EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Ms N Malek	**AND**	**High Commission of Brunei Darussalam - Brunei Student Unit**

Heard at: London Central by CVP videolink **On**: 16 April 2021

Before: Employment Judge Brown

Representation

For the Claimant: **In person**
For the Respondent: **Mr N Henry, Legal Consultant**

JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Respondent submitted to the jurisdiction of the Tribunal when it presented its ET3 Response.

2. The Claimant had 2 years' service in order to bring an unfair dismissal claim.

3. The Claimant has also brought claims of automatic unfair dismissal.

4. The Claimant was an employee of the Respondent.

5. The Claimant's complaints of unfair dismissal and unlawful deductions from wages/failure to pay holiday pay should not be struck out, but will proceed to a Final Hearing.

REASONS

The Claim

1. By a claim form presented on 6 December 2019 the Claimant brought complaints of unfair dismissal, failure to pay notice pay, failure to pay holiday pay and unlawful deductions from wages against the Respondent.

2. In her claim form, the Claimant said that she had been employed from 23 November 2015 to 8 September 2019 as "casual labour".

3. The Claim was served via the Foreign and Commonwealth Office to the Brunei Foreign Ministry and the Claim was received by the Brunei Student Unit on 20 May 2020.

4. The Respondent responded to the claim on 17 August 2020.

5. In its Response the Respondent said, amongst other things,

> "6.2.3. The Respondent submits that the Claimant's claim for unfair dismissal should be struck out as the Employment Tribunal doesn't. have the relevant jurisdiction to the hear the Claimant's claim for unfair dismissal as he Claimant was not employed by the Respondent so is not entitled to the protection of sections 94 and 98 of the Employment Rights Act 1996.
> 6.2.4 The Respondent further and in the alternative, without prejudice to the above, submits that the Claimant by her own admission was on a series of fixed term contracts with the Respondent. As the Claimant's last engagement was only for 6 months and did not form part of any previous engagement, the Respondent submits that the Employment Tribunal does not have the relevant jurisdiction to hear a claim of unfair dismissal the Claimant in any event does not have sufficient continuous length of service.
> 6.2.5 If contrary to the Respondent's primary case above, the Claimant's claim is allowed to proceed the Respondent denies the Claimant's claim in their entirety.
> 6.2.6 The Respondent engaged the Claimant on a casual basis initially on 23/11/2015. The Respondent submits that at no time has there been any mutuality of obligation between the parties. 6.2.7 Each time the Claimant was engaged these were ad hoc fixed assignments and there was no umbrella contract governing the overall relationship.
> 6.2.8 The Claimant's last engagement was between 09/03/2019 and 08/09/2019. When this came to an end the Claimant was offered a further engagement however the Claimant turned this down as it would not provide her with what she deemed as, sufficient hours.
> 6.2.9 The Respondent further submits that the Claimant has failed to particularise her claims for monies owed and or minimum wage in a manner than can be reasonably responded too. The Claimant has provided the National Minimum Wage rates for the particular years however the Claimant has failed to assert either the hours she worked in these periods, the rate of which was paid and or the level of alleged shortfall. The Claimant has also asserted she is owed holiday pay but has failed to assert how much holiday she has accrued; in what periods and the amounts she claims she is owed. On this basis the Respondent submits that this claim should be struck out.
> 6.2.10 If contrary to their primary case above, the Respondent denies the Claimant's claims for monies owed including holiday pay arears of pay and other payments.

6.2.11 The Respondent further submits that any alleged underpayments/deductions that allegedly occurred more than 3 months prior to the date of submission of the ET1.
6.2.12 Further and in the alternative, the Claimant is only entitled to claim for any sums owed (which is denied) for no more than 2 years prior to the date of submission of the ET1.
6.2.13 The Respondent denies that they failed to pay the relevant National Minimum wage as alleged or at all.
6.2.24 Further and in the alternative, without prejudice to the above, the Respondent submits that the Claimant was dismissed for the fair reason Redundancy."

Open Preliminary Hearing

6. On 15 March 2021 I ordered that this Open Preliminary Hearing be listed, to consider the following:

    6.1. Whether the Claimant has sufficient service to bring an unfair dismissal claim.
    6.2. Whether the Tribunal has jurisdiction to consider the Claimant's claims because the Respondent has submitted to the jurisdiction of the Tribunal.
    6.3. Whether the Claimant was an employee of the Respondent, or a worker.
    6.4. If the Claimant was not an employee, whether the Claimant's claim for unfair dismissal should be struck out because it has no reasonable prospect of success.
    6.5. Whether the Claimant's claims for unlawful deductions from wages and holiday pay should be struck out because the Claimant has failed to provide particulars of them and they cannot be sensibly responded to, so a fair hearing could not take place.
    6.6. Further directions for the conduct of the case.

7. In my reasons for making the order, I said that it was appropriate for the Tribunal to determine whether the Respondent had submitted to the jurisdiction of the Tribunal, in advance of any final hearing, seeing that the Respondent had pleaded it is part of the Brunei Darussalam High Commission, and an extension of the Ministry of Education for Brunei Darussalam. The Tribunal was required to give effect to state immunity as appropriate.

8. I gave directions for preparation for this Open Preliminary Hearing, including exchange of documents, preparation of a Hearing Bundle and exchange of witness statements. The parties complied with those directions.

9. At this Hearing, therefore, I had a Bundle of relevant documents and a witness statement from the Claimant, as well as a witness statement from Mr Mohammad Danny Aimi, who is employed by Brunei Government as Director of Studies at the Brunei Students Unit.

10. I decided that I would determine the matter of submission to the jurisdiction first.

Submission to Jurisdiction

11. The Respondent did not argue that its ET3 was presented without the authority of the Brunei ambassador. It did not present any evidence from the relevant ambassador. The issues in *Republic of Yemen v Aziz* [2005] EWCA Civ 745, [2005] ICR 1391 did not arise.

12. The Hearing was conducted remotely by videolink (CVP – Cloud Video Platform). Members of the public could attend the hearing. None did attend.

13. All attendees at the hearing had the bundle and documents. The parties were able to hear what the Tribunal heard. From a technical perspective, there were no difficulties.

The Respondent's ET3 Response

14. I have set out, above, the majority of the Respondent's ET3 Response. The Respondent did not say, in its ET3, that it relied on state immunity. The ET3 Response was signed Croner Group Limited, who were named as the Respondent's representatives.

Submission to Jurisdiction - Relevant Law

15. *Section 1 State Immunity Act 1978* ('the 1978 Act') provides, "(1)(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act. (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

16. By *s22* of the *1978 Act* 'court' includes 'any tribunal'.

17. *Section 2 State Immunity 1978 Act* provides that a State is not immune if it submits to the jurisdiction of the United Kingdom's courts:

"**S2 Submission to jurisdiction**

(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted—
(a) if it has instituted the proceedings; or
(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—
(a) claiming immunity; or
(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counterclaim unless it arises out of the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract."

18. In *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd's Rep 25, CA, the Court of Appeal considered the provisions of *ss2(3) &(4) SIA 1978.* LJ Nourse said, at p31, "What then is the effect of s. 2? Sub-section (3)(b) 'provides that a State (or state entity) is deemed to have submitted if it has intervened or taken any step in the proceedings. But that provision is expressed to be subject to sub-s. (4) which, by par. (a), states that it does not apply to intervention or any step taken for the purpose "only" of claiming immunity. The joint effect of those provisions is to presuppose an intervention or step in the proceedings; the prima facie result of that is a deemed submission to the jurisdiction; but if the intervention or step is made or taken for the purpose only of claiming immunity, there is no submission. Moreover, and this is very important, there is no submission if what is done by the State or State entity does not amount to an intervention or step in the proceedings. In my view s. 2(4) is a relieving provision. It would apply if, for example, a defendant served a defence in which the only claim made was one of immunity. Usually the service of a defence would be the taking of a step in the proceedings. But if it was confined as in the example suggested, s. 2(4)(a) would relieve the defendant from the usual consequences."

19. If a State has submitted to the jurisdiction of the Tribunal, it is not open to it, later, to seek to resile from that submission to the jurisdiction. See sections 2(1) and 2(3)(b) State Immunity Act 1978 Act and High Commissioner for Pakistan in the UK v National Westminster Bank plc [2015] EWHC 55, at [74.5].

Submission to Jurisdiction - Discussion and Decision

20. I decided that the Respondent had submitted to the jurisdiction by presenting its ET3 Response in the terms that it did.

21. Usually the service of a defence will amount to the taking of a step in the proceedings, per LJ Nourse in *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd's Rep 25, CA.

22. However, if, a respondent serves a response in which the only assertion made is one of immunity, s. 2(4)(a) SIA 1978 operates to ensure that the respondent is not treated as having submitted to the jurisdiction of the Tribunal by doing so, *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd's Rep 25, CA..

23. In this case the Respondent did not claim state immunity in its response.

24. Even if it had, I decided that the Respondent's ET3 Response went beyond "only" claiming immunity.

25. I noted that it stated, amongst other things, that the Claimant did not have sufficient service to bring an unfair dismissal claim and it denied that the Claimant had been dismissed (stating that, instead, the Claimant did not want to continue in employment). Both those assertions amounted to substantive defences to the Claimant's unfair dismissal claim: the Claimant could not claim unfair dismissal if she had not been dismissed; and the Tribunal would not have jurisdiction to determine her unfair dismissal claim if the Claimant did not have the 2 year qualifying period under *s108 ERA 1996.*

26. Further, the Respondent "denied" the Claimant's money claims. This also amounted to a substantive defence in relation to the Claimant's claims that money was owing to her.

27. I decided that the Respondent's ET3 Response went well beyond a step taken for the purpose "only" of claiming immunity under *s2(4)(a) SIA 1978*.

28. There was no evidence that the state was ignorant of facts entitling it to immunity. *S2(5) SIA* does not apply to relieve the consequences.

29. By asserting substantive defences to the claim, the Respondent impliedly affirmed the correctness of the proceedings and its willingness to go along with a determination by the Courts of the substantive claim, as Lord Denning MR described in *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd* [1978] I Lloyd's Rep. 357 at p. 36.

30. I therefore decided that the Respondent had submitted to the jurisdiction of the Tribunal and that, therefore, it was not able to rely on *ss4(2) & 16 State Immunity Act 1978* to defend the Claimant's claim.

Submission to Jurisdiction - Reconsideration

31. During the hearing, the Respondent applied to me to reconsider my judgment on submission to the jurisdiction, on the basis that the *Kuwait Airways Corporation v Iraqi Airways Company and Republic of Iraq* [1995] 1 Lloyd's Rep 25, CA case was overturned on appeal in the House of Lords.

32. I considered the application and the relevant caselaw. I noted that, in the House of Lords, Lord Goff gave the leading judgment, with which Lords Nicholls and Lord Jauncey agreed. The appeal was not upheld on the issue of submission to the jurisdiction. Indeed, the Court of Appeal's judgment on this issue was affirmed by the House of Lords. Lord Goff said,

    "Submission to the jurisdiction
    Before Evans J., K.A.C. submitted in the alternative that I.A.C. had submitted to the jurisdiction and so was precluded from claiming state immunity by reason of the exception contained in section 2 of the Act of 1978. Evans J. however rejected the submission; and his decision was upheld by the Court of Appeal [1995] 1 Lloyd's Rep. 25, though on rather different grounds, for the reasons stated in the judgments of Nourse and Simon Brown L.JJ. Before the Appellate Committee Mr. Chambers for K.A.C., while not formally abandoning the point, addressed no argument to the Committee upon it. In all the circumstances, I am not prepared to depart from the decision of the Court of Appeal on this point."

33. There was no suggestion, in the House of Lords, that the Court of Appeal had applied the wrong test regarding submission to the jurisdiction. In any event, I noted that, in his judgment in the Court of Appeal, LJ Nourse had relied on Lord Denning M.R.'s test in *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd* [1978] I Lloyd's Rep. 357 at p. 36, which had not been overturned on appeal or ever disapproved by a higher Court.

34. I did not change my judgment on submission to the jurisdiction in this case.

35. I went on to determine the other issues in the OPH. I heard evidence from the Claimant and from Mr Mohammad Danny Aimi.

Other Issues - Findings of Fact

36. On 18 November 2015, the Claimant signed a document accepting appointment as "Casual labour" at the Brunei Darussalam High Commission. Ahmad Faisal Haji Zainal Abidin, then Director of Studies, Brunei Students Unit, countersigned the document on 23 November 2015, confirming that the Claimant had reported for duty on 23 November 2015, Bundle page 43.

37. On 21 January 2016, Ahmad Faisal Haji Zainal Abidin, Director of Studies wrote to the Claimant, saying that her service as casual labour would be extended, from 25 January 2016 to 25 February 2016, page 44.

38. On 9 May 2016 the Claimant signed a document accepting appointment "on terms and conditions stated in the Employment Contract for Locally Engaged Staff of the High Commission of Brunei Darussalam in London", p45.

39. On 28 July 2016, Ahmad Faisal Haji Zainal Abidin, Director of Studies wrote to the Claimant, referring "to our letter .. dated 6 May 2016" and saying that her service as casual labour at the Brunei Students Unit would be extended from 9 August 2016 to 8 November 2016, page 47. The Claimant's working hours were

stated to be Monday to Friday 9.30am – 4.30pm and her rate of pay was stated to be £6 per hour. The letter said that the Claimant would be working in the Administration and Finance Section of the Brunei Students Unit doing clerical work and other general administration.

40. On 27 October 2016, Ahmad Faisal Haji Zainal Abidin, Director of Studies wrote to the Claimant, again referring "to our letter .. dated 6 May 2016" and saying that her service as casual labour would be extended, from 9 November 2016 to 8 February 2017, page 48. The terms regarding hours of work remained as stated in the 28 July 2016 letter.

41. On 27 January 2017, Ahmad Faisal Haji Zainal Abidin, Director of Studies wrote again to the Claimant, again referring to the letter dated 6 May 2016, and again saying that her service as casual labour would be extended, from 9 February 2017 to 8 May 2017, page 49.

42. On 7 February 2017, 8 March 2017 and 19 May 2017, Ahmad Faisal Haji Zainal Abidin, Director of Studies, wrote to the Claimant, directing her to undertake receptionist duties from 15 – 17 February 2017, 8 March 2017 – 10 April 2017 and 22 – 24 May 2017 page 50 & 51.

43. On 8 May 2017, Ahmad Faisal Haji Zainal Abidin, Director of Studies wrote to the Claimant, saying that her service as casual labour would be extended, from 9 May 2017 – 8 August 2017, page 52. The letter was in the same terms as the letters of 28 July, 27 October 2016 and 2017.

44. On 31 May 2017 the Claimant wrote to the assistant director of studies, Cikgu Irmawati, politely asking to be made a permanent member of staff, page 54.

45. On 8 August 2017, Ahmad Faisal Haji Zainal Abidin, Director of Studies, wrote to the Claimant, saying that her service as casual labour would be extended, from "9 Ogos 2017" to "8 Mac 2018", page 55. I understood those dates to be 9 August 2017 – 8 March 2018. The letter was in the same terms as the previous letters, save that it contained an additional term saying that, when the Claimant was requested to work as a receptionist at Brunei Hall, her working hours would be Monday – Friday 12.00pm – 18.00pm. It also said that the Claimant would be required to work as a receptionist, in addition to her clerical and administration work.

46. On 3 September 2017the Claimant wrote to the High Commissioner, saying that she had been working for nearly 2 years, asking for a permanent position and saying that her salary was being paid late, pp 56 – 57.

47. On 14 February 2018, Irmawati Haji Ahmad, Director of Studies, wrote to the Claimant, saying that her service as casual labour would be extended, from 9 March 2018 to 8 September 2018, page 58. The letter was in same the terms as the 8 August extension letter.

48. The Claimant made an application for annual leave on 17 April 2018 using a form entitled, "Application Form for Leave for Locally Engaged Staff", p59.

49. On 4 September 2018, Pg Ali Shafie Pg Haji Abas, Director of Studies, wrote to the Claimant, saying that her service as casual labour would be extended, from 9 September 2018 to 8 March 2019, page 60. The letter was in the same terms as 8 August 2017 and 14 February 2018 extensions.

50. On 28 September 2018 the Claimant wrote to the Respondent again, asking to be given fair employment entitlements and remuneration. She said that she was entitled to 28 days annual paid leave, the national minimum wage and that her contract should state the date on which her salary would be paid. The Claimant said that she had never taken any holiday because £42 per day would be deducted from her salary if she did, page 61. The Claimant said that workers who worked a 5 day week were entitled to 5.6 weeks holiday and that this applied to casual labour. She also set out the minimum wage rates and said that employers were required by law to pay employees at least the minimum wage, page 62.

51. The Claimant again applied for leave on 12 October 2018, 13 November 2018, 3 December 2018 and 2 January 2019, 11 February 2019, 21 February 2019, using a form entitled, "Application Form for Leave for Locally Engaged Staff", p63, 64, 65, 66, 67, 68.

52. On 1 March 2019, Pg Ali Shafie Pg Haji Abas, Director of Studies, wrote to the Claimant, saying that her service as casual labour would be extended, from 9 March 2019 to 8 September 2019, page 72. The letter was in the same terms as previous extensions.

53. The Bundle contained documents setting out the Claimant's job duties as "casual labour", pp73 – 74.

54. On 14 June 2019 The Mary Ward Centre wrote to the Respondent, on the Claimant's behalf, saying that she was the Respondent's employee, having been engaged on a series of fixed term contracts since 9 May 2016, and providing personal service under a contract of service, working regular hours for a regular salary under the Respondent's control and with mutual obligation. The letter said that the Claimant had not been paid the national minimum wage, and that the Respondent refused to pay the Claimant for her holiday pay, p80. The letter asked that the Claimant be paid her national minimum wage and holiday pay within 28 days. The letter also said that employees on fixed term contracts had the right not to be treated less favourably than a comparable permanent employee, p81.

55. On 1 July 2019 Pg Ali Shafie Pg Haji Abas, Director of Studies, replied, saying that the Respondent would pay the national minimum wage and holiday pay to the Claimant since she started her service, but that this would take some time to calculate.

56. The Claimant's last fixed term contract was not renewed after 9 September 2019.

57. I accepted the Claimant's evidence that she performed receptionist and clerical duties for the Respondent, working regular hours from 9.30am to 4.30pm, 5 days per week, with 1 hour break time. Her responsibilities as a receptionist and clerk

included answering the phone and attending to walk-in guest or students, dealing with student accommodation hostel bookings, corresponding to emails, handling cash receivables for hostel accommodation and food purchases from the canteen, daily cash balancing, filing, photocopying documents from students and the finance department, updating ledgers, updating databases and recording information. She also assisted other senior clerks and officers when required.

58. The Claimant clocked in and clocked out at work the same as other employees. However, she did was not paid automatically through payroll like other permanent employees, but was required to complete a Casual Labour claim form every month to claim her wages.

59. The Claimant applied for leave on a number of occasions using a form entitled, "Application Form for Leave for Locally Engaged Staff".

60. The Claimant was aware that she was not being treated as an employee by the Respondent during her employment. She challenged this in writing and asked to be recognised as an employee.

61. The Claimant was continuously engaged by the Respondent on a series of fixed term contracts from 2016 to 2019. There were no gaps in the Claimant's engagement by the Respondent between 9 August 2016 and the expiry of her last fixed term contract on 8 September 2019.

62. The Claimant took a 12 day period of leave in December 2018. She applied for permission to take this leave and was granted it – p65. That period of leave was during the term of her fixed term contract 9 September 2018 to 8 March 2019, page 60.

63. Mr Aimi told me that the Claimant was offered the opportunity of further casual work in September 2019, but said that she was not interested because it was not possible to guarantee the level of hours she was seeking due to budget restraints.

64. The Claimant, on the other hand, told me that, after her last Fixed term contract ended on the 8th of September 2019, she was told by the Respondent not to come to work the next day. She said that later, on the 23rd of October 2019, she received a letter in Malay from BSU confirming that they would not be continuing with her employment. That letter was in the Bundle, but no translation was available for it.

65. There was clearly a dispute of fact between the parties about the reason the Claimant's contract was not renewed in September 2019.

66. I was not taken to any relevant terms of employment for locally engaged employees.

67. There was no term in any of the letters sent by the Respondent to the Claimant saying that the Claimant was free to provide a substitute worker. There was no term which said that there was no mutuality of obligation between the parties.

Relevant Law
Employee / Worker

68. By section 230(1) Employment Rights Act 1996 it is provided,
"In this Act "employee" means the individual who had entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

69. In deciding whether or not a contract of employment existed between an employee and an employer, four essential elements must be fulfilled. These are: that a contract exists between the worker and the alleged employer; that an obligation exists on the worker to provide work personally (*Express & Echo Publications Ltd v Tanton* ("*Tanton")* [1999] ICR 693), that there is mutuality of obligation (*Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623), and there is an element of control over the work by the employer consistent with the contract being one of employment.

70. Even if all those requirements are fulfilled, the contract may be one of employment, rather than must be one of employment. The Courts have stated the Court of Tribunal will weigh up all the relevant factors and decide whether, on balance, the relationship between the parties is governed by a contract of employment, *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968], QBD 497, *Carmichael and Another v National Power Plc* [1999] ICR 1226 HL, *Express and Echo Publications Limited v Tanton* 1999 IRLR 367 and *Hewitt Packard Limited v O'Murphy* [2002] IRLR 4.

71. The factors which can be taken into account have included: whether the person doing the work provides his or her own equipment; the degree of financial risk taken by the individual doing the work; the intentions of the parties; a prohibition on working for other companies and individuals; remuneration by way of wages or salary; payment during absence for illness; paid holidays and membership of a company pension scheme. Those are not exhaustive factors, but are an indication of the relevant factors which can be taken into account.

Decision - Claimant was an Employee

72. The Claimant was engaged on a continuous series of fixed term contracts by the Respondent. These were set out in writing. They said that the Claimant was employed as "Casual Labour". However, they also specified that the Claimant was required to work Monday – Friday 9.30 – 16.30; or 12.00 – 18.00. The Claimant was required to work fixed hours and there was no suggestion that she was able to turn down work during the term of each engagement. There was no clause allowing the Claimant to substitute another worker. The contracts were directed to the Claimant and they required her to perform the work personally.

73. On the contracts, for the duration of each fixed term, the Respondent was obliged to offer the Claimant the work and the Claimant was required to do the work.

74. Furthermore, the Claimant was required to perform clerical, administration and reception work as determined by the Respondent. The Respondent had control

over the Claimant's work. There was no suggestion on the evidence that that the Claimant was free to direct her own work.

75. I considered that the essential requirements for a contract of employment existed: that a contract existed between the worker and the alleged employer; that an obligation existed on the worker to provide work personally (*Express & Echo Publications Ltd v Tanton* ("*Tanton")* [1999] ICR 693), that there was mutuality of obligation (*Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612, 623), and there was an element of control over the work by the employer consistent with the contract being one of employment.

76. I considered that the other features of the engagement were consistent with a contract of employment. The Claimant was integrated into the Respondent's workplace and clocked in and out of work each day. The Respondent provided the Claimant's place of work and work equipment. There was no suggestion that the Claimant provided her own facilities or tools. The Claimant took no financial risk – she was supposed to be paid an hourly wage for each of her fixed working hours. The Claimant was clearly required to apply for leave and to be granted it before she took leave.

77. While the Claimant knew that the Respondent was not treating her as an employee and was not paying her for holiday, she disputed this. She made clear that she considered that she was, in fact, an employee. I did not consider that the Respondent's failure to pay the Claimant salary or holiday pay indicated that the Claimant was not an employee – it could indicate, just as much, that the Respondent was avoiding its obligations as an employer.

78. There was, in fact, very little to indicate that the Claimant was not an employee. The only significant factors were the Respondent's failure to pay the Claimant a salary, to pay her on a PAYE basis, to pay her holidays. However, on the evidence, I concluded that the Respondent was simply failing to treat the Claimant as the employee she truly was.

Decision - The Claimant had Qualifying Service

79. I concluded that the Claimant was continuously employed on a series of fixed term contracts, without a break, from at least August 2016 – September 2019, over 2 years.

80. She therefore had the qualifying service to bring a claim of ordinary unfair dismissal under *s108 ERA 1996.*

81. I did not accept the Respondent's submission that the Claimant's period of leave in December 2018 broke her continuous service. She was simply absent on leave during this period. She had applied for leave and had been granted permission to take the leave. In any event, she was employed throughout December 2018 on a fixed term contract starting on 9 September 2018 and ending on 8 March 2019, page 60.

82. An employee's period of employment is presumed to last unbroken from start to finish unless and until the contrary is shown *ERA 1996 s 210(5).* This presumption applies for all purposes for which continuity is relevant. The presumption can be rebutted by any evidence, whether adduced by the employer or the employee. It does not matter that the employment was under a succession of consecutive contracts, provided there are no gaps between contracts such as break continuity.

83. The Claimant was continuously employed throughout the period pursuant to *ERA 1996 Pt XIV Ch* 1.

84. *Reg 8 Fixed Term Worker Regulations (Prevention of Less Favourable Treatment) Regulations 2002* was not relevant. Under that provision, an employee kept on successive fixed-term contracts for four years is considered to be a permanent employee and their term of employment is not thereafter limited. That provision does not mean, however, that an employee employed for fewer than 4 years cannot have the 2 years' service to qualify for unfair dismissal rights.

Decision - Claim for Automatic Unfair Dismissal

85. In any event, I considered that the Claimant had brought claims for automatic unfair dismissal. These did not require a qualifying period of employment.

86. In her claim form, under the heading "unfair dismissal" the Claimant said "I have raised concerns numerous times about my treatment as an employee on a fixed-term contract in comparison to my other colleagues at the BSU who are on permanent contracts. The failure to get any response from BSU led me to seek legal advise from Mary Ward Legal. Mary Ward Legal issued a letter on my behalf dated 14 June explained that such treatment was in breach of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations. In the letter, Mary Ward Legal asked BSU for a written statement of reasons for the less favourable treatment towards me as it is my statutory right under legislation.

87. The Claimant also alleged that she had not been paid the national minimum wage. She said that, since the 14 June 2019 letter, she had been paid some money in this regard. She said that she had not been paid her holiday pay entitlement. The Mary Ward letter, to which she referred in her claim form, had alleged both failure to pay the national minimum wage and failure to pay holiday pay.

88. I considered that the Claimant had brought claims of automatic unfair dismissal under *Reg 6 Fixed Term Worker Regulations (Prevention of Less Favourable Treatment) Regulations 2002.* She had alleged that she had been dismissed after she had requested from her employer a written statement *under regulation 5 or regulation 9 Fixed Term Worker Regulations (Prevention of Less Favourable Treatment) Regulations 2002* - see *(Reg 6(3) (ii))* and after she had alleged that the employer had infringed the *Fixed Term Worker Regulations (Prevention of Less Favourable Treatment) Regulations 2002* - see *(Reg 6(3)(iv).*

89. I also considered that the Claimant had brought a claim of automatic unfair dismissal under *s104A ERA 1996* – in that she qualified for the National Minimum Wage and that the Mary Ward letter constituted action taken, or proposed to be

taken, by or on behalf of the Claimant with a view to securing the benefit of her right to the national minimum wage.

90. I further considered that the Claimant had brought a claim of automatic unfair dismissal under *s104 ERA 1996* – in that the Mary Ward letter asserted her statutory rights under the Working Time Regulations to be paid holiday pay. The Claimant also said that the Respondent continued to refuse to pay holiday pay.

Decision - Reasonable Prospects of Success

91. I considered that the Claimant's unfair dismissal complaints had reasonable prospects of success. She had the qualifying period to bring a claim of ordinary unfair dismissal under *s108 ERA 1996*. She had also brought claims of automatic unfair dismissal, to which the qualifying period did not apply. There was clearly a dispute of fact between the parties about the reason the Claimant's contract was not renewed in September 2019. These were matters which could only be resolved at a Final Hearing, having heard all the evidence.

92. Further, the Claimant says that she was treated less favourably, as a fixed term employee. She also says that she has still not been paid her holiday pay. Again, there are factual disputes in these claims which can only be determined at a Final Hearing. Particulars can be ordered to clarify the Claimant's holiday pay claim.

93. There was no basis for striking out these claims.

Listing the Final Hearing

94. I gave directions for preparation for the Final Hearing. The directions accompany this Judgment in a separate document.

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Employment Judge **Brown**

Date: 22 April 2021

SENT to the PARTIES ON

22/04/2021.

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FOR THE TRIBUNAL OFFICE