EMPLOYMENT TRIBUNALS

Claimants:	**Mrs TJ Betts (Claimant 1)** **Mr N Proctor (Claimant 2)** **Miss K O'Brien (Claimant 3)** **Mrs C Penn (Claimant 4)** **Mr M Jones (Claimant 5)**	
Respondent:	**Secretary of State for Justice**	
Heard at:	**Cardiff**	**On: 14 & 15 December 2015**
	And in Chambers	**On: 11, 15 and 16 February 2016 (half days)**
Before:	**Employment Judge S Davies (sitting alone)**	

Representation:
Claimants: Mr Declan O'Dempsey (Counsel)
Respondent: Mr Ben Collins (Counsel)

RESERVED JUDGMENT
(ON A PRELIMINARY POINT)

It is the judgment of the Employment Judge sitting alone that:

1. the claimants had and/or have the status of employees at the material times; and

2. their contracts of employment were and/or are not void for illegality.

REASONS

1. The claimants brought claims for a failure to provide written particulars of employment contrary to Section 1 of the Employment Rights Act

1996 (ERA) and a failure to pay holiday pay pursuant to Regulations 13 and 13A of the Working Time Regulations 1998 (WTR).

2. The issues for determination at the Preliminary Hearing were:

   (i) whether the claimants were employees or workers (or neither); and
   (ii) whether, if a finding of employment status is made, the purported employment contracts were void for illegality.

The Hearing

3. Oral evidence was given by each of the claimants. The claimants' Trade Union official, Mr Andy Bye, provided a written witness statement but no questions were put to him.

4. For the respondent I heard from Mr John Griffiths, Head of Learning and Skills and Reducing Reoffending, and Ms Wendy Hill, Manager of the Learning and Skills Department at HMP Usk/Prescoed.

5. Written submissions were provided by both Counsel on 11 December 2015 together with an agreed statement of facts. A large volume of authorities was provided at the Hearing, which was further supplemented during the course of the hearing, particularly with regard to the issue of illegality.

6. At the outset of the Hearing an application to extend the length of the bundle to more than 800 pages was granted on the basis it would not affect the overall length of the listed Hearing (as the majority of documents would not need to be read).

7. Following conclusion of the Hearing the representatives provided supplementary written submissions on the question of illegality; received from the respondent on 17 December 2015 and from the claimants on 23 December 2015.

8. At the hearing, I informed the parties that I would not be in a position to consider my Reserved Judgment until some time into the new year due to leave. The first opportunity for a Chambers date arose on 11 February 2016. I also considered my decision on 15 and 16 February 2016 resulting in this Reserved Judgment.

9. The principle question I am asked to determine is whether the claimants had the status of employee or worker. In light of the respondent's illegality submissions it is also necessary for me to

consider any distinction between Crown employment and appointment to the Civil Service. The claimants' roles and positions at HMP Usk/Pencoed Prison varied and it is necessary for me to consider their circumstances on an individual basis.

10. The claimants' contention for written statement of employment particulars under Section 1 ERA is dependent on them establishing the legal status of employee. The claimants' assertion that they are entitled to paid annual leave under the WTR is dependent on the claimants demonstrating they have the legal status of worker.

11. The respondent resists these claims contending that the claimants, who all worked as Teachers at HMP Usk/Pencoed Prison, were genuinely self employed. The parties helpfully provided an agreed list of facts relevant to this preliminary issue. The respondent summarised the crux of the case as being whether or not 'mutuality of obligation' existed or exists between the parties. The respondent asserts that there was no obligation upon the claimants to attend work if they did not wish to and neither was the respondent required to provide them with work.

12. The claimants do not have written contracts relevant to the contested period of their work. To the extent that there is dispute and it is necessary to infer the terms of their contract this will be based on the evidence of their conduct.

Definition of an employee/worker

13. The relevant definition is at Section 230 ERA; an employee is "*an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment*".

14. Section 230(2) provides that a "contract of employment" means "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*".

15. An important legal distinction exists between a "contract of service" and "a contract for services". The latter being one where an individual provides services to a client as an independent contractor. The task of identifying what kind of contract exists involves consideration of a mixed question of fact and law. Mr Collins referred me to the well known "multiple test" and the three questions in **Ready Mix Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 2 QB 497**–

(i) whether an agreement exists for the worker to provide their own work and skill ("personal service") in return for remuneration ("mutuality of obligation");

(ii) whether there is "control" of the worker by the respondent such that they should be considered an employee; and

(iii) whether other provisions of the contract are inconsistent with the existence of a contract of service or employment.

16. Case law provides that personal service, mutuality of obligation and control are the irreducible minimum which must be present in order for a contract of employment to exist.

17. The respondent acknowledged in the agreed facts that the claimants were required to provide personal service and did so under the control of the respondent; thus satisfying two of the three minimum requirements.

18. The focus for my purposes is then on *mutuality of obligation*. This requirement refers to the reciprocal obligations featuring in a working relationship by which an "employer" is obliged to provide work for an individual to perform and that in return the individual is obliged to perform the work offered; the 'work for wages' agreement.

19. In this case, of key importance in the evidence, was the issue of holidays/time off and whether or not the claimants were free to take leave at any time of their choosing. Also of note was evidence about the structure of the teaching programme and how the requirements of the delivery of that programme impacted on the relationship between the parties.

20. The last part of the **Ready Mix Concrete** tests refers to 'other factors' for consideration, which can include matters such –

(i) who provides and maintains tools or equipment;
(ii) the degree of financial risk adopted by the claimants;
(iii) whether the claimants had the opportunity to profit from their work;
(iv) whether the claimants are paid a fixed wage or salary;
(v) whether the claimants are paid when absent due to holiday or sickness; and
(vi) the level of integration the claimants had within the workplace.

21. When taking into account other relevant factors I need to determine whether any of them would be inconsistent with the existence of a

contract of employment. It is helpful at this point to refer to the parties' agreed facts dated 11 December 2015:-

"*In respect of each of the claimants –*

(a) they were required to provide personal service,
(b) the work was provided on a regular basis,
(c) they each worked on a daily or weekly basis,
(d) the appointment as a Teacher was not on the basis of the usual rules on "fair and open competition" (though Mrs Penn and Mr Jones were appointed to their original posts with the respondent on this basis),
(e) there are no letters of appointment in respect of the claimants' teaching roles,
(f) they were given a defined place of work by the respondent,
(g) their working days and hours were identified by reference to a timetable,
(h) they were subject to respondent's day to day direction and rules,
(i) the respondent paid them directly,
(j) the respondent arranged for the payment of tax and National Insurance,
(k) they had all sought to lodge a grievance but all save for Mrs Penn were told that they were not entitled to do so,
(l) they were all required to attend job specific training recommended and paid for by the respondent,
(m) they were all required to attend regular staff meetings,
(n) they were not paid for absence e.g. holiday or sickness,
(o) they did not receive paid annual leave,
(p) they are all subject to the respondent's security procedures and vetting,
(q) they all had sets of keys for use within the Prison,
(r) they were under the control of the respondent, they worked to timetables drawn up by the respondent and a curriculum related to the qualifications offered by the respondent, they were required to work to the respondent's professional standards,
(s) all equipment and materials were provided by the respondent."

22. The list of agreed facts, together with the respondent's concession that all claimants worked under a contract (albeit, it says, not one which gives rise to employee or worker status), serves to underline that the focus of my attention must be on mutuality of obligation.

23. By and large the facts as agreed do not seem inconsistent with the existence of a contract of employment; those that point away from employment status (non payment of holiday/sick pay and refusal to

deal with grievances) arise as a result of the respondent's position on status and so I consider as being neutral in the circumstances.

24. I was also referred to Section 191 of ERA:
"Crown employment

(1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers.

(2) This section applies to —

(a) Parts I to III,
(aa) Part IVA,
(b) Part V, apart from section 45,
(c) Parts 6 to 8A,
(d) in Part IX, sections 92 and 93,
(e) Part X, apart from section 101, and
(f) this Part and Parts XIV and XV.

(3) In this Act "Crown employment" means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision.

(4) For the purposes of the application of provisions of this Act in relation to Crown employment in accordance with subsection (1) —

(a) references to an employee or a worker shall be construed as references to a person in Crown employment,
(b) references to a contract of employment, or a worker's contract, shall be construed as references to the terms of employment of a person in Crown employment…"

25. I accept the submission of the claimants that the intention of Parliament must have been that the same tests are to be used for ascertaining whether there is 'Crown employment' as any other employment under section 230 ERA.

Worker Status

26. Mr O'Dempsey referred me to the decision of (now Regional**)** Employment Judge B Clarke, in which Mr O'Dempsey also appeared for the claimant which bears similarities to the present one: **Mr A Thomas v The Secretary of State for Justice (case number: 1602308/2013). Thomas** was also a decision on a preliminary point about the employment status; that of Prison Chaplains. Mr O'Dempsey commended to me the definition of worker as set out by Employment Judge B Clarke and I adopt it as follows –

"79. *The basic distinction between a contract of service and a contract for services has been blurred in recent years by the evolution of the statutory status of "worker": a person with important statutory employment rights, albeit not as extensive as those available to an employee.*

80. A worker is defined in Section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, worked under) either a contract of employment or "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 party to the contract whose status is not by virtue of the contract that of a client or a customer of any profession or business undertaking carried on by the individual". For the purposes of the present case, I note that this definition of a worker is also found at Regulation 2(1) WTR.

81. We are dealing with a category of individual whose relationship might fall short of employment but which nonetheless contains features that make something more than pure self-employment. In the Byrne Brothers case to which I referred earlier, the EAT considered the statutory definition of a worker and laid down the following as a helpful test for the purposes of identifying whether an individual qualified as such:

81.1 First, did the individual undertake under the contract personally to perform work or services? Hence the issue of whether the contract permits substitution, and whether the ability to send a substitute is fettered or in some way a sham, has the same relevance to determining worker status as it does to determining employee status. Many of the cases I considered above were in fact about worker status, so I will not repeat them here.

81.2 Secondly, was the status of the "employer" under the contract that of a customer of a business undertaking carried on by the individual? The EAT noted that "carrying on a business undertaking" was capable of having a very wide meaning as, in one sense, every "self-employed" person "carried on a business", and suggested that such a wide meaning could not have been intended under the statute. The intention behind

the definition of worker was to create an intermediate class of protected worker, who on the one hand was not an employee but on the other hand could not be regarded as carrying on a business. Protection was required because the worker was in a "subordinate and dependent position" and therefore needed similar protection to employees with regard to working hours and pay. The test to determine whether the individual was "carrying on a business undertaking" and whether the "employer" was a "customer" of that business was similar to the test to determine whether a contract was a contract of *service or a contract* for *service. Relevant factors could include: the degree of control exercised by the "employer"; the exclusivity of the arrangement; its typical duration; the method of payment; which party supplied the equipment used; and the level of risk undertaken by the worker. The fact that HMRC might regard an individual as self-employed was relevant but not conclusive.*

81.3 *Thirdly, was there mutuality of obligation between the individual and the "employer"? This remained an essential element.*

82. It can be seen that each of three irreducible minima – personal service, mutuality of obligation and control – each still has a role to play. The EAT noted that the effect of the definition of worker was to lower the "pass mark", so that those who failed to reach the high mark necessary to qualify as employees might still qualify as workers. Therefore, where an individual was, on balance, a self-employed contractor but there were some factors which pointed towards employment, it might still be possible for him to qualify as a worker even though he did not reach the higher pass mark to qualify as an employee.

83. For my part, I think Employment Judges should be wary of treating the intermediate category of "worker" simply as a safe harbour in difficult cases. Its relevance is not that it provides a convenient default answer in such cases, but that it offers a third option in what was traditionally a dichotomous analysis; and it requires assessment on its own terms."

27. As a final comment on the distinction between employee and worker I reminded myself that the employee definition focuses on mutual obligations between parties whereas the worker definition focuses on

the element of personal service by the individual. When considering mutuality of obligations and worker status there is perhaps a lower hurdle with regard to mutuality of obligations; was there, on the facts, evidence that the claimants agreed to undertake some minimum or reasonable amount of work in return for pay?

Illegality

28. If I conclude any of the claimants were employees, I am required to decide whether the respondent had no power to enter into contracts of employment on the basis that none of the claimants were appointed in accordance with Civil Service Recruitment Principles ie on merit in a process of fair and open competition (the "Recruitment Principles"). The submission is that any contract of employment formed must be void from the outset; the respondent cannot enter into such contracts outside of the Recruitment Principles.

29. The respondent relies on the Civil Service Order in Council 1995 (OIC), issued under prerogative power, and the legislation which superceded it: the Constitutional Reform and Governance Act 2010 (CRAGA). CRAGA was implemented as one aspect of constitutional reform of prerogative powers; placing the power to manage the Civil Service on a statutory basis. I will return below to the issue of prerogative powers.

30. The Civil Service Commissioners Recruitment Principles (April 2009 Edition) state:

> *1. The Civil Service Order in Council 1995 (as amended) and the Diplomatic Service Order in Council 1991 (as amended) requires selection for appointment to the Civil Service to be on merit on the basis of fair and open competition ("the requirement") and that the Civil Service Commissioners ("the Commissioners") publish Recruitment Principles to be applied for the purposes of the requirement. This document sets out those principles.*

31. 2 "Role of the Commissioners"-

> *The role of the Commissioners in recruitment is to maintain the principle that appointments to the Civil Service are on merit through fair and open competition. Annex A provides more detail on how the Commissioners interpret the principle.* (my emphasis)

32. 5 "Departments and agencies' responsibilities" -

> *Departments and agencies must comply with the principle of appointment on merit through fair and open competition and these Recruitment Principles, including*

Annexes A, B and C. Overall responsibility for doing so rests with the permanent secretary or chief executive of each department or agency."

33. The Civil Service Commissioners Recruitment Principles use the term *appointment* rather than *employment*.

34. The Recruitment Principles were enshrined in legislation. The foreword to the OIC states -

"WHEREAS by the Civil Service Order in Council 1991 (hereinafter referred to as "the principal Order") provision was made relating to the appointment of persons to situations in Her Majesty's Home Civil Service and for regulating the conduct of Her Majesty's Home Civil Service and the conditions of service therein:…. (my emphasis)

AND WHEREAS it is expedient to make further provision for her Majesty's Home Civil Service in relation to the matters aforesaid:…"

35. Reference to the Recruitment Principles appears at:

Article 2 Selection on Merit

2. (1) Except as otherwise expressly provided by this Order, no person shall be appointed to a situation in the Service unless (my emphasis)

(a) the selection for appointment is made on merit on the basis of fair and open competition; and

(b) the person appointed satisfies such qualifications as may be prescribed pursuant to Article 10(d)"

Where "the Service" means "Her Majesty's Home Civil Service".

36. There is no definition in the OIC of the terms "appointment" or "employment". Insofar as I was referred to relevant Articles of the OIC, I saw no reference to, or use of, the word 'employment'.

37. The OIC was superceded by CRAGA from 11 November 2010; which repeats the Recruitment Principles.

*Chapter 1 "**Statutory Basis for management of the civil service"***

Section 1 Application of Chapter"

(1) ..this chapter applies "to the civil service of the State….

(4) In this Chapter references to the civil service —

(a) are to the civil service of the State excluding the parts mentioned in subsections (2) and (3)(c);

(b) are to be read subject to subsection (3)(a) and (b);

and references to civil servants are to be read accordingly.

38. Section 10 Selections for appointments to the civil service –

(1) This section applies to the selection of persons who are not civil servants for appointment to the civil service.

(2) A person's selection must be on merit on the basis of fair and open competition.

39. In its supplementary submissions on illegality the respondent confirmed that it does not submit there has been a repeal of Section 191 ERA, by either OIC or CRAGA, as the claimants had anticipated. Consequently I have not referred to authorities in relation to this point.

Prerogative

40. During argument I was referred to the use of prerogative powers in the context of management of the Civil Service and the ability of the respondent to enter into contracts (of employment). The following passages, which I referred myself to, served as a useful starting point for consideration of the submissions made.

41. **Halsbury's Laws of England** (Constitutional and Administrative Law A. The Prerogative in General at 166) defines 'royal prerogative' as "*being that special pre-eminence which the monarch has over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and includes all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England".*

42. The footnotes to this definition include Dicey's description of the prerogative as "*both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown",* (the editors note this definition omits certain rights and powers). '*The use of the term "the Crown" conveys the correct implication that prerogative powers are, with very few exceptions, exercised not by the monarch in person but in her name by her servants'.* The 'Crown' encapsulates the monarch in person, her ministers and officials and all emanations of the Crown (so including the respondent).

43. The Crown is not bound by statute save by express words or necessary implications. (footnote 16 of para 167)

The Ram doctrine

44. As well as relying on the respondent's prerogative power to enter into contracts, the claimants rely 'as necessary on the Ram doctrine'. The claimants' further submit that 'the reason why the prerogative is a common law value is explained by the Ram doctrine'.

45. The Ram doctrine derives from a 1945 Memorandum of First Parliamentary Counsel (Sir Granville Ram) on the question of how far legislation was necessary to authorise an extension of the existing powers of a Government department. Under the heading "legal position" he states –

"A minister of the Crown, even though there may have been a statute authorising his appointment, is not a creature of statute and may, as an agent of the Crown, exercise any powers which the Crown has power to exercise, except so far as he is precluded from doing so by statute. In other words, in the case of a Government department, one must look at the statutes to see what it may not do, not as in the case of a company to see what it may do." (my emphasis).

46. The claimants submit that the Ram doctrine "gives an idea of the powers of the Crown prior to the formulation of certain powers of appointment of persons to the Civil Service. These have always included the power to enter into a contract of employment".

47. With regard to the Ram doctrine, the respondent refers me to the Court of Appeal decision in **Shrewsbury and Atcham Borough Council v Secretary of State for Communities and Local Government & another (2008) EWCA Civ 148** at paragraph 44 under the sub heading "Vires": "*the existence of a residual category of Ministerial power, not dependant on either statute or prerogative, is a matter of ongoing academic controversy. One aspect is the so called Ram doctrine, which has been interpreted as enabling Ministers, as representatives of the Crown, to do anything that a natural person may do except if prohibited by statute"*.

48. Para 48: "*unlike the Local Authority, the Crown is not a creature of statute. As a matter of capacity, no doubt, it has power to do whatever a private person can do. But as an organ of government, it can only exercise those powers for the public benefit, and for identifiably "governmental" purposes within limits set by the law. Apart from authority, I would be inclined respectfully to share the view of the editors of De Smith (*De Smith's Judicial Review (6th Ed)) *that "the extension of the Ram doctrine beyond its modest initial purpose of*

achieving incidental powers should be resisted in the interest of the rule of law"".

49. Earlier in the judgment (paragraph 21) Underhill J's decision below on 'vires' is quoted (on decisions taken by the Secretary of State about local government structure):

"21. On (1) (Vires), he held, that, apart from any express or implied statutory restriction, there was no relevant limit on the powers of the Secretary of State to do what she had done. This conclusion followed the decision of this court in R v Secretary of State for Health ex p. C [2000] 1 FLR 627, concerning the legality of a non-statutory list of sexual offenders maintained by the Secretary of State for Health. The court held that the Secretary of State, as representative of the Crown, enjoyed non-statutory powers analogous to those of a natural person, not confined to those conferred by statute, or to her traditional prerogative powers. Hale LJ, with the agreement of the other members of the Court of Appeal (Lord Woolf MR, and Lord Mustill), said:

"The Crown is not a creature of statute and in one respect at least is clearly different from a local authority. The Crown has prerogative powers. But what does this mean? Professor Sir William Wade, in Wade and Forsyth Administrative Law (Clarendon Press, 7th edn, 1994), at pp 248-249, draws a clear distinction between prerogative and other powers:

'"Prerogative" power is, properly speaking, legal power which appertains to the Crown but not to its subjects. Blackstone explained the correct use of the term … Although the courts may use the term "prerogative" in this sense, they have fallen into the habit of describing as "prerogative" every power of the Crown which is not statutory, without distinguishing between powers which are unique to the Crown, such as the power of pardon, from powers which the Crown shares equally with its subjects because of its legal personality, such as the power to make contracts, employ servants and convey land.'

There is no suggestion of a specific prerogative power in this case but Halsbury's Laws of England, vol. 8 (2), at note 6 to para 101, confirms that 'At common law the Crown, as a corporation possessing legal personality, has the capacities of a natural person and thus the same liberties as the individual '. It was on this ground that Richards J declined to hold that the Index was unlawful." (my emphasis).

50. I am unclear as to how the Ram doctrine explains why the prerogative is a common law value, as the claimants submit. However for the purposes of considering submissions I think it sufficient for me to note three potential sources of Crown power: statutory, prerogative and residual powers other than those based on prerogative.

51. For the purpose of determining the preliminary issues, it seems to me that the important point is that parties agree that the Crown has legal personality and can enter into contracts, so long as it is not prohibited by statute from doing so (which is the nub of the illegality point).

52. It is also agreed that the respondent had prerogative power to make appointments to the Civil Service, which power was placed on a statutory basis (CRAGA).

53. The respondent submits that the Ram doctrine cannot be used to circumvent the mandatory requirements of OIC and CRAGA. Which brings us back, I think, to the essential difference between the parties; whether there is a distinction between appointment to the Office of Civil Servant and Crown employment.

54. Closely allied to that issue is the question of the extent to which, if any, the power to enter into contacts of employment is curtailed by the statutory Recruitment Principles. The respondent asserts that the powers to employ (being in essence the same thing as appointment to the Civil Service) were and are limited by the terms of OIC and CRAGA. The respondent asserts that it cannot employ outside the mandatory requirements of OIC or CRAGA.

55. The claimants' submit a distinction exists between *appointment* to the Civil Service and (Crown) *employment* (Section 191 ERA), which latter status is determined by applying the section 230 ERA test. Statutory employment rights follow from a finding of employee status but rights particular to Civil Servants (eg Civil Service terms and conditions and access to the trawl) do not.

56. There was a dispute between the parties as to the obiter judgment of the Employment Tribunal in **Kruck v The Home Office (case number 2301792/2007)**. The judgment in **Kruck** dealt with the question of employment status of an agency worker. It was promulgated on 7 May 2008, prior to the enactment of CRAGA. It includes commentary on the development of employment status for civil servants; drawing a distinction [paragraph 85] between the status of Civil Servant, as the holder of an office, and the mechanism by which their terms of engagement are regulated (by way of a contract of employment or otherwise). The tribunal analysed different concepts in play and identified the following 4 terms [paragraph 74] –

    (1) appointment to the Office of Civil Servant,
    (2) appointment to a situation in her Majesty's Home Civil Service for the purposes of the Order in Council,
    (3) Crown employment, and
    (4) employment under a contract of employment.

57. The respondent suggests that the tribunal in **Kruck** was wrong to identify a distinction between a Civil Servant's office and his or her employment. The respondent relies on **R v Lord Chancellor's Department ex parte Nangle [1991] ICR 743** which dealt with an application by a civil servant for judicial review of disciplinary action taken against him. The court declined to allow a judicial review to proceed, in what it considered to be a private law matter relating to Mr Nangle's terms of employment. It was held that the word "appointment" was neutral when determining whether the parties had entered into legal relations; an objective construction of the documents by which Mr Nangle was appointed was required to determine this question. It concluded that the documents showed the parties had entered into obligations, rights and entitlements consistent with a contract of employment.

58. The claimants submit that **Nangle** does not assist with the respondent's assertion that appointment to the Civil Service is the same thing as employment. The claimants assert that it is irrelevant that a person who is appointed as a Civil Servant cannot assert his rights via a public law route but could insist on private law rights as an employee. Again the claimants rely on a distinction between appointment to the Civil Service and Crown employment.

59. The respondent asserts that the OIC and/or CRAGA is/are relevant in two ways. Firstly demonstrating the respondent cannot have intended to enter into legal relationships of employment and secondly that there can be no relationship of employment, irrespective of the parties' intention, since the contract would be void on grounds of illegality. The respondent, whilst recognising the unattractiveness of its own

argument, since responsibility for flaws in the recruitment process lie with it, contends that any contract of employment would be unenforceable as prohibited by statute, relying on **Hall v Woolston Hall Leisure Ltd [2001] ICR 99** paragraph 30 -

> *30. In two types of case it is well-established that illegality renders a contract unenforceable from the outset. One is where the contract is entered into with the intention of committing an illegal act; the other is where the contract is expressly or implicitly prohibited by statute…* (my emphasis)

60. **Hall** refers to the requirement for express or implicit prohibition by statute. The respondent confirmed that it did not suggest repeal of Section 191 ERA; rather express prohibition on entering into contracts of employment outside the Recruitment Principles.

61. The claimants contend that in circumstances where the respondent seeks to rely on its own illegality, of which they are innocent, they may rely on the contractual agreement whereas the respondent may not. The claimants refer me to **Chitty** [16-020]: "*when the contract does not necessarily involve the commission of a legally objectionable act and the legally objectionable intention or purpose of one party is unknown to the other, the latter is not precluded from enforcing the contract*."

Principle of legality

62. In their supplemental submissions, the claimants assert that the Principle of Legality is relevant in respect of two common law values: (1) the Crown having 'legal personality capable of contract' and (2) freedom to contract. It was not clear until receipt of the supplemental submissions that this was the claimants' position, and the respondent points out in its supplemental submissions that the power to manage the Civil Service is not a common law value.

63. It is submitted by the claimants that the wording of OIC and CRAGA is not explicit or clear enough to prohibit employment outside the Recruitment Principles. The respondent contends that the Principle of Legality cannot override clear statutory provisions. The parties' respective positions take us back to the question of whether a distinction can be made between Office and employment.

Conclusions on Illegality

64. I note that this point is only relevant to a finding that a contract of employment exists. It does not affect any conclusion on worker status.

65. The OIC prevailed at the time of the commencement of Mrs Penn and Mrs Betts' engagement as Teachers. For the remaining three claimants CRAGA was in place.

66. Mrs Penn and Mr Jones were already appointed to the Civil Service when commencing teaching work. It is submitted therefore that the illegality argument cannot apply to their engagements as Teachers. On their behalf it is submitted that the wording of Section 10 (1) CRAGA deals with the '*selection of persons who are not civil servants for appointment to the civil service*'. As such it cannot apply to individuals who are already Civil Servants.

67. The wording of CRAGA at 10(1) seems clear in its natural meaning; it applies only to individuals who do not have the status of Civil Servant. If I conclude that there is a difference between appointment to the Office of Civil Servant and (Crown) employment, it follows that I accept the submission that CRAGA cannot apply to Mr Jones' engagement as a Teacher in 2013.

68. Mrs Penn, however, was engaged as a Teacher in 2007 when the OIC prevailed. The wording of Article 2(1) is different and I think less obviously clear in meaning: *"Except as otherwise expressly provided by this Order, no person shall be appointed to a situation in the Service unless…."* . My conclusion on this submission on behalf of Mrs Penn will depend on whether I interpret this provision as referring to appointment to an Office or (Crown) employment.

69. This difference between the wording of the OIC and CRAGA is illustrative of the lack of consistency in use of terms in the legislation.

70. As for the Ram doctrine; formation of contracts of employment for Teachers by the respondent would appear to amount to '*exercise* (of) *those powers for the public benefit, and for identifiably "governmental" purposes within limits set by the law' (***Shrewsbury and Atcham Borough Council).** I am not persuaded however that it is necessary for the Ram doctrine to be invoked. It is common ground that the Crown has legal personality and can enter into contracts of employment, subject to limits set by legislation, and has done so historically under prerogative powers.

71. It seems to me that there are two key questions.

    (i) can a distinction be properly made between appointment to the Office of Civil Service on one hand and Crown employment on the other?; and

(ii) do the words of OIC and/or CRAGA prohibit the respondent from entering into employment outside of the Recruitment Principles?

'Office' and 'employment'

72. Appointment to the Civil Service carries with it certain rights particular to the Office. Examples include the Civil Service terms and conditions and the "trawl" process where Civil Servants at risk of redundancy have priority status for available positions. This indicates to me a differentiator based on a special status; that of the Office of Civil Servant. This needs to be viewed in a context where the Civil Service is now run with the use of various types of worker, some employed and some who are not (such as agency staff). Not all of those who work for the Civil Service are Civil Servants.

73. The definitions in the legislation are somewhat circular:

Section 1 CRAGA Application of Chapter"

> *(1) ..this chapter applies "to the civil service of the State….*
>
> *(4) In this Chapter references to the civil service —*
>
> *(a) are to the civil service of the State excluding the parts mentioned in subsections (2) and (3)(c);*
>
> *(b) are to be read subject to subsection (3)(a) and (b);*
>
> *and references to civil servants are to be read accordingly.*

74. There is no reference to 'employment' in the relevant sections of CRAGA. Section 10 CRAGA refers to 'appointment' to the Civil Service and the 'selection' of "*persons who are not civil servants for appointment to the civil service*". This wording ("people who are not Civil Servants") suggests to me that there is a distinction between appointment to the Civil Service and Crown employment. I also note that CRAGA came into force 2 years after the decision in **Kruck** and so the position could have been made clear if the legislative intention was to the contrary.

75. There is no reference to 'employment' in the OIC either. The phrase 'selection for appointment' is used (as it is in CRAGA). The OIC refers to a 'situation' in the Service, without defining what that term means. The OIC was updated as of 2008 and it was not thought necessary to provide clarification as to the terms in use, despite the existence of the definition of 'Crown employment' in section 191 ERA. This again

suggests to me a distinction between appointment to office and employment. If there is no difference as the respondent suggests, this begs the question why this was not made clear with consistently used defined terms.

76. Whilst the Employment Tribunal decision in **Kruck** is not binding, I found the analysis it contains regarding the distinction between Office and employment compelling:

"121. The answer to the conundrum is, we consider, the distinction between appointment to a situation in the Home civil Service for the purpose of the Order in Council and the question of whether terms of Crown employment and/or a contract of employment have been entered into. The former principally concerns the appointment of a person to the Office of Civil Servant. The latter concerns the basis upon which their private law relations are governed. In many cases it may be possible to sever the two. The fact that an appointment to the Office of Civil Servant is invalid might require that the appointment exercise to be carried out again or, in certain circumstances, that the employment of the individual concerned be terminated for some other substantial reason. It does not follow that any contract of employment would have been void ab initio as having been entered into for an unlawful purpose. The contract has the lawful purpose of setting out the private law employment obligations of the parties.

122. Much may turn on the particular position that the person is recruited to and the precise contractual terms they have with the Government body. Those are matters that can only be determined on a case by case basis. There might be situations in which a contract is entered into specifically for the unlawful purpose of circumventing the operation of the Order in Council. Such a contract might be void ab initio. Again, this can only be determined on a case by case basis.

123. We do not consider that the effect of the Order in Council is such that there can never be an implied contract of employment between the Government and an agency worker. If the implication of a contract of employment is necessary to give business reality to the situation such a contract may be implied. Such a contract would not have an unlawful purpose rendering it void ab initio. It would not be effective to appoint the person to a situation in the Home Civil Service, i.e. the person would not hold the office of Civil Servant. This may have public law consequences but the implied contract is not prevented from coming into existence as it serves the lawful purpose of regulating the private law relations between the individual and the Government body. It is no more unlawful than the contractual arrangements by which agency workers, who are not appointed to positions in the Home Civil

Service and do not hold the office of Civil Servant, are provided to work for Government Departments."

77. **Nangle** also touches on the dual nature of relationships, public and private, which can exist for those working within the Civil Service. I agree with the claimants' submission that **Nangle** does not directly assist me. It does not follow that because Civil Servants also have contracts of employment (as was found in **Nangle**), that those who are found to have a contract of employment with the Crown must also be Civil Servants. I need to apply the relevant statutory tests to determine (Crown) employment status.

78. In summary I conclude that there is a distinction between appointment to the Office of Civil Servant, which must be subject to the Recruitment Principles, and Crown employment, which is determined by reference to the tests set out above and section 230 ERA.

OIC / CRAGA

79. Having concluded that a distinction exists, it appears to me that the Recruitment Principles apply to appointment to the Office of Civil Servant only; not to recruitment into Crown employment. I reach this conclusion on the basis of the wording of OIC and CRAGA as referred to above. In particular the terminology of CRAGA underlines the difference with its reference to the *selection of persons who are not Civil Servants.*

80. Turning now to the submissions made on the Principle of Legality and its applicability when considering encroachments on "common law values". **Fordam's Judicial Review Handbook** (para 35.2) refers to common law values including 'human rights' and 'fundamental common law tenets'. The use of the word 'tenet' is wide enough to cover the concept of the Crown having legal personality, despite not obviously being a 'value'. In the absence of submissions from the respondent to the contrary, my comments are made on the basis that there are two 'common law values' in play: (1) a Crown with legal personality able to contract and (2) the freedom to contract.

81. It appears to be agreed that the power to manage the Civil Service may not be exercised to abolish fundamental common law values unless in clear primary legislation. The dispute centres on the ambit of OIC and CRAGA and whether its meaning is clear.

82. The respondent suggests that the OIC and CRAGA displace the Crown's power to enter into employment contracts, making it subject to the Recruitment Principles. The respondent's powers are limited by the

legislation. There is a dispute as to whether the wording of the OIC and CRAGA is sufficiently clear to prevent Crown employment, (which is linked to the question, already resolved, of whether there is a distinction between Crown employment and appointment to Office of Civil Servant).

83. Parliament must "*squarely confront the implications of abrogating fundamental common law values*" (Fordham para 35.4). It cannot do so with the use of ambiguous wording. I find that there is a lack of clarity in the wording of OIC and CRAGA; the defined terms, or lack thereof, leads to ambiguity. If the intention of the legislator was that Crown employment should be prohibited outside the Recruitment Principles this could have been made clear but was not.

84. The OIC does not define 'employment' nor refer to it as a term in 'Article 2 Selection on Merit'. The wording of Article 2 is that no person shall be '*appointed to a situation in the Service'* (unless on the basis of merit in fair and open competition); where 'the Service' means 'Her Majesty's Home Civil Service'. There is no reference to 'Crown employment' in the OIC.

85. I am not persuaded that the wording of OIC is sufficiently explicit to displace the ability of the respondent to enter into a contract of employment; it is ambiguous as to its use of defined terms where clear wording could have been used. It appears to me the natural meaning of the words is that OIC applies to appointment to Office only.

86. My view with regard to the CRAGA is the same. Section 3(1) provides for the power to manage the Civil Service of the State including making *appointments* (subsection 3(3)). As noted above, section 10 (1) refers to the selection of "*persons who are not civil servants for appointment to the civil service*".

87. When considering employment status I must refer to Section 230 ERA and the relevant authorities. The provisions of Section 191 ERA are not referred to in CRAGA or the preceding OIC. Since 'Crown employment' is defined in Section 191(3) had it been Parliament's intention to curtail the respondent's ability to enter into 'Crown employment' when enacting Section 10 CRAGA, it seems inconsistent to fail to refer to that definition explicitly. The wording of Section 10 CRAGA is not sufficiently explicit to prevent 'Crown employment' outside the Recruitment Principles, where the other elements of the appropriate test for employment are satisfied.

88. Further I echo the concerns raised in **Kruck** that third party rights could be affected were CRAGA or OIC to render appointments ultra vires if a

selection process was tainted in some way. Were the appointment of a Civil Servant not lawful this could render void, actions taken by that individual whilst in post. On this point, the respondent submitted partial mitigation was achieved by retrospective validation provisions added to the Recruitment Principles under Section 12(1)(b) CRAGA. The Recruitment Principles of April 2014 [793] contain provision for the Commission to approve an individual's appointment after it has been made in exceptional circumstances. There is no explanation of the type of circumstances that would be covered.

89. The claimants suggest that as Section 12(1)(b) CRAGA refers to exception of *selections* for the purposes of Section 10(3)(c), that there can be no retrospective approval of *appointments*. I think this is a distinction without a difference; the words must be read in context. Section 10(1) refers to selection for appointment. However there remains uncertainty as to when the Commission would consider circumstances to be "exceptional" and the concerns noted in **Kruck** remain valid.

90. In summary I concur with the claimants that it is possible for me to conclude that they were employed but not appointed to Office with the Civil Service, save of course for Mrs Penn and Mr Jones. My conclusions on the 2 key questions are –

- Firstly a distinction can properly be made between appointment to the Office of Civil Service and 'Crown employment'; and

- Secondly the OIC and/or CRAGA do not displace the respondent's power to enter into contracts of employment, outside the Recruitment Principles.

91. I have not found it necessary therefore to deal in detail with the submissions made on the premise that employment contracts would be void from the outset. Notwithstanding that position, I make the following comments with regard to the claimants' submission that the innocent party to a contract can nevertheless rely upon its terms if a finding of illegality is made. There was no evidence from any party of knowledge of illegality (in the sense of a *legally objectionable intention or purpose*) at the outset of the teaching engagements. The oral contractual arrangements would not have appeared to be unlawful. Some claimants acknowledge that they were told of a recruitment freeze and that they would be taken on as sessional employees; but there was no suggestion by the respondent that the claimants were aware a contract would be unlawful. I heard no direct evidence from the respondent from decision makers who initiated the 'recruitment

freeze'. The evidence from Mr Griffiths was that the proper recruitment process could have been engaged, albeit with difficulty.

92. As for the respondent's intention to enter legal relations, as mentioned above I heard no evidence from decision makers with regard to the "recruitment freeze". The context was one in which: the respondent indicated to Mrs Penn that efforts were being made to obtain full employment for her, Mrs Betts was given similar assurances, all claimants worked for lengthy periods in excess of the 2 years maximum provided for in PSI 62/2010 Staff Resourcing (see below), and it was clear that the intention was one of a long term relationship from the outset. I do not accept that the existence of the OIC / CRAGA necessarily means there was no intention to create legal relations in these circumstances (and more particularly since I have found the legislation relates to appointment to Office only).

93. It was not necessary for me to consider the case of **Lairikyengban v Shrewsbury and Telford Hospitals NHS Trust [2010] ICR 66** in which it was found that an employment contract did exist despite illegality (the Trust failing to comply with the mandatory requirements of the National Health Service (Appointment of Consultants) Regulations 1996).

Conclusions on Employment Status

94. All claimants are or were working at HMP Usk/Prescoed as Teachers. There is no written contract for any of the claimants. At [180 to 181] there is a template offer of work to sessional workers. The respondent accepts that this template, whilst available to it, was never used to document agreements in respect of any of the claimants.

95. Other than these common features, the claimants' circumstances of appointment and the type of work they carried out varied.

96. A range of courses are available for offenders including degrees through Open University, 'A' levels and GCSE's and at the other end of the spectrum special needs classes, basic skills and/or wellbeing.

97. The respondent considers the claimants to be "sessional workers" and asserts that managers made clear to the claimants, during the course of their engagement, that there was no obligation upon them to attend work and provide services. In particular they rely on the witness statement of Ms Hill [paragraphs 23 to 36].

98. Originally teaching at the Prisons was provided by staff from Coleg Gwent Further Education College (Coleg Gwent). In 2005 the Prison Service took on provision of its educational services and a transfer of employed staff took place between the organisations.

99. Mr Griffiths was appointed Head of Learning and Skills in 2003 and is currently Head of Learning and Skills and Reducing Re-offending. Ms Hill is Manager of the Learning & Skills Department (she was on extended sick leave at the time of the hearing) and was previously employed by Coleg Gwent.

100. In his witness statement Mr Griffiths refers to a "moratorium" on recruitment of employed staff due to a restructuring programme within the Prison Service; he thinks that this was with effect from 2009. To cope with a number of retiring teaching staff, a practice of recruiting sessional or agency workers as replacements was supported by the Governor, Mr Cross.

101. Mr Griffiths avers that he referred to guidance on the use of sessional workers [182 to 188] when recruiting the claimants. The guidance includes an EFC3 sessional appointment form [186 to 188] which should be completed for each Teacher to inform Shared Services and enable their fees to be paid. No EFC3 forms appear in the bundle for any of the claimants.

102. Mr Griffiths suggested that recruitment of sessional workers was carried out under the auspices of PSI 62/2010 Staff Resourcing, issued on 15 December 2010 [159 to 179], in particular at [177 to 178]; chapter 8 'Obtaining services from non employed workers'.

103. At 8.2 sessional workers are defined as "*persons not employed under a contract of employment who are paid for undertaking work or providing a service on the basis of an agreed range of hours to be worked within a specified period, or an ad hoc arrangement to meet varying needs*".

104. At 8.6 it provides that "*managers must ensure that non employed workers… are not treated in effect as employees (non employed workers should not for example be subjected to normal line management responsibilities; performance management procedures; staff discipline arrangements; or sick absence/attendance policy)*".

105. In chapter 7 'Alternative resourcing options', 7.18 refers to exceptions allowed by the Civil Service Commission including short term appointments not through open and fair competition up to a maximum of 2 years and permanent appointment of people appointed on a short

term basis other than through fair and open competition. "*This exception can only be applied at or after 12 months, and only through the use of a fair and objective process specifically approved by the Commission*".

106. The engagement of all claimants exceeded the 2 year limit referred to in chapter 7.

107. I note that PSI 62/2010 was not in force at the time of Mrs Betts and Mrs Penn's engagement; I was not referred to any document in force at the time they were engaged.

108. Mr Griffiths and Ms Hill confirmed that the claimants' recruitment was ad hoc on the basis of personal recommendation. Mr Griffiths asserts that took advice from HR Shared Services to ensure feasibility to recruit sessional staff (paragraph 16 witness statement). Ms Hill referred in cross examination to a HR Advisor, Sonia Davies. Ms Davies did not give evidence but was involved with the recruitment of the claimants. I was not referred to any documentary evidence detailing Ms Davies' involvement in the bundle.

109. Mr Griffiths' confirmed that the Recruitment Principles could have been complied with when recruiting but with difficulty; a business case would have to be submitted to the Director in Wales for onward approval by the Workforce Development Board in London. The implication of this evidence was this would be a lengthy process with no certain outcome. Mr Griffiths was advised by the Governor of the Prison that recruiting sessional staff "was the way to go forward". Mr Griffiths suggested that that was accepted practice within the Prison and therefore applied it to the claimants. Other than this, the respondent's witnesses were unable to give evidence about who made the decision about the moratorium / recruitment freeze or the way in which it would be implemented.

110. The respondent's witnesses understood that sessional recruitment was the only option, or at least the only realistic option in circumstances where the trawl process operates, which could have led to applications from 'at risk' Civil Servants wholly unsuited for the roles. Ms Hill memorably encapsulated her view of engaging via the trawl; 12 months down the line with a recruitment process she could end up with a dog handler for a teaching post.

111. Upon recruitment of the claimants I infer there was a clear intention of long term engagement. The claimants were required to work to a timetable. Courses on offer were held over the long term (eg GCSE courses with a structured learning path and outcome). However even for less structured sessions, such as wellbeing and basic skills, it is

relevant that there was an ongoing commitment by the prisons to offer such courses.

112. Mr Griffiths' asserts that the claimants were told when first engaged that there was no obligation on the part of the respondent to offer work (paragraph 28 witness statement). However Mr Griffiths only personally offered work to 2 of the claimants at the outset of their engagement (Mr Jones and Miss O'Brien). At paragraph 16 Ms Hill asserts in general terms, without reference to named claimants, that she explains to all sessional staff that there is no guarantee of an offer of work and that if work was offered they did not have to accept it.

113. Ms Hill also asserted that the claimants did not need to seek permission to take annual leave or provide fit notes if absent due to illness. At paragraph 17 she states "*the department works together as a team and the difference in employment status is of little day to day importance. However on occasions as the Department's Manager I have had to emphasise the difference in status, for example when discussions are being held concerning Prison Service pay and conditions*…" Mr Griffiths also asserts that the claimants could take time off without obtaining prior authority from management and were not limited as to the length of time they took off. This position was explored in the context of annual leave arrangements during cross examination.

114. The respondent's position is that whilst there was no obligation to obtain authority, or even to inform management of absence, in practice most sessional staff did indicate when they would be absent as a matter of professional courtesy to allow cover to be arranged.

115. Ms Hill managed the leave requests of employed staff within her department but asserts (paragraph 29 of her witness statement) that sessional staff were not subject to leave management and she "*regularly emphasised this difference to sessional members of staff*". Ms Hill accepts that in practice sessional staff provided notice of non attendance 'out of courtesy'.

116. Mr Griffiths sent two noteworthy emails to Teachers in the department on the subject of annual leave on 15 May 2015 [421] and 1 June 2015 [422]. The first states: "*from 1 June I am going to have to be firmer with approving leave and if we are short staffed then leave may be refused. Please also be aware that the longer the notice you can give me the more likelihood of leaving being granted. You may find it worthwhile discussing with your colleagues so you help regulate your own leave patterns*". The second email states: "*due to the lower numbers of staff than we used to have it will be necessary to have*

more robust control of annual leave. Please familiarise yourselves with the NOMS Annual Leave Policy as explained in PSI 16/2013 and be clear that leave will need to be booked in advance and will need to have minimal impact on delivery for it to be authorised".

117. Mr Griffiths' emails were sent to all claimants still working for the respondent: Mrs Penn, Miss O'Brien and Mr Jones (by this time Mr Proctor and Mrs Betts had left the respondent). Mr Griffiths suggested that the leave emails were sent in error to the claimants, as they were included in a group email distribution group he had set up. I do not accept this explanation and consider there was an intention to communicate to all teaching staff, including the 3 claimants in question, of the need to obtain permission for leave. This view is supported by steps Mrs Penn took subsequently to plan a rota of leave, detailed below.

118. Mr Griffiths asserted that there are no holiday or sickness absence records retained in respect of the claimants. Further that the claimants as sessional staff would be permitted to work elsewhere without obtaining permission to do so from the respondent. As for the holiday records, it seems that these were kept in so far as Mrs Penn was required to plan a holiday rota (albeit this was at a time when Mr Griffiths had left the department on secondment).

119. Ms Hill accepts that, as well as being paid for contact teaching hours with offenders, other hours were paid from time to time to the claimants. Examples include time to attend staff meetings, in respect of delivering forms to the Shared Service Centre and where classes were cancelled because offenders were not available. Ms Hill asserts at paragraph 26 that "*beyond a moral expectation that they would attend to teach the topics they had been timetabled and agreed to teach, sessional staff are not obliged to attend work*".

120. Ms Hill unchallenged evidence is that the claimants were paid an "enhanced" hourly rate of £17.68 per hour; a rate inherited from Coleg Gwent sessional staff. Ms Hill asserts that the rate was understood to include an element for holiday pay and is higher than the overtime rate for employed teachers within the department.

121. The claimants were subject to Prison Service professional standards concerning conduct but Ms Hill asserted they were not subject to Disciplinary or Grievance policies or the annual appraisal process.

122. As a note on chronology; the Judgment in **Thomas** (Prison Chaplains) was dated 24 December 2013. Mr Bye, the claimant's Trade Union representative, raised concerns in writing regarding the claimants'

employment status in an email to Governor Darren Hughes on 3 July 2014 [213]. It is submitted that the respondent's stance towards the claimants changed in light of the **Thomas** decision being handed down.

123. I have specified below where findings and conclusions relate to all claimants. I do not necessarily repeat such findings and conclusions under each named claimant.

Tracey Betts

124. The agreed position with regard to Mrs Betts is that she commenced working for the respondent as a Teacher in May 2010. She resigned from her role with effect from 30 January 2015 and now works for the Probation Service.

125. At her commencement date, the Recruitment Principles were contained in the OIC.

126. In light of the agreed facts and the focus being on mutuality of obligation, my conclusions focus on that issue.

127. Following a period of PGCE placement as a trainee Teacher at HMP Usk, Mrs Betts was approached by Ms Hill in May 2010 and offered a role as a Prison Basic Skills Teacher; initially 2 days per week but increased to full time hours a week later. This offer was made on the basis of recommendation by Mark Stephens who monitored her work as a trainee.

128. Mrs Betts accepts that at the time she commenced the role she was advised there was a "recruitment freeze" and she could only be offered sessional work. She states at paragraph 5 "*I was told that once the freeze was over the Education Department would change this to a full time contract of employment, but this did not happen*". This indicates to me the respondent's long term intention; it viewed the relationship as being long term in nature.

129. While Mrs Betts was informed at the outset she was a sessional worker, I accept her evidence that in fact she worked alongside employed Teachers and regularly did exactly the same duties. It is accepted that her work was timetabled and she was required to undertake compulsory training [279].

130. As well as her teaching duties, Mrs Betts was Lead Liaison and contact for Usk Prison with the Jobcentre Plus and Pension Service.

131. Mrs Betts was subject to observation of her teaching (group observation in respect of Mrs Betts and Mrs Penn [515]), she was required to submit statistics in respect of Welsh Government funding; she was required to create lesson plans and schemes of work and her work was timetabled in advance.

132. As for time off, I was referred to [281]; an exchange of emails in April 2011. Mrs Betts writes to Ms Hill "*Hi Wendy <u>you said on Thursday to email you</u> about time off this week. You said Tuesday and Wednesday was okay but is it okay to have Thursday off too? Am trying to decorate the boys bedroom, but it is taking much longer than I thought. If it is too inconvenient its okay just let me know and I'll come in (I am suppose to be up in Prescoed on Wednesday morning and Thursday all day). Thanks Tracey*". (My emphasis underlined). In response Ms Hill states "*That's fine I will copy Andrew into this email. Have a good break Wendy*".

133. Having reviewed this exchange between Mrs Betts and Ms Hill, I consider that the natural meaning is that Mrs Betts was asking for permission for time off, which is indicated in the opening sentence "*you said on Thursday to email you about time off this week*". Ms Hill's response is indicative of permission being given.

134. Mrs Betts participated in an Estyn inspection in 2012, prior to which Mr Griffiths accepts he would have informed all staff that they could not take any leave in the preceding month. Mr Griffiths accepted in cross examination that it was possible that the claimants working at this time would have gained the impression that they were not permitted to take leave. Mr Griffiths stated that it would be necessary for the whole team to function as one and that even though employment status may differ there was a need for them to work together. I conclude that Mrs Betts was expected and obliged to attend in the run up to the Estyn inspection.

135. I accept Mrs Betts' evidence that she was unable to withdraw her services on any particular day without prior permission and planning [281]. In the absence of Mrs Betts, or any of her colleagues, ultimately the responsibility for ensuring adequate cover fell to Ms Hill, if it could not be agreed between members of the team.

136. Mrs Betts submitted a grievance on 4 December 2014 to Mr Griffiths with regard to her employment status. Mrs Betts grievance was not accepted as such but treated as a complaint, held in abeyance.

137. Ms Hill gave evidence that in late 2014 (just prior to Mrs Betts' resignation) Mrs Betts' attendance reduced, which coincided with a time when she was preparing for interviews with the Probation Service. In her absence Ms Hill arranged for cover for her classes. There was no indication of any other periods of time were Mrs Betts did not attend regularly to teach as timetabled in advance. Furthermore this was at a time when the issue of employment status was subject of complaint and Mrs Betts was contemplating leaving. In all the circumstances I do not consider this limited absence detracts from mutuality of obligation; there was no suggestion that Mrs Betts did not inform the respondent of her absences in advance.

138. The respondent put no documentation in place when recruiting Mrs Betts (or other the claimants). I heard no evidence from the decision makers with regard to the recruitment freeze/ moratorium on employment. Whilst Mrs Betts accepts that she was told she was being employed on a sessional basis, in reality it was not the case that she could come and go or attend or not as she pleased. This is clearly indicated by the need for her to request authority for absence [281] and work to timetable. This goes beyond professional courtesy in respect of all claimants. I also take into account Mr Griffiths' comments with regard to the attendance of the claimants in the weeks prior to Estyn inspection; this is incompatible with a lack of mutuality of obligation.

139. It would not be realistic to be able to manage a teaching programme with the majority of staff (7 'sessional' out of a total of 12) being able to come and go as they pleased. The provision of learning needs to be more tightly controlled and I find that the claimant was obliged to attend work as she was timetabled in advance to do. I also take into account the fact that if she was absent it was ultimately for Ms Hill to arrange a replacement.

140. Mrs Betts did not work for any other employer during the time that she worked as a Teacher for the respondent. The respondent accepts that she worked under its control to their professional standards. On the facts there was sufficient mutuality of obligation to establish a contract. Mrs Betts' work was timetabled in advance and it is wholly unrealistic to imagine a situation where she could not attend for work for long periods of time of her own choosing. In summary I conclude that Mrs Betts' was employed with the respondent.

Nathan Proctor

141. The agreed facts with regard to Mr Proctor are that he commenced working with the respondent as a Teacher in August 2011. He

resigned from his role with effect from 27 February 2015 and now works as a Teacher for Coleg Gwent.

142. CRAGA was in force at the time of his engagement.

143. Mr Proctor worked as a Woodwork Teacher on the basis of 35 hours per week, delivering Level 1 City & Guilds qualifications to offenders. Mr Proctor also liaised on behalf of the respondent with outside agencies such as the Police, Schools, the Council and local Museum. It is evident from Mr Proctor's working patterns, an example of which is at [377] the regular and consistent hours that he worked between 2011 and 2015. Mr Proctor attended staff meetings and represented the Learning & Skills Department at the Prison Security Committee at [352 and 353]. Mr Griffiths explained his involvement as due to the workshop he taught in containing tools, however the fact remains that Mr Proctor was the respondent's representative to that Committee.

144. The respondent concedes that had Mr Proctor been unavailable they would have had to cancel his class because of his particular area of specialism. Mr Proctor was required to maintain data for his courses and complete psychology reports on prisoners. Mr Proctor was subject to Estyn inspection (in the period leading up to which he would not have been permitted absence) and observation of his teaching.

145. Mr Proctor's assertion that he had to make formal requests for leave with notice is supported by his resignation email to Mr Griffiths at [376] in which he says "*Hi John would it be possible to have 27th off please? So my last working day is on 26th of the month*".

146. As well as teaching offenders, Mr Proctor was also engaged in fitting out The Clink restaurant at Cardiff Prison; in relation to which he was photographed for the press with prison staff and commended for his work.

147. Mr Proctor was awarded vouchers in recognition of good work on 8 December 2011 [351]. The letter accompanying the vouchers is signed off "*I am also grateful for your responsive and helpful work ethos; these characteristics have been evident from your first day on the team. Put simply, it is a privilege to have you working with us within Usk Prison. I sincerely hope this letter and the vouchers enclosed can in some small way reflect my thanks for your contributions*".

148. Mr Proctor was interviewed by the NOMS (National Offender Management Service) job evaluation team that determined that vocational areas, such as woodwork, were working to the standard of a Band 6 Teacher [357]. Putting Mr Proctor forward for interview in job

evaluation shows the high level of integration he had within the workplace and seems to me a strong indicator of employment status. Mr Proctor was the face of the Learning & Skills Department in internal meetings as well as representing the respondent externally with other organisations.

149. Mr Proctor accepted that he did carry out some private work for family and friends whilst working as a Teacher for the respondent but this was done at the weekend outside of normal working hours at the Prison. I do not consider this detracts from the nature of his position with the respondent. That additional work was not carried out by way of a business on his own account but for personal contacts in his spare time. Also the nature of what he did for friends and family (carpentry) was different to the tasks that he performed on behalf of the respondent (teaching).

150. Mr Proctor submitted a grievance about his employment status on 26 November 2014 [356], which was accepted as a complaint and held in abeyance.

151. Mr Proctor was appointed on personal recommendation in order to cover the departure of a retiring teacher. There is a lack of clarity from witness statements on both sides, as to who spoke with Mr Proctor about the terms of his engagement and as with all the other claimants there is no documentary evidence in place. That the woodwork class could not go ahead without Mr Proctor it is compelling evidence to me that there was mutuality of obligation; this class was on offer to offenders and was held in high regard by the respondent noted with the gift of vouchers [351]. There is a significant level of control over Mr Proctor's work, particularly in circumstances where he is teaching offenders in a workshop where tools are available

152. I am satisfied that there is sufficient mutuality of obligation to demonstrate that an employment contract exists. He was required to obtain permission for time off; as evidenced by comments made by Mr Griffiths prior to Estyn inspection and his email around time of his resignation. Mr Proctor felt bound to do what was asked of him by his managers and did so; attending regular teaching hours as timetabled over a period of 4 years. I conclude that Mr Proctor had the status of an employee.

Kellyann O'Brien

153. The agreed facts in respect of Miss O'Brien are that she commenced working for the respondent as a Teacher in 2013 and remains in this role.

154. CRAGA was in force at the time of her engagement.

155. Miss O'Brien, whilst carrying out a PGCE in Adult Literacy, began a work placement at HMP Usk in November 2012. Miss O'Brien was offered work as a Teacher following an approach by her father, who worked at Cardiff Prison, to Mr Griffiths. Initially in February 2013 Mr Griffiths offered her 9 hours per week, which Ms Hill described as "cover". Miss O'Brien's hours increased from 9 to 18 by August 2013 and then to full time hours in September 2014. On each occasion Mr Griffiths made the offer of increased hours.

156. Miss O'Brien is primarily based at HMP Prescoed teaching Literacy. There is only one other Teacher based Prescoed who specialises in IT. Miss O'Brien offers evening and daytime sessions working regular hours.

157. Miss O'Brien accepted that initially she did some work with Torfaen Borough Council whilst working for the respondent; this was at the outset of her teaching with the respondent when she worked only a limited number of hours per week.

158. Miss O'Brien's work was timetabled and she was required to attend training [430]: an email of 9 July 2015 indicates she was required to complete the training. Miss O'Brien produced schemes of work [445] and had a consistent pattern of work between 2013 and 2015 [462 to 468]. Miss O'Brien was informed by email from Mrs Penn of 19 June 2015 [423] as to data recording that she was required to complete together with deadlines. This data recording was subject to inspection by way of Commissioners Assurance visits (as informed in an email of 25 June 2015 [424 to 425]). In addition Miss O'Brien was required to attend staff meetings ([429] email of 6 July 2015).

159. Miss O'Brien's efforts were recognised in an email of 18 March 2015 from Mr Griffiths [411] in which he notes her putting forward new ideas and innovations including liaison with the Farm Manager to develop learning and skills opportunities for offenders.

160. On 4 December 2014 [405] Miss O'Brien submitted a grievance with regard to her employment status to Mr Griffiths. Again, this was dealt with as a complaint held in abeyance.

161. Miss O'Brien received the leave emails from Mr Griffiths of 15 May and 1 June 2015 [421 and 422] referred to above. Miss O'Brien described a 'pressure' on 'sessional staff' not to take leave at certain times; suggesting that she felt a threat to her job were she to do so. Miss

O'Brien felt that there were times when she knew not to request or take time off due to staff shortages. She also suggested that she was aware of how she would be treated if she took time off during inconvenient periods. "*You knew when you could and couldn't take time off and how you would be treated if you did take that time off"*.

162. Miss O'Brien was sent an email on 13 July 2015 by Mrs Penn entitled 'annual leave 2015/2016' (page 431) which states as follows –

> *"Hi all I am in the process of trying to transfer L&S staff annual leave onto a spreadsheet on the P drive. This sheet will allow us to see when other members of staff are off so that we do not leave classes without cover and also record the amount of individual time taken. In order for me to make sure I have accurate information, could you please forward me your leave sheets for 15/16 asap so that I can complete. Any further leave will need to be approved by Ken and I will update the spreadsheet as and when this happens, so please copy me in to any emails."*

163. On [432] Miss O'Brien's name was included in a spreadsheet entitled "Staff Leave June 2016". Miss O'Brien duly provided her dates of leave to Mrs Penn [434]. Subsequently Mrs Penn emailed Miss O'Brien with an attached spreadsheet on 16 July 2015 [437]: "*Hi so that we have some consistency applying for and recording our annual leave, could you please all start using the attached sheet*".

164. I was referred to an exchange of emails in or around 13 May 2014 [470a] (additional documents added to the bundle during the course of the hearing). These emails, initially between Miss O'Brien and Ms Hill, relate to holiday. They start at 10:51am on 13 May with Miss O'Brien stating "*Hi Wendy I have booked a holiday for the end of the month for 2 weeks. The dates will be 30 May to 13 June. I have informed Andrea. Hope this is okay?*" Ms Hill responds at 11:25 "*Thanks Kelly, are you off anywhere nice?*" Miss O'Brien responds at 11:35 "*Only Tenerife, cheap and cheerful*" with Ms Hill responding "*Enjoy the sunshine*" at 11:41.

165. Some time later at 13:13 Ms Hill sends another email, which for the first time she copies to Mr Griffiths and Andrea Neve, stating "*Brilliant – also Kelly whilst its smashing that you let Andrea know you are going to be on holiday just so that you are aware – one of the benefits of being sessional is that you take leave as and when you want it. The requirement for notice of absence or regularity of attendance is applicable to contracted staff only but I do appreciate your courtesy*".

166. This is the only written evidence I was referred to of Miss O'Brien being told that she could take leave as and when she wanted to. I note that this was sent at a time when the Employment Tribunal Judgment in **Thomas** had been public for some months and would have been known to the respondent.

167. I was also referred to an email of 3 March 2015 [470b] from Ms Hill to Miss O'Brien: "*Just a quickie to ask do you have any plans for leave weeks beginning 16th and 23rd March? I know as a sessional you can take whatever you like but there are cover issues for those weeks and I am just checking to see if you know whether you will be around*". This email was sent 3 months after the claimant raised her grievance with Mr Griffiths about employment status on 4 December 2014.

168. My conclusion from reviewing these emails is that there was a requirement to notify the respondent of leave and seek approval. Whilst I note that the language adopted by Miss O'Brien in the email of May 2014 suggests that she had already booked the holiday; she still appears to seek permission by asking "*Hope this is okay*?" In any event these emails are superceded by leave emails from Mr Griffiths and the documents sent in July 2015, where she is required to provide advance notice of her leave within a spreadsheet and her name is included in a rota of annual leave. I accept Miss O'Brien's evidence that whilst the respondent may have said that as a sessional member of staff she could take time off whenever she chose, the reality was that there was pressure (or in other words, obligation) upon her to work to the planned timetable. As such she was quite aware of the times when she felt she could ask for leave as these were dictated by cover issues, as indicated by the email enquiry from Ms Hill [470b]. There are only 2 teachers based at HMP Prescoed and so it would cause real practical difficulty if Miss O'Brien attended at her whim. The correspondence regarding the taking of leave indicates an obligation upon her to attend and teach to timetable sufficient to show mutuality of obligation. The level of control exerted by the respondent over her work, as acknowledged in the agreed facts, indicates to me that Miss O'Brien has employment status.

169. Finally I note Miss O' Brien applied unsuccessfully for a post as an employed Teacher in a recent process held under the Recruitment Principles. Initially teaching posts within the Learning and Skills Department were made available for application by Civil Servants (such as Mrs Penn and Mr Jones, once he had reverted to OSG). Only when the post was advertised externally could Miss O'Brien apply. Unlike her colleagues, Mrs Penn and Mr Jones who were appointed, Miss O'Brien was not interviewed by a panel including Mr Griffiths. Miss O'Brien asserts unfairness with regard to the panel that

assessed her but it is not necessary to the issues before me for me to make a finding with regard to that assertion.

Cheryl Penn

170. The agreed facts with regard to Mrs Penn are that she was employed by the respondent as an Administration Officer from 2005. From 2007 she was working as a Teacher (for her hours as an Administration Officer she was recognised by the respondent as an employee, but not for her hours as a Teacher). She was accepted by the respondent as fully "employed" Teacher from 3 August 2015.

171. Mrs Penn was appointed to the Civil Service in respect of her role as an Administrative Officer. The OIC was in place when she started work as a Teacher.

172. Her administrative role was to support Mr Griffiths and the rest of the Learning & Skills Department. At an early juncture Mrs Penn showed interest in teaching and was encouraged in this career path by Ms Hill, who subsequently offered her some teaching hours to cover when an employed member of teaching staff partially retired. Ms Hill was complimentary of Mrs Penn's abilities as a Teacher and encouraged her to attain teaching qualifications up to Level 5. Mrs Penn's teaching hours increased up to the point where they matched her administrative hours (20 per week in each role). By 2012 [504] Ms Hill confirms that Mrs Penn worked the following hours on a continual weekly basis from May 2011 to May 2012: '*Monday, Tuesday, Wednesday and Thursday: 8:30 to 11:30 and 13:40 to 16:30'*

173. Mrs Penn was responsible for liaison with external organisations, such as the Shannon Trust, and attended internal meetings on behalf of the department, such as the Employability Team meeting.

174. Mrs Penn's teaching work was subject to observations; an example of a group observation in respect of Mrs Betts and Mrs Penn is detailed at [515]. In its conclusion Ms Neve's observation outlines certain areas of concern at [522] "*actions not mapped to ESW curriculum yet*". She was given teaching observation feedback on 2 May 2014 at [537]. As well as being subject to observation Mrs Penn received feedback with regard to her teaching during the course of performance reviews. At [487] is an appraisal document in respect of Mrs Penn dated 17 June 2011. Under the heading 'Core duties and objectives' it states "*to undertake teaching duties as required against the identified roles and responsibilities in the Learning & Skills Policy documents*". Mr Griffiths comments: "*This is a developing role and going extremely well. You have had 4 observations with the result of 1x Grade 2 and 3x Grade 1s*

which is an excellent achievement. The final module results will be due in July and you intend undertaking a PGCE in September". At [580] in the end of year performance review dated 21 April 2015 there is reference to marking and submission of exams and City & Guilds qualifications [576].

175. Mrs Penn received the leave emails from Mr Griffiths referred to above [581]. Mrs Penn was responsible for sending out the emails and spreadsheets with regard to a rota of annual leave, referred to above in respect of Miss O'Brien. Mrs Penn completed the spreadsheet with her annual leave to enable planning. Evidence of Mrs Penn seeking permission to take time off appears in emails between Mrs Penn and Mr Griffiths at [558] (email of 12 December 2014) and [587] in respect of a dental appointment on 2 July 2015. Mr Griffiths responds "*That's fine*", indicating his approval of the requests.

176. Mrs Penn was subject to disciplinary investigation with regard to alleged errors on her claim for sessional teaching hours. This investigation resulted in no charges being put to Mrs Penn.

177. Mrs Penn is the only one of the claimants to have had a grievance accepted, the details of which appear at [546]. In it she complains that during one to one meetings she was assured that all would be done to acquire her a teaching contract and "*discussions were had about giving up my AO duties and taking on a full time teaching role as I was told that is where my skills lay*". In the grievance Mrs Penn also refers to the fact that she was responsible for mentoring University students training to become teachers and that she participated in the Estyn inspection. The respondent did not provide a substantive response and Mrs Penn appealed at [552], the outcome of which was postponed in a letter of 4 March 2015 [563]. The fact that the grievance remained open was confirmed in a further letter from Governor Hughes on 19 June 2015 at [584].

178. It appears clear to me that mutuality of obligation existed between Mrs Penn and the respondent as regards her teaching duties. Latterly she herself was tasked with setting up a rota of leave, sent out the template spreadsheet for others to complete, which she had already done. There is evidence of Mr Griffiths approving her leave. To suggest that she could have chosen not to turn up to teach is unrealistic in light of the length of time she has been a Teacher within the Department and the fact that she has worked at the equivalent of a Band 6 Teacher since 2013**.** Other factors which strongly point towards an employment relationship are the fact that she was given feedback with regard to her teaching not only during the course of observations and the Estyn

inspection but also in performance appraisal with Mr Griffiths. A further example of her employment status is that she was subject to disciplinary investigation, had a grievance accepted and acted as a mentor. In light of the level of control exerted over the way in which she carried out her teaching tasks and the other agreed facts I conclude that Mrs Penn was an employee.

Matthew Jones

179. The agreed facts with regard to Mr Jones are that he was employed by the respondent from December 2011 as an Operational Support Grade (OSG). He commenced working as a Teacher for the respondent on 17 June 2013. He was accepted by the respondent as an employed Teacher from 3 August 2015.

180. CRAGA was in force at the time of Mr Jones' engagement.

181. Mr Jones' contract of employment at OSG level is at [620 to 627]; he originally worked in security. Mr Griffiths indicated that this was not a graduate role; he discovered during the course of a conversation with Mr Jones that he was an IT & Sport graduate with an interest in teaching. As a result of that conversation Mr Jones accepted an invitation to visit the Learning & Skills Department. Mr Griffiths subsequently offered him a teaching role, indicating there was a need for IT and Physical Education teaching. Mr Jones was given additional responsibility of IT lead in the Department from September 2013.

182. Mr Jones was successful in obtaining an employed position as a Teacher in 2015 when posts were made available to Civil Servants following a trawl for applicants. 'Sessional staff' were not permitted to apply for the roles. On advice, Mr Jones reverted back to his previous OSG role for a period in order to participate in the recruitment process as a Civil Servant. This factor highlights the importance and distinctive nature of the Office of Civil Servant. The details of Mr Jones reverting to OSG were never confirmed in writing by the respondent. Mr Jones continued to carry out his teaching duties but his pay was reduced to that of an OSG with effect from 13 April 2015. During this period Mr Jones was subject to a staff performance and development review [678] which refers to his job title being "OSG / Teacher". The manager's review comments dated 26 May 2015 [684] relate entirely to Mr Jones' work as a Teacher.

183. Mr Jones acknowledges that Mr Griffiths offered him initial hours of teaching on a sessional basis, which Mr Jones accepted as a career progression opportunity. Mr Jones worked a regular pattern of 35 hours per week, retaining his employee number when he changed

from OSG to Teaching. He was responsible for teaching GCSE Maths which included advanced planning over the period of a year with a scheme of work. Mr Jones confirmed that if he had not attended then the GCSE classes would not have gone ahead. He asserted that it was not just his professionalism that dictated he would attend and explained that he had to be there otherwise the students would not achieve, just as students in a school environment would similarly not achieve without teaching on the GCSE syllabus.

184. Mr Jones worked to timetable with specific classes to teach [685], was subject to observation [651 to 652] and was required to provide monthly data analysis for Welsh Government targets. Mr Jones was selected by Mr Griffiths to be the Department representative for the E-SEAP project, a European Sustainable Energy Award available for Prisons. In doing so in an email of 9 September 2013. Mr Griffiths refers to Mr Jones as "*one of our Tutors*" [643]. The training with regard to the project was run by Mr Jones [650] and led to an award for sustainable energy use.

185. Mr Jones was also appointed to represent the Department with regards to the Orderly Meeting in respect of cleaning duties [647]. He was required to provide reports on prisoner roles to support applications for enhanced prisoner status [686] and became external contact point for suppliers and other external agencies as part of the Prison's industries work.

186. Mr Jones received the leave emails from Mr Griffiths on 15 May and 1 June 2015 [421 and 422], which indicate 'robust control' of annual leave and the requirement to book in advance in accordance with NOMS Annual Leave Policy. Mr Jones was also sent the leave rota emails from Mrs Penn [431].

187. Mr Jones did not work in any other capacity other than for the respondent.

188. Mr Jones submitted a grievance with regard to his employment status on 26 November 2014 [655 onwards]. This was rejected as a grievance but accepted as a written complaint, which was held in abeyance as confirmed by Mr Griffiths at [666].

189. Focusing again on mutuality of obligation, I take into account the reality of the situation in that Mr Jones could not simply choose not to attend for long periods of time or attend erratically; this would be unworkable where he taught a GCSE qualification and was the only member of staff teaching that qualification. Mr Jones received the emails from Mr Griffiths about approval of leave and Mrs Penn about the leave rota. It

seems clear that there was an obligation on Mr Jones to request leave; contrary to the assertion that he could take it at any time without permission. The reality of the situation is that Mr Jones was teaching a GCSE and was required to be present at the Prison to deliver teaching. Mr Jones worked regular hours as evidenced at [687] onwards, which demonstrate the level of commitment required. I further note that Mr Jones was subject to feedback during performance review which related to his teaching role; a further indication of his status as an employee. In summary I conclude that Mr Jones has the status of employee.

190. In conclusion, I prefer the evidence of the claimants as more reliable as to the need for prior notification of leave. Contemporaneous documents suggest to me a requirement for notice and approval which goes beyond professionalism and courtesy to members of staff in the Learning & Skills Department managing timetables. After Mrs Betts and Mr Proctor leave their teaching roles in early 2015, the position with regard to taking of leave further hardens as demonstrated in Mr Griffiths' emails of 15 May and 1 June 2015 [421 and 422].

191. The bargaining power between the claimants and the respondent is wholly unequal. There is limited influence the claimants could have in respect of the basis on which they were offered teaching work. Whilst some of the claimants acknowledged they were told their offer of work was made on a sessional basis the reality was that a 'take it or leave it' position was presented to them by the respondent. The respondent's own recruitment policy provides for temporary arrangements of this nature lasting no more than 2 years; this was exceeded for all claimants and I infer that there was an intention of long term engagements from the outset.

192. I was invited by the claimants to consider **Autoclenz Ltd v Belcher 92011) ICR 1157** and the necessity to examine the reality of the agreement between the parties. **Autoclenz** related to written contracts which it was found did not reflect the true agreement of the parties. I need to answer the question "what terms did the parties actually agree?" I am reminded (Elias J in **Kalwak** para 25) that Tribunals must "*take a sensible and robust view of these matters in order to prevent form undermining substance*". I accept that the reference to 'form' applies to oral statements that do not reflect reality as well as written documents that do not record the true agreement of the parties.

193. In this case there is no written agreement. It is only the statements made to the claimants to the effect that they were "sessional workers" and their freedom to take time off/out, which I must examine. In light of my findings above I do not consider those statements reflected the

reality of what was expected from the claimants either in terms of adherence to timetabled teaching or in the organisation and management of time off.

194. In so far as it is necessary for me to infer terms of contract, I find that the claimants were required to work such hours they were timetabled to teach as well as time necessary to carry out ancillary duties for which they were paid. I make no specific findings as to the particular number of hours per week for each claimant; this matter can be determined at the liability hearing.

Direction

195. A **telephone preliminary hearing (1 hour)** will be listed in due course in order to discuss case management, directions and the listing of a liability hearing.

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Employment Judge S Davies

Dated: 8 March 2016

JUDGMENT SENT TO THE PARTIES ON

9 March 2016……..

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.