THE EMPLOYMENT TRIBUNALS

Claimant: Miss K Barnes

Respondent: Guidon Group Limited

Heard at: Newcastle Hearing Centre (by video) **On:** 3 October 2023

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: In person
Respondent: Mr AT McNally, director of the respondent

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant was a "worker" of the respondent as defined in section 230(3) of the Employment Rights Act 1996.

2. The claimant's complaint under section 23 of the Employment Rights Act 1996 that, contrary to section 13 of that Act, the respondent made unauthorised deductions from her wages (in that it did not pay her at all in respect of the wages due to her in the final two months of her employment) is well-founded.

3. In respect of those unauthorised deductions the respondent is ordered to pay £3,266.60 to the claimant.

REASONS

The hearing, representation and evidence

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person and gave evidence. The respondent was represented by Mr AT McNally, director of the respondent, who gave evidence on behalf of the respondent. He also called Mrs AL Clark, business consultant to the respondent, to give evidence on its behalf.

3. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. The Tribunal also had before it two bundles of documents prepared by the claimant and on behalf of the respondent respectively. The former comprised some 108 documents; the latter comprised some 98 documents. References in parenthesis below to a number prefaced by the letter C are to page numbers in the claimant's bundle. The claimant's bundle was divided into six sections and, therefore, a reference, for example, to (C1.1) is a reference to the first section of the claimant's bundle and to page 1 in that first section. References in parenthesis below to a number prefaced by the letter R are to page numbers in the respondent's bundle.

4. Written submissions had been prepared by or on behalf of the respective parties. For want of time at the conclusion of the Hearing it was agreed that, rather than those submissions being made orally, the parties would send them to the Tribunal the following day together with any additional brief comments either of them wished to make.

The claimant's complaints

5. The claimant's complaint was that, contrary to section 13 of the Employment Rights Act 1996 ("the 1996 Act"), the respondent had made an unauthorised deduction from her wages in that it had not paid her at all in respect of the wages due to her in the final two months of her employment by the respondent, namely October and November 2022.

The issues

6. As discussed and agreed with the parties at the commencement of the hearing, the issues in this case were as follows:

   6.1 as is required by section 13 of the 1996 Act, was the claimant a worker employed by the respondent;

   6.2 if so, did the respondent make an unauthorised deduction from her wages?

Consideration and findings of fact

7. Having taken into consideration all the relevant evidence before the Tribunal at the Hearing (documentary and oral), the written submissions made by or on behalf of the parties and the relevant statutory and case law, some of which was referred to by the parties, (notwithstanding the fact that, in pursuit of some conciseness, every

aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

7.1 The respondent is chartered management accountancy firm. It came into being on 4 July 2017 as a result of the merger of two previous businesses: Bookkeeping Counts, which the claimant had conducted as a sole trader, and AMJM Consulting Limited, a company of which Mr McNally was the sole director. On that day the respondent was incorporated on change of name from AMJM Consulting Limited to Guidon Group Limited (C1.1).

7.2 Mrs Clark provided advice to the claimant and Mr McNally in this connection and continued to have significant involvement thereafter: for example, meeting the claimant and Mr McNally individually on a weekly basis, setting them goals that were reviewed monthly and attending monthly meetings involving all three of them.

7.3 At the time of the formation of the respondent it was agreed that the claimant and Mr McNally would be directors of the respondent. Although it is a limited company, it was agreed that the claimant and Mr McNally would, in effect, be 'equal partners' in and joint owners of the business. At incorporation, the four equal shareholders in the respondent were the claimant and Mr McNally and their respective partners. The intention of the parties was that when Mr McNally reached the point of retirement and the new business was successful, the claimant would take it over entirely.

7.4 Notwithstanding the agreement between the claimant and Mr McNally that they would both be directors of the respondent, that agreement was not put into effect by the appropriate notice be filed at Companies House to record the appointment of the claimant as a director. Instead, following the incorporation on change and name of the respondent on 4 July 2017 referred to above, the records at Companies House continued to show Mr McNally as the sole director of respondent from that date until the claimant was appointed as a director on 27 August 2020 (C1.4).

7.5 The evidence of all the witnesses was that the work undertaken by the claimant for the respondent and her responsibilities towards it were the same before and after her appointment as a director.

7.6 The agreement between the claimant and Mr McNally in the above respects was not committed to writing at the time of incorporation of the respondent. A Shareholders Agreement (R88) was drawn up on 31 December 2020. The parties to that agreement are Mr and Mrs McNally, the claimant and her partner at that time. In evidence, each of the parties relied upon this Agreement notwithstanding the fact that it is neither dated nor signed by either of them or the other two shareholders. In evidence Mrs Barnes explained that she had produced this Agreement from the bank of precedent documents to which she had access and confirmed that it fitted the terms of

the oral agreement that had been reached by the claimant and Mr McNally in which she had been involved.

7.7 Clause 4.1 of the Shareholders Agreement (R 91) provides as follows:

> "*The Company shall enter into, no later than 31 days from the date of this Agreement, industry-standard employment agreement with the following key management staff who will manage the operations and business of the Company (if such employment agreements shall not already have been entered into prior to the date hereof):*
>
> *(a) Mr. Anthony McNally as director; and*
>
> *(b) Ms. Kathryn Barnes as director*."

7.8 Clause 4.3 of the Shareholders Agreement provides as follows:

> "*Unless otherwise expressly agreed between the Parties, the Board of Directors shall initially consist of:*
>
> *(a) Mr. Anthony McNally of [private address given]; and*
>
> *(b) Ms. Kathryn Barnes of [private address given]*."

7.9 From the outset, the activities of the claimant and Mr McNally on behalf of the respondent reflected their respective activities in their previous independent businesses prior to the merger of those businesses. Thus, the claimant provided bookkeeping services to clients of the respondent while Mr McNally provided accountancy services. As time went on the claimant's duties evolved to include networking, marketing and human resources. She devoted the whole of her working time solely to the respondent and did not work elsewhere.

7.10 The claimant worked fairly regular hours of some of the 37.5 each week but that could increase to 50 hours if the needs of the job required it

7.11 The respondent made monthly payments to the claimant, evidence in relation to which (bank statements, P60 certificates and payslips) is contained in section 2 of the claimant's bundle of documents. The payments were intended to reflect the thresholds at which, taking account of the personal tax allowance, income tax (and, initially, national insurance contributions) would become payable. Mrs Clark explained that this was to be "tax efficient" while Mr McNally suggested that it was merely an "extraction of profits" that was paid through PAYE. The claimant's evidence was that in 2017 she received £680 per month, which increased annually rising to £1,916.67, in 2022. The intention was that the claimant and Mr McNally would receive further income from the respondent by way of

dividends as its business grew but dividends were only paid in December 2020. They did not receive any director's fees.

7.12 As explained above, monthly payments were made to the claimant through the PAYE system. Neither income tax nor, initially, employee national insurance contributions were deducted. From the claimant's documents it appears that national insurance contributions began to be deducted in February 2019 and continued thereafter.

7.13 The claimant did not submit invoices to the respondent in respect of work she had undertaken as would be the norm in the case of a self-employed worker.

7.14 As recorded above, reflecting the genesis of the merged business of the respondent, the claimant and Mr McNally were responsible for their own workload of, essentially, respectively providing bookkeeping and accountancy services to the clients of the respondent. As Mr McNally wanted to know what the claimant was doing she provided to him a "Weekly Update" of the work that she was undertaking (C3.4 and C3.5) and progress reports on her achievement of the respondent's business plan (C3.6, C3.8, C3.10 and C3.12). The claimant submitted her business plan report for November 2021 under cover of an email to Mrs Clark and Mr McNally dated 4 November 2021 (R83). In that email she also provided them with an update on the progress being made by the trainee accountant. There is no evidence that Mr McNally provided equivalent reports to the claimant.

7.15 During the months of June and July 2018 the claimant took a three-week holiday in Thailand. Despite her absence from work she continued to receive from the respondent the full amount of her pay (C3.1). Her unchallenged oral evidence was that throughout the time she worked for the respondent she thought that she had also taken the full statutory entitlement of a worker to paid holiday of 28 days including bank holidays.

7.16 In 2019 the respondent experienced what Mr McNally described as being a "pressure on cash". He and the claimant orally agreed that although the payments due to them would continue to be processed through PAYE, they would not actually receive their net pay, which would instead be credited to their respective director's loan accounts to be paid to them once cash reserves had been generated. This happened in May, September, October and November 2019. This is recorded in what Mr McNally described as being "an extract from QuickBooks" (R73). That document is headed, "Directors Loan Account – Kathryn" The amounts referred to in respect of those four months are described as being the claimant's "Net Pay" or "Salary". What are described as being the claimant's "Refunds" are then recorded as having been made on 9 April and 27 May 2020.

7.17 Although the claimant and Mr McNally had initially worked fairly regular hours from the respondent's office premises, when that became impossible as a consequence of the Covid 'lockdown' measures they both began to work more flexible hours from home. Notwithstanding the relaxation of those measures Mr McNally continued to work from home on a number of days each week.

7.18 On 14 April 2020 the claimant sent an email to Mr McNally to inform him that her Nan had died as a result of contracting coronavirus (R64). She informed him that while she would ensure the compliance work was attended to, such as the wages and the VAT return, "I can't really promise anything else at this moment in time. I hope you understand." She added, "I will probably take some time off". On 26 June 2020 the claimant sent an email to Mr McNally to inform him, "I'm not going to be able to make today's Zoom call" as she was not in a fit state due to her aunt having passed away very suddenly and unexpectedly (R62).

7.19 On 2 December 2020 the claimant arranged for a coronavirus "bounce back loan" of £20,500 from NatWest Bank; a task that might be undertaken by a director or a senior employee of a company.

7.20 In 2021 the claimant and Mr McNally agreed that a trainee accountant should be recruited to work for the respondent. Arrangements relating to his recruitment were primarily conducted by the claimant, with input from Mrs Barnes. Mr McNally did, however, meet two of the candidates and agreed that an offer of employment should be made to the successful candidate. He commenced employment with the respondent in October 2021.

7.21 The claimant mentored the new employee on four days each week and Mr McNally attended the office to mentor him on Wednesdays. On 26 October 2021 the claimant wrote to Mr McNally to inform him that she would be working from home the following day (a Wednesday) explaining that this was to enable him and the trainee accountant to focus on accounts-related work for clients. Mr McNally replied the following day, "That's very magnanimous of you", and questioned why the claimant needed to be away from the office. The claimant did not attend the office on Wednesday, 3 November 2021. Her evidence was that it had been agreed with Mr McNally that she would not attend the office on Wednesdays in order that he and the trainee accountant could focus on his accounts training. Mr McNally wrote an email to the claimant that day, however, asking why she had decided not to come into the office on a Wednesday and whether that was her intention for the future (C3.15). The claimant replied that day stating that her non-attendance on Wednesdays had been agreed but Mr McNally responded, "We did not agree that you would absent yourself from the office on a Wednesday". He explained why her attendance at the office would have been beneficial and concluded his email, "Remember with power comes responsibility (C3.14).

7.22 In January 2022 the claimant's personal circumstances changed when she separated from her long-term partner of 17 years. As recorded above he was a shareholder in the respondent. Following their separation the claimant acquired his shares, took on the administrative functions that he had previously performed for the respondent, and the monthly payments made to her by the respondent doubled.

7.23 The breakdown of the claimant's personal relationship with her former partner impacted upon her mental health to the extent that she considered that she was having a breakdown in relation to which she sought and was provided with help from a counsellor. She informed Mr McNally of this in a text message on 26 May 2022, which concluded, "I am still doing work as and when I can. Please be patient and bear with me while I deal with it" (C3.18).

7.24 The claimant wrote an email to Mr McNally on 1 August 2022 (C3.20). In that email she summarised her activities in the previous week and it is to be inferred from the documents (although this was not explored in evidence) that she attached her weekly update report in relation to week ending 29 July 2022 (C3.5). Mr McNally wrote to the claimant on that day (C3.19). He thanked the claimant for the update and, amongst other things, stated the following:

7.24.1 "I had thought that the report was to be geared more towards the marketing activity and what you were doing to achieve the targets set regarding leads and conversions."

7.24.2 Mrs Clark had set some goals for the claimant the previous week but, "your report gives no indication as to how they have progressed. You give throwaway numbers on leads and meetings but I am no wiser as to how the leads have been generated, who they are and who you are meeting and whether or not the meeting is a result of your marketing activity or if it is a legacy from some previous activity."

7.24.3 "You imply that you cannot work on and in the business at the same time because of time constraints. I would suggest that the constraints are of your own making. You can find time to complete client work, attend counselling and physio sessions but finding time to market the business it seems is secondary to all of the other commitments you have. Something in your work/life balance has to give until the efforts to improve and grow the business gives you more time and the wherewithal to enjoy more of the life part."

7.24.4 "Your time is yours to control, I really do not want to hear any more excuses as to why something hasn't happened, I want to know when it will happen and the expected outcome".

7.24.5 As regards not being in tomorrow, I don't understand why it should take all day for you to attend one network meeting and for you to leave [*the trainee accountant*] to his own devices all day. I trust you will find time to review the work he does at some point."

7.25 In September 2022 the claimant was absent from work as a consequence of suffering from sinusitis. She self-certified for the first seven days' absence and then obtained and delivered to Mr McNally a fit note in respect of the period 13 to 19 September 2022 (C3.2). During her absence the claimant continued to receive the full amount of her pay from the respondent (C3.3).

7.26 Cash flow forecasts prepared by the claimant in October 2022 (R74) for the four months October 2022 to January 2023 (R 76) and, in November 2022 (R75) for the three months December 2022 to February 2023 showed a deterioration in the respondent's cash position. It was agreed at a meeting involving Mr McNally, the claimant and Mrs Clark on 26 October 2022 that the directors' payments for that month could be processed by PAYE but the net pay would be credited to their respective directors' loan accounts pending an overdraft application. In the event, that application was unsuccessful.

7.27 The claimant received a pay slip from the respondent relating to the month of October 2022, which shows a "Salary" of £1,916.07, deductions of "NIEE" £115.10 and "PAYE" £173.60, and thus "Net Pay" of £1,627.97 (C6.1).

7.28 On 23 November 2022 the claimant orally gave Mr McNally notice of her intention to leave the respondent.

7.29 A further meeting involving Mr McNally, the claimant and Mrs Clark took place on 26 November 2022 following which the claimant wrote an email to Mr McNally that day in the following terms, "Please accept this e-mail as my formal notice of resignation as a director and employee of Guidon Group Ltd with my leaving date being 30th November 2022." She explained that her resignation was "due to personal reasons". She concluded by thanking Mr McNally for the past 5 years and wished him all the best for the future (C4.1).

7.30 On that date of 30 November 2022 the claimant gave notice to Companies House of the termination of her director's appointment with the respondent (C4.2).

7.31 Also on 30 November 2022 the claimant sent a text message to Mr McNally, "Thank you for being my business partner all these years. Please stay in contact and please don't forget to pay me. Thank you. Xx" (R67).

7.32 The claimant received a pay slip from the respondent relating to the month of November 2022, which shows a "Salary" of £1,916.07, deductions of

"NIEE" £104.24 and "PAYE" £173.80, and thus "Net Pay" of £1,638.63 (C6.2).

7.33 The payments as shown on the claimant's payslips for October and November 2022 are included in the HMRC form P45 produced by the respondent (C6.3).

7.34 The extract from "QuickBooks" referred to above (R73) shows that on 31 October 2022 "Net Pay" of £1,627.97 was credited to the claimant's director's loan account and, on 30 November 2022, "Net Pay" of £1,638.63 was similarly credited to her director's loan account.

7.35 The claimant wrote again to Mr McNally on 5 December 2022 (R87). Amongst other things she told him that she had "noticed that my November wages haven't been paid yet. I'm hoping this is just an oversight …." and she "would appreciate it if you can pay me my outstanding October wages before Friday 23rd December". Mr McNally did not respond.

Submissions

8. After the evidence had been concluded Mr McNally began to make oral submissions. It became apparent that he was reading from a prepared document, which he confirmed. The claimant similarly confirmed that she had prepared a written document. In the circumstances and as time was pressing it was agreed that the respective submissions would not be made orally at the Hearing but would be sent to the Tribunal the following day. I urged the claimant and Mr McNally simply to submit the written submissions that they had already prepared as those would have been the submissions made at the Hearing but added that they could make any additional brief comments in their covering emails. Both the claimant and Mr McNally duly complied.

9. It is not necessary for me to set out their respective submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account in coming to my decision.

10. That said, the key points made by Mr McNally on behalf of the respondent included those set out below. For completeness, and as Mr McNally has no legal qualification, I have recorded the following submissions notwithstanding that not all of them were based upon evidence given at the Hearing.

10.1 The claimant had never been an employee of the respondent during her tenure as a director/joint owner and stakeholder in the business. She behaved not as an employee but as a business owner.

10.2 "There was no mutuality of obligation beyond the expectation that both parties would generate and execute sufficient work to sustain the Company,

its profits, their respective income and pay their employees salary. How the claimant did so was entirely at her discretion". See ReadyMixed Concrete (South East) Limited v Minister of Pensions and National Insurance (1968) Rainford v Dorset Aquatics Ltd (2021).

10.3 The claimant had complete control over her day-to-day activities. She was responsible for the day-to-day business under her role as director and there was no master servant relationship as proved by the claimant not needing to notify holiday, sick leave, choosing to undertake flexible working and taking out a bounce back loan on her own volition. If there was a master servant arrangement she would have been required to notify
and seek agreement to taking annual leave, SSP would have been paid, she would have needed to request flexible working and would not as an employee be able to take out a bounce back loan. See the above case law.

10.4 While it never arose, the respondent had no problem with the claimant substituting another to do her work, her hours of work were flexible and she could work for others 'on the side', an ability to work for others at the same time as the main 'employer' indicates self-employment. See the above case law.

10.5 Directors' dividends are set by both parties and dependent on the level of profit. The payment of dividends is inconsistent with employment status.

10.6 There is no dispute that the claimant paid tax by PAYE and NI on some of her income but only when she separated from her partner in January 2022 when his payment was moved from him to her. Taking a payment below tax personal allowance was done for practical tax reasons. It is established in O'Kelly v Trusthouse Forte plc [1983] ICR 728 EWCA that being part of the PAYE scheme and paying NI is not conclusive proof of a contract of service but merely a factor to be taken into account in balance with others. It was agreed between the claimant and the respondent when dividends were paid out similarly to the case of Rainford. See also Ready-Mixed Concrete (South East) Limited and O'Kelly.

10.7 The claimant did not enter a contract of employment with the respondent as she was a business owner. She had full control over how, when and who could do her work. Jointly with Mr McNally she bore all the risks of the business. She was a business owner and director of the respondent from 4 July 2017 to 30 November 2022 and was never an employee. As such she has no claim regarding unlawful deduction of wages. See section 230(1) to (3) of the 1996 Act.

10.8 The work the claimant did was for the same clients pre and post the merger. She was not considered an employee of the previous business and the basis of the discussions for the merger was that this would not change.

10.9 The payments she and her partner received each month were not payments for services, they were a tax efficient way of extracting profit for the shareholders to provide regular income rather than having to wait for a dividend to be declared, usually annually. The claimant agreed to this method in discussion pre the merger.

10.10 The paperwork to put agreed shareholding and directorship in place was delayed because they were both inordinately busy in the early years and the onus to have paperwork in place was hers. Mr McNally merely had to sign it.

10.11 If this was an employment contract, then the claimant and Mr McNally would have been paid in accordance with legislation relevant at the time including National Minimum Wage and pension auto-enrolment. The claimant did not seek to have this included at any point.

10.12 The Shareholders Agreement was not signed and it is not clear whether the claimant regarded it to be valid. However, her appointment as statutory director and allocation of shares was carried out irrespective of the Shareholders Agreement in accordance with the intention on merger.

11. The key points made by the claimant included those set out below. For completeness, and as the claimant is a litigant in person, I have recorded the following submissions notwithstanding that not all of them are of particular relevance to the issues in this case.

11.1 She had been excited about the prospect of the merger with Mr McNally's company and had trusted him and Mrs Clark given their business experience in high level management and director positions. That trust had been misplaced.

11.2 She had been constantly undermined and questioned by Mr McNally and goalposts were frequently changed despite being agreed in management meetings with Mrs Clark present. She felt bullied and this became intolerable to the point that she felt she had no other option than to leave to protect her mental health.

11.3 Her personal life changed dramatically when she split from her long-term partner in January 2022. She made no secret that she was struggling to cope and openly admitted to Mr McNally and Mrs Clark that she was suffering with mental health issues for which she was seeing a counsellor on a weekly basis. The stress etc that she admitted experiencing was never acknowledged or taken into account.

11.4 Mr McNally was very dismissive of her circumstances and made derogatory comments like "something in your work/life balance has to give" and "I really do not want to hear any more excuses as to why something has happened".

11.5 She was also accused of being absent from the office when it had been agreed she would work from home. Mr McNally's attitude and behaviour towards her became increasingly demeaning and patronising. It lacked any support or respect from someone who was supposed to be her equal business partner.

11.6 She had provided bookkeeping services for the respondent from 2017; received the same monthly salary through the company's PAYE scheme; Class I NICs were deducted from her wage at source; the respondent was responsible for paying her tax and NICs to HMRC; she never invoiced the respondent or completed a self-assessment tax return. Does that not indicate that she was an employee?

11.7 The shareholder agreement also states that the company entered into industry-standard employment contracts.

11.8 A director is responsible for running the company and informing Companies House whereas an employee or worker is responsible for providing services to the company. Hence from July 2017 she was an employee and from August 2020 was both director and employee.

11.9 She never gave written consent to withhold her wages for October and November 2022.

11.10 In the case of Stack v Ajar-Tec Ltd 2015 EWCA Civ 46, the Court Appeal found that an unpaid company director and shareholder was an employee, based on an express agreement that the appellant would undertake work for the company on an implied agreement that he would, at some point, be paid for this, once the company had the resources to make payment. Here the evidence showed an intention to create an employment relationship, albeit to be fully detailed at some point not yet determined.

The law

12. The principal statutory provisions, so far as are relevant to the issues in this case, are found in the 1996 Act. They are as follows:

*"**230. — Employees, workers etc.***

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) —

(a) a contract of employment, or

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

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed."

*"**13. — Right not to suffer unauthorised deductions.***

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

(a) the deduction is required or authorised 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.

(3) 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.

(4) 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."

"27. — Meaning of "wages" etc.

(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including —

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, …."

Application of the facts and the law to determine the issues

13. The above are the salient facts and the submissions made on behalf of the parties relevant to and upon which the Tribunal based its judgment having considered those facts and submissions in the light of the relevant statutory law and the case precedents in this area of law, some of which are referred to elsewhere in these Reasons, and particularly including the precedents relied upon by the claimant and Mr McNally.

14. As recorded above, the complaint of the claimant is a relatively simple complaint of unauthorised deduction from wages. An issue of fundamental importance in relation to that complaint is a more complex question, which has exercised courts and tribunals for many years, of whether the claimant was a worker employed by the respondent, the word "worker" being defined in section 230(3) of the 1996 Act as set out above. In this case, the element in that definition that is of relevance is found in section 230(3)(a) of the 1996 Act; namely whether the claimant entered into or worked under a contract of employment.

15. I therefore address first the question of whether the claimant was a worker of the respondent and then turn to address the question of whether, if so, the respondent made one or more unauthorised deductions from her wages.

"Worker" status?

16. The statutory definition of a worker is straightforward in itself but the question of employment/worker status has been considered many times in previously decided cases, the case law derived from which is either binding upon or provides guidance to me in my consideration of that question. As such, I first set out key principles that I draw from previously decided cases that I consider to be relevant to the issues in this case.

17. I first remind myself that in O'Kelly it was held that the question of employment status is a question of law in the overall sense albeit its determination depends on the values attached to the individual facts of the case; this approach being endorsed in Clark v Oxfordshire Health Authority [1998] IRLR 125, CA. This is of relevance in the case before me because although, when I asked them, the respondent's witnesses both agreed that an individual can be both a director and an employee, their evidence and approach to this case generally (for example,

with their sole focus being on the claimant being a director or business owner) appeared to belie their answers. Thus, if the facts in this case, as I have found them to be are indicative of employment status, then, as a matter of law, the claimant was an employee notwithstanding that the respondent's witnesses considered her to be otherwise.

18. I acknowledge that directors are officeholders and are not employees of a company as such and accept the claimant's submission that a director is legally responsible for running the company and ensuring relevant information is sent to Companies House on time. That contrasts with the function of an employee which, at risk of oversimplification, is to perform work for the employer in consideration for a wage in accordance with a contract of service. Directors can, however, be employees on to the by entering into a contract of service. Importantly, that contract can be express or implied, which is of relevance in this case.

19. In Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld [2009] ICR 1183, CA it was held while whether contractual terms have been reduced into writing was an important consideration, if there was not a written contract the parties' conduct could point to the conclusion that there was a true contract of employment.

20. I also acknowledge and accept the point made by both Mrs Clark and Mr McNally that an individual can be what is termed a "shadow director" of a company. Such individuals are not registered at Companies House as directors of the company but can have decision-making powers and exercise influence equivalent to that of a registered director, and will normally hold themselves out to third parties as directors of the company. Such shadow directors have the same responsibilities and legal obligations as a statutory director of the company. Accepting that point only means, however, that until the date upon which the claimant's appointment as a director of the respondent was registered at Companies House she may have been a shadow director; it does not mean that at the same time she was not an employee of the respondent.

21. In many of the earlier cases in which this question was considered it was held that an individual who was a director of a company and also the majority, controlling shareholder of that company was unlikely to be an employee. More recent authorities have, however, tended to the view that the fact that an individual is a controlling shareholder, while relevant, does not by itself mean that he or she cannot also be an employee. In this case, course, the claimant was not the controlling shareholder; until January 2022 she held 25% of the shares in the respondent and, from that date, 50% of those shares.

22. In Secretary of State for Trade and Industry v Bottrill [1999] ICR 592, CA it was held that the individual was an employee of the company of which he was also managing director and sole shareholder. He had a contract of employment with the company and was paid a salary from which tax and national insurance contributions were deducted. He was not paid any director's fees. He worked regular hours, was not employed anywhere else and was entitled to holidays and sick pay. The Court of Appeal gave guidance including as to various factors that

would usually be of relevance. Such factors include whether there was a genuine contract between the company and the individual shareholder, what was done pursuant to that contract and the degree of control.

23. It is now well-established by relevant case law that there is not one single factor that can be determinative of employment status. Instead, it has been stated in the case of Ready-Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2QB 497 and other decisions that the issue is to be approached by examining a range of relevant factors; this is commonly referred to as the "multiple test" or the "multi-factorial approach". Those factors must not, however, be considered as a mechanical exercise using a 'checklist approach' attributing some indicating employment status and others not and then totting up the respective totals to reach a decision. Instead, a tribunal should stand back and make an informed, considered, qualitative appreciation of the whole. As was said in O'Kelly, a tribunal must "consider all aspects of the relationship, no single factor being in itself decisive and each of which may vary in weight and direction, and having given such balance to the factors as seems appropriate, to determine whether the person was carrying on business on his own account".

The irreducible minimum

24. That said, it is now established that there are three elements comprising an "irreducible minimum" without which it will be all but impossible for a contract of employment to exist. I address each of those three elements in turn.

Control

25. In relation to this element, it is not necessary for the work performed by the individual to be carried out under the actual supervision or control of the respondent in the sense of what was previously described as being a 'master and servant' relationship, that term being used by the parties in this case. As was said in Catholic Child Welfare Society v Various Claimants [2013] IRLR 219, SC, it was no longer "realistic to look for a right to direct how an employee should perform his duties …. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus, the significance of control today is that the employer can direct what the employee does, not how he does it."

26. In the above context, I accept, as did the claimant in her evidence, that she was responsible for her own workload (as Mr McNally was responsible for his workload) and, as Mr McNally submitted, that she had complete control over her day-to-day activities. In this connection, however, the nature of their business relationship is important. For much of the time only the claimant and Mr McNally undertook work on behalf on the respondent, essentially as business partners. Further, and importantly, they each undertook a different discipline of bookkeeping and

management accountancy on behalf the respondent. In such circumstances, it is hardly surprising that each had control over the day-to-day activities that they respectively undertook on behalf of the respondent. In this regard, on the basis of the evidence before me, I reject Mr McNally's related submission that being responsible for the day-to-day business of the respondent as a director meant that there was no employment relationship.

27. In this connection Mr McNally maintained in evidence and pursued in cross examination of the claimant that in relation to such matters as her holiday in Thailand, her absence from work or limiting her activities following the deaths of her grandmother and aunt and the breakup of her relationship with her partner, not attending the office on Wednesdays and taking a period of sickness absence (all of which are described in more detail in my findings of fact above), the claimant had merely informed him of such matters and had not sought permission. Hence, he suggested there was no control. Once more in the circumstances of their business relationship as described in the immediately preceding paragraph, I reject that contention. I am satisfied that in such a close working relationship it is inappropriate to seek to distinguish between informing and requesting permission. Even if it is right that the claimant only informed Mr McNally of her wishes or intentions in the above I accept the claimant's evidence that in most respects he then agreed, and in other respects I am satisfied that it was open to Mr McNally, on behalf the respondent, to question or even disagree. I refer, for example, to the email exchange in November 2021 relating to whether the claimant would attend the respondent's offices on Wednesdays. On 3 November Mr McNally wrote, "Just wondering why you have decided not to come into the office on a Wednesday anymore? (C3.15) and, following the claimant's reply that that had been agreed, he wrote on 4 November, "We did not agree that you would absent yourself from the office on a Wednesday." (C3.14).

28. I also consider additional points to be relevant in relation to two of the above matters relating to the claimant's holidays and sickness absence. As to the former, her unchallenged evidence was that she took the minimum entitlement to paid holiday to which a worker is entitled pursuant to regulation 13 of the Working Time Regulations 1998 and as to the latter, the respondent continued to pay her the full amount of her pay as would be the norm in respect of a senior employee and not statutory sick pay.

29. Also in relation to the element of control, I bring into account that Mr McNally wanted to know what the claimant was doing at work and, therefore, she provided to him a "Weekly Update" of the work that she was undertaking and progress reports on her achievement of the respondent's business plan and that there was no evidence that Mr McNally provided equivalent reports to the claimant.

30. Also of relevance in this connection is the email Mr McNally sent to the claimant on 29 July 2020 (C3.19). I have set out above in some detail aspects of that letter which I consider to be relevant in this regard. It is unnecessary to repeat that detail here but as I observed to Mr McNally during the Hearing, I am satisfied that his

several comments in that email are indicative of him, on behalf of the respondent, exercising control of the claimant. Such comments include the following:

30.1 How the claimant's report was to be "geared".

30.2 His expectation of what the report should contain as to how she had progressed her goals.

30.3 She having given "throwaway numbers" leaving him none the wiser of the various matters he referred to.

30.4 Something in the claimant's "work/life balance" had to give.

30.5 He really did not want to hear any more excuses as to why something had not happened, but wanted to know when it would happen and the expected outcome.

30.6 He did not understand why it should take the claimant all day to attend one network meeting.

Mutuality of obligation

31. The existence of "mutuality of obligation" between the parties is now generally regarded as a necessary element of a contract of employment, without which it is highly unlikely that there will be a contract of employment in existence: see Carmichael v National Power plc [1999] ICR 1226, HL and Autoclenz v Belcher [2011] UKSC41. That is to say an obligation on the part of one party (in this case the respondent) to provide work and a corresponding obligation on the part of the other party (in this case the claimant) to accept and perform the work offered.

32. In relation to this point and others I have had regard to the decision in Bradley Rainford v Dorset Aquatics Limited EA-2020-000123-BA, which was relied upon by Mr McNally. In that decision it was confirmed that there is no reason in principle why a director/shareholder of a company cannot also be an employee or worker albeit it does not necessarily follow that simply because he does work for the company and receive money from it he must be one of the three categories of individual identified in section 230(3) of the 1996 Act. Further, the fact that the claimant in that case was a director and/or shareholder was not mutually exclusive with status as an employee. Importantly, in that case the individual's right to substitute another person to act in his place was a matter of significance but, as recorded below, I am not satisfied that in this case the claimant was entitled to provide a substitute to provide bookkeeping services to clients of the respondent in her place.

33. On the facts I have found above, in this case I am satisfied that the respondent was obliged to provide work to the claimant and she was expected to accept and perform that work. In this connection I again place weight upon the email Mr

McNally sent to the claimant on 29 July 2020, particularly regarding what was required of her. Hence, I am satisfied there was mutuality of obligation between the parties.

Personal performance

34. As indicated above, one of the requirements of the test for a contract of service laid down in Ready-Mixed Concrete (South East) Limited was that the employee must have agreed to provide his or her own work and skill.

35. Mr McNally submitted that, while it never arose, the respondent had no problem with the claimant substituting another to do her work. That is not the issue, however, rather the question is whether the employee (or indeed a worker) agreed to provide personal performance or, alternatively, the parties agreed that he or she could substitute a third party to perform the services.

36. In neither the evidence of Mr McNally nor that of Mrs Clark is it suggested that it was part of the agreement reached between the claimant and Mr McNally at the time of the merger of their previous independent businesses that each of those individuals would not, on behalf of the respondent, personally perform the services of bookkeeping and management accountancy respectively. To the contrary, I am satisfied on the basis of the evidence of all three witnesses that the claimant and Mr McNally were each to perform their respective services personally. That is in keeping with the concept of a merger of the two independent businesses in which the claimant and Mr McNally respectively each personally performed services for their respective clients

Other factors

37. In addition to the three elements comprising the “irreducible minimum” that I have addressed above there can be a range of other relevant factors that a tribunal should bring into account in applying the “multi-factorial approach”.

The intention of the parties

38. The parties stated intention as to the status of their working relationship in law may be a relevant factor albeit tribunals will look to the substance of the matter notwithstanding what the parties expressly agreed. A clear description of the relationship may, however, carry considerable weight and will be an important consideration especially where all other relevant factors are evenly balanced.

39. In this case, the stated intention of the claimant and Mr McNally, and therefore of the respondent, is recorded in the Shareholders Agreement. As noted above that Agreement has neither been dated nor signed, neither did it even exist at the time of the merger on 4 July 2017 and was not produced until 31 December 2020.

40. In those circumstances, I specifically asked Mr McNally whether the Shareholders Agreement accurately reflected the arrangements agreed between him and the claimant at the outset. He responded, "Yes". I then referred him to clause 4.1 of that Agreement and, particularly, the provision that the respondent "shall enter into …. employment agreements" with him and the claimant. I asked whether, at the time of incorporation of the respondent, that had been the intention of the parties to which he responded, "Yes, there would be employment agreements at that time." I asked him whether that meant that both he and the claimant were employees to which he responded, "Not initially". I asked him why that was and he replied, "I don't believe that the monthly payments [*to him and the claimant*] were in accordance with normal payments made to employees. This was a new business and it needed to be nurtured until it was strong enough to have employees". I asked whether the duties and responsibilities of him and the claimant before and after the nurturing of the business were to be the same to which he replied, "Yes, of course".

41. It is to be inferred from Mr McNally's response that he and the claimant were not "initially" employees of the respondent that subsequently they either became employees or it was intended that they would become employees. It is, however, evident from Mr McNally's clear response, "Yes, of course", that the duties and responsibilities that he and the claimant performed for the respondent were to be the same that, if they were to become employees sometime in the future, they were employees from the outset.

42. Similarly, I particularly asked Mrs Clark whether clause 4.1 of the Shareholders Agreement accurately reflected the arrangements that the claimant and Mr McNally had agreed orally between them in which she had been involved. She responded, "Yes, I believe so". Mrs Clark also confirmed that if things had been attended to as they should have been on the formation of the respondent, the Shareholders Agreement would have been in place from day one. That said, her evidence was also that the claimant and Mr McNally had never discussed being employees; as she put it, "They were to be 50:50 shareholders and partners".

43. Especially given this clear evidence of the respondent's witnesses I am satisfied that, despite the Shareholders Agreement not having been produced until more than three years after the incorporation of the respondent, its terms accurately represented the genuine intentions of the parties at the time of incorporation. I am satisfied that it was not what is often termed a 'sham' contract; neither did the claimant or Mr McNally suggest that it was a sham. To the contrary, as recorded above, both the claimant and Mr McNally relied upon the terms of the Shareholders Agreement notwithstanding the fact that it had neither been dated nor signed by the parties to it.

Payment of statutory deductions

44. A relevant indicator of employment is the incidence of income tax and national insurance contributions: deductions at source point to employment; gross

payments suggest self-employment. This factor is not, however, generally regarded as being conclusive evidence and, therefore, is not determinative of the question but it can give an indication of employment status.

45. There is no dispute in this case that employers and employees are liable to pay Class 1 National Insurance contributions, subject to how much the employee is paid. Likewise, there is no dispute that the PAYE system is applicable to employees and not those in self-employment. It is clear from the documents before the Tribunal that, subject to the relevant pay thresholds having been exceeded, the respondent made payments to the claimant from which it deducted both income tax and National Insurance contributions at source.

Financial risk

46. A consideration that points away from employment status is whether the claimant had any financial risk in the enterprise. This factor was relied upon by Mr McNally in submissions. In this case, I accept his submission and I am satisfied that the claimant, as director and shareholder, was exposed to financial risk depending on the success or otherwise of the respondent's business.

47. As in the case of Bradley Rainford, however, I am satisfied that that risk as to the respondent's success was referable to the claimant's status as a director/shareholder and this factor is not therefore directly relevant to the question of whether she was an employee or worker.

National minimum wage

48. I address, for completeness, the point made by Mrs Clark in evidence and Mr McNally in submissions that, given the hours that the claimant worked, the amount paid by the respondent to the claimant was less than the national minimum wage. On this basis it was contended that she could not be an employee. I reject that contention. While it is right that the National Minimum Wage Act 1998 requires workers to be paid at least the minimum wage, it is recognised that a number of employers do not comply with that statutory requirement and that many workers are not paid the minimum wage. That does not mean, however, that they are not workers.

49. A related point is that the claimant's evidence was that, on occasions, she could work up to 50 hours each week. I am not satisfied that that means that she was not a worker as the working time of many workers is "unmeasured".

Conclusion on this issue

50. I brought into account all of the facts as found on the basis of the evidence before me and the submissions made as recorded above. Having stepped back and considered all of the above factors in the round (see O'Kelly), I am satisfied that

the claimant was a "worker" of the respondent as defined in section 230(3) of the Employment Rights Act 1996.

Unauthorised deduction?

51. As set out above, section 13 of the 1996 Act provides that an employer must not make a deduction from the wages of a worker employed by him except in two circumstances:

51.1 first, that deduction is required or authorised by statute or by a relevant provision of the worker's contract, or

51.2 the worker has signified in writing his agreement or consent to the making of the deduction before the deduction is actually made.

52. In this regard I remind myself that (again as set out above) section 27(a) of the 1996 Act provides that the term "wages" means any sums payable to the worker in connection with his employment, including any "emolument referable to his employment, whether payable under his contract or otherwise". I am satisfied that the payments made by the respondent to the claimant in consideration for the work she performed on its behalf for its clients comes within that fairly wide definition.

53. It is clear from the evidence before me, not least the payslips that were issued to the claimant in October and November 2022 and the related HMRC form P45, that net pay of £1,627.97 was due to the claimant in respect of October 2022 and that net pay of £1,638.63 was due to her in respect of November 2022.

54. The respondent did not, however, pay either of those amount of net pay to the claimant. Instead, as recorded above, those amounts were paid into the claimant's director's loan account. The claimant agreed to that in respect of her October pay but did not agree it in respect of her November pay; and in this respect I accept the claimant's evidence that she would not have agreed to the payment being made into her director's loan account when she had submitted her resignation and knew that she was about to cease to be a director. Furthermore, the claimant did not agree in writing (as is required by section 13(1)(b) of the 1996) that the respondent could divert her pay in respect of either month into her director's loan account.

Conclusion on this issue

55. On these bases, therefore, I am satisfied that the claimant's complaint under section 23 of the 1996 Act that, contrary to section 13 of that Act, the respondent made an unauthorised deductions from her wages is well-founded.

56. In respect of those unauthorised deductions the respondent is ordered to pay to the claimant the sum of £3,266.60; that amount having been agreed by Mr McNally as the amount due to the claimant if she were to succeed in her claim.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9 October 2023

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