and 6 May 2021

Before: Employment Judge N Walker (sitting alone)

Representations
Claimant: Ms C Lord, of Counsel
Respondent: Ms B Balmelli, of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal on the question of the Claimant's status is that the Claimant was not an employee. The Claimant was a worker.

REASONS

The Preliminary Issue

1. The Claimant brought various claims against the Respondents. The issue in this Preliminary hearing was whether the Claimant was engaged by the First Respondent as an employee, worker, or self-employed independent contractor.

The Evidence

2. The Tribunal heard evidence for the Claimant, from the Claimant herself and Ms Hart-Dale, an accountant and management consultant.

3. For the Respondent I heard evidence from Mr J Carr-Harris, the CEO and controlling shareholder of the First Respondent, Mr D Stridsberg, who provided services to the Respondent, Ms E Perretti, Head of Internal Operations for the Respondent, and Mr M Ferguson, a non-executive director of the Respondent.

4. I had an agreed bundle of documents.

5. The hearing was a remote public hearing conducted using the cloud video platform ("CVP") under rule 46. The parties agreed to the hearing being conducted in this way. In accordance with rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

6. The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. There were no technical difficulties. The Tribunal ensured that each of the witnesses had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

7. The participants were told that it is an offence to record the proceedings.

The Issue before this Preliminary hearing

8. The Preliminary Hearing was listed to consider the Claimant's employment status and whether the claim against any particular respondent should be dismissed.

9. Both parties submitted a draft list of issues for this hearing in which they identified the issues which would need to be considered as follows. To the extent those questions are helpful, I will address them. However, it is my view that I have to address the questions of whether the Claimant was an employee, worker or selfemployed contractor in turn.

9.1 Was the Claimant engaged by the First Respondent as an employee, worker or self-employed independent contractor?

9.2 As to this, was there a contract to perform services between the Claimant and the First Respondent?

9.3 Did the Claimant undertake that contract personally to perform work or services?

9.4 Was there a genuine and unfettered right of substitution?

9.5 Was there mutuality of obligation as between the Claimant and First Respondent?

9.6 Was the First Respondent a client or customer of a business carried on by the Claimant?

9.7 Was the Claimant integrated into the First Respondent's business and, if so, to what extent?

9.8 What level of control did the First Respondent, its employees or agents, have over the Claimant's provision of services?

Facts

10. The Claimant was working in the venture capital industry. Prior to her working with the First Respondent, she was employed by Octopus Ventures, which I am told is one of Europe's largest venture capitalist firms. While there, the Claimant was involved in an investment into the First Respondent on behalf of Octopus Ventures. In the course of her work for Octopus Ventures, the Claimant became friendly with Mr Carr-Harris, the Second Respondent, and Chief Executive of the First Respondent. She told him that she was interested in taking steps either to establish her own business or to work in a start-up. Mr Carr-Harris was impressed by her enthusiasm for the First Respondent's business and decided to offer her a role which the Claimant eventually accepted.

11. The document which the Claimant signed to embody the key terms of her engagement was referred to as a contractor agreement. It was not an employment contract. The Claimant says that she was familiar with the terms of the Octopus Investment agreement which included a clause which required the First Respondent to review the terms and conditions of the individuals working with it and to regularise them if they should be employees. That should have happened within 30 days of the investment. In practice, that time was overdue when the Claimant entered into the contract with the First Respondent.

12. The Claimant says that the role she was engaged to do was to be a General Partner and Chief Commercial Officer ("CCO") of the First Respondent. The First Respondent says that the Claimant was not given any specific title and that very little attention was paid to titles, although the Claimant was given business cards which identified her as General Partner. The Respondent's case is that this was a start-up phase when they were aiming to raise money, both to invest in the First Respondent's project but particularly to enable them to establish a Fund which would invest in a specific type of athletic promotion. Their objective was that the Claimant would join as a self-employed contractor or consultant with a view to fundraising and, when the fund was established, she would be a General Partner in it.

13. The First Respondent's case is that it expected the Claimant to devote energy and time to the fundraising but there was no specific time requirement, and she was not precluded from carrying out other activities. The Respondent

required flexibility in the early stages and almost everyone working for it at the time was self-employed.

14. I have no doubt that the First Respondent did want the flexibility it believed it would get from having the work undertaken by people who were not direct employees. At the start, little attention was paid to the practicalities of whether these individuals were in fact operating as independent consultants or actually behaving and operating as either employees or workers. For example, arrangements were set up to pay the Claimant a monthly sum of money regardless of whether she submitted invoices in advance of payment so that the First Respondent was chasing her for her invoices, having already paid her. In consequence it was necessary to look at the arrangements in some detail.

15. The First Respondent is a company called Cred Investments Holdings Limited and is often referred to in documents and in conversation as CRED. Its aim was to provide some sort of platform for investment in talent in relation to sportspersons and athletes. The concept appears to have been at least partially the brainchild of Mr Carr-Harris who is the Second Respondent in these proceedings.

16. Mr Carr-Harris describes the business of the First Respondent as an investing marketplace for providing capital to athletes. He explained that CRED was planning on setting up either a limited liability, or general partnership, fund to raise a fund to provide capital to sporting talent, specifically footballers. The fund was to be a subsidiary of the First Respondent.

17. At this time the First Respondent had raised approximately £2 million from Octopus Ventures but that was only enough to keep it going while it worked to set up an operational structure. I understand that it was possible that the business could have been carried out both within the First Respondent itself and through the fund, but the business concept required significant capital. The focus at this time was how to raise that capital and set up a structure which could operate, rather than actually running an operation.

18. The fundraising drive was mostly dealt with by a team in which John CarrHarris was the leader and was assisted in varying degrees by the Fourth, Fifth and Sixth Respondents, Matt McLean, Robert Campbell and Daniel Stridsberg as well as the Claimant. The Claimant refers to the CRED partners being Mr Carr-Harris, Mr Stridsberg, Robert Campbell and Matt McLean as well as herself. They were all referred to in promotional materials as the partners. However, there was another very senior person called Cherry Shah, who was a co-founder with Mr Carr-Harris. He worked on the technicalities of the web platform and managed a team of engineers.

19. Once the structure had been set up and sufficient funds raised, the core business would have been activated. At that stage, developing relationships with players, clubs, agents, and financial advisors would have been critical. The Claimant's involvement was on the fund raising side, not on the player

relationship side of the business. Additionally, to some extent she got involved in some operational matters.

Contractor Agreement between the Claimant and the First Respondent

20. The Claimant entered into a Contractor Agreement with the First Respondent which included clauses requiring the Claimant to submit an invoice with all information necessary to evidence that the Services have been provided in accordance with this Agreement. The Claimant was entitled to reimbursement of approved expenses subject to production of receipts or other appropriate evidence of payment. The Claimant was free to be engaged concerned or to have a financial interest in any capacity in any other business, trade professional occupation provided it did not cause a breach of her obligations under the contractual agreement with the First Respondent and she was not to engage in any such activity if it related to a business which was similar to or competitive with the business of the First Respondent without prior written consent of a Director of the First Respondent. No hours of work, no holidays and no place of work were specified.

21. Under the heading "Status", the agreement said:

"Contractor will be an independent contractor and nothing in this Agreement shall render contractor an employee, worker, agent or partner of Cred Investment Holdings and contractor shall not hold themselves out as such."

22. The agreement was signed by the Claimant on 18 November 2019, and she was due to start on 19 December 2019. There was a Term sheet at the end which had a reference to the Project, which said:

"Juliet Souliman will be joining the CRED team to work on financial advisement, financial operations, and deal underwriting for CRED Investment's issuers/clients."

23. Under the heading "Services", it said:

"the Contractor shall provide the following services to CRED Investment Holdings in connection with the -----"

and no further details were provided.

24. Clause 3 dealing with the Claimant's duties included the following provisions about substitution:

"*With prior written approval by a director of Cred Investment Holdings, contractor may appoint a suitably qualified substitute to perform the services on contractors behalf ("**Substitute**") in which case, before performing any part of the Services, Substitute must enter into direct undertakings with Cred Investments Holdings, including with regard to confidentiality and intellectual property rights. All the duties and obligations on contractor shall apply to*

Substitute, and contractor will continue to be subject to all duties and obligations under this agreement for the duration of the appointment of the Substitute. Cred Investment Holdings will continue to pay the contractor as set out in Section 4 below and contractor shall be responsible for all payments to Substitute.

If contractor is unable to provide the Services due to illness or injury, contractor must advise Cred Investment Holdings as soon as reasonably practicable, and Cred Investment Holdings will adjust the fees payable under section 4 to take account of any period contractor or Substitute is unable to provide the Services."

Unapproved Share Option Scheme

25. There were discussions about the Claimant receiving equity which I understand the Claimant argues applied as she was entitled to participate in an unapproved share option scheme which I understand the First Respondent had established. To the extent there is a dispute about whether the Claimant was a participant, I am not in a position to address this. As an unapproved scheme, I understand that the Claimant could have participated, even if she was not an employee. There are two parts to the scheme and Part B applied to Eligible

Persons which was defined as an individual who provides advisory or consultancy services to the Company or any Group Company either directly or through a company or ..other arrangement.

Investor Obligation to re-assess the Contractor Agreement

26. The Claimant argues that the Contractor Agreement was not reflective of the true position and she says two things. She says that she was told by Mr CarrHarris that there was insufficient time to draft a service agreement before her start date and she refers to Clause 4.4.1 of the Investment Agreement which provided for a review of the status of individuals engaged by the First Respondent and says:

    As soon as reasonably practicable following Completion (and in any event within 30 business days of Completion or such later date as approved by the Octopus Manager) the Company and the Founder undertake to: 4.1 Engage a suitable law firm as approved by the Octopus Manager, to review the existing status of each individual engaged by the Company and, subject to such law firm's advice, deliver to the Octopus Manager a Consultancy Agreement or Service Agreement (as applicable) in each case duly executed by (i) the Company and (2) each individual engaged by the Company.

27. The Claimant started with the First Respondent around about 7 December 2019 rather than 19 December as stated in the Contractor Agreement because Jon Carr-Harris thought she could be particularly useful before that date and she had to ask permission from the Octopus to release her.

28. The contractor agreement between the Claimant and the First Respondent was virtually identical to an agreement entered into by the other members of the fund raising team. Robert Campbell entered into his agreement on 16 September 2019 in identical terms, except that the references to the Project and to the Services were different. He was to work on sales, accounts, partnerships, and business development for Cred's investments issuers/clients and to provide services which were sales, business development, account management and partnerships. Daniel Stridsberg had earlier entered into a very similar agreement, but with different project and services, his agreement being dated 10 January 2019.

29. No effort was made to replace the contractor agreement with a service agreement after the Claimant joined and I have not seen any evidence that the Claimant chased this up in terms of asking for the service agreement that she claimed that she was promised, though she did encourage an effort to review the key individuals' status. Given that the other members of the fundraising team were on more or less identical contracts, it is not particularly credible that Mr Carr-Harris would have offered the Claimant a different arrangement. Additionally, the Claimant herself says in her witness statement that on the basis that CRED was a start-up venture capitalist business, it was agreed that the entire workforce force of CRED would be on contractor contracts, using a standard template from Seedlegal, which is an organisation they had membership of.

30. Mr Ferguson, the Third Respondent, is a non-executive director of the First Respondent and is on the board by virtue of the investment made into the First Respondent by Octopus, explained that in the early stages, a start-up needs the flexibility of using consultancy. As a company matures, and it has the means to support a full time employee base, this would be reviewed. He acknowledged the clause 4.4.1, but said that Octopus and the First Respondent agreed it was better to delay that process until they had better visibility on the business being viable.

31. I accept that low priority was placed on requiring CRED to establish formal structures initially. Mr Ferguson pointed out that the majority of early stage businesses fail during the first stage of trying to bring to market a viable product that is desirable to customers. As time goes on the business matures and it is more important to have the appropriately established process and structures. However, what may seem commercially sensible does not correlate with the law or the First Respondent's legal obligations and commitments. The fact that the Respondent parties may have wanted the flexibility of contractor contracts does not make that a correct reflection of the legal status of the individuals concerned.

<u>Amended Contract</u>

32. The Claimant in her witness statement says that between the end of January and 10 February she was offered an amendment to the contract to reflect her status as a member of the CRED fundraising team. She refers to the terms of that contract which entitled her to a finder's fee on investment in CRED to be shared equally between herself, Mr Carr-Harris, Mr Campbell and Mr

Stridsberg. Mr CarrHarris gave evidence that he was approached by Daniel Stridsberg and the Claimant suggesting an amendment to cater for a finder's fee/commission in the event that a potential investor for the fund was found and at that time there was a possible investor identified by Mr Stridsberg. Mr Carr-Harris was uncertain about what would be appropriate and asked them to do some research on industry standards et cetera. In practice Mr Stridsberg sent a proposed draft to Robert Campbell and the Claimant, but without any authority to do so. Subsequently the Claimant, Robert Campbell and Daniel Stridsberg produced signed copies of the proposed draft. It had not been offered to them by the First Respondent or indeed by Mr Carr-Harris. In effect, they put forward a proposal, drafted the document to record it, and pushed for the First and Second Respondent to accept it. In the event Mr Carr-Harris concluded that it was not commercially viable and rejected it. It was never signed by anyone on behalf of the First Respondent. It was never put to the Octopus remuneration committee for approval, which would have been necessary.

General Structure within the First Respondent

33. I asked the Claimant about the operational structure from which I understand that Mr Carr-Harris was the most senior person. The Claimant said she reported to him and there were a number of others who also did so, including Rob Campbell who she saw as responsible primarily for talent, Matt McLean who was largely in the USA and dealt with algorithms, Cherry Shah, who was responsible for the engineers and the website and app platform, and Daniel Stridsberg who was responsible for strategy, fund raising and legal structures. The Claimant said there were in total about 18 people including consultants and business developers who worked remotely from the office. In the office there were between 10 and 12 people. Mr Carr-Harris described Cherry Shah as a co-founder. He was not engaged on the fundraising side but was very senior within the organisation.

The Claimant’s Role

34. The Claimant's LinkedIn profile describes her role at the First Respondent as Chief Commercial Officer and General Partner and records that as a full time role. The LinkedIn profile explains the business and the Claimant’s role in slightly more detail stating this is a *“fintech VC backed venture.* It continues:

    “Building an income sharing agreement investment platform. Leading on the commercialisation, partnership and fundraising. GP of the fund.”

35. In evidence the Claimant explained that the CCO title referred to her responsibility for the early commercialisation of CRED, strategizing and structuring it. By “commercialisation” she said she meant how to get revenues. Her responsibility was how to structure the operation of the business and generate revenue on a regular basis and how to get assets onto the platform. They needed to raise money and she had to ascertain how to attract retail investors to buy into it. The focus first was on a pocket of money which they would need in order to buy assets and the question was how to

gain traction so that people would come to the platform and trade those assets.

36. The Claimant's primary role as far as Mr Carr-Harris was concerned was identifying prospective investors, pitching the First Respondent's business proposition with a view to raising finance and getting an effective legal structure for the fund in place. To that end, the Claimant went on trips to New York and Davos amongst other places, at the expense of the First Respondent, as did other key members of the partnership team. She also finalised the data room, which was a compilation of the information that prospective and actual investors might need to get the full picture of the company and it should contain all the documents and details they might ask for in the process of disclosure prior to a transaction such as a funding round.

37. The Claimant argued that her role was much broader than the Respondents suggested. She complained that it was difficult to demonstrate the full breadth of her work as her emails were entirely deleted very soon after she had left the First Respondent and that other documents had not been produced, such as Trello reports, which was some sort of tracking system for the contacts they met with. The Claimant also complained on occasions about what she thought were changes to the documents, such as changes to her diary. I have endeavoured not to comment on matters which might be relevant to the determination at the full merits hearing. I understand there is no dispute about the deletion of the emails. However, at this stage, I can see no evidence to support the suggestion the Respondents or any of them would have changed the Claimant's calendar. I was given a large bundle which did contain numerous contemporaneous WhatsApp and Slack messages and a number of emails, presumably obtained from the recipient's email systems.

38. The Claimant said in her Grounds of Complaint that she had management responsibilities for the First Respondent's operations team consisting of Ikutaro Saito, Head of Finance, Emily Perretti, who worked on accounts and was the office manager, and Vatsal Desai, who was a sales and business development associate. The Grounds of Complaint asserted that the Claimant was required to allocate tasks to them, assign objectives, and monitor their performance. In her witness statement, the Claimant said she was added to a channel for expenses in order to oversee expenses. She said she was named administrator of the LinkedIn page. She said she oversaw an internship programme and recruitment for a Head of Marketing. She said she drafted an internal HR policy and had overseen an internal accounting investigation and completed tasks assigned to her by Jon CarrHarris, for example a sales report. She met with lawyers, investors and advisors to help with the funding. The Claimant had been involved with a Grant Thornton opinion on fund structures and a Saffrey Champness draft opinion on UK tax for the financial product. She said she had access to the management accounts pack and reviewed the Talent Investment Agreement as well as drafting the Bullying and Harassment policy. She described business visits to Abu Dhabi, New York and Davos.

39. I have reviewed the assertions made by the Claimant about her role and I conclude that her description of her involvement is somewhat overstated.

Operations

40. The Claimant got involved in the operations to an extent. There are WhatsApp and Slack messages in the bundle which show exchanges between Mr Carr-Harris and the Claimant. On 20 January 2020 the Claimant sent a message:

    "hi Jon - I spoke with Emily - we are trying to see how we can improve the behind the scenes efficiency of the team. We are both keen to work on a few improvements/ internal structure suggestions. I asked her to come up with a list of stuff she thinks could be improved operational wise and we will seat down next week. Just as a FYI only so you know I took a bit of her bandwidth".

41. Mr Carr-Harris' response was

    "This is a good idea
    Operational efficiency"

and he finished with a prayer sign emoji.

42. The Claimant and Ms Perretti had an exchange of messages about this in which the Claimant told her that she had informed Mr Carr-Harris that "*both of us are working at a list of suggestions to improve the general office efficiency*". The Claimant explained in those messages that the reason she had done that was "*so he knows that you have a bit of bandwidth committed to that*". The Claimant then continued later on saying:

    "*He is super keen. He knows that it will have to come from us and not him - as his weakness.*"

She continued:

    "*Plan in my head. We both work separately on a list of what to improve/what is going well/what type of structure is needed etc. and we seat down properly next week to share ideas to present to Jon at a later point.*"

The exchange continued with Ms Perretti saying:

    "*Thanks Jules, nice to have a partner on this*!" to which the Claimant replied: "*Will be exciting to work together*".

43. The Claimant was clearly not asked to review operational efficiency and simply volunteered to do so. Ms Perretti's response to her indicates they were not routinely working together, and the relationship was one she termed partners, meaning equals in this matter, not of a junior reporting to her manager.

44. As part of her claim to have operational responsibility, the Claimant claimed to have had managerial oversight over Ms Perretti, Ikutaro Saito, and Mr Vatsal Desai. Ms Perretti said they were all independent contractors/consultants (at that time) and therefore responsible for providing their own services. She also refuted the Claimants argument that she held weekly meetings with Ms Perretti, Mr Saito and Mr Desai. She said there were no weekly meetings led by the Claimant and from looking at her diary she could only find two internal project calls. She also said that the Claimant did not allocate tasks, assign objectives and monitor performance as she alleges, but she did accept the Claimant provided suggestions on tasks for the project, in the same capacity as everyone else on the project team. She also agreed that the Claimant had a conversation with her about working on ideas to improve general office efficiency, which is the exchange above.

45. When the Claimant gave evidence, I asked her questions about the structure of the business and tried to create my own diagram of the reporting structure. In that discussion there was no suggestion that Mr Ikutaro Saito reported to her, rather she recounted that he reported to Mr Carr-Harris.

46. There are numerous Slack/WhatsApp exchanges between the Claimant and Ms Perretti such as the ones I have cited above. The tone of them is generally friendly and inconsistent with the Claimant having any managerial responsibility for Ms Perretti.

47. Additionally, although the Claimant said in a witness statement that she had carried out appraisals, when I asked her about this, she accepted that she had never done a formal appraisal for Ms Perretti, or indeed any other staff member at the First Respondent. Although she specifically referred to appraisals, she said she meant that she had given them feedback.

48. Ms Perretti's evidence is corroborated by the contemporaneous messages. The Claimant did not have operational responsibility for Ms Perretti or manage her. She did not have managerial responsibility for Mr Ikutaro Saito by her own admission. There is simply no evidence that she had managerial responsibility for Mr Desai. To the extent that the Claimant was involved in operations, it was because she chose to get involved. The fund raising team were all flexible and took on matters which they thought needed doing and which they felt they could contribute to.

Named administrator of the LinkedIn page

49. In the course of evidence, it became clear that everybody was an administrator of the LinkedIn page, and this was indeed not indicative of any role in particular.

The Claimant’s involvement in an internship programme

50. The Claimant said she was asked to lead the internship programme and made phone calls as they thought they might want two types of interns, one

to support her and Mr Desai on research and the second to support the company overall. That was still a work in progress and the person would have been required to support her in the summer. The Claimant explained that students who are interested in working in the venture capital and start-up businesses would often try to obtain internships for the summer. The Respondents say that the internship was for someone to work with the Claimant and as such it was reasonable for her to be involved in the selection of that person. I accept that is correct and that this was not indicative of any specific managerial responsibility.

The Claimant's involvement in recruitment

51. The Claimant says she had a very broad role with tasks from human resources and hiring processes to accounting to negotiation of commercial contracts among others. There is no evidence about her having set up any hiring processes. She has said she was asked to participate in certain interviews, but she was never directly involved in selecting who would be interviewed or in identifying a need for specific roles. Her role was rather to meet with people who had already been identified and to give comments towards the general discussion about that person's performance at interview. That is not unusual and does not denote any specific status.

The Claimant's work drafting an internal HR policy - the Bullying and Harassment policy

52. The Claimant did not spend a lot of time drafting an internal HR policy. The Claimant identified a policy from another company and gave it to Vasal Desai who was working on a policy of that type for the First Respondent. It needed to be adapted it so that it would be suitable for the First Respondent. This was not because it was particularly within her remit. This sometimes referred to as a Code of Conduct but from my questioning of the Claimant I am satisfied this was the same document as the Bullying and Harassment policy.

The Claimant's oversight of expenses

53. The Claimant said she was added to an expenses channel in order to monitor the expenses. However, on questioning, she said that everyone was added to that channel. When asked why she had said she oversaw expenses, she said sometimes she was asked to approve some expenses for another person.

The Claimant's oversight of an internal accounting investigation

54. I understand that this is a reference to some analysis undertaken by Ms HartDale. Ms Hart-Dale provided her services through her company, Blue Sky Consulting. Her company was commissioned to work for the First Respondent because Marcus Bean, who had previously worked for the First Respondent, introduced her to them and she met with Mr Carr-Harris, Mr Stridsberg and Ms Perretti as they were looking for someone to identify any financial and accountancy risks facing the business including tax

liabilities/risk. Ms Perretti said that the reason for the appointment was that she took over some of the accounting administration from Mr Ikutaro Saito, including using specific accounting software. As she had no accounting background, she asked Mr Carr-Harris if she could have an accountant train her on the relevant rules and processes and this led to the appointment of Ms Hart-Dale's company, Blue Sky Consulting, to provide this training and also to provide general accountancy advice. Ms Hart-Dale says the Claimant was the last person she met out of the general partners. It is clear from that description that the Claimant did not commission her work. One matter which came up was some sort of accounting query, and Ms Hart-Dale did look into it. The Claimant was clearly interested in that investigation, but she was not assigned responsibility for commissioning or overseeing Ms Hart-Dale's work.

The Claimant's meetings with lawyers, investors and advisors

55. The Claimant did have a number of meetings with lawyers, investors and advisers. She explained that she met with a number of lawyers and advisors, but she accepted that they were not all advising the First Respondent on the same matter. She explained they made it a rule to get as much free advice as they could, and they would often attend introductory meetings and make assessments of the lawyers. The key point was the need to structure the fund in the best way to achieve the necessary efficiencies and a tax structure that worked. The actual structure would rather depend on where they were most successful in terms of attracting funds and the type of talent they could attract. There were tax differences and different structures that would appeal to different investors. This was consistent with the Claimant's role being to work on the establishment and structuring of the fund.

Sales report

56. The Claimant refers to undertaking special projects and tasks assigned to her by Mr Carr-Harris, for example the sales report. Her witness statement refers to the bundle to pages which are a series of messages headed "sales report", but they actually refer to a request to Robert Campbell and to the Claimant to put together a Google document report/list of the investors they had been meeting with over the past few weeks to identify the necessary follow up. This was simply a request for follow up information on the meetings the Claimant had with potential investors, which was part of her main remit.

Grant Thornton opinion on fund structures and a Saffrey Champness draft opinion on UK tax for the financial product

57. Grant Thornton had been instructed to produce an opinion on a fund structure and the work had been done in October 2019 prior to the Claimant joining the First Respondent. Mr Carr-Harris was apparently not satisfied with the quality of their output or with their invoice and wanted to negotiate a discount. The Claimant's involvement related to her finding arguments to apply pressure on Grant Thornton to reduce their invoice.

58. The Saffrey Champness report was to be a draft opinion on UK tax for the First Respondent's financial product and the Claimant's involvement was joining a meeting at Daniel Stridsberg's request. She participated in only one meeting at the offices of Saffrey Champness on 10 January 2020, when they were negotiating prices and timelines.

Access to the management accounts pack

59. The Claimant said she had access to the management accounts pack as did other members of the senior team. She said she was also part of the strategic discussions and decisions regarding every aspect of the business. In practice, the discussions she identifies include the possibility of having an intern to help with certain work and also a discussion about the need to reduce travelling expenses. The Claimant did not attend board meetings and the bundle documents include exchanges between Ms Perretti and the Claimant in which Ms Perretti told the Claimant that Mr Carr-Harris did not want her to have more info. Ms Perretti also said on 27 January in one of these exchanges that she had told Mr Carr-Harris that she had only given the Claimant the P and L. This exchange demonstrates that the Claimant was not expected to have access to certain financial records.

Reviewing the Talent Investment Agreement

60. The Claimant explained that this agreement had been drafted prior to her joining the First Respondent. Robert Campbell had primary responsibility for the relationships with talent and so it would seem likely that agreement fell within his purview, but Mr Carr-Harris and Daniel Stridsberg also looked at that agreement as did the Claimant. It was one of the fundamental aspects of the prospective business. They all commented on it and to the extent that the Claimant was responsible for the data room and seeking investors, it would have been important for her to have it and have some understanding of its contents.

Control and Direction

61. The Claimant argued that Mr Carr-Harris gave her directions and that her time was expected to be fully committed to the business of the First Respondent. In practice, the Claimant largely organised her own diary and when Mr Carr-Harris wanted to hold a meeting with her it proved extremely difficult. Some of that was due to the fact that Mr Carr-Harris himself had a busy schedule but some of it was due to the Claimant having commitments which she was unwilling to change.

62. When, in February 2020, Mr Carr-Harris appeared to become frustrated asking about visibility on the purpose or function of certain meetings, the Claimant was not at all compliant as an employee who was under the control of another would be. Mr Carr-Harris sent a message to the Claimant questioning the purpose of meetings with certain named parties. On 20 February 2020, the Claimant retorted:

"We planned a meeting with Dan you and me on Monday at 8:00 AM to 10:00 AM. I was the only one there -and no one show up and no cancellation note was sent. I was in Paris (as discussed and agreed on two weeks ago) on tuesday. I was available online - with active discussion with emily. Daniel and you among other, with impeccable responsiveness, I was the only one in the office yesterday morning until first arrival started to arrive at 11:00 am after their gym. I was in the office most of the day today with some meeting schedule far in advance and put in my calendar with full visibility from the entire team. You have all the possibility to come by if needed to speak with me.

I would appreciate to be put at the same standard as everybody else. I am the one with the most organise, transparent and explicit agenda.

I need a lunch break regardless - so will be taking some time to go out to grab lunch.

Right now - I am being particularly flex by offering you multiple options to meet up. So not too sure where it's coming from."

63. The exchange continued because Mr Carr-Harris asking the Claimant what the purpose was of meetings with Collective Equity, Christelle and Alexia, to which the Claimant replied indicating they were all investor meetings. Mr Carr-Harris then said he was happy to joint those meetings. The Claimant replied:

"Nope - thanks Not
needed.
They are intro meetings with personal contact."

64. She followed up by saying she would need Mr Carr-Harris if there was a second meeting scheduled. Mr Carr-Harris then told the Claimant that he and Mr Stridsberg were attending all investor meetings, saying it was important that either one of us attend all of those meetings to assess the viability. The Claimant replied:

"Understood - I'll make sure my next meetings to come investors to include you or dan."

65. There is no indication that the Claimant did include Mr Carr-Harris in the three meetings already planned despite what appeared to be a demand that she do so. That behaviour is not consistent with being under the control of another person.

66. The Claimant arranged to work in France for three days at the end of February. Her diary entries show that as "WFH" or work from home. The Claimant says this is strange and she thought it had been entered as holiday. She also says she had asked permission to take this holiday. Mr Carr-Harris says this was not the case and that independent contractors and consultants going on holiday would put out of office on their calendar. They didn't need

to ask him permission, he just needed to know so that meetings could be planned.

67. I am satisfied that the Claimant organised her own meetings. She coordinated with other members of the fund raising team when there was something significant under way such as an overseas trip, but she did not operate as someone under the control or direction of Mr Carr-Harris who, as the chief executive, was the most senior member of management to whom she said she reported.

The Claimant's title

68. The Claimant said her title was Chief Commercial Officer and General Partner and this demonstrated her seniority and status. The bundle contains an email exchange between the Claimant and Will Gibbs of Octopus Ventures while she was still with Octopus Ventures regarding the announcement he was going to make to the team about her departure. The title in the draft message to the team was in square brackets and was CCO and Partner of the fund. In the event the final announcement that went out on 20 November referred to Harris having the opportunity to join as Chief Commercial Officer and be a core part of the team raising the fund.

69. Another announcement made about the Claimant's move to the First Respondent was in an online publication called Sifted. The Claimant had an exchange of text messages with a Sifted journalist, Isabel Woodford, in which she told the journalist "*I will be joining as CCO for the company and as a general partner for the fund.*" The article, which was subsequently written, referred to her leaving to kickstart a new investing start-up, CRED, and its accompanying venture arm. It said:

> *"the French-national will assume the role of chief commercial officer of the company - which will allow retail investors to buy shares in sports stars and musicians - and general partner of the venture fund.*

70. The evidence from Ms Perretti and the documents in the bundle suggest that the process of using titles was fairly relaxed and a disorganised one so that before the trip to Davos, in January 2020, Ms Perretti asked Robert Campbell what his title was at CRED, to which he replied:

> "*Chief Operations Officer well*
> *it is for this*"

71. Ms Perretti said that the Davos organisers would not allow access to some events to individuals who were not what was termed "C-Suite", meaning the most senior level within the company. In consequence, everyone working for the First Respondent used a title indicating they were at that level for that trip.

72. The Claimant had a CRED email which had a sign off which was in the CRED style used by Mr Carr-Harris and others. She used Chief Commercial Officer as her title in that email sign off. The Claimant gave evidence that Mr Carr-

Harris set this up for her. Mr Carr-Harris denied this and denied being aware of the title being used on the email sign off by the Claimant. He pointed to the business cards which had been ordered for the Claimant which said she was General Partner, Cred Investments. Mr Carr-Harris said that was a more accurate description of the Claimant's role, even though the Fund in which she was to be a general partner had not been sent up at that point. Mr Carr-Harris said he was not aware that the Claimant used the title Chief Commercial Officer for some time. He said that often internal emails would not show her title. However eventually Mr Carr-Harris did realise that the Claimant was using that title, as was Robert Campbell, at which point he told them both that that was not correct.

73. There is an exchange dated 18 February between Mr Carr-Harris and both Mr Campbell and the Claimant about the investors they had been meeting which shows that they both did use the title Chief Commercial Officer. There is subsequently a message between Mr Desai and the Claimant dated 25th of February in which Mr Desai tells the Claimant that Rob is the new chief commercial officer to which the Claimant replies:

"And what am I? Chief commercial officer 2? Mr Desai replies with a laughing symbol saying, "*so strange it's becoming a joke*".

74. The use of titles was clearly a contentious issue for some. An exchange of messages in the bundle on 18 January 2020 show that the Claimant was asking for a document to put in the data room which one was to be a short biography of each of the key individuals. She wanted to state their name, title and key responsibility. In response Matt McClean asked "*have we defined what everyone's titles and key responsibilities will be yet? We should probably prioritise this instead of having everyone choose their own*". In response the Claimant replied "*for now titles that you use are fine. I will twick it to make it a whole*". And again, Matt McLean replied "*we're not clear on what everyone's title is though. We were discussing this in the internal meeting Friday, but nothing was finalised yet*". The Claimant then asked for a biopic with No title and Matt Mclean replied again "*okay but titles should be addressed prior to sharing with investors. E.g. your title is not chief commercial officer*".

75. That exchange was replied to by Daniel Stridsberg who wrote

"All, As discussed individually and collectively, key responsibilities, titles and the data room is a key priority at this stage".

He then referred to the draft outline of roles and responsibilities being in place but requiring more work. He then said:

"figuring out "final" titles (or new titles for now) will be easy and quite straight forward ex-post role definitions.

As of now, the titles we have used will have been more or less accurate and frankly less important as we have all worked to pick up tasks beyond the

scope of our titles on an add-hoc basis all under the banner of CRED. This is if course common in a startup, and we are now working on formalizing our operations, and our individual signed engagements. I ask you all to be patient as this will be a process".

76 Mr Stridsberg gave evidence that the exchange above was designed to placate everyone and to avoid tension. However, the dialogue about the Claimant's title and indeed everyone's title appears to have been continued on 6 February 2020 in conversation online between Daniel Stridsberg and Matt McLean in which at one point Daniel was referring to the Claimant's background and then said:

"John had the understanding that she would work with him, and in the fund, with COO type roles... This has since morphed".

A COO role would have been something different again as it usually means chief operating officer.

77. An undated document which appears to set out the structure describes the Claimant as Director of Operations with Mr Stridsberg as Director of Strategy, Rob Campbell as Director of Sales and Emily and Vasal as ops and admin. This was an early draft and not a definitive organogram.

78. I am satisfied that there was no specific allocation of any title to the Claimant and that the choice of CCO, or Chief Commercial Officer, was her own choice and not a specific title allocated to her. The Claimant briefed the journalists and Will Gibb before they wrote about her when she was leaving Octopus Ventures. The exchanges I have quoted above show clearly that there was a great deal of freedom in how individuals presented themselves and they were all keen to present as having significantly important roles when they were meeting with external advisors or potential investors.

79. It is also clear from the comment by Matt MacLean "*we're not clear on what everyone's title is though. We were discussing this in the internal meeting Friday, but nothing was finalised yet"* that there was a discussion between various people about organising a proper structure and allocating titles which reflected the work correctly but that was not concluded. I accept Mr Carr-Harris probably had sight of the documents describing the Claimant using the title "chief commercial officer" but I am also satisfied he did not take this on board. I take from the Claimant's communications with Ms Perretti in which she refers to their suggestions for improving general office efficiency that Mr Carr-Harris was focused on getting the project off the ground, and not on details of that nature.

80. As for the title "General Partner", the evidence from both sides was that investors wanted to have confidence in the team of people who were going to run a business and the investor marketing materials were developed with one slide showing the team being Mr. Harris Mr Stridsberg, Mr McLean, the Claimant and Robert Campbell, all of whom were described as general partners. The slide shows a brief biography of each of them but does not describe the role that they were going to play other than to say "we combine the best of finance, technology and

sport. We have 4 ex professional footballers (soccer players) and 2 former agents on our team.

81. As I have noted the Claimant had a business card which described her as General Partner which had been provided to her by the First Respondent. The Claimant argued that, as the fund did not exist, the title of General Partner was nonsensical, and to the extent she held that title, she said it related to her role within the First Respondent. As no formal structure had been put in place for a partnership, there is some justification in that argument, but there was a sort of informal partnership in place being the partnership of people working to establish the fund and to raise financing who it was envisaged would be general partners in the fund once it was established. While Mr Campbell was more focused on relationships with the players and agents etc, all of this group of five people were trying to establish the fund structure, in contrast to Mr Cherry Shah, who was working on the technology and the platform and managed the engineers.

<u>The assessment by Victoria Hart-Dale</u>

82. The Claimant argues that an independent consultant engaged by the Respondent assessed her to be an employee. I have noted that Ms Perretti was asked to take over responsibility for the accounts and as she had limited experience, it was agreed that she could engage someone to give her some advice and direction. As a result, Blue Sky Consulting was appointed. The original proposal was to support the financial, strategic and operational direction of the company in the short to medium time. Ms Perretti was concerned that the changes to IR35 might mean that the First Respondent company would have to make some operational and organisational changes. Once she started work for the First Respondent, Ms Hart-Dale was asked by Ms Perretti to assist with looking into that. Ms Perretti and Ms Hart-Dale spent some time working through an Inland Revenue online tool designed to try to identify whether people were self-employed or not for the purposes of IR35. There is some dispute as to exactly how they did the task, but it is significant that at that time Ms Hart-Dale had no knowledge of the First Respondent's business or operation. They did have copies of the Consulting Agreements with various key individuals. Ms Perretti and Ms Hart-Dale filled out the online questionnaire together. I have no doubt that Ms Perretti supplied much of the information since Ms Hart-Dale had no background with the First Respondent. Ms Hart-Dale could not recall the questions in the online tool when I asked her, other than one which asked to what extent individuals could substitute other people to do their work for them. Ms Perretti gave evidence that she had effectively given the answers and at that stage she too was relatively new to the First Respondent and had little understanding of exactly what the First Respondent's operation involved. I am told that the online tool suggested that the Claimant was an employee and that was reflected in Ms Hart- Dale's advice to the Board on various matters including IR35 in which she said that the Claimant's status was "*yet to be determined but may possibly be within the scope of IR35*". As regards PAYE v Self Employed, the report said; "*yet to be determined but likely to be deemed an employee*".

83. While I understand that at that time, both Ms Perretti and Ms Hart-Dale thought that the Claimant's day today work was such that she could not be

substituted, and that was the focus of their conclusion that she was probably an employee, it is not appropriate for me to adopt the suggested outcome that the Claimant was likely to be an employee. I do not have a full understanding of what questions the online tool asked and the full range of information Ms Perretti and Ms Hart-Dale used to answer the online questions. Additionally, the approach taken to the question of self-employment versus employee by HMRC is not always identical to the approach taken by the Employment Tribunals. It is incumbent on me to undertake my own assessment.

<u>Substitution</u>

84. As noted under the section of this judgment addressing the Contractor Agreement, there was a provision in that agreement which entitled the Claimant to supply a substitute provided that written approval was given by a director of the First Respondent and the individual who was to act as substitute was suitably qualified. Additionally, there was a requirement for direct undertakings with the First Respondent with regard to confidentiality and intellectual property rights by the substitute. The Claimant did not attempt to provide a substitute at any time, so we can only speculate as to what would have happened if she had.

85. The Claimant's role was to work on identifying potential investors, persuading them to consider the project and selling the First Respondent's project to those prospective investors, along with all the preparation for an investment including maintaining a data room ready for a financing transaction. Another very important part of her role was working on the appropriate structure. In order to do these tasks in place of the Claimant, the substitute individual would need to understand the business project which the First Respondent proposed and would also need to know a considerable amount about the way it worked and the matters in the data room. If the Claimant had wanted to substitute herself, she would have had to locate somebody who could talk to potential investors. That person would have to know how investments are made and know enough about the business project to be able to explain it to potential investors, albeit the meetings should also have been attended by one of Mr Stridsberg or Mr Carr-Harris. That person would also have to know about the business project in the detail necessary to discuss those sort of matters when working with the lawyers and accountants who were advising on the structure.

86. In practice, it is difficult to see how the Claimant could have found someone who had the necessary qualities and either knew, or could quickly get to know, the First Respondent's business proposition. The First Respondent had to be satisfied that the substitute was suitably qualified. Mr Carr-Harris' evidence about this initially was that it would have taken some time (perhaps between 14 and 30 days) in order to get someone up to speed to take on the role. However, as he gave his answer, he appeared to think about it further and suggested that they had some temporary consultants who had been able to be instructed within a matter of hours. It is not clear what those temporary consultants were doing and there was nothing in the bundle about them.

<u>Payment</u>

87. Although the contractor agreement provided for invoices to be submitted, in practice the Claimant was paid on a monthly basis whether she submitted an invoice or not. I note that she had only joined the First Respondent in December 2019. In January and February 2020 there are numerous messages from Ms Perretti to the Claimant chasing her invoices, with the Claimant repeatedly saying she would prepare them. The Claimant did not prepare any invoices until the very end of her engagement. Despite that, her payment carried on being made on a routine basis. In other words, the First Respondent set up a regular payment and did not await invoices before letting that payment be made

Integration within the First Respondent's business

88. The Claimant was held out externally as part of the business in that she was able to use an email which suggested she was an integral part of the First Respondent's operation. As I have noted, the Claimant was given a business card which described her as a general partner in terms that foresaw a creation of a fund. In practice that fund did not exist at the time she was given the business card.

89. The Claimant also attended events at Davos in particular at which she was held out by the First Respondent as being a senior member of their management team. As I have noted, the evidence given by Ms Perretti was that Davos would not accept individuals who were not at level described as C Suite. In consequence titles were created which matched that requirement.

90. Mr Carr-Harris aimed to create a close knit team working to establish the fund and to raise finance so that it could get to the next level. He wanted the Claimant and the other key members of the team to work hard towards that and to contribute their best efforts. Members of the fundraising team were held out externally as being an integral part of the business. They were expected to use their individual skills to get the fund raising achieved and they were all key players in this process.

Equipment

91. The Claimant had her own laptop and mobile phone which she used for her work. She used a desk in the First Respondent's office when she went into the office. I understand there were no allocated desks but there was reference to the fact she tended to use one desk. The Claimant said she put her contacts onto the cloud and gave the First Respondent her intellectual property, but this appears to mean that she logged her contacts and activities on a computer app which helped her track her work. There was nothing to suggest there was any obligation on the Claimant to hand over her contacts and there is no indication of what she meant by her references to her intellectual property.

Other Business Interests

92. The Claimant had a career history in which she had founded some start-up businesses but prior to joining the First Respondent, she had been an employee. She was interested in possibly starting her own venture, and she was keen to promote herself as a venture capitalist and prominent female business woman, but

there is no evidence that she was promoting herself as a business. She spoke at various events and appeared on podcasts.

93. The First Respondent was not a client of any business which the Claimant ran as such. The Respondents did appear to be of the view that the Claimant might have had other business interests. Other members of the team on the same contracts as the Claimant did have other business interests. From the Respondents perspective, the Claimant was free to have other business interests provided she still carried out her responsibilities effectively and her other interests did not compete with the First Respondent's project. As it happens, the Claimant does not appear to have had any other business interests.

Submissions

94. There are detailed written submissions which I have read carefully. For the purposes of this judgment, I shall only summarise the written submissions.

The Claimant's Submissions

95. The Claimant referred to the statutory provisions and to the cases of Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32 and Autoclenz Limited v Belcher [2011] UKSC 41. Additionally, the Claimant referred to the case of Uber BV and others v Aslam and others [2021] UKSC5.

96. The Claimant argued that it was wrong to take the contract as a starting point as it would be inconsistent with the facts. Therefore, following the Uber case, the starting point should be to look at the reality of the relationship.

97. In terms of that relationship the Claimant argued that her relationship was with the First Respondent. The Claimant argued that the reality of that relationship was that it was planned to be a long term relationship. This was envisaged by all the parties. The Claimant was to continue to work in a senior capacity for the group to be created. The Claimant was offered equity on a three year vesting schedule which required her to remain in the group for three years. The Claimant also referred to evidence given by Mr Stridsberg orally that the intention was that the initial contract was a placeholder for a contract with the operating entity. The Claimant argued that in reality her role would not change on the creation of the fund and the paper relationship was not reflective of the reality. The Claimant argued that her job title was indicative of her seniority.

98. The Claimant argued that there was a contract to perform services between her and the First Respondent and that she undertook to perform that contract personally. The Claimant argued there was no genuine or unfettered right of substitution and that substitution would be virtually impossible. The Claimant argued that there was mutuality of obligation between her and the First Respondent and also that the First Respondent was not a client or customer of a business carried on by the Claimant. The Claimant argued that she was a fully integrated member of the business. She also argued that the First and Second Respondents exercised control over her performance to an extent consistent with her being a senior employee.

The Respondents' Submissions

99. The Respondents made various submissions about factual matters which had been raised in the course of the evidence. The Respondents argued that CRED only started operation in July 2019 and was a very new business which needed the flexibility of using contractors as work could be temporal with projects being scaled up or down. The objective was to establish a fund. The Claimant's role was to provide services in establishing the fund with a view to her then becoming a general partner of the fund once established.

100. The Respondents referred to the legal tests of personal service, control and mutuality of obligation. The Respondent also referred to the case of Autoclenz and said that this case provided that the courts will consider whether the provisions of the contract are consistent with it being a contract of employment and will scrutinise the practical reality of the parties' relationship.

101. The Respondent argued that there was no mutuality of obligation. The Claimant had specific objectives to achieve but there was no certainty that the fund would be established. The Respondents analysed the Claimant's activities and argued that she had enhanced her description of events and characterised them in a manner which was not correct. She was not intended to and did not in practice have involvement beyond involvement relating to the establishment of the fund and some other activities which she had taken upon herself and not been asked to do.

102. The Respondents argued that the Claimant controlled her own work and where she did the work from. On occasions she needed to work collaboratively with other individuals and would have to attend the office in order to properly provide her services, but she could choose when, where and how she worked and did so.

103. The Respondents argued that the Claimant did not have to perform services personally and that she had a genuine right of substitution. The Respondents argued that the fact that this right had some restrictions was consistent with the fact that the person dealing with the matters in place of the Claimant would have access to confidential information.

The Law

104 Section 230 of the Employment Rights Act addresses employees and workers and provides:

(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.

105. Section 83(2) of the Equality Act provides:

"Employment" means—

a. employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

Case law

106. In Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD. Mr Justice MacKenna stated:

'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.'

107. In Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC, Lord Clarke approved this, calling it the 'the classic description of a contract of employment'. 108.

It is generally considered that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. This entails three elements:

- control
- personal performance, and
- mutuality of obligation and control.

109. Judge Richardson in White and Anor v Troutbeck SA [2013] IRLR 286 cited MacKenna J in the case of Ready Mixed Concrete saying:

"*In Ready Mixed Concrete MacKenna J said the following:*

"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

'What matters is lawful authority to command, so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.' Zuijus v Wirth Brothers Pty Ltd ((1955), 93 CLR 561 at p 571.). To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

110. Judge Richardson went on to say:

"This passage, which the ET did not cite, seems to me to be of real importance to the resolution of this case. It makes the following points clear.

Firstly, the key question is whether there is, to a sufficient degree, a contractual right of control over the worker. The key question is not whether in practice the worker has day to day control of his own work.

It has often been observed that in modern conditions many workers – especially the professional and skilled – have very substantial autonomy in the work they do, yet they are still employees. But this has, I think, always been the case. There have always been great houses and estates left for long periods in the practical care and stewardship of servants while the owners and masters have been away. The fact that these servants have been left in charge has never prevented the law – and the parties – from regarding them as being retained under contracts of service. There would be no doubt that the owners retained the right to step in and give instructions concerning what was, after all, their property. It does not follow that, because an absentee master has entrusted day to day control to such retainers, he has divested himself of the contractual right to give instructions to them.

Secondly, all aspects of control are relevant to this question. It was once thought that for a contract of employment to exist the master must be empowered to direct not only what is to be done but also the manner in which it is to be done. But many kinds of employee – such as the surgeon, the captain and the footballer discussed by Somervell LJ in Cassidy v Ministry of Health [1951] 1 All ER 574 at 579 – are engaged to exercise their own judgment as to how their work should be done.

Thirdly, the starting point lies in the express terms of the contract between employer and employee. If the express terms of the contract do not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

111. In Pimlico Plumbers Ltd v Smith *[2017] EWCA Civ 51, [2017] IRLR 323* Etherton MR referred to the case law on substitution clauses as follows:

"[84] … In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance."

112. In the judgement of Lord Leggatt in the case of Uber Bv and others v Aslam and others [2021] UKSC 5 said:

"It would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be

in need of protection and not just those who are designated by their employer as qualifying for it."

Conclusions

113. I have reviewed all the case law I was referred to carefully. The Uber case makes clear that the starting point for determining the Claimant's status is not the contract she entered into with the First Respondent. Although the Claimant entered into that contract knowing full well the effect of it was that it meant she was self-employed, it is clear from the judgement in the Uber case that the requirement to ensure that employees and workers get the statutory protection they are entitled to, means that it is necessary to review the circumstances fully to determine the actual status of the Claimant.

114. Both the Claimant and the Respondents identified three key issues to be considered when determining whether the Claimant was an employee, being the questions of whether she was required to provide her services personally, the extent to which the First Respondent had control over her and mutuality of obligation.

115. If I determine that the Claimant was an employee, that is sufficient. If I do not consider her to have been an employee, I then have to consider whether she was a worker.

116. I have taken the questions identified by the parties and considered them and considered the situation as a whole.

<u>Was there a contract to perform services between the Claimant and the First Respondent?</u>

117. There is no doubt that the Claimant and the First Respondent had entered into a contract together under which the Claimant was to provide services to the First Respondent.

<u>Did the Claimant undertake personally to perform work or services?</u>

118. The contractor agreement allowed for the Claimant to perform the work or services personally or to provide a substitute.

<u>Was that a genuine and unfettered right of substitution?</u>

119. Although the contract provided that the Claimant was entitled to send a substitute, there was a very real question as to whether this was in practice feasible. The right to send substitute was subject to some restrictions. The Claimant had to get prior written approval by a director of the First Respondent. The substitute had to be suitably qualified to perform the services. The substitute had to enter into direct undertakings with regard to confidentiality and intellectual property rights. The substitute also had to apply comply with all duties and obligations on the contractor. There is no doubt that any substitute would have had

to have been approved by the First Respondent before they could take over the Claimant's duties.

120. The Claimant argued that it was simply not possible for there to be a substitute. Mr Carr-Harris was questioned about this while giving his evidence. His initial reaction that was it might take a few weeks to "on board" such an individual. He then appeared to think about it further and said that temporary consultants had been brought into work on investor relations and fundraising and they had been able to be brought up to speed rather quickly. In submissions, the Respondents suggested that it was intended by the First Respondent that the Claimant should never attend investor meetings alone but should always be accompanied by either Mr Stridsberg or by Mr Carr-Harris and therefore, it would have been possible for a substitute to have worked with them in place of the Claimant.

121. None of the team involved with fundraising had specifically asked to send a substitute, so there was no background situation to refer to. The contract permitted it, but the reality was that it might or might not have been possible in practical terms. The question was whether it was feasible. As there was no background evidence, the assessment of feasibility is largely a theoretical exercise.

122. We do know that the Claimant had been discussing the appointment of an intern in the summer to assist her with some work and it was clear that some work she did could be delegated and the First Respondent was willing to do that. However, case law has made it clear that some ability to delegate does not equate with a right of substitution.

123. Overall, it is my assessment that the Claimant would not have been able to find a suitably qualified substitute who was able to take over her responsibilities. I take note of Mr Carr-Harris' evidence that they had had temporary consultants who were able to pick up the work quickly but there were no details about that, and I do not know what those temporary consultants were actually doing. Given that this was such a significant aspect of the hearing, I would have thought that if there were temporary consultants, the First Respondent would have been able to disclose documentation relating to them and give more detailed evidence in chief about that process. In the absence of that evidence, I take Mr Carr-Harris's first answer that this would have been a process taking weeks as the guideline as to how long it would have taken to bring a substitute up to speed. That period is simply too long to make it feasible.

<u>Was there mutuality of obligation as between the Claimant and First Respondent?</u>

124. This is a question of whether or not the First Respondent was required to provide the Claimant with work and Claimant was required to do that work. The Claimant had agreed to work on a project which was the fund raising and as part of this, the fund structure. She expected to set her own agenda much of the time. She often worked on contacts that she identified. Although there were discussions between the members of the fundraising team, often the Claimant was sorting out her own work and pursuing her own contacts. The project was a long term project and there was no question of a sequence of individual tasks being assigned to the Claimant. The Respondent referred me to the case of <u>*Windle and another v*</u>

<u>*Secretary of State for Justice [2016] ICR 721CA*</u> and to the judgement of Lord Justice Underhill and suggested this was akin to a situation where someone supplies their services on an assignment by assignment basis. I do not think the Claimant's situation can be likened to an assignment by assignment situation. The Claimant's situation was a potentially long assignment which was at an early stage. The Claimant says that the existence of the unapproved option scheme suggests the parties envisaged a continuing relationship for three years or more. The Respondent says the option scheme never applied to the Claimant as she didn't take it up. What is clear is that the relationship was one where the Claimant was expecting to become a general partner in the fund when it was established and prior to that she was working on the arrangements to set it up. Nevertheless, I consider there was mutuality of obligation. Both parties expected the Claimant to remain involved with the business as it developed, and that she would become a general partner when the fund was established.

<u>Was the First Respondent a client or customer of a business carried on by the Claimant?</u>

125. The First Respondent was not a client or customer of any business carried on by the Claimant. The Claimant did not have any business operation and had not marketed herself as being in business of any sort on her own account.

<u>Was the Claimant integrated into the First Respondent's business and if so to what extent?</u>

126. The Claimant was held out to the external world is integrated into the First Respondent's business. She had an email address and business cards. She also maintained a working relationship with key staff involved in office management and accounting. She makes little mention of any involvement with the engineers and those working on the app and engineering the product. She was not involved with the player side of matters. Overall, she had a degree of integration within the business sufficient to enable her to work on the external investor relations matters and the work to set up the fund as well as collaborating with the staff in the office.

<u>What level of control did the First Respondent, its employees or agents, have over the Claimant's provision of services?</u>

127. There was a dispute as to the extent to which the First and Second Respondents controlled the Claimant. There was there were no specified working hours in the contractor agreement. There was no specified location for the services to be carried out. It was, however, clear that the Claimant was expected to work on fundraising and investor relations as a key part of her role and there were exchanges of emails and other messages about the work she was doing.

128. There were also clear agreements that the Claimant would go on certain business trips being those to Davos, Abu Dhabi and New York. Those were

opportunities to meet potential investors and the First Respondent was paying the travel expenses.

129. The Claimant argues that she was in a senior role and as such, she had considerable autonomy over her work. The question is whether the lack of control over the Claimant was consistent with her being a senior employee or went beyond that. The Claimant did not ask permission to go on holiday and she merely stated that she was going to be working from France when she went for a family occasion.

130. There is a balance to be expected when an individual is operating on a selfemployed basis and providing services. Any client would expect a degree of communication over the work that was being undertaken and again it would be reasonable to expect the service provider to attend meetings in order to discuss the project. The question is whether these discussions and requests to attend meetings tipped over from those reasonable to expect from a service provider to those indicating the level of a control of an employer.

131. The Claimant's approach towards Mr Carr-Harris was largely inconsistent with him having control over her. I have explained in the factual section under the heading control the reasons why I come to this conclusion. The Claimant cooperated with Mr Carr-Harris much of the time but on occasions, she was simply non-compliant in a manner inconsistent with him having control over her.

132. The circumstances surrounding the Amended Contract are relevant in highlighting the equality of arms and peer to peer nature of the relationship. The Claimant and Daniel Stridsberg proposed a finder's fee. Mr Carr-Harris acknowledges that he asked them to do some research on industry standards, so that he could consider their proposal. They then drafted their own contracts providing for that fee and sent their signed copies to the First Respondent before there was any agreement about the principle of such a fee. They pushed for the arrangement on their terms. That is not consistent with an employment relationship and is wholly different to a situation where an employee might ask for a pay rise.

<u>Was the Claimant engaged by the First Respondent as an employee,</u>

133. Looking at the picture in the round, there are some factors which point towards the Claimant being engaged as an employee, for example, she was not in business on her own account and was given business cards and an email address which suggested she was part of the First Respondent's organisation. There appears to be sufficient to demonstrate some degree of mutuality of obligation. However, the Claimant did not act as if she were an employee under the control of the First Respondent. The level of control is a significant aspect of employment.

134. It is necessary to look at the situation in the round as well as individual aspects of it. The Claimant had joined to participate in a team of people who were applying themselves towards finding funding and setting up the

prospective business of the First Respondent. All of them expected to work hard. All of them had a considerable degree of flexibility in how they contributed towards the process. The Claimant had flexibility about where she worked, when she worked and how she worked. She was expected to account for her progress so that the team would know how the overall project of finding the funding and setting up the fund was progressing. She was asked to operate as part of the team on occasions, for example by attending fund raising meetings with potential investors with other members of the team, but she did not always comply. The Claimant was held out as being an integral part of the team. She had an email address and business cards which held her out as being part of the organisation of the First Respondent. The team were identified to potential investors as general partners. They had entered into contractor agreements with the First Respondent, but the long term aim was that when the fund was set up, they would be general partners in that fund structure rather than having an employment relationship with the First Respondent. The fact that there was an option scheme under which options vested after three years, and thus participants envisaged a long term relationship with the Group, does not mean participants (which may or may not have included the Claimant) were in an employment relationship with the First Respondent. Likewise, the fact that the present arrangement was temporary and there was an expectation that the Claimant would be a general partner in a fund which was yet to be set up, does not mean that it was not employment. The arrangement between the First Respondent and the Claimant and indeed the arrangement between the First Respondent and other members of the team was designed to allow them to work on the fundraising effort to get the First Respondent to the next level. It was a specific project. Taking everything into account, particularly the absence of control by the First Respondent, this was not an employment relationship.

135. In reaching this conclusion, I have taken account of the various factors that I was referred to. Specifically, I do not consider the Claimant's title was indicative of employment status. The title situation was a jostle amongst the people working on the fundraising, all seeking to promote themselves as senior players with no agreed titles and without any specific agreement on titles from the First or Second Respondent. I also reject the Claimant's assertion that her role was such that it could only have been performed by an employee. I regard the Claimants description of her role as overstated as I have explained in the section in this judgment on facts.

Was the Claimant a worker or self-employed independent contractor?

136. In order to determine whether or not the Claimant was a worker or selfemployed independent contractor, I have to consider the provisions of section 230(3)(b). The first question is whether the Claimant performed the services personally. I have already determined that she did.

137. I then have to consider whether the Claimant was in business on her own account, effectively in some kind of business or profession or dealing with clients. As noted above, the subsection provides that a worker is someone who works, or worked, under:

"*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*"

It is my conclusion that the Claimant was not in business on her own account and that the First Respondent was not a client or customer of hers.

138. In those circumstances the Claimant is a worker.

E J Walker

Employment Judge N Walker

Date: 19 May 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19/05/2021.

FOR EMPLOYMENT TRIBUNALS