EMPLOYMENT TRIBUNALS

Claimant:	**Miss N Brown**
Respondent:	**North East Tutoring Ltd**
Heard at:	**Newcastle Employment Tribunal (remotely by CVP)**
On:	**03 January 2023**
Before:	**Employment Judge Sweeney**
Appearances:	**For the Claimant: In person** **For the Respondent: Martin Hill, director**

JUDGMENT having been given to the parties on **03 January 2023** and a written record of the Judgment having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

1. By a Claim Form presented on **21 October 2022**, the Claimant brought a complaint of unlawful deduction of wages under section 23 Employment Rights Act 1996. Under the Details of Complaint, she referred to a series of WhatsApp messages that had passed between her and Martin Hill, a director and shareholder of the Respondent company and to an amount of £1,200 which, on **07 July 2022**, he had agreed to be paid to her as unpaid wages.

2. The Respondent returned a Response saying only that it defended the claim but provided no grounds on which it was resisted. Consequently, Employment Judge Aspden, having reviewed the file on **17 July 2022** was considering striking out the Response pursuant to rule 37(1) ET Rules of Procedure 2013 on the ground that it had no reasonable prospect of success. She directed that the Respondent be provided with an opportunity to make representations as to why it should not be struck out.

3. That same day, the Respondent replied in a very brief email saying only that the Claimant had never had a contract with the Respondent. No further explanation or elucidation was given. On **18 November 2022**, Judge Aspden informed the parties that the question of the Claimant's employment status would be decided at the final hearing listed for 3rd January 2023. She reminded the Claimant and the Respondent of the need to comply with the

Tribunal directions which had been sent to them on **31 October 2022**. Those orders were as follows:

3.1. By **28 November 2022**, the Claimant was to send to the Respondent a document setting out how much she was claiming, together with copies of any documents and evidence on which she was to rely.

3.2. By **12 December 2022**, the Respondent was to send to the Claimant documents and evidence on which it was to rely.

3.3. By **27 December 2022**, each party was to send to the Tribunal their documents and witness statements.

4. The case was listed before me on 3rd January 2023. It was immediately apparent that neither party had complied with those orders. I raised this with the Clerk prior to the hearing commencing who, upon checking the parties' internet connection at 09.45am, asked them – on my direction – whether they had any documents and/or statements. Mr. Hill, on behalf of the Respondent, emailed a single document, namely a Direct Earnings Attachment Notice dated **10 August 2022** from the Department for Work and Pensions ('DWP') addressed to the Respondent company directing it to deduct from Miss Brown's net pay the sum of **£690.72** and pay that amount to the DWP.

5. The Claimant emailed a seventeen-page document consisting of:

5.1. Her witness statement [**pages 1-3**],

5.2. Written statement of employment particulars from **03 May 2022** [**pages 4-7**],

5.3. A Table prepared by the Claimant showing payments received by reference to amounts payable in respect of the period **February** to **July 2022** [**page 8**],

5.4. Payslips for the months of **February** to **June 2022** [**pages 9-13**],

5.5. Her P45 dated **14 August 2022** [**page 14**],

5.6. A formal grievance dated **27 July 2022** [**page 15**],

5.7. An exchange of emails between the Claimant and Mr Hill [**pages 16-17**].

6. I asked both the Claimant and the Respondent why they had not complied with the clear directions of the Tribunal. The Claimant apologised and said that it was an oversight on her part. When asked how much she was claiming she was underpaid, she said it was £1,200. Mr Hill said that today was the first time he had heard the amount of £1,200, that he did not know how much the claim was for and that the Claimant never had a contract with North East Tutoring Limited. He said he had nothing to send in those circumstances and could not know be expected to know what to send.

7. I did not consider either explanation to be satisfactory. Nevertheless, I asked if the parties if they were ready to proceed to which they agreed.

The issues

8. I identified the issues with the parties as follows:

   (1) Was the Claimant employed by the Respondent under a contract of employment or a contract personally to undertake work?

   (2) If so,

      a. What was the Claimant's entitlement to pay?
      b. How much is she claiming as unpaid wages?
      c. When were the wages payable?
      d. Was the amount paid less than that which was properly payable on any occasion?
      e. If so, by how much?

   (3) Was any deduction authorised by a relevant provision of the Claimant's contract?

   (4) Should any award be uplifted under section 207A TULRCA 1992, for an unreasonable failure to comply with the Code of Practice on Discipline and Grievances (2015)?

   (5) If so, by what percentage – up to a maximum of 25%?

9. I asked Mr Hill whether the sole defence to the complaint of unlawful deductions was that the Respondent did not employ the Claimant, or whether he also disputed the amount of money claimed, for example. He said that he also disputed the amount. Nowhere in these proceedings had Mr Hill identified who he says employed the Claimant, if not North East Tutoring Limited. When I asked, he said it was a company called Stem Toys Limited.

10. We then broke for 20 minutes to allow Mr Hill to read the Claimant's statement and for the Claimant to read the document sent by Mr Hill. Before doing so, I explained to the parties that I would hear evidence from the Claimant first and that, even though Mr Hill had not sent a witness statement to the Claimant or the Tribunal, nevertheless, I would permit him to give oral evidence. When the time came for him to do so, however, he declined to give any evidence. Therefore, only the Claimant gave sworn evidence.

Findings of fact

11. I found the Claimant to be a truthful and compelling witness. From the evidence, both oral and documentary, and having listened to both the Claimant and Mr Hill in closing submissions, I found the following facts.

12. The Claimant was employed from **23 February 2022** to **30 June 2022**. She was recruited by Mr Hill and was one of two new employees. Mr Hill is a director and shareholder of the Respondent company. He is also a director and shareholder of another company, Stem Toys Limited, which was incorporated on **30 May 2022**. Both companies share the same registered office and address.

13. Upon commencement of her employment, the Claimant was provided with a written statement of particulars of employment identifying the employer as 'The Stem Club'. She was employed for 15 hours a week. It was agreed that she would be paid at the rate of £10 an hour for every hour worked. By **03 May 2022**, the Claimant had obtained a sort of promotion as her role grew. Her title, if not before then, was certainly from that point 'Customer Relations Manager'. Her hours increased to 20 hours a week at the higher rate of £12 an hour. The employer continued to be identified as 'The Stem Club' in the written particulars of employment. The Stem Club is not a legal entity in its own right. Mr Hill described it as a 'trading arm'. It is in fact a trading name. The key issue in this case was a trading name of what or whom. The Claimant says it was the trading name of North East Tutoring Ltd. Mr Hill was very unclear about this but said it was the trading name of Stem Toys Ltd. I set out my finding on this in a moment.

14. The Stem Club is an online 'ecommerce store' selling educational toys. The Claimant's work involved sending out customer orders, communicating with customers and establishing relationships with local schools and other organisations.

15. Her first payslip, dated **28 February 2022**, records a payment of £175 gross pay for 17.5 hours worked. This amount was paid on **07 March 2022**, without any shortfall in pay. The second payslip of **28 March 2022** shows a gross amount of £675 due to the Claimant (in respect of 67.5 hours). On **06 April 2022** she received payment of £770 – £95 more than was payable. The third payslip of **28 April 2022** shows a gross amount of £750 payable to the Claimant. On **03 May 2022** she received payment of £700. That was £50 less than was payable on that occasion and amounted to a shortfall in pay due to her in respect of that third period. However, assuming that £50 had been deducted to account for part of the previous overpayment, that meant that so far, she had been overpaid by £45. The fourth payslip of **28 May 2022** shows a gross amount of £960 as payable to the Claimant in respect of 80 hours of work – by now her pay had increased to £12 an hour. On **08 June 2022** she was paid £648. That was an underpayment of £312 (in fact, the net amount payable was £941.85, leaving a net shortfall of **£293.85**). Assuming that £45 from the overpayment on 06 April was recovered, that meant the total gross shortfall in the Claimant's pay at this stage amounted to £267. Mr Hill told the Claimant that he would pay the balance the following week. However, he did not. The fifth and final payslip shows an amount payable to the Claimant of £960 (80 hours x £12). None of that has ever been paid to the Claimant. It was due to be paid to her on **30 June 2022**, and certainly within a week thereof, namely **07 July 2022**.

16. The Claimant's employment came to an end on **30 June 2022.** This came about because Mr Hill said he could no longer afford to continue to employer her or the other members of staff. When Mr Hill gave her a number of options all of which were unacceptable to her she felt she had no option but to leave. For the purposes of these proceedings, it is academic whether she resigned or was dismissed (although I would incline to the latter) because this is not relevant to the dispute.

17. By the date of termination, the Claimant was owed outstanding wages. Although on **07 March 2022** and on **06 April 2022** she had been overpaid by £3.40 and £95 respectively, on subsequent dates, she was paid less than had been properly payable, namely: **03 May 2022** (£50 less); **08 Jun 2022** (£293.85 less); **30 June 2022** (£941.85 less). The dates on which and the amounts she was due to be paid and the dates on which and amounts she

was actually paid are set out by the Claimant in a table attached to her witness statement (page 8). Those amounts are supported by the amounts set out in the payslips attached at page 9-13. The total deficiency in pay comes to £1,194.10. That amount was outstanding and payable to her as at **30 June 2022**. The Claimant did not in fact see the payslips until after her employment ceased.

18. The Claimant tried her best to get Mr Hill to pay her outstanding wages. Following an exchange of WhatsApp messages, the Claimant and Mr Hill met on **07 July 2022** by video call. Mr Hill agreed that the Claimant was owed unpaid wages. He agreed that a figure of £1,200 would be paid to her. He said it would have to be paid in instalments. At no point did he say that she was not employed by North East Tutoring Ltd. He did not say that her employer was a company called Stem Toys Ltd. That company was incorporated on **30 May 2022**. Therefore, it did not exist at the date of commencement of the Claimant's employment. Nor did it exist when her updated written particulars were amended on **03 May 2022**. At no point between **23 February** and **30 June 2022** did the Claimant's employment transfer to this new company.

19. Despite giving the Claimant his assurances, Mr Hill did not follow through on the agreement reached with her on **07 July 2022**. Following further attempts to secure payment of monies owed, she eventually submitted a formal grievance on **27 July 2022**. The grievance is written in measured terms and reflects well on the Claimant overall. In it, she expressly refers to the amount they had agreed when they spoke on **07 July**: that is, the figure of £1,200 – the amount Mr Hill told me at the outset of this hearing that he had only today been made aware of. The Claimant asked that Tracy Clarkson attend the grievance interview with her.

20. Mr Hill replied on **28 July 2022** to say that the grievance had been noted. He refused to permit Tracy Clarkson to attend any meeting saying that 'she works for me'. This is despite the fact that in the Claimant's written particulars of employment, it expressly states: "*if the grievance is not resolved to your satisfaction, or if the grievance relates to your manager, you should contact Tracy Clarkson*." Mr Hill also referred to his accountant in this email. I find that, in doing so, he was evading responsibility for the Claimant's inability to access her pay details.

21. Miss Brown replied on **28 July 2022** by asking what steps he was going to take regarding the grievance. She also explained what had happened regarding trying to access the online portal and that she needed to access her P45. She pointed out that Tracy Clarkson was identified on her written particulars of employment. Mr Hill replied to say that the steps he was taking in relation to her grievance was "*that it has been acknowledged*". In a further email of the same date, the Claimant asked if Mr Hill intended to pay the £1,200 owed and if so when. He replied '*yes but due to the financial situation it will be paid in instalments as opposed to a full lump sum*'. Again, despite this assurance, Mr Hill did not make arrangements for that to be paid.

22. Throughout her employment, the Claimant took direction from Mr Hill. Her payslips all identify the employer as being North East Tutoring Ltd, as does her P45. She has received nothing to indicate that Stem Toys Ltd was her employer or that her employment transferred to that company.

Submissions by the parties

23. Following the conclusion of the evidence, Mr Hill submitted that I should reject the claim because of the claimant's failure to comply with directions. When asked what about his failure to comply with directions, he repeated the point he made at the outset that he did not know what the claim was about and could not send anything. I asked whether he could have sent the documents which the Claimant had sent, namely the P45 and the payslips, to which he replied that he is not in charge of payroll, that it is not his responsibility.

24. When asked about who employed the Claimant when she first started working on 23 February 2022, Mr Hill submitted that it was Stem Toys Ltd. When asked how that could be when that company was not incorporated until **30 May 2022**, he replied simply that Stem Toys Ltd was the employer, that it was going to be incorporated. He initially suggested that he would have been the employer but then, when appreciating that this might mean personal liability, retracted that. When asked whether – as the P45 and payslips suggested – it might have been North East Tutoring Ltd, he said that it was not, and repeated that it was Stem Toys Ltd. I asked whether there was any explanation for the Respondent's name being on the payslips and on the P45. Mr Hill said it was a mistake, and that he was not responsible for payroll.

25. I asked whether Mr Hill wanted to say anything about the total amount which the Claimant says was underpaid in April, May and June 2022. He submitted that the actual figure was not £1,200 but £1,194.10. He said that money was owed by the Claimant to the DWP by virtue of the Attachment of Earnings Notice.

26. The Claimant submitted that she believed her employer to be North East Tutoring Limited. That was consistent with her understanding and also supported by the payslips, the P45 and even the letter from DWP addressed to North East Tutoring Ltd. She rejected the suggestion that she was employed by Stem Toys Ltd. She never transferred to that company and the first that Mr Hill said she was not employed by the Respondent was after she commenced ACAS conciliation. She accepted that the total amount of the shortfall in the column she prepared on page 8 of her statement comes to £1,194.10 but she was basing her figure of £1,200 on what was agreed at the time with Mr Hill on **07 July 2022**. She observed that Mr Hill had today said he was unaware of the amount of money she was seeking but his email clearly contradicts this. In response to Mr Hill's request to 'refuse' the claim because she had not sent a statement before today, Miss Brown said that there was nothing in that statement that he was not already aware of; that he knew the amount she was seeking, that he had access to her payslips, that he had paid certain amounts to her and he had the emails and WhatsApp messages. She made the point that he had failed to send anything or provide any statement.

27. Miss Brown submitted that she had worked the hours, was entitled to the payments and should be paid the outstanding amount. She also sought an uplift of the maximum amount because the Respondent had done absolutely nothing with regards to her grievance other than simply acknowledging that he had received it. She, on the other hand, had done all that she could to try and obtain what was due to her before commencing proceedings. Mr Hill had not followed through on his agreement to pay her.

Relevant law

28. Section 230 ERA 1996 provides as follows:

> *(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ended, worked under) a contract of employment.*
>
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing,*
>
> *(3) In this Act "worker"… means an individual who has entered into or works under (or where the employment has ceased, worked under) –*
>
> *(a) A contract of employment, or*
>
> *(b) Any other contract, whether express or implied (and if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual*
>
> *And any reference to a worker's contract shall be construed accordingly*.

29. The employer's obligation to pay remuneration is one of, if not the most, important elements of an employment contract. In **Ready Mixed Concrete v Minister of Pensions and National Insurance** [1968] 2 QB 497, MacKenna J famously said, in what is now outdated language:

> "**A contract of service exists [when] 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".**

30. Section 230(4) ERA 1996 defines 'the employer' *in any given case as 'the person by whom the employee…..is (or where the employment has ceased, was) employed*.' The question of who the employer was is a question of fact. Normally, this is straightforward and uncontentious. However, in some cases it may be contentious, for example, in those cases where there is a complicated corporate structure, with the potential for there to be one of a number of legal entities being the employer for legal purposes.

31. In Harvey on Industrial Relations and Employment Law there is a helpful summary of the legal principles which have been derived from cases where the issue of identification of the employer has arisen. That summary, found at Division AI, para 132.05 is taken from the decision of the EAT in **Clark v Harney Westwood & Reigels** [2021] IRLR 528 is as follows:

> **"In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is employed by B or C, emerge from those authorities:**

a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: *Clifford* at [7].

b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence: *Clifford* at [7].

c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: *Bearman* at [22], *Autoclenz* at [35].

d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: *Bearman* at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer? In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: *Dynasystems* at [35].

To that list, I would add this: documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. The primacy of the written agreement, entered into by the parties, would be seriously undermined if hidden or undisclosed material could readily be regarded as evidence of a different intention than that reflected in the agreement. It would be a rare case where a document about which a party has no knowledge could contain persuasive evidence of the intention of that party. Attaching weight to a document drawn up solely by one party without the other's knowledge or agreement could risk concentrating too much weight on the private intentions of that party at the expense of discerning what was actually agreed."

32. There is a longstanding principle of common law that an employee cannot be transferred from one employer to another without her consent: **Nokes v Doncaster Amalgamated Collieries Ltd** [1940] AC 1014. This principle was reaffirmed in the case of **Gabriel v Peninsula Services Ltd** [2012] UKEAT/0190/11/MAA, where HHJ Peter Clark confirmed that at common law, a contract of service could not be novated by substituting a new employer without the express or implied consent of the employee. Consent may be implied from conduct. The principle that a contract of service may not be novated by substituting a new employer without the express or implied consent of the employee can be avoided by clear legislation. There is such legislation, in the form of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

33. Section 13 ERA 1996 provides that:

(1) An employer shall not make a deduction from wages of a worker employed by him unless-

(a) The deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract means a provision of the contract comprised-

(a) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion*.

34. Section 13 does not apply where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages: section 14(1)(a) ERA.

ACAS Code of Practice and section 207A Trade Union and Labour Relations (Consolidation) Act 1992

35. An employer is expected to have regard to the principles for handling disciplinary and grievance procedures in the workplace set out in the ACAS Code on Disciplinary and Grievance Procedures (the "Code"). Paragraph 33 of the Code states that after receipt of a grievance '*employers should arrange for a formal meeting to be held without unreasonable delay.*' Paragraph 34 states that '*employees should be allowed to explain their grievance and how they think it should be solved*.' Paragraph 35 states that workers have a statutory right to be accompanied by a fellow worker or a trade union representative. Paragraph 40 states that following the meeting the employer has to decide on what action, if any, to take, to communicate the decision in writing without unreasonable delay and inform the employee of a right to appeal.

36. Section 207A provides that:

(2) If in the case of proceedings to which this section applies, it appears to the employment tribunal that –

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) The employer has failed to comply with that Code in relation to that matter, and

(c) The failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

37. Schedule A2 of the 1992 Act lists the tribunal jurisdictions to which section 207A applies, one of which is a complaint under section 23 ERA 1996 (a complaint of unlawful deduction of wages).

Discussion and conclusion

38. Dealing first with Mr Hill's submission that I should dismiss the claim because of the Claimant's failure to send a witness statement before today. As set out above, at the outset of the hearing I had a discussion with the parties as to why they had not complied with directions. Neither had a satisfactory answer for me. However, I was particularly unimpressed by Mr Hill's protestations that he had nothing to send until he had received something from the claimant. If he had any concerns, he could have raised this prior to the hearing but did not. In his correspondence with the tribunal, he was reminded of his own responsibilities as regards documents and statements. He could have sent documents and a statement himself but he did not. Indeed, he had an obligation to disclose payslips, p45s, emails, WhatsApp messages but did not. He told me at the outset that the first he had heard any reference to £1,200 was today. Given his email exchange with the Claimant from July 2022 that is clearly untrue. The ET3 which he submitted on behalf of the Respondent said nothing and was on the verge of being struck out until a very short email was sent by him in response to Judge Aspden's order, saying that the claimant did not have a contract with the Respondent. However, he shed no further light on who, according to Mr Hill, employed the Claimant.

39. At the outset of the hearing, the parties agreed that, despite not complying with directions, they would proceed. I gave Mr Hill time to read the statement sent by the claimant today. I said that, although he had sent no statement, he could give oral evidence but in the end he declined to do so.

40. I treat Mr Hill's submission to refuse the claim as an application to strike the claim out for failure to comply with the tribunal directions. He did not make any such application at the outset of the hearing. On the contrary, he agreed that he wished to proceed with the hearing. In any event, I do not accede to this submission to strike out. Both parties failed to comply with directions – although the Claimant's was a less severe failure. Almost all of the content of her statement was in her ET1 and those parts that were not were uncontroversial. There was, therefore, nothing of any surprise in the claimant's statement and nothing that Mr Hill was unaware of. There was no prejudice to him whatsoever. If anything, the Claimant was the one at a potential disadvantage in that I permitted Mr Hill to give evidence even though he had not sent a statement in advance nor had he set out any grounds for resisting the claim in his response. In theses circumstances, it would be unjust to dismiss or strike out a claim which was clearly of merit in circumstances where the facts relating to the amounts of wages both payable and paid were within Mr Hill's knowledge throughout, as was the amount of wages claimed. Further, he was able to give evidence on the employment of the Claimant – as he alleged – by Stem Toys Ltd, given he was a director and shareholder of that company, as well as North East Tutoring Ltd. It was his choice not to take up the opportunity of giving evidence.

Who employed the Claimant?

41. Thus, the first issue I had to decide was whether the Claimant was an employee, employed under a contract of employment by the Respondent, or whether she was a worker, who had entered into or worked under a contract, whether express or implied, oral or in writing, whereby she undertook to do or perform personally any work or services for the Respondent (section 230(3)(b) ERA 1996).

42. I have no hesitation in concluding that when she commenced employment the Claimant was employed under a contract of employment by the Respondent, North East Tutoring Ltd. That was also the position when the employment particulars were updated on **03 May 2022**. Although not strictly necessary, on any analysis she was also a worker, within the meaning of section 230(3)(b) ERA 1996. I reject the submission – unsupported by any evidence – that she was employed by Stem Toys Ltd.

43. She agreed to undertake work for the entity which operated under the trading name 'the Stem Club'. That was the trading name of North East Tutoring Ltd. She agreed to do this work in consideration of payment at the rate of £10 an hour (subsequently varied to £12 an hour). She undertook the work personally and was subject to the control of Mr Martin, the director of the Respondent who had recruited her to the role. The essential terms of the contract as of 03 May 2022 were that she would work as a Customer Relations Manager for 20 hours a week and would be paid at the rate of £12 an hour. The other terms, as set out in the written particulars of employment are all consistent with a contract of employment. I arriving at the above conclusion I have had regard in particular to the following:

    43.1. The written particulars, which is evidence of the contract, identifies the claimant as the employee and 'the Stem Club' as the employer.
    43.2. The Stem Club is not a legal entity.
    43.3. The only legal entities capable of employing the Claimant in February (and on 03 May when the particulars were updated) were either North East Tutoring Ltd or Mr Hill in a personal capacity. Mr Hill, in his submissions eschewed the possibility that he was the employer.
    43.4. Mr Hill's contention that Stem Toys Ltd employed Miss Brown in February was Illogical and absurd. It was simply impossible as it did not exist as a legal entity until **30 May 2022**.
    43.5. That leaves only one other contender: North East Tutoring Ltd, or which Mr Hill was director and shareholder. It is essentially 'his business'. He recruited the Claimant. He gave her direction during the course of her employment. He terminated her employment.
    43.6. The Respondent, through Mr Martin, exercised control over the Claimant. The most important of the employer's obligation – to pay remuneration – was undertaken by North East Tutoring Ltd. I reject Mr Hill's submission (which was made without giving evidence) that this was a 'mistake'.
    43.7. I accept the claimant's evidence that she understood her employer to be the

respondent company. That understanding is supported by the payslips and by the p45. Mr Hill had not given any evidence to explain this. I reject his submission that the reference on the P45 was also a 'mistake'.

44. The conclusion I arrive at from all these facts is that the Claimant entered into a contract of employment (and at the very least a contract personally to undertake work for) North East Tutoring Ltd, the trading name of which was the Stem Club. She was an employee and a worker.

45. I then considered whether her employment transferred – either by operation of law (under TUPE) or by agreement. There was no suggestion by Mr Hill – and zero evidence in any event – of a TUPE transfer. I considered whether the Claimant had moved from North East Tutoring Ltd to Stem Toys Limited. I reminded myself of the principle set out above in **Nokes v Doncaster Amalgamated Collieries Ltd** [1940] AC 1014. There is simply no evidence of the Claimant's employment having moved from North East Tutoring Ltd to Stem Toys Ltd. There is no evidence that she even knew about the company, let alone that she expressly or impliedly agreed to move from one employer to another. Her wages continued to be paid by North East Tutoring Ltd in June 2022. Mr Hill gave no evidence on the matter or, indeed, on any other matter.

46. Therefore, I am satisfied that the Claimant remained an employee (and a worker) of the Respondent throughout her employment. I am also satisfied and conclude that Mr Hill has always been aware of this and that he has sought to evade paying the Claimant what was lawfully due to her.

What wages were properly payable to the Claimant?

47. The following amounts were payable to the Claimant on the following dates:

47.1.	07 March 2022	£175
47.2.	06 April 2022	£675
47.3.	03 May 2022	£750
47.4.	08 June 2022	£941.85
47.5.	07 July 2022	£941.85

The deficiencies in pay

48. Mr Hill did not dispute the amounts – other than to say the total did not add up to £1,200. He is right, but the figure of £1,200 was a figure that they had agreed to following on **07 July 2022** when the Claimant had not accessed the payslips. The total amount of wages paid to the Claimant on **03 May, 08 June** and **07 July 2022** was less than the total amount properly payable on those occasions. Respectively, the wages were deficient by the following amounts: £50, £293.85 and £941.85. I infer from the evidence that the explanation for the shortfall of £50 on **03 May 2022** is that it was for the purpose of reimbursing the employer in respect of the overpayment made in **April 2022**. Therefore, section 13 ERA does not

apply to the deduction on **03 May 2022**. It does apply, however, to the deductions in June and July. Those deductions form a series of deductions.

49. Allowing for the recovery of overpayments in respect of the sums paid to the Claimant in March and April 2022, I accept the Claimant's evidence that as of **30 June 2022** the amount of £1,194.10 was owed to her. Allowing for a week for payroll to be processed, the amount set out in the payslip of **28 June 2022** was payable by **07 July 2022**.

50. I have to determine the amounts properly payable and the amount of any deficiency. Those are the amounts and the dates in the Claimant's statement (page 8). Over the period of her employment, £3,487.10 was properly payable to her on the occasions set out in the table on page 8 and £2,293 was in fact paid. Therefore, the amount of **£1,194.10** was outstanding and payable as of **07 July 2022** and was not paid. The amount of the deficiency is treated as a deduction in law.

51. There is no provision in the Claimant's contract that authorises non-payment or any deduction – and Mr Hill did not submit as much.

52. Therefore, I conclude that the Respondent has unlawfully deducted that amount.

ACAS Uplift

53. The Claimant seeks an uplift of 25% for failure to comply with the ACAS code of practice.

54. The first question I must ask is: was there a failure to comply with the relevant Code of Practice? The answer to this is yes. The first step that is required is to arrange for a meeting so that the employee is able to explain the grievance. This was not done. In fact, nothing was done other than to acknowledge receipt of the grievance. There was, therefore, a failure to comply with paragraph 33 of the Code. The failure to comply with paragraph 33 means that there was a consequential failure to comply with paragraphs 34, 35 and 40 of the Code. It is clear to me, and I so conclude, that Mr Hill had no intention of doing anything with the Claimant's grievance. He understood perfectly well what it was about and what the Claimant was seeking. It is also equally clear to me and I infer from the evidence as a whole and from his failure to advance any evidence or explanation in these proceedings, that Mr Hill knew all along that the Claimant was employed by North East Tutoring, that she was entitled to unpaid wages but had no intention of paying that amount or addressing the Claimant's grievance. His initial comment to me that he was unaware that the Claimant was claiming £1,200 was, in the light of the email evidence, untrue and duplicitous. Indeed, upon checking the ET1, I could also see that the amount had been set out in the details of complaint under 'timeline'.

55. Therefore, there was a complete failure to do anything in relation to the grievance – a failure to comply with paragraphs 33, 34, 35 and 40 of the Code. In light of my finding that Mr Hill had no intention of addressing the grievance or of paying the money, that failure was, in my judgement, an unreasonable failure. Mr Hill has, from the moment these proceedings were initiated, demonstrated an evasiveness which does him no credit. He had given the Claimant

assurances, only to renege on them. He has tried to deflect responsibility on to his accountant. He has sought to advance an illogical argument that the Claimant was employed by a company at a time when that company did not exist. He has said the bare minimum in his response. He has sought to strike out a meritorious claim despite understanding it and despite failing to comply with directions himself. He took a considered decision not to give sworn evidence despite having been given the opportunity to do so. In all of these circumstances, I consider it just and equitable to award an uplift of 25%.

Remedy

56. The Claimant is entitled to a declaration that the Respondent has made an unauthorised deduction of wages and an order that the Respondent pays the amount of the deduction.

57. In light of my conclusion on the ACAS uplift, the Claimant is entitled to an uplift of **£298.53** meaning that the total amount payable is **£1,492.63.**

Employment Judge **Sweeney**

Date: 6 January 2023