mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr B Ikejiaku**

Respondent: **British Institute of Technology Ltd England (BITE)**

Heard at: **East London Hearing Centre**

On: **1-4 & 8 May 2018**

Before: **Employment Judge Russell**
Members: **Mrs P Alford**
Ms L Conwell-Tillotson

Representation
Claimant: **In person**
Respondent: **Mr S Joshi (Solicitor)**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) At all material times, from February 2013 until 13 July 2017, the Claimant was employed by the Respondent.

(2) The Claimant was not dismissed on 28 February 2016.

(3) The Claimant made protected disclosures in October 2015 and on 12 July 2017.

(4) The Claimant suffered a detriment as a result of the protected disclosure made in October 2015, namely the introduction of a new contract from 1 March 2016.

(5) The principal reason for the Claimant's dismissal on 13 July 2017 was the protected disclosure made on 12 July 2017. The claim of unfair dismissal contrary to section 103A Employment Rights Act 1996 succeeds.

(6) The Respondent made an unauthorised deduction from the Claimant's wages on termination of employment in respect of

outstanding holiday pay.

(7) The Claimant is entitled to four weeks' notice of termination (credit to be given for the two weeks already paid).

(8) The claims for unfair dismissal in February 2016 and unauthorised deductions other than on accrued holiday pay due on termination are out of time.

(9) It was reasonably practicable to have presented those claims in time and such claims stand dismissed.

(10) The claims for race discrimination and victimisation fail.

(11) All other claims in respect of deductions and/or breach of contract fail.

REASONS

1 By a claim form presented on 31 July 2017, the Claimant brought complaints of unfair dismissal, wrongful dismissal, race discrimination, victimisation, arrears of pay, holiday pay, whistleblowing detriment and/or dismissal. The Respondent denied all claims. The Claimant describes his race as black African.

2 At a Preliminary Hearing before Employment Judge O'Brien on 9 October 2017 the issues were agreed as follows:

Status

2.1 Was the Claimant an employee of the Respondent after February 2016? The Respondent accepts that he was an employee prior to then.

2.2 Was the Claimant a worker for the Respondent after February 2016?

2.3 Was the Claimant an employee within the meaning of the Equality Act 2010 after February 2016?

Dismissal in February 2016

2.4 Was the Claimant dismissed by the Respondent on 29 February 2016?

2.5 Was it reasonably practicable for him to have brought a claim in time in respect of that a dismissal?

2.6 If not, was the claim brought within a reasonable period thereafter?

2.7 What was the Respondent's reason for dismissing the Claimant? The Respondent relies on statutory necessity.

2.8 Was the dismissal fair in all of the circumstances?

Dismissal in July 2016/Redundancy Pay

2.9 What was the Respondent's reason for dismissing the Claimant on 13 July 2017? The Respondent says SOSR (withdrawal of validation), or alternatively redundancy

2.10 Was dismissal for that reason fair in all the circumstances?

2.11 Is the Claimant entitled to redundancy pay?

Protected disclosure detriment and/or dismissal

2.12 Did the Claimant make a protected closure in September/October 2015 when he contacted HMRC to enquire about the tax treatment of his remuneration and/or when he consequentially complained to his employer that it had not been paying tax or NI on his behalf?

2.13 Did the Claimant make a protected disclosure on 12 July 2017 when he refused to pass the scripts of students who had copied others unless he was sent in written instruction so to do by email?

2.14 Did the Respondent dismiss the Claimant on 13 July 2017 because of either protected disclosure?

2.15 Do any of the allegations identified as D2 to D11 in the Claimant's amended draft schedule of allegations sent to the Tribunal on 30 October 2017 constitute detriments?

2.16 Was the Claimant subjected to any of these detriments because he had made either of the protected disclosures?

Notice Pay

2.17 How much notice was the Claimant entitled to? The Respondent accepts that it paid Claimant two weeks' notice.

Holiday pay

2.18 What was the Claimant's leave year?

2.19 What, if any entitlement to paid holiday had the Claimant accrued as of 13 July 2017? The Respondent accepts that the Claimant was given no paid holiday from 1 March 2016.

Unauthorised deductions from wages/breach of contract

2.20 What was the Claimant paid by way of remuneration?

2.21 What was the Claimant entitled to be paid pursuant to his contract from time to time with the Respondent?

2.22 What, if any, the shortfall had been complained about the time?

2.23 What, if any, shortfall was effectively compromised by settlement agreement between the parties dated 9 March 2016?

2.24 In respect of which these deductions has this claim been brought in time?

Race Discrimination/Victimisation

2.25 Was the Claimant removed as course leader Mr Farmer and replaced by Mr Farid (Vohra) on or around 17 October 2016?

2.26 Were elements of the Corporate Environment module taken out of the Claimant's control on or around March 2017 onwards?

2.27 Did an administrator threaten the Claimant on or around the third Monday of May 2017 that he would be reported to Mr Farmer if he did not sign a fabricated student attendance list?

2.28 Was the Claimant given over 60 scripts to mark by Mr Tanveer on 7 July 2017?

2.29 Was the Claimant dismissed on 13 July 2017?

2.30 Were any of these done because of the Claimant's colour and/or ethnic origin?

2.31 Was the Claimant thereby treated less favourably than a suitable comparator? The Claimant relies on Mr Farid (Vohra) and/or a hypothetical Asian with comparable academic qualifications.

2.32 Were any of these done because the Claimant had asked Mr Farmer 17 October 2016, whether he was being treated badly because he was not an Asian?

2.33 Was the Claimant thereby subjected to a detriment?

2.34 For any of the allegations judged not to part of an act extending over a period and ending less than three months before commencement of Early Conciliation, is it just and equitable to extend time?

Preliminary Applications

3 Disclosure and agreement of a bundle has proved complicated and frankly dispiriting in this case. On 31 January 2018, Employment Judge Brown ordered that the Respondent make specific disclosure to the Claimant of certain categories of

document and gave the parties guidance on what should, and should not, be included in the bundle. Regrettably this did not resolve the dispute. A further Preliminary Hearing took place on 26 April 2018 to consider the ongoing dispute about the preparation and provision of an agreed bundle of documents and the consequent delay to the exchange of witness statements. The frustration of Employment Judge Moor is evident from the content of her Summary and neither party comes out of it with any great degree of credit.

4 It was therefore particularly disappointing that there were further applications on the first day of the hearing in connection with the bundle. The Claimant made an application for the removal of certain pages which were not included in the original bundle index. Upon enquiry, it transpired that these documents were the O'Brien Case Management Summary and two short emails on 13 July 2017 terminating the contracts of Mr Jahid Hussain and Mr Haris Zaman. There were also some additional documents, starting from pages 307 to 348, which related to: (i) an examination set by the Claimant on one of his modules, (ii) a possible complaint by students about the Claimant's performance, (iii) emails sent in August 2017 about whether the Claimant had set an assignment in time with related documents, (iv) some records of the attendance and/or performance of certain students on the Claimant's BA Honours Level 6 Business Administration Course; (v) minutes of a staff meeting on 22 September 2015; (vi) a series of emails in October 2017 relating to marking of a number of level 6 modules and (vii) a copy of an application letter and CV said to have been sent by the Claimant on 31 July 2017 to the University of Northampton International College.

5 Mr Joshi submitted that the documents were relevant to the issues to be determined and had arisen out of the exchange of witness statements which had only taken place at midday on Friday. He says that they are documents necessary for the Tribunal to consider in order fairly to determine the case. The Claimant disagrees. He refers to the procedural history of the case to date. He says that there have been extensive disputes about the content of the bundle and he considers that the Respondent is taking advantage of him. The Claimant says that he would need to adduce additional documents to rebut the content of the Respondent's additional documents, namely student handbooks for the BA Honours Business Course in 2013-14 and 2017-18, a copy of documents relevant to the immigration status of another lecturer as well as a series of recent emails detailing the dispute about the content of the bundles. The Claimant says that he would require between one week and two weeks to deal with the additional documents disclosed by the Respondent.

6 We considered first the relevance of the documents to the issues to be decided. The O'Brien case management summary is a Tribunal document which has already been sent to the Claimant, there can be no sensible objection to its inclusion. The Claimant's case is that he was dismissed on 13 July 2017 as a result of a protected disclosure; the Respondent's case is that he was dismissed for business reasons. The apparent dismissal of others is relevant to that central issue. The Claimant is able fairly to deal with these two short emails, even if they should have been disclosed sooner.

7 As for the other documents, we initially accepted that they ought not be included in the bundle. The specific content of a module set by the Claimant was of limited

relevance where the Claimant's case was that he had been told to pass students who had copied the work of others. Similarly the Respondent's case was that the reason for dismissal was financial, not the performance or conduct of the Claimant. As for the attendance registers or specific pass marks for students, these were of limited relevance to the Claimant's reasonable belief about whether there was a disclosure of information which tended to show breach of a legal obligation, bearing in mind that the Claimant is not required to prove that there was in fact such a breach. The limited relevance was outweighed by the time that it appeared that the Claimant would require to deal with such late disclosure. For the same reasons, we considered that the limited relevance of the documents relevant to the marking of 60 scripts was outweighed by the prejudice to the Claimant of late disclosure in circumstances were the issue was whether the Claimant was in fact required to mark the scripts at short notice and, if so, whether that was because of a protected disclosure and/or race discrimination. We accepted that the Claimant's application letter and CV was of evidential relevance insofar as they purport to set out the Claimant's understanding of his employment status after February 2016. The Claimant denied that he had drafted either document and it seemed to us that to admit them in evidence would require the Tribunal to embark upon a complex assessment of their provenance which may require an adjournment given that they had been disclosed so late in the proceedings. We considered that Mr Joshi could cross-examine the Claimant as to his understanding of his employment status and we would reassess the application to include them in the evidence should it prove necessary in the interests of justice, having regard to the overriding objective. For these reasons, the Tribunal declined to include the additional documents at pages 307 to 348 of the proposed bundle as their limited relevance was outweighed by the prejudicial effect of late disclosure and a fair trial was possible without their inclusion. Consequently, it was not necessary to include in the bundle the additional documents relied upon by the Claimant in rebuttal.

8 Having given Judgment with oral reasons on the admissibility of the additional documents, Mr Joshi informed us that the documents at pages 307 to 348 had in fact been sent to the Claimant on 21 April 2018 (10 days before the hearing). The Claimant was shown copies of the documents and was adamant that he had never seen them before. On the second morning of the hearing, Mr Joshi produced evidence that the documents at pages 307 to 348 had been sent to the Claimant by special delivery on 21 April 2018, that they were collected by him at 7.24am on 24 April 2018 and returned to the Respondent by recorded delivery on 24 April 2018 with a note attached to the documents by the Claimant. The Claimant accepted that, contrary to his initial assertions, he had received the documents on 24 April 2018 but decided to return them as they had not been included in the initial disclosure which took place in February 2018. Whilst the disclosure was still late, it was not the case that it had only been produced at this hearing. The Claimant's denials were misleading and led the Tribunal to exclude the documents because of the prejudice said to have been caused by their late provision.

9 Mr Joshi applied to have the claim struck out today by reason of the Claimant's unreasonable conduct of the proceedings, specifically his misleading representations about when he first saw the documents at pages 307 to 348. We carefully considered the application but concluded that strike out was not appropriate on the facts of the case. As is clear from **Blockbuster Entertainment Limited v James** [2006] IRLR 630, strike out is a draconian power not to be too readily exercised. The cardinal

conditions for its exercise must be present; either that the unreasonable conduct is taking a form of deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. If these two conditions are fulfilled it is still necessary to consider whether striking out is a proportionate response or whether there is a less drastic means which may be adopted. A strike out application should not be made at the point of trial, rather the time to deal with persistent or deliberate failure to comply with rules and orders designed to secure a fair and orderly hearing is when they have reached the point of no return.

10 Whilst the Claimant is representing himself, he is a lecturer in law and the Director and Principal of a legal services company and can reasonably be expected to appreciate the importance of not misleading the Tribunal. The Claimant's conduct in repeatedly stating that he had not seen documents which he had in fact chosen to return as he did not agree their inclusion in the bundle was unreasonable. However, a fair trial is still possible. Rather than strike out the claims, the Tribunal decided instead that the documents at pages 307 to 348 should be included in the bundle and the Claimant's willingness to mislead the Tribunal could be a matter addressed in considering credibility.

Evidence

11 We heard evidence from the Claimant on his own behalf. The Tribunal considered that the Claimant's selective memory about the additional documents (see above) was indicative of the unreliability of his evidence when it did not support the case he wished to advance. The Claimant demonstrated a tendency to emotional responses and exaggeration which we considered also affected his recollection and judgment on material matters. We took this into account when considering the reliability of his evidence on disputed points of facts as appropriate.

12 We heard evidence on behalf of the Respondent from Mr Farmer (Principal Director). The Tribunal considered Mr Farmer to be an unreliable witness, who repeatedly demonstrated a willingness to give the evidence which he considered best suited the Respondent's case rather than accurate evidence. We have set out a number of specific examples below but we also drew the inference more generally when considering the reliability of his evidence on disputed facts. The Tribunal also heard evidence on behalf of the Respondent from Mr Tanveer (Associate Dean), Mr Fattah (Accounts and Resource Manager), Mr Vohra (Lecturer) and Mr Kariburyo (Lecturer). The Tribunal found each of these witnesses to be trying to give their best recollection of matters and whilst there were some inconsistencies, we found that this was due to the ordinary frailty of human memory rather than any lack of truthfulness.

13 We had regard to the bundle of documents provided by the parties, including pages 307 to 348 for the reasons set out above.

Findings of fact

14 The Respondent is a Higher Education establishment. It has no direct power to award qualifications but relies instead on agreements with other universities to validate its courses. It was in partnership with Coventry University until February 2013, then with Staffordshire University, the University of Wales and latterly the London

Metropolitan University. Prior to 2014, the Respondent held a Tier 4 sponsorship licence from the Home Office.

15 The Principal Director and Chief Executive Officer is Mr Farmer; Mr Tanveer is the Associate Dean. The Respondent engages around 20 lecturers, some full-time and some part-time. A small number of lecturers are employees on a PAYE basis; the majority are said to be engaged as consultants, paid without deductions for tax and National Insurance.

16 The Claimant is a qualified solicitor and barrister in Nigeria. He has done some work to cross-qualify but has not completed the requirements to practise as a solicitor in the UK. He is a director and shareholder of BVLO Limited through which he provides legal services, mostly in immigration but also with some employment work. The Claimant charges for those services.

17 The Claimant began to work for the Respondent as a senior lecturer in business and law from February 2013, having previously worked there for about six months in 2011. The Claimant's case is that it was agreed he would be paid £850 per month but he received no such money. There were payslips in the bundle for the period February to July 2013 showing pay of £590.11 per month.

18 The Claimant's case is that from August 2013 he was an employee, contractually entitled to an annual salary of £24,500. He relies upon a certificate of sponsorship issued by the UK Border Agency in August 2013 which records that he was employed by the Respondent as a lecturer, at a salary of £24,500 per annum, for the period 12 August 2013 to 21 June 2016 and working 40 hours per week. This information enabled the Claimant to amass sufficient points to gain his Tier 2 visa.

19 The Respondent admits that it provided the information on the sponsorship certificate to the UKBA. Mr Farmer's evidence was that the information provided was known to be untrue but was given as part of a "gentleman's agreement" between HR and the Claimant to support his visa application. Mr Farmer's evidence was that the true agreement was that the Claimant was a self-employed consultant lecturer, working three days per week for pay of £1,000 per month. In other words, according to Mr Farmer, both the Claimant and Respondent agreed that incorrect evidence would be provided about employment status and salary in order to obtain the Tier 2 visa.

20 Mr Fattah was the Accounts and Resource Manager for the Respondent from September 2012 and, as such, was responsible for Human Resources. Mr Fattah's evidence was that he had not provided the information to UKBA. He accepted that a sponsored person should be on the payroll; he queried this with a colleague who told him to "**follow whatever we are doing**"; which we understood from his evidence to mean he should just submit the application as drafted.

21 In resolving the dispute about the terms of the agreement, we had regard to the contemporaneous conduct of the parties. From August 2013, the Claimant was registered with HMRC as an employee of the Respondent. He was not issued with regular payslips. The only payslips in the bundle in this period are for November and December 2013. The December payslip records net pay of £1,651.69; this would give a gross salary of £24,500 per annum. The deductions for tax and national insurance in

the year to date are £665.80 and £862.20 respectively.

22 In fact, the payslips are a sham. The Claimant was paid £1,000 per month, by cheque and without deductions. HMRC records of the Claimant's employment history for the tax years 2013/14, 2014/15 and 2015/16 show that he was recorded as employed by the Respondent for the first two of these tax years but that no payments in respect of tax or national insurance had been paid.

23 On 9 September 2014, the Claimant sent an email to Mr Farmer with a subject of "Gentleman Agreement" in which he wrote:

> "**Please, I just got my Aug. 2014 salary (cheque); it is still £1000.00.**
>
> **Sir, when hiring you agreed to reflect paying my normal salary and explained that I should manage for one year (Aug 1st 2013 – July 31st 2014).**
>
> **I know that things are rough either way, but it has been very terrible on my side; I was hoping on our gentlemen agreement."**

24 In evidence, Mr Farmer maintained that he had not received the Claimant's email despite his response appearing in the middle of the email chain. Not only is Mr Farmer's evidence incorrect but it is an example of his willingness to give evidence which he thinks may best suit the Respondent's case rather than what is genuinely believed or accurate. We find on balance that Mr Farmer received the email and responded to the effect that he would consider something from September 2014. He did not deny that he had been party to a gentlemen's agreement of the sort asserted by the Claimant. From September 2014, the Claimant's monthly payment was increased to £1,250. The Claimant's response was to thank Mr Farmer but note that this was not up to what they agreed when he was hired.

25 The Claimant raised the issue of pay again on 14 April 2015 in a further email to Mr Farmer in which he wrote:

> "**Please sir, I kindly draw your attention to my previous correspondences regarding my salary as we agreed gentlemanly when you hired me.**
>
> **Since August 2014 (after 1 year of working as we agreed) to April 2015, I have been underpaid by around £370 monthly. As a full-time employee. I am entitled for this being the Institute's / your indebtedness to me currently at £3,060.00.**"

26 The figures stated by the Claimant in this email are consistent with a net salary achieved on an annual gross figure of £24,500. Moreover, the sum of £3,060 represents 8 months' payment if, as the Claimant wrote, the monthly underpayment was around £370. In other words, he had been underpaid from August 2014.

27 In resolving the dispute about the original terms of the agreement between the Claimant and the Respondent, we found neither Mr Farmer nor the Claimant to be witnesses of truth. On the balance of probabilities, we find that an agreement was reached between the Claimant and Mr Farmer in August 2013 that the Claimant would be paid a salary of £24,500 but only from August 2014. For the year until August 2014, it was agreed between the Claimant and Mr Farmer that the Claimant would receive

£1,000 per month without deductions due to the Respondent's financial situation. Both men agreed that the higher salary figure would be stated on the Respondent's certificate of sponsorship submitted to the UKBA in order to ensure that the Claimant's Tier 2 visa application was successful. This was a mutual agreement between the Claimant and Mr Farmer which misled the Home Office. It also appears to the Tribunal that the agreement may have had the effect of avoiding the proper payment of tax and national insurance to HMRC. This is a matter which may require further investigation by the appropriate authorities and we make no finding as to whether the liability to pay was that of the Respondent or the Claimant. Mr Fattah was not a party to the agreement between Mr Farmer and the Claimant.

28 From September 2014 to March 2015 the Claimant received £1,250 per month; this figure increased to £1,500 per month from March 2015. All payments were made by cheque to the Claimant with no deductions for tax or national insurance.

29 On 25 July 2014, the Home Office revoked the Respondent's sponsor licence with immediate effect due to concerns about student' levels of attendance, students' eligibility to study and working in breach of their visa conditions. The Home Office were not satisfied that the Respondent was complying with its duties as a sponsor. The Tribunal is told that the decision is still the subject of an ongoing judicial review.

30 With the loss of the Home Office licence the Claimant's Tier 2 status was potentially in question. The Claimant was legally allowed to continue working on the basis of an application to the Home Office for indefinite leave to remain, which was granted on 12 October 2015. The Claimant kept Mr Fattah informed and provided him with his a copy of his residence permit once obtained in October 2015. Mr Farmer was erroneously advised on 2 October 2015 that a tier 2 licence was required but we find that at all times after 12 October 2015 there was no genuine concern about the Claimant's immigration status.

31 During 2015, the Claimant asked on a number of occasions for paid holiday and provision of payslips in order to provide evidence of employment to external organisations. One such request was made on 1 October 2015. Mr Farmer's reply was that the Claimant had no entitlement as he was not an employee. Some payslips were provided, for example those in January and February 2015 give a net pay of £1,250 after deductions for tax and national insurance. HMRC records show that these sums were not paid. Mr Fattah denied producing any of the payslips or giving them to the Claimant. That may be true but we are satisfied on the balance of probabilities that somebody in the Respondent did produce the payslips. The Claimant says that he was given them; it was not put to him that he had produced them fraudulently. No payslips were provided after February 2015.

32 In October 2015, the Claimant contacted HMRC to enquire whether the Respondent had paid his tax and national insurance. It had not. There is no evidence of the date on which the Claimant contacted HMRC. Having regard to the emails on 1 and 2 October 2015, we find on balance that the contact with HMRC was made because of the Claimant's request on 1 October for payslips and Mr Farmer's refusal in which he denied that the Claimant was an employee and referred to him as a consultant.

33 The Claimant's evidence is that in October 2015 he told Mr Farmer that he had contacted HMRC which had confirmed that the Respondent was not paying his tax and national insurance when it ought to have been. The Claimant was acting on the instruction of HMRC and we find that he believed that he was required to do so as it related to proper payment of tax and national insurance to HMRC. Mr Farmer denied any such conversation took place. We viewed Mr Farmer's denial with scepticism not least as he had previously told the Tribunal that the Respondent had never represented to HMRC that the Claimant was an employee. This is inconsistent with HMRC records and with the apparent deductions shown on the payslips which we have found were provided by the Respondent. Despite our concerns about the credibility of the Claimant's evidence on other points, on this issue we prefer his evidence to that of the Respondent as it is consistent with the HMRC records and his request for a payslip on 1 October 2015.

34 On 21 December 2015 the Claimant emailed Mr Fattah referring to the fact that his holidays ended that day but that he could not afford to return to work for the remaining two days of term, instead he would resume in the new year. Mr Farmer responded with an instruction to the Claimant to sort out his problems and return to work, concluding that if he was unable to do so, the Claimant should send in his resignation.

35 On 12 January 2016, the Claimant again asked Mr Farmer for payslips. Mr Farmer stated that this was not possible as he was not on any contract with the Respondent and he asked the Claimant to work with Mr Fattah to agree a new contract subject to immigration status. In evidence, Mr Fattah candidly accepted that the new agreement was required in February 2016: "**because several times you were asking for payslips and we could not give them to you. We wanted to make things clear**". We have no hesitation in rejecting Mr Farmer's evidence that the February 2016 agreement was only entered into due to uncertainty about the Claimant's immigration status.

36 The first two drafts of a written contract produced by the Respondent expressly stated that the Claimant was not an employee. The Claimant objected to signing. The third and final draft was produced in February 2016. It was entitled "Consulting Agreement" and did not include any clause expressly dealing with employment status. The express terms of the written agreement were that:

36.1 It would start from 1 March 2016.

36.2 The Claimant would provide services as a Programme Leader/Senior Lecturer in law programmes.

36.3 The Claimant was required to perform such duties as were consistent with his position.

36.4 The Claimant was required to provide his services on Monday, Tuesdays and Wednesdays.

36.5 The Respondent would pay the Claimant a fixed sum of £1,500 per month upon receipt of an invoice.

36.6 The Claimant was responsible for his own tax.

36.7 The agreement was valid for one year or determined by either party giving two weeks' written notice.

37 On 25 February 2016, the Claimant signed the agreement as did Mr Fattah on behalf of the Respondent. The Claimant's evidence was that the Respondent insisted that he sign the new agreement even though he explained that the implication was effectively to dismiss and re-engage him on new terms. At the time of entering into the agreement, the Claimant was aware of the right to claim unfair dismissal and was aware of time limits. He chose not to bring a claim to the Employment Tribunal at that time as he was concerned that it may jeopardise his job. We find on balance of probabilities that this was his free choice and that the Respondent did not trick or coerce the Claimant. The Respondent wanted a new contract to resolve the outstanding dispute between the parties as to pay and payslips; it wanted the clarity of a consultancy agreement to end any dispute about employment but not to end the Claimant's provision of services more generally.

38 After the new contract was signed, the Claimant submitted invoices recording between 24 and 28 hours per week. Some of the invoices are missing and some are illegible but we have done the best we can with what is included in the bundle. The Claimant generally submitted his invoices within the first half of the following month but sometimes with greater delays, for example the invoices for November and December 2016 were submitted in January and February 2017 respectively. Mr Farmer accepted that under the consultancy agreements, lecturers were still paid even if they forgot to submit an invoice. The Claimant's invoices were checked by Mr Fattah and approved for payment, generally the same day. Having regard to the schedule of payments by the Respondent we find that there was no delay in payment from March 2017 and, on balance, any earlier delays were caused by the late invoice from the Claimant.

39 From March 2016 until July 2017, the Claimant was consistently paid £1,500 per month with the exception of September 2016 where the Claimant was paid only £750. Mr Tanveer's witness statement suggested that this was due to a lack of funds and that other staff were also affected. We reject that evidence. There is no evidence of other staff being affected. When this was put to Mr Farmer, he denied that the deduction was for lack of funds but was instead because the Claimant had taken time off work. On balance, we find that the reason for the deduction was the Claimant's absence and not any broader financial difficulty.

40 The agreement did not set the number of hours to be worked in any week nor did it provide that there would be any overtime payment beyond a specified number of hours. The Claimant's evidence was that he was regularly required to work on Thursdays and Fridays and was entitled to payment. By contrast, Mr Tanveer's evidence was that the Claimant's hours were erratic, requiring Mr Kariburyo to step in and provide cover. We reject both accounts as unreliable and borne of the ill-will generated by this litigation. Both are inconsistent with the hours recorded in the contemporaneous invoices. There is no contemporaneous evidence of either alleged concern being raised. Mr Kariburyo's evidence was that in January 2017 he covered a lecture for the Claimant. Mr Farmer accepted that in general colleagues would help each other out with management only becoming involved if there were issues around

the reason for absence. Whilst, on occasion, the Claimant may have worked fewer hours in a week there were equally occasions where the Claimant worked more hours. This is consistent with the nature of his work as a lecturer where the demands of students and incidental professional duties may vary. It is far from the more extreme position of long, unpaid hours according to the Claimant or erratic hours according to the Respondent.

41 In an email sent to Mr Farmer on 25 February 2016, the Claimant purported to "suspend" the new agreement signed that day on grounds that the Respondent continued to owe him money from their previous arrangements. The parties entered into extensive negotiations with each advancing their own calculations of what was, or was not, due. This resulted in a further agreement, entitled "Settlement Agreement" being signed on 9 March 2016. The agreement is expressly stated to be in respect of the claim of underpayments from February 2013 to February 2016. The parties agreed that the Claimant would be paid the sum of £3,500 in full and final settlement, with the Respondent to have no further obligations and the Claimant no further entitlement. The Claimant did not receive independent legal advice.

42 On 14 March 2016, some days after signing the settlement agreement, the Claimant emailed Mr Farmer purporting to record that the latter had agreed that it did not affect the Claimant's continuity of employment. Mr Farmer did not reply. The Tribunal find that whilst he received the email, he did not refute its contents as he considered that the two recent agreements had adequately resolved the dispute and he did not wish to engage further.

43 From March 2016, the Claimant continued to be allowed to run his own business. He did not see external clients during his working hours on a Monday to Wednesday but, with the knowledge of the Respondent, he did help students with immigration matters during working hours. The Claimant charged the students for his help. There was no restriction on the Claimant's ability to work for other organisations on Thursdays and Fridays. In September 2016, the Claimant requested that one of his courses be reallocated to reduce his workload. In February 2017, the Claimant asked that he not be scheduled any lectures before 12noon. The Respondent agreed to both.

44 In April 2016, Mr Farmer wanted to propose the Claimant for a permanent Professorship with the Respondent. The Claimant declined as he did not want to limit the range of lecturing jobs for which he could apply elsewhere. Instead, it was agreed that the Respondent would sponsor the Claimant's trip to the University College of Business in Poland as a visiting Professor. The Claimant's evidence that he was forced to accept this appointment upon threat of otherwise losing his job is unreliable. In email correspondence with Mr Farmer, the Claimant felt able to express concern and protect his position throughout 2016 and 2017 yet there is no contemporaneous evidence of any concern or objection to the visiting Professorship. We find his evidence on this issue unreliable; it is borne of a desire to bolster his case in this Tribunal rather than a reflection of what was mutually agreed at a time when the parties were not in litigation.

45 The Claimant's evidence was that in August 2016, he was pressurised by the Respondent to become Course Leader on a BA Business course. He accepted and was asked to move from the general open plan office to a private office on the ground

floor. He states that on or around 17 October 2016 he was told that he could no longer use that dedicated office but was required to use the staffroom with other lecturers. The Claimant states that, when asked why the office had been removed, Mr Farmer told him that he was no longer Course Leader. When asked why Mr Vohra was now Course Leader, Mr Farmer said: "**I am more comfortable to work with the Asians**". The Claimant's evidence was that he told Mr Farmer that the statement was discriminatory. He did not raise a formal complaint about the comments at the time as he was not intending to bring an employment claim at that time; his claim was in respect of termination and it was only when he brought all of the issues together that he made the connection.

46 The Respondent disputes the Claimant's case. Mr Farmer's evidence was that seven or eight other lecturers also moved from the ground floor to the staffroom upstairs at the same time because the Respondent needed the downstairs space for greater student use, for example, interviewing. Mr Farmer stated that the terms Course Leader and Programme Leader are the same; the Claimant remained Programme Leader for the Business Course. He maintained that Mr Vohra was never the Course Leader but, as he was full-time, he could cover for dates when the Claimant was not there. He denies making the "Asians" comment. Mr Vohra's evidence was that he was not teaching any of the Claimant's subjects nor was he Course Leader for the business course; he had never held any leadership position on the BA Business Course, indeed the current Course Leader is Marilyn Rushton. Mr Vohra accepted in cross-examination that his name was given to students and London MET as Course Leader. Mr Kariburyo identified Mr Vohra as the Course Leader on the business course although he could not remember when he had been appointed.

47 The Respondent's 2016/17 BA Honours Business Administration Course Handbook shows the Claimant as Course Leader with an office on the ground floor at Kalam House. The timetables for the course in the period November 2016 to May 2017 for level 3 and level 6 showing courses over the full days of the week. Mr Vohra is clearly identified as the Programme Leader. The Claimant is included on the timetables but is described as a Module Leader. The Course Handbook for the same course in 2017/18 identifies Mr Vohra as Course Leader. Given the inconsistencies in evidence given on behalf of the Respondent and the contradictions with contemporaneous course documents, on the balance of probabilities, we prefer the Claimant's evidence and find that he was initially appointed to be Course Leader but was later removed and replaced by Mr Vohra. Whilst Course Leader the Claimant was allowed to use the private office on the ground floor; upon his removal as Course Leader, he had to return to the shared office.

48 As to the reason for the Claimant's removal, we do not accept the Respondent's explanation as satisfactory. The Respondent was aware from February 2016 that the Claimant worked only three days per week yet had identified him as Course Leader in the 2016/17 Handbook. His availability had not changed and the Respondent adduced no documentary evidence to support its case that Mr Vohra was only cover on Thursdays and Fridays. We find that Mr Farmer's evidence on the Course Leader role was another example of a situation where he said what he believed best supported the Respondent's case, regardless of the truth.

49 There is still the dispute of evidence as to the "Asians" comment. We bear in

mind that just because we have found Mr Farmer to be unreliable on some matters does not necessarily mean that his evidence should be rejected on all disputes. Indeed, this is a case where we have also expressed significant doubt about the reliability of the Claimant's evidence, including a tendency to emotional responses and exaggeration which affected his recollection. In resolving the dispute, the Tribunal regarded it as relevant that the Claimant refers (in his own words) to colleagues as "the Asians", including being replaced by an Asian and Mr Farmer's use of Asian language to discuss official matters with other Asians. The Claimant raised no written complaint at the time about the alleged comment. In the issues before Employment Judge O'Brien the protected act is recorded as the Claimant's question on 17 October 2016 about whether he was being treated badly because he not Asian. The comment ascribed to Mr Farmer in the Claimant's evidence is not identified in the Issues (although in fairness it is included in the original pleading). On balance, we do not find that Mr Farmer did say that he was more comfortable working with the Asians. The Claimant may have believed that Mr Farmer felt more comfortable in this way or, more likely in our view, has come to believe that with hindsight given the way in which he was later dismissed. Nevertheless, we do not accept that the "Asians" comment was said by Mr Farmer, nor was it something that the Claimant raised as discriminatory, on 17 October 2016.

50 On 23 March 2017, London Metropolitan University gave the Respondent one year's notice of termination of the partnership agreement. The consequence was that the Respondent was not able to admit any further students to the courses. It was, however, allowed to continue to provide courses to the existing students until they graduated. The inability to recruit new students was a major financial blow to the Respondent. We infer that the Respondent was keen to retain as many of its existing students as possible and, consequently, an increased desire to maximise pass rates.

51 It was at about this time in March 2017 that the Respondent was concerned about the large number of students failing an assessment on the Claimant's Corporate Environment module. A resit paper was issued by Mr Tanveer. In his witness statement, when dealing with the re-writing of exams and marking of examination scripts, the Claimant complains that he was "**being controlled by those (Asians) whom I am better qualified and who do not even teach those modules, simply because they are all Asians**". The Claimant did not raise any complaint in March 2017. When he did address the question of exams and marking scripts, it was about the alleged request to mark over 60 scripts in just four days (see his email sent on 24 July 2017 which does not refer to the re-sit paper being set by somebody else). This is consistent with his Schedule of Allegations submitted to the Tribunal, where the Claimant refers to this re-sit as part of the batch of scripts he was required to mark at short notice. We find that the Claimant's concern was not about the setting of the re-sit paper but the timescale for marking it. This we find is not consistent with a genuine belief that elements of his module were being removed from him.

52 The Claimant's evidence is that on or around the third Monday of May 2017, the administrator threated that he would be reported to Mr Farmer if he did not sign a fabricated student attendance sheet. In considering this allegation, we had regard to the other evidence given by the Claimant about his registers. Initially, the Claimant disputed the content of the registers contained in the bundle and asserted that his signature had been improperly "cut and pasted" or forged. Upon sight of the original

registers, the Claimant retracted his allegation about cut and pasting but maintained that his signature had been forced on one register. Having seen the document ourselves, it is clear that an administrator has written the Claimant's name on the register but that it does not purport to be his signature. The Claimant's willingness to make serious allegations of impropriety of this sort without any proper evidential basis is a further example of the caution to be attached to his evidence overall.

53 Registers for the Claimant's courses show very low levels of attendance. The Respondent says that low levels of attendance was a problem specific to the Claimant and caused by student dissatisfaction. The Respondent relies upon a complaint received from a group of students which states that the Claimant would arrive late and leave early and had delayed handing out an assessment. This was a criticism not raised with the Claimant before his dismissal. The Home Office decision to revoke the Respondent's sponsorship licence in 2014 identified a more widespread problem with attendance. We are not satisfied that low attendance was limited to the Claimant's course but find that the Respondent was keen to ensure that proper registers were maintained and signed by the appropriate lecturer. To that extent, administrators would chase lecturers to return signed registers. We do not consider this improper and far less to have been targeted at the Claimant.

54 The Claimant did not send any email in May 2017 to complain that he was being required to sign fictitious registers. This was an allegation which he first made in his email on 12 July 2017. Given the serious nature of the allegation, we do not find it plausible that the Claimant would not have complained had the instruction been given. We took into account the Claimant's willingness to make allegations of impropriety about the registers which were in fact without foundation. On balance, we find that the Claimant was not put under pressure to sign fictitious registers by the administrator or by anybody else; he was simply pressed to return properly completed attendance registers as were all lecturers.

55 A significant dispute of evidence has arising over circumstances surrounding a test on the Corporate Environment. There are two allegations arising from it: first that Mr Tanveer gave the Claimant over 60 scripts to be marked in a very short period of time; second that the Claimant was instructed to pass students whom he believed had copied on the test. The Respondent denies both allegations.

56 The Claimant's pleaded case is that the Corporate Environment scripts from the March 2017 re-sit and some scripts from a test on International Trade and Finance were given to him by Mr Tanveer on 5 July 2017 with an instruction that they be marked by Monday 10 July 2017. The Issues agreed before Judge O'Brien mistakenly refer to the instruction being given on 7 July 2017. The Respondent denies that there was an unreasonable instruction: there were only 38 students on the Corporate Environment test which was sat on 5 July 2017 and the Claimant had had plenty of time to mark the International Trade and Finance scripts as the test was sat on 5 June 2017. There is no evidence about the numbers of students sitting the ITF paper nor dates of when the scripts were marked. On balance, we accept that the Corporate Environment test was sat on 5 July 2017 and that there were about 60 scripts for the two combined tests. We further accept the Claimant's evidence that all were given to him on 5 July 2017 and were to be marked by 10 July 2017. This is consistent with the Claimant's email on 12 July 2017 which refers to him having taken the scripts home to

mark and returned them on 10 July 2017.

57 The Claimant's evidence is that on 12 July 2017, he was in the staffroom writing student feedback on the Corporate Environment test scripts. The Claimant believed that some students had copied from each other and therefore wrote "copied" on the top of the sheet and did not allocate a mark. It is common ground that Mr Tanveer entered the staffroom as the Claimant was marking the scripts and that the Claimant said words to the effect that the results were looking good, but there was some copying. It is not clear whether Mr Tanveer saw the Claimant write "copied" on the scripts in question. The Claimant then says that Mr Tanveer muttered: "**you should pass the students**" and left the office. A couple of minutes later, Mr Farmer came in and told him to follow Mr Tanveer's instruction. When the Claimant questioned this, Mr Farmer insisted and told him to hand the scripts to Mr Kariburyo. The Claimant says that he was concerned about the instruction and asked that he be sent to him in writing. Later that same day, the Claimant sent an email to Mr Farmer to complain.

58 Mr Tanveer denied giving the Claimant any instruction to pass the students but accepted that he told the Claimant to give the scripts to Mr Hamim Kariburyo for investigation, which he said was standard policy where there was any concern about copying. In his witness statement, Mr Tanveer said that the Claimant refused to give the scripts to Mr Kariburyo; in the Tribunal hearing, Mr Tanveer said that the Claimant did not reply at all. Mr Farmer denied that he visited the staffroom or told the Claimant to follow Mr Tanveer's instruction.

59 In deciding this conflict of evidence, we had regard to the Claimant's email sent on 12 July 2017 which read;

> "**Dear Farmer (CEO) BITE,**
>
> **It appears there have been devising ways to implicate me.**
>
> **There have been series of recent unwholesome, unethical and unjust acts that I am being compelled to do.**
>
> - **Sometime in May, I was asked to sign newly and unauthentic prepared students' attendance registers on the ground that Mr. Tanveer instructed so and that all other lecturers have signed. When I refused after telling them the negative effects, they insisted that the direction was from you because the registers would be presented to validating Uni 'London Met'.**
>
> - **Also on Monday, Tanveer saw the scripts that I was marking and asked me the students' performances and I noted that some did well, but that many of the students copied each other or colluded. He told me to pass them notwithstanding the collusion. I told him that has never been the academic practice. He replied what practice that it was an instruction from the management. I asked him to send an e-mail to me to that effect authorising me to pass them. He then left. Just a few minutes later, you confronted me to stop writing copied on the scripts that that if I don't want to do what Tanveer advised that I should hand over all the copied scripts to Amim. Of which I replied that I needed an email informing me to pass the students. You said ok and left.**
>
> - **I came today Wednesday, you came again to ask me that I refused to take students works home to mark. But, I stated that I took them home and brought them back on**

Monday after marking.

Please, what is going on? When has BITE changed it usual academic practice; I don't want to be implicated for nothing.

I just want to bring this to your notice"

60 Mr Farmer did not reply to the Claimant's email.

61 On the balance of probabilities, we prefer the evidence of the Claimant. Whilst at times the Claimant let his emotion get the better of him which rendered his evidence unreliable on some issues, we did not consider that to be the case on this matter. The Claimant's evidence is consistent with his contemporaneous email. It is not a mis-recollection borne out of disappointment at his dismissal as were matters such as the Corporate Environment re-sit and the complaint about having to mark 60 scripts in a relatively short timescale. Mr Joshi submitted that there was an inconsistency in the Claimant's case about whether the alleged instruction was given on Monday 10th or Wednesday 12th July 2017. We did not consider this significant given that the chronology was reliably set out in the contemporaneous email.

62 The Claimant was unwilling to pass students whom he believed did not meet the required standard. The Respondent's case is that the Claimant failed to follow the Malpractice Policy whereby it says he should have given the student a "zero" mark, with reasons, signed the script and passed it to the second marker for confirmation. The Claimant's case is that he was not in breach of any policy; there was no need to pass the script to the second marker as there was no mark to standardise and it was not common practice to sign the scripts. We had regard to the Malpractice Policy in the bundle. This applied to staff malpractice and not to student malpractice; there was no malpractice of the Claimant in respect of the exam. We accept the Claimant's evidence that it was not in fact practice for staff to sign and forward all scripts to the second marker. Indeed, we note that the scripts set for the 28 March 2017 were also not signed by the Claimant and contain no input from the second marker. The Respondent did not discuss this with the Claimant prior to his dismissal. We find that the Respondent's criticism of the Claimant arose after the event and only as an attempt to justify his dismissal in light of his reluctance to pass students whom he believed had copied their work in the test.

63 There was no contemporaneous challenge by the Respondent to the account set out in the Claimant's email. This was a serious allegation by the Claimant, it is not plausible that Mr Farmer would not have made clear in writing that the Claimant was not being asked to pass students who copied but only to pass the matter to Mr Kariburyo for investigation if this indeed were the case. On this issue, we considered that neither Mr Tanveer nor Mr Farmer were witnesses of truth. The instruction described by the Claimant is consistent with the financial pressure upon the Respondent in light of the London Metropolitan University notice to terminate the partnership. This created a powerful incentive to pass existing students who would then continue on the course even where, as the Claimant believed, they had cheated in their test.

64 In or around July 2017 Ms Marilyn Rushton, another lecturer, intervened to provide additional support to students who had been set an assessment on one of the

Claimant's modules. From emails sent by students at the time, it appears that the Claimant had set the assignment on short notice and without clarity as to what was required. In such circumstances, the involvement of Ms Rushton was entirely due to the need to support the students in difficult circumstances.

65 On 13 July 2017, when not at work, the Claimant received an email informing him that his services had been terminated. The email came as a complete surprise; there had been no warning and no discussion with the Claimant to suggest that he may be dismissed. Mr Fattah and Mr Farmer's evidence was that there was a discussion about staffing in March 2017 after receipt of the London Metropolitan University notice to terminate the partnership agreement. They both stated that it was agreed at that point that the contracts for the Claimant and two other members of staff would be terminated as a result of the reduction in student numbers. There is no documentary evidence to confirm any such discussion or agreement. Mr Tanveer's evidence was that he had only been told by Mr Farmer about the decision to terminate the Claimant's services around the middle of July after the emails had been sent. Mr Tanveer was Associate Dean and responsible for distributing work to lecturers; it is simply not plausible that he would not have been aware of any such agreement had one genuinely been reached.

66 The Claimant's dismissal came at a time when he was actively involved in a bid for Suffolk University to validate the Respondent's degrees and part way through an academic year (for those students who had started in February and would not finish their course until at least September). After the Claimant's dismissal, Mr Vohra and Ms Rushton taught the Claimant's modules until September 2017 when there would be further assessment.

67 Two other members of staff were also dismissed on 13 July 2017, Mr Haris Haman and Mr Jahid Husain. They were engaged to provide support in English language skills to students on the BA Business course following earlier concerns expressed by London Metropolitan University. Mr Tanveer accepted that this was not a module on the degree course but a short session of support.

68 The Claimant's evidence is that on 24 July 2017, the Respondent told him not to use their organisation for his publications and that he would not get a good reference. The Claimant's email of the same day makes no reference to any such comment. Given that the Claimant referred to possible litigation in that email, we are satisfied that had the comment been made, he would have included it. On balance, we do not accept that any such threat was made on 24 July 2017. On 26 October 2017, the Claimant asked Professor Hasan for a reference which he would draft himself. Professor Hasan initially agreed to provide such a reference but contacted the Claimant on 31 October 2017 to say that he had changed his mind as Mr Farmer believed that it could be used in these Tribunal proceedings. Professor Hasan instead asked the Claimant to give his address to the university and he would forward a recommendation in the usual way.

Law

Employment Status

69 The Employment Rights Act 1996, section 94 gives the right not to be unfairly dismissed only to an employee, as defined within s.230 Employment Rights Act 1996. This requires the claimant to establish that he worked under a contract of service or apprenticeship, whether express or implied, and (if express) whether oral or in writing.

70 There can be no contract of services without there being an irreducible minimum of obligation on both sides, **Nethermere (St Neots) Ltd –v- Gardiner** [1984] IRLR 245. Mutual obligations are necessary for there to be a contract at all. If there is a contract, the Tribunal must then determine what type of contract it is, having regard to the nature of the obligations. Control alone cannot determine employment status; the contract must also necessarily relate to mutual obligations to work and to pay for (or provide) it, **Cotswold Developments Construction Ltd –v- Williams** [2006] IRLR 181.

71 Section 230(3) of the Employment Rights Act 1996 defines a worker as an individual who has entered into or worked under a contract of employment or:

> **(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another part of the contract his status is not by virtue of the contract that a client or customer of any profession or business undertaking carried on by the individual.**

72 It follows, therefore, that there are two parts to the section 230(3)(b) worker test. First, whether or not the contract is an undertaking personally to perform work. Second, whether or not by virtue of the contract, the recipient is a client or customer of a business undertaking carried on by that individual. In deciding status, a relevant factor will be a focus on whether the purported worker actively markets his services as an independent person to the world in general (thus having a client or customer) or whether he is recruited by the principal to work as integral part of the principal's operation.

73 Section 83 of the Equality Act 2010 provides that employment means employment under a contract of employment personally to do work.

Unfair Dismissal

74 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon some other substantial reason, alternatively redundancy. If so, the Tribunal must consider whether dismissal was fair in all of the circumstances of the case. This will include consideration of whether a fair procedure was adopted.

75 The Claimant asserts that he was dismissed because he made a protected disclosure. If this was the sole or principal reason for dismissal, that dismissal is automatically unfair by virtue of s.103A Employment Rights Act 1996.

76 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996. At the time when the Tribunal heard submissions, it had regard to the Employment Appeal Tribunal Judgment in **Kilraine v LB of Wandsworth** [2016] IRLR which cautioned some care in the application of **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38 where the Employment Appeal Tribunal drew a distinction between an allegation and conveying information: the question is simply whether there is a disclosure of information as required by the Act, that it is also an allegation is nothing to the point. On 21 June 2018, the Court of Appeal agreed that approach. The Tribunal must look at the words used by the Claimant to decide whether they convey information (and an allegation may contain information); words which are too general and devoid of factual content tending to show breach of a legal obligation will not amount to information. Words which otherwise fall short may be boosted by context or surrounding communication. The assessment is an objective evaluation in all of the circumstances of the case.

77 The Claimant must reasonably believe that the information tends to show a relevant breach and that it is in the public interest to make the disclosure. The belief that a disclosure is in the public interest must actually be held at the time of the disclosure; whether or not it was a reasonable belief may include consideration of matters not in his mind at the time and it need not be the only or predominant motivation in making the disclosure, see **Chesterton Global Ltd v Nuromohamed** [2017] IRLR 837 at paragraphs 27 to 31 and 37.

78 The requirement for reasonable belief, which should not be conflated with good faith which is addressed below, involves an objective standard by reference to the circumstances of the discloser, including their qualifications, knowledge of the workplace and experience, **Koreshi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, EAT.

79 In **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, the EAT gave helpful guidance as to the approach to be adopted by a Tribunal considering a protected disclosure claim. This emphasised the need not to adopt a rolled up approach but to consider each disclosure by date and content, identify the risk to health and safety in each case and the detriment (if any) which is caused thereby. The need to apply this detailed analysis was confirmed in **Patel v Surrey County Council** UKEAT/0178/16.

80 The correct approach to causation and the different tests which apply to dismissal and to detriment claims was set out in **Fecitt v NHS Manchester** [2012] IRLR 64 per Elias LJ at paragraph 45 (and applied in **Patel**). Whereas the Tribunal must decide whether the protected disclosure was the sole or principal reason for dismissal, it is enough that the disclosure materially influenced the Respondent's treatment of the Claimant in a detriment claim. If the Tribunal finds that the reason given by the Respondent is false, it may be appropriate to draw an adverse inference.

Race Discrimination/Victimisation

81 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably

than he treats or would treat others. Race is a protected characteristic.

82 Section 27 provides that a person is victimised where they are treated unfavourably because of a protected act. No comparator is required.

83 Conscious motivation is not a requirement for direct discrimination or victimisation, it being enough that race or the protected act had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

84 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

85 The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination; they are not, without more, sufficient material from which we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

86 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Money claims

87 The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 Article 3 provides "that proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if the claim arises or is outstanding on the termination of the employee's employment". The claims are for wages and/or notice and, therefore, fall within the scope of art.3.

88 Accordingly, in order to succeed in his breach of contract claim, the Claimant must show:

(i) that he was an employee of the respondent;
(ii) that the claim arises or was outstanding on termination of his employment (if such there was); and
(iii) that there was a breach by the respondent to pay monies due whether as wages or notice.

89 The Employment Rights Act 1996 ("ERA") s.13 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deductions are required or authorised to be made by virtue of a statutory provision, a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

90 A deduction occurs when an employee or worker is paid less than the amount due on any given occasion including a failure to make any payment, s.13(3) ERA. The Tribunal must first consider whether there has in fact been any deduction, in other words what amount was due to the Claimant under the terms of his contract as set out above. In the event that it concludes that a lesser sum was paid, the Tribunal must consider whether the provisions of the contract amounted to a relevant provision authorizing such deduction.

91 An employee's entitlement to paid annual leave is set out in regulations 13, 13A, 14 and 16 of the Working Time Regulations 1998. In particular, regulation 14 provides that where the employment is terminated during the course of a leave year, we must determine the amount of any payment in lieu of accrued but untaken holiday by multiplying the statutory entitlement by the proportion of the leave year expired and then deducting the actual amount of leave taken.

Conclusions

Employment Status

92 The Respondent's pleaded case was that the Claimant was an employee prior to March 2016 and thereafter became a self-employed consultant. This concession was repeated at the Preliminary Hearing in front of Judge O'Brien and is recorded in his Summary. The Respondent sought to resile from this concession in the course of this hearing. Mr Farmer's evidence was that the Claimant had never been an employee and that the reference in the Grounds to Resist to "all deductions being made" was in fact a reference to amounts not paid when the Claimant was absent. The Tribunal considered this frankly implausible and indicative of the tendency of Mr Farmer to give evidence which he considered expedient rather than truthful.

93 In deciding whether to permit the Respondent to resile from its earlier concession, we had regard to the late stage at which it arose, the fact that it was Mr Farmer who had provided the information from which the Response was drafted and the fact that the concession of employment status was consistent with the Respondent's declaration to the Home Office on the sponsorship form. On balance, we considered that the attempt to resile from the concession at trial was made in bad faith and should not be permitted.

94 In considering the Claimant's employment status, the industrial experience of

the lay members was particularly helpful. There was a contract in place between the parties which governed the relationship and we considered whether or not its terms were such that there was the necessary mutuality of obligation between the parties. Whilst the Claimant had no set hours, he was obliged to work each Monday to Wednesday and teach to the timetable allocated to him. The Respondent was obliged to pay him the sum of £1,500 per calendar month. The Respondent did not pay tax and national insurance; the Claimant was said to be responsible for those.

95 The Claimant enjoyed a degree of flexibility, such as the ability to ask that his lectures not start until after 12noon, but the Tribunal considered that this was consistent with the professional status of the Claimant. Furthermore, we are satisfied that if the Claimant's request could not have been accommodated in the timetable, he would not have been permitted to refuse to teach. As for personal service, the Respondent has adduced evidence of one occasion on which a colleague agreed to cover for him. Again, having regard to the nature of the employment, we consider that such a cover arrangement with another lecturer engaged by the Respondent falls far short of demonstrating that there was a genuine right to substitute and therefore no obligation for personal service.

96 Whilst there was no restriction on the Claimant's ability to work for other institutions on the days when he was not working for the Respondent, he was not permitted to conduct his own business for clients other than the Respondent's own students. The Claimant was integrated into the Respondent's organisation: he had his own office, he was held out as part of the "BITE" team to partner universities, was sponsored by the Respondent as a visiting Professor to the University College of Business in Poland and was named in booklets and brochures as part of the staff. The Respondent provided him with facilities and materials to discharge his duties and exercised control over the Claimant's performance, for example, in his obligations to deliver scripts which had been marked in a timely fashion and requiring appropriate feedback to be given.

97 Having regard to our findings of fact and the relevant factors above, we consider that even after 1 March 2016 the Claimant remained an employee of the Respondent. The new Consultancy Agreement and the stipulation that the Claimant would be responsible for his own tax were attempts by the Respondent to change the nature of the relationship. This change in 'label' was not, however, a change in the real relationship between the parties. As such the Tribunal has jurisdiction to hear all of the Claimant's claims.

Dismissal in February 2016

98 In January 2016, Mr Farmer's position was that there was no contract in place between the Respondent and the Claimant. We disagree. Whilst there was no written agreement there was an oral agreement which we have accepted was one of employment. We have found that the original agreement in August 2013 was that the Claimant would be paid a salary of £24,500 from August 2014, prior to that receiving £1,000 per month gross. The consulting agreement purported to supercede all previous contracts but we have found that the Claimant continued in reality thereafter to continue to be an employee. In other words, we do not consider that at law he was dismissed at all rather that his terms and conditions were amended and recorded in

writing.

99 Even if the Claimant were dismissed, any claim for unfair dismissal would have arisen on 28 February 2016 and was significantly out of time by the presentation of the claim form on 31 July 2017. At the time of entering into the new agreement the Claimant was aware of the right to claim unfair dismissal and was aware of time limits. He chose not to bring a claim to the Employment Tribunal as he was concerned that it may jeopardise his job. The Claimant is a law lecturer and qualified lawyer in Nigeria; he holds himself out as providing paid employment law services to the public. On balance we find that, even if the Claimant been dismissed on 28 February 2016, it was reasonably practicable for him to have brought a claim in time. Any unfair dismissal claim relying upon the dismissal in February 2016 is out of time.

Protected disclosure(s); detriment and dismissal

100 The first alleged protected disclosure is that made orally to HMRC and then to Mr Farmer in October 2015. We have found that when the Claimant contacted HMRC it was to ask whether the Respondent had paid his tax and national insurance. We do not consider that asking this question was a disclosure of information by the Claimant, far less that it tended to show a relevant breach. The conversation with HMRC did not amount to a protected disclosure.

101 Following the Claimant's enquiry to HMRC, we have accepted his evidence that he told Mr Farmer that he had contacted HMRC who had confirmed that the Respondent was not paying his tax and national insurance when it ought to have been. This was a statement which disclosed information, namely the conversation with HMRC and the fact that HMRC records showed that the Respondent was not paying tax or national insurance. It was information which tended to show a relevant breach as the Claimant was an employee and the Respondent was under a legal obligation to make those deductions and pay them to HMRC. As for public interest, neither the Claimant nor Mr Joshi addressed us in any great detail on this point. The Claimant's case was that he reasonably believed the arrangement to be a sham designed to mislead HMRC. We have found that the Claimant held the conversation with Mr Farmer because HMRC had instructed him to do so and that the Claimant believed that requirement arose because it related to proper payment of tax and national insurance to HMRC. Whilst the principal purpose of the disclosure was to get the Respondent to give him payslips (which was in his own personal interest), there is no requirement that the public interest be the only or even the predominant motive. The failure to pay deductions applied to the majority of the Respondent's 20 lecturers who were also termed "consultants". The Claimant believed it was a sham depriving HMRC of money properly due. Having regard to all of these circumstances, we accept that the Claimant did reasonably believe his disclosure to be in the public interest. The disclosure to Mr Farmer in October 2015 is protected.

102 The Claimant has provided a list of detriments which he says were because of the protected disclosure. The first four all relate to the dispute between him and Mr Farmer about employment status, namely non-payment of tax and national insurance, failure to provide payslips or paid holiday and describing him as a consultant. We have found that the Claimant contacted HMRC after his request for payslips and Mr Farmer's refusal over the course of 1 and 2 October 2015. There was no payment of

tax, national insurance or holiday from the outset of the working arrangement in 2013. Indeed, it is the failure to pay tax and national insurance which caused and formed the subject matter of the disclosure itself. Insofar as deductions continued not to be paid, the protected disclosure was not a material and effective cause. We consider that the same is true after October 2015 of the Claimant's requests for payslips and paid holiday and the Mr Farmer's repeated assertion that the Claimant was a consultant. These issues around employment status and its consequences happened as much before as after the protected disclosure. The October 2015 disclosure was caused by the dispute about employment status, in that it was the continued failure to make deductions or provide payslips and the assertions that the Claimant was not entitled to payslips or paid holiday because he was a consultant which caused him to go to HMRC and repeat the information to Mr Farmer. Once made, the dispute continued as it had before. The disclosure made in October 2015 was not a material and effective cause of the continued problems thereafter.

103 We turn then to the next of the detriments, namely many threats of resignation, asked to work more than three days on the same payment and being forced or tricked into a new contract due to threats of dismissal. These relate to the consultancy agreement which came into effect from 1 March 2016. The Respondent's case was that the new agreement was only entered into due to uncertainty about the Claimant's immigration status. We have rejected that evidence; the Claimant had provided evidence of his indefinite leave to remain to the Respondent and there was no genuine concern about the Claimant's immigration status after 12 October 2015. We have found that the new contract was required because of the ongoing dispute about employment status, including the Claimant's repeated insistence that he was entitled to payslips and his concern about whether tax and national insurance were being paid by the Respondent. Part of this included the Claimant's disclosure that he had contacted HMRC and been told that no deductions had been paid on his behalf. The Respondent wished to have clarity and to put an end to the Claimant's assertions. We bear in mind again that the protected disclosure does not have to be the only or predominant cause, as long as it is an effective cause. Overall, and whilst we do not accept the Claimant was tricked, we are satisfied that the October 2015 disclosure was a material and effective cause of the requirement that the Claimant sign the new agreement which purported to remove the Claimant's employment status from 1 March 2016.

104 The reference to resignation appears to arise out of an email sent by Mr Farmer in December 2015 in connection with the Claimant's absence from work on 22 and 23 December 2015. The reference to resignation is in response to the Claimant's refusal to return to work on the last two days of term due to his financial circumstances, bluntly that he did not consider it reasonable to pay the train fare for only two days. Whilst Mr Farmer's response was inappropriate, it was entirely caused by the Claimant's failure to attend work; the earlier protected disclosure about contact with HMRC was not a material or effective cause. We have not found that there was any other "threat to resign" (which we understand to mean that the Respondent pressed him to resign). Nor have we found as a fact that the Claimant was required to work for more than his contracted three days without additional payment and, even on those few occasions when he may have done so, this was for professional reasons and entirely unrelated to his protected disclosure.

105 As for the allegation that the Claimant was forced to be a Professor, this was an

opportunity suggested to the Claimant and there was no element of compulsion upon the Claimant to accept a Professorship with the Respondent. The Claimant suffered no detriment and, even if he had, it was entirely unrelated to the protected disclosure in October 2015. As for the visiting Professorship, no reasonable employee could justifiably consider this to be a detriment. The Claimant did not object, it was a positive enhancement to his career prospects and there was no compulsion or coercion.

106 The Claimant's pay was reduced in November 2016 because he was absent on holiday for two weeks. The Claimant's case is that it was a detriment because of a protected disclosure. We disagree. The Claimant was not paid holiday because the Respondent maintained that he was a consultant and, relying upon the terms of the March 2016 agreement, was not entitled to paid holiday. Whilst we have found that the protected disclosure was a material and effective cause for the introduction of the new contract, thereafter the Respondent was acting in line with what it believed were the legal obligations thereunder. The Claimant's position appeared to be that "but for" the protected disclosure there would be no March agreement and therefore he would have had paid holiday. This is not compelling for two reasons: firstly, the causal test in protected disclosure detriment is not "but for" and secondly (but perhaps most telling), the Claimant was in any event being deprived of paid holiday both before and after his protected disclosure in October 2015. We do not accept that the protected disclosure was a material and effective cause of the failure to pay holiday in November 2016.

107 As we have found above, the Respondent was keen to ensure that registers were signed by lecturers. To that extent we can understand that the Claimant felt pressure from the administrator to do so. However, we have not found that there was any threat by the administrator that the Claimant would be reported to Mr Farmer if he did not sign a fabricated student attendance list. Nor was there any evidence that the administrator was even aware of the protected disclosure in October 2015. The disclosure was 18 months before the issue of the registers arose and payslips and deductions were not matters which were the subject of ongoing dispute after 1 March 2016. There is nothing in the chronology from which we could properly infer that the protected disclosure was an effective or material cause for the request to sign registers.

108 The Claimant complains of late payments under the March 2016 agreement by up to three or four months of arrears. There are no delays of payment from March 2017; the invoices for January and February 2017 are not in the bundle; the invoices for November and December 2016 were submitted late by the Claimant. Many of the earlier invoices are missing or illegible. We have found on balance that delays in payment were caused by the Claimant's late invoices. There is no evidence from which we can find or infer that the protected disclosure to Mr Farmer in October 2015 was a material or effective cause of any late payment.

109 The Claimant suggests that the instruction by Mr Tanveer to give the scripts to Mr Kariburyo was also a detriment because of a protected disclosure. As the second disclosure came after the instruction by Mr Tanveer, it follows that the Claimant must be relying upon the disclosure in October 2015. As above, we take into account that 21 months had elapsed between the disclosure and the alleged detriment and that payslips and deductions were not matters which were the subject of ongoing dispute after 1 March 2016. There is nothing in the chronology from which we could properly

infer that the protected disclosure was an effective or material cause for the instruction on 12 July 2017 by Mr Tanveer. Rather, we consider that it was entirely by reason of the Respondent's desire to retain as many of its existing students as possible in light of the financial pressure caused by the notice to terminate given by London Metropolitan University.

110 The second alleged protected disclosure is the email sent by the Claimant on 12 July 2017. In his email, the Claimant disclosed information in that he had told Mr Tanveer that many of the students had copied and that Mr Tanveer had told him to pass the students anyway; there was further information that Mr Farmer had then told him to stop writing copied on the scripts and that if he did not want to do what Mr Tanveer advised (in other words pass the students anyway) he should give the copied scripts to Mr Kariburyo. This was information which the Claimant believed tended to show a breach of the Respondent's legal obligations as part of its partnership with London Metropolitan University and that it was in the public interest that there be integrity in examination standards and, ultimately, the awarding of degrees. We accept that in the context of the academic world both beliefs were reasonable. The email on 12 July 2017 was a protected disclosure.

111 As for the reason for the Claimant's dismissal, the Respondent's case is that this was for some other substantial reason, namely the London Metropolitan University notice in March 2017 to terminate the partnership agreement.

112 As we have found above, there had been no warning or discussion with the Claimant that his job may be at risk. There is no documentary evidence to support the evidence of Mr Fattah and Mr Farmer that termination of the Claimant's contract was discussed and agreed in March 2017 and it is not plausible that, had there genuinely been such a discussion, Mr Tanveer would not have been at least aware of the decision given his responsibility for distributing work to lecturers. Even though there would be no new students, it would make no sense to dismiss the Claimant part way through the academic year for the February cohort. It is again not plausible that Mr Farmer would not have discussed with Mr Tanveer the impact upon course delivery or who would cover the Claimant's modules for the rest of the academic year before the Claimant was dismissed. Moreover, the Claimant's dismissal came at a time when he was actively involved in a bid for Suffolk University to validate the Respondent's degrees. Taking all of this into account, we find that the Respondent has not proved that some other substantial reason was the cause of the dismissal. Indeed, we draw an adverse inference from the Respondent's reliance upon a patently untrue reason and from the chronology, namely a protected disclosure on 12 July 2017 and an out of the blue dismissal the very next day. For these reasons, we are satisfied that the protected disclosure on 12 July 2017 was the sole reason for the Claimant's dismissal. The claim of automatic unfair dismissal because of a protected disclosure succeeds.

113 The Claimant also claims that that the inadequate and untrue particulars of the reason for dismissal given by the Respondent amounts to a separate detriment for the purposes of s.47B. Section 47B does not apply where the detriment amounts to a dismissal. Here, the reason for dismissal as given to the Claimant at the time and that given to the Tribunal are all part of the section 103A claim and we reject any free-standing detriment claim.

114 Finally, the Claimant asserts that the refusal to give him a reference was also a detriment because of his protected disclosure(s). As we have set out above, we have not found that the alleged comment about a reference was made on 24 July 2017. As for the emails from Professor Hasan in October 2017, these post-date the claim form and the issues as identified at the Preliminary Hearing on 9 October 2017. The Claimant's later schedule was emailed on 30 October 2017 and was considered by Judge O'Brien who identified the allegations at D2 to D11 as potential detriments. The reference appears at D14 and does not refer to Professor Hasan. For all of these reasons, and given that the Respondent has not had a fair opportunity to defend such an allegation, we do not consider that later allegation to be properly before us in this claim.

115 On the basis of our conclusions above, the only protected disclosure detriment claim which would succeed is the introduction of the March 2016 agreement. In the absence of any later detriment it appears to have been presented out of time. Whilst we have considered time points on other claims where it was identified in the Issues, time limits and jurisdictional points on the s.47B claim were not matters addressed by Judge O'Brien or by the parties in submission. It is appropriate that the parties have chance to do so at the forthcoming remedy hearing.

Race Discrimination and Victimisation

116 As a matter of fact, we have found that the Claimant was removed as course leader and replaced with Mr Farid Vohra in or around 17 October 2016, this meant that he lost his dedicated office on the ground floor and moved back to the shared staffroom. We have also found that to the limited extent of the exam resit, elements of his Corporate Environment module were taken out of his control in March 2017 and that on 7 July 2017 the Claimant was given over 60 scripts by Mr Tanveer to mark and that he was dismissed on 13 July 2017. In respect of each of these, a reasonable worker would or might to the view that the treatment was to his detriment. We have not found that the Claimant was threatened by the administrator to sign a fabricated student attendance list.

117 In considering the reasons for the treatment, the Claimant relies upon Mr Vohra as an actual comparator or upon a hypothetical Asian with comparable academic qualifications. He asks us to draw an inference of race discrimination from the alleged comments of Mr Farmer in November 2016 that he was more comfortable working with Asians. We have not found as a fact that such a comment was made by Mr Farmer and it is therefore not a safe basis for an inference to be drawn.

118 Dealing first with the replacement as Course Leader, we are satisfied that the Claimant has proved facts from which we could conclude that there was discrimination. The Claimant had been appointed Course Leader, as evidenced by the 2016/17 Course Handbook. The Claimant was replaced as Course Leader in the 2017/18 course and in timetables from November 2016. Both the Claimant and Mr Vohra had the academic qualifications to be Course Leader. On this basis, we are satisfied that the burden of proof has passed to the Respondent to provide an explanation which was entirely unrelated to race. The explanation provided by Mr Farmer was that Mr Vohra was providing only cover or that the Claimant was replaced because he was not present on a Thursday or a Friday. For the reasons set out in our findings of fact, we

have found that explanation unsatisfactory and we conclude that the Respondent has failed to discharge the burden of proof on this detriment.

119 As for the removal of part of the module and/or marking of scripts, the Claimant has not proved facts from which we could conclude that Mr Vohra or a hypothetical Asian lecturer was treated more favourably because of race. There was insufficient evidence about the practice of re-sits on other modules or the requirement to mark a large number of scripts in a short period of time. Whilst each of these may have been unfavourable to the Claimant, for the discrimination claim to succeed it must be shown to be less favourable. The Claimant has not done so. We found the alleged detriment of the registers to be instructive. Whilst it was not a detriment in any event, it was an example of a requirement applied to all lecturers which the Claimant identified in his original claim as an act of race discrimination without any factual basis. The Claimant's position in cross-examination was confusing. At one point he said that he was alleging race discrimination only in respect of his removal as Course Leader and Mr Farmer's comments in November 2016, when pressed he then referred to "working with Asians in management roles" and suggested some form of glass ceiling in respect of management positions. The Claimant did not identify any of the other specific acts as race discrimination when asked to clarify. This is consistent with his complaint of race discrimination being limited to his removal as Course Leader. For these reasons, we find that the burden of proof did not pass to the Respondent on these detriments.

120 Turning then to dismissal on 13 July 2017, the Claimant has proved that he was dismissed. Two other people were dismissed on the same day, Mr Haman and Mr Husain. Both were Asian. As neither taught modules on the BA Business course and provided only a short session of English language support, their circumstances were materially different from those of the Claimant and, as such, are not comparators for the purposes of the Equality Act. We considered therefore whether an Asian lecturer on a BA Business module would also have been dismissed. The material circumstances of such a hypothetical comparator would also require that they had refused to pass students who had copied and had made a protected disclosure as had the Claimant. In deciding how such a hypothetical comparator would have been treated, we applied the guidance in **Shamoon** that the crucial question is why the complainant was treated in the way that they were, particularly where there is no comparator. Whilst we have rejected the business need reason advanced by the Respondent, we are satisfied that the catalyst for the dismissal was the refusal to pass the students and the protected disclosure. This was the reason why the Claimant was dismissed; indeed as we found on the section 103A Employment Rights Act claim, it was the sole reason for dismissal.

121 For the reasons set out above, the only race discrimination claim which would otherwise succeed is the removal as Course Leader in November 2016. The ET1 was presented on 31 July 2017 and as such this complaint is out of the primary three month time limit prescribed by the Equality Act 2010. In deciding whether or not it was just and equitable to extend time, we took into account the Claimant's explanation that he had not intended to bring a claim of race discrimination at that time, his claim was in respect of termination and it was only when dismissed that he "brought all of the issues together". The Claimant is legally qualified in Nigeria. He holds himself out in business as advising on employment issues. The fact that the claim would otherwise succeed is not particularly compelling as here it is based upon the shifting burden of proof

dependent upon the inadequacy of Mr Farmer's explanations given 18 months after the event rather than at a time closer to the events in question. Further, we have accepted that the "Asians" comment was not made by Mr Farmer. Taking all of these factors into account, we are not satisfied that it is just and equitable to extend time. The claim of race discrimination fails and is dismissed.

122 As for the victimisation claim, we found that the "Asians" comment was not made by Mr Farmer nor was it something that the Claimant raised as discriminatory. The Claimant did not ask Mr Farmer whether he was being treated badly because he was not an Asian. There was no protected act and the victimisation claim fails.

Money claims

123 As an employee throughout the period, the Claimant was entitled to paid holiday by virtue of the Working Time Regulations. It is common ground that the Claimant did not receive paid holiday after the most recent contract between the parties commenced on 1 March 2016. Neither party expressly addressed the issues around the dates of the leave year and what, if any entitlement to paid holiday existed on termination on 13 July 2017. This is a matter which may properly be addressed at a remedy hearing.

124 The Claimant took two weeks' holiday in November 2016 and his pay was reduced by £750 accordingly. This was an unauthorised deduction from pay. As the remainder of the holiday entitlement was not taken and the Claimant was entitled to pay in lieu on termination, there was a further deduction from his pay on 13 July 2017. Insofar as the same accrued holiday is relied upon in the Working Time Regulations claim and the unauthorised deduction from wages claim, the Claimant will be well aware that he is not entitled to double recovery. The basis of any compensation for accrued holiday is a matter which will be considered at the remedy hearing. This may include consideration of the effect of the Deduction from Wages (Limitation) Regulations 2014 SI 2014/3322 which has introduced a two year limit on the backdating of unlawful deduction from wage claims and also EAT judgments on the "gaps" between deductions.

125 The Claimant also claims that he was not paid the full salary due to him from August 2013 to 1 March 2016. He accepts that, with the exception of the November 2016 deduction referred to above, he was paid the sums contractually due from 1 March 2016. As such, any claim for unauthorised deduction from wages for sums prior to 1 March 2016 is considerably out of time. The deductions in the alleged shortfall in salary are said to have occurred monthly and throughout the period August 2013 until March 2016. The deductions for holiday pay occurred in November 2016 and again on termination on 13 July 2017. We do not consider that there is a sufficient factual or temporal link between the two types of deduction to give rise to a "series" for the purposes of section 23(3) Employment Rights Act 1996. For the same reasons as the alleged February 2016 "dismissal", it was reasonably practicable for the claim to be presented in time.

126 As for breach of contract, the Claimant was continuously employed from February 2013 until 13 July 2017. Although his contract entitled him to only 2 weeks' notice, his statutory entitlement was to 4 weeks' notice based upon his length of service. The Claimant was given only two weeks' pay in lieu of notice; he is entitled to

a further two weeks' pay.

127 The time limit for presenting a claim for breach of contract is three months from the date of termination and, as such, it has been brought in time. If, therefore, any shortfall in wages during the period from August 2013 until 1 March 2016 was outstanding on termination of employment, the Claimant will be contractually entitled to payment. For the reasons set out in our findings of fact, we have found that the entitlement to £24,500(g) was agreed to apply only from August 2014 and not August 2013. The Claimant was paid only £1,250 per month between September 2014 and March 2015, thereafter he received £1,500 per month without deductions for tax and national insurance. It is not clear to us whether the Claimant has declared this income in his own tax returns and paid the appropriate sums due. As such, whilst there was a shortfall in payment it is not clear of exactly how much. If this has to be decided, the Claimant will need to disclose his tax returns for the relevant years.

128 The Respondent relies upon the agreement dated 9 March 2016 as relieving it of any contractual obligation to the pay the Claimant such that no sums due for the period to 1 March 2016 remained outstanding on termination of employment. In considering the effect of that agreement, we had regard to the fact that it is not a compromise agreement for the purposes of section 203 Employment Rights Act 1996 as the Claimant did not receive independent legal advice before he signed it. As such, the agreement does not preclude the Claimant from bringing proceedings to recover the sums which he says are due.

129 Where the agreement is relevant, however, is to whether or not the sums in question remained outstanding on the termination of his employment on 13 July 2017. In other words, whether the Claimant waived any earlier breach of contract in entering into the new agreement. The agreement was entered into at a time when the parties were in a dispute about whether any sums were due and, if so, in what amount. It followed an extensive period of extensive period of negotiations in which the Respondent continued to deny any entitlement to the full sums sought by the Claimant. Whilst the Claimant still believed that he was due more money but nevertheless decided to enter into the agreement and accept the sum of £3,500 in full and final settlement of any underpayments between February 2013 and February 2016.

130 The Claimant is a trained lawyer, a specialist lecturer in business and law on a degree level course. He entered into the agreement without coercion from the Respondent even if his own financial circumstances led him to settle at a sum which was less than that to which he believed himself legally entitled. The agreement expressly provided that there would be no further obligation upon the Respondent. The Claimant's case at this Tribunal that he could accept the sum of £3,500 and yet maintain an ongoing contractual entitlement to the balance is either disingenuous or displays a worrying and fundamental lack of knowledge for somebody who advises and trains others on business and law.

131 In deciding whether or not any earlier breach of contract regarding pay had been waived by virtue of the 9 March 2016 agreement, we reminded ourselves that the question is whether or not the employee has chosen to hold the employer to the contract. This is a question to be answered by the conduct of the employee. The conduct of the Claimant in this case was clear: in entering into the settlement

agreement he waived any earlier breach. Whilst the Claimant is not precluded from claiming the sums by virtue of the agreement, on the facts of this case, we are satisfied that any shortfall in payment until February 2016 was not outstanding on the termination of employment on 13 July 2017.

132 Finally, the agreement in place from 1 March 2016 did not satisfy the requirements of section 1 of the Employment Rights Act 1996. As the Claimant did not have the required written particulars of employment and as some of his other claims have succeeded, he is entitled to an award of either of two or four weeks' pay. The precise amount will be determined at the remedy hearing.

Next Steps

133 The claims having succeeded in part, a one-day remedy hearing will now be listed. The following directions will apply:

133.1 The Claimant must provide an up to date schedule of loss within 2 weeks of the date on which this Judgment is sent to the parties.

133.2 The parties will disclose all documents relevant to the issue of remedy within 4 weeks of the date on which this Judgment is sent to the parties.

133.3 The Respondent will produce a bundle including those documents to which the Tribunal will be referred on remedy within 6 weeks of the date on which this Judgment is sent to the parties.

133.4 The parties will simultaneously exchange witness statements setting out all of the evidence upon which they intend to rely at the remedy hearing within 8 weeks of the date on which this Judgment is sent to the parties.

133.5 The remedy hearing will be listed for the first available date after 12 weeks. If there are any dates to avoid, the parties must notify the Tribunal as soon as possible.

Employment Judge Russell

6 July 2018