Appeal No: UKEAT/0018/17/JW
At the Tribunal
On 18 July 2018
At 10:30am

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

SHONA MORRISON — APPELLANT

ABERDEIN CONSIDINE & COMPANY — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

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APPEARANCES

For the Appellant	Mr D Hay Advocate Instructed by Quantum Claims Compensation Specialists Ltd 70 West Regent Street Glasgow G2 2QZ
For the Respondent	Mr B Napier QC Instructed by Aberdein Considine & Company 5-9 Bon Accord Crescent Aberdeen AB11 6DN

SUMMARY

Jurisdictional Points – Worker/ Employee or Neither

The claimant, a solicitor, had for many years been a "salaried partner" in the respondent law firm. She raised a number of claims, some of which required her to have been an employee of the firm in order for the Tribunal to have jurisdiction to deal with them. The Tribunal determined after a hearing that she was not an employee, but was a partner. On an appeal by the claimant in which she contended that the Tribunal had erred in approach, held ;- (i) That as the term salaried partner had no meaning in law, the facts and circumstances had to be examined carefully in order to assess the nature of the parties' relationship and the true agreement between them (ii) that while there was no rule requiring the Tribunal to address the terms of the partnership agreement first (Williamson & Soden v Briars UKEAT/0611/10/DM), it was permissible to do so and logical in the circumstances of the present case and (iii) that it was not erroneous for the Tribunal to take the partnership agreement as a starting point and then assess all of the adminicles of evidence consistent and inconsistent with the claimant's position that she was an employee not a partner before reaching a conclusion. Both the approach taken and the conclusion reached were accordingly permissible.

Appeal dismissed.

The Honourable Lady Wise

Introduction

[1] The claimant, a solicitor of some 25 years standing, presented claims of unfair dismissal and for a statutory redundancy payment and also of age and sex discrimination and under Regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 to the Employment Tribunal in Aberdeen against the respondent, a law firm where she had worked throughout her career. On 19 June 2017 the Tribunal (Employment Judge MA McLeod) dismissed all but the sex discrimination claim following a finding that the claimant was *".....a partner, and not an employee....."* in the respondent firm. The claimant appeals that decision.

[2] Before the Tribunal the claimant was represented by Ms M Gribbon Solicitor and on appeal by Mr D Hay Advocate. Mr Napier QC represented the respondent both at the Tribunal and on appeal. I will refer to the parties as claimant and respondent as they were in the Tribunal below.

The Tribunal's Judgment

[3] The Tribunal made some 31 findings in the fact (paragraphs 8 -39) which can broadly be summarised as follows. The claimant commenced employment with the respondent in 1989 as a trainee solicitor and was employed by them on successive employment contracts until 1 May 1995. On that date she became a salaried partner. She signed a copy of the partnership agreement enforced at that time and has signed updated versions of the partnership agreement thereafter. When she became a salaried partner she was not required to pay any capital sum towards the partnership. The partnership agreement was clear in that respect. Entitlement to paid holidays and payment of profits during certain periods of illness were also covered by the

partnership agreement. Maternity leave was provided for. Professional indemnity insurance was to be paid by the partnership. The agreement also dealt with salaried partners' cars and pensions, providing that the ordinary running costs of a car would be met by the firm together with a contribution to a pension fund nominated by the salaried partner equal to that paid by the partner herself up to a maximum contribution of £1,500 per annum. The claimant specialised throughout her career in residential conveyancing. She received a number of modest bonuses which were discretionary. She paid income tax under schedule D and for both tax and national insurance purposes was classed as self-employed. She had no right to receive any net proceeds should the firm be dissolved. While she attended quarterly business meetings together with all partners, associates and certain senior managers she was not entitled to attend equity partnership meetings. The firm had 29 partners, 16 of whom were equity partners, with the remaining 13 being salaried partners. In all of her dealings with the HMRC the claimant described herself as a partner and answered in the negative questions about whether she was an employee confirming to the revenue that she was in partnership. She received a share of the profits of the partnership adjusted according to the profits received by the partnership as a whole. The monies she received were described as "salary" but these were calculated as being a share of the profits. The claimant had the authority to sign missives, correspondence and cheques in her capacity as partner and was not subject to an appraisal system unlike salaried employees. She had a supervisory role within the conveyancing team including responsibility for ensuring that employees within the team met minimum firm standards.

[4] The practice in the firm was for salaried partners to be consulted by email when the respondent sought to appoint a new partner. An example of this was given in evidence. In terms of the partnership agreement the equity partners of the firm indemnified the salaried partners, including the claimant, jointly and severally against any loss howsoever arising incurred in connection with any obligation of the firm. The claimant, however, had a residual concern that

she would be exposed to personal financial risk in the event that such an indemnity failed and so, following her promotion to salaried partnership she transferred her interest in their jointly owned home to her husband to avoid any such risk.

[5] The Tribunal found that a salaried partner in the respondent's firm was distinguishable from an associate or assistant in that the expectations upon a salaried partner were higher. There were expectations in terms of developing business and having input into strategy, staffing, partnership meetings and so on. The claimant was highly experienced and her transactions were not individually supervised by the equity partners and she was not required to submit holiday requests or report sickness absence unlike associates and other employees of the respondent. Having correctly identified the relevant law and the meaning of employee and characterising the issue for determination as whether the claimant was an employee of the respondent during her time as a salaried partner the material parts of the Tribunal's reasoning on that central issue are in the following terms:

> **" 60. The relationship between the claimant and the respondent was set out, expressly, in the Partnership Agreement which the claimant signed in 1995 on accession to the partnership, and repeatedly thereafter owing to the regular need to update that agreement. The claimant does not argue that that agreement was a sham; indeed in evidence she accepted that the Partnership Agreement is the basis of the relationship.**
>
> **61. It is to that agreement that the Tribunal must first look, in my judgment, in order to determine what that agreement says about the nature of the relationship between the parties.**
> **…..**
>
> **65. The Partnership Agreement clearly describes the relationship between the claimant and the respondent as that of a partner in a partnership. It is also clear that the way in which the claimant's role operated in the partnership was consistent with that set out in the Agreement. There was no suggestion, as Mr Napier submitted, that the Agreement was a sham, not reflected by the reality of the claimant's day to day working. The claimant accepted as much in cross examination.**

66. On that basis, the relationship is clearly one in which the claimant was a partner in a partnership. She accepted that during her time at the firm, as is apparent from her actions. She did not challenge her status as a partner at any time; she may be taken to have understood that what she was entering when she signed the Partnership Agreement was a partnership, from its plain terms; she identified herself as a partner both within the firm and to clients outwith, thereby holding herself out as a partner; she accepted that her accession to partnership amounted to a promotion from the position of associate, and that it brought a number of benefits; she was for a time, the firm's conveyancing partner, a title which she plainly accepted as having a simple meaning; and she understood that there were risks to which she was subject as a partner which did not apply to the position of associate. This last point appeared to be to bear some significance. Although the claimant, before the Tribunal, sought to downplay the risks which may fall upon her in the event of debts being called in for the partnership, she accepted that if the personal indemnity given to her by the equity partners were to fail, she would bear that risk herself. That was why she arranged, shortly after becoming an equity partner, to transfer the ownership of her home from joint names to the name of her husband, expressly to avoid that home being included in any assessment of her assets in the event that she became liable for the debts of the partnership. In my judgment, that was a clear indication that she understood that she was more than an employee. An employee in such circumstances would not bear any risk; a partner would have such a risk, and that is inconsistent with the status of employee to which she now appeals.

67. The claimant sought to argue that she was subject to control by the equity partner in her department, Mr Fraser, in that she only took work which he allocated to her, and she could not refuse that work. However, Ms Law appeared to be surprised by this contention. She gave evidence that the claimant, as a partner, was expected to seek business for the respondent on her own, and that she had done so in the past, particularly having a client in the TSB Bank in Newmachar from which the respondent derived considerable business. It appeared that the claimant was seeking to minimise her role in generating business but the evidence suggested that she was expected to do so, and from time to time she did. In addition, it was apparent that he claimant did refuse to carry out certain work at times, for example if she felt that her workload would not allow it."

68. The claimant sought to argue that she was required to provide personal service, in the way that an employee would be. Certainly, the evidence demonstrated that the claimant did require to provide personal service to the respondent. However, of itself, this is not determinative, since that is equally true of a partner in a partnership.

69. The claimant suggested that there was a mutuality of obligation between the respondent and her, and that was another indicator that this was an employment relationship. However, while there was clearly a degree of mutuality of obligation, in that the partnership expected her, in terms of the Partnership Agreement, to fulfil certain service obligations to them, the degree of autonomy exercised by the claimant was, in my judgment, greater

than she sought to represent in her evidence. She was in a position to determine her own workload to a greater extent than employees would be, and in addition, to create her own workload to some extent by attracting and servicing new clients herself.

70. The claimant argued that her remuneration was, in effect, a salary, and akin to that of an employee. Again, there is an extent to which that is correct – the name 'salaried partner' suggests that it is anticipated by both parties – but it is important to recognise that the payments made to the claimant were payments made out of profits of the respondent firm. Those payments were reduced for a number of months in 2008/09 and 2009/10, with no protest by the claimant, the reason given by the respondent (and accepted before me by the claimant) was that the profits of the firm were affected by the banking crisis at that time, and that the payments made to partners required to be reduced at the discretion of the equity partners to reflect the decrease in the profits.

71. The claimant's bonus payments were also affected by the respondent's profits or losses, and they fluctuated depending on the overall performance of the firm. Associates were given bonuses dependent on the performance of the department (or cost centre) within which they were employed, but partners were paid bonuses relative to the overall profitability of the firm. In my judgment, that is a clear indication of the different positions of the partners and the associates; that the profitability of the whole firm is what determines the payment of a bonus, and that from time to time associates would receive a bonus where a partner would not, simply because the firm as a whole was not profitable. In other words, the partners, including the claimant, required to take the risk of profits falling upon themselves, and that is inconsistent with the position of an employee, and consistent with that of a partner. In addition, neither had any input into the capital of the firm.

72. In my judgment, while the evidence demonstrated that there were some features of the claimant's work which suggested that she was in a similar position to that of the associates – for example, neither were invited to equity partner meetings, and both were in attendance at quarterly business meetings – there were sufficient differences in their positions to allow a distinction to be made.

73. In particular, the claimant did have supervisory duties as part of her partnership role, and required to take responsibility for the management of staff within her department. The emails showing the claimant issuing instructions to her team about the standards of the firm which required to be maintained were evidence of a manager seeking to manage the performance of her team, and implement and ensure adherence to standards agreed by the management of the firm. Ms Law also gave evidence that the claimant could delegate work, and there was some evident that she did so, though she herself said that she had nobody to delegate to.

74. Further, the claimant had a right to be consulted over the promotion of staff to partnership. She accepted that salaried partners were consulted about such decisions, and given the right to object. That was a form of input

into the management of the firm which is consistent with the status of a partner.

75. She received certain financial benefits not granted to employees, such as payment of all costs associated with her car, such as her petrol costs, no matter whether incurred on business or privately. While that is not in itself determinative of employment status, it is a clear difference in her treatment by the respondent to that of an associate or assistant, and in my judgment, signposts an understanding by both claimant and respondent that as partner she was entitled to certain specific benefits not given to the employees of the firm.

76. The fundamental question here was whether the Partnership Agreement truly reflected the relationship between parties, since, if it did, that would be inconsistent with the claimant's claim to be an employee of the respondent. In my judgment, the claimant's relationship with the respondent was clearly that of a partner in a partnership. That was explicitly what was said in the Agreement which the claimant signed on a regular basis during her partnership with the firm, and she never challenged it until it became expedient, as part of these proceedings, to do so.

77. I accept Mr Napier's submission that in construing the terms of the Partnership Agreement it is necessary to look at those in plain terms first, and then see whether they have been consistently applied in practice. In my judgment, the Partnership Agreement established a partnership which included the claimant as a partner; the way in which that worked in practice was consistent with the terms of that Partnership Agreement; and there was no evidence, nor any suggestion, that the Agreement was a sham which did not truly reflect the relationship between the parties. In the face of these findings, it is my judgment that the claimant was a partner, and not an employee. "

The Claimant's Arguments on Appeal

[6] Mr Hay for the claimant clarified that he was restricting the appeal to a contention that the Tribunal had erred by adopting the wrong approach to consideration of the nature of the relationship between the claimant and the respondent. While the second ground of appeal made reference to the Tribunal having regard to irrelevant considerations, he did not pursue these as a separate point but indicated that they were simply illustrations of the more general error relied upon. He confirmed that no perversity argument was pursued and that there was no appeal against the rejection of the alternative argument made briefly before the Tribunal (recorded at

para 59 of the ET judgment) that if not an employee then the claimant may be regarded as a worker.

[7] The primary contention on behalf of the claimant was that the Employment Tribunal in this case, while producing a carefully prepared judgment, had not addressed the issue of whether the claimant was an employee in the way required by the authorities and so had drifted from the proper course that it had set itself. Accordingly, the conclusion that it had reached could not stand. Counsel identified three categories of findings within the Tribunal Judgment, namely those which tended to negate a conclusion of partner status, those which tended to negate a finding of employee status and thirdly certain neutral indicators. The first category, those tending away from a finding of partner status were:-

> "1. The claimant was not required to make any capital contribution to the firm (paras 10, 11 and 23);
> 2. Her remuneration level was controlled by the equity partners including such variations in remuneration as were evidenced by some of the reductions in payments due to recessionary factors (paras 11 & 32);
> 3. The claimant had no right to any net proceeds of the firm on dissolution (para 24);
> 4. She was indemnified in relation to any loss or firm obligation (para 36);
> 5. The claimant was not entitled to attend equity partnership meetings (para 25);
> 6. She was subject to control, including the control of the equity partners in relation to a requirement to retire. (para 27)

So far as factors that tended to negate employee status were concerned these included:-

> "1. The claimant paid income tax under schedule D (paras 22 & 30);
> 2. She attended certain business meetings with partners (paras 25);
> 3. She described herself as a partner externally in relation to her tax affairs and when signing partnership agreements (para 29);
> 4. The claimant's remuneration was paid from profits (para 31);
> 5. She had authority to sign missives and cheques (para 33)".

Mr Hay described the following as neutral findings;

> "1. The respondent paid professional indemnity insurance contributions for the claimant but will have also have done so for equity partners;
> 2. The firm made payments of annual pension contributions for the claimant but these were modest;

3. Payments of annual bonus to the claimant were part of her remuneration (para 21). These were discretionary but did depend on the profitability of the firm (unlike payment to associates) and so would be regarded as neutral overall;
4. The claimant's seniority and supervisory responsibility for the conveyancing team referred to at paras 34 and 37 of the Judgment did suggest a senior position in the hierarchy although that would also be as common amongst employees as with partners;
5. The claimant as a salaried partner was consulted when new partners were recommended (para 35) although her approval was not strictly needed and there was no evidence of a veto.

[8] Turning to the Tribunal's reasoning, Mr Hay confirmed that the crux of his argument related to paragraph 61 where the Tribunal had determined that it **must** first look at the partnership agreement to determine the relationship between the partners. Paragraph 65 onwards tended to do no more than look at some of the evidence against the backdrop of that agreement. Further, there was no reference in the Tribunal's reasoning to the absence of any capital contribution being made by the claimant, nor of the absence of any right to a distribution on dissolution of the partnership, which were material factors. There was no analysis at all in the reasoning of the distinctions between the salaried partners and equity partners in the respondent firm.

[9] On the relevant law, Mr Hay submitted that the Tribunal required to apply the multifactorial test as to whether someone was an employee as initially set out in the case of **Ready Mixed Concrete (South East Limited) v Minister of Pensions & National Insurance [1968] 1 All ER 433.** This approach had been described by Mummery J in **Hall v Lorimer [1992] ICR 739** as having as its object the painting of a picture from the accumulation of detail. The view there expressed was that the overall effect could only be appreciated by standing back from the detailed picture which had been painted, viewing it from a distance and making an informed, considered and qualitive appreciation of the whole. Turning to the more recent treatment of the issue, in **Autoclenz v Belcher [2011] ICR1157,** there Lord Clark of Stone–cum-Ebony had stressed that (at paragraph 29) that the question in every case must be what was the true agreement between the parties. Relating that to the particular situation of the salaried partner Mr Hay relied on the decision of

Langstaff P in **Williamson & Soden Solicitors v Briars UKEAT/0611/10/DM.** It was there clarified (at paragraph 25) that in a case such as the present the question to be determined for the purposes of jurisdiction is not whether a given individual is a partner or whether he is self-employed but rather whether he comes within the definition of employee. That is because the rights claimed, including the claim of unfair dismissal in the present case, were rights which could only be accessed by an employee as so defined by **section 230** of the **Employment Rights Act 1996**. Langstaff P also reiterated that the question must be; "what is the nature of the agreement?" Having referred to the longstanding test in the **Ready Mixed Concrete** case the analysis that follows in **Williamson & Soden** makes clear that there was no rule of law that a Tribunal should have regard to the terms of the Partnership Act 1890 in resolving any disputed question of employee status. The Tribunal had to look at all of the circumstances and bear in mind that labels may be a bit misleading. Those labels may be relevant factors but are in no sense determinative (para 30).

[10] In anticipation that Mr Napier might rely on the case of **Carmichael v National Para PLC [2000] IRLR 43**, Mr Hay pointed out that at paragraph 27 of the **Williamson & Soden** case, Langstaff P had, under reference to **Carmichael,** confirmed that where the entire relationship of the parties is not contained solely in documents then the nature of the relationship is a matter of fact for the determination by the Tribunal. That was the position in this case. On the issue of partnership Mr Hay acknowledged that it was generally accepted in Scots Law that an individual could not be both a partner and an employee. However, the question of whether an agreement was a partnership agreement was itself a multifactorial one involving consideration of all the various features – **Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd 1996 SLT186** and **Section 2** of the **Partnership Act 1890**. Applying those principles to the approach that had been taken by the Tribunal in this case, Mr Hay pointed out that having stated in terms at paragraph 61 that it *"must first look"* at the partnership agreement, the Tribunal had effectively then determined, at least on a *prima facie* basis on the agreement alone that the claimant was a partner. That was evident from paragraph 66 of the

Judgment where, having recorded that the agreement was not a sham, the Tribunal stated *"on that basis, the relationship is clearly one in which claimant was a partner in a partnership"*. These passages illustrated that the Tribunal had grasped at the label of partnership and had used it to inform how it dealt with the rest of the analysis that followed. Accordingly, where it analysed the claimant's actions in terms of signing an agreement and not challenging the label of partnership, the Tribunal erred because it didn't look at those factors as part of a picture but in the context of having already categorised the claimant by the label in the written agreement. While it was accepted that one of the factors considered in paragraph 66 was the issue of risk, the Tribunal having made the initial error of focusing on label of partnership, had failed to balance its assessment of the risk to the claimant by noting that it was only a perceived rather than an actual risk and that it was not balanced by any reward. Accordingly, the approach to that factor was erroneous because it flowed from the error of starting with the label. What the Tribunal had done in this case was effectively adopt the reverse approach to that taken by the Employment Tribunal in **Williamson & Soden v Briars.** In that case the Tribunal had taken the starting point as being employee status and looked at subsequent events to see whether it had changed. While in the present case the Tribunal had not taken a starting point of employee (or indeed of partner), it had nonetheless failed to comply with the requirement to make a broad multifactorial assessment. It was wrong to rely first on the claimant's assertions that she was a partner. What that had amounted to was the setting up of a presumption against which the Tribunal tested a number of factors. It could be seen that even when the Tribunal did go on and consider those various other matters, they were discounted one by one against that presumption of partnership.

[11] Further, the Tribunal had made no attempt to reconcile the important issues of the lack of a capital contribution and the control by the equity partners with the conclusion it reached. The reference to control was restricted to paragraph 67 of the reasoning and to issues of autonomy and the seeking of new business. What the Tribunal had ignored was the overall control of the equity

partners in the relationship, a factor which militated strongly in favour of an employee/ employer relationship. The Tribunal's comparison of the claimant as against the associates in the firm was unobjectionable but incomplete. It ignored the other important comparison as between salaried partner and equity partner. Accordingly, to be seen that the Tribunal, having latched onto the label of partnership from the outset failed to distinguish between the different types of those who held that label in the firm and so occluded its view of the bigger picture. For these reasons, notwithstanding that the Tribunal had initially embarked on the correct course, it had reared off that course and so erred in law.

[12] Mr Hay submitted that as a result of the error identified the Tribunal's conclusion could not stand and had to be overturned after which the matter should be remitted to a fresh Tribunal for a determination of the issue of whether the claimant was an employee. He reiterated that there was no stand-alone point in relation to whether as an alternative the claimant might be a worker. However, as the definition of worker in terms of the 2000 Regulations relied on by the claimant included those under a contract of employment it would be open to the claimant to pursue that part of her claim if she was ultimately regarded as an employee and it was proposed that that would be reflected in any remit to the Tribunal. While his primary position was for remit to a freshly constituted Tribunal Mr Hay's fall-back position was that the matter could be remitted to the same Judge but with appropriate directions in law.

The Respondent's Arguments on Appeal

[13] Mr Napier first emphasised the inordinate difficulty involved in determining whether someone was an employee as distinct from providing services as a self-employed individual. Cases involving this difficult issue were extremely fact sensitive and the decision of the first instance Judge should accordingly be given particular respect. In essence, the crux of the claimant's appeal was that the employment Judge in this case had started at the wrong place by referring first to the partnership

agreement rather than looking at all the facts and circumstances individually before any analysis. The respondent's case was not and had never been that a salaried partner was by definition an employee. The Court of Appeal, in **M Young Legal Associates Limited v Zahid & Others 2006 EWCA Civ 613,** had pointed out that the label "salaried partner" may be applied simply to enhance the status of an individual who is truly an employee or may reflect that a true partner receives a salary rather than a share in the profits. Much depended on the particular agreement in question. What the respondent had contended before the Tribunal was that this was a case where the partnership deed itself incorporated and fully expressed the relationship between the parties and so was sufficient to determine the question of the claimant's status. It was clear from the Judgement that the Tribunal had not accepted a submission that there was no need to go outside the partnership agreement at all. However, it was in that context that the Tribunal considered it appropriate to look first at the partnership agreement. Mr Napier submitted that the analysis had to start with something and it was unobjectionable for it to start with the clear terms of the parties' agreement. In any event, paragraph 61 had to be looked at in the round and not in isolation and there could be no suggestion that the Tribunal had done anything other than assess all of evidence before it. Importantly, on the authority of **Williamson & Soden v Briars**, which the respondent had put before the Tribunal, it was clear that Langstaff P had accepted (at paragraph 26) as an example of where a contract of service might be negated that a contract properly construed provided that the individual was a partner who was operating together with others in common with a view to profit so as to come within the **Partnership Act 1890.** For all these reasons it could not be described as an error for the Tribunal to have started with the partnership agreement. While there might be an argument that it could be an error to start and finish with the partnership agreement, paragraph 26 of **Williamson & Soden** was supportive of a proposition that it was not.

[14] Senior counsel did not contend that the claimant's self-employed status was in any way determinative of the matter. It was, however, a relevant factor that, as Lord Denning MR had put it

in **Macy v Crown Life Assurance Ltd [1978] ICR 590** at **596,** the claimant had *"made her bed"* as being self-employed "*and so must lie on it".* The point being made in **Macy** was relevant to the claimant's situation. The significance of schedule D status as a factor was that it didn't sit very easily for a professional person to take the benefits of self-employment for over 20 years for one purpose and then claim to be an employee for another purpose from which she would derive a separate benefit. In that sense the situation of someone like the claimant was rather different from the celebrated cases of Uber drivers and plumbers who might be presented with a proforma style contract which did not reflect the true nature of the relationship between them and the other more dominant party. The Tribunal had assessed the claimant's position in evidence in this respect as "curious" as she had disavowed any understanding of employment or partnership law and downplayed her role in the respondent's firm which did not sit easily with the long period of having accepted the benefit of partnership status. In any event it was clear from the undisputed facts that the claimant knew what the consequences of partnership were or could be as evidenced by the transfer of her property from the joint names of her and her husband into her husband's sole name. The claimant was in an entirely different category from those deprived of employment status by someone who is all but name their employer such that they require to appeal to the Tribunal or the Court to resolve their situation. The claimant knew the benefits and risks of partnership and had agreed to that.

[15] In relation to the considerations emphasised or not mentioned by the Tribunal, Mr Napier contended that it mattered not that the absence of a capital contribution was not mentioned in the Tribunal's reasoning. It was trite law that it was not necessary to incorporate every relevant fact in the reasoning. The Tribunal had made relevant findings in fact about the matters said to be absent from the reasoning. Lord Wilson had correctly been dismissive of a similar argument in the case of **Pimlico Plumbers Ltd & Another v Smith [2018] UKSC29** at paragraph 49 describing it as a "thin point". In relation to the argument that the claimant may not have always been consulted in

relation to new partners, the Tribunal had not described this as an unfettered right, simply as a right which may or may not always have been exercised by the claimant. Paragraph 35 of the Judgment should be read as finding that there was a general pattern of consulting a salaried partner such as the claimant but not that it was invariably the case. Finally, as the focus had been almost exclusively on paragraph 61 and the Tribunal's suggestion that it "must" start with the partnership agreement, Mr Napier submitted that at worst that comment was an infelicitous use of the imperative and could not be described as an error far less a material one.

[16] On disposal, it was submitted that the claimant had already had an opportunity before the Tribunal and on appeal to make something of the "worker" point if this was to be pursued as an alternative to employee and so could not run that argument again. It had not been part of this appeal and if there was success for the claimant she could not be put in a better position because of what would be, at its highest, a mistake made by the Tribunal in its approach. Accordingly, any remit should make clear that the issue of worker couldn't be opened up again. In any event, Mr Hay having conceded that the Judgment was a carefully crafted one, there was no reason why in the event of success for the claimant the matter could not go back to the same Tribunal. Mr Napier's primary submission was however, for dismissal.

Discussion

[17] In order to make claims, particularly those of unfair dismissal and for a statutory redundancy payment, the claimant requires to have been an employee of the respondent. The circumstances of her working relationship with the respondent firm between 1995 and 2016 were that she held the title "partner" in an unlimited liability firm of solicitors. Within the partnership not all partners were equal. Some were equity partners and others, such as the claimant, were "salaried partners". While the position of salaried partner has become commonplace, it is something of an oxymoron. Traditionally, partners (in an unlimited liability firm) are self-employed individuals working in

business together with a view to profit. The terms of the **Partnership Act 1890** will apply in relation to any matters that the partners have not regulated in a partnership agreement. The partners of a firm may employ a number of individuals and pay them a salary. Salary is a form of remuneration normally paid to an employee. Partners normally receive a profit share and conversely require to accept liability for any losses of the firm in such proportions as they may agree. These are, however, generalities and there are always exceptions that prove the proverbial rule. Combining the concepts of a salaried employee and a profit sharing partner in one individual's relationship with the firm results in the need for very careful scrutiny of all the circumstances where the status of that individual vis-à-vis the firm is unclear or is challenged as in the present case.

[18] There is ample authority on the issue of the approach to be taken to disputes about whether an individual was an employee or not. The test set out by McKenna J in **Ready Mixed Concrete (South East Limited) v Minister of Pensions & National Insurance [1968]1 All ER433** at 515 has now stood for a number of decades. That test is:-

> *"A contract of service exists if these three conditions are fulfilled:*
>
> 1. *The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and scale in the performance of some service for his master;*
> 2. *He agrees expressly or impliedly that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master;*
> 3. *The other provisions of the contract are consistent with it being a contract of service."*

The third of these requirements is the one that requires assessment of all the individual facts and circumstances of the parties' relationship. Consistencies and inconsistencies between those facts and a contract of employment must be considered.

[19] More recent authorities have focused on the different types of working relationships now recognised and have tended to approach the matter as requiring to identify if someone is a "worker, employee or neither" to reflect the worker status relevant to EU Regulations, including the **Part time Workers (Prevention of Less Favourable Treatment) Regulations 2000** previously relied on for one of the claims in this case. However, the central question before the Tribunal in the present case was whether the claimant was an employee and it is in the approach to that question that it is contended that the Tribunal erred. No issue of the approach taken to whether the claimant, if not an employee, was a worker arises in this appeal. There is clear authority to the effect that in this context form is less important than substance. A label put on a relationship by the parties may not affect the true agreement between them and any written agreement is usually only part of the material to be used to determine the real nature of the relationship. In **Autoclenz v Belcher [2011] ICR 157**, the UK Supreme Court confirmed that the written deed may only be a part of the true agreement, particularly where the relative bargaining power of parties is taken into account (paragraph 35).

[20] The most recent example of a case involving the peculiarity of the so called salaried partner was that of **Williamson & Soden Solicitors v Briars UKEAT/0611/10** where Langstaff P confirmed that the determination of the employee or partner issue involved a question of fact. In rejecting an argument that, where the contention was that the claimant was a partner and not an employee, the only starting point would be to address first the question of partnership, Langstaff P stated:-

> *"….. I do not think this derives properly from the authorities of **Kovats** and **Tiffin,** but that is to assume that he intended his submission to be taken as widely as I have put it. I do not accept that there is a rule of law to that effect and a principle that a Tribunal should generally have regard to the terms of the Partnership Act 1890 in resolving any disputed question of employee status where that is relevant must not be elevated into a rule of law. It seems to me rather to be a matter of logic, whose appropriateness will vary depending on all the circumstances and on the particular context. It is up to the Tribunal how best logically to address the*

> *specific questions that arise for determination in its particular case upon the particular circumstances of that case when it is deciding whether the individual is or is not an employee which is the overall question it has to resolve."*

I agree wholeheartedly with that characterisation and consider that it can be applied to the circumstances of this case. Where a contention was being made by one side that the partnership agreement was not just the starting point but also sufficient on its own to determine the relationship between the parties and so the claimant's status, there was an inherent logic in the Tribunal addressing first the terms of that agreement and to construe them. It is implicit in the Tribunal's analysis in this case that it rejected the respondent's submission that in this particular case the partnership agreement was both the starting point and the end of the matter. But it cannot be a material error of law to regard it as necessary to address first the issue that the respondent had contended was a "knockout blow" to the claimant's case.

[21] As in the case of **Williamson & Soden v Briars**, the Tribunal in this case must have had in mind that labels can be misleading, standing that it embarked upon an analysis of the various adminicles of evidence militating for and against employee status outside of the written agreement. It was then a matter for the Tribunal, having heard the evidence and assessed the witnesses, to decide what weight to give to each of these extraneous factors. The evidence of the claimant having transferred ownership of her jointly owned home to her husband on attaining her partnership status was one such extraneous factor from which the Tribunal was entitled to infer that the claimant knew of the risks of being a partner and regarded herself as exposed to that risk. Similarly, the Tribunal was entitled to rely on the claimant having held herself out as a partner both within the firm and to clients outside for many years, as well as to HMRC, to her financial benefit. It is also noteworthy that the Tribunal records (at paragraph 60) that in evidence the claimant accepted that the partnership agreement was the basis of the relationship between her and the respondent. That appears immediately before the passage in paragraph 61 complained

about in this appeal. It seems to me that, while the Tribunal could have been clearer in distinguishing a situation where construction of the partnership agreement was all that was required from one such as the present case where the written agreement was only part of the factual matrix, the context of the passage under challenge was an absence of dispute that the partnership agreement was genuine, freely entered into, and represented many of the important terms governing the parties' relationship. In light of the professional qualification of the claimant and the nature of the business in which the respondent firm is engaged, that is unsurprising. The claimant's position was, quite simply, that while the terms of the partnership agreement were accurate and operated to regulate the parties' relationship, the picture was incomplete without an analysis of the way in which the working relationship operated. That is exactly how the Tribunal approached matters and so cannot, in my view, be regarded as having erred.

[22] The argument that by using the partnership agreement as a benchmark against which various bits of evidence would be tested the Tribunal created a rebuttable presumption is superficially attractive but does not ultimately withstand scrutiny. The Tribunal examined the terms of the partnership agreement because it was a document accepted by both sides as governing their relationship. Following the line of authority discussed in **Williamson & Soden,** the Tribunal could not in my view regard that agreement as an end to the matter because the label "salaried partner" was used in the partnership agreement and that label has no particular status in law. As a salaried partner may or may not be an employee, the Tribunal required to go further and examine the various features of the parties' relationship that militated for and against that categorisation. I have reached the view that the characterisation of the Tribunal having set up a presumption (that the claimant was a partner) and then tested it is not an accurate one reading the Judgment as a whole. Construction of the contract was not sufficient on its own to conclude that the claimant was a partner operating together with others with a view to profit. It

was strongly indicative of that, but the claimant's contention that she was subject to control, that there was a mutuality of obligation between her and the respondent and that her remuneration was in effect a salary and not a profit share all required analysis. To put it another way, the Tribunal looked at the agreement not for a presumption, far less a conclusion, on the point for determination but as a starting point against which it could test consistent and inconsistent factors. Just as the Tribunal in **Williamson & Soden v Briars** had looked to see whether new arrangements changed the fundamental relationship of the parties as had previously existed, so in this case the Tribunal looked first at the agreement as the governing deed and then asked whether the various points made by the claimant suggesting that the true situation was more nuanced than set out there had any force. The whole context was that the claimant's assertion that she was an employee was contradicted by formal documentation and so scrutiny of the aspects of the agreement that were said either to reflect or not to reflect the true position was necessary. That formal documentation was an important factor in dealing with that. As Mr Napier pointed out, in **Williamson & Soden v Briars,** Langstaff P specifically commented that it *"..would negate there being a contract of service if the contract properly construed provided that the individual was a partner who was operating together with others in common with a view of profit, so as to come in the Partnership Act 1890."* The Tribunal did not so as far as that in this case, but regarded the partnership agreement as an important factor that tended to negate there being a contract for service, albeit not a determinative one. That was a permissible approach and so nothing turns on the overstatement of the Tribunal in this case that it **must** consider the partnership agreement first. It was entitled to do so, but in the absence of any rule of law to the effect that it was obliged so to do, the statement can be viewed simply as one of intent, namely to approach matters in the order that had been advanced in argument and in a manner that was logical having regard to the consensus about the status of the agreement.

[23] In paragraphs 66 – 77 of the Judgment, the Tribunal examined each of the issues contended for by the claimant as indicative of employee status. The lack of capital contribution or the ability to share in the assets of the firm on dissolution were undisputed facts and were part of the partnership agreement that had been the starting point. It was not necessary for the Tribunal to reiterate those in its reasoning section. Ultimately, neither the partnership agreement nor any of the individual adminicles of fact extraneous to that agreement were determinative in this case. The Tribunal looked at both the written and oral evidence, at the important issues of control, nature of remuneration, interaction with third parties and how the parties identified their relationship and reached a permissible conclusion. There could be no suggestion that the evidence pointed overwhelmingly one way, as the lists of factors militating for and against employee status relied on by Counsel for the claimant themselves illustrate. The emphasis to be placed on each of those factors was a matter for the Tribunal of first instance which set them out with care. In those circumstances the claimant's appeal must fail and no issue of a remit arises.

Disposal

[24] For the reasons given the appeal is dismissed. The claimant has outstanding discrimination claims and the case will be remitted back to the Tribunal to proceed with those.