THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs R Jesmin	**v**	Regent's University London

Heard at: London Central **On**: 7 February 2017

Before: Employment Judge Baty

Representation:
Claimant: Mr P Apraku (Solicitor)
Respondent: Ms G Crew (Counsel)

JUDGMENT

1. **The claimant's complaints of unfair dismissal, breach of contract and for unpaid holiday pay were presented out of time and it was reasonably practicable to have presented these complaints in time. Therefore, the Tribunal does not have jurisdiction to hear these complaints and they are struck out.**

2. **The claimant's complaints of direct race discrimination, harassment related to race and direct discrimination because of maternity leave were presented out of time and it was not just and equitable to extend time. The Tribunal does not therefore have jurisdiction to hear these complaints and they are struck out.**

3. **In the alternative, the claimant was not an employee of the respondent and the Tribunal does not therefore have jurisdiction to hear the claimant's complaints of unfair dismissal and breach of contract which, had they not been struck out for the reasons above, would have been struck out for this reason.**

4. **In the alternative, had the complaints not been struck out as above, the Tribunal would not have struck out the claimant's direct race discrimination and harassment related to race complaints on the grounds that they had no reasonable prospect of success. However, the Tribunal would have ordered a deposit of £100 to be paid as a condition to continuing each of the claimant's complaints in relation to unfair dismissal, breach of contract, holiday pay, direct race**

discrimination and direct discrimination because of maternity on the grounds that they had little reasonable prospect of success (being a total deposit of £500).

REASONS

The Complaints

1 By a claim form presented on 23 September 2016, the claimant brought complaints of unfair dismissal, direct discrimination because of maternity, direct discrimination because of race, for unpaid holiday pay, breach of contract and arrears of wages. The respondent defended the complaints.

2 At an earlier preliminary hearing on 9 January 2017, at which the claimant was not in attendance and was not represented, Employment Judge Goodman set out the issues of the claim on the basis of what material was available to her. Those issues were set out in the note of that preliminary hearing which was sent to the parties on 9 January 2017. In addition, Employment Judge Goodman listed today's preliminary hearing and set out the issues which it would consider. In addition, she made orders under which the claimant was ordered to provide the schedule of loss which she had not yet supplied and to clarify various points, including the factual basis of the complaint of race discrimination, the nature of the detriment alleged as maternity discrimination and the basis of any complaint of sex discrimination. The claimant duly responded to these orders with further and better particulars of the claim. However, whilst some clarity was provided, there was nothing in any of these documents in relation to the wages complaint or the holiday pay complaint.

The Issues of the Claim

3 At the start of today's hearing, I went through these details with the representatives in order to try and agree precisely what the issues of the claim were for the full merits hearing (which was prelisted for 15-17 March 2017). Mr Apraku confirmed that there was in fact no unpaid wages complaint and no sex discrimination complaint and therefore withdrew these complaints and I dismissed them.

4 In relation to holiday pay, he conceded (and it was agreed) that the respondent's holiday year ran from 1 August to 31 July (as set out in the claimant's contract). Mr Apraku said that the holiday pay claim was for 20 days' holiday in relation to the holiday year in which the claimant's alleged employment terminated. He did not give any further details.

5 Furthermore, we went through the list of issues of the claim in Employment Judge Goodman's note to add these details and to incorporate a further complaint of harassment related to race which was set out in the further and better particulars. The allegation in relation to harassment was that "John

Thorpe, the Associate Head, said to the claimant towards the end of February 2016 "go and see Annabel, she is your type; she looks like you and will be able to help you"". The claimant also confirmed that, for the purposes of the race discrimination and harassment complaints, she described herself as "Asian".

6 Other than that, it was agreed that the list of issues in Employment Judge Goodman's note remained agreed as it was, subject to the above amendments and additions.

7 By way of background, ACAS early conciliation commenced on 11 July 2016 and completed on 25 August 2016 and the claim was presented on 23 September 2016. Therefore, it was submitted by Ms Crew, and not disputed by Mr Apraku, that any action which took place prior to 12 April 2016 would be prima facie out of time.

8 Importantly, for the purposes of the issues before this hearing, the allegation under the direct discrimination (both race and maternity) complaints, which was that the respondent failed to offer the claimant further work, was said by the respondent to have occurred on 24 March 2016, whereas the claimant suggested that this happened in May 2016. Similarly, for the purposes of the unfair dismissal/breach of contract/holiday pay complaints, the respondent maintained that the date on which the claimant's contract terminated was 24 March 2016 whereas the claimant maintained that it was in May 2016.

The Issues for Today's Preliminary Hearing

9 The issues for me to determine today which had been set down by Employment Judge Goodman were as follows:-

1. Whether the claimant was an employee or a worker. This was said to be for the purposes of Section 230 Employment Rights Act 1996 and Section 39 of the Equality Act 2010. However, Ms Crew conceded from the start that the claimant was a worker for the purposes of the Working Time Regulations 1998 and the holiday pay claim and, in her submissions, she conceded that the claimant was an employee in the extended sense of the definition in the Equality Act 2010 for the purposes of her discrimination/harassment complaints. The issue was, therefore, only as to whether the claimant was an employee under Section 230 Employment Rights Act 1996 for the purposes of the unfair dismissal/breach of contract complaints.

2. Whether the claims should be struck out because they are out of time. This would include, in relation to the complaints of unfair dismissal, notice pay and holiday pay, consideration of whether or not it was reasonably practicable to present the complaints in time and (if it was not reasonably practicable to present them in time) whether they were presented within such reasonable time thereafter; and, in relation to the discrimination/harassment complaints, whether there was conduct extending over a period which was to be treated as done at the end of the period and, if so, whether such conduct was accordingly in time and, if not, whether any of these complaints were presented within such period as the Employment Tribunal considered just and equitable.

3. Whether the race discrimination complaints should be struck out as disclosing no reasonable prospect of success.

4. Whether a deposit order should be made as a condition of any complaint proceeding to hearing on grounds that it has little reasonable prospect of success.

10 At the start of today's hearing, I confirmed and agreed with the representatives that these were the issues which would be considered by me.

The Evidence

11 Witness evidence was heard from the following:-

For the respondent:

Mrs Margaret Wilson, a Faculty Manager at the respondent; and

Mr Grant Valentine, an HR Business Partner at the respondent.

For the claimant:

the claimant herself.

12 A bundle of documents numbered pages 1-90 was provided to the Tribunal by the respondent. There was some dispute as to whether or not a copy of this bundle had been sent to Mr Apraku in advance of the hearing (Ms Crew stated that her instructing solicitors had informed her that it had) but, in any event, Mr Apraku did not have a bundle at the hearing. It was agreed that, as it was a relatively short bundle, a copy would be made by the representatives whilst I was reading the witness statements so that there would be a copy for Mr Apraku as well as for the witness table. Ms Crew duly arranged for the respondent to do this photocopying and the bundle was provided. The representatives were happy to proceed on that basis.

13 Mr Apraku also provided further documents in the form of various payslips, which were in the end never referred to any stage during the hearing.

14 Furthermore, Ms Crew and Mr Apraku each provided a note/submissions, which I read prior to the commencement of the evidence.

15 I read in advance the witness statements and any documents in the bundle which the witness statements referred to.

16 A timetable for cross examination and submissions was agreed between the representatives and myself at the start of the hearing. For the most part this

was adhered to. However, Ms Crew needed roughly an extra 20 minutes to complete her cross examination of the claimant. This was because the claimant had repeatedly and persistently failed to answer simple questions which were put to her in cross examination, such that they had to be repeated by Ms Crew numerous times and such that I often had to step in to remind the claimant that she should answer the question put to her. Mr Apraku, surprisingly in the light of this, objected to extra time being afforded to Ms Crew to complete her cross examination. However, I decided that, for the reasons in this paragraph, it was entirely fair that Ms Crew should be allowed the extra time to complete her cross examination. In the end, it was not a substantial amount of time over and above her original time estimate and did not prevent the hearing from being completed within the day allocated.

17 Both parties made oral submissions in addition to the notes/submissions which they had provided to me. Thereafter, I adjourned to consider my decision and, when the parties returned, gave my decision orally with reasons. At the end of the hearing, Mr Apraku asked that written reasons should be produced and forwarded to the parties.

Findings of Fact

18 I make the following findings of fact. In doing so, I do not repeat all of the evidence, even where it is disputed, but confine my findings to those necessary to determine the agreed issues.

19 The respondent is an independent, not for profit University in London.

20 The claimant is a highly educated individual, with both a degree and a PHD (in computer science).

21 The claimant was engaged by the respondent as a "Visiting Lecturer" in its Faculty of Business and Management between September 2013 and January 2015.

22 The claimant was engaged under a contract dated 4 September 2013 and headed "Terms of Engagement for a Casual Visiting Lecturer in the Casual Lecturing Pool". The claimant admitted in cross examination that she signed a copy of that contract around that time (even though the copy set out in the bundle of documents was not a signed copy). I therefore find that she was engaged under the terms of that contract.

23 At the top of the first page of the contract, is the bold and underlined statement that:-

"**Please note that this agreement is not a contract of employment**".

24 The contract contains the following provisions:-

"I am pleased to confirm that your name will be added to our list of people available for work as a Visiting Lecturer as and when required in the Accounting, Financial and Economics department in the Faculty of Business and Management.

We cannot always predict the exact staffing levels we will require. Regent's University London (the "University"), therefore, requires casual workers and is entering into this Agreement to record the terms on which a causal work relationship is entered into.

Status of Agreement

This agreement governs your engagement from time to time by the University. This is not an employment contract and does not confer any employment rights on you (other than those to which workers are entitled). In particular, it does not create any obligation on the University to provide work to you and by entering into this agreement you confirm your understanding that the University makes no promise or guarantee of a minimum level of work to you and you will work on a flexible "as required" basis. It is the intention of both you and the University that there be no mutuality of obligation between the parties at any time when you are not performing an assignment.

University's discretion as to work offered

It is entirely at the University's discretion whether to offer you work and it is under no obligation to provide work to you at any time.

The University reserves the right to give or not give work to you at any time and is under no obligation to give any reasons for such decisions.

Arrangements for work

We cannot guarantee you work each week. If we want to offer you any work, you will be contacted by the department in advance and shall be notified of the times and dates you will be expected to work and the location in which the work will take place. You are under no obligation to accept any work offered by the University at any time. Once you have accepted any offer of work you are obliged to undertake the work. This offer may be emergency cover for one class or for a lengthier period of time, for example a semester. Please note that it may be the case that any hours offered to you cannot be guaranteed until students have enrolled for the courses on offer. Therefore the University reserves the right to cancel any course for which there is insufficient enrolment. If any work you are offered is cancelled, even at short notice, the University has no obligation to compensate you.

We ask that you provide us with at least a week's notice where possible if you are unable to undertake any work offered to you …

If you accept an assignment you must inform the University immediately if you will be unable to complete it for any reason.

No presumption of continuity

Each offer of work by the University which you accept shall be treated as an entirely separate and severable engagement (an assignment). The terms of this agreement shall

apply but there shall be no relationship between the parties after the end of one assignment and before the start of any subsequent assignment.

Your engagement terminates whenever the specified period of work offered ends and the University has no obligation to offer you any other engagements in the future.

…

Holiday

Your holiday entitlement will depend on the number of hours that you actually work and be pro-rated on the basis of a full time entitlement of 28 days holiday during each full holiday year (including all public holidays in England and Wales). The University's holiday year runs between 1st August and 31st July."

25 The contract provides that statutory sick pay (SSP) is paid by the University. This is in contrast to permanent employees at the University, who are entitled to contractual sick pay.

26 Furthermore, whilst some University policies were said to apply under the terms of this contract (for example equal opportunities policy, code of conduct, dignity at work, no smoking policy etc), certain other policies, which would apply to permanent staff, did not apply to the claimant. This included the respondent's policy on maternity leave.

27 Essentially, in contrast to permanent employees of the University, visiting lecturers are used for short term cover or for teaching in a specialist area. They can be used for dissertation supervision or lecturing. The respondent uses visiting lecturers where there is a gap in teaching caused by resignations, sickness or any other long term leave. Visiting lecturers are a pool of lecturers which the University can use to fill such gaps in teaching.

28 The claimant was not, once she accepted an assignment, entitled to provide a substitute to do the work for her but was expected to carry out that assignment herself.

29 The amount of time which the claimant actually worked for the respondent under her contract with it varied from year to year. The respondent's academic year is divided into two semesters. In the academic year 2013/14, the claimant worked 114 days in the first semester and then 91 days in the second semester. At the time there was a shortfall in teaching expertise around ICT skills and the claimant was allocated to several modules during a time when the faculty was advertising for permanent staff in this area.

30 During the academic year 2014/15, this teaching gap was filled by a successful recruitment process in hiring permanent staff; therefore the claimant was no longer required to teach on the modules. She was then allocated as a supervisor to final year students on the undergraduate programme; once those students had completed their studies, the

respondent no longer required her services to supervise, as it had adequate resources in its permanent staff. Consequently, in the academic year 2014/2015, the claimant worked 27 days in the first semester and only 6 days in the second semester. This obviously contrasts significantly with the amount of work which she did for the respondent in the academic year 2013/2014.

31 The claimant stopped working at all for the respondent in January 2015 in order to have a baby. She was not, however, on statutory maternity leave.

32 At the time, the head of department at the respondent who would have liaised with the claimant was Dr Brian Kieffman, who has since left the respondent and who was not a witness at these proceedings. There was a form MAT B1 in the bundle. Mr Valentine's evidence was that this form was only submitted by the claimant during correspondence which he had with her when she sought a return to the respondent in 2016. In her evidence before the Tribunal, the claimant suggested that in fact this form had been completed by Mr Kieffman. However, that is highly unlikely, given that forms MAT B1 are usually filled in and submitted by those about to take maternity leave in conjunction with their doctor and contain information which only they would know (for example the name and address of the relevant medical practitioner and the due date for the birth). When this was put to the claimant, she suggested that she had told Dr Kieffman these details and he had filled in the form. That is inherently implausible, particularly as the details of the medical practice on the form were inserted using a stamp rather than being handwritten. For these reasons, and other reasons to do with the claimant's credibility, I do not accept that this form MAT B1 was filled in by Dr Kieffman or that it was sent to the respondent at any time before it was submitted by the claimant in correspondence with Mr Valentine in 2016.

33 It is worth stating at this point that, in any instance where there is a conflict of evidence between the respondent's witnesses and the claimant's, I prefer the evidence of the respondent's witnesses. The claimant was not a reliable witness when she was cross examined. She repeatedly avoided answering the questions, often in relation to extremely simple questions which were easy to answer (particularly for someone as intelligent and educated as the claimant) and she often had to be reminded to answer the question, sometimes three to four times on a particular question, by Ms Crew and frequently by me. Furthermore, she contradicted herself. One example is that she originally accepted that she knew at the time she signed her contract that it was not a contract of employment and then later resiled from that and stated that she did not think that it was a contract of employment. For all these reasons, I prefer the evidence of the respondent's witnesses where it conflicts with the evidence of the claimant and do not necessarily accept evidence which the claimant gave except where it is backed up with evidence in the form of contemporaneous documents.

34 As noted, the claimant stopped working for the respondent in January 2015 in order to have a baby. The next contact she had was when the respondent

became aware of an overpayment to the claimant and wrote to her about this on 8 September 2015. Mr Valentine met the claimant on 16 December 2015 to discuss this and she said she would need to work to repay it. However, there was no casual work available immediately and the respondent was closed over the Christmas period. There was then no suitable casual work available in January 2016.

35 In February 2016, the claimant contacted at least six managers in the Faculty of Business and Management asking about further casual work and, in order to avoid taking up their time and duplicating efforts, Mr Valentine asked the claimant to channel her queries through him. The claimant had made several visits to the University without prior appointments which tied up the time of several staff. The claimant came to Mrs Wilson's office on several occasions to request that she allocate work to her. Mrs Wilson did not have any work available for her and told her so; however, the claimant insisted that she was legally entitled to work. Mrs Wilson checked with Mr Valentine about this and he confirmed that this was not the case. The claimant visited Mrs Wilson on several occasions insisting that she supply her with work; on each occasion she told the claimant that the respondent did not have any work for her as they were fully staffed (in fact they were going through a redundancy process with their permanent staff at the time).

36 In addition, Mr Valentine also obtained feedback about the claimant's performance when she had been working at the respondent from managers within the department. I have seen several examples of this in the bundle. That feedback was negative. The managers did not wish to use the claimant for any further casual work.

37 On 24 March 2016, Mr Valentine emailed the claimant. He explained that, with regards to any future casual work at the University, he had sought views from the claimant's previous managers about her performance as a casual worker visiting lecturer and that a number of concerns had been identified (which he then listed). He went on:-

> "On the basis of the above, there are sufficient concerns about your performance as a Visiting Lecturer, not to offer you further casual work.
>
> I am sorry to be the bearer of bad news and I wish you success for the future."

At the same time, he wrote to her to confirm that the respondent would write off the overpayment.

38 Mr Valentine also proceeded to cancel the claimant's IT access to the respondent on 24 March 2016 (which had been set up again in December 2015). The claimant became aware of this by 5 April 2016 as she contacted IT to complain about it and IT put her through to Mr Valentine. The claimant then emailed Mr Valentine the next day, 6 April 2016, about this.

39 There is further email correspondence internally with the respondent at around that time confirming what had already been noted, that there was no work for the claimant and that the respondent did not want to engage her anyway. However, that decision had already been taken and had been communicated by Mr Valentine to the claimant on 24 March 2016.

40 On 4 May 2016, the claimant "tailgated" a student onto the respondent's premises and was therefore present on the respondent's premises without authorisation. Mrs Wilson called security to escort the claimant from the campus, which security duly did.

41 Contrary to her assertion in her claim form, the claimant did not "resume her normal duties" on 26 May 2016. She had done no work for the University since January 2015.

42 However, Mr Valentine did send the claimant an email on that day reiterating the respondent's position after she had emailed him a week before. However, this was no more than to reiterate the decision which had already been taken and communicated on 24 March 2016.

The Law

Employment Status

43 Under section 230(1) of the Employment Rights Act 1996, an employee is defined as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

44 In the lead case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, QBD, Mr Justice McKenna set out the three stage test of whether there is an employment relationship, namely that there must be mutuality of obligation, a sufficient degree of control and that the other provisions of the contract must not be inconsistent with it being a contract of employment.

45 Personal service is of the essence of a contract of employment. A right of substitution is incompatible with a contract of employment (see Ready Mixed Concrete v Minister of Pensions [1968]).

46 Without mutuality of obligation there can be no contract at all so the requirement for mutuality of obligation is a required element of a contract of employment. Without it a person would be a casual worker only like the power station guides in Carmichael v National Power [1999] ICR 1226 HL.

47 There must be a sufficient degree of control for a person to be an employee and this will distinguish him from a worker. The extent to which orders and

instructions are taken is a good indication of control exerted by an employer over an employee, as is application of disciplinary proceedings.

48 Another test is to consider whether the claimant is part of the employer's organisation or a separate entity merely providing external assistance, or is the claimant in reality in business on his/her own account.

49 It is necessary to look at the position in the round. It is not a tick box exercise. When the facts are established the tribunal should stand back and look at the overall picture, see Hall v Lorimer [1994] ICR 218 CA.

50 The parties own characterisation or label is not conclusive. The employment tribunal should look to the reality of the arrangements as above but in a borderline case the label they have mutually agreed to adopt may indicate their clear mutual intention as to what the arrangement was. In Consistent Group Limited v Kalwak [2008] IRLR 505 CA, the Court of Appeal held that it was not the function of the employment tribunal to re-cast the parties bargain. If a term solemnly agreed in writing is to be rejected in favour of a different one, it can only be done by a clear finding that the real agreement was to a different effect and that the term in the contract was included by them so as to present a misleadingly different impression.

51 The decision of the Supreme Court in Autoclenz Limited v Belcher [2011] ICR 1157 SC went further than this and made clear that, where one party was relying on the genuineness of an express term and the other party was disputing it, there was no need to show that there had been a common intention to mislead. This was particularly so in the employment field where it was not uncommon to find that there was inequality in bargaining power and that the "employer" was in a position to dictate the written terms and the other party was obliged to sign the document or not get the work. In such a case, there was no need to show an intention to mislead anyone; it was enough that the written term did not represent the intentions or expectations of the parties.

Employment Rights Act 1996 – time extensions

52 Section 111(2) of the Employment Rights Act 1996 provides that a Tribunal shall not consider a complaint under that section unless it is presented to the Tribunal before the end of the period of three months beginning with the effective date of termination or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

53 This test applies in relation to the complaints of unfair dismissal, breach of contract and for unpaid holiday pay.

Equality Act 2010 – time extensions and continuing acts

54 The Equality Act 2010 provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

55 It further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

56 In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

57 As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA. The tribunal takes into account anything which it judges to be relevant and may form and consider a fairly rough idea of whether the claim appears weak or strong, see TJ Hutchison v Westward Television [1977] IRLR 69 EAT. This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. It is likely to include whether it is possible to have a fair trial of the issues, see Mills v Marshall [1998] IRLR 494 EAT. There is no requirement to go through all of the matters listed in s 33(3) of the Limitation Act 1980, provided no significant factor has been left out of account, see London Borough of Southwark v Afolabi [2003] IRLR 220 CA.

58 This test applies in relation to the complaints of direct race discrimination, harassment related to race and direct discrimination because of maternity leave.

Strike out and deposit

59 As regards striking out, the power to strike out a claim is contained in Rule 37 of the Employment Tribunal Rules 2013 which provide:

> "37. At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds ….
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success..."

60 The importance of determining discrimination claims on their merits has been emphasised in the past, in particular in Anyanwu v South Bank Students Union [2001] IRLR 305, where it was stated that the power of strike out should be used only in the most plain and obvious of cases. In that case, Lord Steyn, at paragraph 24, emphasised:

> "Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field, perhaps more than any other, the bias in favour of a claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

61 At paragraph 37, Lord Hope of Craighead stated:

> "I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

62 However, more recent cases have shown a keener interest in disposing of poor cases. Mummery LJ commented in Gayle v Sandwell & West Birmingham Hospitals NHS Trust [2011] IRLR 810 at paragraph 12:

> "One area of debate is about cases of little or no merit, but considerable nuisance value. All are agreed that they should be cleared out of the system as soon as possible. They should not be allowed to take a disproportionate amount of time in the ET or cause the other party to incur irrecoverable legal costs and loss of valuable working time."

63 In addition, Judge Peter Clark in Deer v University of Oxford UKEAT/0532/12/KN [2013] stated at paragraph 42:

> "There is a tendency to treat the observations of Lord Hope of Craighead in [Anyanwu] paragraph 37 as meaning that discrimination claims, including victimisation, must always be permitted to run their full course. That is too generalised an approach. Each case must be viewed on its own facts and circumstances."

64 As regards deposits, the power to order the paying a deposit is at Rule 39 of the Employment Tribunal Rules 2013 which provide:

> "1. Where at a preliminary hearing (under rule 53) the Tribunal considers that any

specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order against that party requiring a party ("the paying party") to pay a deposit of an amount not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

2. The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

Conclusions on the Issues

Employment Status

65 As noted, Ms Crew conceded that the claimant was a worker for the purposes of her holiday pay claim and an employee under the Equality Act 2010 for the purposes of her race and maternity discrimination complaints. The issue in relation to employment status was therefore simply whether or not the claimant was an employee for the purposes of Section 230 of the Employment Rights Act 1996 for her unfair dismissal and breach of contract complaints.

66 Firstly, I have no reason to doubt that the terms of the contract under which the claimant was engaged were genuine. The claimant is an educated and intelligent individual and she signed that contract and accepted the conditions within it at the start of her engagement. It has not been suggested that she was somehow a vulnerable worker who did not understand the terms that were put in place in relation to her. As the claimant admitted that she signed the contract, I do not accept the rather strange submission made by Mr Apraku that the contract in the bundle was fabricated.

67 I turn now to the test in the Ready Mixed Concrete case.

68 I have quoted the relevant sections of the contract fully in my findings of fact. They are absolutely clear that it is not a contract of employment. Furthermore there is no obligation on the respondent to provide work for the claimant and there is no obligation for the claimant to undertake such work when offered. Therefore, there is no mutuality of obligation in relation to the contract. That contract cannot therefore be a contract of employment.

69 Furthermore, the fact that the claimant was engaged under a contract as a casual worker is backed up by what happened in practice. The claimant was only engaged when the respondent had a need for her services. The vastly differing amounts of work which she did for the respondent over the course of the two academic years when she was doing work for the respondent back this up. She was not, as has been submitted by her, a "full time employee". Her work patterns varied depending on the respondent's needs. She was genuinely part of a pool of casual workers upon whom the respondent could call (subject to the claimant accepting the assignments) when it had gaps to fill.

70 Furthermore, I accept that there is no evidence of the respondent having had sufficient control over the claimant for any engagements under this contract to amount to employment engagements. There was no control over what the claimant did in providing her services. The claimant suggested that she was more embedded into the organisation because she went to departmental meetings. However, there is no documentary evidence that she did so and the respondent's witnesses deny that she was required to go to departmental meetings. Particularly in the light of my findings in relation to credibility above, I find that the claimant was neither required to nor did attend departmental meetings. For these reasons I, therefore, conclude that there was an absence of a sufficient level of control and therefore the contract cannot have been an employment contract for that reason as well.

71 It is also notable that there are significant differences between the contract under which the claimant was engaged and terms for permanent staff. The particular difference of note was the fact that the maternity leave policy, which applied to permanent staff, did not apply to the claimant. The claimant did not therefore take "maternity leave" with the respondent. This is a further distinction which distinguishes between the claimant's contract and those for permanent employees.

72 For all these reasons, I find that the contract under which the claimant was engaged was a casual worker's contract and was not a contract of employment. As the claimant was not an employee of the respondent, therefore, the Tribunal has no jurisdiction to hear her complaints of unfair dismissal or breach of contract. But for the striking out of these complaints due to lack of jurisdiction in terms of them being presented out of time (see below), these complaints would be struck out for lack of jurisdiction on the basis of the claimant's lack of employment status.

Time Limits

73 As noted, any event which took place prior to 12 April 2016 is prima facie out of time.

74 If the claimant's contract was an employment contract (which I found that it is not), the date of termination of that contract (and consequently the date of dismissal) would be 24 March 2016. Mr Valentine's clear email of that date to the claimant is indicative that the contract came to an end at that date. Furthermore, that is also the date on which Mr Valentine removed the claimant's IT access, which is further evidence that the contract was at an end at that point. The claimant is an intelligent and educated individual and it should have been and, I find, was quite clear to her from that email that the contract had been brought to an end by it. The effective date of termination for the purposes of the unfair dismissal and breach of contract complaints was therefore 24 March 2016. Therefore, the unfair dismissal, breach of contract and holiday pay complaints are prima facie out of time as the relevant date was prior to 12 April 2016.

75 Furthermore, the discrimination complaints are also out of time. The date of the alleged discrimination in respect of refusing to give further work to the claimant is 24 March 2016 so that is the date that time runs from. It is the date of the decision not to give further work to the claimant which counts as the relevant date, so the fact that this decision was repeated to the claimant in May 2016 is irrelevant to the time limit points. That decision had been taken and communicated to the claimant on 24 March 2016 and therefore time runs from that date in respect of the direct race and maternity discrimination complaints.

76 Furthermore, the new allegation of harassment related to race in relation to Mr Thorpe is, the claimant submits, something that occurred in late February 2016. That too is therefore prima facie out of time.

77 I turn therefore to the relevant tests in relation to whether to extend time.

78 In relation firstly to the unfair dismissal, breach of contract and holiday pay complaints, no good reason has been put forward by the claimant to suggest that it was not reasonably practicable to have put in her claim on time in relation to these complaints. As noted, the 24 March 2016 letter is clear and should have been especially clear to an intelligent educated individual such as the claimant. I therefore do not accept her assertion that she thought that time only ran from May 2016. Furthermore, the claimant was quite capable of instructing solicitors and indeed did so. It was, therefore, reasonably practicable for her to have put in her claim on time in relation to the unfair dismissal, breach of contract and holiday pay complaints and, therefore, time should not be extended in relation to these complaints. The Tribunal does not therefore have jurisdiction to hear these complaints and the complaints of unfair dismissal, breach of contract and holiday pay are therefore struck out.

79 I turn to the discrimination/harassment complaints. Firstly, in terms of whether there is a course of conduct which continues, this issue is irrelevant in the light of my finding that the allegations for the purposes of the direct discrimination complaints in relation to ceasing to provide work for the claimant date from 24 March 2016. There is no allegation which is in time on which the other out of time allegations can hang.

80 Therefore, I turn to the question of whether it is just and equitable to extend time in relation to these complaints. The burden is on the claimant to prove that it would be just and equitable to extend time. However, no reason has been provided as to why it would be just and equitable to extend time. I therefore find that it would not be just and equitable. Therefore, the Tribunal does not have jurisdiction to consider the complaints of direct race discrimination, harassment related to race and direct maternity discrimination and these are therefore struck out.

Prospects

81 In the light of the above findings, it is not therefore necessary for me to go on and consider the issues regarding reasonable prospects. However, for completeness, I do so in the alternative.

Race Discrimination/Harassment

82 I turn first to the question of whether the race discrimination/harassment complaints have no/little reasonable prospect of success. Starting firstly with the decision not to give the claimant any further work, I note that the claimant has suggested no prima facie case as to why the burden of proof might shift in relation to these allegations. The claimant has shown only that she has the relevant protected characteristics. Therefore these complaints are not likely to succeed. Furthermore, the respondent has shown documents in the bundle which indicate that it had a non discriminatory reason for not giving any further work (namely the lack of work/complaints regarding the claimant such that the respondent did not want to give further work). In the absence of evidence, I do not feel that I am able to say that the complaints have "no" reasonable prospect of success. However, I certainly agree that, in the light of the above analysis, they have little reasonable prospect of success and, subject to the claimant's means, would have considered making a deposit order in this respect.

83 In relation to the harassment related to race complaint regarding Mr Thorpe, I accept that this complaint was not in the claim form and was introduced at a very last minute stage via the further particulars. However, it is a question of fact and comes down to Mr Thorpe's word against the claimant's. Even in the light of the findings I have made regarding the reliability of the claimant's evidence, I do not feel able to say, without the benefit of hearing evidence, whether this complaint has either no or little reasonable prospect of success. I would not therefore have considered making a deposit order in respect of this complaint.

Other complaints

84 Firstly, it should be noted that it was never an issue before me as to whether I should consider strike out due to no reasonable prospects in relation to the remaining complaints but only to consider whether a deposit order should be made in respect of them.

85 As regards the unfair dismissal/breach of contract complaints, I would consider that they have little reasonable prospect of success for the "employment status" jurisdictional reasons that I have already found and would, subject to the claimant's means, have considered making a deposit order in relation to them.

86 I would also have considered that the holiday pay complaint had little reasonable prospect of success. This is because it is clear from the contract that the claimant's entitlement to holiday pay is pro rata to the amount she has worked in the relevant holiday year and the claimant never did any work for the respondent in the holiday year during which her contract terminated. She would therefore not have had any holiday entitlement for that year.

Means

87 Turning to the question of means, the claimant explained to me that she was not working. However, she owned her own home (jointly) which was worth £250,000 when she bought it in 2009 but could be worth more now. She, however, has a mortgage on it (having recently remortgaged) and that mortgage is at least £200,000. She estimates that there is around £50,000 of equity in the house. She has money in the bank of around £10,000. She has no income other than child benefit. Furthermore, she has outgoings of around £700 per month and some of this is paid out of her savings generally so those savings are going down.

88 In the light of these findings, I find that the claimant is someone of relatively limited means so I would not consider awarding the maximum deposit of £1,000 per allegation. However, whilst I acknowledge that her savings of £10,000 are decreasing, she has enough money such that she would be able to pay a deposit of £100 in relation to each allegation which I would be minded to make a deposit in relation to. Those allegations are those in relation to direct maternity discrimination, direct race discrimination, unfair dismissal, breach of contract and holiday pay (five allegations in total). Therefore, had I not struck the complaints out for the reasons set out above, I would have made a deposit order totalling £500 in relation to these five complaints as a condition to continuing those complaints.

Other matters

89 In the light of the above decisions, the full merits hearing listed for 15-17 March 2017 is therefore vacated.

Employment Judge Baty
21 March 2017