1.

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Leanne Wilcox**		
Respondent:	**Diamond Contracts Limited**		
Heard at:	**Hull**	**On:**	**11 and 12 December 2017**
	Deliberations		**21 December 2017**
Before:	**Employment Judge T R Smith**		

Representation

Claimant:	Mrs Leanne Wilcox, litigant in person
Respondent:	Mr Morton, solicitor

RESERVED JUDGMENT

The unanimous decision of the Tribunal is: -

1. The Claimant's complaint of unfair dismissal is well founded.
2. The Claimant's complaint of breach of contract (holiday pay) is not well founded and is dismissed.
3. The Claimant's complaint of breach of contract (failure to pay contractual notice) is well founded and the Tribunal awards the Claimant four weeks' pay less tax and national insurance.
4. The Claimant's complaint of unlawful deduction from wages is well-founded and the Tribunal awards the Claimant wages from 1 January 2017 until 22 February 2017 less tax and national insurance.

REASONS

Background.

Issues.

1. Was there any form of contract between the Claimant and the Respondent?
2. If so, was the contract void for illegality?

3. Was the Claimant an employee of the Respondent, a worker of the Respondent or neither?

4. In relation to the Claimant's complaints of damages for breach of contract (notice pay), unlawful deduction from wages (1 January 2017 until termination), non-payment of holiday pay and unfair dismissal were all or any of the complaints presented within time and if not, applying the relevant statutory provisions for each complaint, should time be extended? It was conceded by Mr Morton that if the Claimant was an employee and dismissed as she claimed on 22 February 2017 then her unfair dismissal claim was in time.

5. Due to the amount of time wasted, most of one day out of a two-day hearing, (the details of which are set out below) the Tribunal indicated that if it found for the Claimant on unfair dismissal, remedy would be dealt with separately, but if it found for the Claimant on any of the other complaints it would deal with remedy in its reserved judgement.

Amendment.

6. On the first day of the hearing Mr Morton contended that the reason or principal reason for the dismissal of the Claimant was for some other substantial reason. The Tribunal pointed out that although the Response had been professionally drafted this had not been pleaded and nor, in the Tribunal's opinion, were there factual circumstances to support such a defence in the Response. This was conceded. The Tribunal therefore invited Mr Morton to seek leave to amend if he wished to pursue that argument.

7. The Tribunal did not have before it a draft of the proposed amendment. It was therefore agreed that the Respondent would produce a draft amended Response for the Tribunal and the Claimant on the morning of 12 December 2017.

8. This was done (352).

9. The amendment sought not only to plead a potentially fair reason for dismissal but also to contend that a fair process was followed, raised a Polkey argument and contended that the Claimant caused or contributed to her dismissal.

10. The Tribunal heard representations from both parties on the amendment point.

11. The Tribunal had regard to its power under Rule 29 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, relevant case law and the Presidential Guidance on case management at paragraph 5.

12. In reaching its decision on amendment and its decision to refuse the same the Tribunal had regard to the following factors.

13. This was a substantial amendment. This was not a relabelling or a minor clarification of matters already clearly before the Tribunal. Substantial new evidence would be needed as neither party dealt with any of these issues in their statements. The evidence would be of a different nature. For example, the Claimant would need to know what her alleged conduct was (which was not even pleaded in the proposed amended ET3) and would then need to answer that matter after the Respondent had lead evidence on it. Even if the amendment was allowed the Respondent, who would bear the burden of proof, had no evidence in its witness statements to explain the reason why the Claimant was dismissed. The Tribunal noted that Mr Bamford's witness statement made no reference whatsoever as to the reasons why the Claimant

was dismissed. He would need to prepare a new statement. There were no documents in the bundle such as a letter of dismissal setting out the reasons why the Claimant was dismissed upon which the Respondent could rely so even if the amendment was allowed there was no evidence to support the allegation.

14. The timing of the application. The application was made on day one of a two day trial. Whilst legal representatives had changed that was no excuse as to why an application could not have been made earlier. The Tribunal noted the claim form was presented as long ago as 17 June 2017. Whilst delay cannot be the sole reason for refusing an amendment it is a factor that can be taken into account. No adequate explanation was put forward as to why the application was so late.

15. Thirdly the Tribunal balanced the issue of hardship for both parties. If the amendment was permitted this added a hurdle to the Claimant's unfair dismissal complaint. It would result in delay. The Claimant did not address the proposed new matters in her witness statement and nor did her witness. New statements would be required resulting in an adjournment. Balanced against that by refusing the amendment, if the Claimant succeeded in establishing she was an employee and had brought a claim in time, the Respondent was deprived of a defence. In looking at hardship the Tribunal noted that there had been a comprehensive case management discussion on the 24 August 2016 when EJ Maidment spent some time looking at the issues. It is instructive to note what was recorded as regards the Claimant's unfair dismissal claim *"..It is recognised by the Respondent that it would in all the circumstances struggle to show that she [i.e. the Claimant] had been fairly dismissed whether in terms of potentially fair reason for dismissal or in terms of the procedure followed given that the Claimant has not been regarded as an employee at all".* The Respondent well knew that it had difficulties and had no pleaded case on unfair dismissal as long ago as 24 August 2016. It did nothing. It now seeks to reconstruct its case during the trial. Any hardship was self-inflicted.

16. The Tribunal reminded itself of the words set out in **Selkent Bus Company Ltd -v- Moore 1996 ICR 836** that the Tribunal *"should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against injustice and hardship of refusing it."*

17. The hardship/injustice test takes precedence in the exercise the Tribunal was required to engage in. The Tribunal had to have regard to the overriding objective. Weighing all these factors up with particular regard to the fact that the Respondent already had defences namely that of illegality, time, and employment status the injustice of allowing the amendment exceeded the injustice and hardship of refusing it. Whilst the Tribunal did consider an adjournment and a consequential costs order that would further delay this case and if the Claimant succeeded interest would not run on any award the Tribunal could make.

Evidence.

18. The Tribunal heard oral evidence from: –

19. The Claimant, Mrs Wilcox

20. The Claimant's husband, Mr Jon Wilcox.

21. Mr Alan Bamforth, director of the Respondent
22. Mr Terry Doyle, accountant with Clive Owen LLP who attended pursuant to a witness order.
23. The Tribunal also had a statement of Mr Chris Wood before it. Mr Wood acted as an internal accountant/bookkeeper for the Respondent from April 2012 to May 2017 on a self-employed basis. Mr Wood was not called and did not give evidence. As his evidence was not tested under cross examination the Tribunal gave it limited weight.
24. On the first day of the hearing Mr Morton sought to adduce two statements, the first from Tanya Ehlers and the second from Amanda Bamforth.
25. The Tribunal declined to admit either of the statements in evidence firstly, due to the timing of their production and the prejudice it caused to the Claimant, secondly the failure to comply with case management orders made on 24 August 2016 by the Tribunal as regards the production of witness statement and thirdly because Mr Morton indicated he did not intend to call the maker of either statement in any event so the weight that, even if admitted, would have been limited.
26. The Tribunal, eventually, had before it an agreed bundle consisting of pages 352
27. The Tribunal records its frustration and disappointment that over 4 hours and 25 minutes of valuable hearing time on day one was wasted on documentary issues and the failure to produce one clear paginated bundle. This was even more vexing given the very clear case management orders made on the 24 August and comments made by EJ Buckley in her judgement handed down on the 6 November 2016. In the latter E.J Buckley specifically reminding the parties of the need for documentary issues in this case to be resolved well before the hearing given the difficulties she encountered in trying the case between Mr Jon Wilcox and the Respondent.
28. It was also of concern to the Tribunal that it was only on the morning of the hearing that an application was made for a witness order addressed against Mr Doyle. Although Mr Morton satisfied the Tribunal that Mr Doyle could give relevant evidence and was unwilling to attend on a voluntary basis and a statement of Mr Doyle had been disclosed at an earlier date to Mrs Wilcox this application could have been dealt with at an earlier juncture. If it had been, further valuable Tribunal time would have been saved. In the circumstances, however, the Tribunal acceded to the request.
29. The Tribunal found it particularly unhelpful that a witness in some cases had more than one statement, for example Mr Wilcox, much of which had little, if any relevance, to this dispute.
30. The Tribunal noted Mr Bamford statement was almost exclusively addressed to the previous claim of Mr Wilcox. Mrs Wilcox was only mentioned once, in the final paragraph, number 20 when Mr Bamford contended he had been *"nothing but honourable and understanding with both Mr and Mrs Wilcox."* That was the extent of Mr Bamford evidence in his proof in relation to the complaints of the Claimant. No consideration had been given to the fact that the claims of Mr and Mrs Wilcox against this Respondent were separate and distinct as was

evidenced by the fact they were dealt with on different days by differently constituted Tribunals.

31. The directions given by the Tribunal on 24 August 2017 made it clear that oral evidence in chief would be given by reference to witness statements. Whilst the Tribunal allowed both parties a little leeway as regards supplemental questions the Tribunal was forced to intervene and stop wholly new evidential contentions being raised that were not in the statements.

32. Having considered all the evidence, both oral and documentary, the Tribunal made the following findings of fact on the balance of probabilities.

33. These written findings are not intended to cover every point of the evidence given.

34. These findings of a summary of the principal findings that the Tribunal made and from which it drew its conclusions that are relevant to the agreed issues it had to determine.

35. The Tribunal means no disrespect to either party but it is not recorded their closing submissions which have been carefully noted and are appended to the Tribunal file.

Findings of fact

Background

36. The Respondent is a company involved in industrial concrete flooring.

37. Up until December 2016 it's two directors were Mr Bamforth who held 51% of the issued share capital and Mr Jon Wilcox who held 49% of the issued share capital.

38. Mr Bamford concentrated on production whereas Mr Wilcox concentrated on sales and administration.

39. Mr Bamford was described as a production director and Mr Wilcox as the commercial director. Mr Bamford spent much of his time on site.

40. Both directors, in addition to being officeholders, as Company Act directors, were also employees of the Respondent.

41. Both directors signed off the Respondent's tax return and company accounts.

42. The Claimant is the wife of Mr Wilcox.

43. In approximately August 2016 the relationship between Mr Wilcox and Mr Bamforth started to deteriorate.

44. By December 2016 Mr Wilcox made it clear he wished to leave the Respondent.

45. A post termination agreement was drawn up and signed on the 23 December 2016 between Mr Wilcox, Mr Bamford and the Respondent. The Claimant was not a party to the post termination agreement between Mr Wilcox and the Respondent (256 to 259). There is nothing in that agreement that required Mr Wilcox to secure the resignation of the Claimant. There is no side agreement requiring the termination of the Claimant. There is no settlement agreement. The post termination agreement is an agreement solely between the Respondent, Mr Wilcox and Mr Bamford.

46. Mr Wilcox was placed on gardening leave and his employment and directorship subsequently terminated on the 10 February 2017.

47. There is clearly considerable animosity between Mr Bamford and Mr and Mrs Wilcox evidenced not only by these Tribunal proceedings, some intemperate language in emails, but also documentation in the Tribunal bundle which points to either threatened or actual legal proceedings in other forums.

48. The alleged termination of Mr Wilcox's employment with the Respondent led to Tribunal proceedings, dealt with on 19 October 2017 by E.J.Buckley, when some of his claims were upheld and others dismissed.

49. Whilst the Tribunal has divided its findings of fact into a number of headings some findings are relevant for more than one heading. Such findings have not been repeated. The parties are reminded they must have regard to the totality of all the findings of fact.

Mrs Wilcox's role.

50. The Claimant asserted she worked for the Respondent, her principal activities being supporting Mr Wilcox as his personal assistant. The Respondent's case was she did not work for the Respondent.

51. For the majority of her time she worked from home.

52. The arrangement suited Claimant, as from 2014, also had a part-time job with East Riding of Yorkshire Council. The employment with East Riding of Yorkshire Council involved working on average of 20.75 hours per week. The Claimant worked five mornings a week for the Council (241).The work is linked to the school calendar

53. The Tribunal is satisfied that Mrs Wilcox did undertake work for the Respondent. The basis for that conclusion is set out in the following paragraphs.

54. Firstly, there is evidence the Claimant appeared on the Respondent's web site and was described as "Information Technology support" (117/118) with a brief description her IT skills. She was held out to third parties as part of the Respondents organisation.

55. Secondly the Tribunal found the Claimant had well-developed IT skills. She had been trained in website design, setup and maintenance, keyword use, meta descriptors, adding and updating plug-ins, HTML coding, use of YouTube, Flickr, embedding, tags and the use of social media. The Claimant had undertaken training with a company known as IT Express Ltd (which she subsequently introduced to the Respondent) on design, site functionality, navigation, and using Google AdWords to draw traffic to websites. The Tribunal is satisfied that the Claimant deployed some of these skills in supporting the Respondent's website. It was very clear from the Claimant's oral evidence, when discussing optimisation of Internet traffic, that she understood the process in detail. She was able to explain how hits on the Respondent site could be monitored and more importantly how long a potential customer viewed the site and at what stage they left the site. Whilst the Tribunal found that the Claimant exaggerated somewhat her role; on the balance of probabilities, it was more likely that IT Express Ltd carried out the majority of the work; the Tribunal was satisfied that the Claimant had some input into the maintenance, posts, and functionality of the Respondents website. The Tribunal is satisfied the web site

was relevant to sales enquiries and that Mr Wilcox had no real understanding of the optimisation of a web site. The Claimant did.

56. The Claimant devised a spreadsheet for Mr Wilcox to use when estimating for work so that the entry of a number of variables produced an indicative price. This benefited Mr Wilcox in his role as the Respondent's commercial director.

57. Thirdly there was evidence that Google maps regarded the Claimant as its point of contact with the Respondent (242/242A). Further evidence that the Claimant dealt with the IT functions involving Google maps can be found in the bundle (250). Taken together the Tribunal was satisfied that the Claimant had an involvement with Google maps. After the Claimant left no one at the Respondent, for several months changed the Respondent's address on Google maps even though the Respondent changed premises. This is an evidential point that is supportive of the Claimant's contention as to her involvement with the Respondents website. The Tribunal finds that the Claimant had the ability, and access, to change the Respondent's website (251).

58. Fourthly the Claimant's contention that she managed the Respondents web site and IT functions as others within the Respondent didn't know how to do this carries weight as a screenshot, taken well after the Claimant's termination, still shows Mr Wilcox and another member of staff who had left, on the website (116).

59. Fifthly the Claimant conducted a grievance /probationary meeting for the Respondent on 14 April 2014 (33 to 45) and in the outcome letter was described as the office administrator (49/50).

60. Sixthly the Claimant did do work for the Respondent by acting as a personal assistant to Mr Wilcox. The Claimant was a touch typist. She was fully familiar with a range of computer packages including word. She was able to produce PowerPoint presentations for him. She assisted him with paperwork such as expenses and filing. She took messages for Mr Wilcox. She undertook some research in relation to potential customers. For example, if Mr Wilcox noted a building site and the name of a builder on some occasions Mrs Wilcox would find out further information so that Mr Wilcox could then seek to tender on behalf of the Respondent for work. The Claimant planned his calls. The Claimant ran Mr Wilcox's diary. The Claimant accessed Mr Wilcox's work e-mail account and drafted responses for him on the basis of a few bullet points from Mr Wilcox. The Claimant was working for the Respondent in that she was the PA to its commercial director who happened to be her husband. Given the Claimants skills, her degree in engineering and the nature of the Respondent's business it is perfectly credible that the Claimant could work as Mr Wilcox's PA.

61. Whilst the Tribunal accepts that the facts it has found do not carry equal weight, standing back and looking at the overall picture the Claimant has established on the balance of probabilities that the Claimant undertook work for the Respondent. The Tribunal has not lost sight of the argument, forcefully pursued by Mr Morton, that if the Claimant was employed, she was employed personally by Mr Wilcox and not by the Respondent.

62. The Tribunal has rejected that argument.

63. The Tribunal was satisfied that the Claimant worked as a personal assistant to Mr Wilcox to assist Mr Wilcox in the better performance of his duties as a

director and employee for the Respondent. The more efficient Mr Wilcox was the better likely reward for the Respondent.

64. Mr Morton spent considerable time in cross examination suggesting that such work as the Claimant did undertake was limited and did not equate with the sums paid to her. The Tribunal is not required to determine whether the Respondent obtained value for money for the salary it paid to the Claimant.

A contractual relationship?

65. The Claimant was never issued with a contract of employment

66. The Claimant was never issued with a statement of terms and conditions which complied with section 1 of the Employment Rights Act 1996 ("ERA 96").

67. The Tribunal found on the balance of probabilities the Claimant had an oral contract with the Respondent.

68. The background to the oral contract was that the Claimant had been doing some PA work for Mr Wilcox without pay whilst the Respondent business was established and became more profitable. However, by 2012 the business was profitable and an offer was made by Mr Wilcox, on behalf the Respondent, to the Claimant which she accepted.

69. Documentary corroboration was before the Tribunal that the Claimant was classed by the Respondent as an employee with a start date 6 April 2012.

70. The Tribunal, in the absence of a contract or written particulars, had to make findings of fact on the evidence placed before it as to the principal terms of the Claimant's contract.

71. On the balance of the evidence the Tribunal found that the Claimant worked 20 hours per week at an initial salary of £18500 pa. Payslips in the Tribunal bundle confirmed the Claimant's assertion as to her agreed initial salary.

72. The Claimant initial salary of £18, 500 per annum remained at that level for a number of years until April 2016 when this is increased to £30,000 per annum. Mrs Bamford received a similar arrangement.

73. The Claimant was entitled to 26 days holiday plus bank holidays pro rata her part-time hours. She commenced her employment with the Respondent on the 6 April 2012. In the absence of any express agreement the Claimant's holiday year ran from 6 April to 5 April of the following year.

74. The Claimant was unable to give any satisfactory details of what holiday she had or had not taken in the holiday year April 2016 until her relationship with the Respondent, whatever that might be, ended. The Claimant was unable to explain how she alleged she was owed £23.08 accrued holiday pay. She accepted the figure bore no relationship to a day or multiples of a day's pay.

75. The Claimant was paid monthly on the last Friday of each month. The Claimant's bank statements supported the Claimant's contention as to when she was paid.

76. The only aspects of the above findings that were disputed by the Respondent was that it denied the Claimant was an employee or that she worked 20 hours per week. The Tribunal will deal with the issue of employment status later but on the 20 hours per week limb preferred the Claimant's evidence. The Claimant worked principally from home and therefore Mr Bamford was not able to make a

judgement as to the hours the Claimant worked. Whilst the Tribunal shared some of the concerns expressed by Mr Morton as to the Claimant's credibility the Tribunal did not doubt the Claimant's credibility on this point in dispute.

Evidence as to status.

77. The Claimant received, monthly regular payslips from the Respondent. The payslips contained PAYE and NI deductions.

78. There is further evidence from the P11D that the Claimant was paying PAYE tax. The Claimants start date on the P11D was recorded as 6 April 2012.

79. The Claimant was registered with HM Revenue and Customs as an employee of the Respondent (52) and was issued with a tax code for her employment with the Respondent.

80. The Claimant had been registered by the Respondent in the National Employment Savings Trust,that is the new compulsory pension scheme for all employers (260/261).

81. The Claimant worked from home. As a PA she used a printer, computer and telephone all of which were the property of the Respondent. The Claimant did not provide any of her own equipment.

82. The Claimant's salary was fixed. There was no commission or performance related pay. The Claimant could not benefit from her own ingenuity. The Claimant took no risk.

83. The Claimant did not have an email account in the Respondents name.

84. The Claimant was required to undertake tasks given to her by Mr Wilcox as she was his PA. He would give her the tasks and within reason she would decide what to do within time parameters set by Mr Wilcox.

85. The Claimant was expected to provide the services personally.

86. Whilst Mr Wood did not appear and give evidence, his statement was that it was Mr Bamford who instructed him of the amount of wages to be paid to all employees at the end of each month, including the Claimant. The Tribunal does not find it credible that if the Claimant was in reality a person employed by Mr Wilcox that it was not noticed for a period of almost 5 years that the Claimant was being paid via the Respondents payroll.

87. The Claimant was issued with a P45. Mr Bamford's evidence as to why one was issued if the Claimant was not an employee was that it was "protocol". He admitted the Claimant was on the Respondent's payroll as an employee.

Illegality.

88. The Tribunal had careful regard to the evidence of Mr Doyle, a chartered accountant.

89. Mr Doyle was the most impressive of the witnesses the Tribunal heard from and gave his evidence in a clear and concise manner.

90. The Respondents had pleaded that if a contract existed between the Respondent and the Claimant it was tainted by illegality. The basis of the illegality was apparently that the Claimant was paid through the books of the Respondent but did not work for the Respondent. This was done to save tax for Mr Wilcox.

91. Mr Doyle had directly addressed this point in an email to the Claimant prior to the commencement of these proceedings (the email is attached to Mr Doyle's statement) which read as follows: –

92. *"I am happy to confirm to you that I have not doubted the validity of your employment and its validity for the purposes of your personal tax return and as a deduction for corporation tax purposes… Indeed, tax arrangement you have is a widely accepted method of reducing the family tax bill as I say. For the tax deduction to be valid there must be <u>some</u>* [Tribunal's emphasis] *work done which we have always been led to believe the case. This confirmation was also given implicitly by both directors of the company on signing the accounts of the company tax returns. I believe the arrangement to provide you with employment was made some time ago as was the same arrangement to provide Mr Bamforth's wife in similar work. It is widely accepted as a legal genuine family tax planning strategy."*

93. Mr Doyle confirmed the above on oath. In his expert opinion as an accountant with over 25 years' experience it was perfectly lawful for a wife or relative of director of the company to work in the company and to receive a salary, provided they undertook some work, and it was accepted family tax planning. He indicated that the vast majority of his SME clients adopted a similar strategy and it was considered lawful by her Majesty's Revenue and Customs.

94. The Tribunal noted that Mr Doyle was called expressly on behalf of the Respondent.

95. The Tribunal has already found that the Claimant did do work for the Respondent.

96. In the course of Mr Bamford's evidence, he accepted that the arrangement involving the Claimant and Mr Wilcox was, as he understood it, lawful. He had a similar arrangement involving his own wife within the Respondent business. This contradicted the Respondent's pleaded case.

97. Mr Wilcox claimed in his evidence that he did not discuss in any detail the Claimant's employment position when he was negotiating his own exit. The Tribunal do not accept that contention. Is inconceivable that a man who was a substantial shareholder in a company and derived a significant income, as did the Claimant, would not have discussed what was to happen to the Claimant. It is further inconceivable that the Claimant, knowing her husband was to leave the Respondent and that she worked for him would not want to know what her position in the future was. Whilst the Tribunal noted there was one other member of the sales team employed by the Respondent, he was not at the seniority of Mr Wilcox.

98. There was no refusal by the Claimant to work when Mr Wilcox was placed on gardening leave. There was simply little work for her to do. At no stage did the Respondent contact the Claimant requiring her to do any work which she refused. The Tribunal is satisfied that she was ready willing and able to work.

<u>Termination.</u>

99. There is an important chain of emails that appear in the bundle (66 to 69). The first is an email sent by the Claimant to Mr Bamford at 15.34 on 22 February 2017. It states:-

"*Jon and I have still not been paid wages of January… Jon is owed February wages up to the 10th."*

Mr Bamford replied at 16.31 stating that there were no outstanding wages and:-

"your employment with nationwide terminated at the end of December as did Jon's. Both P45's have been issued as I thought."

The Claimant responded that 17.45 stating:-

"regarding me, you said you are sending me my P45 in the post. Does this mean you have fired me? I was not aware I had done anything to merit … dismissal and I certainly have not been asked to attend a disciplinary meeting or similar. I am concerned I have been unfairly dismissed. My husband left the company on February 10 but not me."

The Tribunal interjects here that under the terms of the post termination exit agreement Mr Wilcox employment terminated on compliance with certain financial obligations. It was common ground that the obligations were apparently complied with on 10 February 2017.

At 18.30 Mr Bamford replied:-

"… Respectfully ask you (sic) talk to your husband, it was Jon that set the settlement of repayments with his solicitor unpaid(sic) and witnessed the accountants and agreed your termination! He was a director and your employer time… I simply cannot change this now this is all documented and has been signed by Jon as part of the package received. Your employment was terminated at the end of December no notice was worked therefore no notice pay due as per your terms. Again, talk to Jon he was your immediate superior and employer at the time not I".

Mr Bamford claimed in an email of 27 February that:-

"Leanne's [the Claimant] *employment was tied in with yours and as such terminated as agreed at the same time as yours again no monies are outstanding."*

Pausing at this juncture Mr Bamford could not have been right that it was for Mr Wilcox to terminate the Claimants "employment", if she was an employee of the Respondent. He was expressly prohibited from doing anything under the post termination agreement which provided at clause 2.4:-

"it is agreed that with effect from the 23 December 2016… the outgoing shareholder [i.e. Mr Wilcox] will start a period of garden leave and whilst remaining an employee and director of the company, will not be required to attend the office and <u>will not have any involvement in the running of the business [Tribunal emphasis]</u>…."

100. The Claimant received a P45 from the Respondent. There was no covering letter. The Tribunal will deal with <u>when</u> the Claimant received the P45 later in its judgement. The termination date on the P45 was stated to be the 31 December 2016.The P45 was dated 26 January 2017 (109).

101. The Tribunal found that the P45 did not come to the Claimants attention until after the 22 February and probably on the 28 February 2017. The reason for the Tribunals findings on this point are as follows.

102. Firstly the Claimants e-mail of the 22 February 2017 at 17.45 shows, if she was telling the truth, and the Tribunal finds that she was, that she had not got a P45 at that date.

103. Secondly EJ Buckley found that Mr Wilcox did not receive his P45 until 28 February. Given Mr Bamford said in his e-mail at 16.31 that "*Both P45's have been issued as I thought"* then it is inexplicable if the posting date was the 26 January 2017 as claimed that it would take over a month for them to be delivered. The Tribunal has come to the conclusion that the most likely explanation is that when the Claimant raised the issue of the P45 on the 22 February that one was then sent out but backdated. When it is remembered that Mr Bamford accepted he did not dismiss the Claimant as he believed she was not an employee (and if she was she worked personally for Mr Wilcox and it was for him to dismiss the Claimant) this becomes even more likely. Mr Bamford did not think about a P45 until the Claimant mentioned it on the 22 February.

104. At the earliest, the Tribunal finds that the Claimant was dismissed on the 22 February at 18.30. There might have been legal arguments as to whether the e-mail was unambiguous but that point needs not trouble this Tribunal given the Claimant's case was she believed from the e-mails of the 22 February that she was dismissed on that day.

105. ACAS received an EC notification from the Claimant on the 16 May 2017. ACAS issued a certificate on the 16 June 2017.

106. The Claimant's claim form was received by the Tribunal on the 17 June 2017.

Conclusion.

107. The Tribunal is satisfied on the balance of probabilities that there was a contract between the Claimant and the Respondent. For a contract to exist it need not be written although clearly the presence of such a document greatly assists for evidential purposes. The documentation points to the fact that the Claimant started a paid relationship with the Respondent on 6 April 2012. The fact the Claimant worked for the Respondent prior to that date, from 2008, on an unpaid basis is irrelevant. The Tribunal accepted the evidence that the Claimant moved onto the Respondents books on 6 April 2012 because it was profitable and previously there been insufficient money to remunerate her contribution.

108. An employee is defined in section 230 (1) ERA 96 as: –

"employee means an individual who entered into for works under (or, where the employment has ceased, worked under) a contract employment."

Contract of employment means,

" a contract of service or apprenticeship, whether express or implied, and, (if it is express) whether oral or in writing" Section 230(2)ERA 96.

109. For a contract of employment to exist there must be as a minimum, firstly an obligation on the person to provide work personally, secondly mutuality of obligations between the purported employer and employee and finally the purported employee must expressly or impliedly agree to be subject to the control of the person for whom she works to a sufficient degree.

110. All three elements must be present for there to be a contract employment. Even if every element is present that does not mean the contract is one of the conduct of employment. It will depend upon the assessment of all of the circumstances of the case.

111. The Tribunal is satisfied the Claimant was under an obligation to work personally for the Respondent. She could not send a substitute. The Tribunal having had the opportunity to see and hear the Claimant and Mr Wilcox is easily persuaded that the Claimant's command of English and use of English far exceeds that of Mr Wilcox and he would dependent upon the Claimant heavily for written documentation. The Tribunal finds that the Claimant spent the vast majority of her time acting as a personal assistant to her husband and commercial director. She researched customers, organised receipts and expenses, helped to manage his diary, took messages, printed out documents and drafted and checked emails. The Tribunal also accepted that she had IT skills and did some work to increase the Respondent's prominence on search engines found on the Internet, although this role was relatively limited and the majority undertaken by IT Express Ltd.

112. There was mutuality of obligations. When the Claimant was given work, she was expected to do it. She could be told what to do, albeit the Tribunal accepted that most of the instructions would come from Mr Wilcox, the commercial director. However, there were clear examples when the Claimant was given work by the Respondent other than by Mr Wilcox such as dealing with the grievance issue already alluded to in the findings of fact. At the very least there was an obligation on the Claimant to accept and undertake such work as she was given. She was required to be available when she was not performing her part-time duties for the local authority. There was an obligation on the Respondent to pay the Claimant and the Respondent did so as is evidenced by the numerous payslips within the Tribunal bundle.

113. Finally, the Tribunal was satisfied there was control of a sufficient degree to establish a contract of employment. The control was predominantly from Mr Wilcox. Control of the performance of the Claimant's work rested with the Respondent. The Respondent could, if it chose, tell the Claimant what to do and when to do it.

114. There are a number of other factors which point towards the Claimant being an employee and some that do not. An example of the later is the Claimant did not have a company e-mail address which may point to a lack of integration. However the Claimant was accessing Mr Wilcox's e-mails account and used her own home account to contact the IT Express Ltd the factor is of less significance. Whilst certain factors may point towards an employment status, at the end of the day the obligation upon the Tribunal is to determine what are the significant elements and look at the whole arrangement, **Hall -v- Lorimer 1994 ICR 218.** No one factor, in itself, is conclusive and the factors do not necessarily carry equal weight. The Claimant was subject to tax and National Insurance as an employee. The Claimant took no financial risk. The Claimant could not profit from her own expertise. She was paid a fixed salary. She carried no financial risk. She did not provide her own equipment or hire helpers. It is instructive to look at how others regarding the relationship. Mr Doyle regarded the Claimant as an employee. Mr Bamford regarded the Claimant as an employee as he issued her with a P45. In an email from Mr

Bamford dated the 22 February 2017 (67) when the Claimant queried why she had not been paid Mr Bamford replied:-

> *"your employment with nationwide terminated at the end of December as did Jon's"*.

115. He did not suggest the Claimant was not an employee. How parties describe themselves and how they present themselves to others is not conclusive but it is a factor that the Tribunal is entitled to take into account in looking at the overall picture to make a judgement on the relationship. Finally, the Tribunal has taken into account the length of the relationship and the fact that Mr Bamford only challenged whether the Claimant was an employee in February 2016 when the Claimant was seeking money from the Respondent. If the Claimant was self-employed or a worker it is likely that Mr Bamford, a skilled and experienced businessman, would have raised the issue at an earlier stage particularly given the not inconsiderable salary that the Claimant was receiving.

116. Given that the Tribunal has determined that the Claimant was an employee the Tribunal did not address whether she was or was not a worker or was neither an employee nor worker.

117. The Tribunal next turned to the issue of illegality. The Tribunal rejected Mr Morton's submission that, to the extent a contract existed between the Claimant and the Respondent that it was void for illegality. Mr Morton has not discharged the burden of proof that falls upon the Respondent. He has not shown that the arrangement with the Claimant was for the purposes of defrauding the Inland Revenue or the performance of the contract was done in a way that had that effect, see **Colen -v- Cebrian (UK) Ltd 2004 ICR 568**.

118. This was not a case where, for example, an agreement was entered into such that no tax would be paid or that part or all of the remuneration was structured so there was a fraud on the Inland Revenue. All the earnings of the Claimant were properly declared and subject to tax and national insurance deductions.

119. The Tribunal accepted that there would tax advantages in profits from the Respondent been withdrawn, in part, as earnings for the Claimant and the Claimant and Mrs Bamford being paid over the market rate.

120. However, as Mr Doyle clearly stated in his evidence this was a widely accepted as legal and a genuine family tax planning strategy provided the Claimant did some work.

121. If a qualified accountant regarded the arrangement between the Claimant and the Respondent as being legal and a genuine family tax planning arrangement the Tribunal accepts that the Claimant had no knowledge and no reason to believe that the arrangement was a fraud on the Inland Revenue. There was no active participation by the Claimant, if there was a fraud; she simply relied upon the accountancy advice that had been given. The Tribunal finds for the reasons set out earlier in this judgement the Claimant did do some work for the Respondent. As Mr Doyle indicated in his evidence confirmation was implicitly given by the directors, Mr Wilcox and Mr Bamford by signing the accounts and company tax returns. There was evidence which the Tribunal accepted from Mr Wood was that Mr Bamford authorised salaries each month including salary for the Claimant. The Tribunal observed Mrs Bamford received a similar salary arrangement. The allegation of illegality is not made out.

122. The Tribunal next looked at the time issue and the effective date of termination.

123. Subject to the ACAS early conciliation an employee must present their claim to a Tribunal before the end of three months beginning with the effective date of termination; section 111 (2) (a) ERA 96. The Tribunal's discretion to extend time is limited. Time may be extended if the Claimant can show that it was not reasonably practicable to present the claim on time and that the claim has been submitted within a reasonable time of its becoming practicable to present complaint, section 111 (2) (b) ERA 96.

124. The Tribunal then turned to the effective date of dismissal given that the Tribunal had found that the Claimant was an employee. Here no notice was given so the effective date of termination was the date on which the termination took effect, section 97 (1) ERA 96.

125. The Tribunal did not accept the contention that the Claimant's employment terminated when Mr Wilcox employment ended by mutual agreement. As the Tribunal has already found the documentation in relation to Mr Wilcox is wholly silent on the subject of the Claimant. The post termination agreement was drawn up by solicitors. If the parties intended that the Claimant's employment would end at the same time as Mr Wilcox this could have been addressed. It was not.

126. The law requires that for dismissal to be effective it must be communicated by the employer, **Hindle Gears Ltd -v- Mc Ginty 1985 ICR 111** although conduct might suffice if it was clear and sufficiently unequivocal, **Sandle -v- Adecca UK Ltd 2016 941**.

127. The Tribunal came to the conclusion the effective date of termination was 22 February 2017. The Tribunal reached this conclusion with some hesitation. The Tribunal reminded itself that to the extent that there is any ambiguity it should be construed against the Respondent because a Respondent should not be able to rely upon their own ambiguities if the employee is in doubt as to their true position and may lose valuable statutory rights see **Graham Group Plc -v- Garett EAT 161/97**. However the Tribunal concluded when the Respondent made it clear on that day the Claimant would not be paid that was the effective date of termination. An unequivocal decision to stop payment may constitute the effective date of termination, **Gisda Cyf -v- Barrett 2010 UKSC 41**. Given the Claimant's case was that she regarded herself as dismissed on the 22 February this assuaged the Tribunals concerns.

128. Given the concession by Mr Morton that if the Tribunal found that the effective date of dismissal was the 22 February 2016 that the unfair dismissal claim was in time and the Tribunal finding that this was at the earliest, the effective date of termination then the Tribunal has jurisdiction.

129. The burden is on the Respondent to show the reason or principle reason for dismissal is a potentiality fair reason within section 98(2) ERA 96 or some other substantial reason. It has not done so; thus the Claimant claim of unfair dismissal must succeed.

130. For an unlawful deduction of wages section 13 ERA 96 must be satisfied. Section 13 provides:-

" an employer shall not make a deduction from wages of a worker employed by him unless-

The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of a workers contract or
the worker has previously signified in writing his agreement or consent to the making of the deduction"

131. It was common ground on the facts that neither section 13(a) nor (b) were satisfied.

132. A claim for unlawful deduction from wages must be made within three months of the last in a series of deductions. A deduction is made at the time it is properly payable.

133. The contractual position was that the wages for the Claimant were not payable until the fourth Friday in every month. Only at this point were wages contractually payable. The none payment on the 24 February (the fourth Friday) was therefore the last in a series of deductions.

134. A claim must be submitted within three months of the last in series deductions, that is by 23th of May 2017. The effect of the ACAS early conciliation rules is to extend time. Here the early conciliation was between 16th May to 16 June. The claim form was presented on 17 June. The claim is in time.

135. The Claimant is entitled to recover the admitted none paid wages from the 1 January 2017 until the effective date of termination, 22 February 2017.The none payment of wages amounts in law to an unlawful deduction unless a statutory defence is made out .None was relied upon.

136. A claim for breach of contract runs from the date of termination of the employment as any notice pay should be paid on termination. The time limit is set out in Regulation 7 of The Employment Tribunals (Extension of Jurisdiction) Order 1994 namely the claim must be presented within 3 months of the effective date of termination of the contract giving rise to the claim. The ACAS early conciliation applies. For the reasons given as to why the unfair dismissal claim is in time so is the breach of contract claim.

137. No contractual notice was given. This was not a case of gross misconduct

138. In the absence of any express contractual agreement minimum notice is calculated in accordance with section 86 ERA 96. The Claimant is entitled to one weeks' notice for each complete year of service. The Claimant had 4 complete years' service as at the effective date of termination and thus is entitled to 4 weeks' notice less tax and national insurance.

139. Finally the Claimant's compliant of breach of contract, holiday pay, must be dismissed. The Claimant carries the burden of proof. Her evidence as to what holiday she had or had not taken was so unreliable and her figure as to the sum of her claim unexplainable to such an extent that she has not discharged the burden of proof on her and the compliant must be dismissed.

140. The extant complaints will now be listed for a remedies hearing in accordance with the accompanying case management orders.

Employment Judge Smith

Date: 21 December 2017