THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Dr R Narayan	**AND**	**Community Based Care Health Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **22 November 2017**

Before: **Employment Judge A M Buchanan**

Appearances

For the Claimant: **Ms J Callan of Counsel**
For the Respondent: **Mr R Gibson - Solicitor**

JUDGMENT ON PUBLIC PRELIMINARY HEARING

It is the judgment of the Tribunal that:-

1. The claimant was not an employee of the respondent as defined in section 230 of the Employment Right Act 1996 and thus does not have the status to advance the claims of unfair dismissal and wrongful dismissal which are therefore struck out as having no reasonable prospect of success pursuant to Rule 37(1)(a) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules").

2. The claimant was a worker of the respondent as defined in section 230(3)(b) of the 1996 Act and thus does have the status to advance the claim in respect of unpaid annual leave whether advanced pursuant to the Working Time Regulations 1998 or pursuant to Part II of the 1996 Act.

3. The claimant was an employee of the respondent as defined in section 83(2) of the Equality Act 2010 and thus does have the status to advance the claims of sex and/or race discrimination.

4. It is not appropriate to strike out the claims of sex and/or race discrimination on the basis that they have no reasonable prospect of success pursuant to Rule 37(1)(a) of Schedule I of the 20103 Rules.

5. A Deposit Order is made pursuant to Rule 39 of the 2013 Rules in respect of the allegations of sex and/or race discrimination and that Order is issued separately.

6. A Private Preliminary hearing will be convened to make orders to bring the claims allowed to proceed on for final hearing.

REASONS

Preliminary Matters

1 By a claim form filed on 15 June 2017 the claimant advanced claims to the Tribunal of unfair dismissal, race discrimination, sex discrimination, breach of contract in respect of notice pay and unpaid holiday pay.

2 By a response filed on 14 July 2017 the respondent denied liability to the claimant and raised a jurisdictional preliminary matter. The jurisdictional matter pleaded was that the claimant was a self-employed person and as a result the Tribunal lacked jurisdiction to advance any of the claims she sought to advance.

3 On 22 September 2017 the matter came before Employment Judge Garnon on a private preliminary hearing and orders made on that day resulted in the claim being set down for a public preliminary hearing in order to determine these matters:

3.1 Whether the claimant has the status to bring any of the claims in her claim form before an Employment Tribunal and, to the extent she does not, whether such claims should be struck out.

3.2 If the claimant has status to advance any one or more of the claims she seeks to advance, whether any such claim or claims should be struck out, or a deposit ordered as a pre-condition of her pursuing it, on the basis that it has no, or only little, reasonable prospect of success.

5 Accordingly a public preliminary hearing came before me in order to determine those two matters which engage Rules 37(1)(a) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (Strike Out) and Rule 39 of the 2013 Rules (Deposit Order).

The hearing

6 At the hearing I heard evidence from the claimant who was cross examined at length. I asked some questions of my own in order to clarify my understanding of certain aspects of the case. For the respondent I heard evidence from Julie Anne Mitchell who is Chief Executive of the respondent company. This witness was cross examined at length and again I asked some questions of my own in order to clarify my understanding of her evidence.

7 I had an agreed bundle before me comprising some 365 pages. Any reference in this Judgment to a page number is a reference to the corresponding page in the agreed bundle. Due to the lateness of the hour I reserved my decision which I issue now with full reasons in order to comply with Rule 62(2) of the 2013 Rules. I regret the delay in my being able so to do – this has been the result of a variety of factors but principally the pressures of other judicial business.

The claims

8. The claims advanced to the Tribunal by the claimant are:

8.1 a claim of unfair dismissal pursuant to sections 94/98 of the Employment Rights Act 1996 ("the 1996 Act") and the status required by the claimant to advance this claim is that of "employee" as defined in section 230(1) of the 1996 Act

8.2 a claim of wrongful dismissal relying on the provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the status required by the claimant to advance this claim is again that of "employee" as defined in 8.1 above.

8.3 a claim of unpaid holiday pay advanced either under Part II of the 1996 Act or Regulations 14 and 16 of the Working Time Regulations 1998 ("the 1998 Regulations") for which the status required by the claimant is that of "worker" as defined either in section 230(3) of the 1996 Act or Regulation 2 of the 1998 Regulations

8.4 claims of race discrimination and sex discrimination advanced pursuant to the Equality Act 2010 ("the 2010 Act") for which the status required by the claimant is that of "employee" under the wider definition set out in section 83(2) of the 2010 Act.

Submissions

9. I briefly summarise the written submissions which are held on the Tribunal file and the oral submissions made to supplement such submissions.

Respondent

10.1 It was submitted that the claimant was at all times a self-employed person and therefore out of scope in respect of the required definition for any of the claims advanced. It was submitted that the claimant is a qualified medical practitioner and was an intelligent contracting party and that she had knowingly and willingly entered into a contract with the respondent under which she was self-employed. Reference was made to three distinct concepts: personal service, control and mutuality of obligation.

10.2 **Personal Service**. It was submitted that the intention of the parties at the outset of their arrangement and throughout their relationship was one of self-employment as was evident from the Rules for Duty Doctors, the GatDOC Service Manual and the Terms and Conditions of Engagement document. It was submitted by reference to **Pimlico Plumbers Limited –v- Smith 2017 EWCA Civ 51** that the right of the claimant to appoint a substitute was limited only by the need to show that the substitute was a qualified medical practitioner registered with the respondent as a duty doctor and thus inconsistent with the requirement for personal service.

10.3 Considerable reliance was placed on the decision in **Suhail –v- Herts Urgent Care UKEAT/0416/14**. While it was accepted that no two cases are entirely the same, the facts of that case bore a striking resemblance to the facts of the claimant's case. It was submitted that whilst there was no written substitution clause or personal service clause in the claimant's case, the work could be carried out by any qualified GP and did not have to be done by the claimant personally. The claimant decided when and where

she wanted to work and custom and practice showed that she could provide a substitute to the respondent from the pool of approximately 70 out of hours GPs registered with the respondent. Thus there was no requirement for personal service and therefore the claimant did not fall within any of the definitions required to be satisfied if she was to advance any of the claims to the Tribunal. In oral submissions, it was noted that the claimant appears to have had two customers of her business. Reference was made to page 205 and the claimant's medical defence union membership in which she is described as an "*Independent GP (Locum or Private Work)"* and that is sufficient to remove any suggestion the claimant is a worker. In any event the right to substitute in this case removes any suggestion of a requirement to do the work personally.

10.4 **Control**. It was submitted that the claimant had complete autonomy as to how she organised and performed her work once on shift. The respondent did not tell or show or control the way in which the claimant worked – she exercise complete clinical independence. Without a sufficient degree of control there can be no contract of employment. A self-employed person is not required to submit to the same controls or supervision as an employee and they determine their own working hours and days. This is precisely what happened in the case of the claimant.

10.5 **Mutuality of Obligation:** the obligation on the employer to provide work and the obligation on an individual to accept work is indicative of whether a contract is in existence at all. This question is relevant to the consideration both of employee status and worker status. It was submitted that there was no mutuality of obligation. The respondent was not obliged to offer work and the claimant was not obliged to accept it. The claimant viewed which shifts were on offer on the respondent's Rotamaster system and elected those she wished to work. She could hand shifts back at any time if that suited her. Occasionally she did not accept work for up to 3 weeks at a time. There was no mutuality of obligation. In addition the claimant was free to leave at any time: she was not obliged to give any notice of her intention to cease to work with the respondent. In oral submissions it was submitted that this matter was the key feature of this case and was patently lacking.

10.6 It was submitted that if the fundamental test of whether the claimant was performing services in business on her own account was applied, then it was clear the claimant was indeed in business on her own account. Detailed reference was made to 14 factual matters which pointed in that direction. There was no mutuality of obligation between the claimant and the respondent and that prevented an employment relationship. The claimant had her own business and was a professional person and worked with the respondent as her client or customer. That factor militates against worker status. Furthermore the right of substitution militates against a contract of personal service.

10.7 Reference was made to the allegations of sex and race discrimination and in particular the explanation which the respondent has sought to advance now that that claim has been further particularised. It was submitted the claims were of direct discrimination and had no reasonable prospect of success. The claimant had disclosed no arguable case in law in respect of direct discrimination. The claimant has not demonstrated a causal link between a protected characteristic and any alleged wrongful conduct on the part of the respondent. In the alternative it was submitted that it was appropriate for a deposit order to be made. The claim for direct discrimination was flawed first by reference to an actual comparator rather than a hypothetical comparator as originally pleaded, secondly as one of the three pleaded detriments could not amount

to a detriment at all and thirdly by it being clearly shown that the circumstances of the unnamed actual comparator were materially different from those of the claimant. In oral submission, it was noted that a claim of indirect discrimination had not been pleaded and the claim of direct discrimination should not be allowed to go forward.

10.8 Reference was made to the relevant statutory provisions and (in addition to those referred to above) to the following authorities:

The first issue

Ready Mix Concrete –v- The Minister of Pensions and National Insurance 1968 2QB 497

Carmichael –v- National Power 1999 1WLR 2042

James –v- Redcat (Brands) Limited 2007 IRLR 296

Clyde & Co LLP –v- Van Winkelhof 2014 IRLR 467

Cotswold Developments –v- Williams 2006 IRLR 181

Haswani –v- Jivraj 2014 UKSC 40

Redrow Homes (Yorkshire) Limited –v- Wright 2004 EWCA Civ 469

Bacica –v- Muir 2006 IRLR 35

Yorkshire Window Company Limited –v- Parkes UKEAT/0484/09

Uber BV –v- Aslam 2017 IRLR 4

Independent Workers' Union of Great Britain –v- Roofoods t/a Deliveroo 2016

Montgomery –v- Johnson Underwood Limited 2001 EWCA 318

Stephenson –v- Delphi Diesel Systems Limited 2003 ICR 471

Byrne Bros Limited –v- Baird 2002 IRLR 96

Windle –v- Secretary of State for Justice EWCA Civ 459

Market Investigations –v- Minister of Social Security 1969 2QB 173

The second issue

Ezsias –v- North Glamorgan NHS Trust 2007 EWCA Civ 330

Balls –v- Downham Market High School & College UKEAT/0343/10

Anyanwu –v- South Bank Students Union & South Bank University 2001 IRLR 305

A -v- B and C UKEAT/0450.08

Croke –v- Leeds City Council UKEAT/0512/07

Sivanandan –v- Independent Police Complaints Commission UKEAT/0436/14

Van Rensburg –v- Royal Borough of Kingston upon Thames UKEAT/0095/07

Claimant

11.1 It was submitted that in determining employee status, the starting point is whether the agreement between the claimant and the respondent was intended to be an exclusive record of their agreement. If not, all other relevant exchanges can be considered. It was also necessary to consider if there was mutuality of obligation and a requirement to do work personally. In oral submissions it was noted the claimant had

worked for the respondent for 14.5 years with only short gaps of up to three weeks. The ability to substitute had been over-egged and exaggerated by the respondent in submissions. The claimant stated that she did not need to request work: it was given to her and when the pre-populated sheet was sent to her setting out her shifts for the next period, she was obliged to work them. Thus the claimant is an employee notwithstanding the existence of her limited company which is not a determinative factor.

11.2 In respect of worker status, it was submitted that the question to be asked was whether there was a contract in existence and, if so, the claimant is a worker: **Gilham – v- Ministry of Justice 2017 ICR 404**. In respect of the 1998 Regulations, these implement the Working Time Directive and therefore the decision of the Supreme Court in **Ministry of Justice -v- O'Brien 2013 ICR 499** should be applied. The respondent was not in the position of a client or customer of the claimant's business. The claimant ran no risk in her so-called business and thus even if not an employee she was a worker.

11.3 In respect of the requirement to work personally reference was made to **Pimlico Plumbers (above**). It was submitted that the claimant was working under a contract of employment when the matter was properly analysed by reference was made to **Drake-v Ipsos Mori UK Limited 2012 IRLR 973.** In the alternative it was submitted that the claimant was a worker within section 230(3) of the 1996 Act and has the required status to advance her claims under the 2010 Act relying again on the decision in **Pimlico Plumbers Limited (above).**

11.4 It was submitted that the power to strike out should be applied only in rare circumstances particularly where the central facts are in dispute and it will be exceptional to strike out where an issue to be decided is dependent on conflicting evidence. That was the case in this matter and the allegations should proceed to trial.

11.5 In respect of deposit orders, it is not wrong for a Tribunal to make a provisional assessment of credibility but the matter must be put to a full Tribunal to test evidence where matters are in dispute.

The Law

12.1 I set out briefly the legal provisions in question.

The terms "employee" "contract of employment" and "worker" are defined in subsections 230(1) (2) and (3) of the1996 Act:

"(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
(2) "Contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing
(3) In this Act "worker" (except in the phrases "shop worker" and "betting 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."

That definition of "worker" is also adopted for the 1998 Regulations.

For the purposes of the 2010 Act the definition of "employment" is to be found in section 83(2) in these terms:

"Employment" means employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

12.2 I have reminded myself that in considering whether or not a person is an employee a so called balance sheet approach is not acceptable. I must look at the reality of the relationship between these parties. I remind myself of the guidance of Mummery J in **Hall v Lorimer [1994] IRLR 171** namely that in determining whether an individual carried on business on his own account, it was necessary to consider many different aspects of the person's work activity and that this was not to be done by way of a mechanical exercise of running through items on a check list to see whether they were present in or absent from a given situation. Mummery J continued "*the object of the exercise is to paint a picture from the accumulation of detail……. it is a matter of evaluation of the overall effect of the detail which is not necessarily the same as the sum of the individual situation"*

12.3 I have reminded myself of the decision of the Supreme Court in **Autoclenz –v-Belcher 2011 UKSC 41** and the words of Lord Clarke:

18. As Smith LJ explained in the Court of Appeal at para 11, the classic description of a contract of employment (or a contract of service as it used to be called) is found in the judgment of MacKenna J in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C:

"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service. … Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

19. Three further propositions are not I think contentious:

i) As Stephenson LJ put it in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623, "There must … be an irreducible minimum of obligation on each side to create a contract of service".
ii) If a genuine right of substitution exists, this negates an obligation to perform work personally and is inconsistent with employee status: Express & Echo Publications Ltd v Tanton ("Tanton") [1999] ICR 693, per Peter Gibson LJ at p 699G.
iii) If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement: see eg Tanton at p 697G.

12.4 In **Clyde & Co LLP v van Winkelhof** UKEAT/0568/11 HHJ Peter Clark explains what needs to be shown for someone to be what he described as a "limb (b)" worker:

"A limb (b) worker, namely (1) there must be a contract, (2) under that contract the worker must undertake to do or perform work or services personally, (3) the work or services are to be done or performed for another party to the contract, and (4) the other party must not be a client or customer of a profession or business undertaking carried on by the putative worker."

12.5 In **Cotswold Developments v Williams** **[2006] IRLR 181** Langstaff J at paragraph 53 gave helpful guidance as to the circumstances in which someone might be regarded as a "worker":

"53. It is clear that the statute recognises that there will be workers who are not employees, but who do undertake to do work personally for another in circumstances in which that 'other' is neither a client nor customer of theirs – and thus that the definition of who is a 'client' or 'customer' cannot depend upon the fact that the contract is being made with someone who provides personal services but not as an employee. The distinction is not that between employee and independent contractor. The paradigm case falling within the proviso to 2(b) is that of a person working within one of the established professions: solicitor and client, barrister and client, accountant, architect etc. The paradigm case of a customer and someone working in a business undertaking of his own will perhaps be that of the customer of a shop and the shop owner, or of the customer of a tradesman such as a domestic plumber, cabinet maker or portrait painter who commercially markets services as such. Thus viewed, it seems plain that a focus upon whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls.

54. The phrase "mutuality of obligation" is most often used when the question is whether there is such a contract as will qualify a party to it for employment rights or holiday pay. In this situation, a succession of contracts of short duration under each of which the person providing the services is either an "employee" or a "worker" will not give rise to any rights unless (i) the individual instances of work are treated as part of the operation of an overriding contract; or (ii) s.212 of the Employment Rights Act applies to preserve continuity. Such an overriding contract cannot exist separately from individual assignments as a contract of employment if there is no minimum obligation under it to work at least some of those assignments. However, an overriding contract is not deprived of mutuality of obligation if the employee has the right to refuse to work or where the employer may exercise a choice to withhold work. The focus must be on whether there is some obligation upon an individual to work and some obligation on the other party to provide or pay for it."

12.6 I have considered the decision in **Pimlico Plumbers Limited –v- Smith 2017 EWCA Civ** 51. I have noted the words of Underhill LJ at paragraph 145 of the Judgment:

"If the position were that in practice the putative employee/worker was regularly offered and regularly accepted work from the same employer, so that he or she worked pretty well continuously, that might weigh in favour of a conclusion that while working he or she had (at least) worker status, even if the contract clearly (and genuinely) provided that there was no legal obligation either way in between the periods of work".

12.7 I have considered in detail the decision in **Suhail –v- Herts Urgent Care** (above) on which Mr Gibson placed considerable reliance in this matter.

12.8 I have considered in detail the decision in **Drake –v Ipsos Mori UK Limited** (above) on which Ms Callan paced considerable reliance in this matter.

12.9 Rule 37(1) of the 2013 Rules reads:-
"*At any stage of the proceedings either on its own initiative or on the application of a party a tribunal may strike out all or part of a claim or response on any of the following grounds –*

(a) that it is scandalous or vexatious or has no reasonable prospect of success".

12.10 Rule 39 of the 2013 Rules reads:-

"*Where at a preliminary hearing under rule 53 the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

(2) The tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit".

12.11 In respect of the power to strike out a claim I have reminded myself of **Balls v Downham Market High School & College** *[2011] IRLR 217*, *EAT* where Lady Smith explained the nature of the test to be applied as follows (at para 6):

"[T]he tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no *reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be* no *reasonable prospects."*

12.12 I have reminded myself of the decision in **Van Rensburg-v- Royal Borough of Kingston UKEAT/0096/07** where Elias J stated:

***"Ezsias** then demonstrates that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even*

when a strike out is considered pursuant to rule 18(7). It would be very surprising if the power of the Tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the tribunal is assessing the prospects of success, albeit to different standards. Moreover, the test of little prospect of success in rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in rule 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response".

The claimant's pleaded case

13.1 In the claim form claimant asserted she had been employed by the respondent since 2005 working shifts in accordance with a rolling 12 week rota. The claimant was allocated shifts which she was required to undertake unless she had provided advanced notification to the respondent that she was unable to cover the shifts.

13.2 On 8 November 2016 the claimant received an email from the respondent asking her to reflect on two calls she had recently undertaken for the respondent and to do that by 21 November 2016. On 21 November 2016 the claimant wrote to the respondent to say that she had not been able to carry out the reflection but would do so by 2 December 2016. On 9 December 2016 the respondent asked for that reflection report by the end of the day. The claimant could not comply and so told the respondent on 16 December 2016 and on 20 December 2016 the respondent asked the claimant to prioritise her report. On 19 December 2016 the claimant informed the respondent that she would be unable to work as allocated on 27 December 2016 due to public transport difficulties. In January 2017 the claimant swapped some of her allocated shifts and covered shifts of colleagues in return.

13.3 On 14 February 2017 the claimant received a letter from the respondent dated 9 February 2017 (page 234) confirming that the respondent had decided to cease offering work to her with immediate effect because she had failed to respond to requests for reflection and because she regularly swapped duties without informing the respondent and/or at short notice. The letter left open a way for the claimant to be offered work again if she would do as the respondent asked.

13.4 The allegations of less favourable treatment pursuant to the 2010 Act because of race and/or sex were that the claimant was not suspended pending investigation prior to her "dismissal" unlike other staff members, secondly that she was penalised for swapping shifts when other colleagues were not and thirdly that her "employment" was terminated but when more serious allegations were raised against those of other races or men they were not dismissed.

Neutral Findings of Fact

13.5 The claimant was asked to reflect on some of the telephone advice which she had given and which had been reviewed by way of audit by a senior GP Doctor Gerard Reissmann. There had been a delay in doing so and the claimant had been chased up. A date had been set by her for 28 February 2017 for her to review the recordings. The claimant had not received a CD of the relevant recordings nor had she done all she could to receive one. The claimant had to liaise with two members of staff of the

respondent in respect of the recordings she needed to review. One of them was away at the time through illness.

13.6 On 9 February 2017 (page 234) the respondent wrote to the claimant to advise that it had decided to cease offering work with immediate effect. This letter came out of the blue in the sense that the claimant had not been warned that termination was being considered. The reason given was a failure to review feedback and concerns which had been highlighted to the claimant on 8 November 2016 and secondly because it had been noted the claimant regularly swapped duties allocated to her with other GPs without informing the respondent's staff and at short notice. The letter continued:

"we are willing to offer some structured support from a senior GP in our organisation to get to a situation where we may be willing to provide you with work in the future. However this will require full adherence to our requirements and a willingness to have some unpaid one to one support on how to improve your performance...".

Findings of fact in respect of the status of the claimant

14.1 It is necessary that I make findings of fact in respect of the first of the two questions before me namely the status of the claimant. My findings are limited to that question.

14.2 The respondent is a "not for profit" company delivering an out of hours GP service to patients in Gateshead using GPs from a "list" it maintains. The respondent was set up in 1994 out of a co-operative of doctors in Gateshead who had become known as GATDOC. Doctors in Gateshead formed this co-operative so that the duty to provide out of hours services to patients was effectively pooled across all GP practices in the area. GPs from all practices who wished to do out of hours work volunteered and a rota was prepared. This was a flexible way for GPs to supplement their income and in respect of GATDOC any GP covering out of hours work was considered self-employed. When the respondent was set up in 1994 the system did not initially change.

14.3 In 2004 the GP contract changed and GP practices could opt out of the out of hours service altogether if they wished and the respondent company contracted with the local Primary Care Trust to commission arrangements for out of hours services. Since 2004 the range of services offered by the respondent company had gradually broadened so that it now provides a walk in centre service and an extended opening hours service in addition to the out of hours service. In addition the respondent now holds the contract to provide usual GP services from three surgeries and in respect of that aspect of its service, the respondent employs 14 salaried GPs.

14.4 In 2014 the NHS rolled out a new standard contract for the providers of an out of hours service such as the respondent. That contract required the respondent to ensure doctors providing that service were competent and appropriately qualified and the respondent was required to be able to evidence that those providing the service met national quality requirements. To enable it to do so, it conducts audits of the work of the GPs who provide the services it offers. So it was that the work of the claimant was audited which in turn led the respondent to ask the claimant to reflect on her work in November 2016 which in turn led to the decision not to offer the claimant any more work with the respondent in February 2017.

14.5 The claimant is a qualified general medical practitioner who did work for the respondent from 1 August 2005 until 14 February 2017 as what was called a “duty doctor”. The claimant initially did out of hours work for the respondent but when the range of services offered by the respondent increased in 2004 so did the choice of services the claimant could choose to provide and, on occasions, she did choose to provide other services but in the main she worked in the out of hours service.

14.6 The claimant was responsible for providing her own professional indemnity insurance and did so through the Medical Defence Union (“MDU”). Her insurance certificate for the period 1 March 2016 – 1 March 2017 shows she described herself as an *“Independent GP (locum or private work)”* which she stated was carried out across multiple locations (page 205). The cover obtained by the claimant was for her work as a locum doctor and also for her work (mainly out of hours) for the respondent. The amount of work carried out by the claimant in any one membership year was relevant to the MDU level of fee and was frequently adjusted at the end of a membership year by reference to the average number of sessions undertaken (page 217).

14.7 The claimant is the director and shareholder of a limited company called RNJ Medical Services Ltd (“the Company”). This company was formed in October 2015 and it received from the respondent the payments due to the claimant for the services she provided. The accounts of the Company filed at Companies House (page 35d) state that the turnover for the year ending 31 October 2016 represents ”*amounts chargeable in respect of the sale of goods and services to customers*”. The balance sheet for that same period shows net assets of £76288 represented by share capital of £100 and shareholder funds of £76188. The claimant was responsible for payment of her own income tax and national insurance contributions in respect of her work for the respondent and she did that through her the Company subsequent to its formation. The claimant did not send invoices to the respondent and neither, after its formation, did the Company. Prior to its formation, the claimant received payment from the respondent direct but was responsible personally for her own income tax and national insurance contributions. The claimant formed the Company on the advice of her accountant.

14.8 In the calendar year 2016, the claimant received payments totalling £152051 from the respondent. The claimant was subject to assessment by the respondent and her work was subject to audit. The audit was carried out by a senior clinician who listened to recordings of the claimant’s telephone advice and would produce a clinical audit feedback sheet on which the claimant’s performance was rated as either excellent, good, satisfactory or not satisfactory. An annual audit sheet was provided on 13 February 2012 (page 318), 13 June 2013 (page 330), 26 March 2015 (page 337), and 20 October 2016 (page 355).

14.9 In addition to her work for the respondent, the claimant worked for a locum agency to offer her services to GP practices needing a locum GP to cover absences and the like: the agency is called Primary Locums. In the 12 month period before February 2017, the claimant did work for two practices as a locum and had the fee she received for that work paid into the Company. The claimant accepted that in working as a locum she was a self-employed GP. The claimant did not seek the permission or approval of the respondent to carry out any locum work because such work was carried out in the normal working day whereas the work carried out by the claimant for the respondent was mainly outside the normal working day – thus so called “out of hours”. The claimant received payment from the respondent without deduction of tax or national insurance.

The respondent did not pay holiday pay to the claimant or sick pay in the event of illness.

14.10 The claimant tended to carry out work for the respondent at the same venue namely an address in Queen Elizabeth Avenue in Gateshead and she tended to cover the same duty slots in each rota period. Since 2013, the method of booking of duty slots was by use of a computerised system known as "Rota Master" (page 62-76). The system worked by the claimant (and her 70 or so colleagues) being asked to log their availability for a future period within a specified time frame and then the logging facility would cease and the respondent would issue the rota for that period. Reminders were issued and a standard reminder is found at page 73 in these terms:
"The September and October Rota will be published on 1 June ready for you to log your availabilities. You will have 2 weeks to log your availabilities and then the Logging will be switched of on 15 June".

14.11 However, in practice when logging of shifts was invited, the rota for the claimant (and others who did regular shifts) would be prepopulated with the shifts the claimant normally worked. The claimant tended to work the same shift pattern over a 12 week period and thus in practice and to save time, the rota was prepopulated. Thus it was taken the claimant would cover the prepopulated shifts and if she agreed, then no action was needed by her. However, if she did not agree for any reason to cover her usual shifts then she could and did tell the respondent that such was the case and her availability was removed and the shift(s) became available for another doctor to take up. The days and times of sessions covered by the claimant differed from week to week but were mainly the same pattern over the rolling 12 week rota. Some 30/40 hours of work per week were prepopulated on the rotas received by the claimant depending on which week in the 12 week cycle it was.

14.12 Of the 80 or so colleagues of the claimant, some, like her, had a regular pattern of availability and some did not have a standard pattern of availability and so the indication of availability in their case was more critical than in the claimant's case. The claimant described herself as one of a group who had retained a more or less consistent pattern of work for 12 years or so and thus the respondent had come to rely on her (and her colleagues with a similar arrangement) and I find that that was indeed the case. That group comprised some 12 doctors and they were known to each other. The group worked together and would not hand shifts back to the respondent without first checking with each other if someone could cover a shift one of them wanted to give up. If no one could, then the shift was "handed back" (the claimant's terminology) to the respondent. If a shift was swapped the respondent would be told by the claimant. An example of such a communication was at page 188 when a change for 8/9 January 2017 was advised by the claimant on 6 January 2017. On occasions the respondent would be told of a swap after the event but this was not usual. Changing shifts just before they were due to be worked or notifying a change retrospectively caused administrative difficulties for the respondent as it could result in payment for a shift being sent to the wrong person.

14.13 The claimant would decide for herself when and if she was to go on holiday. That was not infrequently for a period of three weeks at a time. She would make sure the respondent knew in good time but she did not ever seek approval nor was approval ever given: the rota was simply marked accordingly. The claimant decided for herself how long she would be away and when.

14.14 The claimant provided her own medical bag when at work for the respondent. She was not required to wear any sort of uniform. The claimant did not have her own prescription pad but used prescription pads supplied by the respondent. The respondent provided guidance as to what it expected doctors to have available in their bags (page 57). The respondent is required through its contract with the PCT (now the Care Commissioning Group) to have certain types of drugs available when providing the out of hours service and thus a home visiting drug box is provided for the doctors carrying out that service. In addition the respondent contracted separately with the North East Ambulance Service to provide transport for its doctors required to visit a patient at home out of hours and so it was the claimant was driven in that way to any home she was required to visit out of hours. There were no disciplinary or grievance procedures applicable to the claimant at any time throughout the claimant's relationship with the respondent and GATDOC.

14.15 The written documents governing the relationship of the parties prior to the issue of an agreement in January 2017 were somewhat sparse. There was a document entitled "GatDoc Service Manual" (pages 36-41) from July 2014. That document required all GP duty doctors to adhere to the rules of the company. They were expected to be fully registered GPs and on a medical providers list. Requirements for timeliness in respect of service users were set out. The responsibilities of the doctors were set out and they were required to organise themselves if working in pairs or larger groups to ensure all the requirements of the service provided by the respondent were met. Annual appraisals were required and there was a requirement for the GP to be familiar with and to use correctly the IT systems of the respondent. Several sets of guideline were referred to and had to be followed - for example in respect of the giving of advice over the telephone and in respect of prescribing and supplying medication. Rules for Duty Doctors were issued in February 2016 (Pages 42-45) in which similar provisions to those subsequently set out in the Agreement (defined below) are contained. In respect of cancellations it was stated that less than four weeks' notice would be monitored by the Management Board and disciplinary action would be taken if it was felt that there was an unacceptable delay in notifying a cancellation. In practice I find this did not happen in respect of the claimant at least. There are detailed provisions for payment of a fine if a doctor was late for duty, rules about not leaving the operating base until the oncoming duty doctor arrives, rules about working at an acceptable rate and to an acceptable standard and a provision that failure to be available for a booked standby duty would result in loss of all standby fees for that month. It was a requirement that each consultation should be handled to Carson Report standards and it was noted that each duty doctor required to make home visits would be conveyed to and from home visits in specially fitted out vehicles driven by employees of the respondent. There was a requirement to complete a computerised consultation record for all consultations. All duty doctors were to provide their own medical bag but the respondent supplied a *"Drugbox and other essential equipment".* Those rules were reissued in January 2017 (pages 46-49).

14.16 On 30 January 2017 the respondent wrote to the GPs with whom it contracted in the following terms (page 218):

"We have been reviewing our corporate systems and processes and one of the areas we have been focusing on is the terms of engagement that are in place with self-employed GPs undertaking regular sessions for CBC. As a consequence of this review

it has been recommended that we have a formal document in place which sets out the terms of engagement...".

14.17 The terms of engagement ("the Agreement") was dated 30 January 2017 (pages 220-233) and it was noted that the Agreement was to apply for each and every assignment undertaken by a doctor with the respondent. It had the following provisions in clauses 1 and 2:

"1. Status of the Agreement

This agreement governs your engagement from time to time by CBC Health Ltd..... This is not an employment contract and does not confer any employment rights on you, nothing in this agreement shall render you an employee, worker, agent or partner of the Company and you shall not hold yourself out as such.

This agreement constitutes a contract for the provision of services and not a contract of employment and accordingly you shall be fully responsible for and shall indemnify the Company or any Group Company for and in respect of:

any income tax, National Insurance and social security contributions and other liability deduction contribution assessment or claim arising from or made in connection with the performance of the Services where the recovery is not prohibited by law.....

any liability arising from any employment related claim or any claim based on worker status... brought by you or any substitute against the Company arising out of or in connection with the provision of the Services including for the avoidance of doubt (and without limitation) any claim for unfair dismissal redundancy or annual leave under the Working Time Regulations 1998.

In particular this agreement does not create any obligation on the Company to provide work to you and by entering into this contract you confirm your understanding that the Company makes no promise or guarantee of a minimum level of work to you and you will work on a flexible "as required" basis. It is the intention of both you and the Company that there be no mutuality of obligation between the parties at any time when you are performing an assignment.

2. Company's Discretion as to Work Offered

It is entirely at the Company's discretion whether to offer you work and it is under no obligation to provide work to you at any time. You are not required to accept any work offered to you.

No Duty Doctor has either the right or the obligation to work for CBC Health Ltd either at specific times or on specific days. CBC Health Ltd reserves the right to refuse to allow a Duty Doctor to work for any or certain sessions if it is felt it would not be in the best interest of the organisation.

The Company reserves the right to give or not give work to any person at any time and is under no obligation to give any reasons for such decisions".

14.18 The Agreement goes on to provide in clause 4 that all duty doctors should be medically qualified, vocationally trained and registered with the GMC and licensed to practice and eligible to work in the UK. All duty doctors must have up-to-date indemnity insurance at their own expense and must provide evidence of training and competence

to the respondent. Clause 6 provides for the doctor to give to the administrator at least 14 days' notice to cancel a previously booked session and in exceptional circumstances lesser notice but as much as possible. Persistent late cancellation may result in financial penalty or the withdrawal of sessions. Clause 7 provides for financial penalty in the event of late arrival for a duty session with a right of appeal to the Management Board. Work can be offered by the company at various locations. Clause 10 sets out the work required ranging from face-to-face contact with a patient to telephone triage in which case all calls must be recorded. The claimant is told of the required hours for each assignment undertaken. Clause 14 sets out the hours of work which depend on the operational requirements of the company. Clause 15 requires a doctor to comply with relevant company rules policies and procedures during each assignment and clause 16 provides that any documents manuals computers or other equipment provided remain the property of the company. Clause 18 provides that if a doctor no longer wishes to be considered for duty sessions then the rota administrator should be told as soon as possible. In addition the company may terminate an engagement with immediate effect for various reasons including gross misconduct or any serious or repeated breach or non-observance of any provision of the agreement or neglect to comply with any reasonable and lawful direction of the company. Clause 20 provides that the contract was intended to fully reflect the intentions and expectations of the parties in respect of their future dealings.

14.19 The claimant only received the documents sent out by the respondent on 30 January 2017 on 13 February 2017 (because of incorrect postage paid) and on the following day she received the (page 234) dated 9 February 2017. Thus she did not sign the Agreement. Some of the colleagues of the claimant raised issues with the respondent about some of the provisions of the Agreement.

14.20 The respondent company does employ doctors and the arrangement it makes with such individuals is through a very different series of written documents (page 246-256).

15 Conclusions

I deal with the two issues before me in turn. In respect of the first issue, I have made findings of fact and use those findings to inform my conclusion. In respect of the second issue, I make it plain that I have not made findings of fact but for the purposes of this exercise, I accept the claimant's pleaded case as set out above to which I have merely added some brief findings which were not in dispute. I apply the necessary tests to those matters as pleaded and make it plain that any future Tribunal will make its own findings of fact on the factual matters advanced by the parties entirely unfettered by this Judgment save in respect of the status of the claimant.

The first Issue: The status of the claimant

Employee/Worker/Self Employed Status

15.1 I have considered whether a contract existed between the claimant and the respondent. It has to be said that the written documents in existence in this case were considerably lacking. There is no evidence of any written agreement between the parties. The Agreement issued by the respondent at the end of January 2017 had not been completed and I accept that the claimant saw the Agreement for the first time only on the day before she received what she took to be a letter of termination. The submission of the respondent that that document governed the relationship between the parties is rejected – it most clearly did not.

15.2 I have taken account of the contents of the GATDOC documents to which I refer above and I have also taken account of the course of dealings between the parties. It is clear that the arrangement between the claimant and the respondent had been ongoing for over 11 years and in that time a method of working had been established on the terms of the GATDOC rules and procedures. That said, I do not see the proposed terms set out in the Agreement as being in conflict with the GATDOC documents and I accept that the Agreement reflected how the respondent would have liked the legal relationship between the parties to have been. The question for me is whether or not the Agreement reflected the actual position in law.

15.3 Up until the formation of the Company in 2015, I have no hesitation in concluding that a contract existed between the claimant and the respondent: that contract was evidenced by the GATDOC documents and by a long course of dealing between the parties. I have considered whether the formation of the Company and the payment by the respondent of fees due to the claimant to the Company had any effect on the legal relationship of the parties. I conclude that it did not. The evidence suggests that the respondent was not aware of the coming into existence of the Company and that the claimant simply requested the payment of fees be paid to a different bank account without making any reference to the fact that the account was that of the Company: it clearly suited her to do so. The respondent accepted that situation without further enquiry. If the respondent had entered into a contract with the Company and in turn the claimant had entered into a contract with the Company for the supply of her services to it, then the situation would have been very different. However, that did not happen and I conclude that the oral contract between the claimant and the respondent continued at least until February 2017 on the terms of the GATDOC documents. There is an issue as to whether that contract came to an end in February 2017 because it is the position of the respondent that the letter of 9 February 2017 was not a termination. That matter was not before me and will be an issue for another day.

15.4 I have considered whether that contract was a contract of employment – namely a contract of service. I have first considered the question of mutuality of obligation which is accepted as the irreducible minimum necessary to create a contract of service. I conclude that there was no obligation at all on the claimant to accept any work from the respondent and no obligation on the respondent to offer work. The claimant was one of some 80 or so doctors who chose to work with the respondent as and when she/they chose to do so. Over a period of 11 years, it suited both parties in this case to contract with one another. The respondent had a service to provide to the PCT and its successor organisation and the claimant wanted to earn money and did so to the tune of over £150000 per annum. However, I conclude that the claimant and the respondent were free at any time not to offer work to or to accept work from each other. I reach that conclusion as it was clear by the claimant booking holidays as and when she wished, and without being required to seek permission from the respondent so to do, that she was free if and when to work. An employee cannot dictate the time or length or her holidays as the claimant did. Equally I see no obligation of any kind on the respondent to offer work. The fact that the parties worked together as they did for over in 11 years suited them both but it did not give rise to mutuality of obligation such as to create a contract of employment.

15.5 In reaching that conclusion, I do not overlook the claimant's contention that the issuing each quarter by the respondent of a pre-populated rota was evidence of a requirement on her to work those pre-populated shifts. I reject that contention. The issuing of a proposed rota was simply an administrative device to save both the

claimant and the respondent time. It was something done not only for the claimant but also other colleagues who decided to work regular shifts each quarter for the respondent. I conclude that nothing can be read into that practice. Notwithstanding the issuing of a rota, the claimant was free to tell the respondent she would not work some or all of those shifts and from time to time at holiday times she did just that. The fact she did not often choose to do so was evidence that she wished to earn money and the respondent wished to use her services – nothing more. An employee does not have such a right.

15.6 I have considered whether the control exercised by the respondent over the claimant was sufficient for a contract of service. I reject the respondent's contention that the fact that the claimant could treat and advise patients as she wished indicated a lack of control by the respondent. The same alleged lack of control would apply equally to those GPs who the respondent accepts it did employ. When a professional person is employed, it is a hallmark of that relationship that how she carries out her professional duties are not matter which the respondent can exercise control. I have noted the control which was exercised over the claimant. Having agreed to take on a shift, she was required to attend on time and for the duration of the shift and, if she did not do either of those things, she could face financial penalty. The claimant was required to meet the service standards to which the respondent itself was subject in its contract with the PCT. The claimant was required to use the equipment provided by the respondent and the transport provided by the respondent when carrying out home visits. The claimant's work was subject to audit and to independent checking – indeed it is this last matter which led the respondent to write in the terms it did on 9 February 2017. It is clear the claimant did not take kindly to that scrutiny but the fact remains she was subject to it and when she chose not to take the remedial action the respondent wished her to take, the letter of 9 February 2017 was written. I conclude that there was sufficient control of the claimant to evidence a contract of service.

15.7 I have considered whether the claimant was required to provide personal service to the respondent. I conclude that the claimant was required to carry out the service for the respondent personally. She had no real power of delegation. If she was unable or unwilling for any reason to cover a shift she had agreed to take, then the respondent required that she hand back her shift and it would find a replacement. In those circumstances, whoever was found to take up the duty would be paid for it by the respondent and the claimant would not be paid at all. There was no question that the claimant would find a replacement who would take say 80% of the fee with the remainder going to the claimant – that never happened. By liaising with the group of 12 or so doctors with whom she was in touch, the claimant was effectively suggesting to the respondent a replacement from its approved pool and so assisting the respondent to cover the duty. The respondent could always object (although it rarely, if ever, did so) on the basis that the replacement had already done sufficient shifts in that week and could not lawfully or effectively work anymore. However, the claimant had no right to send a substitute at all: there was nothing in any written agreement evidencing such a right and the practice which had developed did not evidence such a right but rather a practice which meant the claimant did not "let down" the respondent as she was keen to keep in with the respondent and its staff for the benefit of her future work. The claimant was required to work personally and in all the shifts for which she was paid, she did just that.

15.8 However, there are several other compelling factors which point against employment status for the claimant. The claimant did not receive holiday pay or

sickness pay throughout her 11 ½ years with the respondent. There were no disciplinary or grievance procedures applicable to the claimant. The claimant did provide her own doctors back which is the most essential part of the tools of her trade and she did arrange and carry her own professional indemnity insurance and GMC registration. The claimant did accept work from another agency and was free to do so at any time had she so chosen. She did not choose to do so because it suited her to work with the respondent but she had that right. The claimant had made arrangements for her income to be treated for tax and national insurance purposes in the most beneficial way and in a way entirely indicative of self-employed status. The claimant sought to explain this away by saying the Company had been formed on advice of her accountant and that she did not understand the position. It lies very ill with an educated professional person to come before a tribunal and seeking to say she did not understand the financial arrangements into which she had freely entered and which so patently gave her the taxation advantages of the self-employed. Even before the creation of the Company, the claimant was treated at all times for taxation purposes as self-employed. The claimant was free to work for other organisations at any time and did so. She had no set hours of work with the respondent or any minimum number of shifts to work each week.

15.9 Accordingly having assessed all relevant factors, I conclude that the claimant was not an employee for the purposes of the definition contained in section 230 of the 1996 Act at any time. The absence of mutuality of obligation and the several factors set out in paragraph 15.8 above, when taken together, lead me to that conclusion in respect of the status of the claimant both when working and between shifts. There will always be factors pointing the other way and there are in this case in terms of control and personal service but they do not outweigh the other relevant matters. In any event the so-called irreducible minimum of mutuality of obligation is absent. Accordingly, the claims of unfair dismissal and wrongful dismissal depending as they do on the status of employee within section 230 of the 1996 Act have no reasonable prospect of success and are struck out.

Worker Status

15.10 I turn to consider whether the claimant has the status of a worker as defined in section 230 the 1996 Act. I note that the definition of worker is now taken as equivalent to that of “employee” in section 83 the 2010 Act and therefore my findings on this question will be determinative of whether or not the claimant can advance her claims for unpaid holiday pay and race and sex discrimination under the 2010 Act.

15.11 I conclude by reference to the decision in **Pimlico Plumbers** (above) that the lack of any contractual obligation to offer and/or to do work does not preclude a finding that a contracting party has the status of a worker particularly where an individual works regularly and consistently for the other contracting party. It is an inescapable fact in this matter that for over 11 years the claimant worked with the respondent on a very regular basis, so much so that when it issued its quarterly rotas, the respondent expected the claimant to carry out her usual pattern of shifts. This is an important factor in establishing status as a worker. The claimant was no mere casual contractor with the respondent undertaking work from time to time but rather a frequent and regular worker carrying out many shifts week after week, month after month and year after year. That is not necessarily conclusive of worker status but it goes a considerable way in doing so.

15.12 I have concluded that the claimant was required to work personally for the respondent. If my conclusion on that point should be wrong and she was not then I have looked at the arrangements for sending a substitute in the context of claimed worker status. If my above mentioned conclusion is wrong, then it is clear that any right enjoyed

by the claimant to send a substitute was not an unfettered right. The claimant was under a duty to provide notice in good time if there was to be a substitution and the only individuals allowed to substitute were those who had been approved of by the respondent. The respondent maintained a panel of doctors and an individual was not permitted membership of that panel unless and until she had been appropriately vetted by the respondent in terms of a DBS check, a check on indemnity insurance and a check on registration with the GMC. The claimant could not just send anyone to do her shifts for her: clearly she could only send a qualified medical practitioner and one already vetted and on the panel of the respondent. Thus any right to send a substitute was greatly restricted. The right to send a substitute is not necessarily going to defeat a claim for worker status and I have borne in mind the guidance of Sir Terence Etherton MR in **Pimlico Plumbers** where it was stated that a right of substitution only when the contractor is unable to carry out the work will usually be consistent with personal performance as will a right of substitution limited by the need to show the substitute is as qualified as the contractor. If the claimant did have the right of substitution it was a very limited one and one falling well within the permitted exceptions set out in **Pimlico Plumbers** and did not mean the claimant was not subject to a requirement of personal service.

15.13 In any event it is my role as set out in **Pimlico Plumbers** to stand back and ask whether the respondent is truly a customer of the claimant's business (whether carried on through the Company or not) or whether the respondent should be regarded as a principal and the claimant an integral part of the operations of and subordinate to the respondent. When I stand back and ask myself those questions, given the fact that the claimant had worked with the respondent for over 11 years working many regular shifts year after year and being subject to considerable control by the respondent, then I conclude that the claimant was an integral part of the business of the respondent and was within the definition of a worker within section 230 of the 1996 Act.

15.14 Accordingly I conclude that the claims for unpaid holiday pay and sex and race discrimination should not be struck out on the basis that the claimant did not have the required status to advance those claims.

The second issue: Strike Out or Deposit Order

15.15 I turn to consider whether the claims of discrimination have no reasonable prospect of success. I note that in dealing with this question it was not suggested that the claim of holiday pay should be struck out and therefore that matter can proceed to full hearing.

15.16 The claimant advances three allegations of direct sex and race discrimination as set out above. I confess to being surprised to hear reference to a claim of indirect discrimination. At the PPH in October 2017 Employment Judge Garnon could not see a claim of indirect discrimination and nor can I. I do not see any such claim referred to in the claim form and if the claimant is to advance such claim, an application to amend the claim form will have to be made.

15.17 I deal with the application to strike out on the basis of no reasonable prospect of success purely in relation to the three allegations of direct discrimination. The three allegations are dependent on the claimant identifying an appropriate actual comparator or failing that a hypothetical comparator. As with all allegations of discrimination, these allegations are fact sensitive and much will depend upon how a tribunal views the witnesses to such alleged matters when it hears them. There has been authority from the EAT and higher courts time and again to the effect that discrimination allegations

should not be struck out as having no reasonable prospect of success save in the most clear and obvious cases. This is not such a case. I have borne in mind the test which I must apply as set out above. It is a high test. I am satisfied that it would be wrong to strike out any of the three allegations of direct discrimination for they are fact sensitive and evidence sensitive and should be assessed at a full hearing. Therefore I will not strike out the claims.

15.18 I have considered whether I can conclude that the three allegations have only little reasonable prospect of success. In making this assessment, I can form a preliminary view on the matters placed before me both orally and in writing. I have concluded that in the circumstances of this case, it would be appropriate for a deposit order to be made under Rule 39 of the 2013 Rules. I will issue a separate order setting out my reasons for doing so.

Next Steps

16 The result of this judgement is that the claimant can proceed with her claims of race and sex discrimination (subject to payment of a deposit) and unpaid holiday pay. I will instruct that a telephone private preliminary hearing be convened at the earliest opportunity in order to enable the issues in those claims to be clarified and for case management orders to be made to bring those matters on a final hearing. The date of the hearing will not be before the date on which the ordered deposit should be paid.

_____

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 23 February 2018