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EMPLOYMENT TRIBUNALS

Claimant: Mrs P Worboyes

Respondent: FDR Ltd

Heard at: East London Hearing Centre

On: 4 August 2017

Before: Employment Judge J Brown

Representation

Claimant: In person

Respondent: Mr R Bhatti (Solicitor)

PRELIMINARY HEARING JUDGMENT

The Judgment of the Employment Tribunal is that:-

- (1) The Claimant was employed by Objective People Solutions Ltd during her assignments with the Respondent under a contract personally to do work.
- (2) The Claimant was supplied to the Respondent under a contract with Objective People Solutions Ltd and the Respondent made work available to her, so that the Respondent was a principal and the Claimant was a contract worker under *s41 Equality Act 2010*.
- (3) The Claimant was not employed by the Respondent, either under an express, or implied, contract of employment.

REASONS

1 This was a Preliminary Hearing (Open) to determine the following issues:-

- 1.1 Whether the Claimant was employed by Objective People Solutions Ltd such as to fix the Respondent with liability under *s 41 Equality Act 2010*.

- 1.2 Whether the Claimant had a contract of employment with the Respondent.
- 1.3 Whether the Claimant had a contract personally to perform work or service with the Respondent and therefore whether the Tribunal had jurisdiction to hear the Claimant's claims of age and race discrimination and victimisation against the Respondent.

2 I was given a bundle of documents, as well as witness statements from the Claimant and from Ms Homer, Human Resources Manager employed by the Respondent. The Claimant also provided me with two documents; a monthly evaluation of her work conducted by the Respondent and a data capture form which she had been given by the Respondent. I heard evidence from the Claimant and from Ms Homer. Both parties made submissions.

Findings of Fact

3 The Respondent operates Call Centres in the Basildon area. It has contracted with De Poel UK for De Poel UK to provide temporary workers for the Respondent. De Poel, in turn has entered into agreements with other agencies to provide temporary workers to the Respondent. One of these agencies is Objective People Resourcing Ltd.

4 The Claimant entered into an agreement with Objective People Resourcing Ltd ("Objective People") as an agency worker to be supplied to work temporarily and under the supervision of other firms and companies. The following were terms of that agreement:

"1. DEFINITIONS AND INTERPRETATION

1.1 ... **"Agency Worker"** means Petralyn Worboyes ... Agency Worker supplied by the Employment Business to provide services to the Hirer...

"Assignment" means assignment services to be performed by the Agency Worker for the Hirer for a period of time during which the Agency Worker is supplied by the Employment Business to work temporarily for and under the supervision and direction of the Hirer;..

"Employment Business" is Objective People Solutions Limited ...
"Engagement" means the engagement.., employment or use of the Agency Worker by the Hirer..

"Hirer" means the person, firm or corporate body together with any subsidiary or associated person, firm or corporate body (as the case may be) to whom the Agency Worker is supplied or introduced...

2. THE CONTRACT

- 2.1 These Terms constitute the entire agreement between the Employment Business and the Agency Worker for the supply of services to the Hirer and they shall govern all Assignments undertaken by the Agency Worker. However, no contract shall exist between the Employment Business and the Agency Worker between Assignments. These Terms shall prevail over any other terms put forward by the Agency Worker.
- 2.2 During an Assignment the Agency Worker will be engaged on a contract for services by the Employment Business on these Terms. For the avoidance of doubt, the Agency Worker is not an employee of the Employment Business although the Employment Business is required to make the Deductions from the Agency Worker's pay. These Terms shall not give rise to a contract of employment between the Employment Business and the Agency Worker, or the Agency Worker and the Hirer. The Agency Worker is supplied as a worker, and is entitled to certain statutory rights as such, but nothing in these Terms shall be construed as giving the Agency Worker rights in addition to those provided by statute except where expressly stated...

3. ASSIGNMENTS AND INFORMATION TO BE PROVIDED

- 3.1 The Employment Business will endeavour to obtain suitable Assignments for the Agency Worker to perform the agreed Type of Work. The Agency Worker shall not be obliged to accept any Assignment offered by the Employment Business...

4. AGENCY WORKER'S OBLIGATIONS

- 4.1 The Agency Worker is not obliged to accept any Assignment offered by the Employment Business but if the Agency Worker does accept an Assignment, during every Assignment and afterwards where appropriate, s/he will:
- 4.1.1 co-operate with the Hirer's reasonable instructions and accept the direction, supervision and control of any responsible person in the Hirer's organisation;
 - 4.1.2 observe any relevant rules and regulations of the Hirer's establishment (including normal hours of work) to which attention has been drawn or which the Agency Worker might reasonably be expected to ascertain;
 - 4.1.3 take all reasonable steps to safeguard his or her own health and safety and that of any other person who may be present or be affected by his or her actions on the Assignment and comply with the Health and Safety policies and procedures of the Hirer;

4.1.4 not engage in any conduct detrimental to the interests of the Employment Business and/or Hirer which includes any conduct which could bring the Employment Business and/or the Hirer into disrepute and/or which results in the loss of custom or business by either the Employment Business or the Hirer;

...

4.2 If the Agency Worker is unable for any reason to attend work during the course of an Assignment s/he should inform the Employment Business within 1 hour of the commencement of the Assignment or shift. In the event that it is not possible to inform the Employment Business within these timescales, the Agency Worker should alternatively inform the Hirer and then the Employment Business as soon as possible.

...

5. TIMESHEETS

5.1 At the end of each week of an Assignment ... the Agency Worker shall deliver to the Employment Business a timesheet duly completed to indicate the number of hours worked during the preceding week ...

5.2 ... the Employment Business shall pay the Agency Worker for all hours worked regardless of whether the Employment Business has received payment from the Hirer for those hours...

7. ANNUAL LEAVE

7.1 The Agency Worker is entitled to paid annual leave according to the statutory minimum as provided by the WTR from time to time. The current statutory entitlement to paid annual leave under the WTR is 5.6 weeks.

7.2 Entitlement to payment for annual leave under clause 7.1 accrues in proportion to the amount of time worked by the Agency Worker on Assignment during the Leave Year.

...

7.5 If the Agency Worker wishes to take paid annual leave during the course of an Assignment s/he should notify the Employment Business of the dates of his/her intended absence giving notice of at least twice the length of the period of annual leave that s/he wishes to take. In certain circumstances the Employment Business may require the Agency Worker to take paid annual

leave at specific times or notify the Agency Worker of periods when paid annual leave cannot be taken...

8. SICKNESS ABSENCE

8.1 The Agency Worker may be eligible for Statutory Sick Pay provided that s/he meets the relevant statutory criteria.

...

9. TERMINATION

9.1 Any of the Employment Business, the Agency Worker or the Hirer may terminate the Agency Worker's Assignment at any time without prior notice or liability."

5 The Claimant attended an interview with Objective People in response to an advert for Collections Agents for the Respondent. Two managers from the Respondent were present at the interview.

6 The Claimant was engaged by Objective People, pursuant to the agreement set out above and was given work at the Respondent as a Collections Agent. The Claimant was paid by Objective People for all the work she did for the Respondent. The Claimant was paid statutory sick pay and for annual Leave by Objective People.

7 The Claimant underwent a four week training programme at the Respondent. She worked under the instruction of the Respondent's managers.

8 The Respondent appraised the Claimant's work weekly. It gave her targets and objectives. The Claimant was required to book annual leave using the Respondent's leave system and to have her leave approved by the Respondent's managers. The Claimant submitted a grievance against the Respondent and its employees and a grievance outcome was notified to her by Objective People.

Relevant Law

9 *S41(1) Equality Act 2010* provides that a principal must not discriminate against a contract worker. *S41(3) EqA* provides that a principal must not victimise a contract worker. By *s41(5) EqA* a principal is a person who makes work available for an individual who is:-

- (a) employed by another person, and
- (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

By *s41(7) EqA* a contract worker is an individual supplied to a principal in furtherance of a contract such as is mentioned in *ss 41 (5)(b)*.

10 By *s83(2) Equality Act 2010*: "Employment" means –

“.. employment under a contract of employment, a contract of apprenticeship or a contract personally to do work”

11 *London Borough of Camden v Pegg* UK EAT/0590/11 considered a case where Ms Pegg was engaged by an agency, BBT, under a contract with BBT and was supplied to the London Borough of Camden. In that case, the Employment Tribunal had found that there was a contract between BBT and Ms Pegg that it was a contract for services, not of service, but that, under the contract, Ms Pegg was required personally to do work and therefore came within the extended meaning of employment in the discrimination legislation. The Tribunal had decided that Camden had made work available to Ms Pegg and, therefore, was a principal under the relevant provisions.

12 The EAT considered the terms and conditions of Ms Pegg’s engagement by BBT and set these out at paragraph 6 of the EAT judgment. It adopted paragraph 16 of the Employment Tribunal’s judgment, saying as follows:

“The agreement between the Claimant and BBT, on BBT’s standard terms.., defines a “Temporary Worker” as an individual supplied to “the Client” by BBT, “under a contract for services”, to carry out an “Assignment”. “Assignment” is defined as the period during which a Temporary Worker undertakes an “Engagement”. In turn “Engagement” is defined as meaning the engagement, employment or use, directly or indirectly, of the Temporary Worker by the Client by which the former receives monies or reward for services performed for the latter. By Clause 2.1 it is provided that:

‘These terms constitute a contract for services between [BBT] and the [Temporary Worker] and they govern all Assignments undertaken by the Temporary Worker. However, no contract shall exist between [BBT] and the Temporary Worker between Assignments.’

The point that no contract shall exist between Assignments is repeated at clause 3.2. Clause 4.1 obliges BBT to pay the Temporary Worker for work done, regardless of whether they have received payment (in respect of his or her services) from the Client. Clauses 5.1 to 5.8 contain provisions concerning statutory leave. Clause 5.3 requires the Temporary Worker wishing to take paid leave to notify BBT, giving notice of at least twice the period of the leave intended to be taken. BBT reserves the right to give a counter-notice... The agreement acknowledges that the Temporary Worker “may” be eligible for statutory sick pay, subject to meeting “relevant statutory criteria”... Under the heading “Conduct of Assignments”, the following provisions appear:

‘8.1 The Temporary Worker is not obliged to accept any Assignment offered by [BBT] but if she/he does so, during every Assignment and afterwards where appropriate she/he will:

8.1.1 Co-operate with the Client’s reasonable instructions and accept the direction, supervision and control of any responsible person in the Client’s organisation;

- 8.1.2 Observe any relevant rules and regulations of the Client's establishment (including normal hours of work, equipment usage and data protection policies, etc) to which attention has been drawn or which the Temporary Worker might reasonably be expected to ascertain;
- 8.1.3 Take all reasonable steps to safeguard his or her own health and safety and that of any other person who may be present or be affected by his or her actions on the Assignment and comply with the Health and Safety policies and procedures of the Client.
- 8.1.4 Not engage in any conduct detrimental to the interests of the Client and immediately advise [BBT] of any potential conflict of interest...

13 By clause 8.3 it is provided that if the temporary worker is unable for any reason to attend work during the course of an assignment he or she should inform the client and/or BBT within one hour of the commencement of the assignment or shift. By clause 9.1 BBT or "the Client" may terminate the Temporary Worker's Assignment at any time without prior notice or liability.

14 In *LB Camden v Pegg* the EAT decided as follows, at paragraphs 18 and 19:

"[18] ... Once Ms Pegg accepted the assignment with Camden she owed express contractual duties to BBT which required her to do the work personally (and BBT paid her). That, to our minds, is sufficient to bring her within section 68. We see no warrant in the wording of the section for excluding her from its provision merely because she was not bound to accept the assignment. The critical point is that when she accepted the assignment she owed a contractual duty to BBT to do the work personally.

[19] We would add that the arrangements under which Ms Pegg came to work for Camden are common arrangements, and we have no doubt that Parliament intended the protection for contract workers to apply to such workers..."

15 In *Muschett v HM Prison Service* the EAT and Court of Appeal decided that no contract could be implied between an agency worker and an end user. In *Muschett*, in the EAT, UKEAT/0132/08, the EAT considered whether Mr Muschett came within the provisions outlawing discrimination against contract workers. At paragraph 30 of the judgment, the EAT said this:

"As regards the contract worker provisions, again Mr Muschett's claims are defeated if one looks carefully at the provisions. It requires that the person who is providing the contract worker to the principal has to be in a relationship with an employment contract with the worker. The words are: "Who are employed not by the principal himself but by another person". In other words, in the circumstances of this case Mr Muschett would have to show that he was employed by Brook Street. The Chairman has found in his conclusions that he was not employed; that is dealt with in paragraph 13, and again in paragraph 15.

The aspect of that appeal has not been permitted to proceed. In any event, the Appellant's work through the agency was done under a single contract for services for temporary workers between him and Brook Street rather than a series of separate contracts for each assignment, such as one sees in the authority of **Bunce v Postworth** ... where the existence of those series of separate contracts was held to be a sufficient contract of personal services to fall within the scope of the temporary worker provisions. Again I can find no error in the Chairman's conclusions."

16 It is clear that there was no appeal against the Employment Tribunal's findings that *Muschett* was not an employee of the agency. There was also no record of the contractual provisions which gave rise to the Employment Tribunal Chairman's findings. There is a suggestion, from paragraph 30 of the EAT judgment, that the relevant contractual provisions were different to those in the case of *Pegg*. I therefore consider that *Muschett* is to be distinguished from *Pegg*, where the EAT did make a decision on the particular contractual terms - and where the EAT decided that, once the Claimant accepted an assignment, she owed express contractual duties to the agency which required her to do work personally.

17 In *Abbey Life Assurance Co Limited v Tansell* [2000] IRLR 387 decided that the words "principal" means "a person (A) who makes work available for doing by individuals who are employed by another person who supplies them under a contract made with A" (the equivalent provision in the old *Disability Discrimination Act 1995*, s12, to the words of s41 *EqA 2010*), do not require a direct contractual relationship between the employer and the principal. The s12 *DDA* / s41 *EqA* protection applies to a case where there is no direct contract between the person making the work available and the employer of the individual who is supplied to do the work.

18 In *James v London Borough of Greenwich* [2008] EWCA Civ. 35 the Court of Appeal considered a case of an agency worker employed by an agency and supplied to an end user. The Court of Appeal considered the question of whether a contract could be implied between the agency worker and the end user. It decided that the question was to be decided applying the test as to whether it was necessary to imply a contract. At paragraph 23 of that judgment the Court of Appeal said this:

"... in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end user, the test being that laid down by Bingham LJ in **The Aramis** [1989] 1 Lloyd's Report 213 at 224

" ... necessary ... in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist."

19 In *James v LB Greenwich*, at paragraphs 41 and 42, the Court of Appeal decided that it was not necessary to imply a third contract between Ms James (the worker) and the Council (the end user). The Court of Appeal said that what Ms James did and what the Council did were fully explained in the case by the express contracts into which she and the Council had entered with an employment agency. The Court of

Appeal decided that Ms James was not an employee of the Council because there was no express or implied contractual relationship between her and the Council. Her only express contractual relationship was with the employment agency. The provision of work by the Council, its payments to the employment agency and the performance of work by Ms James were all explained by their respective express contracts with the employment agency, so that it was not necessary to imply the existence of another contract in order to give business reality to the relationship between the parties.

Discussion and Decision

20 It is clear that the Claimant was engaged by Objective People under a contract in the terms set out in my findings of fact at paragraph 4, above. The contract provided that, during an assignment, the Claimant would be engaged on a contract for services by Objective People, according to the terms of the contract.

21 The terms of the contract provided that, "Assignment" meant "assignment services to be performed by the Agency Worker. That meant that, the Claimant, personally, was required to perform the assignment services. Where the Claimant accepted an assignment, she was bound by the terms set out in clause 4. These required her, personally, to work and to work under the direction of the Respondent. The requirement for personal service by the Claimant was also made clear in the definition of "Engagement" under the contract - **"Engagement"** means the engagement.., employment or use of the Agency Worker by the Hirer."

22 The Claimant did accept assignments for the Respondent and the Respondent provided her with work during that assignment. As set out in the case of *Pegg*, which dealt specifically with contractual terms almost identical to those in the current case, the Claimant was under a duty to do work personally pursuant to her contract with Objective People. As *Pegg* has decided, the Claimant came within s41 Eq A; she was a contract worker and the Respondent was a principal.

23 It does not matter that the Respondent did not contract directly with Objective People, *Abbey Life Assurance Co Ltd v Tansell*. The s41 EqA protection applies to a case where there is no direct contract between the person making the work available and the employer of the individual who is supplied to do the work.

24 I reject the Respondent's submissions that *Muschett* is the relevant authority and that *Pegg* was wrongly decided. In *Muschett*, the relevant Claimant had been decided not to have been an employee of the relevant agency by the Employment Tribunal. That decision of the Employment Tribunal was not subject to appeal. The EAT did not, therefore, make a decision as to whether the Claimant in that case was employed by that agency, so as to come within the equivalent of s41 EqA. The EAT judgment did not set out the provisions of the relevant contract. In any event, it seems that the provisions of the contract in *Muschett* were different to the provisions of the contract in the current case; in that, in *Muschett*, the EAT contrasted the overarching agency contract in *Muschett* with an agency contract which applied to a series of assignments. By way of contradistinction, an agency contract applying to a series of assignments was present in the *Pegg* case and in the current case.

25 I find that the Claimant was not employed by the Respondent. There was no

express contract of employment between the Claimant and the Respondent and I find it was not necessary to imply any contract. Applying the case of *James*, what the Respondent and the Claimant did was fully explained by their express contracts with agency and **De Poel**. It is not necessary to imply any further contract between them in order to explain their relationship.

CASE MANAGEMENT DISCUSSION AT PRELIMINARY HEARING

Listing the Hearing

1 The case has already been listed for four days on **31 October and 1 to 3 November 2017**.

The Complaints

2 By a claim form presented on 4 April 2017, the Claimant brought complaints of direct age and race discrimination and victimisation against the Respondent, the end user, with whom the Claimant was placed by an agency as a contract worker. The Respondent has defended all the claims.

3 Essentially, the Claimant contends that the Respondent's managers were critical of her performance where they were not critical of comparators' performance, refused to allow her to take annual leave and/or unpaid leave and excluded her from a list of people to whom they would consider offering permanent employment and that, ultimately, the Respondent sent the Claimant back to the agency. The Claimant says that, in doing so, the Respondent subjected her to race and/or age discrimination and/or victimisation. The Claimant relies, in her race discrimination cases, on her black colour, and compares her treatment with the treatment of white people. In her age discrimination case, the Claimant says that she is 50 years old. She compares her treatment with the treatment of people in their 20s.

List of Issues

4 After discussion with the parties, the following issues were agreed for determination at the final hearing:-

Factual Allegations

4.1 Did the Respondent do the following:-

4.1.1 Danielle Crawford deciding that she had "had enough" of the Claimant and that she was going to have the Claimant "file noted".

4.1.2 Matthew Rowe supporting Danielle Crawford's decision to file note the Claimant, but deciding not to do the same to Emma after she claimed responsibility and accepted that she should be filed noted.

- 4.1.3 Danielle Crawford not allowing the Claimant to have unpaid leave when another worker, Brittany, was allowed to take unpaid leave.
- 4.1.4 Mark Peters refusing to hear the Claimant's appeal against the decision given by Danielle Crawford and the Respondent making the Claimant sit in an appeal meeting with a manager about whom she was complaining.
- 4.1.5 The Respondent bullying the Claimant into not taking holiday and Mark Peters threatening the Claimant by stating he would send the Claimant back to her agency and that she would not be allowed to return.
- 4.1.6 Danielle Crawford excluding the Claimant from the list of candidates for the opportunity of a permanent position when Brittany was included.
- 4.1.7 The Respondent failing to act according to good practice when the Claimant had spoken to Laura Homer informally complaining of discrimination, bullying and victimisation.
- 4.1.8 The Respondent deciding not to give the Claimant permanent full-time working hours.
- 4.1.9 The Respondent engineering a reason to return the Claimant to her agency.
- 4.2 The Claimant relies on subparagraphs 1 to 8 as direct race discrimination; 1 to 5 and 7 and 8 as age discrimination and subparagraphs 6 and 9 as victimisation.

Legal tests: Race and/or Age discrimination

- 4.3 If the Respondent did those things, in doing so, did the Respondent treat the Claimant less favourably than it did treat or would have treated a comparator in the same or not materially different circumstances? In her race discrimination complaints, the Claimant relies on her black colour and compares herself with white people. In her age discrimination complaints, the Claimant is aged 50 and compares herself with people in their 20s.
- 4.4 If so, did the less favourable treatment amount to a detriment or other unlawful act under s41(1) *Equality Act 2010*?
- 4.5 If so, has the Claimant shown facts from which the Tribunal could conclude that the less favourable treatment was because of race and/or age?
- 4.6 If so, has the Respondent shown that race and/or age was no part of the

reason that it acted as it did?

Legal tests: Victimisation complaints

- 4.7 Did the Claimant do the following protected acts:-
- 4.7.1 In December 2016 making a complaint to Laura Homer that Danielle Crawford and Mark Peters were behaving unfairly to her?
- 4.7.2 In February 2017 the Claimant making a written complaint of race and age discrimination?
- 4.8 If the Respondent did the acts in paragraph 4.1.6 and 4.1.9 above, in doing so, did the Respondent subject the Claimant to a detriment?
- 4.9 If so, has the Claimant shown facts from which the Tribunal could conclude that she was subjected to a detriment because she had done either of the protected acts?
- 4.10 If so, has the Respondent shown that the protected act or acts were no part of the reason that it acted as it did?

The Respondent confirmed that it was not relying on time points.

Mediation

5 I gave a brief explanation of the mediation facility offered by the Employment Tribunal. The Claimant was interested in mediation. The Respondent asked for time to write to the Tribunal. I ordered the Respondent to write to the Tribunal by **10 August 2017**, indicating whether it is interested in mediation and, if it is, asking for the Tribunal to offer a date for judicial mediation to the parties.

Other Directions

6 The directions already sent out to the parties are modified, with different dates for compliance as set out below. Accordingly, I made the following orders.

ORDERS

Made under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Mediation

1 By **4pm on 10 August 2017**, the Respondent shall write to the Tribunal and to the Claimant, indicating whether it is interested in judicial mediation and, if it is, asking for a date for judicial mediation to be offered to the parties.

Directions for Preparation for the Final Hearing

2 Directions for preparation for the final hearing are amended as follows:-

Disclosure of Documents

2.1 The parties shall provide disclosure of all documents in their possession and control, relevant to the issues in the Claim and Response, to the other, by list and copy documents, by **4pm on 28 August 2017**.

Schedule of loss

2.2 By **4pm on 28 August 2017**, the Claimant shall serve on the Respondent a schedule of loss, setting out all the sums she claims in her complaint by way of loss of earnings and/or injury to feelings.

Bundle

2.3 The Respondent shall prepare the Tribunal bundle

2.4 By **4pm on 9 September 2017**, the Claimant shall tell the Respondent which documents need to be included in the bundle on her behalf.

2.5 By **4pm on 18 September 2017**, the Respondent shall prepare an indexed, paginated bundle of all the documents relevant to the issues in the claim and response, set out in chronological order and shall serve this on the Claimant.

2.6 The Respondent shall bring four copies of that bundle to the final hearing.

Witness Statements

2.7 By **4pm on 13 October 2017** the parties shall exchange witness statements for all witnesses whom they intend to call to give evidence at the final hearing, including the Claimant.

2.8 The witness statements shall be in numbered paragraphs, on numbered pages. If a document is referred to, it shall be referred to by page number in the bundle.

2.9 The parties shall bring four copies of each of their witness statements to the final hearing.

Chronology

2.10 The Respondent shall prepare a chronology, with references to relevant pages in the bundle, and shall send it to the Claimant by **4pm on 20 October 2017**.

Employment Judge Brown

09 August 2017

NOTES: (1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.