Case Number: 3333862/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs S Armstrong	v	(1) Aedifice LLP (2) Tasty Tales Limited

Heard at: Watford (via CVP) **On**: 24-26 May 2021

Before: Employment Judge Hyams **Members:** Mr I Bone
Mr P Randall

Appearances:

For the claimant: In person
For the first respondent: Mr D Bansal, solicitor
For the second respondent: Mr T Hussain, representative

UNANIMOUS LIABILITY JUDGMENT

1. The claimant was not dismissed unfairly. The claimant's claim of unfair dismissal therefore does not succeed and is dismissed.

2. The claimant was not subjected to discrimination because of age. The claimant's claim of age discrimination therefore does not succeed and is dismissed.

3. The claimant's claim for more by way of redundancy payment than she was in fact paid does not succeed and is therefore dismissed.

4. The claimant's claim for holiday pay, made as a claim of unpaid wages and/or as a claim for damages for breach of contract, is not well-founded and is accordingly dismissed.

REASONS

The claims

1 In these proceedings, the claimant claimed that she was dismissed unfairly by the respondents within the meaning of section 98(4) of the Employment Rights Act 1996 ("ERA 1996") when she was dismissed for redundancy. She also claimed that she was discriminated against because of her age. That claim was clarified in the claimant's closing submissions as having been about (and only about) the failure to give her an opportunity to input information onto some software used by the second respondent called FreeAgent, in the circumstances which we describe in paragraphs 49-51 below. The claimant also claimed that there had been a breach of contract or an unlawful deduction from her wages in that she was paid no accrued holiday pay on the termination of her employment. That claim was defended by the first respondent on the basis that no such accrued holiday pay was owed because the claimant had, it was the first respondent's case, taken all of the holiday to which she was entitled by 31 May 2018.

2 The claimant was employed on what is normally called a full-time basis. She claimed that she was employed to work for half of her working time for the first respondent and during the other half of her working time for the second respondent. She claimed that there was an implied contract of employment between her and the second respondent. One result of that was that she should, she said, have been paid a redundancy payment by both respondents, and that her redundancy payment was as a result £1,338.21 less than it should have been. She also claimed that her dismissal was unfair because the second respondent had not consulted with her before it decided that she should be dismissed.

3 It is the respondents' case that the claimant was employed by the first respondent only. The parties agreed that the claimant had been dismissed. It was the respondents' case that the dismissal was for redundancy. Age discrimination was firmly denied by both respondents.

The contents of these reasons

4 In what follows, we first state the relevant law. We then describe the procedure which was followed in this case, both before we heard the case on the three days that we heard the case and on those three days. We then state our findings of fact. Finally, we state our conclusions on the claims made.

The relevant legal principles

Implying a contract of employment

5 The law relating to the possibility of implying a contract of employment concerns exclusively agency workers. It is case law only: there is no statutory provision which applies to the matter. The manner in which that case law emerged was described very helpfully and comprehensively in paragraphs AI[187]-[192] of

Harvey on Industrial Relations and Employment Law ("*Harvey*"), and we caused a copy of that passage to be sent to the parties before hearing oral submissions. In a nutshell, a contract of employment can only be implied where it is necessary to do so. We found the decision of the Employment Appeal Tribunal ("EAT") in *Cairns v Visteon UK Limited* [2007] IRLR 175 to be of particular assistance here. The facts of that case were helpfully and succinctly summarised in the headnote to that report in the following way:

> 'Ms Cairns worked as a full-time administrative assistant for Visteon's manager from 1998. From 2001, however, her services were provided by an agency, MSX, which employed her under a contract of service. In May 2005, she was accused of falsifying time sheets. Although an investigation by MSX concluded that she had not done so, Visteon were not prepared to take her back and the purchase order for her services was ended. When no alternative employment was found, MSX terminated her employment.
>
> Ms Cairns sought to bring unfair dismissal proceedings against Visteon. An employment tribunal took the view that were it not for the contract between MSX and the claimant, the case would be a classic example of one in which the facts pointed "overwhelmingly" that there would be a need to imply a contract between the worker and the end-user. "Otherwise there would have been an insufficient legal framework to regulate the business relationships between the parties."
>
> However, the tribunal noted that there was a contract of employment between the agency and the worker. It asked itself "where a worker is contracted by an agency to provide her services to an end-user, and the contract between the worker and the agency is a contract of employment, how far does that additional fact preclude the existence of a second contract of employment between the worker and the end-user." The tribunal said that it was not aware of any cases in which a contract was implied between a worker and an end-user where there was also a contract of employment between the worker and the agency. This led it to conclude: "we are unable to say that it has been established on the facts that there was a necessity in order to give effect to the business relationship between Ms Cairns and Visteon, that there be a contract of employment between those parties."'

6 The EAT dismissed the appeal. Again, the headnote is of particular assistance. It stated the reasons for the dismissal of the appeal in the following manner, which was an accurate summary of the material passage of the EAT's judgment (paragraphs 13-25; the reference in paragraph 19 to the now-repealed "statutory grievance procedure or dismissal and disciplinary procedures under the Employment Act 2002" in no way affects the force of the authority of the principles stated in those paragraphs):

> "The employment tribunal did not err in finding that there was no implied contract of employment between the claimant and the respondent end-user in circumstances in which she was employed under an express contract of

employment with the agency which supplied her. The tribunal correctly concluded that in such circumstances the test of necessity for implying a contract of employment was not made out.

Although it is clear from both judgments of the majority in *Dacas v Brook Street Bureau (UK) Ltd* that where there is no contract of employment between worker and agency, a contract of service may be implied between worker and end-user as a matter of necessity, the possibility of dual contracts of service in respect of the same work done by the worker remains problematic. Where the worker is employed by the agency and thus is protected for unfair dismissal purposes, there is no good policy reason for extending that protection to a second and parallel employer. The statutory language of Part 10 of the Employment Rights Act envisages one employer that makes the decision to dismiss the employee and that engages in the statutory dismissal procedure.

Nor is there any business necessity for implying a contract of service with the end-user in such a triangular relationship. To imply a contract of service by conduct, it is necessary to show that the conduct of the parties is consistent only with there being a contract of service between them. In the present case, it was open to the tribunal to conclude that the conduct of the claimant and the end-user was equally consistent with the claimant's services being supplied to the respondent under the terms of the contract of service between the claimant and the agency and the commercial contract made between the agency and the respondents as end-user."

The law of unfair dismissal

7 It is not open to an employment tribunal to question an employer's business and/or economic reasons for deciding to dismiss an employee for redundancy. That is the clear effect of the decision of the Court of Appeal in *Cook v Tipper* [1990] ICR 716, which concerned the parallel situation of redundancy dismissals arising from the closure of a business. At page 729F-G, Neill LJ, with whose judgment Farquharson LJ and Sir Roger Ormerod agreed, said this:

"The industrial tribunal [now, of course, the employment tribunal] is of course entitled to consider whether the closure of a business is in fact genuine. It is also possible that in some cases a small award may be made on the basis that, although in the end the dismissal was inevitable, the observance of a fair procedure would have postponed the dismissal to a later date. Thus in *Mining Supplies (Longwall) Ltd. v. Baker* [1988] I.C.R. 676 it was held that though the employee would have been dismissed for redundancy in any event even if prior consultations had taken place, he was entitled to a small compensatory award to take account of the period by which his dismissal would have been postponed while consultations to explore possible alternatives had taken place.

> It seems to me, however, that a distinction has to be drawn between the case of an individual employee where some compensation may be awarded to take account of a further period of consultation which would have been appropriate to deal with his particular situation and a case such as the present where a whole business is closed down. In my judgment it is not open to the court to investigate the commercial and economic reasons which prompted the closure. It may be that in order to ensure fairness for the workforce the court should have this power, but in my view it does not have this power at present."

8 Where an employee is dismissed for redundancy, there is a need to consult the employee about the proposal to dismiss him or her. There is much case law concerning the manner in which that consultation must be done, but it is ultimately (we concluded, in part because of the approach taken by the Court of Appeal in *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111 in relation to a claim of unfair dismissal for conduct, but in any event as a matter of principle) a question to be determined by applying the 'range of reasonable responses of a reasonable employer' test (so that if what is done is within that range then it does not contravene the law of unfair dismissal, but if it is outside that range, then it does contravene that law).

9 There is authority for the proposition that there is, in a addition to a duty to consult an employee before dismissing him or her for redundancy, to warn the employee of the possibility that he or she may be dismissed for redundancy. However, there is subsequent authority to the effect that there is only one duty, which is to consult, but by starting the consultation with the employee by giving a warning of the risk that he or she may be dismissed for redundancy. The first authority is that of *Rowell v Hubbard Group Services Ltd* [1995] IRLR 195, where, in paragraph 12, the Employment Appeal Tribunal ("EAT") said this:

> "Finally, the notice of appeal contended that the judgment below:
>
> > '(e) elided the tests for warning and consultation, when the obligation to warn is separate from the obligation to consult.'
>
> Both parts of the contention are correct."

10 However, in paragraph 13 of its judgment in *Elkouil v Coney Island Ltd* [2002] IRLR 174, the EAT, having been referred to that paragraph in *Rowell*, said this:

> "The process by which an employee is dismissed for redundancy necessarily should include, if it is to be done properly, a consultation process. That consultation process should commence with a warning that the employee is at risk. There are not two separate processes, one of warning and another separate one of consultation and we do not read the passages to which we had been referred as saying anything of that sort. The two parts, warning and consultation, are part of a same single process of consultation which begins with the employee being given notice that he is at risk."

11 In addition to a need to consult an employee sufficiently, an employer must, in order to dismiss an employee fairly for redundancy, make reasonable efforts to redeploy the employee. The 'range of reasonable responses of a reasonable employer' test applies here too.

12 In situations where there is a need to select one or more employees from a group of employees doing the same, or similar, work, then there is a need to act within the range of reasonable responses of a reasonable employer in carrying out that selection. That involves determining by reference to one or more selection criteria which it is within the range of reasonable responses of a reasonable employer to use, whom to dismiss.

Direct age discrimination

13 As clarified by the claimant during the hearing (see further below, where we describe the various procedural issues that arose in this case), her claim is of direct discrimination because of age. Thus, the claim was made under sections 13 and 39 of the Equality Act 2010 ("EqA 2010"). In the course of determining a claim of direct discrimination within the meaning of section 13, section 136 of that Act applies. The latter provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

14 When applying that section it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey*, as follows:

> "Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010] EqLR 82). That means that the

claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in *Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. A note of caution, however, is necessary against taking from *Igen* [i.e. *Igen Ltd v Wong* [2005] ICR 931] a mechanistic approach to the proof of discrimination by reference to RRA 1976 s 54A. In *Laing v Manchester City Council* [2006] IRLR 748, [2006] ICR 1519 Elias P observed as follows:

> ''71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
>
> 72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.
>
> 73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and

become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.''

In *Commissioner of Police of the Metropolis v Maxwell* UKEAT/0232/12, [2013] EqLR 680 it was emphasised that particularly in cases where there are a large number of complaints the tribunal is not obliged to go through the two stage approach in relation to each and every one."

15 Nevertheless, in some cases, the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred. That is the effect of the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

The issues for determination by us

16 In addition to the question whether or not the claimant was entitled to any accrued holiday pay on 31 May 2018, the primary issues were accordingly these.

(1) The claimant's employer

17 Who was the claimant's employer: was it the first respondent only, or was the claimant employed under two contracts of employment, one with each respondent?

(2) The claim of unfair dismissal

18 What was the reason for the claimant's dismissal?

19 If, as it is the first respondent's case, it was redundancy:

19.1 Was the claimant warned sufficiently of the possibility that her employment might be terminated by reason of redundancy, i.e. was the warning that she was given of that possibility less than it was within the range of reasonable responses of a reasonable employer to give?

19.2 Was there consultation of a sort which it was within the range of reasonable responses of a reasonable employer to undertake?

19.3 Was the process for determining whether or not the claimant should be dismissed for redundancy one which it was within the range of reasonable responses of a reasonable employer to use?

19.4 Were reasonable efforts to redeploy the claimant undertaken? That is to say, were the efforts that the claimant's employer made to redeploy the claimant ones which it was within the range of reasonable responses of a reasonable employer to make?

19.5 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer?

The claim of age discrimination

20 The claimant's claim of age discrimination was based on the proposition that if she had been younger then she would have been given an opportunity to put information into the FreeAgent software to which we refer in paragraph 1 above. That software started to be used by the second respondent in November 2017. Mr Bansal on behalf of the first respondent correctly pointed out that even if that was true, the discrimination could be justified, given the terms of section 13(2) of the EqA 2010. The issues for us here were therefore

20.1 was the fact that the claimant was not given an opportunity to input information into the FreeAgent software used by the second respondent as from November 2017 onwards to any extent because of the claimant's age, and

20.2 if so, was that claimed discriminatory conduct justified?

21 In answering the first of those questions we were obliged to apply the principles stated in paragraphs 14 and 15 above.

<u>The procedure followed</u>

The preliminary hearings

22 There was a preliminary hearing in the claim before Employment Judge ("EJ") Alliott on 8 May 2019. The case management summary which was produced by EJ Alliott after that hearing was at pages 51-57, i.e. pages 51-57 of the hearing bundle. (Any reference below to a page is a reference to a page of that bundle.) EJ Alliott listed the hearing of the claimant's claims to take place on 23 March 2020. That was the first of the days of closure of the Watford Employment Tribunal because of the Covid-19 pandemic, and the hearing of that day was converted to a telephone hearing. Co-incidentally, it was held by EJ Alliott. He produced a short record of that hearing, of which a copy was not in the bundle. In paragraphs 3 and 4 of that record, he said this:

> "3. The claimant has not exchanged a witness statement. On 19 February 2020 the first respondent applied for an unless order. The claimant had stated in February 2020 that she would not be providing a statement. She explained to me today that as far as she was concerned, her case was as set out in the bundle.
>
> 4. Mr Bansal and Mr Hussain are prepared to accept the contents of the particulars of claim attached to the claim form as the claimant's written statement and, subject to a statement of truth being attached, that is what I direct."

23 EJ Alliott's orders made on 23 March 2020 included this one:

> "The particulars of claim attached to the claim form will stand as the claimant's witness statement subject to being verified by a statement of truth. The claimant must send the particulars of claim verified by the statement of truth to the respondents by 4pm, 20 April 2020."

24 We record here that it was only on the second day of the hearing before us that were we sent what the claimant had sent to the tribunal and the respondents in purported compliance with that order. It was, in fact, a witness statement, and not just a verification by a statement of truth of the particulars of claim.

25 EJ Alliott also listed the case to be heard on 24 May 2021 for 3 days, in person, at Watford Employment Tribunals.

The hearing before us

26 However, on Thursday 20 May 2021, the parties were informed by an email sent at 12:10, i.e. just after noon, that the hearing would take place via CVP, i.e. by video and therefore not in person. On the first day of the hearing, the claimant nevertheless attended the Watford hearing centre. We arranged for her to attend via CVP using her mobile telephone, but she was unable to do so. We then managed, after Mr Bansal called her on his mobile telephone and eventually put her on speakerphone, to have a discussion with her about the matter. The claimant had attended by using a taxi, and she needed time, she said, to get back home. She explained her attendance at the tribunal in person despite the tribunal having informed the parties that the hearing was going to be by video by saying that she had not looked at her emails in the final part of the week, as she had telephoned the tribunal and been told that the hearing rooms were being used with adaptations to cater for the current pandemic and that she had then concentrated on preparing for the hearing. However, she had sent an email to the tribunal on Saturday afternoon.

27 We had intended to resume the hearing at 12 noon, but at the claimant's request we put back the time for the resumption of the hearing to 2pm. Before doing so, EJ Hyams had a discussion with the parties about the law relating to implied contracts of employment, i.e. the case law concerning when a contract of employment can be implied. EJ Hyams then caused two extracts from *Harvey* to be sent by our clerk to the parties, for consideration in advance of the resumption of the hearing, and so that the parties could prepare to deal with the legal issues stated in those extracts.

28 We then spent the intervening period completing our reading of the papers and having lunch. We then resumed the hearing at 2pm. As the respondents had admitted the claimant's dismissal and it was for them to prove the reason for it, we heard first from the respondents' witnesses, who were:

28.1 Mr Nicholas Martin, the first respondent's Principal Partner;

28.2 Mr Alistair Howden, a Partner with the first respondent; and

28.3 Mrs Ruth Martin, the second respondent's sole director.

29 During the afternoon of 24 May 2021, the claimant asked a number of questions that were about irrelevant matters. EJ Hyams sought to keep the proceedings on track by confining the questions to relevant ones and as part of that endeavour by seeking to enable the claimant to understand why he was not requiring Mr Martin to respond to the irrelevant questions. The claimant found it hard to take direction from EJ Hyams, and engaged in lengthy debate with him about the things that he was saying, on many occasions speaking over him and making assertions as to the law which were matters for us. Eventually, EJ Hyams said that the claimant's cross-examination of Mr Martin would have to conclude within an hour of its recommencement on the following day. The claimant then said that there were many things in Mr Martin's witness statement about which she would need to ask questions. EJ Hyams then spent over half an hour at the end of the hearing day on 24 May 2021, until just before 5pm, explaining what cross-examination involves and asking the claimant to say with what particular factual allegations in Mr Martin's witness statement she took issue. There was, however, very little in that witness statement with which the claimant was able to say that she took issue factually.

30 The claimant did then, on the next day, complete her cross-examination of Mr Martin within an hour. However, after we had asked questions of Mr Martin, we gave her an opportunity to ask further questions in cross-examination, intended to be confined to the things said by Mr Martin, in answer to our questions, and she spent another 30 minutes or so cross-examining him.

31 The claimant then cross-examined Mr Howden and Mrs Martin. Their cross-examination was concluded by 13:31. We then adjourned for lunch until 2:30pm at which point the claimant told us about the statement that we refer to in paragraph 24 above. It had in fact been sent to the tribunal on 20 April 2020, but no party had put it before us, and it had not been linked with the tribunal file, so there was no copy of it in that file. Our clerk helpfully located it and forwarded it to us. We then read it. The claimant also adopted as part of her evidence the particulars of claim at pages 14-20, and an email that she had sent to the tribunal on 10 January 2019 stating her claim of age discrimination, of which there was a copy at page 58. In fact, the content of that email was not relied on by the end of the hearing, and the claimant's claim of age discrimination was only as we record in paragraph 1 above. The claim that we there record was not stated in the email at page 58.

32 Before hearing the claimant cross-examined, EJ Hyams sought to ascertain what was her case about the fairness of her dismissal, and in what way she alleged that the fact that she was employed by the second respondent as well as the first respondent was relevant to the fairness of her dismissal. It became clear during

that discussion (during which the claimant continued repeatedly to speak over EJ Hyams) that the claimant's case was that the respondents should have consulted her about the proposal to use the FreeAgent software, and not just about the proposal to dismiss her for redundancy, having both made the decision to use that software and put it into operation. EJ Hyams then explained the applicable legal principles which we set out (albeit more comprehensively) in paragraphs 5-15 above.

33 The claimant was then cross-examined by both of the respondents' representatives. EJ Hyams then directed that submissions in writing were exchanged on the next day, at or before 10.00am.

34 We resumed the hearing at that time on the next day, 26 May 2021, and heard oral submissions from all parties and adjourned just before lunch. During the course of the morning (and this occurred also during the afternoon of 25 May 2021) the claimant asserted that EJ Hyams had altered her case by what he had said. As EJ Hyams assured the claimant, he had not done that. All he had done was to state the applicable legal principles in order to assist the claimant to focus her case on what was truly in issue.

The facts

The background to the situation in which the claimant's dismissal for redundancy was first proposed

35 The claimant is a part-qualified accountant, having completed parts 1 and 2 of the Chartered Institution of Management Accountants' examinations. She was introduced to Mr and Mrs Martin by a mutual friend, and she had a meeting with them in 2008 after which Mr Martin sent her the letter dated 18 July 2008 at page 62. That letter was in the following terms:

> "**Accounts and Book keeping services Aedifice Partnership Ltd and Tasty Tales Ltd**
>
> Further to our conversation a couple of weeks ago, firstly my apologies for not getting back to you sooner.
>
> We have been issuing as many invoices etc as possible to get up to date and get some funds in for the end of July which has been our focus.
> As discussed it will take some time to bed in and agree a working arrangement so for the purposes of the initial period I would suggest as discussed an hourly rate of £14 per hour gross. We will also need to agree on the status of employment to suit your position but this can be agreed as an employment contract in which case we will deal with the tax and NI deductions as a salaried member of staff. (I am assuming at this stage that this would amount to around 1 day a week but this is flexible)

I would suggest initially we agree to a 6 month probationary period so we can fine tune the working arrangement and both be happy with the general working arrangements.

The post would be initially to carry out the book keeping functions for the companies, dealing with cash flow management including the income projections and statements and ensuring payments are received promptly against the invoices issued. Additionally checking incoming invoices and scheduling these for payment at the appropriate times and monitoring cash flow.

It will normally be that invoices will be generated by those carrying out the work however this will need to be checked against the cash flow forecast to ensure where possible these are issued in a timely manner and where necessary the forecast is adjusted.

It would be our intention over time to provide training for payroll management so that this could be brought in house.

Our intention would be to provide a laptop with the Sage software on this and a mobile phone so although there will be a requirement to be in the offices and meeting with Ruth and myself etc much of the work can be done at home if this suits.

Perhaps you could confirm and agree a start date in September and that you are happy with the above."

36 At that time, there were so far as relevant, two companies in existence: Aedifice Partnership Limited, and Tasty Tales Limited. The first of those was established by Mr Martin, who is a Chartered Building Surveyor. Aedifice Partnership Limited was the vehicle for the operation of a chartered surveying practice. The letter at page 62 was in the name of Aedifice Partnership Ltd.

37 Tasty Tales Limited was established by Mrs Martin, and it operates (and this is not reflected in its name) a Montessori nursery called Artisans Kindergarten for pre-school and nursery-age children from two to five years old.

38 Subsequently, in 2010, on advice from a firm of accountants, Mr Martin established the first respondent as a limited liability partnership, leaving Aedifice Partnership Limited in place, but renamed as Aedifice Limited. In addition, Mr and Mrs Martin established a further company which held shares in Aedifice Limited and the second respondent.

39 Mr Martin's witness statement contained the following description (which we accepted) of the manner in which the respondents operated on a day to day basis:

"5. The business is formed of two operating companies, Aedifice Partnership LLP, this is a company which provides services for the main trading company, employs all the staff and holds the leases and finance agreements etc. A second company Aedifice Limited invoices the fees and enters into service agreements with clients etc.

6. Aedifice Limited has three directors, Myself, Ruth EM Martin and Alistair Howden and the share holding is held 20% by Alistair and Megan Howden and 80% by Aedifice Holdings Limited.

7. Aedifice Holdings directors are myself and my wife. In addition to owning Aedifice Limited (80%), we also holds the shares of Tasty Tales Limited, which is another group company with my wife and myself being the directors.

8. Tasty Tales Limited owns and runs a nursery school business run by my wife called Artisans Kindergarten operating in Harpenden. It was established in May 2007.

9. Aedifice Partnership carries out many of the normal functions of a Chartered Building and Quantity Surveying Practice but specialises in Project Management of care developments and carries out work for schools and housing sectors along with a variety of other clients/sectors."

40 The claimant's work was initially, in 2008, of a book-keeping nature only, but it gradually increased as the businesses run by Mr and Mrs Martin expanded. Eventually, the claimant was employed full-time when, in 2016, she and the first respondent agreed that. She then entered into a written contract of employment. The contract was signed by the claimant (on 4 August 2017), Mr Martin (on 19 June 2017) and Mr Howden (on 15 June 2017). There was a copy of the signed contract at pages 61a-61i. Its first two clauses were these:

"**1. Commencement of Employment**:

Your employment as full time in this role with the Partnership commenced on: 1 November 2016

Your employment on a part time basis originally commenced with the Partnership in September 2008 which is the commencement date of your continuous employment.

2. Position:

The title of the job which you are employed to do is: FINANCE MANAGER

> The Partnership may amend your duties either on a temporary or permanent basis. You will be notified of any permanent change in writing. In addition to your normal duties, you may be required to undertake additional or other duties as necessary to meet the needs of the business.
>
> You agree to devote the whole of your time, attention and abilities during your hours of work to promote, develop and extend the Partnership's business and interests.
>
> You may not without first obtaining the prior written consent of the Partnership accept or hold any office or directly or indirectly be interested in any other trade, business or occupation whilst working for the Partnership."

41 The hours of work for the employment were in effect full-time, being stated in clause 14 as being "Monday to Friday from 9.00 a.m. to 5.30 p.m."

42 The claimant's work for the second respondent never went beyond book-keeping work. The claimant complained about that to us, and said that it had been envisaged by Mr Martin and her that her work would expand into financial planning for the second respondent. Mr Martin accepted that he had intended or at least thought that that expansion might occur, but, he said, Mrs Martin had not wanted it to happen, so it did not happen. We accepted that evidence of Mr Martin.

43 It was Mr Martin's evidence (in paragraph 20 of his witness statement) that during the 2017-2018 financial year, about 50% of the claimant's time was spent "inputting [financial data for the second respondent] and preparing accounts information for auditing". The claimant did not take issue with that paragraph, and accepted that approximately half her time was spent doing work of a book-keeping nature for the second respondent. We therefore concluded that that was the true position at least during the 2017-2018 financial year.

44 The book-keeping work which the claimant did for both respondents until her dismissal for redundancy (albeit that she did more than just that work) involved her putting onto Sage accounting software the details of paper invoices of which she was given a copy by Mrs Martin, whether in person or by Mrs Martin giving the invoices to Mr Martin for him to take to the first respondent's offices to give to the claimant. At some times, the claimant spent time at the second respondent's premises, in order to liaise with Mrs Martin about the information she (the claimant) was putting into the Sage software, to ensure that it was accurate.

45 The claimant's time was paid for purely from the income which the first respondent received. However, as Mr Martin said in paragraph 37 of his witness statement (which we accepted):

> "Despite [the claimant] undertaking duties for [the first and second respondents], there was no split in the company accounts and no intercompany payments made. [The claimant's] salary and other payments were always made by [the first respondent] and no other party was involved in this process."

46 EJ Hyams asked Mr Martin why that had happened, and his evidence (which we accepted) was that it was because he and Mrs Martin controlled all of the companies in the group and simply drew income from the group profits. Accordingly, they saw no need to go to the trouble of ensuring that there were proper accounting arrangements for the provision of services by the claimant to the second respondent.

47 It was Mrs Martin's evidence (which we accepted) that at no time did she think that a contract of employment was intended to, or did, come into existence between the claimant and the second respondent.

48 In paragraph 10 of her witness statement (which we accepted), Mrs Martin said this:

> "The First Respondent had all the control including line management instructions and interactions. I would ask Nicholas Martin for any work that needed to be done and it was his role to get the work done for me. I had no concern whether this would be done by the Claimant or anybody else. My port of call was Nicholas Martin. Of course, there was bound to be some contact with any employee Nicholas Martin would have employed to get the work done for the Second Respondent for all practical purposes."

49 In paragraph 7 of her witness statement, Mrs Martin said this:

> "In or around July 2017, I informed Nicholas Martin of the First Respondent that I would be installing and implementing computer software system called FreeAgent for accounts and book keeping purposes. I informed the First Respondent that the new software would be in place from 1st November 2017. I can confirm that since the software system was put in place by the Second Respondent, no natural person has taken the role for accounts management or book keeping for the Second Respondent. Since November 2017, it is only the software system through which I manage the company's accounts."

50 We accepted that paragraph. We ourselves tested the evidence of Mr and Mrs Martin, and the claimant, about the situation described in that paragraph. The FreeAgent software was supplied by the second respondent's bank, and was introduced in order to comply with a requirement of Her Majesty's Revenue and Customs to record taxable transactions digitally. The software required invoices to customers to be created by the information which would previously have been put into a word processed document being put into the FreeAgent software. The software would then generate the invoice and send it by email to its intended

recipient. The accounting information in the invoice would be recorded in the software in the same way that the information on paper invoices had previously been recorded by the claimant in the Sage accounting software which she used in the course of her employment.

51 Therefore, after October 2017 Mrs Martin no longer required the claimant's book-keeping services. However, the second respondent still needed the claimant to finalise the accounts of the second respondent, and that finalisation was, both respondents knew, going to take about six months. Mr and Mrs Martin wanted (1) the claimant to remain in her employment until that task was completed, and (2) to see whether or not Mrs Martin's use of the FreeAgent software was going to mean that (a) the second respondent no longer needed the services of the claimant at all, or (b) the second respondent continued to need the claimant to do some work for the second respondent. Mr Martin said that he did not want to unsettle the claimant by warning her of a possibility that she might be dismissed, when that might not occur and that he wanted to wait until the trial of FreeAgent had concluded before he said anything to her about the possibility that she might be dismissed. We accepted his evidence in that regard.

52 In the event, Mrs Martin found by April 2018 that the FreeAgent software was working satisfactorily and that she was no longer going to need the claimant to do any work for the second respondent. That knowledge was of course communicated to Mr Martin, and he and Mr Howden proposed the claimant's redundancy in the manner to which we now turn.

The procedure followed in deciding that the claimant should be dismissed

53 On 4 May 2018, the parties agreed, the claimant had a first meeting with Mr Martin and Mr Howden about the circumstances to which we refer in paragraphs 49-52 above. There were in the bundle minutes of that meeting, made by (he told us and we accepted) Mr Howden. They were at pages 144-146. They showed that the claimant was "asked ... to come up with ideas on what other roles she could play within the organisation to make up the 50% of time that has currently been lost", as

> "This could mitigate the consequences of any potential redundancy."

54 The claimant initially claimed not to have seen those minutes, or any other minutes made by Mr Howden of the consultation meetings that we describe in the following paragraphs below, until a couple of days before the hearing of 24 May 2021, when, she said, the hearing bundle was first sent to her. It transpired, however, that she had in fact been sent those minutes at the latest on 24 September 2019, when they were disclosed to her by the first respondent. Mr Howden said that thought that he would have sent them to the claimant at the time that they were created, as that was recorded on the minutes, but he was not able to say at this distance in time from May 2018 whether or not he had in fact done so. EJ Hyams said that the claimant should identify and put to Mr Howden anything that she said was inaccurate in the minutes. She was able to refer only

to paragraphs 1.3 and 1.6, and said that paragraph 1.3 was inaccurate in that she had not been told specifically in 2017 that her work for the second respondent might disappear, and that paragraph 1.6 was an assertion that the meeting of 4 May 2018 was the start of the consultation process. We accepted those criticisms of those paragraphs, albeit that paragraph 1.6 was inaccurate only because it involved the application of a label and was not a statement of fact. Paragraph 1.6 was in these terms: "This is the start of a consultation process regarding the current Finance Manager position within Aedifice." However, to the extent that the paragraph was intended to record that the meeting of 4 May 2018 was the first time that the claimant had been told that her job was at risk, it was accurate. The claimant was not able to point to any other inaccuracies in the minutes.

55 EJ Hyams said to the claimant that she should include in her written submissions any allegation of inaccuracy in any part of the minutes, but she did not do so. She said that she was not able to do that because of the distance in time from May 2018. She also said that she could not have said in September 2019 whether or not the minutes were accurate, because that too was too long after the events which the minutes purported to describe for her to be able to do so.

56 What was clear was that the claimant received the letter at page 147 dated 10 May 2018 which started: "Following our discussion on 4 May 2018, I regret to confirm that your role is potentially going to be made redundant." It continued by referring to the first respondent's cashflow, after which it concluded:

> "Tasty Tales have also decided to take control of their own bookkeeping, which they did on 1 November 2017. Therefore your workload has reduced by around 50%.
>
> As a result, I am writing to confirm to you that the Company has now commenced consultations with you, with an aim to avoiding or minimising the need for redundancy.
>
> If you have any questions surrounding the potential redundancy situation, please do not hesitate to contact me."

57 There was then a further consultation meeting on 14 May 2018. That was minuted in the same way as the meeting of 4 May was minuted, i.e. by Mr Howden. The minutes of the 14 May meeting were at pages 150-153. There was then a meeting on 21 May 2018, the minutes of which were also made by Mr Howden and were at pages 154-156. There was in addition at page 157 a note of the meeting of 21 May 2018. That note was made by Mr Martin. The claimant said that she had received it in May 2018, and she did not say that it was in any way inaccurate. That note included this key passage:

> "1. We have reviewed the various options in terms of working hours as discussed previously including part time and full time options as follows:-

A, Part time continuing in the short term the remaining roles within the job and completing the accounts for this year.
B, Full time or a larger part time role encompassing additional roles in terms of marketing and financial control.

Currently we do not have the additional funds to support a role including new areas of work within the business and working out whether these are indeed need[ed] or best served in this way may take some time even if funds were available.

This precludes at this stage considering option B above.

Option A has some benefits in the short term in completing work already undertaken and is worthy of consideration. We therefore reviewed this option with our HR advisors.

2. We considered the conversion of the role to a temporary part time position. Firstly a mutually agreed part time position would not involve redundancy and therefore no redundancy payment would be due which would be beneficial to us but not I suspect to you.

   Given the changes in the financial systems proposed this is likely only to be a temporary change as a new accounts system would change the need for data inputting and therefore the role would have to be reviewed again at the end of the financial year.

   You also suggested as an option that you would consider the temporary position as part time to complete this year's accounts as above.

   If as is highly likely the role became completely redundant from this part time position at the end of the financial year the redundancy payment would be reduced to the proportion of the part time salary with only the benefit of a few months reduced salary and we would have to start this process all over again. The net effect would put you in no better or even a worse financial situation with the uncertainty that would come with this.

   It is therefore are [i.e. our] view that the best way forward for all is that we have a clean break and offer redundancy as of the end of May 2018."

58 There was then a final meeting, on 24 May 2018, at which the claimant's dismissal for redundancy was confirmed. That was recorded in the letter dated 24 May 2018 from Mr Martin to the claimant of which there was a copy at page 159, which stated that the effective date of the termination of the claimant's employment would be 31 May 2018. The claimant accepted that she had received that letter.

The administrative staff of the first respondent

59 During May 2018 the first respondent had three administrative members of staff, i.e. members of staff who were not fee-earners. There was (the claimant agreed) no overlap between the roles of those three members of staff. Those three administrative staff member were

59.1 the claimant,

59.2 the office manager, and

59.3 an office assistant.

60 The invoices which the first respondent issued were created by the office manager who was, incidentally, older than the claimant.

The work that the claimant would have had to do if she had been involved in using the FreeAgent software instead of Mrs Martin

61 If the claimant had been asked to operate the FreeAgent software, then she would have been involved in the creation of invoices, and only that. Mrs Martin's evidence (which we accepted) was that that work had to be done by her or an administrative member of the second respondent's staff, who would know from being involved in the operation of the second respondent's kindergarten whom to invoice, and for what.

The claimant's position on the claim of unfair dismissal by the end of her submissions

62 By the end of her submissions, the claimant had accepted that (1) the reason for her dismissal by the first respondent was redundancy, and (2) the first respondent had conscientiously considered her response to the proposal that she be dismissed for redundancy. As far as we could see, the claimant's case on the fairness of her dismissal was (and was only) that it was outside the range of reasonable responses of a reasonable employer to fail to tell her until 4 May 2018 that her post was at risk of redundancy.

Our conclusions on the claims

The claimant's employer

63 We could not see any basis on which we could lawfully conclude that the claimant was employed by both the first respondent and the second respondent. That was for the following reasons.

64 Even in 2008, as shown by the letter at page 62 which we have set out in paragraph 35 above, it was envisaged that there would be one employer, not

two. The letter was also written by Mr Martin on behalf of what became in practical terms the first respondent. We accepted the evidence of Mr Martin and Mrs Martin that the intention at that time was that the claimant was employed by the first respondent and only the first respondent.

65 The contract signed by the claimant in 2017, to which we refer in paragraphs 40 and 41 above, was for full-time employment. It was inconsistent with the claimant having in addition a contract with the second respondent, and in any event, there was no practical reason for a separate contract between the claimant and the second respondent coming into existence: the claimant was able consistently with being an employee of the first respondent to provide book-keeping services to the second respondent.

66 The fact that the contract referred in clause 1 to the claimant's continuous employment as having started when she was working part-time in 2008, which the claimant relied on as showing that there were in reality two contracts of employment for her, one with each respondent, in our judgment in no way supported the proposition that there were two contracts of employment. That was because clause 1 so far as relevant merely referred to continuity of employment in the employment to which the contract related.

67 Thus, the claimant was in our judgment employed by, and dismissed, only by the first respondent. The second respondent never employed the claimant.

The claim for a redundancy payment

68 That conclusion meant that the claimant's claim for additional money by way of a redundancy payment did not succeed.

The claim of unfair dismissal

69 We agreed with the claimant that the reason for her dismissal was redundancy, i.e. because the first respondent no longer required an employee to do work of the sort that the claimant (and only the claimant) did for the first respondent (i.e. including the work that she did on behalf of the first respondent for the second respondent). We came to that view irrespective of the claimant's concession that the reason for her dismissal was redundancy, but we welcomed the concession.

70 We concluded that the only possible criticism that the claimant could make of the procedure followed in dismissing her was that she was not warned in November 2017 (or at any time after then and before 4 May 2018) that she might be dismissed in May 2018. However, we concluded that there were sound, good business reasons for not telling her either in November 2017 or at any time after then but before May 2018 that her employment might be at risk in May 2018. We concluded that in the circumstances described by us in paragraphs 51 and 52 above, it was within the range of reasonable responses of a reasonable employer to warn the claimant of the possibility of her dismissal by reason of redundancy only on (i.e. and not before) 4 May 2018.

71 We were completely satisfied that the respondent made reasonable efforts to redeploy the claimant and that the claimant's dismissal was well within the range of reasonable responses of a reasonable employer in the circumstances described by Mr Martin in the note at page 157 that we have set out in paragraph 57 above.

72 Therefore, the claimant's claim of unfair dismissal did not succeed.

The claim of age discrimination

73 We came to the clear conclusion that the reason why the claimant was not given an opportunity to put information into the FreeAgent software for the second respondent's business was that it made no business sense for her to do that, given the circumstances that we describe in paragraphs 49-52 above. It had nothing whatsoever to do with the claimant's age.

74 For the avoidance of doubt, there was in the circumstances as we found them to be nothing from which we could draw the inference that the claimant was, by not being given an opportunity to put information into the FreeAgent software on behalf of the second respondent, treated less favourably than she would have been if she had been younger than she in fact was in November 2017 through to May 2018.

The claim of unpaid holiday pay

75 The claimant's holiday year ran from 1 January to 31 December. The claimant was unable to say what holiday she had taken in the period from 1 January 2018 to the time of her dismissal, on 31 May 2018. She was therefore unable to put before us any evidence that she was entitled to any pay in lieu of accrued, untaken, holiday.

In conclusion

76 In conclusion, none of the claimant's claims succeeds.

Employment Judge Hyams

Date: 3 June 2021

Case Number: 3333862/2018

JUDGMENT SENT TO THE PARTIES ON

17 June 2021

S. Bhudia

FOR THE TRIBUNAL OFFICE