EMPLOYMENT TRIBUNALS

Claimant: Miss M Okunola

Respondent: Global Prime Partners Ltd

PRELIMINARY HEARING

Heard at: in public by CVP **On:** **11 July 2023** at **10:00**
Before: Employment Judge Woodhead

Appearances

For the Claimant: In person
For the Respondent: Ms G Churchhouse (Counsel)

JUDGMENT

The claims of ordinary unfair dismissal are dismissed on withdrawal pursuant to Rule 52.

The Claimant's claims under case number 221073/2022 against the Respondent are dismissed under Rule 37 (1) (a) of the Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237 (as amended) as having no reasonable prospects of success (the Claimant not being an employee or worker of the Respondent under the relevant statutory provisions).

The Claimant's claim in 2200267/2023 (of direct race discrimination under S. 13 Equality Act 2010) has not been brought in time and is dismissed.

REASONS

THE ISSUES / BACKGROUND

1. In this judgment the Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237 (as amended) are hereafter referred to as "**the Rules**".

2. On 5 May 2023 there was a preliminary hearing for case management heard by Employment Judge A.M.S Green who listed these claims for a public preliminary hearing on 20 June 2023 via CVP.

3. EJ A.M.S Green also, at the request of the Claimant and following some discussion, removed, as a respondent to both claims, Titan Wealth Holdings Ltd ("**TWH**") (previously the First Respondent) and dismissed on withdrawal the Claimant's claims of ordinary unfair dismissal. In this respect her Case Management Orders record:

> *Application to remove the first Respondent*
>
> *4. The Claimant's application to remove the first Respondent is allowed. The first Respondent is removed from both claims.*
>
> *[…]*
>
> *32. I note that the Claimant has claimed ordinary unfair dismissal. She does not have the requisite two years qualifying service. I invited her to withdraw her claims. She withdrew those claims which I dismissed on withdrawal.*
>
> *33. The Claimant has applied to have the first Respondent removed as a party from the claims. The Tribunal Rules provide the Tribunal with a wide discretion to add, substitute and/or remove parties to proceedings. This power is set out in rule 34 and covers removing any party apparently wrongly included.*
>
> *34. I asked the Claimant to reconsider her application having heard what Ms Churchouse had said as to who had employed her. Having done so, the Claimant continued to rely on her application to remove the first Respondent as a party. She said that the first Respondent should be dismissed from these proceedings. She was very clear about that and said that the second Respondent had issued her P60. I allowed the application to remove the first Respondent. At the end of the hearing, the Claimant appeared to change her mind and backtracked on what she had said earlier about who she believed her employer was. However, the order had been made. If she wishes the decision to remove the first*

Respondent to be reconsidered and the order varied, then it is up to her to make the appropriate application to the Tribunal.

4. No formal judgment was issued dismissing the claim of unfair dismissal on withdrawal (paragraph 32 of the case management orders of 5 May 2023) and, as the decision in those Orders is clear, this judgment therefore records the dismissal on withdrawal pursuant to Rule 52.

5. The Claimant has not asked (either after the preliminary hearing on 5 May 2023 or at the preliminary hearing on 11 July 2023) for reconsideration of the decision to remove Titan Wealth Holdings Ltd from the proceedings under Rule 34. That decision was of course made at her request and a request to reconsider it would have run contrary to her argument that Global Prime Partners Ltd is the correct respondent to her claims.

6. Consequently there is one respondent to these remaining claims being Global Prime Partners Ltd (hereinafter referred to as "**GPP**" and/or "**the Respondent**").

7. Unfortunately the hearing had to be postponed from 20 June 2023 to 11 July 2023. Pursuant to the Orders of 5 May 2023 and, as agreed with the parties at the start of the hearing on 11 July 2023, the points to be determined at the hearing were:

   7.1 Who employed the Claimant at the relevant time (it was not contested by the Claimant that the relevant time is 14 November 2022 and 25 November 2022)?

   7.2 Should the Claimant be granted a just and equitable extension of time in respect of her claim for direct race discrimination in claim number 2200267/2023? This will be dealt with as a preliminary issue under rule 53(1)(b);

   7.3 Alternatively, should the claim for direct race discrimination be struck out under rule 53(1)(c) and rule 37(1)(a) as having no reasonable prospect of success?

   7.4 To make such case management orders as appropriate.

8. The Orders of 5 May 2023 recorded that these should be the matters determined "*unless the Judge at the public preliminary hearing decides that it is in the interests of justice to leave these points for determination at the final hearing*".

9. The Claimant was ordered to provide further particulars of her alleged protected disclosures, whistleblowing detriments and victimisation claim by **19 May 2023.**

10. The Respondent was ordered to prepare a file of documents for the **11 July 2023** (originally 20 June 2023) preliminary hearing by **9 June 2023**. Each party was to send the other witness statements for the hearing by **16 June 2023.** The Respondent's representative was ordered to submit to the Tribunal electronic

copies of the agreed hearing file and witness statements no later than **4 days before the hearing**.

11. EJ A.M.S Green summarised the case as follows:

30. The Claimant is black. She has made two claims relating to her employment with the first Respondent as CASS CF10 & Senior Risk Manager. She says she was employed from 14 November 2022 until 25 November 2022. Prior to that, from 3 August 2022, she provided her services through an agency. There is an issue as to who employed her, which I deal with below.

2210731/2022

30.1 This was presented to the Tribunal on 6 December 2022 following a period of Early conciliation which started on 1 December 2022 and ended on 6 December 2022.

30.2 In this claim, the Claimant claims the following:

30.2.1 Automatic unfair dismissal contrary to the Employment Rights Act 1996, section 103 A ("ERA").

30.2.2 Unfair dismissal contrary to ERA, sections 94 & 98 (subsequently withdrawn).

30.2.3 Whistleblowing detriment contrary to ERA, section 47B.

30.2.4 Direct race discrimination contrary to the Equality Act 2010, section 13 ("EQA").

30.2.5 Victimisation contrary to EQA, section 27

2200267/2023

30.3 This was presented to the Tribunal on 12 January 2023 following a period of Early conciliation which started on 30 December 2022 and ended on 5 January 2023.

30.4 In this claim, the Claimant claims the following:

30.4.1 Unfair dismissal contrary to ERA, sections 94 & 98 (subsequently withdrawn).

30.4.2 Direct race discrimination contrary to EQA, section 13 – this alleges that in July 2019 Gretchen Roberts did not offer her the permanent position of CASS Oversight Officer (CF10a) and offered it instead to a white comparator, Abigail Yardley. There is a time bar issue here.

31. In essence, the claims relate to the Claimant not being offered a permanent position and the manner in which the Respondent handled grievances. The Respondents deny liability. The second Respondent says that it never employed the Claimant and the claim against it should be dismissed. Ms Churchouse repeated this at the hearing.

[…]

35. The Respondents have asked for more information about the claims. This is set out in the draft list of issues. We spent a lot of time discussing this. The Claimant helpfully verbally provided some of the information requested. She will need to provide the remainder of the information in writing. I have made case management order to that effect.

36. We discussed the scope of the direct race discrimination claims and worked through paragraph 16 of the list of issues. The Claimant said that she was only relying on paragraph 16.5 in respect of her direct race discrimination claim. In other words, that in July 2019 Gretchen Roberts did not offer the Claimant a permanent position as CASS Oversight Officer. Instead she offered it to Abigail Yardley. She is white and is the named comparator.

37. We discussed the Claimant's victimisation claim. The Claimant said that she provided evidence in support of her grievance on 14 November 2022 which was not considered at the first stage of the grievance process 18 November 2022. She provided further evidence for stage 2 of the grievance process on 18 November 2022. She had the second stage of the grievance process on 24 November 2022 and received the outcome letter on the same day. It did not cover the evidence that she had provided. Regarding her allegation that no one considered the evidence, the Claimant said that she had sent the evidence to Gretchen Roberts at stage 1 and Damien Sharp at stage 2.

38. I agreed with Ms Churchouse that there should be an open preliminary hearing to consider the identity of the Claimant's employer and whether the direct discrimination claim made in the second claim was out of time. Depending on the outcome of that hearing, it may also be necessary to make further case management orders in respect of the five day final hearing that has already been listed.

12. EJ A.M.S Green prepared a list of issues the Tribunal will decide and set them out in the case management order making clear that it was a provisional list which requires updating once the Claimant has provided further information to the Respondent and amended its response as indicated in the case management orders.

THE HEARING

13. On 11 July 2023, due to technical issues with the saving of documents on the Tribunal's systems, I was not able to open documents that were sent into the Tribunal by the parties the evening before the hearing. I had not therefore been able to familiarise myself with the following documents sent in by the parties at the point that the hearing was due to start at 10am:

    13.1 Preliminary hearing bundle which I was told had been agreed with the Claimant (248 pages)

    13.2 Claimant's skeleton arguments (6 pages)

    13.3 Case Management Agenda completed by the Claimant

    13.4 Claimant's witness statement (6 page)

    13.5 Witness statement for Ms Gretchen Roberts (Group Head of Human Resources for the Titan group of companies) (4 pages)

    13.6 Respondent's skeleton arguments (17 pages)

    13.7 Draft list of issues in the claim prepared by the Respondent

    13.8 The decision in ***United Taxis Limited v Mr R Comolly Mr R Tidman v Mr R Tidman v United Taxis Limited v Mr R Comolly [2023] EAT 93, 2023 WL 04267647 (Before His Honour Judge Auerbach 28 June 2023)***

14. It was also agreed by the parties that further to the preliminary hearing on 5 May 2023, in respect of claim 2210731/2022:

    14.1 If the Claimant was found to be engaged (either as a worker or employee as applicable) by the Respondent then her claims of (i) Automatic unfair dismissal contrary to the Employment Rights Act 1996, section 103 A ("ERA"); (ii) Whistleblowing detriment contrary to ERA, section 47B; and (iii) Victimisation contrary to EQA, section 27 would need to be subject to case management orders to ready the claims for hearing;

    14.2 If the Claimant was found to have been engaged (either as a worker or employee as applicable) by Titan Wealth Holdings Ltd ("**TWHL**") but not the Respondent and it was found that, as such and because TWHL is not a Respondent to the claims of (i) Automatic unfair dismissal contrary to the Employment Rights Act 1996, section 103 A ("ERA"); (ii) Whistleblowing detriment contrary to ERA, section 47B; and (iii) Victimisation contrary to EQA, section 27 it would then need to be decided whether those claims had no reasonable prospects of success and if so, should be struck out. If stuck out they would proceed no further.

    I refer to this as "**the Employer Point**".

15. It was also agreed by the parties that further to the preliminary hearing on 5 May 2023, in respect of claim 2200267/2023, the matters to be determined under that claim were:

    15.1 whether the tribunal has jurisdiction to hear her complaint of direct race discrimination contrary to EQA, section 13 i.e. that in July 2019 Ms Gretchen Roberts did not offer the Claimant the permanent position of CASS Oversight Officer (CF10a) and offered it instead to a white comparator, Abigail Yardley. If it has been brought out of time the next question would be whether it would be just and equitable to extend time. I refer to this as the "**the Jurisdiction Point**" and it is also the only claim that continues under this claim number following the preliminary hearing on 5 May 2023.

    15.2 If it were just and equitable to extend time then a final consideration would be whether the claim should in any event be struck out as having no reasonable prospects of success (**"the Prospects of Success Point**").

16. Consequently if the Employer Point and either the Jurisdiction Point or Prospects of Success Point were to go in the Respondent's favour then both claims would fail. If a claim were to proceed then there would need to be further case management orders.

17. It was agreed by the parties that it would only be appropriate to hear the following applications by the Claimant if a relevant claim were allowed to proceed following determination of the Employer Point and Jurisdiction Point Point/Prospects of Success Point:

    17.1 The Claimant's application to amend her claims (to add new grounds of complaint) as per 2.2 of the case management agenda:

    Statement of initial employment particulars contrary to s1(3)(a) ERA 1996 (name of employer);

    Breach of employment contract contrary to s3 ERA 1996 (dismissal during probation and denial of right to appeal dismissal) (clause 1.2, p174 & clause 19.3, p183);

    Unfair dismissal contrary to Section 39(2)(c) EqA 2010; and

    Unfair dismissal contrary to Section 39(4)(c) EqA 2010.

    17.2 The Claimant's application for strike out of the Respondent's defence to the claims set out at 4.2 of her Case Management Agenda, which reads:

    The Respondent's dishonesty for strike out of the Respondent's case under Rule 37(1)(a) and in accordance with Base Childrenswear v Otshudi (UKEAT/0267/18/JOJ) relating to the following:

• The Claimant's correct employer (para 2, p34)

• Recruitment and race discrimination in July 2019 – evidence in bundle suggests Respondent did not receive application from the Claimant, however, contend that Claimant's race had no bearing on their decision not to offer her the position (para 6, p47);

• Denial that Claimant was entitled to three stages to grievance procedure (para 16a, p68) even through stipulated in the staff handbook (p164); and

• Respondent's reason's for dismissal i.e., the Claimant's conduct (para 34, p72) – Claimant was working from home on 15th November 2022 (p202) contrary to assertion in termination of employment letter (p203), carried out the agreed strategy for the client meeting with GPP's client Henderson Rowe (p195-197) and was not the cause of "severe damage" to an already damaged relationship with GPP's client Henderson Rowe (p190 & p150) contrary to assertions at para 8, p48.

The Tribunal is therefore requested to determine the true reason for dismissal: whistleblowing and/or race discrimination in contravention of the Claimant's employment contract (clause 1.2, p174).

18. I explained the process of giving evidence and cross examination, we agreed that the Claimant should give evidence first and the parties did not have any questions. We broke at 10:39 and agreed to reconvene at 11:45 when I had done more reading. At 11:45 I told the parties I needed more time and we reconvened at 12:30.

19. The Claimant made reference to the Respondent breaching Rule 42 of the Employment Tribunal rules by providing skeleton arguments and a reported case the evening before the hearing. I considered this and confirmed that I was happy that the rules had not been broken and that it was fair to proceed (the Claimant having had the opportunity to read the Respondent's skeleton arguments, the Respondent not having been ordered to prepare skeleton arguments, the Claimant having prepared her own skeleton and both parties being given the opportunity to talk to their skeleton arguments today).

20. Having read the Claimant's witness statement (which covered many of the things that would need to be determined at a full merits hearing) I made sure that the Claimant understood that her allegations would not be decided today.

21. We then heard the Claimant's evidence. I gave her the opportunity to clarify points which she felt she had not made clear in response to cross examination and questions I had asked her. In giving her response it became apparent that much of the detail she relied upon in relation to the matters to be determined today were in her skeleton arguments rather than her witness statement. I heard submissions on whether the relevant paragraphs from the Claimant skeleton argument should be allowed to stand as the Claimant's evidence. I considered

those submissions over a short lunch break between 13:30 and 14:00 and confirmed when we reconvened that, the Claimant having confirmed their truthfulness (which she did) I would allow the paragraphs under headings 1 (The Claimant's Employer) and 2 (Recruitment in July 2019 and Continuity of Discrimination) in skeleton arguments to stand as her evidence. I then gave the Respondent the opportunity to ask further cross examination questions.

22. We then heard the evidence of Ms Gretchen Roberts of the Respondent. There were some supplemental questions from the Respondent, the Claimant (who confirmed that she had a law degree and legal practice qualification but had never practiced as a lawyer) cross examined her, I asked two questions and there was no re-examination.

23. At 14:49 the parties were happy to go straight into submissions, the Respondent going first, then the Claimant. The Respondent did not want to reply to any points raised by the Claimant in submissions. The hearing adjourned at 15:17 and I agreed to update the parties at 16:00. Ms Churchhouse could not attend the hearing beyond 16:45. At 16:00 I confirmed to the parties that I would need to reserve my decision. I took available dates from the parties so that a further preliminary hearing could be listed if claims were to proceed. I made clear to the parties that they should not take this as an indication that I had made a decision either way (as I had not at that point in time).

The Law

The Employer Point

24. Section 83 Equality Act 2010 provides:

> *(2) "Employment" means*
>
> *(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work*;

25. Section 43K Employment Rights Act 1996 provides:

(1) For the purposes of this Part "worker " includes an individual who is not a worker as defined by section 230(3) but who:

(a) works or worked for a person in circumstances in which

> *(i) he is or was introduced or supplied to do that work by a third person, and*
>
> *(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,*

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)"

26. A contract of employment is defined in section 230(2) of the Employment Rights Act 1996 as:

"*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*"

27. Section 230(3) of the Employment Rights Act 1996 provides that a ""worker"

means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

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

and any reference to a worker's contract shall be construed accordingly.

28. Although one person can have two jobs with separate employers at the same time, case law affirms that an employee cannot usually be employed by two employers at the same time on the same work (***Patel v Specsavers Optical Group Ltd* UKEAT/0286/18**). Instead, it is possible for an employee to have a contract of employment with one employer, but to be seconded to work for a different employer or an agency worker relationship may exist.

29. In ***Uber BV and others v Aslam and others [2021] UKSC 5***, important considerations which led to the Supreme Court deciding that the documentation should not be relied upon included: (a) the documentation did not reflect the reality and appeared to have been put in place deliberately to avoid the Uber drivers gaining employment rights; (b) there was a significant imbalance in the commercial bargaining power of the Respondent and the drivers; and (c) the drivers were precisely the individuals who needed basic employment law protections.

30. For there to be employment status there must be the ''the irreducible minimum'' of control, personal service and mutuality of obligation (***Carmichael v National Power Plc [1999] ICR 1226***). This has been approved in ***Autoclenz Ltd v Belcher and ors [2011] ICR 1157, SC***.

31. As set out in the Respondent's skeleton arguments, the question of whether an individual can be an employee of one entity and work of another in respect of the same work was recently considered by the Employment Appeal Tribunal in ***United Taxis Limited v Mr R Comolly Mr R Tidman v Mr R Tidman v United Taxis Limited v Mr R Comolly [2023] EAT 93, 2023 WL 04267647 (Before His Honour Judge Auerbach 28 June 2023) ("Comolly")***. I agree that the Respondent quoted the relevant passage:

> *[43] The second reason arises from the dual employment point. The jurisprudence can be traced back to the nineteenth century; but the point has been considered in the present century more than once by the Court of Appeal and EAT. In the following passage in Cairns v Visteon UK Limited [2007] ICR 616 the EAT reviewed the pertinent authorities up to that point, including Brook Street Bureau (UK) Limited v Dacas [2004] EWCA Civ 217 and Cable & Wireless plc v Muscat [2006] EWCA Civ 220:*
>
>> *9. The contract of employment line of cases, including Franks and Dacas, are not referred to in the Judgments of May and Rix LJJ, the members of the Court in Viasystems. However, we think that the observations of Rix LJ at paragraph 76 are pertinent for present purposes. At paragraph 76, His Lordship said:*
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>>> *'In my judgment there is no doubt that there has been a long-standing assumption that dual vicarious liability is not possible, and in such a situation it is necessary to pause carefully to consider the weight of that tradition. However, in truth the issue has never been properly considered. There appears to be a number of possible strands to the assumption. Two are mentioned by Littledale J [in Lather v Pointer [1826] 5B & C 547]: the formal principle that a servant cannot have two masters; and the policy against multiplicity of actions. As for the first, even if it be granted that an employee cannot have contracts of employment with two separate employers at the same time and for the same period and purposes - and yet it seems plain that a person can (a) have two jobs with separate employers at the same time, provided they are compatible with one another; or (b) be employed by a consortium of several employers acting jointly - nevertheless that does not prevent the employee of a general employer being lent to a temporary employer. As was so clearly exposed in Denham [Denham v Midland Employers Mutual Assurance Ltd [1955] 2QB437 (CA)], it is an inaccurate metaphor to say that the employment or the employee has been transferred: it is rather that the services of the employee have been lent or hired out, or borrowed or bought in, in circumstances where the temporary employee becomes responsible, under the doctrine of vicarious liability (respondeat superior) for the employee's negligence, and does so even though the formal contract or relationship of employment has not been transferred. That demonstrates that the doctrine of vicarious liability may properly be*

> *invoked against an employer who is not really, in law, the employee's employer; and that the use of the expression "transfer" is potentially misleading.'*

10. We confess to being attracted by Rix LJ's analysis of the different approach to be taken to the question of vicarious liability owed to a third party in tort and the concept of employment, based on the contract of employment, for the purposes of unfair dismissal protection under part 10 of the Employment Rights Act 1996, with which we are directly concerned in the present case.

11. However, the matter does not end there. It was unnecessary to decide the latter question in Viasystems. Equally it seems to us the point did not arise directly for decision in Dacas. There the Claimant's services as a cleaner were supplied by the Respondent agency, Brook Street, to Wandsworth Borough Council. For some five or six years she worked a regular five day week at a hostel run by the Council in Streatham. Her engagement, to use a neutral word, having been terminated, she brought a claim for unfair dismissal against both Brook Street and the Council. An Employment Tribunal dismissed that claim on the basis that she was employed by neither Respondent. The EAT took a difference view, finding that she was employed by Brook Street. On appeal to the Court of Appeal, Mrs Dacas did not argue that the Council was her employer, but sought to uphold the EAT's decision. The Court of Appeal restored the Tribunal finding that she was not employed by Brook Street but, having of its own motion joined the Council as Respondent in the Court of Appeal, would have remitted the question of whether the Council was her employer to a fresh Tribunal for re-hearing. But, since there was no appeal by the Claimant against the Tribunal's finding that she was not so employed, the original Tribunal decision stood.

12. What is of interest in the present case are the observations made by Mummery LJ (paragraphs 19 and 20), endorsed by Sedley LJ (paragraph 78), as to the possibility of a contract of service between the worker and both the employment agency and end-user. Mummery LJ thought that "more problematical" than a contract of service between the worker and (a) the end-user by implication or (b) the agency.

13. It may be premature to rule out that possibility for all future cases (paragraph 20). It remains for consideration (per Sedley LJ, paragraph 78). What is clear from both Judgments of the majority in Dacas (Munby J dissenting on this aspect) is that whilst in a case such as that, where there is no contract of employment between worker and agency, a contract of service may be implied between worker and end-user as a matter of necessity: see Muscat, per Smith LJ (paragraph 43), explaining Dacas (paragraph 16, per Mummery LJ), and applying the Court of Appeal approach the Aramis [1989] 1 Lloyd's Report 213. The further possibility of dual contracts of service in

respect of the same work done by the worker remains, to use Mummery LJ's word, problematic.

14. The potential problems we see in deciding the point raised directly in the present appeal are three-fold. First the policy considerations. Where a third party Claimant is injured by the casual negligence of a workman, who has both a general and temporary employer, there is no difficulty in holding both employers jointly and severally liable in tort to compensate the Claimant for the damage cased by that negligence. Liability can be apportioned as between both tortfeasors. The Claimant will recover the whole of his damages against either or both of them. Sedley LJ referred to the tortious liability of the Council for any negligent act by Mrs Dacas vis-à-vis a visitor to the hostel at which she worked, who, for example, suffered injury as a result of falling over cleaning materials carelessly left by her in a position of danger: see paragraph 72.

15. However the policy consideration in such cases is the protection of injured third parties. It is unnecessary for that purpose on the authorities to find that the negligent workman is employed under a contract of service by both the general and temporary employer, as Rix LJ explained in Viasystems, paragraph 76. We find a similar approach in the Judgment of Arden LJ in Interlink Ltd v Night Truckers [2001] RTR 338, paragraph 51.

16. The policy considerations behind the protection under part 10 ERA against unfair dismissal seem to us to be rather different. That protects the right of an employee not to be unfairly dismissed by his employer (section 94(1) ERA). It regulates relations between employer and employee as defined by section 230.

17. What, it seems to us, concerned the Court of Appeal, particularly Sedley LJ (see paragraph 78 in Dacas) was the possibility that Mrs Dacas had no employer for statutory unfair dismissal protection purposes, and this defied common sense. In these circumstances we fully understand the policy considerations arising. Where the contract between worker and agency is one for services then it may be possible to imply a contract of service between worker and end-user so as to provide protection under part 10 ERA. However, where it is common ground that she is employed by the agency, and thus is protected under part 10, we can see no good policy reason for extending that protection to a second and parallel employer. If the only reason is, as appears to be the argument for the Claimant in the present case, that she would have a better prospect of establishing unfair dismissal against the end-user rather than the agency, then we can see no basis for departing from what has been the common understanding from at least of the Judgment of Littledale J in Lather v Pointer in 1826. A servant cannot have two masters. That of course does not prevent him from having different employers on different jobs or, as in the case for example of Land v West Yorkshire County Council [1981] ICR 334 (CA), severable parts of the same contract of employment with one employer.

18. Secondly the requirement of necessity before implying a contract of service as recognised by Mummery LJ in Dacas: see the passage in the Judgment of Smith LJ in Muscat, paragraph 43. We cannot immediately see any business necessity for implying a contract of service with the end-user in a triangular relationship where the Claimant, it is accepted, has entered into a contract of service with the employment agency; a point to which we shall return on the facts of the present case.

19. Thirdly we have considered the nature of the statutory protection under part 10 ERA and its ramifications if there are two employers. The statutory language envisages, we think, one employer. If there are two employers must both, or if one which one, make the decision to dismiss before the employee is dismissed within the meaning of section 95(1) ERA? Which employer, or must both employers, engage in the statutory grievance procedure or dismissal and disciplinary procedures under the Employment Act 2002 and the 2004 Dispute Resolution Regulations? These problems are not insuperable, as Mrs Kurji has submitted, but they do require further consideration."

[44] I highlight two particular points emerging from that discussion. The first is that the Court of Appeal and the EAT have both considered that to hold that a person was, simultaneously, the employee of two different employers in respect of the same work would be, for reasons explained, "problematic". The second is that, where the individual has been found to be the employee of one party, it cannot be necessary to imply that they are also the employee of another party in order to secure that they are not deprived of employment protection rights to which they should be entitled.

[45] These authorities, and the problems to which dual employment would be liable to give rise, have been discussed again more recently by the EAT in Patel v Specsavers Optical Group Limited [2019] UKEAT 0286/18 and McTear Contracts Limited v Bennett [2021] UKEAT 0023/19.

[46] In my judgment many, if not all, of the same difficulties or conundrums, discussed in the authorities, to which dual employment under two contracts of employments with two different employers would arise, would equally arise from dual worker contracts with two different employers, having regard to the fact in particular that both entail a wage-work bargain. The same would be true, therefore, of dual employment with one employer as a worker and the other as an employee. While the EAT in Cairns observed that the problems may not be insuperable, I have not been referred to any authority which discusses how they could be overcome or holds that dual employment is legally possible. I cannot for my part see how they could be overcome.

[47] Mr Comolly relied upon the passage in Viasystems v Thermal Transfer (cited in the foregoing passage from Cairns at [9]) in which Rix LJ contemplated that a person could have two jobs at the same time with separate employers provided

they are compatible with one another, or be employed by joint employers. But in this passage Rix LJ contrasted these scenarios with the proposition that an employee cannot have contracts of employment with two separate employers at the same time and for the same period and purposes. Similarly, secondment, or lending of an employee or worker, from one party to another, is another permissible, but different, scenario

[48] In this case, however, the tribunal reached the conclusion that, when carrying out a job conveying a United Taxis customer, Mr Comolly was both an employee of Mr Tidman (which it appears to have found he also was continuously throughout their relationship) and a worker of United Taxis. It found that he was both things in respect of the same work at the same time. It erred in failing to grapple with the dual employment issue; nor, in the light of the authorities, can I see any basis on which it could properly have found that Mr Comolly was, in respect of the same work at the same time a worker (whether or not also an employee) of both United Taxis and Mr Tidman.

<u>The Jurisdiction Point</u>

32. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

33. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

34. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.

35. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

36. In ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686***, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the Claimant was treated less favourably. An example is found in the case of ***Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/17*** where it was determined that the Respondent’s decision to instigate disciplinary proceedings against the Claimant created a state of affairs that continued until the conclusion of the disciplinary process.

37. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected (**Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548)**; The tribunal in Lyfar grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.

38. A distinction needs to be drawn between a continuing act and a one-off act that has continuing consequences (***Barclays Bank plc v Kapur and others [1992] ICR 208***;).

39. This distinction will depend on the facts in each case (***Sougrin v Haringey Health Authority [1992] IRLR 416, CA***). In that case the Court of Appeal held that an employer's refusal to upgrade a black nurse was a once-and-for-all event, which took place (at the latest) on the dismissal of the nurse's appeal against that decision. The resulting, ongoing payment of a lower salary was not a continuing act extending over a period, but the continuing consequence of the employer's one-off decision.

40. The Sougrin case was considered by the EAT in ***Pennine Acute Hospitals NHS Trust v Power and others UKEAT/0019/11***. There, the EAT remitted the matter to a tribunal to decide whether the substance of the Claimant's age discrimination claim concerned the employer's one-off decision to regrade her (in which case, the claim was out of time) or a continuing age discriminatory failure to pay her at a higher rate. On remission, the tribunal concluded that it was the application of a policy which caused the employee to receive less pay than her comparators. Since the policy was applied each time the employee was paid, then this constituted a continuing act and not a one-off decision with ongoing consequences.

41. In ***Okoro and another v Taylor Woodrow Construction Ltd and others [2012] EWCA Civ 1590***, the Court of Appeal considered whether banning two agency workers from a particular construction site was a continuing act or a one-off decision with continuing consequences. The ban was imposed on 7 April 2008; another agency sent the workers to the site on 18 April 2008 and they were turned away. They presented race discrimination claims on 6 August 2008, brought under the RRA 1976. The Court of Appeal, upholding the EAT, found that the ban was a one-off act. It was comparable to the dismissal of an employee by an employer. It terminated the relationship between the principal and the workers and time ran from the date of the ban. In the absence of a continuing relationship between the parties, there was no continuing state of affairs on which a complaint could be based. The latest date on which time could begin to run for limitation purposes was therefore 18 April 2008.

42. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

43. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23***, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but might, depending on the circumstances, include some or all of the suggested list from the case of ***British Coal Corporation v Keeble [1997] IRLR 36*** set out below, as well as other potentially relevant factors:

    43.1 The extent to which the cogency of the evidence is likely to be affected by the delay.

    43.2 The extent to which the party sued had co-operated with any requests for information.

    43.3 The promptness with which the Claimant acted once they knew of the possibility of taking action.

    43.4 The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action

44. It is for the Claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (***Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576***).

45. The potential merits of the claim may well be a factor that falls to be considered (***Kumari v Greater Manchester Mental Health Foundation Trust [2022] EAT 132***) although care needs to be taken not to conflate the determination of a time point and the application of the just and equitable test with the tests to be applied when considering an application for a strike out or a deposit order under the tribunal rules.

Findings of fact, analysis and conclusions

Employer Point

46. As I have said, the Claimant's witness statement (which I have taken into account) covered many of the things that would need to be determined at a full merits hearing but I also allowed into evidence the paragraphs under headings 1 (The Claimant's Employer) and 2 (Recruitment in July 2019 and Continuity of Discrimination) in her skeleton arguments. They were more central to the issues to be determined than the content of the Claimant's witness statements. The Claimant argued that, although she signed a contract with TWHL dated 21st October 2022 (page 174-189):

    46.1 On 2nd July 2021, Titan Wealth Services Limited ('**TWS**'), a company incorporated in the Jersey, acquired GPP (i.e. the Respondent). TWHL is a shareholder investor vehicle (p158), is the holding company for all Titan

Wealth group companies and does not generate any revenue (p111). The Respondent agreed that in 2021, GPP became part of the Titan group of companies and is now a wholly owned subsidiary of TWHL.

46.2 She was registered as the Respondent's CASS CF10a (an FCA Client Assets Sourcebook (CASS) oversight role) on the FCA website on 14 November 2022 until 25 November 2022 (page 248). Neither she nor any other individual could hold FCA regulated or certified positions for TWHL as it is not authorised or regulated by the FCA as asserted on (page 172 and page 203). In this regard the Respondent said, that the Claimant's role was to provide guidance to regulated entities in the Titan Group, including GPP and that the Claimant worked on the CASS remediation project within GPP. Ms Roberts said in cross examination that any person employed by TWHL could hold a CF10a role. She also explained that the inclusion, on the footer to the Claimant's contract of employment and dismissal letter, of a statement that TWHL was regulated by the FCA was a clerical error in the creation of those documents. I accept the Respondent's evidence on this point and do not consider that the fact that the Claimant performed a regulated FCA activity in respect of GPP as part of her employment contract with TWHL meant that her employment was with GPP rather than the company named in her employment contract or that she was a worker of GPP.

46.3 From 3 August 2022 until obtaining employment (she says with GPP) she worked for GPP, via an agency TwentyAi (page 136), as CASS and Risk Consultant. The Respondent says in fact the Claimant first worked as a contractor with TWHL (<u>not GPP</u>) from 3 August 2022 (providing her services through a personal service company called Marian Atinuke Okunola Limited, which in turn provided services via an agency called twentyAI Limited) and this is evidenced at pages 120 to 145. On the evidence presented I accept the Respondent's position.

46.4 On the evening of her first day of employment she raised a grievance via email to Gretchen Roberts who she says was GPP's Head of HR (page 238). The Respondent says Ms Roberts is currently the Group Head of Human Resources for the Titan group of companies and is employed by TWHL. Ms Robert's evidence was that a number of people in the Group are employed by TWHL but also do work for other entities in the group and I accept her evidence on this.

46.5 TWHL only became registered as an employer with HMRC from 14 March 2023 (page 246) and the Claimant's payslips were issued by the Respondent and Samantha Hyde (the Respondent's HR Assistant (page 241)). She questioned how TWHL could be her employer if it did not have a payroll set up and argued that, had the intention really been for her to be employed by that company, why was the payroll not set up sooner? In this regard the Respondent said that TWHL was a newly established business, it therefore did not have a payroll facility and PAYE number in place but that

did not obviate the need for it to take on employees. GPP's payroll facility was therefore used to pay TWHL's employees until 1 April 2023 when its payroll and PAYE was ready to take over. It pointed to pages 246 – 247, being a letter from HMRC. It said that payments made by GPP prior to 1 April 2023 on TWHL's behalf were internally cross charged and pointed to page 208 which it said showed the Claimant's name appearing as one of the relevant employees for this purpose for the November 2022 payroll. Ms Roberts, when asked in cross examination if the cross charging involved real world movements of monies, could not confirm the position because she is not in a finance role. I accept the Respondent's evidence and do not consider that the fact that the Claimant was paid through the payroll of GPP in these circumstances means that her true employer was GPP and not the employer named on her contract of employment.

46.6 The Payroll Journals at page 208 (as referenced above) constituted creative accounting for a company that, she said, had experienced a decline of 67% in profit from 2021 to 2022. She asserted that no formal intragroup agreement had been produced to evidence the cross charging of her services to TWHL. As I have said, I accept the Respondent's explanation for the fact that for a period the Respondent's payroll was used to pay employees of TWHL.

46.7 Her employment contract was created by Samantha Hyde using a @gpp.group email address (page 189) and was signed by Damian Sharp, the Respondent's Chief Operating Office (page 211), using a @titanwh.com email address. During the claimant's tenure at GPP employee email addresses (@gpp.group) were being migrated to a @titanwh.com but, the Claimant contended, they were still GPP employees. I do not accept that this suggests that her true employer was the Respondent.

46.8 The IT infrastructure, including the email servers, was owned, controlled and managed by the Respondent which, the Claimant said, suggested an intention to move the Respondent's operations into TWHL. I do not accept that this suggests that her true employer was the Respondent.

46.9 Her employment contact, in naming TWHL as the employer, was a forgery contrary to the Section 1 of the Forgery and Counterfeiting Act 1981 thus leaving her without a statement of initial employment particulars with the name of her correct employer contrary to s1(3)(a) ERA 1996. I do not find that there was anything fraudulent in the naming of TWHL as the employer and do not find that employment with that entity was a sham.

46.10 Her contract was signed by Damian Sharp but she had not seen evidence that he was an authorised signatory for TWHL (whereas he was for GPP - she pointed to the GPP authorised signatories list for May 2022 at pages 114 – 119 of the bundle)). Again, I do not accept that this means that her employer was the Respondent rather than the legal entity named on her contract of employment (TWHL).

46.11 Her recruitment was approved by Geoff Towers who she said was CEO of GPP from 13 Jan 2023. She pointed to an FCA register at page 233. Ms Roberts in cross examination explained that he was one of three people who needed to approve the Claimant's appointment as part of the remuneration committee for TWHL and I accept this explanation.

47. The Respondent, in addition to the points referenced above, said:

47.1 The letter offering employment to the Claimant (pages 171-172) was from TWHL;

47.2 The contract of employment (pages 174-189) was between TWHL and the Claimant and stipulated that the Claimant's place of work was the offices of TWHL;

47.3 The Claimant was appointed to provide guidance to regulated entities in the Titan Group, including GPP (Ms Robert's witness statement paragraph 12).

47.4 The letter terminating the Claimant's employment was on TWHL letterhead (page 203) and sent by Ken Coveney (CEO of that company).

47.5 The Claimant cannot show control, personal service and mutual obligation as with GPP.

47.6 The analysis in *Comolly* applies to the s13EqA 2010 and s27EqA 2010 claims and the reasoning, extends to s43K ERA 1996 claims.

48. Taking all of the evidence and submissions into account I prefer the Respondent's. I find that the Claimant's employer was TWHL, as stipulated in the documents she signed, and I am not persuaded that her employer was in fact GPP. I also find that the Claimant was not a worker of GPP under the extended meaning within s43K ERA 1996 or within the meaning of s83(2) EqA 2010. It is clear to me that the Claimant's employer was as stipulated in her contract of employment. To the extent that she was to perform work for other group companies, that would have been pursuant to a lending arrangement (of the type discussed in the case law I have referenced above). Such a lending arrangement need not have been documented formally as between companies in the same group. Other people were employed by one group entity and provided services to other group companies and the Claimant would not have been unique in working in that way had her employment with TWHL continued. This is not a case where, absent a contract of employment or worker relationship between the Claimant and Respondent, the arrangement does not make sense or in which the Claimant is denied statutory rights. Nor am I persuaded that the contract of employment entered into between TWHL and the Claimant was a forgery or a sham and I accept the Respondent's explanations for the payroll arrangements in place during the Claimant's short period of employment. This

was a period in which there were structural changes taking place in TWHL's group and I do not accept that the matters pointed to by the Claimant (such as email addresses used by individuals, who others were employed by, who signed her contract) suggest that the Claimant was in fact an employee or worker of the Respondent.

49. As such I also conclude that the Claimant's claims against GPP for automatic unfair dismissal under s103A 1996, whistleblowing detriment under s47B ERA 1996 and victimisation under s27 EqA 2010 should be struck out as having no reasonable prospects of success.

<u>The Jurisdiction Point</u>

50. As regards claim 2200267/2023 and whether the tribunal has jurisdiction to hear the Claimant's complaint of direct race discrimination contrary to EQA, section 13 i.e. that in July 2019 Ms Gretchen Roberts did not offer the Claimant the permanent position of CASS Oversight Officer (CF10a) and offered it instead to a white comparator, Abigail Yardley, the Respondent said:

50.1 ACAS notification was on 30 December 2022, the ACAS certificate was issues on 5 January 2023, and the ET1 was issued on 12 January 2023 and the claim, as it relates to a decision in July 2019, is many years out of time. It is also noteworthy that the Claimant had already brought her first claim at the end of 2022.

50.2 The Claimant should have been aware of the basis for the claim (if there were any basis, which it disputed) in July 2019 and, even if she did not become aware of the basis until she started work as a contractor in August 2022, then her claim was still out of time and it would not be just and equitable to extend time.

50.3 The Claimant had identified no just and equitable reason to extend time from July 2019 and, it being several years out of time, the claim should be struck out.

50.4 Whilst at the hearing the Claimant sought to rely on a continuing act from July 2019 to October 2022, that is not her pleaded case and she had clarified it as such at the May preliminary hearing (pages 50-62). The Claimant's arguments in respect of a continuing act in her skeleton argument included the following:

At the time of recruitment Abigail Yardley had 2 years 6 months CASS experience at one firm, Vanguard Asset Management (p83), compared to the claimant's 8 years and 3 months as a CASS SME within industry (p78-82). Given that GPP received its first adverse audit in March 2019 (p154) and the claimant's most recent experience of remediating an adverse audit within one calendar year for Cavendish Asset Management (p78) she

should have been invited to interview for the position. When she joined GPP on 3rd August 2022, 3 years 5 months after the receipt of GPP's first adverse audit GPP was still in adverse (p147). This evidences that the claimant had more relevant skills, education, and experience in July 2019 and also in August 2022 (with the completion of an MBA withdistinction in September 2021) when she entered into handover sessions to take over Abigail's employment on a zero hours contract. It is contended that the claimant's performance during her tenure (pxx Damian sharp email) evidences that she was a better candidate than Abigail.

The discrimination the claimant experienced in July 2019 by not being offered the position of GPP's CF10a was a continuing act from July 2019 until 21st October 2022 in accordance with s123(3)(a) EqA 2010 when the claimant entered into an agreement for the position of GPP's CF10a. There is no time bar issue as the claim was presented to the Tribunal within the time limits of 3 months prescribed in s123(1)(a) EqA 2010 on 12th January 2023 and therefore the Tribunal is not required to consider the grant of an extension of time. There would be a time bar issue if the claim was presented to the Tribunal after 21st January 2023. The claimant's claim for direct race discrimination should, therefore, not be struck out under rule 53(1)(c) and rule 37(1)(a) as having no reasonable prospect of success.

The claimant contends the respondents claim should be struck out rule 37(1)(a) as having no reasonable prospect of success because the claimant has shown beyond a reasonable doubt that she was a better candidate than Abigail Yardley and in accordance Base Childrenswear v Otshudi (UKEAT/0267/18/JOJ.

Additionally, Kumari v Greater Manchester NHS [2022] EAT 132 – which held that the last act of discrimination in a series of acts determines whether time has lapsed in bringing a case to the Employment Tribunal – applies. The discrimination overlaps from 3rd August 2022 during her contracting period which is the subject of her grievance, consistent with s27(2)(d) EqA 2010 (direct race discrimination and harassment contrary to s13 and s26 EqA 2010, respectively), raised on 14th November 2022, the first day of her employment. The claimant was treated unfairly contrary to s27(1) (a) EqA 2010 throughout the grievance procedure, i.e., evidence not being considered at each stage and Gretchen Roberts threatening to give the claimant a detrimental reference if she did not resign and retrieving the claimant's fob and locker key on 18th November 2022 (para 20, p38), not permitting the claimant to take her grievance to the third stage as per the staff handbook (p164) and was subsequently dismissed on 25th November 2022 the day following the receipt of the second stage grievance outcome letter contrary to s39(2)(c) EqA 2010 (discrimination), s39(4)(c) EqA 2010 (victimisation) and victimisation contrary to s27(1)(a) EqA 2010 (detriment of dismissal during grievance). The claimant submits that discrimination at the hands of Gretchen Roberts, GPP's Head of HR, is a series of discriminatory acts beginning in July 2019 (discrimination at recruitment)

with the last continuing act of discrimination being victimisation contrary to s27(1)(a) EqA 2010 (detriment of dismissal during grievance) even though the respondent did not follow a disciplinary procedure to confirm any allegations of misconduct to dismiss the claimant. This is contrary to s3 ERA 1996. The disciplinary procedure (p160-163), however, did not apply to the claimant during her probation period (clause 1.2 p174) suggesting that the claimant could not be dismissed during her probation and is therefore a breach of her employment contract. The claimant further contends that the respondent's case should be struck out of under rule 37(1)(a) as having no reasonable prospect of success because of unfair dismissal contrary to s39(2)(c) and s39(4) (c) EqA 2010 (dismissal because of discrimination and victimisation) and victimisation contrary to s27(1)(a) EqA 2010 (detriment of dismissal during grievance) and in accordance with Base Childrenswear v Otshudi (UKEAT/0267/18/JOJ) (Dishonesty regarding 3 stages to the grievance procedure).

51. In cross examination and in response to a question from me the Claimant suggested that:

    51.1 the only way she was able to find out that there was discrimination was when she took on the role as a contractor and realised she thought she had more/better experience than the person who got the role in July 2019 (Abigail Yardley) and was then subjected to discrimination and dismissed from her employment within three days;

    51.2 she knew when she joined in August 2022 as a contractor that she was better than Ms Yardley and knew of Ms Yardley's characteristics.

52. I was not persuaded by the Claimant's arguments that there was a continuing act and accept the Respondent's submissions that the Claimant, until the hearing on 11 July 2023 had not relied on a continuing act. There was no continuing state of affairs on which a complaint could be based. I conclude that this claim is substantially out of time.

53. I further conclude that it would not be just and equitable to extend time taking into account that it is now four years since the events in question, the impact of that passage of time on memories and the fact that I accept the Respondent's evidence that it cannot find a record of the Claimant having applied for the role. It is also relevant that the Claimant could not produce documentary evidence that any application by her had been passed on to the Respondent by the recruitment agencies she was in contact with at that time. The Employment Tribunal does not therefore have jurisdiction to hear this claim and it is dismissed.

54. Claim 2200267/2023 failing on the Jurisdiction Point I have not gone on to consider the **Prospects of Success Point.**

Employment Judge Woodhead

25 October 2023

Sent to the parties on:

25/10/2023

For the Tribunal Office: