EMPLOYMENT TRIBUNALS

Claimant: **Miss I M Tomacsek**

Respondent: **Devoncare Ltd**

PRELIMINARY HEARING

Heard at: **Bristol** **On: 4 and 5 May 2021**

Before: Employment Judge Midgley

Representation
Claimant: In person,
Respondent: Mr L Collins, representative

JUDGMENT

1. The claimant was not an employee of the respondent.

2. The claim for unfair dismissal is not well founded and is dismissed.

3. The claimant was a worker from 1 November 2019.

4. The claims of breach of contract in respect of notice pay, unlawful deduction of wages, and unpaid annual leave and failure to provide written particulars of employment will proceed to a final hearing.

Judgment having been given orally on the 5 May 2021 and a request for written reasons having been received from the claimant on 11 May 2021, the following reasons are provided in accordance with Rule 76.

REASONS

Claims and Parties

1. By a claim form presented on 11 June 2020, the claimant brought claims of unfair dismissal, breach of contract in respect of notice pay, unlawful deduction of wages and non-payment of holiday pay. In the claim she alleged that she was an employee of the respondent from September 2017 and had been engaged as a Director with responsibility for marketing and sales, booking coordination, bookkeeper and recruitment manager.

2. In a response presented on 16 July 2020 the respondent defended the claims. In particular, it denied that the claimant was an employee or a worker for the purposes of section 230 ERA 1996. The respondent averred that the claimant was a director in

business on her own account in accordance with an agreement that had been formed with the two remaining directors, Mrs Ghizela Adam and Mrs Stefanescue, by which they set up the respondent as a limited company to operate as an agency providing cover staff for nursing and care providers.

3. In consequence, following a telephone case management preliminary hearing before EJ Livesey on 2 February 2021, the case was listed for this preliminary hearing to determine whether the claimant was an employee or a worker of the respondent for the purposes of section 230 ERA 1996.

Procedure, Hearing and Evidence

4. The hearing was conducted remotely by CVP.

5. At the outset of the hearing, I was provided with a bundle of documents which was contained in 3 PDFs entitled Court Documents, Court Documents 2 and Court Documents 3 respectively. In addition, I was provided a word document entitled Respondent's Documents, and further documents. It materialized that all of the documents contained in those bundles were in fact documents produced by the respondent, including their witness statements. They consisted of the following:

   5.1. Character statements – I informed the parties that these were not relevant

   5.2. Witness statements

   5.3. Documents relating to the respondent's shares

   5.4. A page from the claimant's Linkedin account, detailing her qualifications and her prior experience and businesses

   5.5. Print outs of the respondent's bank accounts for the period 13.2.19 until 24.1.20 showing payments to the claimant

   5.6. The respondent's credit card statement for the period 1.3.18 until 30.3.18

   5.7. Receipts from Ikea and petrol stations which were submitted by the claimant to the respondent.

   5.8. An email dated 30 January 2020 from Mrs Adam to the claimant.

   5.9. An email dated 25 February 2020 from Mrs Adam to the claimant.

6. At outset of the hearing, I identified the documents which I had received and asked the parties to confirm whether those were all of the documents. The claimant did not at that stage identify that her documents were not included. During her evidence, the claimant indicated that she had wage slips which she relied upon, which had been sent to the respondent. I therefore directed that the claimant should email the documents to the Tribunal and to the respondent (so that it might be confirmed that they were the same documents that had been sent to the respondent) and adjourned the hearing to read the documents. The parties consented to that course.

7. I explained that the issues were those set out below, and therefore the evidence that was relevant to those issues was that relating to the agreements as to work and remuneration which was to be carried out by the claimant, and the way in which the claimant in fact performed her work, looking at personal service mutuality, integration and control. Against that background I indicated that I did not need to hear from Ms Ntiasugwe or Mr Azode whose evidence did not address those issues, although I had read their statements, and similarly I did not need to hear from Timeea Adam, although I had read her statement. Again, the parties consented to that course.

8. Accordingly, I heard evidence from the claimant in support of her case, and from Ms Stefanescue and Mr Collins on behalf of the respondent. Whilst Mrs Adam observed the hearing in part, she neither gave evidence nor had submitted a witness statement. All gave evidence by affirmation, confirmed the contents of their statements were true and answered questions from other side and from me. The statements of the parties focused more on whether the claimant had defrauded the respondent and breached her duties as a director, and less upon whether she was engaged as an employee, a worker or was in business in her own account as a director.

9. During the hearing, whilst cross-examining the claimant, Mr Collins referred the claimant to company's financial position at the time of the events in question, suggesting that the respondent was not profitable. I asked whether Mr Collins could be more specific so that the claimant could more sensibly comment on the issue. Mr Collins looked up the respondent's accounts on the Companies House Website and put figure of £1015.00 as being the loss the company made in the first year of trading. I suggested to the parties that the claimant should look at the respondent's accounts on the Companies House website, as she had access to the internet, to see whether they were agreed. The parties agreed to that course. I adjourned to permit the claimant to review them, and having done so, she accepted them in the sense that she said that had no reason to suggest that they were inaccurate.

10. I heard closing arguments from both of the parties before delivering an oral judgment.

Factual Background

11. I make the following findings on the balance of probabilities in light of the documentary and testimonial evidence presented to me.

<u>The formation of the respondent company</u>

12. The parties agree that in September 2017 the claimant, Mrs Ghizela Adam and Mrs Mihaela Stefanescue agreed to incorporate a limited company, Devoncare Limited. All three ladies are Romanian nationals. Mrs Adam and Mrs Stefanescue were nurses by profession and, at the point of their discussions with the claimant were then working in that field. The claimant was a friend of Mrs Adam who had been known to her for a considerable time. Her skill set, as she represented it to Mrs Adam and Mrs Stefanescue, was in sales and marketing and in bookkeeping, the claimant having obtained a qualification in accountancy in Romania.

13. The claimant was, at the time of those discussions, then involved in two enterprises. First she acted as a Romanian translator for Multilingual Devon CIC, a role she had begun in October 2015, and secondly, she and her husband ran a company providing Greek kebabs which they had started in January 2016. The claimant was the owner of that company.

14. As each of the three proposed directors had their own sources of income, which they proposed to maintain, it was agreed that upon the company's incorporation each would be a director, none would be employees and none of them would draw a salary or wage from the company, but rather would rely on their own personal sources of income, until such time as the respondent's finances were sufficiently robust to enable them to draw dividends as directors. The claimant accepted in cross examination that that was an accurate description of their initial agreement.

15. In order to establish the company Mrs Stefanescue loaned the company £20,000 as capital, which it was agreed would be paid back to her when the company was sufficiently financially viable, and Mrs Adam gave a charge over her house as a guarantee for the business debts. Mrs Stefanescue was, as I understand it, to be a less active director than Mrs Adam and the claimant. In consequence the agreement

as to the division of shares was as follows: Mrs Stefanescue received 33 shares, the claimant one share, and Mrs Adam 67 shares, reflecting their respective degrees of investment and risk in the respondent's business.

16. Regrettably, none of the discussions were reduced into writing and there was no written contract reflecting the nature of the parties' relationship, indeed there was not even an agreement in relation to the loan of £20,000, stipulating when, how or in what circumstances it might be repaid.

17. The claimant alleges that at the time that the respondent was incorporated as a company in September 2017 the three directors agreed that they would review the question of the directors' remuneration after a year of trading. The respondent did not directly challenge that evidence; it was not addressed in the evidence of Mrs Stefanescue and Mrs Adam did not give evidence during the proceedings (possibly because of a misunderstanding as to the nature of the issues to be resolved). On balance I accept that there was a provisional agreement that the position of the directors' remuneration should be reviewed after approximately a year, and that such a review might include consideration of whether the directors could become employees of the company and receive a salary. That position is one which is reflected in Mr Collins's statement, where he describes his understanding of the original agreement at the time of his appointment, although he was not present at the time that agreement was formed.

18. I reject, however, the claimant's argument that there was an agreement that she would be paid as an employee after approximately a year. That directly contradicts the nature of the agreement which was formed initially that none of the directors were to be employees, and would not permit any room for manoeuvre to take account of the company's financial position at that stage. My Stefanescue denied there had been any such agreement.

19. Not long after the company was incorporated, in approximately November 2017, Mrs Stefanescue decided that she did not want the responsibility of being a director. She therefore transferred her shares to Mrs Adam and was removed from her appointment as a director.

    <u>The day-to-day running of the respondent's business.</u>

20. Mrs Adam worked as a nurse for the company as well as in her original role. In addition, she sought to use her contacts to develop and expand the respondent's client base.

21. The claimant's responsibilities were to promote the respondent and to obtain new clients, to manage the day-to-day conduct of the respondent's business, including making a record of bookings, allocating nurses to the respective clients, invoicing and recording payments. Where required, she would also transport nurses on the respondent's payroll to clients to provide the necessary service. The claimant was also responsible for maintaining the necessary payroll records for tax and national insurance purposes and for providing that information to the company's accountants.

22. The claimant suggested in her evidence that her responsibilities (detailed above) occupied her for 24 hours a day and seven days a week. I found the claimant's evidence in this regard unsatisfactory and reject it. Firstly, the claimant's LinkedIn page shows that she continued to operate as a translator, and secondly suggests that she was in some actively way involved in the running and management of the company she shared with her husband. The claimant suggested for the first time in evidence that she had ceased to become involved in their joint business in early 2018. That position was inconsistent with the LinkedIn document and its inherent representations, and not reflected in the claimant's witness statement. Lastly, if the claimant had ceased to work for and/or drawn an income from either of those two businesses, there would have been no obvious need for her to continue to submit

details of her earnings in those businesses to her accountant for the purposes of filing tax returns, as her only source of income would have been from the respondent which role she had declared to the accountant was that of an employee.

23. Rather, I find on balance that in the early months of the business in 2017 the claimant was occupied in setting up the necessary register of nurses and developing, insofar as she did, contacts with the respondent's clients. However, once those matters had settled in, the claimant largely ran the business remotely, often by sending text messages to inform the nurses where they needed to be, and by sending invoices to the clients in respect of those services.

24. The respondent had a designated bank account and a credit card for business related expenses. In order to undertake those functions, on 17 March 2018 the claimant used the respondent's credit card to purchase an Apple laptop at a cost of approximately £2500. Initially, the claimant was the only signatory to the bank account and had possession of the company credit card.

25. The respondent purchased a license to use the accountancy software QuickBooks, which the respondent's accountant had indicated was necessary and would assist them in preparing the company's accounts and payroll. However, the claimant failed to maintain any or any reasonable records of the invoices, payments in respect of them, and other business expenses, save for the payroll for the nurses which only required her to notify the company accountants of their hours of work. The claimant stated during cross-examination that whilst it was necessary to maintain records of such matters as a bookkeeper, she was uncertain where or how the records were produced and maintained. The respondent produced unchallenged evidence that when Mr Collins took over responsibility for the day-to-day running of the business, there were only seven entries on QuickBooks for a 15 month period of trading. The contemporaneous emails and letters, in particular the email of 30 January 2020 sent by Mrs Adam to the claimant and copied to the respondent's accountants, record her complaint that for the financial year ending in October 2018 there were no figures available, and the claimant had failed to provide the respondent's accountants with any information, including copies of the respondent's bank statements. The claimant's response to questions in relation to those matters was to suggest that as the business was "successful" she had competently fulfilled her role.

26. The claimant came and went from the respondent's offices as she wished and conducted her tasks and responsibilities at times and in the manner of her own choosing. The respondent operated no control whatsoever over the claimant whether as to the times at which she was to fulfil her duties, how she was to fulfil them or where she was to fulfil them. This suited the claimant entirely, because it enabled her to continue to conduct her other businesses as an interpreter and the owner of the business with her husband.

27. The claimant alleges that in August or September 2018, she met with Mrs Adam and it was agreed that she would be paid a salary in arrears for the previous year, while simultaneously being paid a salary of £900 a month in respect of her roles with the respondent as an employee. Again, I reject that evidence. Firstly, the agreed evidence in relation to the respondent's financial position at the end of the first year of trading was that it had made a loss of £1015.00, which included a bank balance of £3000 in credit. Secondly, the accounts as submitted do not record any debt owed to the claimant, notwithstanding the fact that the claimant was the individual who submitted the necessary details to the accountant.

28. Rather, I accept the respondent's case, identified in its response, that in approximately September 2018 the claimant informed Mrs Adam that she wanted to withdraw money from the respondent's account as a payment for her services because of a financial need. However, Mrs Adam informed her that the company could not afford to make such payments at that time.

29. At or about the same time the respondent employed Miss Timeea Adam, Mrs Adam's daughter, as a bookkeeper. That appointment is consistent with the claimant's desire to be able to increase her earning capacity (by taking on more contracts as a translator) by transferring the simpler administrative and bookkeeping tasks to a comparatively lower paid employee.

The claimant's withdrawals

30. From September 2018 the claimant made a series of payments to herself from the company's bank account. The initial withdrawals, by way of bank transfer, were of £900 a month. Such deductions were made in the following approximate sums:

    30.1. September 2018 to April 2019 £900 a month

    30.2. July to September 2019 £1000 a month

31. I find that those payments were unauthorised for the following reasons: firstly, I accept the respondent's case that they were unauthorized. Whilst the respondent's evidence was largely hearsay, given that it mostly related to periods before Mr Collins' appointment, his evidence was that they were not authorized. Mr Collins' evidence and was consistent with the respondent's financial position which did not sensibly permit the payment of such sums to the claimant; the company was in debt in September 2018 and not in credit, notwithstanding a positive balance in its bank account. Thus, it would be contrary to common sense that it would agree that such sums could be paid to the claimant. The consequence of the payments was that the respondent's bank account changed from being £3642 in credit in February 2019 to being £16,472 overdrawn by the beginning of September 2019.

32. Secondly, in September 2018 Miss Timeea Adam had been employed as a bookkeeper. Her evidence, contained in her statement, was that the claimant had failed to conduct her induction because she needed to act as a translator for Multilingua, and that progressively the claimant was not in the office and Miss Adam had to take over responsibility for aspects of the claimant's role including administration, invoicing, the collation of payroll information, and the making of payments. It would be a nonsense for the respondent to have agreed to pay the claimant nearly a thousand pounds a month for those responsibilities whilst at the same time employing a bookkeeper to undertake the majority of them.

33. Thirdly, the claimant relied upon payslips which she produced to demonstrate that the payments had been authorised and were also paid to her as a salary for employment. Those payslips were defective in fundamental matters: they lacked the claimant's national insurance number, and with the exception of the payslip for March 2019, they did not include any deduction for tax or for the claimant's or the respondent's national insurance contributions. The claimant was wholly unable to explain why that was the case, suggesting that any error was the responsibility of the company accountants who produced the payroll, and further was unable to explain why she had not raised those omissions at any stage with the respondent or its accountants. The respondent alleged that the claimant had fabricated the payslips for the purpose of these proceedings. Whilst it is unnecessary for me to make any finding as to whether that specific allegation is true, in the absence of any sensible explanation for the content of the documents, and given that the respondent's accountants did not have access to the respondent's bank statements (as evidenced by Mrs Adam' email of 30 January 2020), I observe that it is consistent with the facts that if the claimant had made unauthorised payments to herself in this manner, that she would have sought to conceal or withhold the necessary documents from the accountant, because that would disclose her evident wrongdoing and therefore the documents could be fabricated.

34. Fourthly, the respondent produced receipts which created a very strong inference that the claimant had used the company funds impermissibly for personal

expenditure, which was consistent with her misusing company funds by making direct bank transfers to herself without agreement from Mrs Adam. In particular, she had paid for petrol two occasions each day on both 18 October 2018 and on 14 January 2019, and had bought articles of furniture from IKEA on 7 December 2018. Given that on the first occasion the claimant filled each car with petrol, and on the second with petrol and diesel respectively, the evidence goes some way to creating an inference that the claimant was filling her vehicle and her husband's using company funds, or at the very least that it was most unlikely that both of the vehicles were being used for company business. In addition, the purchase of furniture and other domestic items is not obviously a business-related expense, particularly when one of the items is a soup ladle, and again creates a strong inference that the claimant was using the company resources for her own ends without authorisation.

The discovery of the claimant's payments and the breakdown in her relationship with Mrs Adam

35. In approximately September 2019, Mrs Adam discovered that the claimant had been making payments by direct bank transfer to herself and that the respondent was significantly overdrawn as indicated above. In addition, at that time, the claimant had failed to secure any new clients for the respondent's business, despite that being one of her functions within the business. The relationship between the claimant and Mrs Adam therefore rapidly deteriorated. I am satisfied that the reason for the breakdown in the relationship was the claimant's financial conduct as described above. I reject the account given in the claimant's statement that the reason was her need to discipline Miss Adam for late attendance, or that Mrs Adam was making unauthorised payments to herself from the respondent's bank account. Those matters are not referenced at all in the claimant's claim form. Even were the claimant's allegations true, and it is unnecessary for me to make a specific finding in that regard, it would not logically lead to the position which both parties agree developed, whereby neither the claimant nor Mrs Adam could be in the office at the same time and each agreed that they would work on a two-week rolling basis, being in the office for two weeks and then working from home for two weeks. When they worked in the office they were responsible for 24-hour cover for phones and callouts.

36. It is, however, entirely consistent with the respondent's case of its discovery of the claimant's conduct as described above, that it was agreed that each of the remaining directors' signatures would be required to authorise further payments from the company accounts, an agreement which was put into place from October 2019.

The reformulation of the claimant's roles and responsibilities in November 2019.

37. The claimant accepts that in October 2019 the respondent agreed that she would be engaged to carry out her duties as a director at the rate of £9.50 for 19 hours a week and in addition would be paid £60 a week to carry out the basic bookkeeping duties. The claimant was therefore working 25 hours per week, two weeks a month for the respondent.

38. Insofar as the use of the company credit card was concerned, Mrs Adam and the claimant agreed that they would spend a maximum of £1500 a month which had to be limited to business expenses only.

39. The claimant accepts that she received appropriately competed payslips in respect of that work, which contained both her national insurance number and the necessary deductions for tax and national insurance. The claimant was unable to explain why those payslips were in the correct form whereas those in respect of the disputed period were not. The claimant accepts that she received payment in accordance with those payslips for months of November and December.

The termination of the claimant's appointment as a director.

40. Although it is not material to the matters that I have to determine, for completeness I record that the relationship between Mrs Adam and the claimant broke down in approximately January 2020 when it was discovered that the claimant had failed to comply with the agreed spending limit on the company credit card. In addition, as reflected in the email of 30 January 2020, the claimant had failed to provide the necessary documents to the respondent's new accountant to prepare the company accounts. When the claimant did provide the documents, it was discovered that she had failed to make more than seven entries on the QuickBooks software.

41. On 25 April 2020 the parties agree that Mrs Adam wrote to the claimant requiring the termination of her appointment as a director.

The Issues

42. The sole issue was whether the claimant was an employee or a worker for the purposes of section 230 ERA 1996 in the period September 2017 to April 2020.

The Relevant Law

43. Section 230 ERA 1996 provides as follows:

> (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.

44. The following is a summary of the relevant principles as derived from the applicable case law.

45. In Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, at 515C-517B four essential elements were identified as being necessary for the formation of a contract of employment:

> "(1) There must be a contract between the worker and the employer in which the worker agrees to provide his work in consideration of a wage, although that contract may not be in writing.
>
> (2) There must be an obligation to carry out the work personally.

(3) There must be a mutual obligation for the employer to provide work and for the employee to accept it and perform the work that has been offered.

(4) There should be a degree of control by the employer over the worker which is consistent with an employment relationship."

46. An obligation to provide the work personally, mutuality of obligations and control are the "irreducible minimum of obligation" on the two parties of the contract which are necessary to establish a contract for services (or employment). The continued application of the test in Ready Mixed Concrete was confirmed by the Supreme Court in Autoclenz Ltd v Belcher [2011] UKSC 41. I can do little better that to quote the Court's careful and helpful summary of the relevant legal principles:

"19. Three further propositions are not I think contentious:

(i) As Stephenson LJ put it in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 , 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service."

(ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express & Echo Publications Ltd v Tanton [1999] ICR 693 , 699 g , per Peter Gibson LJ.

(iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg the *Tanton* case, at p 697g .

20. The essential question in each case is what were the terms of the agreement?"

47. The Tribunal must determine (a) what the true terms of the contract which governed the work in question were (b) how to characterize the relationship which the terms give rise to and (c) then stand back and assess all of those matters against the statutory test.

The terms of the contract governing the relations

48. Tribunals must focus on the reality of the situation when determining the terms of the contract between the parties and are not bound by the terms of any written contract, which may not reflect the reality of the relationship, indeed they do not even need to begin their enquiry with the contract itself (see Autoclenz, SC at 22 and 29). The question in every case is "what was the true agreement between the parties?"

49. In that context the Supreme Court in Autoclenz at paragraphs 32-35 endorsed the approach of Aitkens LJ in the CA (CA judgment at 90-92) that due to the relative inequality of bargaining power between the parties in an employment context, the principles relating to the construction of the terms of commercial contracts were of no application in an employment context. Thus the following rules do not apply: (i) the "parol evidence rule", whereby a contractual document is treated, at least presumptively, as containing the whole of the parties' agreement; (ii) the signature rule, whereby a person who signs a contractual document is treated in law as bound by its terms irrespective of whether he or she has in fact read or understood them; and (iii) the principle that, generally, the only way in which a party to a written contract can argue that its terms do not accurately reflect the true agreement of the parties is by alleging that a mistake was made in drawing up the contract which the court can correct by ordering rectification. In consequence, the Supreme Court directed that the Tribunal should focus on the agreement that was made between the parties:

"What the parties privately intended or expected (either before or after the

contract was agreed) may be evidence of what, objectively discerned, was actually agreed between the parties: see Lord Hoffmann's speech in the Chartbrook case [2009] AC 1101, paras 64–65. But ultimately what matters is only what was agreed, either as set out in the written terms or, if it is alleged those terms are not accurate, what is proved to be their actual agreement at the time the contract was concluded. I accept, of course, that the agreement may not be express; it may be implied. But the court or tribunal's task is still to ascertain what was agreed."

50. That, the Supreme Court observed, requires the Tribunal to consider:

> "..all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were. Evidence of how the parties conducted themselves in practice may be so persuasive that the tribunal can draw an inference that that practice reflects the true obligations of the parties. But the mere fact that the parties conducted themselves in a particular way does not of itself mean that that conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right … "
>
> Per Smith LJ in Autoclenz CA at [53].

51. The task, as the Supreme Court identified in Autoclenz at 35, requires a purposive approach which requires the tribunal to take into account the relative bargaining power of the parties 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 part. Consequently, a Tribunal can disregard a term which it believes does not or did not reflect the reality of the situation, without it first having to be established that it was a sham.

52. In Uber BV v Aslam & Ors [2021] ICR 657, the Supreme Court rejected Uber's argument that a Tribunal could only depart from the words of a written agreement if there were inconsistency between the terms of the written agreement and how the relationship operated in reality. It observed that the rights in question derive from statute and thus the task for the Tribunal is to "to determine whether [a] claimant fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation" (see para 69). The Supreme Court noted at 70-72:

> "…this approach requires the facts to be analysed in the light of the statutory provision being applied so that if, for example, a fact is of no relevance to the application of the statute construed in the light of its purpose, it can be disregarded. Lord Reed JSC cited the pithy statement of Ribeiro PJ in Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454, para 35: "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.
>
> [72] In Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328; [2004] ECR I-873 the European Court of Justice held, at para 67, that in the Treaty provision which guarantees male and female workers equal pay for equal work (at that time, article 141 of the EC Treaty): "there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration". The court added (at para 68) that the authors of the Treaty clearly did not intend that the term "worker" should include "independent providers of services who are not in a relationship of subordination with the

person who receives the services""

53. In order to be a contract of employment the following must be present

53.1. There must be mutuality of obligations. Indeed 'if there are no mutual obligations of any kind then there is simply no contract at all.… If there are mutual obligations, and they relate in some way to the provision of or payment for, work which must be personally provided by the worker, there will be a contract in the employment field' (see James (EAT) per Elias J at para 16);

53.2. There must a contractual obligation to provide the service personally. In that regard, four principles apply (see Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51)

53.2.1. an unfettered right to substitute another person to do the work perform the services is inconsistent with an undertaking to do the work personally;

53.2.2. a conditional right to substitute another person may not be inconsistent with personal performance depending upon the conditionality;

53.2.3. 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 poor performance;

53.2.4. 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 considered inconsistent with personal performance.

53.3. There must be sufficient control of the one by the other to amount to a relationship of master and servant. In that regard the test is not whether the putative master exercise day-to-day control, but whether the master retained a sufficient right of control (see White v Troubeck (UKEAT 0117/12/SM).

Workers or those in business in their own account, such as Directors

54. The words of Mr Justice Cook in Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173, QBD, are perhaps a helpful guide in such situations "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the individual is more likely to be self-employed or an office holder; conversely if the answer is 'no', they might be a worker. Other factors that can assist are

54.1. Whether the individual provided their own equipment,

54.2. Whether they hired helpers,

54.3. Whether they had any responsibility for investment in or management of the business in which they worked,

54.4. Whether they might benefit for an increase in the value of the company through shares, and conversely whether they carry any of the risk associated with the company or business, and

54.5. Whether they were able to able to negotiate the price or rate for the work in question.

55. If there exists a relationship of client and customer, wherein the putative employee is offering services by selling products on behalf of his putative employer and his own products or services, that may well be a factor mitigating against any

form of employment or worker relationships (see Inland Revenue v Post Office [2003] IRLR 199 EAT, particularly at 46 where it was noted that it was not necessary that the business in question predates or is independent of the contract).

56. Similarly, the fact that an individual is paid by clients and takes economic risk is a powerful pointer against a contract being one of employment/worker; the Tribunal must examine and assess all the relevant factors which make up the employment relationship to determine the nature of the contract (see Quashie v Stringfellow [2013] IRLR 99 CA paras 48-51).

57. The claimant relied upon Stack v Ajer-Tec Limited [2015] EWCA Civ 46. The Court of Appeal found that an Employment Judge had been entitled to find on the facts that a director was an employee and a worker of the company. It is a case which is particular to its facts, rather than creating any proposition of general application. It is not, however, comparable on its facts to the present case; in particular in the case the three directors were equal shareholders, one of the directors was agreed and intended to be an employee from the point when the company was incorporated, a draft contract of employment was prepared but not agreed for the claimant, Mr Stack, and the claimant had made very significant investment into the company of £495,000 and the company had operated from premises owned by him. Debts owed and payments to him were recorded in the company accounts.

Implied contracts

58. The question of the circumstances in which it would be appropriate to imply a contract of employment was considered in James v Greenwich London Borough Council [2008] EWCA Civ 35. The Court of Appeal noted (para 5) that it was 'legally possible for a worker to have one kind of contract with an employment agency and another kind of contract with an end user to whom he rendered services.' The issue for the court was to identify the circumstances in which it was appropriate to imply such contract. Applying the long-established principle from The Aramis [1989] 1 Lloyd's Rep 213 at 224, the Court held that the appropriate test was one of necessity, namely whether it was necessary

> "in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist"

59. The Court of Appeal endorsed Bingham LJ's observation that it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of the contract the parties would or might have acted exactly as they did in the absence of a contract (para 24 of James).

60. In that regard, in reaching its decision on the issue, the Court of Appeal in James endorsed the tribunal's view that there were no grounds for treating the express contracts between Ms James and the employment agency as anything other than genuine contracts noting 'what Miss James did and what the council did were fully explained in this case by the express contracts into which she and the council had entered with the employment agency' (see paragraph 41).

61. The Court of Appeal concluded 'the question whether an 'agency work' is an employee even end-user must be decided in accordance with common law principles of implied contract and, in some very extreme cases by exposing sham arrangements (paragraph 51).

62. Where the court or tribunal deems fit to infer a contract between the parties the necessary task for the tribunal is to determine what the nature of that contract is.

Discussion and Conclusions

63. The first question for me is whether there was a contract formed between the claimant and the respondent by which the claimant agreed to provide her services personally and the respondent agreed to provide her with work and remunerate her for it. That question is not determinative, rather as the Supreme Court in Uber made clear, the test is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically. However, the nature of the agreement forms part of the facts from which such a realistic view must be derived.

64. The claimant has significant difficulties in that respect for the following reasons. First, the claimant agreed that the nature of the agreement formed before the incorporation of the limited company was that each of the proposed directors would not be an employee and would not be paid until such time as the company was able to make provision for them. That was an oral contract which appropriately and reasonably defined the nature of the relationship between the three individuals and the company that was to be created. It is necessary to note, however, that it was an agreement formed between the three directors, and not between the claimant and the company itself as the company was not then in existence.

65. Nevertheless, the clear effect of that agreement is that the claimant was not to be an employee or a worker of the company upon its incorporation, and secondly that she would not receive payment from the company for her services until such time as the company itself was in a position to permit the directors to draw dividends; the payment was therefore to be in the form a dividend and not a salary or weekly or monthly wage. That was the clear intention of the parties to the agreement by which the company was formed.

66. Secondly, the nature of the relationship which the oral contract created was that of directors to a limited company, in circumstances where the directors agreed to provide their services and not to be paid for those services, at least initially. Their duties and responsibilities were to be performed in accordance with the Companies Act 2006 and any subsequent legislation made in accordance with or amendment of it. The directors were certainly not be engaged as employees in respect of the services they provided to the company. It would therefore be entirely inconsistent with the terms of the express oral agreement to imply a term that the claimant was to be employed from September 2017 as an employee.

67. Thirdly, not only was there was no express contract by which the claimant was to be engaged as an employee or a worker from September 2017 but, applying the test of implied terms in the Aramis, it would be unnecessary “in order to give business reality to the transaction and to create enforceable obligations between the parties who were dealing with one another” to create a such contract between the claimant and the respondent company. That is because the contractual relationship between the individuals and the company was sufficiently clear from and explained by the oral contract, the shareholding agreement, and the Companies Act 2006, which required the company’s regulation to be recorded in its Articles of Association. The shareholding agreement reflected the directors’ respective degrees of investment and risk in the company.

68. Fourthly, I have rejected in paragraph [22] above the claimant’s argument that the contractual position was changed as a result of an agreement was reached between Mrs Adam, acting for the company, and the claimant, in or about August or September 2018 that the claimant would be treated as an employee from that date, and paid in arrears for her work to that point. There was no express agreement to that effect at that time, rather there was a fundamental disagreement between the claimant and Mrs Adam as to whether the claimant should be remunerated for her work at all, and, if so, when and at what rate.

69. I conclude that section 230(1) ERA 1996, construed purposively do not require the claimant to be regarded as an employee, when the surrounding facts are viewed realistically.

70. I must however go on to consider whether the claimant should be regarded as a worker when section 230(3)(b) ERA 1996 is viewed purposively as consequence of the facts as realistically viewed. Here the nature of the assessment is different, I have to consider whether there was an express or implied contract between the claimant and the respondent and (if it is express) whether oral or in writing, whereby the claimant undertook to do or perform personally any work or services for the respondent, 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.

71. Here, there is no dispute between the parties that the claimant agreed to provide her services personally to the respondent company. The issue is whether the nature of that agreement was as a director or as a worker.

72. There is no dispute that there is no written contract governing that relationship. The question therefore is whether there was an express oral contract that the claimant was to be engaged as a worker to provide her services to the company, or whether it is necessary to imply one in accordance with the principles in The Aramis and James.

73. In the period September 2017 until November 2019 I find that there was not and it is unnecessary to imply one. It is not the claimant's case that there was any agreement after the formulation of the company by which any of the directors, acting for the company agreed that she was to be engaged as a worker. Rather as indicated above, the express agreement was made between three individuals in relation to their future conduct which was to come into force after the formulation of the company. I have to consider whether it is necessary to imply a contract a contract in order to make business sense of the nature of the relationship between the claimant and the company. For the reasons that I have given above, it is unnecessary to do so. Moreover, if I were to imply such contract, it would be one that directly contradicts the terms of the express oral contract formed between the putative directors prior to the company's incorporation. It would require me to find that three individuals who became directors had simultaneously intended that they should form a company and become its directors and would receive no pay and would not be employees, but at the same time find that they intended to form a contract acting on behalf the company that the claimant would be engaged and paid for her services.

74. However, that position changed in October 2019. In October 2019 the respondent and the claimant agreed that the claimant would provide her services personally as a bookkeeper and sales and marketing manager, on a fortnightly basis for approximately 25 hours a week at an agreed level of remuneration. The claimant was paid in accordance with that agreement.

75. The claimant was not at that time an employee given that the necessary control was not present. The claimant was able to come and go from the office as she wished, and to conduct her responsibilities as and when she wished during the two-week period. She did not need to account for her hours, nor did I hear any evidence that she needed permission to book or take annual leave. Moreover, the claimant was a director and conducted herself in accordance with that role, rather than the more subservient role of employee; in fact the respondent's case was the she presented herself to the world at large, inaccurately, as the Managing Director, in her emails and messages. She was not answerable, save insofar as her statutory duties as a director required, to the company for the manner in which she fulfilled those services, nor could she be subjected to any disciplinary procedure.

76. If she was not an employee in the period November 2019 until February 2020, were

the relevant statutory provisions, construed purposively, intended to apply to the transaction, viewed realistically? In October 2019 Mrs Adam was seeking to formalise the work that was to be done by the claimant and to agree a fee to be paid for the work. There was a precise oral contract as to the work to be done, the hours and place of work and the need for the claimant personally to do it. Whilst the claimant retained her role as a Director, the intention and effect of the agreement was that there should be certainly as to what the claimant would receive as remuneration for her work, when it was to be paid, at what rate and, crucially, that this was to be the sole means of her remuneration, replacing any possibility of her drawing sums from the respondent as 'dividends' in any form. The claimant was therefore not in business on her own account, as she had been previously. I find that s.230(3)(b) ERA 1996 was intended to apply to that transaction, viewed realistically.

77. For those reasons I find that the claimant was not an employee at any time between September 2017 and the termination of her engagement with the respondent in February 2020, but she was a worker between November 2019 and February 2020.

Employment Judge Midgley
Date: 24 May 2021

Judgment and Reasons sent to the Parties: 27 May 2021

FOR THE TRIBUNAL OFFICE