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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Nos: 4109293/2021 and 4110451/2021**

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**Held at Dundee on 21 March 2022**

**Employment Judge McFatridge**

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**Mrs J Haddon**

**Claimant  
In person**

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**The Partnership of Cameron, Elaine &  
Trevor Taylor t/a The Portnellan Company**

**Respondent  
Represented by  
Cameron Taylor,  
Partner**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is

1. The claimant was unfairly dismissed by the respondent. The respondent shall pay to the claimant compensation therefor in the sum of £2820
- 35 2. As at the date of termination of her employment the claimant was due the sum of £ 1369.68 in respect of annual leave accrued but untaken. The respondent shall pay to the claimant the sum of £1369.68 in respect of this.

E.T. Z4 (WR)

3. As at the date these proceedings were commenced the respondent were in breach of their duty under sections 1 and 4A of the Employment Rights Act 1996 to provide the claimant with a statement of particulars of employment. The respondent shall pay to the claimant the sum of £1248 (four weeks' pay) in terms of section 30 of the Employment Act 2002.
4. The claim of wrongful dismissal succeeds and the respondent shall pay to the claimant the sum of £1560 in compensation therefor ( pay in lieu of notice.)

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### REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she was due a payment in respect of unpaid holiday pay. This claim was registered under reference 4109293/2021. The respondent submitted a response to this in which they stated that the claimant was neither an employee nor a worker and as such was not entitled to holiday pay. Subsequent to this the claimant submitted a further ET1 to the Tribunal indicating that on 31 May 2021 she had been dismissed and it was her position that her dismissal was unfair. An order was made that both claims be heard together. Following a case management hearing it was decided that whilst the issue of the claimant's employment status was clearly one which would have to be determined by the Tribunal it was as well to decide this at a final hearing rather than at a separate preliminary hearing. The final hearing took place on 21 March. The claimant gave evidence on her own behalf. The claimant also sought to lead evidence from a Dr N Scott however once he commenced his evidence it was clear that the only evidence he could give was "character evidence" in relation to his knowledge of the claimant. He had no evidence to give in relation to the matters which required to be determined by the Tribunal. I accordingly indicated that I was not prepared to spend Tribunal time on this as it was not relevant to the issue before me. Cameron Taylor gave evidence on behalf of the respondents. Both of the other respondents (Trevor and Elaine Taylor) were present and initially I had understood that they were

to be giving evidence however in the event Mr Cameron Taylor who was conducting the case on behalf of all three respondents chose not to call them. A joint bundle of documents was lodged by the parties. I have referred below to the documents therein by page number. On the basis  
5 of the evidence and the productions I found that the following facts relevant to the matters to be decided by me were either proved or agreed.

### **Findings in fact**

2. The respondent are the The Portnellan Company which is a partnership between Trevor Taylor, Elaine Taylor and Cameron Taylor. Cameron  
10 Taylor is the son of the Elaine and Trevor Taylor. The company operates a holiday lettings business at Portnellan Estate in Glen Dochart. In total they operate around 17 chalets or cottages. Some of these are owned by the partnership or members of the family. Some of them are owned by external owners. Some properties are owned by syndicates of owners  
15 where each owner is entitled to a certain number of weeks each year. The chalets and cottages are rented out on short term lets to holidaymakers and others. The respondent arranges for the cleaning and maintenance of them. Within the complex is a visitor centre which has a shop for essential items operated using an honesty box. They also rent out DVDs  
20 using a similar system. The respondent have operated the business for around 40 years.
  
3. The claimant is a qualified Accounting Technician. In 2015 she was living in Dalnally which is reasonably close to the respondent's business. The respondent's previous bookkeeper was leaving and advised Cameron  
25 Taylor, who by this time dealt with day-to-day operations, that she knew of the claimant and that the claimant might be interested in taking on a bookkeeping role. Up to that point the claimant had not met Cameron Taylor. Cameron Taylor telephoned the claimant out of the blue and advised her that he was looking for a bookkeeper and had heard that this  
30 might be something she would be interested in. He invited her to a meeting. This was in or about November 2015. The claimant attended this meeting which she considered to be an interview. Mr Taylor told the claimant what was involved in the role and what the rate of pay would be.

4. At that point the claimant was not in business on her own account. She had no other bookkeeping clients. During the course of her engagement with the respondent she worked solely for the respondent.
5. The claimant commenced working for the respondent in November 2015. She worked 40 hours per week and was paid at the rate of £10 per hour. The hours of work were fixed by Mr Taylor. He had advised the claimant of the rate of pay.
6. Mr Taylor advised the claimant that she would not be paid through the PAYE system but would be paid on the basis that she was self-employed. The claimant was required to submit a note every month to the respondent for the hours she had worked. The respondent provided a duplicate book in which the claimant wrote her hours every month and she was paid for these hours at the agreed rate of £10 per hour. An example of the entries in the duplicate book was lodged (pages 117-128). The claimant's duties were to maintain the respondent's financial records, to confirm reservations and correspond with chalet owners and customers booking accommodation, file documents and also perform ancillary administrative duties. She did not keep Mr Taylor's diary but his appointments were logged on a Google calendar to which both he and the claimant had access. She would remind him of meetings and also deal generally with typing and correspondence.
7. When the claimant's engagement with the respondent started she had been living in a rented cottage in Dalmally. After a few months she agreed with Mr Taylor that she and her husband would move in to an empty property which Mr Taylor owned adjoining the estate on the basis that she would live there rent free with a view at some point to buying it.
8. The claimant was not given any statement of terms and conditions of employment as at November 2015 when she started working with the respondent. She was not given any documentation at that time. In March 2016 Mr Taylor sent an email to the claimant dated 14 March which was lodged (page 69-70). Although not sent until March 2016 this appears to have been an email intended to set out Mr Taylor's understanding of the arrangements entered into at the meeting. In the email Mr Taylor refers

to trying to take the business forward with a number of improvements and additions and states

“I am looking to build the right team alongside me”.

It then goes on to say

5 “.... Jayne your involvement is crucial and what I’ve just said is your role in the finance administration of the business is that service to holiday properties at Portnellan. I would be looking to work closely beside you with all financial budgetary control, forecasting and projection to enable us to build a stronger product and team over  
10 the coming years.” ....

He then went on to state

“With the above in mind I would like to propose the following:  
Jayne, I would like you to work five days a week from 11/7 and I would require you to be in the office on Monday, Tuesday, Friday,  
15 Saturday and Sunday. Your hourly rate would be £10. .... Any holidays to be taken November to April (excluding Christmas and Hogmanay period) and to be booked well in advance. I will pay Jayne for holiday leave of two weeks but am happy for you to take further holidays without pay with prior agreement.”

20 The letter also refers to an arrangement to engage the claimant’s husband on a part-time ad hoc basis as a handyman and also proposes various arrangements regarding the house known as Ardencaple in to which the claimant moved.

9. The claimant continued to work the hours fixed by Mr Taylor.

25 10. The claimant worked in the office at the Visitor Centre operated by the respondent. Initially the claimant was required to carry out the financial record keeping on a Sage accounting system which operated on a PC which the respondent supplied. In addition to this the claimant was expected to operate the respondent’s reservation system which ran on an  
30 Apple computer which the respondent also supplied. All materials within the office and all consumables were supplied by the respondent.

11. The claimant was expected to wear a uniform which was supplied by the respondent and contained their logo. Pictures of the uniform were lodged (pages 113-114).
12. After a time the PC which the respondent supplied ceased to work with the Sage software. This may have been because an upgrade to the Sage software meant it was no longer compatible with running on such an old PC or it may have been simply because the old PC stopped working. In any event, in order to deal with this issue the claimant arranged for the Sage software to be copied over to an old computer which she had herself and for a few months the claimant used this old computer to carry out the financial record keeping for the respondent. During this time the old computer was kept when not in use in a locked drawer in the office at the Visitor Centre. After a few months the respondent purchased a new PC and the Sage software was loaded on to that and thereafter the claimant used the respondent's PC for doing the financial records as before.
13. As the person dealing with the respondent's financial records the claimant became aware that no-one who worked at Portnellan was being paid through the PAYE system. Housekeepers and others who carried out work would be required to submit a note setting out their hours in the same way as the claimant. They would then be paid gross.
14. The claimant's husband was paid as an ad hoc handyman on a gross basis also. He would do occasional work for the respondent maintaining their properties either two or three days a week. In addition to this the respondent would often use the services of local tradesmen such as plumbers, electricians who would invoice for their services in the usual way.
15. The claimant made arrangements for her own income tax with HMRC and submitted an annual tax return and paid her tax due to them personally.
16. Mr Taylor had full control over and direct supervision of the work that the claimant was asked to perform. She was required to turn up at set times at the office within the visitor centre. She carried out the range of duties mentioned above. She felt that she had a designated role which was recognised by all other employees and by the customers. Owners would

often contact her to ask her about work which had been carried out on their property.

- 5 17. The system which the respondent used for properties owned by a syndicate involved the owners being allocated certain weeks in the year and these weeks changing annually so that each owner would get their fair share of weeks in the various seasons. The claimant was required to carry out the work of compiling these tables and sending them out to the owners.
- 10 18. Although the shop and DVD rental operated on the basis of an honesty box the claimant would often chat to owners and guests who came in to the visitor centre during the period when she was at work. She would answer questions and generally act as the customer facing “face” of the respondent’s business.
- 15 19. Generally, keys for the chalets were left in each individual chalet but the claimant would deal with holidaymakers when they arrived and provide them with whatever information and assistance they required.
- 20 20. The respondent’s telephone system initially had one line which was answered by whoever was there. Subsequently the respondent put in a system whereby callers were presented with a choice. They could press 1 and speak to Cameron Taylor or they could press 2 to speak to the claimant or if they had any financial queries. The claimant was required to answer calls when she was working there in the evenings. An email was lodged from February 2018 confirming that the claimant was being asked to take over the phone in the evenings (page 74).
- 25 21. On 29 March 2018 Mr Taylor sent an email to the claimant setting out various changes to operational arrangements. This email was lodged (page 75-76). Mr Taylor indicated that he was starting to work through tutorials for a new software package which the respondent were introducing called SuperControl. This would manage the various booking channels and deal with reservations. In addition to that it would contain the basic financial information about what guests were paying etc which would then require to be input into the Sage accounting system. Mr Taylor then went on to set out various requirements for the claimant. He said
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“Requesting special occasions from guests.

It was identified the best time to request this information is either when guests have booked and paid for a short stay or when the final balance is collected for a week or longer reservation. I would prefer that this information is requested over the telephone and an email is a last resort to acquire information. The intention is that the information is passed to Lucy who will be co-ordinating ‘a little something’ for these guests.

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Acquiring email addresses

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Please continue to request direct email addresses from any online agency reservations that do not provide this information i.e. booking.com. Emailing through ‘ghost’ emails is not ideal. Please update SuperControl individual reservations and booking forms with this information.

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Dog fee

New dog charges £25 per week or £25 per short stay.

Check-out and check-in

I wish to confirm with you what is required for if you are flying solo on the estate and you have check-outs and check-ins

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Check-out

Unlocked property and leave key in the chalet

Switch off heating. Unless cold within winter months.

Take meter reading (if required)

Report any notice maintenance or housekeeping needing undertaken over and above normal.

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Check-in

Key in chalet

Shortbread on beds

Meter reading

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General final checks

Hot water boosted

Appropriate mood lighting and heating on. Season depending.

Make sure any special requests for the booking are fulfilled.

Should guests not arrive within your working day then please be

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sure to bring the welcome sheets and any accompanying information to either Lucy or I at Portnellan House. Office door



should be open to leave on my desk. Radio me to confirm or if need to discuss further.

5 Uniform. I provided a uniform that I need you to start wearing. It is not appropriate that you choose not to wear it when everyone else at the Portnellan team is wearing appropriate branded clothing. What I will say is that if you wish me to purchase other clothing to complement you wearing the women's shirts and jacket that we have already provided then please let me know.

Evaluate arrivals

10 Please introduce pulling forward a week before arrival all reservations. Our recent altercation with the men for Ptarmigan that we had to move into Buzzard on the day of their arrival should have been addressed well before the day of their arrival to avoid a crisis situation. At the same time I would like an email sent to the  
15 guests detailing what we're expecting, when we're expecting them and whether there is anything we can do for them before they arrive.

Days and hours of work

20 As discussion with you previously I am keen to apply structure to my working time. I will continue to work from the office in my house but it is a requirement that the reception is manned and if not at any time then accurate or precise instructions are laid out to direct the guest to being able to contact me or the relevant person in charge. I have detailed days and hours of work for the both of us.  
25 Throughout periods of the holiday season I do need you to work and cover the reception later into the day. This is mainly from Easter through until the end of October, Christmas and Hogmanay. Once we move out of the season we can revise these hours and days of work to be more flexible as we have done in the past.

30 Jayne Monday Portnellan 9:30, Tuesday off, Wednesday 9 til 7pm, Thursday off, Friday Portnellan 11-7, Saturday Portnellan 11-7, Sunday Portnellan 9 til 5 ...."

22. The reference to "flying solo" was a reference to those occasions when the claimant would be in the office and Mr. Taylor was away so that the

claimant was the sole responsible person on site within the respondent's organisation. This happened on a regular basis.

23. Around this time the claimant and her husband also entered into a written agreement with Mr Cameron Taylor regarding their purchase by instalments of Ardencaple which at that time belonged to Mr Taylor. The agreement was lodged. It basically provided that the claimant and her husband were purchasing this property from Mr Taylor by paying the price over a period of five years from April 2016. They were to pay a minimum of £1500 per month but in the event they paid the full sum due in various instalments over three and a half years. Most of the agreement deals with the house but one paragraph states

“An agreement to allow the purchasers to occupy the property rent free during the terms of the loan agreement provided that you agree to provide services as required by the business of Portnellan in accordance with any agreed terms on a self-employed basis at the rate of £10 per hour.”

This document was signed by the claimant and Mr Taylor on 22 February 2018.

24. As noted above the respondent gave the claimant 10 days' paid holidays per annum. The claimant required to ask Mr Taylor in advance whether or not she could take these holiday dates.

25. In March 2020 the Covid pandemic began. It was not permitted for people to visit self catering cottages or chalets for a holiday. The respondent were however permitted to rent out properties to key workers which they did. There was a reduction in their business and Mr Taylor advised the claimant that her hours would reduce to 24 hours per week. This basically involved the claimant working three days per week. The claimant continued to work three days per week until May 2021. [A note of the payments made by the respondent to the claimant from May 2017 until May 2021 was lodged (pages 67-68). Also lodged was the statement showing the monthly payments paid by the respondent to the claimant from April 2017 onwards. These show that the sums remain steady at around £1600-£1760 per month until March 2020 when they reduced to

around £1000-£1200 per month following the claimant's reduction in hours to three days per week (pages 63-66).

26. At no point has the claimant ever run her own business. During the period of her engagement with the respondent the claimant did not carry out work for anyone else either on an employed or self-employed basis. The claimant has a hobby of manufacturing garden gnomes. She has a website on which she offers these for sale called Arden Gnomes. As at the date of the hearing she has not in fact sold any gnomes.

27. In or about March 2021 the claimant became aware of various Employment Tribunal judgments which were reported in the news. She researched the matter and came to the view that rather than being self-employed she was in fact an employee of the respondent. She also became aware that the respondent were considering selling their business and was concerned that if she were made redundant she would not receive a redundancy payment. She wrote to the respondent on 4 March 2021. The letter was lodged (page 121). It stated

"Your recent announcement that the estate is to be sold has naturally given me cause to consider my own future.

At recruitment you stated that I would be considered self-employed presumably because you prefer not to operate PAYE or National Insurance for any staff.

However a number of recent Employment Tribunal cases reported in the press has led me to question my actual employment status and reached the conclusion that technically I am in fact an employee of Portnellan for the following reasons

(a) Control i.e. the extent to which I decide work tasks and how they are to be performed

(b) Integration i.e. the extent to which I am part of the organisation

(c) Mutuality of obligations i.e. am I offered work only when it's available

Can I decide when to work and what tasks are to be accepted

(d) Economic reality i.e. the extent to which I bear any financial risk of work performed.

5 In view of my weekly hours and 5+ years of employment at Portnellan I therefore believe I should have enjoyed the full compliment of statutory holiday entitlements per year instead of the 10 days you specified. Moreover upon sale of the estate I would be entitled to statutory redundancy payment. I would be obliged therefore if we could meet at the earliest opportunity to discuss the means to rectify this situation.”

10 28. Following receipt of the email Mr Taylor had a meeting with the claimant on or about 15 March at which the claimant considered that Mr Taylor was unpleasant, domineering and aggressive insisting that she was not an employee and stating that he was not prepared to discuss the matter further.

15 29. The claimant commenced Acas conciliation on 16 March 2021. The Acas certificate was lodged (page 26). The claimant then lodged an ET1 in which she indicated that she was seeking holiday pay on 27 April 2021. This was claim no. 4109293/2021.

20 30. On 31 May Mr Taylor approached the claimant and advised her that he was terminating her engagement as a bookkeeper. He maintained his position that she was self-employed and not an employee. He stated that he had decided to use an accounting system called Zero rather than the Sage software which the respondent had been using up until then.

25 31. The position was that the respondent had initially not used the services of an outside accountant to deal with tax returns etc but had started using an accountant from Crieff approximately two years previously. The claimant had attended meetings with that accountant and provided the accountant with the information necessary for him to carry out the work he was required to do. The accountant used an account system called Zero. The claimant provided him with the information from Sage which the accountant entered into his own Zero system. This system had worked well and the accountant had not advised the claimant of any difficulties. Mr Taylor now advised the claimant that his accountant had now told him that they should be using Zero themselves. Mr Taylor advised that he did not consider that the claimant would be able to operate the Zero system

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and was therefore dispensing with her services. The claimant advised that when she started with the respondent she had been used to operating a system called QuickBooks and had been new to the Sage accounting system but had picked it up quickly. She could not see any difficulty with her picking up the Zero system. Mr Taylor did not discuss the matter further with the claimant. No procedural steps were taken whatsoever in respect of the termination. The claimant was simply advised that she was no longer required. The claimant was paid for the hours worked up until 31 May.

10 32. At that time the claimant was still working around 24 hours per week. By this time her pay had increased to £13 per hour. The claimant believed that since occupancy levels were likely to return to normal once the Covid pandemic was over it was highly likely that had she remained her hours of work would have gone back up to 40 hours per week at some stage.

15 33. Following the termination of her engagement with the respondent the claimant wrote to various local hotels seeking work. She was called by a local hotel and invited for interview. Following the interview she was offered a job. The claimant started work for a local hotel on 24 June. She works 40 hours per week which is paid at the rate of £9 per hour. The claimant's gross weekly pay in the 15 weeks prior to 31 May was £312 per week. This was also the sum she received net. Her gross weekly pay in her new employment was £360 per week net.

34. In the two year period prior to the termination of the claimant's engagement she received paid leave for a total of 13 days.

25 **Matters arising from the evidence**

30 35. It was clear that both the claimant and Mr Cameron Taylor had strong feelings about this issue and evinced a fair amount of hostility towards each other. That having been said although there was some argument over detail the salient points of the arrangement between them was effectively agreed to by both parties. The claimant gave her evidence in a fairly organised and straightforward manner. She referred to the various documents which she had lodged most of which had come from the respondent's own records and backed up her position. There were a

number of occasions where she was questioned about the detail and made appropriate concessions. For example she initially refuted the suggestion that she had used her own computer to carry out any work for the respondent. After discussion however she then accepted that there had been a period of a few months when as noted above, she had used her own computer. In general terms I found her evidence to be both credible and reliable.

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36. Mr Taylor did not give much in the way of evidence in relation to the way that the claimant had carried out her duties. His position essentially was that she had agreed at the outset that she would be self-employed and that this had been re-stated in the 2018 agreement relating to the house. He stated that the respondent's business operated in a remote area where people were used to doing work on a self-employed basis. He asserted that at all times the claimant had been free to negotiate whatever terms she wanted with him. He denied that she had acted under his control as she stated but he was unable to point to any documents or indeed any incidents which backed up this position. He was unable to give an explanation as to why the claimant was paid holiday pay if she was an independent self-employed contractor.

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20 37. There was a lengthy passage of cross examination regarding whether the claimant had carried out other work from the respondent apart from bookkeeping. I was unclear as to the relevance of this however at the end of the day it would appear to be jointly agreed between the parties that on one occasion the claimant agreed to do housekeeping and following one shift said that she was not prepared to do this ever again. On another occasion the claimant agreed with Mr Taylor that she would do some gardening. I understood this to be around the time when the pandemic had broken out and there would be a need for the claimant to make up her hours since she was not furloughed. The claimant worked for one or two days in the garden. At around the same time the claimant's daughter was also engaged by the respondent on a self-employed basis to do some gardening work. There was no question of the claimant paying her daughter to do the gardening. There appears to also have been an occasion when the claimant carried out some painting for the respondent.

The claimant noted the hours spent on these tasks in the same way as she was noted the hours for everything else and was paid as part of her monthly payment. At the respondent's insistence payment for these hours was set down separately in the accounts prepared by the claimant. As noted above I did not consider this evidence to be relevant but I rehearse it here as an example where at the end of the day the parties reached an agreement on what had actually factually occurred.

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38. Both parties' recollection of precisely what had been said or done in 2015/16 was vague. Mr Taylor's initial understanding was that the claimant had moved in to Ardencaple straight away. He thought she had started in or about 2016. He accepted however that he might be wrong in this and did not say that the claimant was wrong in saying she had started in November 2015. At the end of the day it appeared to me that the letter sent in March had the look of one which was sent round about the start date but on the other hand the claimant's clear evidence was that she had started some months before this and given that Mr Taylor said he could not remember I decided it was appropriate to accept the claimant's evidence on this.

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39. At the beginning of cross examination the respondent made some reference to the bundle not containing all of the documents which he had thought it might. It would appear that the bundle had been sent to the Tribunal by previous solicitors instructed by the respondent in or about December 2021. There was no application by the respondent to add any additional documents and the matter was not raised again either during cross examination or during Mr Taylor's evidence.

## **Discussion and decision**

### *Issues*

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40. The claimant claimed that she had been unfairly dismissed and wrongfully dismissed by the respondent. She claimed that she was due notice pay. She also claimed that as at the termination of her employment she was due a sum in respect of annual leave accrued under the Working Time Regulations but untaken in terms of Regulation 14 thereof. She also claimed that the respondent had failed to comply with their obligation to

provide her with a statement of terms and conditions of employment in terms of sections 1 and 4A of the Employment Rights Act 1996. She complained that the respondent were in breach of those obligations at the time each of her claims was commenced and that accordingly she was

5 entitled to compensation of four weeks' pay in terms of section 30 of the Employment Act 2002. It was her position that the respondent had failed to comply with the terms of the Acas Code in respect of her dismissal and that any compensatory award made to her should be increased by 25% to take account of this. Finally, although it was not specifically pled by the

10 claimant it was clear from the terms of her ET1 in respect of her unfair dismissal claim that she believed that the reason she had been dismissed was because she had raised her previous Tribunal proceedings asserting her statutory right to be paid holiday pay and that if the Tribunal found that this was the sole or principal reason for her dismissal then her dismissal

15 was automatically unfair in terms of section 104 of the Employment Rights Act 1996 as well as being unfair under general principles in terms of section 98. The respondent denied the claims but their primary position was that the claimant was neither an employee nor a worker and so was not entitled to make any of the claims raised before the Tribunal.

20 Accordingly, as a preliminary matter the Tribunal was required to determine the employment status of the claimant. In order to make a claim for unfair dismissal, automatic unfair dismissal and wrongful dismissal (notice pay) the claimant required to be an employee as defined in section 230(3)(a) of the Employment Rights Act 1996. This defines an employee

25 as someone who works under (or where the employment has ceased, worked under) a contract of employment. On the other hand, in order to make her claim for holiday pay the claimant required to establish that she was either an employee (alternatively referred to as a limb A worker in terms of section 230(3)(a) of the Act or alternatively that she was a worker

30 under section 230(3)(b). A limb B worker is defined as someone who " works under or worked under "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

35 that of a client or customer of any profession or business undertaking carried on by the individual."



Accordingly the first matter to be determined was whether or not the claimant was an employee that is someone who worked under a contract of employment. In the event that I had found that the claimant was not an employee I would then have required to consider whether she fell into the category of being a limb B worker since in that event her claim of unfair dismissal could not succeed but the Tribunal would be entitled to determine her claim for holiday pay.

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41. The question as to whether or not a contract amounts to a contract of employment or not is a matter of law. It is not something which the parties can determine by simply assigning a label to the arrangements between them. I say this because the respondent at various times seem to be under the impression that because at the outset he had stated that the claimant was to be engaged on a self-employed basis and the claimant had continued to work for him that was essentially the end of the matter. That is not the case. The law requires a Tribunal to look at the terms of the contract between the parties and determine whether or not it falls into the category of being a contract of employment. If it is a contract of employment then certain terms are implied by common law and statute. In addition, an employee is afforded a number of statutory protections which cannot be contracted out of.

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42. There is no requirement for a contract of employment to be constituted in writing although there is a requirement that an employee provides a statement of particulars of employment to the employee at the time of commencement of the contract and the respondent's failure to do this may result in the employee being entitled to payment therefor. Even if the terms of a contract are reduced to writing the Tribunal is generally speaking entitled to look behind the terms of the written contract and look at how matters operated in practice.

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43. The case of ***Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance*** [1968] 1 All ER 433 sets out what is required for a contract to be regarded as a contract of employment. The requirements, briefly stated, are that the servant agrees to provide the employer their own work in return for a wage that the servant is subject to control in the performance of their duties. There must be mutuality of

obligation and the other provisions of the contract must be consistent with a contract of employment.

44. In this case on the basis of the evidence I was in absolutely no doubt that the **Ready Mixed Concrete** test was met and the claimant was an employee of the respondent. It was clear to me that there was an obligation on the individual to supply her services personally. The claimant does not run her own business. There was no suggestion that the claimant was entitled to send a substitute to carry out work on her behalf. There was some limited suggestion in evidence (not stated in the pleadings) that at some point the claimant's daughter had worked alongside her whilst doing gardening for the respondent. This fell considerably short of providing any kind of suggestion that the claimant was entitled to provide a substitute. It was clear from the terms of the initial letter that the respondent had chosen the claimant to carry out the work and that she was to do it personally.

45. It was clear that there was mutuality of obligation. In the letter sent in March 2016 the respondent confirmed that the claimant was required to work certain hours and would be paid a certain wage for this. It was clear that there was an obligation accepted by the respondent to provide the claimant with work. It was also clear that there was an obligation on the claimant to take this work. The respondent said that they would allow the claimant 10 days' paid holiday per annum. Although the letter goes on to state that the claimant would be entitled to take additional unpaid holidays over and above this the letter goes on to state that any such holidays required to be agreed by the respondent and indeed stipulates that these can only be taken during certain months of the year. This is not a case where the claimant was free to turn down work and simply decide that she was not going in to work one day.

46. With regard to the issue of control it was clear to me from the evidence and indeed from the documents provided that the respondent exerted a considerable degree of control over the way the work was carried out. The work was carried out in the respondent's premises. The claimant was expected to be there during specific hours. The letter sent in March 2018 makes specific reference to reception having to be manned by the

claimant. It was clear to me that over the years the claimant was given very specific instructions by Mr Taylor as to the way in which she carried out her work. The respondent chose which software package to use. The respondent supplied all the equipment. I did not consider that the short  
5 period of time during which the claimant had loaded the respondent's software onto her own computer so as to maintain continuity during a period between the demise of one computer and another computer being purchased by the respondent in any way changed matters. The respondent required the claimant even to wear their own uniform whilst  
10 carrying out her duties.

47. Whilst it is entirely possible that a business may use the services of an outside bookkeeper who is entirely independent running their own business and for that bookkeeper to not be an employee the situation in this case was that the degree of control exerted was much more than  
15 sufficient to tip the claimant over into being an employee. It was also clear to me that the rate of pay was fixed by the respondent. Although the claimant was required to submit a note of her hours the respondent provided the duplicate book which she used and indeed although this was referred to as an invoice it was no more than a time sheet which many  
20 employees are required to complete. There was certainly no question of the claimant being free to fix her own charging rate.

48. So far as the evidence went I was satisfied that the claimant initially accepted that she would be working on what the respondent called a self-employed basis because that was what the respondent told her. The  
25 claimant was the bookkeeper and knew full well that her wages were not being put through the PAYE system and indeed her evidence was that she made alternative arrangements to pay any tax and national insurance that fell due. In addition I accepted that the house purchase agreement makes reference in one paragraph to the claimant providing services to the  
30 respondent on a self-employed basis. I considered that these points did not provide any assistance to the respondent given that it was clear from the correspondence and from the evidence about the way that matters worked in practice that the contract between the claimant and the respondent was one of master and servant. It was a contract of

employment. It is not possible for a business to opt out of their responsibilities and obligations placed on them by law in relation to employees by simply seeking to call the relationship something different. Given that the claimant was an employee of the respondent the Tribunal has jurisdiction to hear all of the claims.

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49. If I am mistaken about the claimant being an employee (which I do not accept) then there is absolutely no doubt in my mind that the Tribunal would still have jurisdiction to hear the claimant's claim in relation to holiday pay. There is no doubt that the claimant was required to do work personally for the respondent and there is also no doubt that the claimant was not running her own business or providing any services to the respondent as part of any business. Even if the claimant is not a limb A worker (which I believe she is) she was clearly a limb B worker.

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50. So far as the claim for holiday pay is concerned the claimant was entitled to paid annual leave as set out in the Working Time Regulations 1998. She was entitled to 5.6 weeks' pay per annum.

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51. The claimant had submitted a Schedule of Loss however this was completed on the basis that her normal working hours were five days a week working 40 hours per week. On the basis of the evidence by the time the claimant's employment was terminated in May 2021 she had been working on the basis of three days per week, 24 hours per week for a period of over a year. It therefore appears to me that her normal working week by this time was three days per week and that her weekly wage was £312. This equates to £104 per day.

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52. Where an employee leaves employment without having taken all of the leave which they have accrued they are entitled to compensation therefor which is calculated in terms of Regulation 14 of the Working Time Regulations 1998. Up until 2020 an employee was only entitled to compensation for untaken leave in the current leave year during which their employment ended. As a result of Coronavirus, Parliament passed the Working Time (Coronavirus) (Amendment) Regulations 2020 which introduced a provision in Regulation 13(10) to the effect that where in any leave year it was not reasonably practicable for a worker to take some or

all of the leave to which the worker was entitled as a result of the effects of Coronavirus ... the worker shall be entitled to carry forward such untaken leave as provided for in paragraph 1.

53. In order to calculate the amount of compensation the claimant is entitled to I considered that given the effects of the pandemic it would not have been practicable for the claimant to take annual leave she was due in the year to November 2020 particularly given the circumstance that the respondent were only prepared to allow her to take leave during the winter months when the country was locked down. I therefore consider that the claimant was entitled to carry forward up to 17 days in to the 2020/21 leave year. The claimant had taken 10 days according to her evidence and therefore seven days would be carried forward.

54. The claimant's annual leave entitlement for the period from 15 November 2020 to 31 May 2021 amounted to 9.17 days. ( $17 \times 197 \div 365$ ). The evidence was that the claimant had taken 3 days' annual leave over this period. She was due a further 6.17 days. That means that overall the claimant was entitled to be paid for 13.17 days untaken holiday. This amounts to £1369.68 ( $13.17 \times 104$ ).

55. With regard to the claim of unfair dismissal I did not accept the respondent's position that the reason for dismissal was that the respondent had decided to change their software package and that the claimant would not be able to use this. I accepted the claimant's evidence that the respondent's accountant had been using the alternative software package for the entirety of the period he had worked with the respondent and no moves had been made to change things up to that point. In any event if there had been a genuine wish by the claimant to change their software package then I have no doubt that the respondent would have explored with the claimant the possibility of her carrying out training with a view to being able to use this package. On the basis that the claimant had not known how to work the Sage system when she joined the respondent I consider that this would have been a normal and reasonable thing to do. I say this particularly given that at various points the respondent spoke of the difficulty of finding employees in such a remote area. There was a very high chance that if the claimant was not retained

then whoever took on the role to replace her would also require training. It appeared to me that this was simply a smokescreen set up by the respondent to disguise the true reason for dismissing the claimant which was that the claimant was now asserting her statutory employment rights and in particular her right to holiday pay.

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56. Such a dismissal is automatically unfair in terms of section 104 of the Employment Rights Act 1996 and accordingly the claimant's claim of unfair dismissal succeeds.

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57. In any event, even if I had been satisfied that the reason given by the respondent was a genuine one (which I was not) then the claimant's claim of unfair dismissal would succeed under section 98 in any event. For a start, it did not appear to me that the reason given by the respondent fell within one of the four nominal potentially fair reasons for dismissal namely conduct, redundancy, capability or illegality. It appeared to me that the respondent could only succeed in showing that this was a potentially fair reason if it came within the category of being some other substantial reason. It is clear to me that it did not. In any event even if I had been satisfied that the respondent had provided a potentially fair reason for dismissal it was clear to me that the dismissal would have been unfair in any event in terms of section 98(4). The respondent carried out absolutely no procedure. They did not seek to discuss matters with the claimant or investigate whether or not she would in fact be able to operate the new software package. The dismissal was clearly unfair.

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58. The claimant is entitled to a basic award in terms of the statute. She had five full years' service during all of which she had been above the age of 41 years. She was therefore entitled to seven and a half weeks' pay amounting to £2340.

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59. With regard to the compensatory award the claimant sought a sum of £500 for loss of statutory rights. I consider an award of £400 to be more in line with the value of such a loss and would award this sum. With regard to wage loss I am satisfied that the claimant is entitled to 3.6 weeks' pay for the period between 31 May and 24 June when she took up other employment. Since her new employment was higher paid I consider that

she is not entitled to any wage loss beyond that date. Her wage loss to 24 June is £1123.20. I would award this sum however the claimant is also entitled to notice pay during this period and there would be a double recovery if I awarded her wage loss in addition to her notice pay therefore I have made no award for wage loss.

60. In terms of section 86 of the Employment Rights Act 1996 the claimant was entitled to 5 weeks notice of termination of employment. She received no notice. She is therefore entitled to be paid 5 weeks pay as damages for breach of contract. This amounts to £1560.

61. I am satisfied that as at the date both claims commenced the respondent were in breach of their obligation to provide the claimant with a statement of initial particulars of employment in terms of section 1 of the Employment Rights Act 1996. They were also in breach of their obligation under 4A to provide her with a statement of change of particulars when her hours changed in or about 2020. In terms of section 30 of the Employment Act 2002 I must therefore make an award unless there is an exceptional reason for not doing so. I do not see any such reason in this case. I have a discretion as to whether to award two weeks' pay or four weeks' pay. In this case it appears clear to me that the respondent denied the claimant her full employment rights over a period of years and their failure to provide her with a statement of initial particulars no doubt assisted them doing this. I consider the appropriate amount to award is four weeks' pay (£1248).

62. I considered that the Acas Code was applicable in this case. The respondent did not comply with any of the terms of the Acas Code. The claimant was not advised that dismissal was in contemplation or why. She was not given the opportunity to discuss matters at a meeting. She was not given the right to be accompanied at any meeting. The claimant was simply called in and told that her services were being dispensed with. As noted above I consider that the reason given by the respondent at the time was not the correct reason but was simply a smokescreen. The claimant sought an uplift of 25%. Whilst I considered that this is a fairly egregious case I note that the employer is a relatively small employer with limited access to specialist advice. I therefore consider that it is appropriate that

the uplift be restricted to 20%. The total compensatory award prior to calculating the uplift is therefore £400. The uplift is therefore £80 The total compensatory award is therefore £480. The total compensation for unfair dismissal comprising the basic award and the compensatory award amounts to £2820 (2340+480). The total award is £6997.68 (2820+1560+1369.68+1248). There is no prescribed element.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**I McFatridge**  
**11 April 2022**  
**11 April 2022**