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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100541/2024**

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**Held in Edinburgh on 11, 12 and 13 September 2024**

**Employment Judge E Mannion**

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**Mrs Hayley Harvey Smith**

**Claimant  
In person**

**Glam Candy UK Limited**

**Respondent  
Represented by  
Mark Thompson,  
Lay representative**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30 The judgment of the Tribunal is as follows:

1. The claimant was an employee of the respondent organization. Her continuous service dates from 31 August 2011 until her dismissal on 4 December 2023.
2. The claimant was unfairly dismissed on 4 December 2023 and the  
35 respondent is ordered to pay the claimant £7,716 as a basic award and a compensatory award as follows:

- a. £29,997 subject to tax and national insurance to reflect loss of earnings from the date of dismissal to the hearing; and
  - b. £350 for loss of statutory rights
3. The respondent is ordered to pay £307.69 subject to tax and national insurance for non-payment of wages for the 1 and 4 December 2023.
  4. The respondent is ordered to pay £10,000 subject to tax and national insurance to reflect the claimant's contractual entitlement to three months' notice pay.
  5. The respondent is ordered to pay £2,923.15 subject to tax and national insurance for accrued but untaken annual leave on termination of employment.
  6. The claimant is not due, and the respondent is not ordered to make, a payment in respect of a contractual claim for expenses.

## REASONS

### Introduction

1. This is a claim of unfair dismissal, non-payment of wages and holiday pay. This respondent contests all aspects of the claim on the basis that the claimant was not an employee of the respondent organisation and so there was no dismissal in law, and no entitlement to holiday pay, notice pay or expenses.
2. The ET3 lodged by the respondent defended the claim on the basis that the claimant was "*a director in the company responsible primarily for marketing but also in regular contact with myself about company strategy and employment issues. The marketing position was a position that was no longer needed internal and the role was then made redundant.*" Mr Thompson on behalf of the respondent confirmed in evidence that there was no redundancy scenario but instead the redundancy label was used as a mechanism to provide the claimant with payment from the respondent. He explained that this response was outlined in the ET3 form as it responded to the claimant's case. He confirmed in evidence the respondent's position that the claimant was not an employee and was not made redundant. It was therefore conceded that as there was no redundancy, if it is found that the claimant is employed by the respondent, there

was no fair reason under Section 98 of the Employment Rights Act 1996 to dismiss the claimant. The case therefore turns entirely on the claimant's employment status.

3. The claimant gave evidence on her own behalf. She also called Lee Ross, former employee of the respondent, Paige Fyfe, former employee in the marketing department and Amanda McCarthy, former Education Manager. Dionne Proudfoot, Operations Director of the respondent and Mark Thompson, owner and shareholder gave evidence on behalf of the respondent. Mr Thompson both gave evidence and acted as representative. Mr John Borthwick also gave expert technology evidence on behalf of the respondent.
4. Both sides lodged separate bundles of documents in advance of the hearing. As well as this, both parties brought additional documents to be added to their bundle at various points during the course of the hearing. Objections were made at the outset of the hearing by the claimant as to the relevancy of some of the documents in the respondent's bundle, specifically documents taken from the claimant's corporate email account that relate to her mortgage application, medical detail and personal conversations. The respondent submitted that these documents were relevant to the claim. I decided at that point of the hearing it was difficult to assess the relevancy without hearing the evidence, that the objection was noted and would stand, that in coming to my decision I would decide what weight to place on the document, taking into account the relevancy objection.

### Relevant law

5. **Section 230 of the Employment Rights Act 1996** (the ERA) provides at subsections 1 and 2 that
- (1) In this Act "*employee*" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act "*contract of employment*" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

6. The decision in **Ready Mixed Concrete(South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD** remains good law. While outlining a multifactorial approach, a contract of employment requires an irreducible minimum entailing: sufficient control; personal performance; mutuality of obligation. All other factors must be consistent with it being a contract of employment rather than a contract for services.
7. When looking at control, a contract of employment depends on there being sufficient control of when and how to do the work which is commensurate with the nature of the work. Control may mean ultimate control rather than day to day control especially where skilled or senior employees may be given substantial autonomy (**White v Troutbeck SA [2013] IRLR 949, CA**).
8. A contract of employment requires personal performance of the work. Any limited right to provide a substitute to undertake that work in the place of the “employee” must be properly construed and such that it is not inconsistent with that requirement (**Pimlico Plumbers Ltd v Smith [2017] EWCA Civ 51, [2017] IRLR 323**).
9. Mutuality of obligation requires that an employee is obliged to provide work on the basis the employer is obliged to provide pay for this work. In **Stevedoring & Haulage Services Ltd v Fuller [2001] IRLR 627** , the “mutual obligations” recognised by the Court of Appeal appear to have been to offer work, on the employer's side, and to accept it, on the employee's.
10. Other factors affecting the relationship must be consistent with it being a contract of employment rather than a contract for services. Other relevant factors include but are not limited to: the nature of remuneration; the degree of risk borne; the extent of organisational integration; and the categorisation by the parties.
11. A check list approach should not be adopted and the tribunal must stand back from the accumulated detail and consider the overall picture. In **Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA**, the Court of Appeal upheld the

decision of Mr Justice Mummery in the High Court (reported at 1992 ICR 739), who had said:

5           *'this is not a mechanical exercise of running through items on a checklist to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail... Not all details are of equal weight or importance in any given situation.'*

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12.   Where the purported employee is also a majority shareholder, there are other considerations to take into account. Holding the office of director does not preclude employment status. Caselaw allows for an office holder such as a director to also be employed. Where that director is a majority shareholder, case law has considered whether such a person can also be an employee. The argument against this the ultimate control they have over the Board. As majority shareholder, they could remove the Board and/or block their dismissal or proposed amendment to their terms and conditions of employment. This is not to say that a majority shareholder will never be held to be an employee.

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13.   Guidance on what to consider is provided by the EAT in **Clark v Clark Construction Initiatives Ltd and anor 2008 ICR 635 EAT**. *"It is not the lack of control of the company over the individual but rather the extent of the control of the individual over the company which sometimes creates doubts as to whether the contract of employment truly reflects the nature of the relationship."* The EAT outlined a list of eight non-exhaustive factors for consideration:

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(1) *Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.*

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5 (2) *The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the company does (Lee).*

10 (3) *Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes (Arascene).*

15 (4) *If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.*

20 (5) *Conversely, if the conduct of the parties is either inconsistent with the contract or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.*

25 (6) *In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing (Fleming). This will be powerful evidence that the contract was not really intended to regulate the relationship in any way.*

30 (7) *The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them. It would wholly undermine the Lee approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment.*

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5 (8) *Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a Tribunal in finding that there was no contract in place. That would be to apply the Buchan test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another.*

10 14. **Section 94(1) of the ERA** states that ‘An employee as the right not to be unfairly dismissed by his employer.’ Unless the claimant is either admitted to be, or can be found in law to be, an employee at the point of termination of employment, the complaint of unfair dismissal cannot proceed.

15 15. **Section 98 of the ERA** provides that in determining whether a dismissal is fair or unfair in law, an employer must show that the reason amounts to one of the following: conduct; capability (including performance and ill health); redundancy; that holding the role contravenes the law; or some other substantial reason justifying dismissal.

20 16. **Section 98(4) of the ERA** outlines that where an employer has shown the reason for the dismissal is one of the above quoted reasons, the Tribunal must determine where the dismissal was procedurally fair or unfair having regard to whether the employer acted reasonably or unreasonably in treating it as a reason for dismissal, having regard to their size and administrative resources and also determining same in accordance with equity and the substantial merits of the case.

25 17. The formula for calculating the basic award is set out in **Section 119 of the ERA** and provides that a claimant is entitled to one week’s pay for each complete year of continuous service where the claimant was below the age of 41 but not younger than 22. A week's pay is capped at £700 under statute.

30 18. As per **Secretary of State for Employment v John Woodrow and Sons (Builders) Ltd 1983 ICR 582, EAT**, a week’s pay is calculated based on gross pay.

19. The compensatory award is provided for in **Section 123 of the ERA** and is such amount “as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained” by the claimant in consequence of the dismissal. The loss must be attributable to the actions taken by the respondent employer. As per **Norton Tool Ltd v Tewson 1972 ICR 501 NIRC**, the compensatory award should include items such as loss of earnings loss between the date of dismissal and the hearing; estimated loss after the hearing; expenses incurred as a consequence of dismissal; and loss of statutory protection rights.

10 **Issues**

20. The issues were confirmed and agreed at a preliminary hearing on 15 May 2024 and are as follows:

- (i) Was the claimant an employee of the respondent as at 4 December 2023?
- 15 (ii) If so, on what basis?
- (iii) Was the claimant unfairly dismissed by the respondent?
  - (i). What was the reason for the claimant’s dismissal?
  - (ii). Did the respondent follow a fair redundancy procedure in dismissing the claimant?
  - 20 (iii). Was the claimant unfairly selected for redundancy?
  - (iv) What remedy should the claimant be awarded if she was unfairly dismissed?
  - (v) Did the respondent unlawfully deprive the claimant of a redundancy payment?
  - 25 (vi) If so, what was the amount of the redundancy payment to which the claimant was entitled?



(vii) Did the respondent unlawfully deprive the claimant of notice pay, holiday pay and/or arrears of pay?

(viii) If so, what payment should the claimant be awarded?

### Findings in fact

5 21. The Tribunal makes the following findings in fact on the balance of probabilities having considered the evidence and submissions by the parties.

22. The respondent organisation is involved primarily in creating, developing and running SQA accredited courses in make-up application and other beauty techniques. Students are provided with make-up kits and accessories which are sourced and provided by the respondent. At the end of their course, their work is photographed and can be used for their portfolio. The company began in Edinburgh but has expanded to have education centres in Glasgow, Inverness Aberdeen, London, Liverpool, Brighton and Dundee. The respondent has also expanded into liaising with high schools to provide courses and also offers short or one-off 'masterclass' sessions.

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23. The claimant established this business in or around 2011 with her sister in law, Ebony Smith.

24. The claimant's role in the organisation changed over time as did the make up of the company. Prior to June 2021, the respondent had a Board, made up of approximately 7 people including the claimant. The respondent had a Managing Director at that time and the claimant's day to day role was in marketing. Since June 2021 to the point when the shareholding was sold in June 2023, there was no Board and the claimant was running the organisation herself. Directly under here were four senior managers, one of whom was Dionne Proudfoot, Operations Manager. The claimant was the most senior person in the organisation. In the absence of a Board, she did not report to anyone. Mrs Proudfoot was employed by the respondent from April 2022. Her areas of responsibility included HR and some finance responsibility, including raising invoices on behalf of the respondent and collating and paying expenses to employees including the claimant.

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25. The claimant held the office of director and was majority shareholder until June 2023. She was also an employee of the respondent.
26. In or around January 2020, the respondent went through the process of reviewing employment documentation including the contracts of employment.  
5 New contracts were drafted for existing staff, and these contracts were then used for any new hires. A separate “senior management” contract was created for senior management staff. This exercise was done in conjunction with Harper McLeod and Croner HR. The claimant was given a contract of employment at this time dated 17 January 2020 which noted her continuous  
10 start date as 31 August 2011. The claimant did not sign this contract at the time it was given to her.
27. The respondent bought a HR management program called HR Toolkit in or around the same time as the HR review. This is a digital HR platform that both employer and employee could access. Each employee has an account on HR  
15 Toolkit which includes their personal details, annual leave calendar and details of pay. Their employment contract is uploaded to this page. They can also review employer policies and procedures. The claimant had access to HR Toolkit but did not have an account. She was not listed as an employee on HR Toolkit and her contractual documentation were not uploaded to the site.
- 20 28. The employee handbook includes a paragraph entitled “Moonlighting” which states that employees are not permitted to compete with the respondent organisation in any activities outside their employment. The claimant had a number of additional businesses outside of the respondent organisation. This included a beauty magazine, make up brush company, property company,  
25 photography company. None of these businesses were operating in competition with the respondent. Not all of these businesses were live businesses at the time of employment.
29. While her contract outlined set hours of work, the claimant worked in excess of these. She often worked from 5am in the morning answering emails and also  
30 at evenings and over the weekend. This was in addition to working a normal 9-5 day.

30. The claimant was entitled to take 25 days annual leave plus 8 public or bank holidays. She did not seek authority to take annual leave. Rather she took leave as and when she desired. At times, she would work while abroad. In January 2023, the claimant took an extended trip to Bali and Australia. She was abroad from 22 January to 20 February 2023. During this time, she was working for the respondent. The respondent took a trip to Val d'Isere from 24 March to 1 April 2023. While some work was done on this trip, this was primarily a holiday. The claimant went to Paris from 7 to 11 May 2023. During this time she was working for the respondent.
31. The claimant was on the respondent's payroll system. She was paid monthly by the respondent and this pay was subject to tax and national insurance. She received payslips each month and a P60 at the end of each financial year.
32. The claimant's place of work was not specified in her employment contract, but she worked alongside her colleagues in various locations across Edinburgh. Initially the claimant worked from offices within the respondent premises at William St but as education courses were taking place there, it was often busy. She worked from rented offices spaces or shared work spaces at Gorgie and also We-Work location in Edinburgh. This was alongside her marketing and other colleagues. The rent or membership of these locations was covered by the respondent.
33. The claimant's primary duties and responsibilities related to marketing, specifically the drafting of adverts, creating and running social media campaigns, creating and running leads, training and mentoring of marketing staff. She was also involved in overseeing the set up and running of education centres, engaging with the SQA on accreditation of courses, overseeing the writing and development of these courses. She sourced items for the make-up kits and liaised with suppliers for this.
34. In June 2023, the claimant sold her shareholding in the company to Mark Thompson. Mr Thompson had previously worked for the respondent as a bookkeeper, joining the respondent in 2022. At the time of sale, the claimant held an 87% shareholding. Ms Smith held the remaining 13% shareholding.

The claimant was motivated to sell her shareholding as the company was in financial distress. The claimant had previously invested her own personal money in the respondent company to assist with the financial difficulties it faced. The share purchase agreement was signed by the claimant on 12 June 2023. As part of this agreement, the claimant agreed to resign from her office of director. A letter of resignation from this office did not form part of the completion documents.

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35. After the sale of her shareholding, the claimant continued to undertake work for the respondent. There was no noticeable change in management structure and Mr Thompson, as owner and majority shareholder, did not assume the role of Managing Director. There was no noticeable change in the work done by the claimant.

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36. In September 2023, the claimant's salary was reduced from £70,000 per annum to £40,000 per annum. This change was instigated by Dionne Proudfoot.

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37. In or around September 2023, the claimant suggested that Mrs Proudfoot take over her office of director. Discussions took place between the claimant, Mr Thompson and Mrs Proudfoot in respect of this change. Mrs Proudfoot became a Director on 1 December 2023. Her job title changed from Operations Manager to Operations Director. It was not discussed or agreed that Mrs Proudfoot would undertake the claimant's duties and responsibilities. Mrs Proudfoot's areas of responsibility included HR and Finance.

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38. The claimant's salary was not paid as normal on 1 December 2023. She raised this with Mr Thompson and ultimately was paid on 12 December 2023. This was the last payment the claimant received from the respondent.

39. Mr Thompson called a Board meeting on 1 December 2023. At this Board meeting, he removed the claimant from her office of Director and installed Mrs Proudfoot as Director. The claimant was not in attendance at this meeting and did not have knowledge of the intention to remove her from office.

40. On 4 December 2023, Mr Thompson wrote a letter to the claimant with the heading “notice of redundancy”. The letter set out that the respondent applied redundancy selection criteria to the claimant and that she had been selected for redundancy. This was as a result of a decision to outsource a significant part of the marketing function. She was given notice of termination, noting an entitlement to 11 weeks’ notice. The termination took effect that day. This letter set out a false narrative. The respondent had not applied any redundancy selection criteria nor selected the claimant’s role as redundant. A genuine redundancy scenario did not exist.
41. The redundancy and notice payments referred to in the letter were not paid to the claimant.
42. The claimant exercised her right of appeal as set out in the above letter on 11 December 2023. An appeal was not heard by the respondent.

**Observations on the evidence**

43. Given that none of the parties were legally represented, it was necessary to explain how evidence is taken and the role of the documentary evidence that forms part of the Bundle. During the course of examination in chief and cross examination, it was necessary to remind the parties that they cannot refer to documents that are not in evidence and that statements made when asking a question will not be taken as evidence. It is only the information provided by a witness when under oath or affirmation which is taken as evidence and will allow the Tribunal to make findings of fact. Any submissions or statements made outside of that are not evidence and do not carry evidential weight.
44. There was a contradiction in Mr Thompson’s evidence when compared with the case set out in the ET3 response form. His evidence in respect of the dismissal was that there was no redundancy situation in December 2024, no redundancy process was followed and the claimant was not in effect made redundant. This was contrived to give the claimant money. The ET3 however outlines that the marketing role the claimant undertook was redundant and positions redundancy as the potentially fair reason for dismissal. Mr

Thompson also confirmed in evidence that the claimant resigned from her office of director at a Board meeting on 1 December 2023 and this was put to the claimant (who denied this position). The ET3 response however states that the claimant was removed from her office of director on 1 December. His  
5 evidence generally on the period September to December 2023 was vague and lacking in detail, particularly as it pertained to the claimant's day to day role during this time and the catalyst for drafting a letter to the claimant, terminating her role on 4 December 2023. I found that he was not a credible witness.

10 45. With regard to the claimant, at times she was quick to respond with "I can't recall" when asked specific questions, particularly around the establishment of the company and matters some years ago and this appeared as an attempt to be unhelpful to Mr Thompson. It was clear from their interactions that the two did not get on. Apart from this, she answered clearly and consistently.

15 46. All other witnesses gave their evidence to the best of their ability and memory.

### **Decision**

*Was the claimant an employee of the respondent as at 4 December 2023?*

47. When looking at employment, there are two separate periods which I need to consider – (1) the period from 2011 to June 2023 when the claimant was the  
20 majority shareholder of the respondent organisation; and (2) the period of June 2023 to 4 December 2023.

*Was the claimant an employee while a majority shareholder?*

48. The claimant held the majority shareholding in the company from 2011 until  
25 June 2023 when she sold this to Mr Thompson. Her position was that she was an employee of the organization at the same time as being the majority shareholder. I considered the evidence heard during the course of the hearing, the submissions of the respondent and the claimant as well as the guidance from the EAT in Clark set out above in the section 'Relevant law'.

49. The claimant was on the respondent's payroll and was paid monthly. This pay was subject to tax and national insurance. She received monthly payslips and at the end of the financial year, she was provided with P60s. After she left the respondent organisation, she was issued with a P45. Both the P60 and P45  
5 (page 4 of the claimant's bundle) refer to the claimant as an employee.
50. The respondent attempted to evidence that the contract provided by the claimant was "fraudulent" and asserted that it was created by the claimant after December 2023. The expert evidence did not show this. Instead, the technology expert Mr Borwick confirmed that the PDF version of the contract  
10 provided was created on 4 January 2024. He confirmed that his report only looked at the PDF version provided at that time and not the original word document itself.
51. The focus of the respondent's position was the alleged fraudulent nature of the contract provided rather than the legal effect of the contract. It was put to  
15 the claimant repeatedly that the contract which formed part of her bundle was not her contract of employment as one did not exist. The claimant's evidence was that she was provided with a contract of employment in 2020 at the time of the HR review which set out her continuous start date of August 2011. Whilst I appreciate the difficulty the respondent faced in addressing this point  
20 as Mr Thompson and Mrs Proudfoot were employed by the respondent from 2022 onwards, no real evidence was led to challenge the claimant's position on the 2020 contract. The only person who spoke to this period was the claimant. Mrs Proudfoot was asked about emails confirming the contract review in 2020, where recipients of the email were asked to sign and return  
25 their updated contracts. The claimant was copied into this email and so supports her contention that she was provided with a contract of employment at that time. If it was the case that during the second contract review in 2022 the claimant was not issued with an updated contract along with other employees, this point was not made in evidence nor was it put to the claimant.  
30 In the absence of challenge, I accept the claimant's position that she was provided with a contract of employment in January 2020 which outlined her continuous employment dating from August 2011.

52. As per Clark, it is for the respondent to evidence that a contract does not truly reflect the legal relationship between the claimant and respondent organisation. I find that the respondent failed to do so.

53. Apart from the line of questioning on when the contract in the bundle was  
5 created, the respondent provided little evidence to deny the legal effect of the  
purported contract. While it was put to the claimant that she was not employed  
and the position of the respondent was that she held the office of director  
only, she did not accept this. There was limited evidence led to show the legal  
relationship was one other than employer/employee. Mrs Proudfoot said in  
10 evidence on more than one occasion that she viewed the claimant as a  
director, but did not outline how she came to this view. It was not put to the  
claimant that any work she undertook fell within the remit of director rather  
than employee. The makeup of the company changed at various points since  
2011, with managing directors appointed at various times and a Board of  
15 Directors of whom the claimant was a part, but the potential impact of these  
changes on the claimant's status was not put to the claimant. There was no  
counter evidence to the claimant's position that she was employed since 2011  
as well as holding the office of director and being majority shareholder. The  
respondent position that there was insufficient control of the claimant to create  
20 an employment relationship was focused on 2023, particularly whether she  
sought authority for annual leave during this time. Mrs Proudfoot said in  
evidence that the claimant was the "master" of the company but again, the  
basis for this was not forthcoming. There was some questions around the  
start date of the company and early Companies House listings but this was  
25 based on documents which were not in evidence.

54. It is accepted that the claimant held the controlling interest in the company.  
The fact that she was selling her shareholding was testament to this. From  
2021 to the sale of her shareholding, there was no Board to report to and no  
managing director. She in effect had and exercised sole control over the  
30 respondent.



55. It is also accepted that the claimant founded and built up the company and throughout the history of the company undertook a variety of roles. She had access to and availed of director's loans and also put her own personal money into the organisation to assist with its level of debt.

5 56. The respondent sought to evidence that the claimant was not acting as an employee would have and so not in line with the contract of employment. They pointed to the fact that she did not seek authority for holidays and took in excess of her contractual holiday entitlement in 2023. The claimant's evidence was that any time she was out of the country in 2023, she was  
10 working and so authority was not required. An area of dispute was a lengthy trip the claimant took to Bali and Australia in January and February 2023 with the claimant asserting she was working while abroad. Her evidence was that when she was in Bali and Australia she was undertaking marketing tasks, scheduling ads, linking these with the website, writing and editing stories for  
15 Instagram. This evidence was not challenged and the position that any time spent working was limited or minimal was not put to the claimant, save for some comments made by the respondent when asking about this period which does not hold evidential weight. I accept the claimant's position that this was a working trip rather than annual leave. Another trip which was  
20 disputed was a week spent in Val d'Isere. The claimant stated that she was posting Instagram stories which were used for marketing and that she photographed a colleague and that this drove students to their courses. This was challenged, specifically the length of time to post these Instagram stories versus the length of the holiday. I accept the respondent's position that this 6  
25 day trip was a holiday. In respect of the trip in Paris in May 2023, the claimant's evidence was that this was a worktrip which involved meeting with a third party to discuss the respondent undertaking photography work for the façade of the Moulin Rouge. This evidence was not challenged by the respondent. I find that this was a work trip rather than a holiday. No other  
30 purported holidays were put to the claimant.

57. The respondent pointed to the clause in the employment contract which states that the employee will not be expected to work outside of the UK. Mrs

Proudfoot gave evidence that other employees are not permitted to work outside of the UK. This clause however does not prohibit working outside of the UK which was suggested by the respondent, but simply aligns with the statutory requirement to confirm whether or not an employee will be required to work outside of the UK for more than a month. I do not find that she took in excess of her annual leave entitlement in 2023 (the only year for which this argument was made).

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58. It is not in dispute that at or before the time of travelling to Val D'Isere in May 2023, the claimant did not seek authority for this period of annual leave. Her employment contract does not set out a process for requesting annual leave.

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59. Mrs Proudfoot gave evidence about the moonlighting clause in the employee handbook (page 26 of respondent bundle) and went through a number of businesses that the claimant owns and is involved in. The key point of the moonlighting clause is that an employee cannot have an outside interest that conflicts with the respondent. It states "employees are not permitted to engage in any activity outside their employment with the Company which could be reasonably be interpreted as competing with it." The respondent position, that the claimant would not be permitted to engage in outside businesses if she were truly employed by the respondent was challenged, and it was conceded by Mrs Proudfoot that these businesses were not in conflict with the respondent. The employee handbook is a non-contractual document. I find that the claimant was not acting in contravention to the handbook.

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60. The claimant's evidence was that her hours of work were "erratic", that she would email and message at 5am, would regularly work evening and weekends and was generally "the point of call for everything." This was in addition to her normal working day. She stated that she would usually look at her emails when she got up and deal with these first thing before heading into the workspace for the rest of the day. This was not challenged by the respondent. I therefore accept that she worked in excess of her contractual working hours. She confirmed that she had a place of work in Edinburgh. This

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was in keeping with her contract, which did not specify where in Edinburgh. Initially the claimant worked from the William St premises in Edinburgh, then some office space at Gorgie but latterly in shared work spaces rented from WeWork also in Edinburgh as the William St location was very busy with students. She worked at the rented work space with other employees of the respondent, in particular the marketing team. If she was working outside of Edinburgh, it was at other respondent locations. This evidence was not challenged by the respondent. She described fortnightly meeting with Paige Fyfe in marketing and Steph Kent in finance. She was focused primarily on marketing but was required to be across the business of the respondent organisation as a whole. This included recruitment, engaging with the SQA on the accreditation of the various courses they ran, organising and running photoshoots, overseeing the start up of new locations, organising and overseeing photography shoots. This was put forward as work done as an employee. This was not challenged by the respondent.

61. Taking all of the above factors into account, I find that while the claimant was the majority shareholder, on balance she was also an employee of the respondent organisation. She had a contract of employment and her actions were broadly consistent with this. The contract in the claimant's bundle notes her continuous start date from August 2011. While the respondent sought to challenge this with reference to Companies House records, those records did not form part of the respondent bundle and were not in evidence. The continuous start date from 2011 is therefore accepted.

*Was the claimant an employee after the sale of her shareholding?*

62. I have considered the relationship between the respondent and claimant after the sale of her shareholding on the basis of the irreducible minimum of control, personal service and mutuality of obligation. I have also considered other factors.

### Control

63. After the completion of the share purchase agreement, there was no change in the structure of or management of the respondent organisation. Mr Thompson was owner but did not have a day to day role in the organisation. The structure of the organisation with claimant at the head of the organisation, with four managers directly below her remained in place. Mrs Proudfoot's evidence was that the claimant was the boss; she was in charge. Despite the status quo in terms of the management structure, Mr Thompson as sole shareholder had sole control of the company. He also had oversight and control of the respondent's finances and had a responsibility for paying both freelancers and employees. He was responsible for paying the claimant's wages. When the claimant was not paid her salary on 1 December as expected, it was Mr Thompson whom she spoke to and he ultimately paid her on 12 December. The claimant agreed to a reduction in her salary from £70,000 to £40,000 in September 2023 and this change was instigated by Mrs Proudfoot. The claimant continued to be paid on a monthly basis through the respondent payroll with tax and NI deducted. If the claimant required the payment of expenses, she submitted receipts and details to Mrs Proudfoot, with approval of payment of these expenses coming from Mr Thompson.
64. It was the respondent's position that had the claimant been a true employee, she would have been disciplined for the manner in which she took annual leave or worked from abroad and her involvement in outside businesses. Evidence was not led to suggest that it was not possible to discipline the claimant because of a lack of control over her.
65. Ultimately Mr Thompson took the decision to end the relationship between the claimant and the respondent organisation in December 2023. At a Board meeting on 1 December 2023, the claimant was removed from the office of director. I accept the claimant's evidence that was not in attendance at that Board meeting, that she did not resign but was in fact removed by Mr Thompson. This is consistent with the respondent's position as per their ET3. Mr Thompson informed the claimant by letter on 4 December 2023 that her

employment had come to an end by reason of redundancy. If it were the case that the claimant only held the office of director within the respondent organisation, it would not be necessary to create a redundancy situation on 4 December 2023 to terminate the relationship. As of the 1 December, the claimant was removed as director and if this was the only role she held in the organisation, the relationship between the claimant and the respondent would have come to an end at that time. The fact that the respondent took a further step to remove her by way of a sham redundancy dismissal on 4 December, evidences both control over the claimant in the respondent's ability to terminate her contract and an acknowledgement that the relationship between respondent organisation and claimant did not end when she ceased to be a director.

66. I find that the respondent did have sufficient control over the claimant from the sale of her shareholding to her dismissal on 4 December 2023.

### **Personal service**

67. Following the sale of the claimant's shareholding, the claimant continued to have a role in the organisation and continued to undertake duties, primarily in marketing. She undertook these duties herself. It was not put to the claimant that she was undertaking these duties as a director rather than employee. There was no evidence lead that the claimant had a right of substitution or that she substituted others to provide services on her behalf. She provided personal service. These included overseeing another employee, Lee Ross in establishing a new education centre, engaging with the SQA on education courses, instructing Miss Ross to write these courses and overseeing same. All of these duties were performed personally. The regular fortnightly meetings with marketing and finance continued following the sale of the shareholding. She continued to work the same hours as when she was majority shareholder. There was no noticeable difference in the manner in which she worked after the sale of her shareholding. She remained integrated into the business, working alongside colleagues in their regular rented workspace.

68. From September 2023, discussions began whereby Mrs Proudfoot would take over the Claimant's office of director, and with that a change in job title to Operations Director. Mrs Proudfoot's areas of responsibility included HR and Finance. Taking on the office of director would not mean that Mrs Proudfoot would take on the marketing duties and responsibilities the claimant undertook. These would remain with the claimant. Ultimately Mrs Proudfoot took up the office of director on 1 December 2023, days before the claimant's dismissal on 4 December 2023.

69. I find that the claimant was providing personal service to the respondent at the relevant time.

### **Mutuality of obligation**

70. The claimant evidence was that she worked regular hours at the respondent's place of work, undertaking duties and responsibilities on behalf of the respondent. In exchange for this she was paid a monthly salary. The amount of salary changed over time. In 2020, her salary was £220,000 per annum. By 2023 this was reduced to £70,000 and in September 2023 she agreed to a reduction to £40,000. None of this evidence was challenged. It was not the respondent's position, nor did the respondent lead evidence, that the claimant could refuse to undertake tasks for the respondent or turn down offers of work from the respondent.

71. I find that there was a mutuality of obligation as between the claimant and the respondent during the relevant time.

72. Along with the irreducible minimum, I also considered other factors. It was accepted by both parties that the claimant has a number of other businesses that she is involved in to some degree. Some of these businesses such as HSS Investments, which was a property business and leased the Glasgow premises to the respondent, was an ongoing business while others such as Wild Brushes had gone nowhere. Others such as Blend Collective had launched since the claimant finished with the respondent. The claimant confirmed in evidence that any work she undertook on live businesses was

done outside of the time she spent undertaking work for the respondent. It was not put to the claimant that her involvement in any of these businesses was sufficient to amount to secondary employment or work in any form.

5 73. I also considered the claimant's integration into the business. She worked either at the respondent premises at William St, Edinburgh or other premises rented or paid for by the respondent. She worked alongside other respondent employees in these premises. She had an email address that aligned with the other respondent employees. In magazines published by the respondent she was credited as Director/Editor. Although she did not have her own account  
10 on HR Toolkit, she had access to this and was able to review all other employee information that it contained as well as respondent policies and procedures. She had accounts with other IT programs such as Hootsuite, which allowed her to undertake her role, paid for by the respondent.

15 74. Taking into account these other factors, as the irreducible minimum of control, personal service and mutuality of obligation, I find that the claimant was an employee of the respondent organisation from August 2011 to 4 December 2023.

*Was the claimant unfairly dismissed by the respondent?*

*What was the reason for the claimant's dismissal?*

20 *Did the respondent follow a fair redundancy procedure in dismissing the claimant?*

75. The ET3 submitted by the respondent provided redundancy as a potentially fair reason for the dismissal of the claimant. In evidence however, Mr Thompson confirmed that this was not correct, that the redundancy letter sent to the claimant on 4 December 2023 were a sham. There was no genuine  
25 redundancy situation, a redundancy consultation or process had not been followed and the claimant had not been fairly selected for redundancy. The respondent did not set out an alternative fair reason for dismissal under Section 98. In the absence of a fair reason for dismissal, I find that the claimant's dismissal on 4 December 2023 was unfair in law. A determination  
30 of fairness of procedure under Section 98(4) ERA predicates that there was

a fair reason for dismissal under Sections 98(1) and (2). As there was none, the Tribunal is not required to determine the fairness of the process applied. It is noted that in any event, a process was not followed. The claimant was informed by letter after the decision to dismiss had been made by the respondent. It was made without any input or consultation with the claimant. The claimant exercised her right of appeal as outlined in the letter but an appeal hearing was not organised by the respondent. The claimant therefore had no real right of appeal.

*What remedy should the claimant be awarded if she was unfairly dismissed?*

76. The claimant is entitled to a basic award and a compensatory award as per Section 118 of the Employment Rights Act 1996.

**Basic award**

77. The claimant was 39 at the time of her dismissal and had 12 complete years of service, taking 31 August 2011 as her continuous start date from her contract. Her gross salary being £40,000 gives a gross weekly salary of £769.23. Using the formula set out above, the claimant is entitled to a basic award of £7,716.

**Compensatory award**

78. Although the claimant has a number of companies that she is involved in, they do not at this time provide her with an income. The respondent did not put forward any evidence that she failed to mitigate her loss. Her financial loss runs from the date of dismissal to the date of the hearing and amounts to 9 months' pay. Based on her salary of £40,000, this amounts to a gross figure of £29,997. This is subject to tax and national insurance.

79. The claimant is entitled to compensation for loss of statutory rights and this amounts to £350.



*Did the respondent unlawfully deprive the claimant of a redundancy payment?*

*If so, what was the amount of the redundancy payment to which the claimant was entitled?*

5 80. The respondent failed to pay the claimant the redundancy payment as set out in their letter of 4 December 2023. However, as the claimant was unfairly dismissed and not dismissed as a result of a genuine and fair redundancy situation, she does not have an entitlement to a redundancy payment.

*Did the respondent unlawfully deprive the claimant of notice pay, holiday pay and/or arrears of pay?*

10 *If so, what payment should the claimant be awarded?*

15 81. The claimant was employed on the 1 and 4 December, being the only working days in December prior to her dismissal taking effect. She was not paid for these days. Based on her salary of £40,000, a days' gross pay is £153.85. She is entitled to £307.69 reflecting two days pay. This amount is subject to tax and national insurance.

82. The claimant was not paid a notice payment on termination. Her contract provides that she is entitled to a three month notice period. Based on her salary of £40,000, she is entitled to a gross notice payment of £10,000. This amount is subject to tax and national insurance.

20 83. The claimant sought to evidence that she was entitled to paid expenses by the respondent. The claimant failed to evidence a contractual entitlement to repayment of all and any expenses undertaken by her in the course of employment. I find that she is not entitled to repayment of expenses.

25 84. There was a dispute as to whether the claimant took annual leave or was working from abroad in 2023. As set out in paragraph 30 above, only the trip to Val D'Iserre was found to amount to annual leave. This trip amounted to 6 working days. The claimant's holiday entitlement was 25 days for a full calendar year. This did not include public holidays. She is therefore owed 19 days annual leave. Based on her salary of £40,000, a days' gross pay is

£153.85. She is entitled to £2,923.15 for accrued but untaken annual leave.  
This amount is subject to tax and national insurance.

**Employment Judge: E Mannion**  
**Date of Judgment: 8 November 2024**

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**Date sent to parties**

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12/11/2024