EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Kotonou-Ramnarain**

Respondent: **Accountancy Business Centre Digital Limited**

Heard at: **London South Employment Tribunal (by CVP)** **On:** **11 and 12 August 2022**

Before: Employment Judge T Perry

Representation
Claimant: Ms R Paterson (Free Representation Unit)
Respondent: Ms K Bailey (counsel)

JUDGMENT

1. The Claimant's claims of unfair dismissal, wrongful dismissal, failure to pay holiday pay and failure to provide employment particulars fail and are dismissed.

REASONS

Claim and issues

2. The Claimant brings claims of unfair dismissal, wrongful dismissal, failure to pay holiday pay and failure to provide employment particulars.

3. The issues for the Tribunal to decide are as set out in the record of Preliminary Hearing before Employment Judge Curtis held on 11 May 2022 and are attached at the back of this judgment.

4. At the start of the hearing the parties confirmed there were no outstanding applications.

Evidence

5. The Tribunal was provided with an agreed final hearing bundle running to 398 pages. The Claimant provided a further annex to the bundle of 11 pages. The Respondent did not oppose these pages being added to the final hearing bundle. The Tribunal also

had access to a skeleton argument from the Respondent with a bundle of authorities.

6. The Claimant gave evidence from a witness statement. The Tribunal was also provided with a witness statement from the Claimant and skeleton argument used at the Preliminary Hearing before Employment Judge Curtis held on 11 May 2022.

7. For the Respondent, Ms S Herrera, Mrs K McLaren, and Ms D Gamino gave evidence from witness statements.

Findings of fact

8. The Claimant's late husband, Mr Angelis (known as Andy) Kotonou, ran an accounting business under the trading name Accountancy Business Centre.

9. The Claimant initially met Mr Kotonou in around 2001, when he was married to his first wife. The Claimant and Mr Kotonou began a romantic relationship.

10. In 2001 Mr Kotonou incorporated Accountancy Business Centre UK Limited (ABC UK).

11. The Claimant alleges that she started working for ABC UK formally in 2002 having previously assisted Mr Kotonou informally.

12. The Claimant's National Insurance record shows that she earned £3,600 in tax year 2002-2003 and had no earnings between tax years 2003-2004 and 2007-2008. Between tax years 2008-2009 and 2011-2012 the same record shows the Claimant earnt £5,400 per annum. The Claimant's P60 certificates show that she earned £5,400 from ABC UK between 2012-2013 and 2018-2019.

13. The Claimant's incomplete bank statements show her receiving "ABC Salary" of £450 in some months from August 2010 to February 2019. There are large gaps in these records. The Claimant herself confirmed in evidence that there were months when she was not paid salary. Her evidence was that she would say to Mr Kotonou that "he could leave it for that month" if ABC UK's finances were stretched.

14. In November 2017 Mr Kotonou wrote a reference letter for the Claimant stating that she had been employed for 15 years and that her job title was Accountant's Assistant.

15. In March 2018 Mr Kotonou was diagnosed with stage four colon cancer.

16. In October 2018 the Respondent company, Accountancy Business Centre Digital Limited, was formed. Ms Villa-Herrera was the sole director of the Respondent.

17. In around April 2019 there was a transfer under the Transfer of Undertakings

(Protection of Employment) Regulations 2006 (as amended) and the staff of ABC UK moved over to the Respondent.

18. From 1 May 2019 the Claimant was paid by the Respondent via payroll (for the period from April 2019) at a rate of £451.55 per month. The Claimant was listed as employee number 2. The payslips record the Claimant working 55 hours per month.

19. In May 2020 the Claimant was put on furlough and her payments reduced to £361.24 per month. It is clear from the later correspondence where she asks for his instructions, that it was Mr Kotonou and not Ms Villa-Herrera who made the decision to put the Claimant on furlough. No other member of the Respondent's staff was put on furlough at any point.

20. In July and August 2020 Mr Kotonou was in hospital having an operation. Into August 2020, Mr Kotonou was still engaging with Ms Villa-Herrera by email and WhatsApp and was continuing to be engaged with work issues such as payment of staff.

21. On 1 August 2020 Mr Kotonou executed a codicil to his will which provided for a monthly wage payment of £1000 net of taxes to the Claimant "paid as an expense" commencing after his death. There is no mention of the Claimant being required to do any work to receive this money.

22. On 3 August 2020, in relation to the Claimant's wages, Mr Kotonou simply stated in a message to Ms Villa-Herrera "leave Sam".

23. During August 2020, Ms Villa-Herrera pushed for a meeting with Mr Kotonou regarding the business. From around mid August 2020 the Claimant exchanged some text messages with Ms Villa-Herrera regarding arranging a meeting.

24. On 5 September 2020 Ms Villa-Herrera met with the Claimant and Mr Kotonou. The Claimant recorded this meeting on her mobile phone. Transcripts of sections of the video were provided in the bundle. The Claimant alleges there is not one long recording because her phone's memory became full. I do not accept this explanation and consider that, on the balance of probabilities the Claimant either only recorded parts of the meeting she wanted recorded or that the recording has been edited. Either way, I do not accept that the transcript provided by the Claimant is an accurate record of all that what was discussed at the meeting nor that it is presented chronologically.

25. It does appear that at this meeting there was a discussion of Mr Kotonou transferring the business to Ms Villa-Herrera and that the Claimant would be paid £1000 a month. I accept Ms Villa-Herrera's evidence that in response to this suggestion, she asked

why the Claimant should be paid money without doing any work when Ms Villa-Herrera would need to pay a qualified accountant also after Mr Kotonou's death.

26. In September 2020 Ms Villa-Herrera and the Claimant began to exchange more correspondence via WhatsApp. There were discussions about providing client paperwork kept in Mr Kotonou's home office, ordering ink for Mr Kotonou's printer, and the amount of the Claimant's salary payments. The Claimant reported looking for documents asked for by Ms Villa-Herrera but being unable to find them as "he [Mr Kotonou] has hundreds of files." I find that the Claimant was not familiar with or able to locate Mr Kotonou's individual files or information contained therein.

27. On 22 September 2020 Mr Kotonou signed a letter to Ms Villa-Herrera stating that immediately after his death the Claimant would receive £1,000 a month net of taxes and would become a second signatory of the bank account.

28. On 28 September 2020 Mr Kotonou died.

29. In early October 2020, the Claimant told Ms Villa-Herrera that she had a power of attorney over Mr Kotonou's accounts. Ms Villa-Herrera asked the Claimant to transfer money to the Respondent's accounts to pay wages. When this was not possible, on 4 October 2020, the Claimant loaned the Respondent money to pay wages. On 19 October 2020 the Claimant started to ask for this loan to be repaid. Ms Villa-Herrera ceased replying to the Claimant's messages.

30. On 7 October 2020 Ms Villa-Herrera sent an email to the clients of ABC UK inviting them to continue working with the Respondent. This email invited the clients to change their standing order mandates to the Respondent's accounts.

31. Mr Kotonou's funeral took place on 22 October 2020.

32. On 31 October 2020 the Claimant emailed Ms Villa-Herrera to ask to meet regarding the business. The Claimant stated "I do not claim to know much about the current state of the business."

33. On 6 November 2020 Ms Villa-Herrera replied to state that she was not involved in ABC UK and that she was unable to assist the Claimant.

34. On 13 November 2020 the Claimant asked Ms Villa-Herrera for her p60 and payslips. The following day, the Claimant said she needed her p45.

35. On 16 November 2020 Ms Villa-Herrera provided the Claimant with a p45 form showing the leaving date from the Respondent as 1 October 2020.

36. On 17 November 2020 the Claimant wrote to Ms Villa-Herrera asking that the loan be repaid and asking why she did not receive wages on 1 October 2020. The Claimant accused Ms Villa-Herrera of taking ABC UK's clients for free.

37. On 25 November 2020 the Claimant wrote to the business' clients denying that Ms Villa-Herrera represented Mr Kotonou and inviting the clients to work with a different accountant, Mr Arjun.

38. On 21 December 2020 South West London Law Centres sent a letter on behalf of the Claimant regarding repayment of the loan made for payment of salary.

39. On 27 December 2020 the Claimant contacted ACAS to commence early conciliation. The Claimant obtained an early conciliation certificate on 11 January 2021.

40. The Claimant submitted her ET1 claim form on 2 March 2021.

41. In February, March and May 2022 a number of Mr Kotonou's purported clients wrote letters stating that the Claimant had assisted them to make appointments with Mr Kotonou, had attended those appointments, and had travelled abroad with Mr Kotonou to visit clients.

The Law

42. Section 230(1) Employment Rights Act 1996 (ERA) defines 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. S.230(2) ERA provides that a contract of employment means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.

43. Section 230(3) ERA defines a 'worker' as an individual who has entered into or works under (or, where the employment has ceased, worked under):

    43.1. a contract of employment ('limb (a)'), or

    43.2. any other contract, whether express or implied and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual ('limb (b)').

44. To be either a worker or an employee an individual must work under a contract.

45. Common law rules governing the formation of contracts are relevant in cases such as

this one to determine whether a valid contract of any sort exists.

46. For a contract to exist, several conditions must be satisfied. There must be an agreement (usually consisting of an offer which is then accepted) made between two or more people, the agreement must be made with the intention of creating legal relations and the agreement must be supported by consideration — i.e. something of benefit must pass from each of the parties to the other.

47. The key factors in this case are whether there was intention to create legal relations and whether the Claimant provided consideration.

48. As to intention to create legal relations, for there to be a binding contract, the parties must intend to be legally bound by the terms.

49. In the employment context, **Edwards v Skyways Ltd** 1964 1 All ER 494, QBD is an example of where a pension clause in an agreement between an airline and the British Airline Pilots Association headed 'ex gratia payment' was nonetheless held to be legally binding. The High Court said in that case that the burden on the employer in showing that a commercial agreement was not intended to be legally binding was a heavy one.

50. In most cases, an agreement, even if it is made with the intention of creating legal relations, will not be binding on the parties unless it is supported by consideration. Consideration is something of value which passes between the parties when the contract is performed.

51. In **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** 1968 1 All ER 433, QBD, Mr Justice McKenna stated that 'in order for a contract of employment to exist there must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill''.

52. This has been qualified in a more recent decision — **Secretary of State for Business, Innovation and Skills v Knight** 2014 IRLR 605, EAT in which His Honour Judge Burke QC made obiter comments to the effect that a contract of employment could exist in circumstances where the employee does not seek payment. It is clear that consideration from a worker or employee is the work done or possibly a willingness to be available to work if required.

53. There must also be certainty of terms to create a contract. However, certainty is not compromised simply because it is not possible to pinpoint the exact date on which

agreement was reached. In **Whitney v Monster Worldwide Ltd** 2010 EWCA Civ 1312, CA, the Court of Appeal refused to disturb the High Court's decision that the employer was contractually bound 'at least after October 1990' by a 'no detriment guarantee' given to the employee when he transferred to a new pension plan.

54. It is well established at common law that consideration does not have to be sufficient. **L'Estrange v F Graucob Ltd** 1934 2 KB 394, KBD is authority that absent fraud or misrepresentation, the law will not save a party from a bad bargain.

Status

55. Where there is a valid contract, the next step is to identify the nature of the contractual relationship. The Claimant seeks to establish that she was both an employee and a worker.

Employee

56. In **Ready Mixed Concrete** Mr Justice MacKenna stated:

'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

57. Following the **Ready Mixed Concrete** decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements:

    57.1. control

    57.2. personal performance, and

    57.3. mutuality of obligation.

58. In **Hall (Inspector of Taxes) v Lorimer 1994** ICR 218, CA, the Court of Appeal cautioned against using a checklist approach in which the court runs through a list of factors and ticks off those pointing one way and those pointing the other and then totals up the ticks on each side to reach a decision. In so doing, it upheld the decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who stated that 'this is not a mechanical exercise of running through items on a checklist to see

whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail… Not all details are of equal weight or importance in any given situation.'

Control

59. In the context of employment status, control is a matter of degree: it is rarely a question of whether there is any control, but rather of whether there is enough control to make the relationship one of employer and employee.

Personal performance

60. This is considered below under worker.

Mutuality of obligation

61. The courts have endorsed the idea that, for a contract of employment to exist, there must be an 'irreducible minimum' of obligation on each side — see **Nethermere (St Neots) Ltd v Gardiner and anor** 1984 ICR 612, CA, and **Carmichael and anor v National Power plc** 1999 ICR 1226, HL. This will usually be expressed as an obligation on the employer to provide work and pay a wage or salary, and a corresponding obligation on the employee to accept and perform the work offered

62. However, the phrase 'mutuality of obligation' should not be understood as requiring the purported employee to be obliged to work whenever asked by the employer. It permits him or her to refuse work, although this may involve a factual assessment as to whether any refusal is so extensive as to deny the existence of an obligation even to do a minimum of work — **Khan v Checkers Cars Ltd** EAT 0208/05. Nor should a tribunal approach the question of mutuality by looking for evidence of precision in the hours and days to be worked — **Dakin v Brighton Marina Residential Management Co Ltd** EAT 0380/12. Instead, it should ask whether the history of the relationship showed that it had been agreed there was an obligation on the claimant to do at least some work and a correlative obligation on the employer to pay for it.

63. It is uncommon for casual staff to be classified as 'employees'. It is generally a characteristic of casual work that there is no obligation to provide work and no obligation to accept it. Workers are free to work when they wish and employers are free to hire when they wish. Claims by casual staff to employee status, therefore,

generally fail through lack of mutuality of obligation.

64. However, if the worker can point to the existence of a 'global' or 'umbrella' contract of employment, which continues to exist during periods when he or she is not working. Such a contract may be implied in circumstances where there is a relationship of such a long-standing nature that, even though work is done on a casual or piece-work basis, the truth of the matter is that the employer is under a continuing obligation to provide work which the worker is likewise obliged to accept.

65. The distinction between global and specific contracts was highlighted and clarified in **McMeechan v Secretary of State for Employment** [1997] I.R.L.R. 353. In that case Lord Justice Waite said that 'temporary or casual workers pose a particular problem of their own, in that in their case there will frequently be two engagements, to use a neutral term, which the tribunal may be called upon to analyse. There is the general engagement, on the one hand, under which sporadic tasks are performed by the one party at the behest of the other and the specific engagement on the other hand which begins and ends with the performance of any one task. Each engagement is capable, according to its context, of giving rise to a contract of employment.'

Other factors

Tax

66. Deductions at source point to employment; gross payments suggest self-employment. However, this factor is not generally regarded as strong evidence.

Integration

67. The degree to which the individual is integrated into the employer's organisation remains a material factor under the multiple test.

Worker

68. Distilling the statutory definition into its constituent elements, the following factors are necessary for an individual to fall within the definition of 'worker':

    68.1. there must be a contract, whether express or implied, and, if express, whether written or oral;

    68.2. that contract must provide for the individual to carry out personal services; and

    68.3. those services must be for the benefit of another party to the contract who

must not be a client or customer of the individual's profession or business undertaking.

Personal service

69. To fall within limb (b) of S.230(3) ERA, an individual must undertake 'to do or perform personally any work or services for another party to the contract'.

70. Determining whether a contract includes an obligation of personal performance is a matter of construction, and is not necessarily dependent on what happens in practice. In **Redrow Homes (Yorkshire) Ltd v Wright** 2004 ICR 1126, CA, the Court of Appeal observed that it does not necessarily follow from the fact that work is done personally that there is an undertaking that it be done personally.

71. Since an undertaking to perform work or services personally is fundamental to limb (b) worker status, a clause that ostensibly allows the work to be done by someone who is not a party to the contract may mean that the contract does not include an obligation of personal performance.

72. However, a tribunal may conclude that the substitution clause does not reflect the reality of the working relationship. In this regard, the Supreme Court's decision in **Autoclenz Ltd v Belcher and ors** 2011 ICR 1157, SC, has afforded tribunals a degree of leeway to disregard written substitution clauses where such terms do not begin to reflect the real relationship. Lord Clarke held that, in cases with an employment context, 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.

73. The Supreme Court has since gone even further in **Uber BV and ors v Aslam and ors** 2021 ICR 657, SC, holding that the determination of 'worker' status is a question of statutory interpretation, not contractual interpretation, and that it is therefore wrong in principle to treat the written agreement as a starting point. The correct approach is to consider the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work.

Unfair dismissal

74. Section 98 ERA states

(1) In determining for the purposes of this Part whether the dismissal of an employee

is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(c) is that the employee was redundant,

……

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

75. The burden is on the Respondent to show the sole or principal reason for dismissal and that it is a potentially fair reason within section 98(1) or (2) ERA.

76. The classic statement of the reason for dismissal is per Cairns LJ in **Abernethy v Mott Hay and Anderson** [1974] IRLR 213 "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'."

77. Once the employer has shown the reason for dismissal, it is then for the tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. That question is to be determined in accordance with equity and the substantial merits of the case and the circumstances to be taken into account include the size and administrative resources of the employer's undertaking. The burden as to fairness under s 98(4) ERA is neutral.

78. The Tribunal must assess the reasonableness of the employer's decision and must not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and

another quite reasonably another view and still be acting fairly (**Iceland Frozen Foods Ltd v Jones** 1982 IRLR 439).

Redundancy

79. For there to be a fair dismissal for redundancy, there must be a redundancy situation within the meaning of section 139 ERA.

80. Section 139 ERA states

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

81. If there is a redundancy situation within the meaning of section 139 ERA that must then be the reason for dismissal.

82. In **Williams v Compair Maxam Ltd** [1982] IRLR 83, the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). In the context of this case this includes an obligation to give as much warning as possible, the obligation to consult with affected employees and the obligation to consider alternative employment rather than dismissal.

Some other substantial reason

83. There is an important residual category of dismissals that are capable of being fair notwithstanding that they do not fall into any of the specific categories detailed in ERA 1996 s 98(2).

84. Provided the reason is not whimsical or capricious (**Harper v National Coal Board** [1980] IRLR 260), it is capable of being substantial and, if, on the face of it, the reason could justify the dismissal then it will pass as a substantial reason (**Kent County Council v Gilham** [1985] IRLR 18, CA).

85. In certain cases the dismissal of a spouse where a married couple have been employed together (eg living in a public house) and the other spouse has been dismissed, even if that dismissal was unfair (**Kelman v Orman** [1983] IRLR 432);

86. The ACAS Code of Practice No 1 on Disciplinary and Grievance Procedures S [1] can apply to a dismissal for 'some other substantial reason', at least where the employee is facing disciplinary measures. In cases of some other substantial reason for dismissal the steps that an employer has to take to act reasonably will depend on the nature of that reason.

Polkey

87. In considering whether the 'Polkey' principles, laid down by the House of Lords in **Polkey v A E Dayton Services Limited** 1987 IRLR 503 HL, apply, regard should be had to **Software 2000 Ltd v Andrews** 2007 IRLR 568 EAT.

Conclusions

88. As intimated above, the first question is whether there was a legally enforceable contract and the key factors in this analysis are whether there was an intention to create legal relations and whether the Claimant provided consideration for the salary paid to her every month.

89. On the Claimant's side, apart from her own evidence, the highest point of her case in terms of documentation is the 2017 reference written by Mr Kotonou that stated that the Claimant had been employed for 15 years as an Accountant's Assistant. This suggests both intention to create legal relations and that the Claimant had been providing consideration in the form of work since 2002.

90. However, there must be serious reservations about whether Mr Kotonou was telling the truth in this document. The Claimant's National Insurance records suggest that the Claimant was not paid anything for four years between tax years 2003-2004 and 2007-2008. On the balance of probabilities and based on the evidence before me (which includes no bank statements for these years) I find that the Claimant did no work for ABC UK between 2003-2004 and 2007-2008 and that no contract existed during these years. Accordingly, I find that the 2017 reference letter is not a reliable source of

information about the Claimant's working relationship with ABC UK.

91. The question of whether there was a contract before this hiatus therefore effectively falls away. If there was any contract in place during tax year 2002-2003, it undoubtedly came to an end during the hiatus before tax year 2008-2009. No claims can arise from this earlier period that the Tribunal has jurisdiction to hear.

92. The period from tax year 2008-2009 through until 2020 becomes the focus of the analysis. The national insurance record suggests that the Claimant was paid during this period at the rate of £5,400 per annum. Was this a contract for which there was an intention to be legally bound and for which the Claimant provided consideration?

93. Considering the question of consideration first, the Claimant in her evidence stated that 2008 was the point at which she changed from working at the office at 55 Demark Hill to working for Mr Kotonou in the office at the home they shared.

94. The Claimant alleges that she performed a number of tasks for Mr Kotonou. These are considered in turn below.

95. The Claimant says that she flagged urgent emails and post to Mr Kotonou. In relation to post, as the Claimant was not in the office where post was received, this cannot be correct. In relation to emails, there is no evidence to show the Claimant ever bringing urgent emails to Mr Kotonou's attention. Whilst only a snap shot, the correspondence from as late as July 2020 shows Mr Kotonou dealing directly with his staff other than the Claimant with no suggestion of the Claimant being involved at all. I do not find that the Claimant flagged urgent emails and post to Mr Kotonou.

96. The Claimant says that she communicated with and scheduled appointments and meetings with clients including client lunches, dinners and networking and relationship building meetings. There is no contemporaneous evidence of any communication between the Claimant and Mr Kotonou's clients. The Claimant alleges to have done all such correspondence by telephone. I do not consider this credible. If the Claimant had communicated with clients there would be some contemporaneous record of this. Moreover, the Claimant alleges to have scheduled appointment for Mr Kotonou but it was accepted that Mr Kotonou's diary was a hard copy document, retained in the ABC UK office. As the individuals have not been tested in cross examination, I assign no weight to letters from alleged clients suggesting that the Claimant did perform some of these tasks. These were produced significantly after the event, once it was clear that the Claimant was in dispute with Ms Villa-Herrera. I do not find that the Claimant communicated with and scheduled appointments with clients.

97. The Claimant says that she attended client meetings with Mr Kotonou. The Claimant says she took minutes in these meetings, which were given to Mr Kotonou. No such minutes are in the bundle – despite the Claimant having access to numerous of Mr Kotonou's files in the home office. I do not find that the Claimant attended client meetings with Mr Kotonou as his personal assistant. If there were isolated instances where the Claimant did attend meetings, I consider it would have only been with clients who were social friends of the Claimant and that she attended purely in a social capacity.

98. The Claimant says that she did photocopying and printing and posted mail for Mr Kotonou. It is notable that the Claimant in September 2019 relayed an instruction from Mr Kotonou for Ms Villa-Herrera to purchase cartridges for his printer which suggests that the Claimant was not familiar with purchasing or replacing the printer cartridges in the home office. Moreover, in the recordings of 5 September there is an exchange on page [392] about documents needed for a client regarding an HMRC investigation. Mr Konotou clearly knew where these documents were but the Claimant did not. I do not find that the Claimant did photocopying and printing or posted mail for Mr Kotonou.

99. The Claimant says that she booked Mr Kotonou's business travel and attended meetings abroad. The Claimant's evidence was that she and Mr Kotonou would be away on holiday only once a year and on work trips two times a year. The Respondent's witnesses say that actually Mr Kotonou was on holiday approximately 5 or 6 times a year and over 2009 to 2010 was abroad for 6 months. I prefer the evidence of the Respondent's witnesses on this point because of the lack of evidence of these being business trips such as emails, itineraries or notes of meetings. In fact, whilst Mr Kotonou may have visited clients during trips, it appears that essentially all the trips the Claimant and Mr Kotonou took were holidays rather than work trips. There was no documentary evidence before me to show the Claimant arranging any of these trips (let alone any business trips). If the Claimant did book any such trips, I find that she did so in a personal capacity because these were personal trips and not as Mr Kotonou's personal assistant.

100. As a general point, I accept the evidence of the Respondent's witnesses that, when not on business trips, Mr Kotonou did most of his work at the office on Denmark Hill. I accept Ms Gamino's evidence that, once the effects of his cancer prevented Mr Kotonou from climbing the stairs at the office, he worked primarily from a coffee shop in Camberwell. Whilst he undoubtedly did work both when away and in the evenings and weekends, the majority of his work was done in the office.

101. I do find that the Claimant did on occasion use interior design skills to produce

design drawings to assist Mr Kotonou's restaurant clients who were applying to renew licences. However, I find that this work was done under the auspices of the Claimant's company, Tan2lize Limited and not under any direct contractual relationship between the Claimant and ABC UK. The Claimant says this herself in terms on page [154] of the bundle. I attach no weight to letters from clients produced after the event as to the basis on which this work was done. Had this work been done four times a year under the auspices of ABC UK (as the Claimant alleges) there would be contemporaneous documentary evidence of this. None was included in the bundle. For that reason, I do not accept the Claimant's evidence in this regard. I do not find that any work done under the auspices of the Claimant's company, Tan2lize Limited, was done as worker or employee of ABC UK.

102. I find that the Claimant was not Mr Kotonou's personal assistant. On 31 October 2020 the Claimant emailed Ms Villa-Herrera to ask to meet regarding the business. The Claimant stated "I do not claim to know much about the current state of the business." Were the Claimant performing the role of personal assistant, she would have had some understanding of the operation of the business. As the Claimant did no work, there was no consideration from the Claimant.

103. In the absence of consideration from the Claimant, there can have been no legally binding contract with Mr Kotonou, ABC UK or the Respondent. There was certainly no contract signed under deed, which would have avoided the need for consideration. In those circumstances the Claimant cannot establish that she was an employee or a worker, meaning that all her claims fail and are dismissed.

104. It is unnecessary to consider the question of intention to create legal relations.

105. If I am wrong that the Claimant provided absolutely no consideration and there was a binding contract because of some isolated incident of work done in consideration for the payments (which I have seen no evidence of), I would have found that, in line with the **Gardiner** and **Carmichael** cases, there was nonetheless insufficient mutuality of obligation to found a contract of employment. An isolated instance of work would suggest next to no obligation to provide or do work and would be insufficient for these purposes. If the Claimant did any work as Mr Kotonou's personal assistant under a contract, the Claimant would likely have been a worker in respect of such individual assignments. However, there was no evidence before the Tribunal to quantify a claim for failure to pay holiday pay. The Claimant totally failed to establish any detail on the hours of work she alleged.

106. The conclusions above, leave open the question of what was the nature of the

payments made to the Claimant. In my judgment, these payments were a £5400 per annum stipend or allowance to provide the Claimant with an income. It was an expense to the business. The proposal in September 2020 for the payment to be increased to £1000 a month was clearly not intended to be salary as it not expected that Claimant would continue as a personal assistant after Mr Kotonou's death. The Claimant disputed this but was not able to say who she would act as assistant for. The Claimant suggested that the £1000 arrangement was intended to apply during Mr Kotonou's life but this is clearly not the case from the terms of the codicil to the will. The evidence of the recording of 5 September 2020 suggests this may have been intended by Mr Kotonou as some kind of payment for transfer of the business. Were that so it might well have been an attempt to avoid tax and a potential fraud on the revenue. It is understandable and correct that Ms Villa-Herrera was opposed to this.

107. If I am wrong and the Claimant was an employee, the Effective Date of Termination would have been 16 November 2020, the date the Claimant was provided with her the P45. Even though the Claimant asked to be provided with this, which suggests she thought any relationship had come to an end, there was no earlier communication sufficient to terminate the Claimant's alleged employment. On that basis, the Claimant started ACAS early conciliation and issued her claim on the last day possible to be in time. The question of extension of time would not have arisen.

108. However, I would have found that any dismissal would have been for the potentially fair reason of redundancy. In circumstances where the Claimant's entire role allegedly related to assisting one person, Mr Kotonou, there would have been a redundancy situation after his death. I accept Ms Villa-Herrera's evidence that she did not need a further member of administrative staff and indeed was forced to make another member of administrative staff redundant early in 2021. Whilst the absence of any procedure would have undoubtedly made that dismissal unfair, I would have limited compensation to a period of three weeks at full salary, being sufficient time for a fair redundancy process to have been followed. Thereafter I would have applied a 100% reduction to compensation to reflect the certainty of the Claimant's fair dismissal for redundancy in any event.

109. The Respondent invited the Tribunal to make a finding of fact that the Claimant in pursuing her claims acted scandalously or vexatiously in pursuing this claim as a means to pressure the Respondent regarding a collateral dispute regarding an alleged binding contract created at the meeting on September 2020. Having considered the definition of vexatious in **ET Marler Ltd v Robertson** [1974] ICR 72 and **A-G v Barker** [2000] 1 FLR 759, [2000] 2 FCR 1, I am not satisfied that the Claimant has acted in

such a manner. I consider that the Claimant's case did have some basis in law and I do not consider that the defence of the claim has subjected the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant or that it involves an abuse of the process of the court. Put simply, had the Claimant's case that she did some work been accepted, her claim would have had some value and I find that that was her purpose in bring the claim.

Employment Judge T Perry

Date 24 October 2022