EMPLOYMENT TRIBUNALS

Claimant: **Miss T Scott**

Respondent: **CYC Coastal Club Ltd**

Heard at: **London South Employment Tribunal**

On: **29.11.2023**

Before: Employment Judge Dyal

Representation:

Claimant: Mr Clarke, Counsel

Respondent: Ms Owusu-Agyei, Counsel

RESERVED JUDGMENT

1. The Claimant was employed by the Respondent under contracts of service.
2. The application for a deposit order is refused.

REASONS

Introduction

1. This matter came before me today at a Preliminary Hearing to determine:

    a. Whether or not the Claimant had been employed by the Respondent under a contract of employment;
    b. The Claimant's application to strike-out the response. In the course of the hearing this application was very sensibly moderated down to an application for a deposit order in the event that the employment status issue was decided in the Claimant's favour.

2. There was an agreed bundle of 227 pages of documents. I heard evidence from:

    a. For the Claimant: the Claimant, Ms Robyn Barnett, Mr Lee Davies, Mr Norman Simmons;
    b. For the Respondent: Mr Alan Morgan and Ms Maisie Adkins (their statements were materially identical).

3. Counsel made oral (only) closing submissions. Given the way I have determined the case it was not necessary for me to deal with the submissions on s.39 – 41 Companies Act 2006, apparent/ostensible authority, ratification and implied contract of employment.

Findings of fact

4. The Respondent is a company limited by guarantee. It leases a holiday park from Swale Borough Council and is run as a private members club, meaning that to purchase a chalet the purchaser must be admitted as a member.

5. The Respondent's Memorandum of Association is dated 10 February 1961 and has been amended a number of times since. Its Articles of Association are undated but are before me. They are drafted in a way that suggests they are contemporaneous with the Memorandum of Association and I so find. I have considered these documents in full.

6. Of particular relevance are articles 9, 10 and 11 of the Articles of Association.

    a. Article 9 makes provision for annually elected officers of the club including a President, Vice-President, Flag Officers and an Honorary Secretary.
    b. Article 10 makes provision for a governing committee. It provides at 10(2) that the members of the committed "*shall retire annually and be eligible for re-election*". In broad terms the idea is that there are nominations and then an annual election of committee members. The officers of article 9 are ex-officio members of the committee.
    c. Article 11 makes provision for the powers of the committee. These are broad. It makes the committee the deemed authorised agents of the Respondent and its members for the purpose of carrying out its objects. It creates a wide power for the committee to enter contracts on behalf of the Respondent.
    d. Article 16 gave members a power to call a special meeting subject to the conditions explained there.

7. In modern times, and certainly at the relevant times, there has been no-one with the title of President though there has always been a chair of the committee who took essentially that role. There have been no Vice-Presidents nor Flag-Officers. There has been a Company Secretary but it is not clear on, because not addressed by, the evidence before me whether this is the same role as the Honorary Secretary described in the articles.

8. A members' handbook was produced in 2019. There is little evidence about the circumstances of this. The document says that it states the club rules as at March 2019. On page three there is an information page written by Alan Ogilvie, Company Secretary. In closing submissions the Respondent's counsel suggested there was no written evidence that Mr Ogilvie was the Company Secretary, though there had been oral evidence he was. The thrust of the submission was that I should not accept that he was. In fact there is this written evidence and I in any event accept the oral evidence that Mr Ogilvie was the Company Secretary.

9. The handbook contains a section on 'Club Governance'. In many respects it is in similar terms to the articles of association, though the wording is not identical. The provisions include that members of the committee shall retire annually and may offer themselves for re-election by members of the club present at the AGM "*with the exception of the chairman who will stand down when the new Committee has been elected*".

10. On 7 April 2019, the Claimant and Mr Lee Davies were among those elected to the committee and they became statutory directors of the Respondent along with the rest of the committee. Mr Davies elected chairman.

11. Notwithstanding the provisions of article 10(2) the committee did not resign by 7 April 2020, there was no election of a new committee and there was no AGM. Of course by this time it was the height of the first wave of the Covid 19 pandemic and I find that this is the reason why there were no resignations and no AGM at or around this time. It continued to be the reason why there had been no AGM by the time the Claimant entered both of the agreements referred to below. The pandemic continued, and continued to be disruptive of normal life/business, at those times.

12. On 1 June 2020, the Claimant commenced working on a paid basis for the club as Site Manager/Administrator. Prior to that she had been carrying out administrative tasks on a goodwill basis. This arrangement was formalised in writing on 21 August 2020 when the Claimant signed a document titled 'contract of employment'. The document included a job description and the stated job title to perform duties as directed by the chairman. It stated that the employment commenced on 1 June 2020. Under the notice provisions it stated *"the employer must give the employee two years full occupancy to acquire alternative permanent accommodation from date of dismissal."* The Claimant had a chalet on the site. Generally chalet occupants were not allowed to remain on site for the whole year nor to make the chalet their principal residence.

13. The contract was in a typical form for a small employer and made the usual provisions that may be expected in a contract of employment such as;

    a. Stating weekly working hours (20);
    b. The pay and pay frequency (£235 p/w);
    c. Method of payment (BACs)
    d. Paid holiday;
    e. The need to give notice of holiday;
    f. Confidentiality;

g. Reporting of sickness absence and sick pay;
h. The place of work;
i. Pension auto-enrolment
j. Rules of conduct;
k. Notice provisions;
l. Grievance procedure.

14. On its express terms the contract made no provision for any form of substitution and was plainly for personal service.

15. The contract was counter-signed by Mr Davies, and Mr Alan Ogilvie. I accept the evidence I have heard that Mr Ogilvie was the Company Secretary at the time. Mr Ogilvie was not present when the claimant and Mr Davies signed the contract. He signed the contract separately and sent it by post.

16. The contract provided for the Claimant to carry out a range of duties. It was essentially put to the Claimant in cross-examination that she had not carried out these duties. The basis for this was extremely thin and largely based on weak conjecture. I accept the Claimant's evidence that she did carry out these duties. It was reasonably detailed, given in a credible way and I found it plausible.

17. I do not think the Claimant's evidence is undermined by the fact that in the past she had carried out some of these duties for free, nor the fact that there had in the past been a culture of other club members chipping in and helping the club out for free. The type and amount of things the Claimant was required to do under the contract were perfectly ordinary and proper things for an organisation of the Respondent's kind to pay someone to do - even if it had benefitted from things being done on a goodwill basis in the past. The timing of the commencement of the contract (1 June 2020) is also significant. It was a time during which there remained many legal and *de facto* restrictions in place by virtue of the pandemic. It was scarcely surprising that the Respondent had to find new ways of operating. The employment of the Claimant was a part of that.

18. One of the duties in the contract was expressed as follows:

> *Engaging appropriate contractors to rectify any arising problems within the CYC Coastal Club Ltd with the exception of problems incurred by private chalet owners which are deemed not the responsibility of the CYC Coastal Club Ltd, including contractor instruction with site maintenance, once authorised to do so by the Chairman.*

19. One of the people that the Claimant engaged as a contractor was her partner and she herself also did some of the work on rectifying the site. I accept her evidence that before doing so she got the committee's approval. I also accept her evidence that the reason she and her partner sometimes did the works to the site was that there were real difficulties in getting other contractors to do it because there was a lack of funds to pay them. Accordingly, the committee approved her and her partner doing some of the work. Sometimes they were paid for this work by setting off their liability for ground rent. This was mutually convenient. When the

Claimant carried out remedial work on the site with her partner she did not regard this as part of her employment – it was additional work.

20. It was suggested in closing submissions that the Claimant engaging her partner to carry out work at the site meant that there was no obligation for personal service on the Claimant's part because this was a form of substitution. This submission was, respectfully, odd, hard to follow and did not sit well with the evidence that had been heard. In light of it, it is important for me to be clear here that the Claimant did not defer/assign the task of *engaging* appropriate contractors to her partner. Rather, he was sometimes the person that she engaged to do the work and she herself was sometimes the person she engaged.

21. It is also the case that Mr Davies was sometimes involved in engaging contractors. In closing submissions the Respondent again submitted, oddly in my view, that this was evidence of the Claimant having a right of substitution. In light of that it is important to be clear in my findings of fact that Mr Davies, when he was involved in engaging contractors, was not doing so on the Claimant's behalf in fulfilment of her contractual obligations. The Claimant was not somehow sub-contracting or even delegating her duties out to him. On the contrary, it was simply part of Mr Davies' own duties to be involved in engaging sub-contractors. There is nothing in the slightest strange or surprising about a duty of this sort being carried out by more than one person.

22. On 9 May 2021, the Claimant resigned as a committee member and company director.

23. On 30 June 2021, the Claimant signed a document titled contract of employment with a commencement date stated as 1 October 2020. This was additional to the existing agreement which continued. The terms of this contract were essentially the same as the first one save that:

    a. it included different duties that were essentially related to book-keeping including those previously carried out by Mr Ogilvie;
    b. was for an additional 4 hours work per week for £65;
    c. the notice provisions were a bit different *"the Employer must give the Employee two years full occupancy (12 month stay) to acquire alternative permanent accommodation from date of dismissal).*

24. I find that this contract reflected the reality of the situation – the Claimant had been carrying out these additional duties since October 2020 and had been paid extra for them. I did not think there was any cogency in the challenge to her evidence on this matter. I accept that Mr Ogilvie had not been an employee and had carried out the book related work he did as an independent contractor. As explained below this does not undermine either the Claimant's case or her evidence.

25. I find that the contract was signed on 28 June 2021 by Mr Davies and on 30 June 2021 by the Claimant, Mr Norman Simmons, and Michael Penman:

a. I accept Ms Atkin's evidence that on 29 August 2023, Mr Penman *told her* that he had not signed this contract, that it looked like his signature on the document but that it was not. She says that Mr Penman produced a witness statement to that effect but the same is not before me in evidence. I accept however that he did do that. I have not heard from Mr Penman. I also accept the Claimant's evidence that Mr Penman did sign the contract and that he did so in her presence, in the office on 30 June 2021. I consider hers the better and more reliable evidence on this point not least as I had the benefit from hearing from her directly. I infer that Mr Penman was simply mistaken through the passage of time in what he told Ms Atkins.
b. The Respondent's (hearsay) evidence was that on 30 August 2023, Mr Simmons told Ms Fraher (by then a company director), that he had signed this contract of employment but had not witnessed the other signatures. I heard from Mr Simmons (unlike Ms Fraher) and I accept his evidence that he did not say this to her, that he remembered signing the contract in the office and that Mic, who I infer is a reference to Michael Penman, had been there. This is something he remembered because he recalled Mr Penman complaining on that occasion about an incident with swans.

26. It was also put to the Claimant that the contract was effectively a sham, that it did not reflect the reality of the situation and the real reason it had been entered was not to do with employment but in reality simply for the occupancy clause in the notice provision. I accept her evidence that that is simply not true. She entered the agreement because she wanted to carry out the work for a wage. The Claimant negotiated the clauses that she did in respect of notice provisions / accommodation because she was concerned about finding alternative accommodation in the event of her employment ending.

27. I accept the Claimant's evidence that she took instructions as to her work from Mr Davies and the rest of the committee (she was a part of the committee for some of the chronology so she took her instructions from the rest of the committee at those times). She and Mr Davies worked together on some things, like a newsletter, but he was nonetheless her 'boss' / line manager. For instance, he approved the newsletter before it went to print. I also accept Mr Davies' evidence in answer to questions about whether he "physically supervised the Claimant" carrying out her duties, that he did albeit not each and every time she carried a duty out (but there was no reason to do that). In his words he witnessed and assessed that Claimant carrying out her tasks. She did not have appraisals - but the Respondent was a micro-employer.

28. Deductions from the Claimant's earnings were made at source (PAYE), she received payslips, she did not have to invoice to be paid and she was auto-enrolled in a NEST pension.

29. On 18 November, John Copland & Son solicitors, acting for Mr Rough, a member of the Respondent, wrote to Mr Davies. It referred to a failure to conduct an AGM and argued that without an AGM there was no committee. It expressed sympathy with the difficulties posed by the pandemic but said other organisations had managed to find ways of having AGMs, including by postal ballot.

30. Shortly afterwards, presumably in light of the suggestion in the letter, on December 2021 there was a 'Postal AGM'. This comprised of a postal ballot to elect new directors. Mr Davies was not on the ballot but instead simply continued in office. His explanation for that is that none of the candidates on the ballot paper were qualified or prepared to be chairman. That does not, in my view, fully explain why he was not on the ballot. He could have been on the ballot even if he was the only person able/willing to be chair.

31. On 18 January 2022, the same firm wrote to Mr Davies again on behalf of Mr Rough. It made essentially the same points.

32. On 16 June 2022, there was a committee meeting to discuss a pay increase the Claimant had requested. At one stage Mr Davies referred to this as 'Tanya's demands'.

33. In December 2022, there was a further 'Postal AGM'. This again comprised of a postal ballot to elect new directors. Mr Davies was not on the ballot but instead simply continued in office. His explanation is this same and my view of the adequacy of it is the same.

34. The Respondent places weight on the fact that it was a term of its lease agreement with the local authority for the holiday park that: "*4.3.2 no chalets or caravans shall be occupied except between 1 March or 2 January in the following calendar year."* Its says that the clauses in the Claimant's purported contracts in respect of accommodation were in breach of this provision and that this indicates that the contracts are in some way not genuine or are a sham.

35. However, the lease agreement also provides: "4*.3.3 any chalet or caravan that is not the subject of a signed agreement pursuant to clause 4.3.2 shall not be occupied at any time with the exception of two chalets which may be used as Wardens accommodation throughout the whole year subject to the tenant informing the Landlord* […]". The wardens referred to are known as 'Winter Wardens' and they remain on the site for the couple of months it is closed making sure all is well.

36. It was put to the Claimant that she was not a warden throughout her employment and specifically not in 2022 or 2023. Her evidence is that she was. I accept that evidence. I do not think it was undermined by cross-examination although the cross-examination did show that at times there may have been more than two winter wardens (and that Mr Davies attempted to discuss this with the council) and also that circumstances arose from time to time that meant it was convenient to change who the wardens were during a winter (i.e., when the Claimant took leave and when her partner had a dispute with a member).

37. By March 2023, a significant proportion of the membership were unhappy. A new committee was elected. On 19 April 2023 the new committee wrote to the Claimant and told her that it took the view she had never been an employee because there had been no authority to employ her. Without prejudice to that

position, if she was an employee, she was summarily dismissed for gross misconduct.

Respondent's case

38. The Respondent submits that:

    a. When the Claimant's purported contracts of employment were entered Mr Davies and the committee had no power to bind the company so the Respondent is not bound by the contracts. This is because they ought to have resigned 12 months after their appointment and had not done so. I indicated before lunch at the hearing that I wanted counsel to address me specifically on why it was said to follow from the failure to resign that Mr Davies/the committee ceased to exist/had no powers to bind the company. I asked to be referred to authority on that point if there was any. When closing submissions were made after lunch no authority was referred to on this point and counsel submitted that it was simply a matter of construction of the Articles of Association. She submitted that the ordinary principles of contractual interpretation applied when construing the Articles of Association and that properly construed the Respondent's position correctly stated what they meant. Thus there was no contract. I note that the Respondent's position was that officer (i.e. article 9) members of the constitution were also required to resign annually. It needed to be so otherwise Mr Davies as chairman (i.e. President) would have remained in office and/or Mr Ogilvie would have too at least until they resigned or were removed.
    b. The purported contracts were not saved by reference to s.39 – 41 Companies Act 2006 nor the doctrines of apparent/ostensible authority.
    c. The contracts were a sham.
    d. The contracts even if they existed were not contracts of employment.

Discussion and conclusion

39. When construing a written contract the principles of construction summarised by Lord Neuberger in ***Arnold (Respondent) v Britton*** [2015] UKSC 36 at paragraph 15 should be applied. Regard should be had to:

    > *(i)…the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*

40. I do not accept that the Respondent's interpretation of the Articles of Association is the right one.

41. There was an obligation on the committee to "resign" after 12 months (clause 10(2)). The use of the word 'resign' is significant. It means that some action on the part of the committee member was required to bring the term of office to an end, i.e., an act of resignation. Further:

a. There is nothing in the articles of association that says if the committee does not resign it in any event ceases to be a committee or to have the powers of the committee.
b. It would have been very easy for the articles to have achieved that result if that is what had been intended. For instance, it could have provided that if there was no actual resignation there would be a deemed resignation. Or more simply that the term of office was limited to 12 months and automatically ended thereafter. The articles did not say any such thing.

42. Yet further, in my view the Respondent's construction of the agreement flies in the face of commercial and common sense. It would mean that where there was a failure for the committee to resign and to hold an election, the Respondent simply had no committee and thus no natural persons to exercise the functions needed for it to achieve its objects or even to deal with emergencies. This point can be illustrated by an example but what follows is just an example and the point stands and speaks for itself even if this proves a bad example.

43. Imagine the committee had failed to resign after a year, entirely innocently, and there was a serious water leak on the premises that only a plumber could fix. No-one would have powers under the articles to call a plumber and agree a fair price to get the leak fixed and pay the plumber out of the companies' funds to do the work. That is absurd.

44. In my view the correct interpretation of the articles of association are that the committee and its members continued to have the powers of clause 11 until it/they resigned or were otherwise removed from office, whether by dismissal or the election of a new committee.

45. I infer that the Respondent was driven to adopt the extreme construction of the articles it did because a more moderate one, perhaps along the lines that the committee continued to retain its powers for a reasonable period after its 12 month term or that it retained its powers if it had good reason not to resign, would have defeated its case that even the first contract with the Claimant had was ultra vires. The committee's 12 month anniversary ended at what was literally the height of the pandemic (April 2020). The Claimant's paid work with the Respondent (which I ultimately find was employment) was agreed and commenced just past the peak of the pandemic but while it was still raging and was still immensely destructive of life and business as we knew it. There were very plainly, at that time, exceptional circumstances for having no AGM and no resignations.

46. I accept that the Claimant was aware that the committee ought, according to the articles, to have resigned after 12 months. However, I do not accept that *in this case* that made a difference. I do not accept that she or anyone was improperly exploiting the committee's failure to resign to take the benefits of the contract (I say more about this when considering the 'sham' argument. The work the Claimant contracted for was work that the company needed and wanted to be done. The wages and terms were unremarkable save in one respect. The accommodation provisions were favourable to the Claimant. That in my view simply means she struck a good bargain. This was not a fraudulent contract nor

otherwise an improper one. Another way of capturing my view is that the contracts were, on both sides, entered in good faith.

47. Finally on this point, I note that none of this means that the committee/chairman could continue its tenure indefinitely without further election if this was not what the membership wanted. There were various means of redress available to dissatisfied members including calling a special meeting under clause 16 if they wanted to. Indeed, ultimately, the membership decided it wanted a (non-postal) AGM and election and it had one.

48. I reject the submission that the contracts of employment were a sham.

49. In ***Autoclenz Limited v Belcher*** [2011] IRLR 820, Lord Clarke, having reviewed the authorities on 'sham' contracts in the employment context said at [29]:

> *"The question in every case is…what was the true agreement between the parties."*

50. He went on at paragraph 35 to say:

> *"So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description."*

51. The Respondent says the agreement was a sham because

    a. The work in the contract did not need to be done by an employee. There was evidence that club members had chipped in to do things for free;
    b. The Claimant had entered the agreement simply so she could remain on site all year round.

52. I reject this argument. The true agreement is indeed as described in the written agreements. The fact that club members chipped in for free in the past may be true, but is nothing to the point. I find that the Claimant was doing the work she was contracted to do and it was the parties' intention when contracting that this be the case. I also reject the suggestion that the Claimant entered the agreement simply so she could live on the site all year around. I accept that living on the site all year around was important to her. The accommodation benefits were simply an (important) part of the overall consideration for the contracts. Without the accommodation term the employment was not attractive to the Claimant; with it, it was. There was no sham. This was a genuine arrangement.

53. I wholly reject the argument that if there were contracts they were not contracts of employment. The argument was very thin.

54. The starting point is the definition of employment at s.230 Employment Rights Act 1996. I have reminded myself of it. In *Autoclenz,* Lord Clarke cited with approval the following well known principles:

> *A contract of service exists if these three conditions are fulfilled.*
> *(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.*
> *(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.*
> *(iii) The other provisions of the contract are consistent with its being a contract of service ...*
> *Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be.*

55. His Lordship added:

> *Three further propositions are not I think contentious:*
>
> *(i) As Stephenson LJ put it in Nethermere (St Neots) v Gardiner [1984] IRLR 240, 245, 'There must ... be an irreducible minimum of obligation on each side to create a contract of services'.*
> *(ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express & Echo Publications v Tanton ('Tanton') [1999] IRLR 367, per Peter Gibson LJ at pp.369–370.*
> *(iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at p.369.*

56. In this case:

a. There was clearly mutuality of obligation. The Claimant was obliged to carry out work and the Respondent was obliged to pay her for it. This was both the express contractual position and the position in reality;
b. There was clearly a requirement for personal service and no right whatever of substitution. The Claimant was required under the contracts to carry out the work herself. There was no right of substitution of any kind whether in the express agreement or in practice. The Respondent's argument to the contrary is simply a bad point. The Claimant's partner carried out some remedial work to the site as did she as did other contractors. However, her contractual duty was to engage contractors. No one did this on her behalf, not her partner not anyone. It is true that Mr Davies also engaged contractors but he did not do it on her behalf he did it

on his own account. The reality of the situation was that there was no right of substitution.

c. Control. I accept that the Claimant took her instructions from Mr Davies and the committee and answered to them both. In practice Mr Davies was her 'boss'/line manager. There were no performance appraisals or the like but this was a micro-employer and there is nothing at all unusual about employees being managed informally by micro-employers. She was controlled to the extent I would expect for an employee in these kinds of roles in this kind of business. She did sometimes work collaboratively with Mr Davies– like producing a newsletter together - but again that is entirely consistent with being an employee. She was subordinate to him to the necessary extent. The fact that at some stage the Claimant wanted a pay rise and that Mr Davies referred to this as her demands is of no material significance. It is entirely normal, indeed utterly routine, for employees to make demands for more pay and for requests of this kind to be referred to as demands.
d. The other features of the contract are entirely consistent with and point to employment and I am referring both to the express terms and how things operated in reality e.g.:
    1. The manner of pay with deductions at source;
    2. Auto-enrolment for pension;
    3. The existence of a grievance procedure;
    4. Having notice provisions (albeit with an unusual term about accommodation);
    5. A power of dismissal.

57. It would be preposterous on the facts of this case to say the Claimant was in business on her own account. She was not. I do not think the fact that Mr Ogilvie carried out his book related duties for the Respondent as an independent contractor is a factor of any weight. It does not follow that because that is what *he* did it is what the Claimant did. There are many duties that could be carried out by either an employee or an independent contractor or by both. Books/accounts are a paradigm example. In any given case a multi-factorial test must be applied and when it is applied to the Claimant the results are plain. She was an employee working under two contracts of service.

Application for a deposit order

58. The Claimant's application to strike out the case was moderated to an application for a deposit order.

59. By rule 39 the tribunal has a power to order a deposit in relation to any specific allegation or argument in a claim or response that has little reasonable prospect of success. This is a lower threshold.

60. In ***Van Rensburg v Royal Borough of Kingston-Upon-Thames***, UKEAT/0096/07 at [24 – 27], Elias P (as he was) made clear that when applying the 'little reasonable prospect' test the tribunal is not limited to legal matters

alone. Elias P also made clear that there was more scope for exercising the power to order a deposit because of the improbability of essential facts being established than when exercising the power to strike out for that reason. For instance, he said:

> [27]… *the tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim or response.*

61. The basis for the application was that even taking Respondent's case at its highest the dismissal was procedurally unfair in that the Claimant was summarily dismissed with no procedure.

62. I was initially attracted to this submission and not attracted to the Respondent's submission in response that I needed to see all the evidence in the case to form any view as to whether there was little reasonable prospect of success. Plainly that goes too far otherwise it would almost never be possible to make a deposit order prior to a case being fully prepared. That would undermine the deposit order regime to the point of absurdity.

63. If the Claimant was dismissed without the new committee's concern being put to her that she was not validly employed and/or that she was guilty of gross misconduct and without her having a chance to respond before any decision was taken, then it is hard to see how that could be other than unfair applying the statutory test at s.98(4) Employment Rights Act 1996.

64. I therefore specifically asked whether, prior to the decision being taken to dismiss the Claimant, she was invited to a meeting to discuss the employment status issue/gross misconduct allegation. I was told by the Respondent's counsel, on instructions, that the Claimant was invited to such a meeting prior to dismissal but that she declined it. If that is right then I would not make the deposit order as the test would not in my view be met. I was not, today, in a position to form any sensible view of whether or not the Claimant was invited to such a meeting. I do not have a proper basis for doubting what I was told by counsel. I therefore do not think the deposit order test is met.

65. However, in case it is relevant for the future, I note that but for this representation from counsel (on instructions), I would have made a deposit order because I would have taken the view that the averment that the dismissal was not unfair had little reasonable prospect of success and that it was right for me to exercise my discretion to make such an order.

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Employment Judge Dyal

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Date 29 November 2023