



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4105603/2017

Heard in Glasgow on 19 and 20 June 2018

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Employment Judge: Robert Gall

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Mr Gilbert John Anderson

**Claimant
Represented by:-
Ms A Peat -
Solicitor**

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Matthew Barsaukas

**First Respondent
Represented by:-
Ms L Bell -
Solicitor**

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Weber Wolf Ltd

**Second Respondent
Represented by:-
Ms L Bell -
Solicitor**

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CASUK Ltd

**Third Respondent
Represented by>
Ms L Bell -
Solicitor**

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JUDGMENT FOLLOWING PRELIMINARY HEARING

5 The Judgment of the Tribunal is that:-

1. The claimant was initially a consultant to Weber Wolf Ltd from October 2014 to April 2015. He was then an employee of Weber Wolf Ltd from April 2015 until 31 August 2016. From 1 September 2016 until termination of his employment he was then employed by CASUK Ltd. In the period from
10 termination of his employment with CASUK Ltd until 22 August 2017 he was a consultant to CASUK Ltd.
2. The claim will therefore proceed against the third respondents, CASUK Ltd.
- 15 3. In terms of rule 76 (2) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 CASUK Ltd is ordered to pay to the claimant the sum of £800 together with VAT if applicable in respect of expenses arising due to failure by the respondents to meet the terms of the Order issued by the Tribunal on 16 February 2018.

20 **REASONS**

4. This case called at Glasgow on 19 and 20 June 2018. It did not prove possible to complete the case by close of business on 20 June. All evidence had been heard at that point. There had not however been time for submissions to be heard. Submissions were therefore heard at a date
25 agreed, being 2 July 2018.
5. The case was set down for a Preliminary Hearing ("PH") in order to determine the identity of the employer. The claimant gave evidence. Calum Grant also gave evidence on behalf of the claimant. The respondents' witnesses were Matthew Barsauckas and Jane Barsauckas. A joint bundle
30 of productions was lodged. Evidence in chief was given by witness statements which were taken as read.

6. The following were found to be the relevant and essential facts as admitted or proved.

Background

5 7. The claimant is a qualified solicitor. He is 59 years of age. He qualified later in life obtaining a law degree in 2000 and being a trainee in 2008 and 2009. His traineeship finished in 2010. He then commenced work within the Citizens Advice Bureau ("CAB") network.

10 8. It was in this role that the claimant encountered Mr Barsauckas and also Mrs Barsauckas. This was in relation to provision by him of advice to Mr and Mrs Barsauckas.

15 9. The claimant continued in employment with CAB until 13 March 2015. By that point CAB had obtained funding and had more employees than was the case during the earlier part of the claimant's employment with them. In September or October 2014 he discussed with Mr Barsauckas a working arrangement in terms of which legal advice would be provided by the claimant.

Weber Wolf Ltd

20 10. Mr Barsauckas was the principal party behind different companies. The one of most relevance in relation to the role to be played by the claimant at the time of this discussion was that of Weber Wolf Ltd (W). That company was incorporated on 11 September 2012.

25 11. In late September or early October 2014 it was agreed between the claimant and Mr Barsauckas that the claimant would act as a consultant to WW, being paid a consultancy fee. There was no written agreement between the parties. There were no set hours of engagement. Work was carried out by the claimant as agreed with Mr Barsauckas, on behalf of WW, and the claimant.

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12. This arrangement continued until April 2015. In the lead up to that time there was discussion between the claimant and Mr Barsaukas as to the claimant leaving his job with CAB and becoming an employee. The entity with which he was to become an employee was WW. It was agreed that he would move "in-house" with WW. This he did with effect from April 2015. The claimant was keen to move and WW and Mr Barsaukas were keen for him to move.
13. Payment arrangements for the claimant from April 2015 were on the basis of a salary of £507 per month based on 16 hours per month being worked by the claimant. It was recognised that the claimant would be providing more than 16 hours of work to WW each month. It was agreed that he would be paid on a consultancy basis in respect of any hours beyond 16 hours per month. There was no commitment by either WW or the claimant involving either a requirement that he work particular hours or that WW provide to him a specific level of minimum hours. In practice, the consultancy fee element paid to the claimant from April 2015 onwards varied. It was paid on the basis of the hourly rate being £30 or £31. A schedule of the payments made, prepared by the respondents, appeared at page 171 of the bundle showing some payments at £1521, some at £0 and some in excess of £1521. The claimant would simply advise Mr Barsaukas of the number of hours which he had worked beyond 16 in each month and appropriate payment arrangements would then be made.
14. Payment to the claimant of an annual salary of £35,000 would have been a very high salary for WW to meet. It would have been greater than the combined total of the annual salaries drawn from WW by Mr Barsaukas, his wife and daughter at that point
15. Notification was given by the claimant to the Law Society that his employers were WW. WW paid fees to the Law Society for the practising certificate issued to the claimant. He appeared on the Roll of Solicitors as being employed by WW. The claimant handled all matters relative to his practising certificate with the Law Society. He had also done so during his time with CAB.

16. Pay records for WW were completed by Jane Barsauckas. She submitted those to HMRC, reporting on payments made and tax deducted via electronic submission. Such a submission must be made at the time when payment is being made. If that does not occur then a fine is payable by the company filing the information online. There was no evidence of any such fine being levied against either WW or CASUK Limited ("CASUK"). Relevant payslips completed and submitted by WW in relation to the claimant appeared at pages 51 to 86 of the bundle. Those commenced for the period to 30 April 2015 and concluded with the payment for the period to 31 August 2016. Other than members of the Barsauckas family, being Mr and Mrs Barsauckas and their daughter Rebecca, the claimant was the only employee of WW.
17. The claimant was aware that he was being paid by WW. The payment records produced by him, in terms of a document compiled by him rather than vouched by bank statements, confirm that payments received by him in the period from 6 October 2014 to 4 September 2015 were, save for two payments attributed to Mr Barsauckas, received from WW. The relevant record of payments prepared by the claimant appears at pages 117 to 119 of the bundle. It is unclear whether the payments in February and March 2015 apparently paid by Mr Barsauckas were paid personally by him or on the same basis as payments made by him in relation to later times as explained below, i.e. by means of a company card where Mr Barsauckas was the operative party.
18. At pages 125 and 126 of the bundle a letter dated 14 February 2018 from HMRC appeared. This was produced in response to an enquiry by the claimant on 13 February 2018. The claimant asked HMRC for his employment history. He did not enquire at an earlier stage as he had been unwell.
19. In terms of that letter sources of income were detailed in respect of the tax years ended 5 April 2016, 5 April 2017 and 5 April 2018. In the tax year ended 5 April 2016 the employer of the claimant was identified as being WW.

5 The claimant's employment with that company was noted as having started on 6 April 2015 and having ended on 31 August 2016. The claimant's income for tax year ended 5 April 2017 was shown as being from the party specified as his employer - WW in respect of the period to 31 August 2016 and CASUK in respect of the period from 1 September 2016. It was noted that the claimant's employment with CASUK had ended on 28 June 2017. For the tax year ended 5 April 2018 the claimant's employer was noted as being CASUK with relevant income details being specified. There was no mention of Mr Barsauckas as the employer of the claimant during any of these periods.

Position with the Law Society

20. The claimant was also aware that the records of the Law Society of Scotland showed that he was employed as an in-house solicitor with WW. He had an exchange with the Law Society in February 2015. This related to court actions involving various companies. The claimant sought to instruct counsel on behalf of those companies. He was referred by counsel to the Law Society for clarification of the position. He set out to the Law Society on 14 June 2016 what he said had been said to him at the time of that contact in February 2015. An internal email sent within the Law Society on 16 June 2016 appeared at page 188 of the bundle. That email is from David Cullen at the Law Society. It states;

25 *7 had a full discussion with the GJSA (the claimant) this Tuesday following on from Ian's last email. He confirmed that he is the in-house solicitors (sic) for all the companies defending the court actions. He was asked specifically by Counsel if he could give instructions for all these companies. Counsel asked him to obtain the specific advice of the prof practice team at the Society on these points. This he did and he obtained that advice from a solicitor in prof practice team on 16 and 17 February 2015 who gave him the "all clear and go ahead". He then provided that advice to Counsel who then accepted the instructions. "*

21. This email from Mr Cullen followed an earlier email from him to the claimant of 8 June 2016. A copy of that earlier email appeared at page 186 of the bundle. It said:-

5 *“My colleagues in our regulation team have provided me with additional information which is as follows ~*

“we have in our possession copies of Court of Session interlocutors showing E - legal as being the firm of solicitors acting on behalf of the defenders in 3 separate actions. E - legal is one of a number of trading names of a company known as Weber Wolf Ltd. The main director and shareholder of Weber Wolf is a Matthew Barsauckas. Weber Wolf employ Mr G Anderson and he is an in-House lawyer there.”

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I would be most grateful if you could kindly clarify your position with these three companies. ”

- 15 22. It is unknown whether there was any written reply to this email. The email of 16 June set out above refers to a telephone conversation which had taken place between Mr Anderson and Mr Cullen on 14 June. That may well have been a conversation in response to the email of 8 June from Mr Cullen. There was no evidence of any challenge by the claimant to the statement made as to his employer being WW. The claimant at no point informed Mr Barsauckas of the contact from the Law Society and of the details of any exchange between the claimant and the Law Society.
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23. The claimant dealt with renewal of his practising certificate each year. In 2015 and, it is understood in 2016, he made that application for renewal on the basis that his employer at that time was WW. He confirmed that he was employed by a limited company. A letter from the Law Society in relation to renewal of the practising certificate appeared at page 194 of the bundle. It is addressed to the claimant at WW. Similarly, a request for a Scottish Legal
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Complaints Commission Levy due on 20 June 2016, a copy of which appeared at page 189 of the bundle, is addressed to WW.

Work carried out by the Claimant

24. The work carried out by the claimant as in-house solicitor for WW was varied. The principal shareholder and director of WW, Mr Barsauckas, gave direction to the claimant as to areas in which advice was sought or in which there was a requirement for the claimant to become involved. Where that advice or involvement related to parties who were not clients of WW there were, at least in some instances, mandates provided by those clients authorising WW to act. Examples of such mandates appeared at pages 210 to 213 of the bundle. In certain limited instances the claimant would act on the basis of a request from Mr Barsauckas so to do.
25. Acting through WW at the request of Mr Barsauckas occurred on one occasion when the claimant made a telephone call or wrote one letter as part of a discussion between Mr Barsauckas and a Scottish university, that discussion being in relation to Mr Barsauckas' daughter. There was no written or signed mandate produced to this Tribunal in that regard.
26. At page 172 of the bundle a sheet appeared which had tasks on it which Mr Barsauckas asked the claimant to carry out. The sheet was relative to work to be carried out by the claimant on 17 August 2017. That date was after termination of the claimant's employment with CASUK. It was during his period of consultancy with CASUK.
27. The list of tasks contains a reference at number 6 to a fence dispute. That was a personal matter relating to a fence affecting property owned by Mr Barsauckas. The word "possibly" appears in the box for number 6. That entry was written by the claimant. It is unclear whether the claimant carried out any work in relation to the fence dispute at the request of Mr Barsauckas.
28. WW would, as part of carrying out work for clients, instruct consultants or insolvency practitioners to whom work would be passed.

Terms and Conditions of Employment

29. At some point the claimant prepared a document entitled "*Statement of Particulars of Employment under the Employment Rights Act 1996*". A copy of that document appeared at pages 127 to 133 of the bundle. In that document the employer is defined as Matthew Barsauckas. It states in the introductory paragraph that it is setting out particulars of the claimant's employment with his employer as at 1 May 2015. It states in paragraph 2 under the heading "*1. Commencement of employment*" that employment commenced on 16 March 2015. It is unclear when this document was prepared and whether it was given to Mr Barsauckas by way of passing a memory stick to him, the only method the claimant stated had been used to give Mr Barsauckas the document.

30. This document says, under the heading "*4. Administration*" >
"For the purposes of administering your employment will be under the control of Weber wolf Ltd or other associated company or firm under the direct control of the employer. The administering organisation will be responsible for: payroll, licensing, compliance, professional fees and indemnities, insurance and other administrative requirements of your employment. "

31. It refers to a staff handbook with which it is said that the employee is required to familiarise himself. It is said that the handbook could be obtained from Jane Barsauckas. Various policies and procedures said to be contained within the staff handbook are mentioned. In fact, there was no staff handbook available at any time during the employment of the claimant.

Luke Barsauckas' employment

32. In July 2015 Luke Barsauckas, son of Matthew and Jane Barsauckas, worked with WW as a summer job. He worked between 9 AM and 5 PM on Tuesdays, Wednesdays and Thursdays. A copy of a job description for him

appeared at page 193 of the bundle. That refers at the bottom of that page to him reporting to ^UG Anderson” (the claimant) for guidance and training.

Comments In correspondence as to the role of the Claimant

5 33. On 3 August 2015 Mr Barsauckas wrote to a solicitor. A copy of that letter appeared at pages 191 and 192 of the bundle. Mr Barsauckas wrote in his capacity as managing director of WW. The letter appeared on WW headed paper. It set out the comments which Mr Barsauckas wished to make on a matter which is not relevant to this Tribunal. In course of that letter Mr Barsauckas writes:-

10 *“Additionally I have seconded our in-house solicitor Mr G Anderson to liaise with you directly. Mr Anderson has been dealing with the administrator our Advocates and the regulators on all matters relevant to MWSL and the administration process. He has also been involved in ongoing communications with the FCA and HMRC regarding the*
15 *conduct of Greene King, in a more specific and related matter currently under review.*

... In the meantime I can be contacted as detailed below. I am available at the Bellshill office - Monday Tue & Fridays. In my absence Mr Anderson is available Monday to Friday”

20 34. This letter of 3 August therefore confirmed to the solicitor that Mr Anderson was in-house solicitor with WW and that in the absence of Mr Barsauckas, Mr Anderson was available each weekday.

Company Card

25 35. At page 199 of the bundle a copy of a “cash plus” business MasterCard appeared. It ran in name of “WWL E-claims UK” and also had the name of Mr Barsauckas on it. It was a company card relative to WW, E-claims being a trading name of that company. The card was used on many occasions to make payment to the claimant of sums due to him by WW. Payments made

in that fashion appeared with the payer's name being that of Mr Barsaukas. The payment was in fact made by WW by means of this card.

Pay, Payslips and Forms P45 and P60

5 36. Payments made by WW to the claimant were made through a method known as "Faster Payments". That appears in bank statements referenced by the initials FPL

10 37. It is unclear whether the claimant received a copy of his salary payment information from the respondents. He did receive form P60 in respect of the tax year to 5 April 2016. That confirmed that his employer was WW. The claimant did not challenge this document in any manner. A copy of that document appears at page 87 of the bundle. HMRC proceeded on the basis that WW was employer of the claimant. They issued details of the tax coding to be applied by WW in respect of the claimant. The letter so doing appeared at page 88 of the bundle and is dated 2 September 2015.

15 38. It is also unclear what the source was of pay slips which appeared at pages 120 to 122 of the bundle. Those pay slips purport to show payments made by WW to the claimant. Page 120 bears to be in respect of the period to 31 July 2015. It refers to this as tax period 4. It shows the payment method as being BACS. In fact, payment of salary to the claimant by WW was never made by BACS. It shows a monthly amount paid of £291 6.66. It shows a running total in respect of taxable pay to date, tax paid and national insurance contributions in respect of employer and employee. Page 121 shows the same details in respect of tax period 5, the payment date being said to be 31 August 2015. It again refers to payment by BACS. It shows the sum by way of basic pay as being £291 6.66. That amount is also shown as the pay in the payslip which appears at page 122. That purports to show payment by WW to the claimant in respect of the period to 30 September 2015. It again refers to payment being made by BACS. All 3 of these payslips state that the pay period involved is "M1".

39. These were not payslips produced by WW and passed to the claimant by WW.

CASUK Ltd

5 40. CASUK is another company of which the principal is Mr Barsauckas. It was incorporated on 15 July 2016. Notice of intended strike off of the company was issued on 17 October 2017. Strike off was temporarily suspended as a result of, at least in part, a letter written by the claimant. It is detailed below.

10 41. The office in which the claimant worked both with WW and CASUK comprised 1 room within which there were 4 workstations. CASUK Ltd dealt mainly with consumer and commercial debt as opposed to WW which dealt with individuals who had debt issues. WW specialised in dealing with claims. Mr Barsauckas and the claimant discussed the position with regard to business health and prospects of WW. WW was experiencing a downturn
15 in business. The claimant was aware of this and of the intention that such business of WW which remained would be transferred to CASUK. That occurred in August 2016. The claimant was aware of that switch. His employment transferred to CASUK. He was issued with a P45 by WW. A copy of that P45 appeared at pages 89 to 91 of the bundle. It confirms the
20 claimant's leaving date as an employee of WW as being 31 August 2016.

25 42. There was no formal TUPE procedure or consultation undertaken by Mr Barsauckas on behalf of either WW or CASUK in relation to transfer of employment of the claimant between WW and CASUK. The claimant was however aware of the arrangement that WW would be wound down with business passing to CASUK and with CASUK being the vehicle through which he would operate and which would become his employer.

30 43. Jane Barsauckas completed real-time returns to HMRC in respect of the employment of the claimant by CASUK Ltd. A copy of those appeared at pages 92 to 111 of the bundle. A copy of form P60 relative to the claimant

for the tax year to 5 April 2017 appeared at page 113 of the bundle. That confirmed the employer as being CASUK.

Evidence from Mr Grant

5 44. At the beginning of August 2016 the claimant and Mr Barsauckas met with Calum Grant. Mr Barsauckas introduced Mr Grant to the claimant. He did not refer to the claimant as being "his" solicitor. Mr Grant initially assumed from the relationship which he saw between the claimant and Mr Barsauckas that they were partners in a business. Over the subsequent few months the claimant gave Mr Grant advice and assistance in relation to a business
10 transaction between Mr Grant and a business in which Mr Barsauckas had an interest.

15 45. At one point, whilst in the offices of WW and CASUK, Mr Grant overheard Mrs Barsauckas participating a telephone call where raised voices were involved. Mr Barsauckas conveyed to Mr Grant that Mrs Barsauckas was speaking to a lawyer and was not fond of lawyers. He went on to say that she did not have that view however of one lawyer, being the one that he employed.

20 46. Extracts from the bank accounts of CASUK appeared at pages 169 and 170 of the bundle. Those showed CASUK as making payments to the claimant from December 2016 through until September 2017. The statement prepared by the claimant showing payments to him, at pages 118 and 119 of the bundle, confirms that payment was made to him by CASUK from
25 December 2016.

30 47. Pages 173 to 185 of the bundle comprise what is said to be an Agency Agreement between Mr Grant and Xpress Colour Art Group Ltd. The signatories to this Agreement are said to have been Mr Grant and Mr Barsauckas. The claimant is said to have signed the document as a witness to the signatures. The claimant and Mr Grant deny that they signed such a

document. Mr Barsauckas says that they did sign it. No view can be taken at present and whether the signatures on the document are genuine or not.

Letter from The Claimant to Registrar of Companies

5 48. As mentioned above the claimant became aware of a proposal that CASUK be struck off the Register of Companies. This was proposed on 17 October 2017. The claimant wrote to the Registrar of Companies. A copy of that letter appeared at page 145 of the bundle.

10 49. Having given the name and company number of CASUK and under reference to "Striking off Action" the claimant said in this letter that he believed good cause was shown as to why the company should not be struck off the register. He then set out his reason. He said: -

"My name is Gilbert JS Anderson. I am a former employee of the above company.

15 *I am the claimant in an ongoing employment Tribunal action in which CASUK Ltd are the Respondents.*

20 *I am seeking an award from the Tribunal for unlawful stoppage of wages and unfair dismissal. If the striking of (sic) action where (sic) to continue, I would be deprived of the opportunity to seek redress against the company for quite substantial sums of money and its breaches of my employment rights.*

Moreover, I am personally aware of at least two other former employees of the company who are currently raising actions against the company"

25 50. Calum Grant was someone who the claimant had in mind when referring to other employees. He did not regard Mr Grant however as being employed by CASUK. Mr Grant was a client of WW. The claimant regarded Mr Grant as being employed by one of Mr Barsauckas' companies.

51. In circumstances detailed below form P45 was given by CASUK to the claimant confirming his leaving date as being 26 June 2017. A copy of that P45 appeared at pages 114 and 115 of the bundle.

Termination of Employment of the Claimant

5 52. There is a dispute as to the precise date on which the employment of the claimant ended. The respondents maintain that it occurred in course of a meeting on 27 June 2017. The claimant says that it occurred on 4 July 2017. The circumstances surrounding dismissal and the basis on which employment ended are also matters of dispute.

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53. In the P45 the claimant was given at time of termination of his employment the employer is shown as CASUK. The claimant also received a letter at time of termination of his employment. A copy of that appeared at page 123 of the bundle. It was on CASUK headed paper and signed by Mr Barsauckas as a director of CASUK. It refers to a conversation on 26 June 2016. The letter is erroneously dated 28 March 2016.

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54. After his employment with CASUK ended the claimant became a consultant to CASUK. He was paid by that entity in respect of consultancy work. This was at the rate of £30 or £31 per hour. The arrangement operated on the basis of the claimant informing Mr Barsauckas of the time which he had spent working as consultant each week. Payment of the relevant amount was then made to him.

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55. The consultancy arrangement ceased on 22 August 2016. There was no personal guarantee given by Mr Barsauckas that payment of consultancy fees for this period from end of June or beginning of July 2016 until 22 August 2016 would be paid.

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56. For personal legal advice and issues Mr Barsauckas has for many years used the services of a legal firm in Uddingston, Friels. He has also used the services of D J Falls, Solicitors, for some elements of personal legal advice.

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The Issues

57. The first issue for determination by the Tribunal was that of whether the employer of the claimant was:-

(a) Mr Barsaucas

5 (b) WW or

(c) WW and subsequently CASUK

58. The second issue for determination by the Tribunal was whether an award of expenses relative to the abortive diet of PH in April 2018 was to be made in favour of the claimant. If such an award was to be made, the amount
10 awarded required to be determined.

Applicable Law

59. A contract of employment can be formed through oral agreement between parties. In circumstances where, as here, it is agreed that there is a contract of employment and where the dispute is as to the identity of the employer
15 who has entered into that contract, resolution of that dispute turns upon facts found.

60. In terms of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules") costs may be awarded by the Tribunal.
20 Specifically, in terms of rule 76 (2) a Tribunal may make such an Order where a party has been in breach of any Order or practice direction or where a hearing has been postponed adjourned on the application of a party.

61. A Costs Order may be made for a specific amount not exceeding £20,000.
25 This is in terms of rule 78 (1).

62. Rule 84 provides that Tribunal may have regard to the paying party's ability to pay in deciding whether to make a costs order and if so in what amount.

Submissions

Submissions for the claimant

5 63. Ms Peat underlined to the Tribunal that the focus was on identity of employer. There had been some evidence which had extended beyond that point.

10 64. The Tribunal was urged to accept the claimant's evidence and version of events. He had been credible and reliable. His evidence had been clear and concise. The respondents' evidence on the other hand was not credible.

15 65. The position for the claimant was that he had been employed by Mr Barsauckas personally as his solicitor. If the Tribunal did not accept that, then it should find that the claimant had been employed by WW from commencement of his relationship of employment until termination of it. If that was not the view of the Tribunal, then it should accept that the claimant had been employed by WW initially and then subsequently by CAS UK.

20 66. Ms Peat started by considering the contractual documentation and how the relationship was formed.

25 67. There was no contract by way of offer and acceptance here. There was a verbal agreement. The documenting of it was not agreed. Mr Barsauckas said that the claimant had approached him seeking employment. The claimant said that Mr Barsauckas approached him over a period looking to engage services as an employee. The claimant's evidence should be accepted. He had, at that point, a full-time post as an employee with CAB. He was a manager. CAB had recently secured funding. The claimant was therefore in a secure position both financially and in terms of permanency.
30 It would not make any sense for him to have left that post to seek work from an individual to whom he had given advice regarding council tax arrears. It was far more likely that Mr Barsauckas had approached the claimant,

impressed by the claimant's work. The claimant becoming a full-time employee of Mr Barsauckas had, Ms Peat said, the "ring of truth".

5 68. The claimant had produced a contract of employment for the Tribunal. Mr Barsauckas had said in evidence that he had not seen this before. He had said that the claimant had told him that he did not need a contract of employment Mr Barsauckas accepted in cross examination however that this was a peculiar stance for a solicitor to take. He had agreed that it was far more likely that a solicitor would wish a contract of employment to be in
10 place.

69. The claimant had said that he insisted on there being a contract of employment when he moved into full-time employment and that Mr Barsauckas had asked him to draft one for his review. The document at
15 pages 127 to 133 was that draft contract. The claimant had given it, he said, to Mr Barsauckas but did not get any response. Mr Barsauckas had sought to discredit this in his evidence. He had said to the Tribunal that he believed the document to have been only recently drafted although it referred to setting out particulars as at 1 May 2015. Mr Barsauckas said that the date
20 could have been altered. The Tribunal should reject that evidence. It was far more likely that the claimant's version was correct.

70. Turning to payslips, Ms Peat said that the Tribunal should accept that the claimant did not receive the documents said to have been submitted by the
25 respondents to HMRC, those being at pages 51 to 86 and 92 to 111. Those documents may have been submitted to HMRC. That did not however prove that they had been given to the claimant. The claimant's evidence was clear. He did not receive these documents. If he had these documents he would not have required to approach HMRC in February 2018.

30 71. The claimant had consistently expressed his view that WW was a back-office administrator, with the employer being Mr Barsauckas. He had submitted 3 payslips, those being at pages 120 to 122 of the bundle.

72. There was no reason for the claimant to challenge the process which he understood to be in place namely that WW made payments to him and was the back-office administrator whereas Mr Barsauckas was his employer. He had trusted Mr Barsauckas. He had worked for him on a part-time basis and had received payment within agreed timescales. The claimant and Mr Barsauckas had at that stage a good relationship.

73. There was correspondence from the Law Society. Ms Peat then considered that in relation to the question of identity of employer. The relevant information appeared at pages 189 and 194 to 196 of the bundle. That all referred to WW. There was no reference to CASUK. The claimant said that he had told the Law Society that it was correct to refer to WW. That was however on the basis of WW being a back-office administrator. It had been put to Mr Barsauckas that it did not make sense to have no change to show the employer as being CASUK when that company had become employer. Mr Barsauckas had said that the details would not change until the practising certificate had expired and was due for renewal. That however was simply incorrect. Solicitors changed jobs and when that occurred the employer for practising certificate purposes should be notified with the new employer then being shown.

74. The Tribunal should therefore accept that WW was the back-office administrator. If it did not accept that then it should accept that WW was the employer and that that was the position which pertained throughout employment.

75. The work which the claimant had carried out was wide and varied. The respondents had said that the claimant did this work via WW and CASUK via a mandate system. The claimant had however carried out work for Mr Barsauckas and his family. Although Mr Barsauckas said that this was done via mandate, the claimant said that mandates did not exist as described by the respondents. His position was that because he was employed by Mr Barsauckas on a personal basis he could deal with personal matters and anything else which Mr Barsauckas instructed him to act upon. This was

illustrated by the fact that he had dealt with a dispute between Mr Barsauckas' daughter and the University and that he had instructed counsel in relation to a number of matters. The claimant said that he would not have been able to do either of these things had he not been personally employed
5 by Mr Barsauckas. The Law Society had corresponded with the claimant about this. The claimant had explained that he was employed by Mr Barsauckas personally and said that this had been accepted by the Law Society. There was no detailed note of that conversation, Ms Peat accepted. The exchange of emails which appeared pages 186 to 188 of the bundle
10 confirmed that the Law Society agreed that the point would be taken no further. Mr Barsauckas had said that he was unaware of the Law Society discussion. The office was however a small one and Mr Barsauckas had said in evidence that he was there 5 days a week or sometimes more often. He also said that he required to check a lot of the claimant's work. The
15 Tribunal was asked by Ms Peat to accept that Mr Barsauckas must have been aware of this exchange with the Law Society.

76. Turning to witness evidence, Ms Peat said that the Tribunal should keep in mind the need to focus on the parts relevant to the issue before it at this PH.
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77. There was clear evidence from Mr Grant of the conversation he had had with Mr Barsauckas when Mr Barsauckas had referred to the lawyer that he employed.

25 78. Assessing the credibility of the respondents' evidence, the Tribunal should keep in mind that Mr Barsauckas said in the statement that he had never had a difficulty with employees. He had maintained that position initially in cross-examination. It was put to him however that there was a different Employment Tribunal claim, this being brought by Mr Grant. That was a
30 difficulty with an employee. This showed the difference between the written statement of Mr Barsauckas and his evidence at Tribunal.

79. There had also been evidence from Mr and Mrs Barsauckas about some issue with the conduct of the claimant. If that was true, there had been

months and months of inaction. Further, despite this alleged issue with his conduct, the claimant had become a consultant after his employment had ended. That did not make sense if he was in fact a "monster". In addition the letter given to the claimant on dismissal, page 123 of the bundle, did not marry up with the respondents' position as to the relationship between them and the claimant. The Tribunal should accept that there was no issue in relation to conduct of the claimant. The reason for dismissal was due to difficulty in making payment to the claimant.

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10 80. There had also been evidence from the claimant and Mr Grant that their signatures on the agency agreement at page 185 of the bundle were not in fact theirs. The beneficiary of that document was the respondent.

15 81. All of this should be taken into account in assessing credibility. The claimant's position as to identity of employer should be accepted.

Expenses

20 82. The Tribunal was also asked to address the question of expenses insofar as those arose from the PH set down for 25 April 2018. The claimant had referred to the possibility of seeking expenses at that PH. Ms Peat accepted that any award of expenses would properly be directed against the party who was found to have been the employer as a result of this PH.

25 83. Expenses were sought as there had been an unreasonable failure on the part of the respondents to comply with Orders issued on 16 February 2018. By the day of the PH in April 2018 there were two different versions of the respondents' witness statements, neither of which had been signed. That had prevented proper preparation for that PH. The respondents' position had been uncertain in the lead up to that PH. The respondents had also introduced documents the day before that PH. The claimant was unable to proceed with that PH due to potential prejudice through that course. Had the Order been complied with the PH could have proceeded. Preparation for that diet and again for this diet would not have been necessary.

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84. Over 14 hours work in preparation for the earlier PH had been involved. The sum claimed was £2256 plus VAT, £2707.20.

5 85. On this being raised with her, Ms Peat accepted that some preparation time for this PH had been saved due to preparation having been carried out for the earlier PH. She said that some 3 hours had been saved, she estimated.

Submissions for respondents

10 86. Ms Bell for the respondents submitted that the employer of the claimant at time of termination of his employment should be found to have been CASUK. There were five propositions advanced by Ms Bell:-

1. The claimant had not been employed by Mr Barsauckas as an individual.
2. The claimant had been engaged by WW on a consultancy basis and subsequently as an employee.
- 15 3. The claimant's employment had been transferred from WW to CASUK at the end of August or beginning of September 2016.
4. The claimant had been dismissed by CASUK in June 2017.
5. Thereafter the claimant had been a consultant to CASUK until August 2017.

20 87. At time of dismissal, said Ms Bell, the claimant was employed by CASUK. That company was responsible for payment of salary. The P45 given to him confirmed the employer as CASUK. CASUK had paid the claimant's fee for the ongoing consultancy work until August 2017.

25 88. There had been contradictory evidence from the claimant on the one hand and from the respondents on the other as to parties involved in the employment relationship. Both could not be correct.

30 89. In considering the factual evidence and in coming to a view, the Tribunal should have regard to the credibility and reliability of witnesses.

5 90. The claimant said that he was employed by Mr Barsauckas during his employment. He said that he was instructed to undertake work on a personal basis for Mr Barsauckas. He had referred to the document which appeared at page 172 of the bundle as being an example of the tasks he was asked to carry out. That document however related to August 2017. That was out with the period of employment with the respondents. There was nothing to suggest that the work shown on that this was an accurate reflection of the work which the claimant had been asked to do during course of his employment.

10 91. The list contained at item 6 reference to a fence dispute. Mr Barsauckas had said that the claimant was asked to consider that point but that it was never something taken forward by the claimant or which he was instructed to take forward. The only other example of personal work which had been
15 raised was that of a dispute between Mr Barsauckas' daughter and Edinburgh University. Mr Barsauckas said that he dealt with that, with the claimant only being involved in one telephone call in his absence. There been no further examples of any personal work carried out.

20 92. In addition, Mr Barsauckas had given clear unequivocal evidence that mandates existed. Those were signed by clients and gave the claimant as an employee of WW/CASUK authority to deal with those matters for clients.

25 93. Further, the evidence from Mr Barsauckas was that the claimant did not deal with all matters which arose as he had said in evidence. He dealt with matters at a lower level with instructions then being issued to other solicitors or insolvency practitioners. Personal or family matters had been dealt with by Friels or D J Falls, solicitors.

30 94. The claimant's evidence as to his involvement with WW directly contradicted the evidence from the respondents.

95. The respondents said that the claimant initially performed a consultancy role between October 2014 until April 2015. The consultancy relationship was

with WW. The payment record produced by the respondents at pages 199 to 208 showed payment being made through the company card in the consultancy period. Thereafter payment was made by WW again by means of the card on many occasions. Page 171 of the bundle was a record prepared by the respondents showing the payments made to the claimant, split into categories of "monthly salary" and "consultancy". The record of payments produced by the claimant at pages 116 to 119 of the bundle reflected payment by WW in the vast majority of cases. There were also references to Mr Barsauckas as the payer. Again however that was on the basis of the company card used by him. There had been no payment made personally by Mr Barsauckas.

96. There were also the returns made to HMRC showing WW as the employer. Those appeared at pages 51 to 86 of the bundle. The respondents' position was that those showed salary payments to the claimant. In addition, there were forms P60 and P45 pages 87 to 91 of the bundle confirming the employer as WW.

97. The position of the claimant was that he did not get these documents. They had been prepared for litigation alone, he said. That however was rebutted by the evidence from the respondents that if late submission was made of such documents to HMRC then a fine would be incurred. That however had not happened. That was because the documents had been submitted by the respondents when they were prepared.

98. There had been a transfer of the claimant's employment to CASUK. The claimant had said that he was not initially aware of any such transfer. Ms Bell highlighted however the small open plan office and asked the Tribunal to accept the evidence from Mr Barsauckas that the transfer had been discussed openly.

99. Ms Bell submitted that the real-time salary payment documentation submitted to HMRC, pages 92 to 111 of the bundle confirmed that CASUK had become employer of the claimant. Form P60 at page 113 of the bundle

and the P45 at pages 114 and 115 of the bundle confirmed the employer as CASUK. The respondents' evidence was that the claimant received these documents.

5 100. Pages 169 and 170 of the bundle were extracts from the bank account for CASUK. That showed payment to the claimant. The claimant's own schedule at pages 118 and 119 of the bundle also confirmed payment as being made to the claimant by CASUK.

10 101. Ms Bell said that whilst there was a dispute as to the date when dismissal had occurred, there was agreement that the employment relationship had ended.

15 102. The claimant said that the meeting was on 4 July 2017. Mrs Barsauckas had said that she was not present in the office that day. She was however present when termination took place on 27 June 2017.

20 103. The claimant's evidence in cross-examination had been that he was only aware of CASUK when his wife noticed a change in the payer on the bank statement. Despite this alleged awareness occurring only at that point, there had been no evidence that the claimant had approached the respondents in relation to the matter. That would suggest, Ms Bell submitted, that this was not a surprise to the claimant. It supported the respondents' evidence that the claimant was aware of involvement of CASUK as his employer as it had
25 been discussed in the office beforehand.

30 104. The claimant had continued in a consultancy role with CASUK until August 2017 after termination of his employment. The claimant's position was that the consultancy arrangement during that time was with Mr Barsauckas as an individual. He said in paragraph 47 of the statement that he would receive £100 per day working on a personal basis two days each week from Mr Barsauckas with Mr Barsauckas guaranteeing payments. Page 119 of the bundle, the schedule of payments produced by the claimant, showed however that the source of further payments during the consultancy period

was CASUK. This did not sit, Ms Bell submitted, with the suggestion that the initial employment relationship had been with Mr Barsauckas or that the consultancy arrangement was with Mr Barsauckas.

5 105. Ultimately only the claimant and Mr Barsauckas could speak directly to any discussion as to the employment relationship.

106. In considering the evidence in that regard, the Tribunal should keep in mind, Ms Bell said, that the claimant referred to the administration of his
10 employment being dealt with by one of Mr Barsauckas' various company interests. There was a stark difference between that and the position of Mr Barsauckas, Ms Bell submitted. Mr Barsauckas was clear that there had been an initial consultancy arrangement between the claimant and WW. That had moved to being an employment relationship. In August 2016 a P45
15 had been given to the claimant with his employment with WW ending and employment with CASUK commencing. That employment with CASUK had terminated on 27 June 2016.

107. In support of the position of the respondents, Ms Bell drew the attention of
20 the Tribunal to the documentation submitted to HMRC. The fact that this documentation had been submitted could not be reconciled with the account given by the claimant. There was also documentation detailing payments made to the claimant, who those were paid by and, in relation to the Law Society, documentation showing WW as the employer.

25 108. Other documentation existed. A statement of particulars of employment was produced by the claimant. Mr Barsauckas said that he had not seen that document until it appeared in the productions for the Tribunal. The claimant had also produced payslips at pages 120 to 122 of the bundle. There were
30 a number of anomalies in relation to those payslips which had been discussed in evidence. Again the respondents' evidence was that these documents had not been seen until they were produced for the PH.

109. Much of the documentation produced by the claimant had been looked at out of context, said Ms Bell. There had been an obvious attempt to manipulate what the documents said to suit the claimant's version of events.

5 110. An example of this could be found in the letter which appeared at pages 191 and 192 of the bundle. That was the letter from Mr Barsauckas to the solicitor. The claimant had said that this letter showed that he was employed by Mr Barsauckas personally in a full-time role. The Tribunal should have regard however to the terms of the letter. It referred in fact to the claimant
10 as in-house solicitor. It referred to contact with the claimant on the basis that he was available Monday to Friday in absence of Mr Barsauckas. The letter had been sent on headed paper of WW. The claimant did not accept that he had misunderstood or manipulated this document to support his reasoning. He did not, or would not, accept that he was only available
15 Monday to Friday in the absence of Mr Barsauckas.

111. A further example could be found in the note of the duties of Luke Barsauckas. That appeared at page 193 of the bundle. The claimant said that Luke Barsauckas worked 5 days each week. The memo in fact showed
20 that he worked 3 days each week. The claimant did not accept in cross-examination that Luke Barsauckas could only seek guidance from the claimant when Luke Barsauckas was in the office.

112. Ms Bell also submitted that the correspondence involving the Law Society at
25 pages 186 to 188 of the bundle illustrated this point. The claimant said that the Law Society accepted that Mr Barsauckas was his employer. That was not however so in the correspondence. The emails referred to another email and to a telephone conversation. There was no record of any call or of that email. It was only the claimant's word as to what might have been said. This
30 was a matter of significance. The claimant was asked in cross, Ms Bell underlined, whether he had taken notes of the conversation. He said that he may have taken such notes. Those had not been produced. His response to questioning on that point was that he had not had access to

5 systems post termination. There were however other documents produced after termination of his employment for that period. The claimant had, in summary Ms Bell submitted, been selective as to what he had produced. That was further illustrated by consideration of the schedule of payments which the claimant had presented. That was said to show all payments. No bank statements however had been produced. That would have been prudent and far better to determine the source of payments. In cross examination the claimant said he had no objection to production of bank statements. The fact was however that he had not produced them for the PH. As a solicitor he was aware of the rules of evidence. The document produced by the claimant was therefore one in abstract, said Ms Bell.

113. There were two occasions raised with the claimant as to when he had misrepresented identity of his employer. At time of renewal of his practising certificate he had represented to the Law Society that WW was his employer. That was a misrepresentation on the basis that his view upon the point was at the time, and was now, that Matthew Barsauckas had been his employer. Also, the letter written to the Registrar of Companies which appeared at page 145 of the bundle saw the claimant state that he was a former employee of CASUK. He also said that he was aware of two other employees who were raising action. In cross examination the claimant sought to explain this as an error of judgment. He was unable to answer the question as to why he could not have explained in this letter that there was a dispute as to identity of his employer. He had also confirmed that the other employees to whom he was referring were Karen MacDougall and Calum Grant. Mr Grant and said in evidence that he was never an employee of CASUK.

114. Ms Bell invited the Tribunal to reject the claimant's evidence as to identity of his employer as being incredible.

30 115. Further, Mr Barsauckas had said in evidence that he was unaware of the correspondence between the claimant and the Law Society. If Mr Barsauckas had been employer of the claimant, the question was why an employee, especially one who was a solicitor, had not informed Mr

Barsauckas as his alleged employer of that correspondence. This was particularly so as the correspondence impacted upon the claimant's ability to perform his role.

5 116. As to the Agency Agreement, the allegation made by the claimant that the signature on the document was not his and therefore was forged was a serious allegation. He had sought to have a handwriting expert's report accepted by the Tribunal. The author of that document was not however a witness at Tribunal. No weight should therefore be given to the allegation
10 made by the claimant and to the report of the handwriting expert. It was not available to cast doubt on Mr Barsauckas' credibility.

15 117. Ms Bell then moved to consider the evidence from other witnesses. Mrs Barsauckas had been credible and reliable. She could only give limited assistance to the point at issue. She had not been a party to the discussion between Mr Barsauckas and the claimant as to the employment relationship or consultancy arrangement. She could however assist regarding payments made during course of the claimant's employment.

20 118. Mr Grant was largely irrelevant to the matter to be determined at this PH, said Ms Bell. He moved in cross examination from his initial position that Mr Barsauckas had introduced the claimant as **his** solicitor. Mr Grant said he had successfully run a business for many years employing some 18 people. He was therefore no stranger to the business and legal world. It was
25 therefore somewhat surprising, Ms Bell submitted, that Mr Grant would think that the claimant, who allegedly was known to him as the personal solicitor for Mr Barsauckas, would be able to assist Mr Grant upon a matter when Mr Barsauckas was involved in the same matter as a company director. Potential conflict existed.

30 119. Other than the reference to the comment made after the telephone conversation as to Mrs Barsauckas not hating the claimant as a solicitor, Mr Grant was unable to confirm to the Tribunal who the claimant's employer had been. It also required to be borne in mind that the relationship between

the claimant and Mr Grant arose from dealings during the claimant's employment. It had been put to both that they had colluded in relation to that evidence, particularly given the Employment Tribunal case in Edinburgh. It was suggested by Ms Bell that Mr Grant's involvement was financially motivated.

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120. Although the credibility of Mr Barsauckas had been attacked during cross examination, he had given clear and concise evidence. He was able to provide a valid explanation for events. He had been involved in the claims industry for some 30 years and had dealt successfully with high net worth claims. Documents supported his version of events.

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121. Ms Bell said that the Tribunal should accept the evidence from Mr Barsauckas as being credible and reliable and find that the employer of the claimant at time of termination of the claimant's employment was CASUK.

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122. Ms Bell then addressed the submissions made by Ms Peat.

123. Ms Peat said that it would not make sense for the claimant to give up employment with CAB based on the finances and the permanency of his job there and to take up employment with the respondents on the terms which the respondents say applied. The evidence from the respondents was however that a 16 hour per week employment relationship suited Mr Anderson. By the time the consultancy arrangement was taken into account he was on an equal or better footing than when employed with CAB.

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124. As to the contract of employment, Ms Bell said it was strange that if the claimant's position was that a written contract of employment was required, that had been no attempt to finalise it. There was no evidence that, having provided it to Mr Barsauckas, there had been any follow-up. There was nothing to support the position as to when the document had first been produced.

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125. It was unclear as to why it had taken the claimant until February 2018 to make an approach to HMRC to clarify the position regarding his earnings. If this was a matter of concern it would surely have been subject of an approach at an earlier point. There was no evidence however of any such approach.

5 **Expenses**

126. The Tribunal was urged not to award expenses in the circumstances. Ms Bell confirmed that she was content that the Tribunal did not take account of ability to pay on the basis that there was no attempt to argue that an award should not be made or should be restricted due to an issue with ability to pay.

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127. It was of relevance that the error in having failed to provide a copy of documents to the claimant's solicitor the day prior to commencement of the previous PH in April 2018 was hers, said Ms Bell. It was not a malicious act. It was human error. The respondents should not be penalised by way of an expenses award being made.

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128. Indeed, said Ms Bell, the claimant had benefited from delay. Ms Peat had been instructed less than a week prior to the earlier PH being set to proceed. The passage of time had enabled both parties to become much more focused on the issues involved. Much of the preparation carried out for the first diet of PH had been undertaken by the claimant himself. The respondents had been caused additional expense by potential witness no longer appearing. There had been some overlap between the previous PH and this PH. If an award was made then a deduction should be made to reflect that, Ms Bell submitted. The same issues had been involved and much of the initial cost would be relevant by way of saving in preparation for this diet.

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Brief reply from the claimant

129. Ms Peat said that the list of tasks in August 2017 reflected tasks which the claimant was asked to carry out at earlier stages. He was not able to obtain access to have to hand documents relative to any earlier period.

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130. As far as HMRC pay information was concerned, the position for the claimant was that he simply did not get those documents. There was no evidence of an independent nature to prove that there had been no fine paid and therefore it could not be established that they had been prepared at the time when payment was due or was made.

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131. As to payments, the claimant's position was that both WW and CASIIK were back-office administrators for payment. That did not therefore relate to the question of identity of employer.

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132. The claimant had accepted that his email to Companies House contained an error in judgment. He had been trying to protect his position. No inference should be drawn from that.

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133. Mr Grant's comment in evidence had been that he did not realise that there was a conflict of interest or a potential conflict of interest. It was clear from his evidence that whilst he was a businessman, he did not understand why there might be such a conflict. No negative inference should be drawn.

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134. Any issue as to hours of work went beyond the question of identity of employer. The hours and any loss suffered would be for a full hearing once the identity of the employer was known. In relation to the contract of employment, the date of 1 May was referred to in the document. Ms Peat said that what had been given to the respondents electronically had the date of creation on it.

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135. It was accepted that there had been a delay by the claimant in taking matters up with HMRC. The claimant had had health issues and had to decide

whether to progress any claim. He also had to obtain documentation and support with any such claim.

5 136. The Tribunal should also take into account in assessing credibility a dispute in the evidence as to when the claimant started employment on a full-time basis. The respondents said that this was April 2015. The claimant said that this was March 2015, specifically 16 March, following termination of his employment with CAB on 13 March.

10 137. The termination letter, page 123 of the bundle, had errors in it. It referred however to difficulty in paying the claimant. That supported the claimant's credibility.

15 138. Ms Peat repeated that it made no sense for the claimant to leave full-time secure work with CAB on the basis of a 16 hour contract with a consultancy arrangement. There was no evidence as to how this arrangement suited the claimant's circumstances. His evidence had been clear that the contract was with Mr Barsauckas and was on a Monday to Friday basis. It involved the claimant doing whatever he was asked to do by Mr Barsauckas. There
20 was no documentation to support a consultancy arrangement. It was accepted that the work which he undertook as a consultant and the work which he did as an employee were the same. The Tribunal should be satisfied on the evidence that a full-time employment arrangement had been arrived at and that the claimant's employer was Mr Barsauckas.

25 **Discussion and decision**

139. There was a substantial amount of hotly disputed evidence presented at this PH. Each party said that the other had prepared and produced documents for the purposes of this PH, those documents not being in existence, it was alleged, during the course of the working relationship between the claimant
30 and whichever entity was ultimately found to have been his employer.

140. The claimant said that the pay slips produced by the respondents as part of the returns to HMRC, pages 51 to 86 and 92 to 111 were in that category. He accepted in cross-examination however that they may have been produced when it was said they were produced, with his evidence being that he did not have sight of these at that time.

141. The claimant also said that the Agency Agreement, which appeared at pages 173 to 185 of the bundle and which had no direct connection to this case bore to contain signatures of the claimant and Mr Grant but that those signatures were in fact forged.

142. The respondents maintained that the statement of particulars of employment which appeared at pages 127 to 133 of the bundle not only had not been received by Mr Barsauckas but also had only been prepared by the claimant for the purposes of this litigation. Likewise, they maintained that the payslips produced by the claimant at pages 120 to 122 of the bundle had been prepared by the claimant for the purposes of this litigation.

143. All of these allegations were extremely serious. As stated, the claimant departed to some extent from his position in respect of payslips. There was no supporting evidence or material in relation to the alleged forged signatures on the Agency Agreement. There was no independent evidence as to when it was that the PDF document comprising the statement of particulars of employment had been passed to Mr Barsauckas, assuming it was in fact given to him. There was no documentary evidence as to when that document had originally been prepared. That was also the position in respect of the payslips produced by the claimant.

144. I comment below on the position with regard to the statement of particulars of employment. That does not however touch upon the question of when the document was actually prepared. I do not have evidence in front of me enabling me to express a view on that. I also do not have evidence which enables me to make a finding, which would be of relevance only in relation to credibility, in respect of the Agency Agreement. I simply have the

accusation and denial. I am not a handwriting expert. I express below my view in relation to the pay slips produced by the claimant. I cannot be definitive about the issue of those being prepared by the claimant, in effect, for his own purposes.

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145. I was faced with two materially different versions of what had happened both to establish the working relationship and as to who the employer was during that working relationship.

10 146. It was said by the claimant that he had become a part-time employee of Mr Barsauckas around October 2014. He had then become a full-time employee of Mr Barsauckas in March 2015, he said.

15 147. I found it very hard to accept that evidence and ultimately did not accept it. I concluded that the claimant had been initially a consultant with and was then employed by WW, with his employer changing to CASUK from late August or early September 2016.

20 148. There were a number of factors which led me to this view. I accept that payment of salary is not sufficient to render the payer the employer of the recipient party. It is, nevertheless, something which weighs in assessment of identity of employer. The claimant was paid by WW during the period of his consultancy and until the end of August 2016. Thereafter he was paid by CASUK during a substantial part of the period after 1 September 2016. That
25 is accepted by him in the schedule of payments he produced at pages 117, 118 and 119. The record of the payer in the period immediately prior to that time in the months leading up to 1 September 2016 and for the 3 months thereafter is, on the claimant's records, shown as Mr Barsauckas. I accepted the evidence from Mr Barsauckas that payment was made at earlier times
30 by a company card with his name upon it, the card being one which meant that WW was paying. It is difficult, without the claimant's bank accounts being present to determine whether the entries in that account document show Mr Barsauckas as paying his wage in the period immediately before

and after 1 September 2016 on that basis i.e. a company card. Production of the claimant's bank statements would have revealed this. It was said in evidence, without any challenge, that the payments at earlier times to the claimant which showed in the claimant's document as having been made by Mr Barsauckas were in fact made on the company card and therefore by WW.

149. It did strike me that the claimant's position in relation to source of payment contained an inconsistency. He maintained that he had been paid at times by Mr Barsauckas himself. The claimant argued that this was consistent with Mr Barsauckas having been his employer. He had also, he accepted, been paid by WW. It would seem consistent with the claimant's position as to the import of payment being said to have come from Mr Barsauckas himself, for the payments made by WW to be regarded as pointing to that entity having been the claimant's employer. That however was not so in the claimant's argument. He said that payment by WW only arose as that company was the "back office administrator" for such a matter. This seemed to me to be inconsistent on the part of the claimant.

150. If the claimant was an employee of WW, he either continued as an employee of that entity beyond 1 September 2016 or he became on 1 September 2016 an employee of CASUK. It was not contended by either party that the claimant had initially been an employee of Mr Barsauckas, and then had become an employee of CASUK in September 2016.

151. The critical times for determination therefore of identity of employer, as to whether that was a limited company or Mr Barsauckas as an individual, were both when the working relationship commenced in October 2014 and when the claimant worked several more hours having left CAB, this in late March or early April 2015. It was also important to determine whether the identity of the employer changed in September 2016 to become CASUK.

5 152. The claimant said that the initial relationship was one of employment, the employer being Mr Barsauckas. The respondents said that there was a consultancy agreement in place between the claimant and WW. Both parties agreed that this relationship ran from October 2014 to March or April 2015.

10 153. I note that in the figures prepared by the claimant which appeared at page 117 of the bundle there are two principal columns. In addition to details as to the date and the description of the transaction, essentially the payer, there is a column detailing "Pay Due" and a further call showing "paid". I further note that in respect of the period from 2 October 2014 to 3 March 2015 there is no entry in relation to pay due. The amount paid detailed for that period varies. Whilst this was not specifically explored in evidence, this seems to me to be more indicative of a consultancy agreement than employment.
15 From 3 March 2015 onwards the pay due is specified as being £507.

20 154. There was no evidence as to Mr Anderson discussing with CAB the fact that, in his evidence, he taken a second job with Mr Barsauckas. It would be anticipated that if secondary employment is obtained or potentially obtained the primary employer would have this notified to them possibly for discussion and/or approval. That might be particularly so where the employment was to be taken up with a party who had used the services of the primary employer. That is perhaps less of a necessity if a consultancy arrangement is involved.

25 155. I attach very little weight to these points given that there was no evidence about them.

30 156. There is however in my view an element of significance that the source of payment was WW. The claimant explained this by saying that WW acted in a back-office administrator capacity making the payment and covering professional membership fees with the Law Society in order to obtain a practising certificate.

157. Such an arrangement might be possible. I do not find it credible however that this is what occurred in this situation. I say that as the claimant himself represented to his professional body, the Law Society, that he was an in-house solicitor with WW. The correspondence with the Law Society clearly proceeds on that basis. The claimant's practising certificate was issued on the footing that he was a solicitor employed by WW. The Law Society correspondence in the email which appears at page 186 and is dated 8 June 2016 proceeds on the basis that WW employs the claimant and that he is an in-house lawyer there. The claimant's position was that he had explained the situation to the Law Society i.e. that he was not an employee of WW. He said that this was something which had occurred on the telephone. This seemed to be at odds with the email of 16 June which appeared at page 188 where it is said by Mr Cullen, registrar of the Law Society of Scotland, that the claimant confirmed in a full discussion that he was the in-house solicitor for all the companies defending the court actions. That does not therefore leave room as I see it for the claimant's position to have been in course of that call that he was in fact employed by Mr Barsauckas. The claimant said that there may be notes of the conversation and that those were not present before the Tribunal. He said that the fact that the email from the Law Society said that he was solicitor for all the companies supported him in his position that he was employed by Mr Barsauckas.

158. What is clear is that the Law Society did not at any point alter the records to proceed on the basis that Mr Barsauckas was in fact employer of the claimant. It seems to me that they might have done this if the claimant had stated that to them as being the position, even had it been the case that for whatever reason WW was meeting the costs of renewal of his practising certificate.

159. I was satisfied that the claimant had represented to his professional body that he was employed by WW. It was the claimant who had dealt with the Law Society and with them in particular in relation to renewal of his practising certificate. Further, I was not particularly impressed by his evidence in cross-

5 examination defending that scenario and maintaining that he had not misrepresented the position to the Law Society. He maintained that he was employed by Mr Barsauckas. Any correspondence from the Law Society, both by email and letter, was not however to that effect. It proceeded on the basis that the claimant's employer was WW. The claimant said that the Law Society was aware that his employer was Mr Barsauckas. I did not find that to be a credible position given the references both in the addressee of correspondence and in the body of emails to the claimant being employed by WW. The claimant himself had completed forms for renewal of his practising certificate. Those confirmed WW as his employer.

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160. Although it was said for the claimant that Mr Barsauckas had not notified the Law Society of the change in employer from WW to CASUK (thereby supporting their position that there was no change in employer, it was said), it did not seem to me on the evidence that this notification would have been expected to have come from Mr Barsauckas. The claimant dealt with the Law Society on such matters.

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161. Another highly relevant document was the letter written by the claimant to the Registrar of Companies. This related to CASUK. The letter appeared at page 145 of the bundle.

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162. The claimant said that this letter was written when he was pursuing the current Tribunal claim. He wished to preserve the position and to prevent strike off of CASUK at that point. He stated in clear terms

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I am a former employee of the above named company"

163. He does not say that there is a dispute over the identity of his employer and that there is a risk that the Tribunal might find that he was employed by CASUK. His position to this Tribunal is of course that he was not a former employee of CASUK. He says to this Tribunal that he was an employee of Mr Barsauckas. I regarded it as of significance that the claimant had made the statement he does in this letter. He went on in the letter to state that he

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was seeking an award from the Tribunal for unlawful stoppage of wages and unfair dismissal. He says if striking off continued that he would be deprived of the opportunity to seek redress against the company for quite substantial sums of money and for breaches of his employment rights. The claimant is a solicitor. In my view it is highly relevant and significant that he writes in those terms adopting the clear position that CASUK were his employers. He conceded in cross-examination that the statement that he was a former employee of CASUK was misleading given that that was not his position. He goes on in the letter to say that he is aware of at least two further employees of the company who were currently raising actions against it. There is some doubt as to the accuracy of that statement. When asked about this in cross examination, the claimant said that he meant to say that the action to which he referred had been raised against Mr Barsauckas' companies. He accepted that the statement in the email to the Registrar of Companies was not correct. Mr Grant said in evidence that he was not an employee of CASUK. The claimant described his correspondence with the Registrar of Companies in this email/letter as an error in judgment.

164. The claimant pointed to the statement of particulars of employment which he said had been given to Mr Barsauckas on a memory stick, without reply or response from Mr Barsauckas. I was unable to come to any view as to when this document was produced to Mr Barsauckas or even if it was. There was no information before me as to when the PDF was created or when the original document was created. The position of the claimant was that he commenced employment, albeit on a part-time basis, in October 2014. He described in his evidence in chief that in the first few months of his employment he "*continually reminded*" Mr Barsauckas that a set of terms and conditions of employment were required. He goes on to describe being asked by Mr Barsauckas to prepare terms and conditions if it was felt by him to be really necessary. He then states that he drafted a set of terms and conditions based on his agreement with Mr Barsauckas. He says he signed the hardcopy. Interestingly, his evidence is that the electronic copy was

given to Mr Barsauckas on a memory stick. There is no electronic trace therefore of the document going to Mr Barsauckas.

5 165. I am asked to accept that something which appears to have been of significance and importance to the claimant was put on a memory stick and given to Mr Barsauckas but that no chasing up whatsoever was done by the claimant to try to pin down Mr Barsauckas. This is despite the claimant's evidence that he had earlier "*continually reminded*" Mr Barsauckas of terms and conditions being required. Had a copy been sent by email or a reminder
10 written that would have been far more persuasive in establishing that Mr Barsauckas had a copy of the statement of particulars of employment.

15 166. I do not regard myself as able, on the evidence, to come to the conclusion that the statement of particulars of employment was in fact prepared by the claimant and sent to Mr Barsauckas. At best, even if sent, it would be a reflection of what the claimant may have understood to be the position. It would not establish identity of employer. Further, and in any event, looking at the document (pages 127 to 133 of the bundle) I note that it is said to set out particulars of employment as at 1 May 2015. It says in clause 1 that
20 employment commenced on 16 March 2015. That is however the date when, on the claimant's evidence, full-time employment commenced. The claimant's position at Tribunal is that he became an employee of Mr Barsauckas in late September/early October 2014. He worked on a part-time basis from that time through till March, then becoming a full-time
25 employee. The statement of particulars of employment does not therefore square with employment commencing as the claimant now alleges occurred.

30 167. The claimant says that he discussed this position with Rebecca Barsauckas saying that he had passed a copy of the statement of particulars of employment to her father and that she and the claimant had joked about her father's lack of organisation and carelessness in relation to matters of this type and electronic/computer documentation. Ms Barsauckas was not led by the claimant as a witness to any such alleged conversation.

168. I accept that Mr Barsauckas is, in effect, the corporate entities WW and CASUK personified. He is the main owner and driving force. It seems to me that the claimant may have misinterpreted the working relationship on the basis that he was in effect “answerable” to Mr Barsauckas. Alternatively,
5 and viewing the matter less favourably from the claimant’s point of view, he may have appreciated that there was little prospect of success in recovery of any funds from the limited companies, leading him to argue that Mr Barsauckas as an individual was his employer.
- 10 169. In addition to the foregoing matters, I regarded there as being other material which caused me concern as to the interpretation placed on events by the claimant.
- 15 170. In his statement he said that Luke Barsauckas was employed five days per week. He referred to the memo at page 193. That memo was clear in saying that Luke Barsauckas was employed for three days each week.
- 20 171. More significantly, perhaps, the claimant referred, as support for the view that he was employed by Mr Barsauckas, to the letter which appeared at pages 191 and 192 of the bundle. He said in his evidence in chief that this letter was sent “*clearly showing I was in his (Mr Barsauckas’) employment*”. The letter in fact said no such thing. It said exactly the opposite. It was written on WW headed paper and bore to come from Mr Barsauckas as the managing director of that entity. It referred to the claimant as being *in-house solicitor*.
25 It also did not, as the claimant stated in his statement it did, say that the claimant was working full-time Monday to Friday and acting on behalf of Mr Barsauckas. Rather it said that in the absence of Mr Barsauckas the claimant was available Monday to Friday.
- 3U 172. Despite the fact that Mr Barsauckas appeared to me to be, as mentioned above, the personification of the limited companies and quite a forceful personality, I could not see a basis on which it could properly be established, on the balance of probabilities, on the evidence I heard that he was employer of the claimant.

173. Insofar as it might be said that payments had been made by Mr Barsauckas, those payments had been made on a company card when Mr Barsauckas was the individual named as authorised on the face of the card.

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174. I accepted that the claimant had had, what seemed to me on the evidence to be very limited, involvement in a dispute between Mr Barsauckas' daughter and the University she was attending. I saw no evidence of a mandate being in place in that regard. There may or may not have been such a mandate. I did see evidence of other mandates at pages 210 to 213 of the bundle authorising WW to act in particular matters. Even if there was no mandate in place in relation to Ms Barsauckas and the University dispute, the extremely limited involvement of the claimant in that matter personal to the Barsauckas family did not render Mr Barsauckas employer of the claimant. There was no widespread involvement on the part of the claimant in any personal matters on behalf of of Mr Barsauckas. This was the only specific matter mentioned. There was also evidence that Mr Barsauckas used the services of two firms of solicitors to conduct his personal business.

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175. The claimant's evidence was that he had only ever received three pay slips. He said those were the ones which appeared in the bundle at pages 120 to 122. He is quite clear in paragraph 44 of his statement that throughout his employment he received only three pay statements. In cross-examination however he said that there may have been more and that his wife found the three pay slips which he had produced. This change in the position of the claimant undermined his credibility and reliability.

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176. The respondents said that they did not recognise these pay statements produced by the claimant. I am unable to determine when those pay statements were produced and whether they were prepared by the claimant or not. Ultimately that is not relevant to the decision as to identity of employer. The claimant produced them, as I understood it, on the basis that they showed running totals in respect of pay at a level which supported his

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position that he had been employed on a full-time basis since March 2015 at an annual salary of £35,000.

5 177. It would seem odd that the respondents submitted returns to HMRC reflecting payment on the basis of the salary they state was agreed with the claimant, also paying him a consultancy fee, yet at the same time produced monthly payment statements showing the claimant as earning substantially more than was shown in the real-time returns to HMRC. The letter which the claimant received from HMRC of 14 February 2018, pages 125 and 126
10 of the bundle, reflects the income paid to the claimant by WW as being in line with the real-time pay information given to HMRC by WW and subsequently CASUK. If the pay slips produced by the claimant were issued to him by WW, as he claimed, then they would be at odds with that information and indeed at odds with the tax paid to HMRC and the national
15 insurance contributions paid by both employer and employee. It is difficult to imagine why the respondents would have produced those pay slips. The pay slips in question refer to payment method being by BACS. Payment was not however made by that method. They all contain reference to pay period being "MT. It would be anticipated that each time the payslip was
20 issued the pay period would be updated.

178. The claimant's evidence in this area was unconvincing. Put simply, there must be doubt surrounding the pay slips at pages 120 to 122 having been produced by the respondents. The letter of 14 February 2018 from HMRC
25 provided support for the view that the returns said to have been made by WW and CASUK on a real-time basis and the information contained therein had indeed been submitted to HMRC.

179. Turning to that evidence and those documents produced by the
30 respondents, it was unclear to me on the evidence whether the claimant did or did not receive copies of those pay statements. His position in paragraph 45 of his statement was that he believed the documents which the respondents had produced were prepared by Mr Barsauckas after dismissal

of the claimant. In cross-examination he accepted that it might be the case that those documents were produced at the times they bore have been produced. His position became that he did not receive copies of them at the relevant time. This change in his position further undermined his credibility and reliability.

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180. There was no evidence of the claimant having taken issue with the P60s given to him. He said that he did not receive pay slips as the respondents had produced those after the event. It was said in submission on his behalf that there had been no evidence produced that a fine had not been imposed upon the respondents for late submission of these documents. In many ways it is difficult to vouch negative i.e. non-payment of a fine. I accepted the evidence from Mrs Barsauckas that there had been no such fine imposed. She was the person who give evidence about completion of the real-time returns. That evidence was accepted by me as being credible and reliable.

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181. The statement of Mr Grant saw him say that Mr Barsauckas introduced the claimant as his solicitor. Slightly further on in the statement Mr Grant said that Mr Barsauckas made it clear at initial meetings and on a number of other occasions that he employed the claimant as his solicitor. He then referred to overhearing Mrs Barsauckas on a telephone call raising her voice. Mr Barsauckas was said by him to have commented that his wife he hated all lawyers bar one, being the one that he personally employed.

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182. When Mr Grant gave evidence under cross examination however, he was far less clear on this. He said that Mr Barsauckas had mentioned to him that the claimant was employed. He himself had remarked at that point that he thought the claimant was a partner of Mr Barsauckas. When asked as to whether Mr Barsauckas had said by whom the claimant was employed Mr Grant replied "*not that I can recall*" He later said that he did not know if the claimant had been employed a personal basis or by one of the companies of Mr Barsauckas. He repeated his evidence as to Mr Barsauckas having commented that his wife hated all lawyers apart from the one that he

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personally employed. Towards the end of his evidence when talking about a time in September 2017 Mr Grant said that he knew that the claimant was not *“with the company any longer”* It was also put to him as the final point in cross-examination that the claimant was an in-house solicitor with WW. His reply was *“maybe he was”*,

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183. Given the departures from a clear and definite position in his statement that the claimant was an employee of Mr Barsauckas as an individual, having been introduced to him on that footing as set out above, I had severe reservations as to the reliability and to an extent credibility of Mr Grant on this point. It seemed to me that I was left ultimately with his evidence that Mr Barsauckas had referred to the claimant as the solicitor personally employed by him. I was surprised that the words were remembered with as much precision by Mr Grant. I did not regard them as particularly persuasive in my assessment of the identity of employer given Mr Grant's departure from the terms of his statement, his concession in cross examination mentioned above and my assessment of the likelihood of these precise words being specifically recalled.

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184. I was satisfied on the evidence that after initial consultancy period during the time of his continued employment with CAB, the claimant had become an employee of WW. That occurred in March or April 2015.

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185. It was contended for the claimant that if I was to conclude that he had been an employee of WW, I should also find that his employer at date of termination of his employment remained WW.

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186. The basis of this proposition seems to me to be that the claimant was unaware of any change of employer. He certainly did not point to any basis on which it could be argued that if his employer initially was WW, that had changed so that it became Mr Barsauckas.

187. The evidence I heard was to the effect that there had been a close working relationship between the claimant and Mr Barsauckas. Mr Grant had

assumed that they were partners in a business. Further evidence from both parties was that the office space involved was small with there being four desks contained within one room. The claimant said that he was aware of the formation of CASUK and that he was aware of a number of companies operated, effectively, by Mr Barsauckas.

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188. Given the points just mentioned, I found it impossible to accept that there had been no discussion between Mr Barsauckas and the claimant as to CASUK and that entity effectively taking over from and assuming the work of WW. I accept that there was no evidence of any TUPE discussion. The claimant said that if he had been aware of any change of employer between WW and CASUK he would have given Mr Barsauckas advice on the need for consultation and to follow procedures in relation to TUPE. It is not maintained for Mr Barsauckas, WW or CASUK that there has been a "fresh start" by the claimant as a new employee with zero service in September 2016. Continuity of employment is accepted by the respondents.

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189. I concluded that the claimant was employed by CASUK from 1 September 2016 and that he was aware of the change of employer. He did not query, on his evidence, the payment source. He received a P60 from CASUK without challenging that. I realise that his position was that whether WW or CASUK were involved in issuing P60s or in being the source of payment to him, they were not his employer. Nevertheless, if the claimant was unaware of the unheralded involvement of CASUK I cannot imagine that he would not have raised that in some fashion with Mr Barsauckas or Mrs Barsauckas. There was no evidence that he had raised any query in this regard.

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190. In addition, of course, there is the claimants letter to the Registrar of Companies. That is the document at page 145.

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191. Whilst I understand the purpose of that letter, namely to avoid CASUK being struck off, I find it somewhat astonishing that the claimant makes that request on the basis of a clear statement that he is a former employee of the company, if that was not in fact his view of matters. The claimant is a

qualified solicitor. He is an intelligent person. Whilst he said that he was dyslexic and had difficulty with accuracy in words and spelling to a degree, this is not an example of a statement attributable to being affected by dyslexia. It is a clear statement that he was a former employee of CASUK.

5 He could have explained that he had a potential interest in that in litigation there was a dispute as to whether he was or was not employed by CASUK. He chose however to represent himself as being a former employee of that company. When challenged in cross examination, the claimant said he had been told on the telephone by Companies House that he could not say in his

10 letter that he was "*potentially*" an employee of CASUK. I found that hard to accept. He makes no reference to any such prior telephone call in the letter he sent. The claimant went on to say in cross examination that although he said he was an employee of CASUK he did not actually mean that.

15 192. In this letter he also referred to seeking redress against CASUK in the Tribunal claim for unlawful stoppage of wages and unfair dismissal. He went on to say that he was personally aware of two other former employees of the company who were currently raising actions against the company. That again was not correct.

20 193. At the very least from the claimant's point of view this letter in my view substantially dented his credibility and reliability. At worst it "*gave away*" the reality of the situation in that in his own words he is stating that he was a former employee of CASUK.

25 194. When the claimant's employment terminated, whether at the end of June or beginning of July is difficult to determine and is not of any significance in relation to this element of the case. It was terminated by CASUK, looking to the letter confirming termination. That letter, page 123 of the bundle,

30 appeared on CASUK headed paper. It was signed by Mr Barsauckas as a director of the company. The claimant's P45 was given to him. That again referred to the employer as CASUK. The claimant's evidence was that he had notified a complaint to HMRC following receipt of this P45. That was at latest in early July 2017. He believed that HMRC were looking into the

situation due to that. On it being put to him that the respondents had not heard from HMRC in relation to this matter, the claimant said that he believed that there would be an approach made to them. He confirmed that he had not written to HMRC, with any contact being by telephone. I found it hard to accept that a complaint had been notified to HMRC, particularly given the absence of reference to that in the letter from HMRC of 14 February 2018 and the absence of any contact with CASUK by HMRC.

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195. Somewhat strangely in many ways, a consultancy agreement, verbally constituted, was entered into thereafter. The claimant's position was that the consultancy entered into was with Mr Barsauckas. He said in his written statement in paragraph 47 that he was to be paid £100 per day worked by him. He accepted in evidence that payments made to him for this time were made by CASUK. It was of significance in my view that the claimant went on in his statement to say about Mr Barsauckas *"Moreover, he would guarantee payments."* If the agreement to act as consultant was with Mr Barsauckas then Mr Barsauckas would be personally liable for any payments under that agreement given that it was with him as an individual. When asked about this in cross examination, the claimant said that Mr Barsauckas had suggested the original agreement apply with the limited company being responsible for payment and administration. That did not seem to me to address the basic point. If the original agreement was with Mr Barsauckas as an individual then whatever payment arrangements might be made in the background, the claimant could ultimately turn to Mr Barsauckas and enforce payment. Given that the arrangement was one of consultancy, the identity of the party entering into such a consultancy agreement with the claimant is not critical to determination of who was the employer of the claimant. The claimant's evidence however suggests to me a distinction in his own mind between the situation after the end of June or beginning of July 2017 and the situation in terms of the consultancy agreement when it comes to liability for payment of wages. There would however be no such difference if Mr Barsauckas had been his employer in the period to termination of his employment. I accept that responsibility for

arrangements for administration and payment would have been with the limited company on the claimant's evidence. Nevertheless there would in effect have been a guarantee from Mr Barsauckas if Mr Barsauckas was in fact the claimant's employer, as the claimant maintained was the case.

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196. This evidence therefore to me pointed away from Mr Barsauckas having been the employer of the claimant.

197. There were two other relatively minor elements which led me to doubt the reliability and credibility of the claimant.

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198. Firstly, he said that in discussion as to whether he would join Mr Barsauckas and his companies in late 2014, Mr Barsauckas had referred to the fact that he would be setting up his own business in a very short period of time. That however did not square with the fact that WW was incorporated in 2012.

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199. Secondly the claimant gave evidence in chief that his role with CAB was to provide legal advice and provide appropriate representation. He later said in cross examination that he was in fact a manager within CAB. That was not as he had described his role in the early part of his evidence. It was therefore a variation on his evidence. The context in which he gave that varied evidence was also of significance in my view. He gave this evidence when an apparent contradiction between his positions in paragraphs 6 and 13 of his statement was pointed out to him. Paragraph 6 referred to CAB having increased staffing levels and financial backing. Paragraph 13 however saw him refer to a lengthy period of notice being given by him to CAB due to a lengthy recruitment process being necessary to find his replacement. It was put to him that increased staff numbers yet a lengthy process in securing a replacement for him did not sit well together. It was only at this point that he said that he had held a managerial post within CAB.

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200. This to me seemed a surprising turn in his evidence. In my view it undermined his credibility and reliability in that his position seemed to me to be inconsistent.

201 . There was evidence about the Agency Agreement said to contain signatures which had been forged. That allegation was strongly disputed by the respondents. A handwriting expert's report had been obtained by the claimant. The expert was not present to speak to the agreement and I had no information as to her qualifications, the background documentation given to her to allow her to assess the position and to express a view and indeed as to the quality of the document itself to which she had access. The document was of relevance only in relation to credibility. It does not of itself assist determination of identity of employer. The claimant made a telephone call with a view potentially to arranging attendance of the author of the report as a witness. Arrangements could not be made however and it was confirmed to me on behalf of the claimant that it was accepted that the report would not be available and before me for the PH. Accordingly, all I had was the allegation that it contained forged signatures and the denial of that. Stating the obvious, and as mentioned above, I am not a handwriting expert and would not have been able to form a view upon the authenticity of the signatures of otherwise. I was not asked to do that.

202. For all of the foregoing reasons I came to the view that on the balance of probabilities the claimant had been employed initially by WW and subsequently, and until date of termination of his employment, by CASUK. It seemed to me that it might well have been the case that the claimant was somewhat naive in his dealings and actings. Equally Mr Barsauckas struck me as a fairly hard-headed and "savvy" businessman. Whatever the reality, as mentioned, I came to the view that on the balance of probabilities the claimant's employer was as just mentioned, WW and thereafter CASUK.

Expenses

203. The application for expenses related to the abortive PH set down for 25 and 26 April 2018. The reason that the PH could not proceed was that statements had not been provided to the claimant's solicitor as had been ordered.

204. The Order issued after the case management PH on 15 February was that witness statements would be exchanged between parties no later than 14 days prior to that PH. That was in terms of the Note and Orders dated 16
5 February 2018. Signed and dated statements referring to the bundle with appropriate page numbers where documents were mentioned were to be lodged with the Tribunal no later than 7 days prior to the PH.

205. Witness statements, albeit unsigned, were lodged by the claimant prior to
10 the reading day set down for 24 April, being delivered to the Tribunal on 18 April. That was the day on which the claimant instructed a solicitor, an email from the claimant's solicitor confirming that as being the case.

206. On 11 April the respondents had sent to the claimant statements from the
15 proposed witnesses. There were in fact two versions of a witness statement from Mr Barsauckas. The statements from Mr Barsauckas and that from Mrs Barsauckas were not signed nor did they make reference to particular page numbers in the bundle when referencing productions. A copy of
20 whatever was intended to be the final statement of Mr Barsauckas and signed statements, containing reference to page numbers of documents mentioned in the statements, was sought urgently by the claimant's solicitor by email of 24 April timed at 11:26. At 13:20 that day the solicitor for the
25 respondents emailed the Tribunal enclosing final statements, which contained references to appropriate page numbers of documents in the bundle. In addition documents which had not previously been included within the bundle, including a transcript of a telephone call involving a potential witness, were emailed on the basis that it was proposed that they be accepted as productions. Unfortunately this email was not sent or copied by the respondents' solicitor to the claimant's solicitor.

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207. At time of the PH the respondents wished it to proceed. Ms Bell apologised for the fact that the email of 13:20 on the preceding day had not been copied to the claimant's solicitor. Her position was that the claimant himself had the statements prior to his involving a solicitor. They had therefore been

available for some time. It was her view that the transcript was relevant in relation to credibility of a witness. The Note of the PH records at paragraph 8 that the solicitor for the respondents, Ms Bell, explained at the PH that the failure to obtemper the Order was "*due to late instruction from her clients and also as a result of oversight on her part*" Ms Peat was however of the view that she did not know of the finalised statements until time of the PH. She required to consider what they contained. She also required to consider the transcript and to take instructions. There was potential prejudice to the claimant. The possibility that an award of expenses would be sought was "flagged up" at that point.

208. I decided in the circumstances that it was in the interests of justice to postpone the hearing set down for 25 and 26 April. Fresh Orders were made and the diet of PH was set down for 19 and 20 June.

209. It was therefore accepted that the Order had not been met. That remained the position of Ms Bell at this PH, as recorded above. In her submission in relation to expenses Ms Bell said that the failure was hers in not including Ms Peat in the email sent 13:20. It seems to me however that the failure went beyond that. The failure was in meeting the terms of the Order by not having finalised statements with appropriate references by page number to documents in the bundle intimated by 11 April. Had the finalised documents been in the same terms as the statements which apparently were intimated by the respondents to the claimant himself on 11 April, there might not have been such an issue. Given the fact that there were differences between the statements intimated on 11 April and those intimated on 24 April, it was understandable that there was prejudice to the claimant if the PH set down for April proceeded.

210. As stated in Rule 76 (2) an Order for costs may be made where a party is in breach of an Order or where a hearing has been postponed on the application of a party. In my view the appropriate "touchstone" is that of the interests of justice.

211. Whilst it was appropriate for Ms Bell to acknowledge that her oversight had contributed to and perhaps highlighted the issue in that the finalised and signed statements referring to page numbers in the bundle only became available immediately prior to the PH commencing, in her submission at time
5 of the PH in April she mentioned not only that as being a reason for failing to meet the terms of the Order but also late instruction from her clients as being an element contributing to the failure.
212. A diet of PH was lost. Preparation time was incurred on behalf of the
10 claimant in circumstances where it was not then put to use by the PH proceeding. Ms Peat estimated the amount of time in preparing for the PH in April as being more than 14 hours. She put a value on this of £2256 plus VAT. She accepted however that elements of preparation for the PH in April were of relevance to the PH in June and therefore saved that time being
15 spent in preparing for the PH in June.
213. It does seem appropriate to me to make an award of expenses in
20 circumstances where the Order was not met and where there were consequences as a result of that in that the diet was abortive and preparation time was, to an extent, unnecessarily incurred. I say to an extent as preparation for the diet in April would stand in good stead as a starting point when it came to undertake preparation for the diet in June with which this Judgment is concerned.
- 25 214. On express confirmation from the respondents, I do not require to consider their ability to pay in determining whether to make an award of expenses or in determining the amount of any such award.
215. This was not a situation where no statements were produced. Whilst there
30 were some changes between the draft statements which the claimant had been sent and the finalised statements produced, it was not said that those were major. In my view, from what I was told, there would be quite a substantial overlap between preparation for the PH in April and that ultimately undertaken for the PH in June. No detailed account of expenses

was produced. On the basis of more than 14 hours (though presumably less than 15 hours) of work resulted in a figure of £2256 before application of VAT, I have taken the hourly rate applicable to be £160, in round terms. It seems to me that it might be the case that approximately five hours of work was involved which might require to be repeated or which was peculiar to the diet in April. In other words, some 9 hours of work carried out for the April diet would be of relevance to the June diet. Put another way, five hours extra work has resulted from the failure to meet the Order and the consequent postponement of the April PH.

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216. I appreciate that this is a somewhat "rough and ready" view on the amount of any expense which is to be awarded. I had however relatively little information before me to make this assessment.

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217. In the circumstances I find that the extent of expenses to be awarded as payable by the respondents CASUK, the employer of the claimant at time of dismissal as has been found, to the claimant is £800 together with VAT if applicable.

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218. I believe that hearing dates should now be set down. The Clerk to the Tribunals is requested to send to parties* representatives date listing letters so that appropriate arrangements can be made.

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Employment Judge: R Gall
Date of Judgment: 11 July 2018
Entered in register: 25 July 2018
and copied to parties

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