THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Dr M Szollosy**
Respondent	**The University of Sheffield**
Held at:	**Sheffield On: 18 & 19 March 2014 30 June 2014 28 August 2014 (In chambers)**
Before:	**Employment Judge Brain**
Members:	**Mr RI Hughes Mrs S Rogers**

Appearances

For the Claimant:	**Ms Furby-Carl (Lay Representative)**
For the Respondent:	**Mr Williams (Counsel)**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The claimant was an employee of the respondent when he undertook work for them.
2. The claimant had continuity of employment from September 1998 to September 2012 and then from January 2013 to the date of expiry of the fixed term contract under which he was then engaged. Continuity of employment was broken between those periods.
3. The claimant's complaint under regulation 3 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 succeeds in part in so far as the claim relates to his period of employment from January

2013. The claim relating to his earlier periods of employment is dismissed as it was presented out of time.

4. The claimant's complaint under regulation 9 of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 fails and stands dismissed.

5. The claimant's complaint of less favourable treatment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 succeeds in part in so far as the claim relates to his period of employment from January 2013. The claim relating to his earlier periods of employment is dismissed as it was presented out of time.

6. It is not just and equitable to extend time so as to vest the tribunal with jurisdiction to consider the claims presented out of time.

REASONS

This case was listed for a two day hearing which took place on 18 and 19 March 2014. It was determined that additional evidence was required in relation to the role carried out by the claimant for the respondent in the respondent's School for Health and Related Research. This was known as ScHARR by the parties and the Tribunal shall adopt the same abbreviation. That evidence was heard on 30 June 2014. The parties made written submissions. These were considered by the Tribunal in chambers on 28 August 2014. These are our reasons for the Judgment.

1. On 18 and 19 March 2014, the Tribunal heard evidence from the claimant. The claimant called Dr David Buxton to give evidence on his behalf. The respondent called evidence from Susan Fitzmaurice and Lisa Allen. Professor Fitzmaurice is employed by the respondent as the Head of School for the School of English, a position that she had held since August 2011. She has been employed by the respondent from 2006. Lisa Allen is employed by the respondent as the School Manager/Administrator for the School of English. For short the Tribunal shall refer to this as the English School. Miss Allen is a longstanding employee of the respondent. She has been employed there since 1988. She has held her current position since August 2010. In relation to the ScHARR role, we heard further evidence form the claimant. The respondent called evidence about this role from Rhiannon Hammond-Jones, HR Manager for the Faculty of Medicine, Dentistry and Health. The claims made by the claimant in these proceedings relate only to his work in the English School.

2. The claimant has a long association with the respondent. In addition to that role and his role in ScHARR he was employed as a Research Fellow in the respondent's Department of Psychology on a part-time fixed-term contract from 1 August 2012 to 31 December 2012. It was common ground between the parties that the Research Fellow position is of no relevance to the issues between the parties in this case.

3. The issues in this case had been identified by Employment Judge Little at a case management discussion which took place on 31 October 2013. At the outset of the hearing on 18 March 2014, the Tribunal revisited that list of issues with the parties. We shall set out the issues in the case in due

course. During these preliminary discussions, Mr Williams, on behalf of the respondent, drew the Tribunal's attention to the respondent's Framework for the Regularisation of Atypical Workers. This document is dated May 2008 and is in the bundle starting at page 155. We shall call this the Regularisation Agreement for short. We shall have more to say about it in due course. Suffice it to say at this stage that Mr Williams submitted that the Regularisation Agreement marked something of a watershed in relations between the parties and that the bulk of the documentation within the bundle post-dates the Regularisation Agreement. As we shall see, the Regularisation Agreement was applied to the claimant in September 2010 (in relation to his work in the English School).

4. The claimant's account of his role in the English School prior to September 2010 was largely unchallenged. His evidence is that at the end of the first year of his doctoral studies (in academic year 1997/98) he was encouraged to undertake studies in a Post-Graduate Certificate in Higher Education run by the Respondent through the Department of Education. As part of his PGCE, the claimant was required to teach. In the autumn term of 1998 accordingly, he began teaching second year criticism and literacy theory and first year literacy practice. These courses have the code numbers LIT204 and LIT182 respectively. The claimant was paid by the hour for this work. He says about those modules that he "was not expected to design the modules or deliver lectures, though the means through which I delivered the curriculum was entirely up to me." In 1999 and 2000, he was assigned again to module LIT204 and to three other modules (LIT302, LIT303 and LIT304). LIT304 is 'criticism and literacy theory 1: psychoanalytic criticisms.' LIT302 was on modern literature and LIT303 on contemporary literature.

5. The claimant gave unchallenged evidence that he "was expected to use my specific knowledge of complex literacy criticism, 20th century fiction, drama and poetry to design syllabi for my own groups." For LIT304, the claimant's evidence was that, "this core module is wide ranging and asks final year students to study a specific school of literacy theory. This requires highly specific knowledge and a detailed understanding of what is very often complex material."

6. The claimant says that in 2002 he was asked to deliver a module on magic realist literature (LIT213) which was based on the claimant's doctoral research. The claimant said, "As with LIT304, I was asked to introduce this completely new, completely original module based on my unique and highly specialised expertise, and an acknowledged gap in the department's offering to students (i.e. the need for modules on 20th century fiction). And again, for this module, I was required to complete all administrative paperwork, reach faculty targets and learning objectives, write the curriculum, lectures, lead seminars, assess assessments, evaluate students' responses, etc."

7. We see copies of the descriptions of the modules in the bundle starting at page 441. Within this section of the bundle is a form completed by the claimant in which he proposes there to be a new unit or module in magic realist fiction. As we know, this came on stream as module number LIT213.

We also see the modules for LIT302 (modern literature) and LIT303 (contemporary literature).

8. The claimant completed his PhD in the autumn of 2002. His pay therefore moved from the post-graduate rate to the post-doctoral rate. This presented a significant rise in his hourly rate of pay for the work that he was undertaking.

9. In a very helpful document in the bundle at pages 27 to 29, the claimant has set out in tabular form the module and number of teaching hours that he undertook from academic year 1998/99 to academic year 2012/13 inclusive. We see that throughout, the claimant undertook work in LIT204, LIT213, LIT302, LIT303 and LIT304. We see from the table (which also incorporates his schedule of loss) that there was no regularity as to the modules in each academic year that would be taught by the claimant. His work overall was confined to these five modules (albeit the combinations of modules differed from year to year). Under cross examination Professor Fitzmaurice agreed that prior to the Regularisation Agreement of 2010 there was "considerable consistency" in the claimant's pattern of teaching. By this was meant that he would teach the various modules in both the autumn and spring terms.

10. In his printed witness statement, the claimant said, in paragraph 23, that "I have worked continuously for the University each semester since 1998, whatever they might claim. In each year from 1998 I have taught in these schools/Department of English and until 2008 I have taught there in both the autumn and spring semesters. The University would argue that I did not work over the summer in these years. As there is no teaching over the summer, I was for more than ten years offered work in each and every term in which work was available." The claimant goes on in paragraph 24 to say, "However, in each of those years I most certainly did work over the summer. The University's assessment of my employment includes only dates in which I had contact with students, and the dates which my fixed contract stayed, typically from October to the end of May each year." The clamant then goes on to give some detail as to the type of work that he was doing outside term time itself. This included planning of modules, the marking of assessments and meetings with module teams and students.

11. In his evidence before us, the claimant was asked as to how the engagements prior to the Regularisation Agreement were arrived at. The claimant said that it was "very difficult to say. There was no consistency. Sometimes it was hourly, sometimes for periods of time. There was a lot of change over the years."

12. There was a paucity of documentation in the bundle to illustrate the basis upon which the claimant was retained prior to the Regularisation Agreement. The claimant referred to page 298A which is a letter dated 14 October 2009 addressed to him by Sandra Henry on behalf of the Head of the English School. This confirmed payment for teaching during the autumn semester (between 28 September and 18 December 2009) in modules LIT204, LIT213 and LIT304. The claimant said that this was typical of what he would receive prior to the Regularisation Agreement.

The claimant pointed out that the two hours per week of contact time there stipulated included preparation and marking time.

13. In the first paragraph of his printed witness statement, the claimant said, "My employment in English has, throughout, been on a fixed term basis – I was paid an amount each teaching hour which commenced with students' first seminar and finished at the end of the academic year. The requests to teach each year were informal and rarely in writing." When pressed on this in cross examination, the claimant said that he would have discussions with the Head of the English School. The claimant gave evidence that he feared that he would not be offered further work if he pushed for greater formality.

14. Departing slightly from what he had said in paragraph 23 of his printed witness statement the claimant gave evidence before us that up until 2010, he had worked each autumn and spring semester from 1998. (As we have said, the claimant had referenced 2008 in his witness statement). We find that that he taught each autumn and spring semester up to and including the autumn semester of academic year 2009/10. He was able to produce the detailed table at pages 27 to 29 and his account on this issue was unchallenged.

15. The claimant told us that he did not work for the English School in the spring semester of academic year 2009/2010. This was because LIT213 (which would usually be taught in the spring semester) was moved to that academic year's autumn semester as is evidenced by the letter at page 298A. That semester was a demanding one for the claimant as, in addition to LIT213, he also taught LIT204 and LIT 304. His unchallenged evidence that the switch of LIT213 was presented to him as being a "great service to [the Respondent] as they found themselves short on second year modules in the autumn term that year."

16. We see from the letter at page 299 that the claimant was then engaged to run LIT204 for the autumn semester in 2010. He also taught LIT213 and LIT 304 in this semester. It follows, therefore, that the claimant did no work for the Respondent in the English School between January and September 2010. The claimant said in evidence that this was at the Respondent's instigation "for cynical reasons but that is true." He contended that the Respondent had engineered this gap in order to break his continuity of employment.

17. Having worked the autumn semester between September 2010 and January 2011, the claimant again found himself without work in the spring semester of 2011 before taking up work again in the autumn semester of 2011 (as we see from page 324). In that semester he taught LIT204 only. His evidence was that LIT304 and LIT213 (normally taught in the spring semester) were both closed without any reference to him.

18. He did not undertake any work for the English School in the spring semester of 2012 or the autumn semester of academic year 2012/13. He did work for the English Department in the spring semester in 2013. The claimant therefore agreed with the proposition that he had no work with the English School between January 2012 and January/February 2013. The

claimant concluded this part of his evidence by saying, "Up to 2010 I had work every term. After 2010 there was a change. After Regularisation there was a drop in the amount of work being offered." Upon the evidence, we conclude that the pattern of work between January 2010 and February 2013 referred to in paragraph 16 of Mr Williams' written submissions of 21 July 2014 to be accurate.

19. We shall now say a little more about the claimant's role. We have already touched upon the evidence given by the claimant in paragraphs 6 and 7 of his printed witness statement in connection with LIT204, LIT182, LIT302 and LIT303. In paragraph 8, the claimant says (about LIT304), "As early as 2000 I was asked to participate in delivering LIT304, page 444, criticism and literacy theory 2. This core module is wide ranging and asks final year students to study a specific school of literacy theory. This requires highly specific knowledge and a detailed understanding of what is often very complex material. I was asked to teach sections of this module whilst still a doctoral student as I was regarded as the only person in the department capable of delivering such a module. In this module, I worked completely independently and was expected to take full responsibility designing the course, including filing all applications and providing detailed information to meet departmental and facility standards, delivering the curriculum, setting assessments, marking assessments, evaluating student feedback and dealing with student questions and problems both long before and long after the dates in which the module has been delivered." It appears from the table at pages 27 to 29 that the claimant taught LIT304 in each academic year between 2000/2001 and 2009/2010 (except in academic year 2001/2002).

20. In paragraph 11 of his witness statement, the claimant says, about the module on magic realist literature (LIT213), "In 2002 I was furthermore asked to deliver a module on magic realist literature (LIT213), based on my doctoral research. As with LIT304, I was asked to introduce this completely new, completely original module based on my unique and highly specialised expertise, and an acknowledged gap in the departments offering students (i.e. the need for modules on 20th century fiction). And again, for this module I was required to complete all administrative paperwork, meet facility targets and learning objectives, write to curriculum, lecture, lead seminars, set assessments, evaluate students' responses, etc."

21. We see from the table at page 27 to 29 that LIT213 was taught in each academic year between 2002/2003 and 2010/2011. At page 20 of his witness statement, the claimant says that he was continuously employed from October 1998 "only not working over the summer, when no teaching was available. Even in those summers, I was expected (again, as I have already testified) to offer re-sit examinations to students, do marking, and prepare for the next terms teaching by planning, answering colleagues and students' e-mails and attending module meetings." In addition to the table at pages 27 to 29, the claimant additionally produced the chart at page 296A which helpfully sets out the modules of seminars taught by the claimant in the academic years from 1998/99 to 2012/13.

22. At page 331 is an e-mail from Lisa Allen dated 14 June 2013. She there sets out details, presumably obtained from the Respondent's records, of modules taught by the claimant between 2009/10 and 2013 inclusive. She says that she has only been in her role from November 2009 and therefore can go back no earlier than the academic year 2009/10. Her records largely accord with that of the claimant in his table at pages 27 to 29. (In fact, the respondent credits him with the teaching of one more module in academic year 2009/10 (LIT204) than contended for by the claimant. In all other particulars, the details are the same).

23. The respondent called no evidence from anybody who had any personal knowledge of the claimant's day-to-day role within the English School. Professor Fitzmaurice told us that she had not even met the claimant until 5 July 2012. Miss Allen had no knowledge of the claimant's work in the English School prior to 2010.

24. The claimant, in particular, took issue with paragraph 15 of Professor Fitzmaurice printed witness statement. In this statement, she has said that the claimant was undertaking what "can be described as seminar type teaching." She went on "he was part of the group of staff which was responsible for teaching a prepared (core) module to students in small groups. He was not responsible for designing, developing or preparing such a module; that responsibility would have rested with the module leader. He was expected to prepare for the seminar groups for which he was responsible and he had autonomy over the way in which he delivered the subject in the classroom, but someone else set the parameters in which he had to teach including the topics that he had to cover and textbooks that he needed to use. Depending upon the way in which the convenor led the teaching team on core modules such as LIT204 and LIT303, he also had responsibility for marking assessed coursework submitted by the students in his seminar groups. He was not responsible for designing the assessments."

25. The claimant said that Professor Fitzmaurice was correct to say that LIT204, LIT302 and LIT303 were taught as part of the team and he made reference to sample timetables that we see at pages 478 and 479 of the bundle. He told us that although each of those modules had a team leader the core texts were agreed by the team. He and the other members of the team could then chose non-core texts. To that extent, therefore, these were not pre-prepared modules which he simply delivered. He designed the modules (in relation to the non-core text books) within the parameters set by the team as to what needed to be covered by the course. However, as we have seen, the claimant, to use his words, introduced "completely new, completely original modules," those being LIT213 and LIT304.

26. It was the claimant's case therefore that he did have autonomy in his method of delivery in all the modules that he taught. We conclude that this autonomy was greater in some modules than others.

27. An issue raised by the claimant was his access to resources (or, the lack of it). In paragraph 9 of his printed statement, he says he was given access to very few resources. The claimant was referring here to access to computers, stationery, photocopying and the like. He therefore organised

a post-graduate students' society which was known as the Students' Association in Graduate English to represent post-graduate students and address both the resource issue and the "inconsistent, opaque processes by which teaching was offered and pay arranged." The claimant's unchallenged evidence was that, "we met with some success, convincing the department to implement a transparent process through which post-graduate students could apply for and be given teaching. We were also able to secure a shared room and some old, otherwise idle computers for our use." The claimant told us that this organisation "became defunct" after a couple of years. The claimant agreed with the proposition, when put to him by Mr Williams, that his primary resource is his own skill and knowledge. He also mentioned that he would prepare PowerPoint presentations at home using his own computer.

28. The claimant told us that he was expected to attend at module meetings. This attendance was without pay prior to the Regularisation Agreement. When asked at whose instigation the claimant attended such meetings, the claimant said that he did so by reason of his own professional standards. He conceded that no one had specifically asked him to attend the meetings but the claimant said that he would have expected to have been spoken to had he not done so. In addition to attending those meetings, the claimant's evidence was that there was much work to be done over and above the contact time with the students. The claimant details this in paragraph 24 of his witness statement. He assumed these to be simply part of his duties. The claimant details work such as reading, research, planning, providing re-sit assessments over the summer and marking them and the provision of information well ahead of the commencement of the courses in September.

29. The claimant gave evidence, again unchallenged, that his courses were "incredibility popular with students." He said that "on occasions I was asked by the department/school to allow more students onto my modules, which I regularly did. Sometimes this meant taking on as many as five or six extra students (at no extra pay)." The actual courses were delivered in classrooms on the respondent's premises at times arranged by the respondent's administration. About this, the claimant said, "An administrator in the school books the classrooms on the day it is prescribed (all on University premises) and sends me the details (though I have sometimes had some ability to choose times)." The claimant's evidence was that his name "has always been on the module handbook advertising my presence to students" and he gives examples of this in the documentation in the bundle at pages 441 to 479 inclusive.

30. The claimant said that once he began teaching the module, he considered himself to have a duty to the students and the respondent to deliver the entire module and provide the assistance and assessment work which the claimant described in some detail his witness statement.

31. We shall now turn to the events leading up to the Regularisation Agreement. Both Professor Fitzmaurice and Miss Allen gave evidence that the respondent negotiated the Regularisation Agreement with the trade unions. The Regularisation Agreement was the culmination of a review of

the atypical working arrangements across the respondent. The application of the Regularisation Agreement to the English School took place in September 2010. According to Miss Allen, there were seven atypical workers (including the Claimant) whose roles fell to be considered in accordance with the Regularisation Agreement.

32. The Regularisation Agreement is in the bundle starting at page 155. The guiding principles are set out in section 2 at page 158. The overall purpose of the agreement was 'to provide an implementation of regularisation framework for existing atypical workers (hourly paid teachers and other casuals) and for future engagements.' The process for the regularisation of hourly paid individuals was then described. This process commences in our copy at page 159 of the bundle. The first step was to determine employment status followed by a determination of grade/rate of pay and the number of contracted working hours.

33. The Regularisation Agreement recognised that 'an individual's employment status of course is defined under law rather than based on either an employer's or individual's preferences.' Employment status was 'determined by a number of legal tests, which would include considering the size and nature of the role undertaken, personal service, control and mutuality of obligation.' The table at page 160 gives a summary of 'employment status groups.' These groups were identified as:-

- Open ended employee;
- Fixed term employee;
- Worker with a registration agreement for the University Bank;
- Self employed;
- Agency worker.

34. For those workers with a registration agreement for the University Bank, the tables says, 'The registration agreement for the University Bank may be used by departments requiring a 'Bank' or 'Pool' of support to be called upon, often at short notice. Individuals can refuse work and the [University of Sheffield] is under no obligation to provide it. This category is not anticipated to be appropriate to engage individuals in longer term work unless the type of relationship that it takes renders the continuation of the status is appropriate.'

35. The determination of the grade/rate of pay was only to be undertaken for those identified as open ended and fixed term employees. Similarly, it was only those with that status for whom there would be a determination of the number of contracted working hours.

36. The Regularisation Agreement provided for an appeals process. For those individuals who were determined not to be open ended employees or fixed term employees, a right of appeal existed only upon the issue of employment status in the first instance.

37. Miss Allen was one of those who determined the employment status of the Claimant. She attended meetings on 21 July 2010 and 11 August 2010 (along with Sue Vice and two members of staff from HR) to determine the

status of those in the English School. Minutes are at pages 297 and 298. In paragraph 9 of her printed witness statement, she said that it was decided and determined that the Claimant was properly categorised as a Bank Worker (as were the other six within the pool for consideration in the English School). She justified this decision as follows:-

> "In reaching this conclusion, we took into account the fact that it was possible to swap between and substitute individuals; the fact that none of the tutors were obliged to do the work offered to them and that they could refuse to do so without penalty, that if they did refuse work this would not preclude the school from offering them work again if it was available [*we interpose to observe that the issue of substitution features in the minutes largely in these terms*]. We also noted that whilst the school had a reliance on a Bank of Tutors, there was no reliance on anyone individual and no guarantee that any work would be offered to any of them." Professor Sue Vice, who at the time was the Head of the English School, wrote to the Claimant on 27 September 2010 to confirm the determination of his employment relationship as 'worker on University Bank.' That letter is at pages 300A and B.

38. Those determined to be a worker on the University Bank were required to sign an agreement in the terms set out at pages 291 to 296. Miss Allen told us that she placed two copies of this in the pigeon hole of each of the Bank Workers who had accepted work for the 2010/11 academic session. She sent an e-mail to them all asking them to sign the registration agreement (page 301). The Claimant did not sign his registration agreement. It appears from paragraph 12 of Miss Allen's witness statement that he was not the only one who did not sign it.

39. Miss Allen told us, "by the time that we implemented regularisation in the school, offers of work had already been made to Bank Workers for the academic year 2010/11." We see from pages 299 and 300 that the Claimant was offered work for the autumn semester teaching criticism and literacy theory (LIT204). It will be recalled that the Claimant had received no offer of work for the spring semester of that academic year.

40. The letter at pages 299 and 300 lists the Claimant's duties. In the final paragraph Professor Vice says, 'If you have to cancel any of the classes during the semester please rearrange with the students: if this is not possible or you wish to provide a substitute, please let us know in advance. There is no obligation on the part of the School of English to provide any work, or for you to accept any work offered to you. You should submit a claim to School Administrator, Lisa Allen to be paid if any work is carried out.'

41. The issue of substitution was touched upon by the claimant in paragraph 22 of his witness statement. He told us, "On the very rare occasions over the last 15 years I've been ill, it has been expected by the department/school that I will make up those seminars and lectures at other times, as soon as possible, so as not to interrupt the students' learning. And as I am committed to the students' learning, I have always made sure that I have made up any lost sessions. The idea that anyone could walk in

and teach the modules that I ran is inconceivable. Others may have been able to stand in for my seminars on core modules when a teaching team is in place (as I have on occasions stood in for both part time and full time colleagues, both in the short and long term), page 318 and penultimate paragraph, but this is always difficult because each lecturer (full or part time) brings to his or her seminars a specific knowledge and unique approach to the module."

42. On second day of the hearing on 19 March 2014, the respondent introduced documentation which was placed into the bundle at pages 280A to I inclusive. This documentation goes to the issue of the methodology by which arrangements were made for the claimant to teach modules. At page 280E is an e-mail from the claimant to Lisa Allen of 14 December 2010 in which he makes reference to having missed LIT204 sessions and plans to make up other missed lectures and tutorials. Upon the basis of this e-mail, therefore, we accept the evidence of the claimant that if he did miss sessions, a substitute was not sent in his stead (whether at the instigation of the claimant or respondent) but rather, the claimant would make up for the missed session himself.

43. Page 318, to which the claimant made reference in paragraph 22 of his witness statement, is part of the document at pages 317 to 320 entitled: 'Regularisation appeal response for bank worker engaged in work with the School of English.' The claimant had appealed against the respondent's determination of his employment status. The document at pages 317 to 320 is the outcome. It appears from the document at page 317 that eight colleagues appealed. The respondent gave generic grounds for refusing the appeals with specific grounds pertaining to each individual (in the claimant's case at page 320).

44. The fifth paragraph at page 318 deals with the issue of substitution. It says, 'When the individual is offered work they are asked where possible to work with a particular seminar group. Whilst this arrangement is advantageous for both Bank Worker and the students who are able to build a rapport with the teaching assistant/teaching associates it is not a requirement of the role. However, within the consultation meetings and the information provided to new teaching assistants/teaching associates, the group were advised that should they become unable to complete the work they had been requested to undertake they should contact the School Administrator at the earliest opportunity to allow her to locate a substitute.'

45. There was simply no evidence that the claimant had ever provided a substitute to do the work that he had agreed to undertake. As we say, on the contrary, the claimant had clearly taken the view that it was for him to do the work. When asked who had made it clear to him that he had to make up for the lost seminars (examples of which we have already referred to dating from November 2010) the claimant said, "by administrative staff at the University." There was also no evidence of anyone else in the claimant's position having exercised the apparent right afforded to them to provide a substitute to do their work. The claimant did accept that from time to time, through illness or inclement weather or otherwise, he may be asked to step in at short notice for a colleague. The claimant made a valid

point when he said that this was no different to the practice adopted by employees both within the respondent and in other academic institutions. The claimant rejected out of hand the notion, when put to him by the Employment Judge, that he could simply send anybody in his stead. The Tribunal also contrasts the wording of the fifth paragraph of page 318 (whereby the respondent retains control of the identification of the substitute) with page 299 (which appears to vest the right to provide a substitute in the employee). The respondent was unable to satisfactorily explain the discrepancy between the two forms of wording. When asked about the issue of substitution Professor Fitzmaurice said, if there is a group teaching a module, the tutors engaged in that "are equally prepared and they can substitute for one another."

46. We have already mentioned the Registration Agreement (which the claimant and others did not sign). Professor Fitzmaurice was taken to this by the claimant's representative. The third paragraph of the Registration Agreement says, 'For the avoidance of doubt, both parties agree and understand that nothing in this agreement is intended to create a contract of employment between you and the University *outside any specific periods of engagement, and that during each engagement only, statutory employment rights would apply*' [emphasis added]. Professor Fitzmaurice was asked what she understood this clause to mean. It was put to her in particular, that the clause recognised there to be a contract of employment within specific periods of engagement. Professor Fitzmaurice said that she had "no opinion on the matter." The claimant accepted that, in reality, any individual could turn down the offer of employment or engagement. It was the claimant's case, however, that once the engagement had been accepted, that created a contract of employment between the parties. The distinction Professor Fitzmaurice sought to draw between an employee on the one hand and somebody in the claimant's position on the other was that the latter could decide not to honour the agreement and "if he did that, he could substitute." On the issue of substitution, Professor Fitzmaurice said that there was of "no one practise across the board." When asked if she had any personal knowledge or experience of substitution (at anyone's instigation) she conceded that there was none "to my knowledge."

47. We now turn from the generic reasons for the refusal of the claimant's appeal (at pages 317 to 319) to the specific reasons peculiar to the claimant. These reasons are at page 320. In essence, the grounds for refusal are as follows:-

47.1 The work has not been consistent and has involved a number of different subject areas.

47.2 There is no mutuality of obligation that the work will continue to be provided or that the work will be accepted when it is available.

47.3 The work has varied considerably over the years, both in respect to the academic area and the amount of work which has been offered.

Professor Fitzmaurice was pressed by both the claimant's representative and the Employment Judge as to why the variety of engagements was a factor telling against employment status. She conceded that the variety

of teaching engagements in fact made no difference to the determination of employment status and could not say why that had been mentioned in the specific grounds for refusal of the claimant's appeal.

48. We have already mentioned the break in the pattern of the claimant regularly teaching in both the autumn and spring semesters with effect from January 2011. The LIT304 and LIT213 modules had both been discontinued. The claimant therefore undertook a reduced amount of teaching in LIT204, LIT302 and LIT303. The claimant considers this to be "nothing other than a cynical attempt to break my continuity of service." He is also aggrieved that the two discontinued modules were closed without consultation with him. In evidence, Professor Fitzmaurice said that those two courses were not offered any more (although she did not explain why). She also told us that there had been some changes in the organisation of LIT303 in that the autonomy for the lecturers to a set non-core texts has been reduced.

49. We now turn to the issue of the claimant's remuneration. Professor Fitzmaurice told us that following regularisation, the claimant was paid for this seminar type work at a rate which corresponded to point 1 of Grade 6 on the grading structure. This was in accordance with the University's guidelines for the determination of pay for Bank Workers. She refers to pages 267 to 270 in the bundle. In recognition of the additional demands, for example, on module LIT213, the claimant was paid at a rate corresponding to point 1 of Grade 7 on the grading structure. Similarly, he was paid at that rate for module LIT304. In academic year 2010/11 the claimant was paid at a rate equivalent to Grade 6.1 for LIT204 and at a rate equivalent of Grade 7.1 for LIT304 and LIT213. In academic year 2011/12, the claimant was paid at a rate equivalent to Grade 6.1 for this work on LIT204 and similarly, was paid at a rate equivalent to Grade 6.1 for the work in academic year 2012/13 on LIT303. The clamant has included his payslips within the bundle. He is given an employee number and tax and national insurance are deducted at source. The same employee reference number was used for all three roles carried out from time to time by the claimant for the respondent. The claimant candidly and fairly accepted there to be a good and logical administrative reason for having only a single employee reference number.

50. Much of Professor Fitzmaurice's witness statement is taken up with an explanation as to the factors taken into account by the respondent in determining whether to offer work to those other than permanent employees. In her evidence before us, Professor Fitzmaurice summarised the position when she said, "we have to balance the needs of the respondent and any additional teaching requirements. It is contingent on the number of students and funding issues." That is, we think, a fair summary of the evidence that she gives in paragraph 28 to 31 of the witness statement and we shall not set out that detail here.

51. The claimant fairly accepted that after the Regularisation Agreement, there had been a change in practice. Whereas prior to the Regularisation Agreement, there would be a discussion about forthcoming needs, afterwards, the claimant would simply be sent letters such as that that we

see at page 299 offering him an engagement. A further degree of formality was introduced by the respondent as the claimant was required to complete a teaching assistant application form. We see these at pages 280(H) and (I) for the academic years 2011/12 and 2012/13 respectively.

52. We now turn to consider the claimant's work for ScHARR. The claimant gave unchallenged evidence in his second printed witness statement about his duties in ScHARR. He was a part-time tutor on the MA in Psychoanalytic Studies (MAPS). This was a distance learning course, originally run from the Centre for Psychotherapeutic Studies from 2000 until 1 September 2001, upon which date it transferred to ScHARR upon closure of the Centre. On 2 October 2006, he successfully applied for a post of lecturer in Mental Health. The job description, job application and the claimant's CV are at pages 493 to 516. Knowledge of psychoanalytic theory, literature, the arts, critical theory and/or history were essential for the role. The claimant's experience in the English School stood him in good stead and he was the unanimous preferred choice of the interview panel (page 517). He was then engaged upon a series of unbroken fixed term contracts from 1 January 2007 until September 2013. There is no dispute that the claimant was an employee of the Respondent in ScHARR. The claimant was not seeking permanent status for this role, as he accepted that the course had a limited shelf-life (and thus the Respondent could objectively justify not granting permanent status).

53. His evidence is that his work at ScHARR had been unbroken, from 2001, extending over every term and every summer. In evidence, the claimant qualified that by this, he meant that he was not teaching every summer but would in some summers undertake preparation work and the like. It was his work at ScHARR that deterred the claimant from applying for one of three temporary teaching fellowships in the English School that was advertised in 2005. The claimant had both professional and personal reasons for declining to apply for one of those positions. Firstly, his evidence is that his work at ScHARR was expanding. Secondly, a ten month teaching fellowship is a demanding role and the claimant felt that he was unable to fulfil that role alongside work at ScHARR, particularly given his domestic circumstances (his wife having given birth to a second child).

54. The respondent offered the claimant a formal appointment as a part time lecturer in ScHARR from 1 January 2007 to 31 December 2008. The offer of appointment is at pages 339 to 341. His continuity of service was said to commence on 1 January 2007. On 29 March 2009, continuity of service was altered to 1 August 2006. The respondnet was unable to explain this change.

55. The respondent did not call anyone to give evidence about the issue of ScHARR when the matter was before the Tribunal on 18 and 19 March 20014. The Tribunal considered it to be in the interests of justice to enable both parties to give further evidence about the issue of the claimant's work within ScHARR. Hence a further hearing took place on 30 June 2014. Miss Hammond-Jones said that the respondent may have alighted upon 1 August 2006 as the date of commencement of his continuity of employment as, under the Regularisation Agreement, that was the earliest

date upon which continuity may commence. However, she had no first hand knowledge of the application of the Regularisation Agreement to the claimant's role in ScHARR and this was surmise upon her part. Her evidence was that the claimant was a bank worker prior to 1 August 2006. Nothing turns upon the claimant's employment status prior to that date and it is not for the Tribunal to determine that issue.

56. In his second printed witness statement, the claimant gave an unchallenged account of his role in ScHARR. From 1 January 2007, he says he was effectively acting as course director with the many responsibilities set out in particular at paragraphs 15 to 18. We shall not set out those paragraphs here. However, in substance, the role appears in some respects to be similar to that he held in the English School in terms of planning and designing of courses and modules, running the modules, setting assessments, supervision of dissertations and working with external examiners. There was no challenge to the claimant's account of these duties and no evidence was called by the respondent by way of rebuttal. There were differences between his two roles as the claimant had recruitment responsibilities and running of examination boards in addition. He was engaged to work in ScHARR on the basis of a 0.5 full time equivalent post. Miss Hammond-Jones' gave evidence that he worked 7 hours per week for 52 weeks a year. It was put to her that that was teaching time and the addition of a multiplier of 2.5 added for non-teaching duties was a more accurate reflection of the claimant's duties and hours. Miss Hammond-Jones appeared to have little first hand knowledge of the matter (having been in post only from May 2012.) We therefore accept the claimant's account upon this issue.

57. The claimant was concerned to be told, about a year after his appointment as Lecturer, that his title was in fact Teacher in Mental Health. Although this had no impact on his pay grade, it was perceived by him to be a less prestigious role. Miss Hammond-Jones was unable to explain why the claimant's job role was at variance with that offered and referred to in the documentation referred to at paragraph 54 above. The claimant's evidence is that had he been aware of this at the time, he would have applied for one of the three more prestigious roles in the English School to which we made reference in paragraph 55 above.

58. We now need to make some findings of fact about Dr Buxton and Dr James Foley. Dr Buxton gave evidence before the Tribunal. He is the claimant's nominated comparator for his claim brought under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. We did not hear any evidence from Dr Foley himself. He is the claimant's nominated comparator for the claim which he brings under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

59. Mr Williams indicated that he had no cross examination for Dr Buxton. We can therefore make findings of fact simply based upon his witness statement. He graduated in July 2000 from the respondent in Spanish and Latin American studies. He then undertook teaching duties each year. He underwent a similar process to that of the claimant. On 25 August 2009,

he was informed that he was classed as a Bank Worker. Dr Buxton appealed against that the determination. His appeal was unsuccessful. He then commenced Employment Tribunal proceedings. He said in his witness statement that "I am not able to say how those proceedings were resolved." We understand them to have been settled under the auspices of ACAS.

60. Dr Buxton was offered an appointment with the respondent as a Spanish tutor with effect from 26 September 2011. The offer of appointment is in the bundle at pages 437 to 439. His continuity of service was said to date from 1 April 2007. Dr Buxton gave unchallenged evidence that this was incorrect and in fact continuity of service was recognised to commence on 1 September 2001. He says, "My job is exactly the same as it was when I started, even down to the modules I have given each year since 2001."

61. The claimant was taken to Dr Foley's job summary at pages 432A and 432B. Dr Foley is an English Language instructor. His role is to give English tuition to overseas students and then determine whether their English is at a suitable level for study at the University. His role includes the preparation and delivery of classes as well as 'development project work.' It extends to general administrative duties, tutorial support and testing of the students. Dr Foley undergoes performance assessment (unlike the claimant) and undertakes work on behalf of the Respondent throughout the entire year. In evidence, the claimant appeared to have no knowledge of Dr Foley's job role.

62. The claimant's job within ScHARR ended in September 2013. He has received a redundancy payment. It appears from the letter of 28 March 2009 at page 342 that the Claimant's hourly paid work for ScHARR prior to 1 January 2007 was discounted for the purposes of the calculation of an anticipated redundancy payment.

63. Following the work undertaken in the spring semester of the academic year 2012/13, the claimant has received no further work within the English School.

64. Against that background, we now turn to the events which had lead to the claimant commending Employment Tribunal proceedings. His claim was presented to the Tribunal on 10 July 2013.

65. On 5 June 2013, the claimant sent a letter to the Respondent. That letter is at page 328. It is headed 'Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.' We need to set out the letter in full. The claimant says:-

> *'I have been employed by the University of Sheffield since 1998. I have been employed by the School of English every academic year since September 1998 without interruption. Since 2001, I have also been employed at the School for Health and Related Research (ScHARR) year round including summers (with a fixed term contract from 2007 to the present).*
>
> *I do not believe that there are any objective justifications for my employment to be on a fixed term basis.*

I therefore believe that I have the right to regard my position as permanent in accordance with Regulation 8 of the above Regulations.

I am formally writing to request from my employer the University of Sheffield a written statement confirming that my contract is no longer fixed term.

I will be grateful if you would provide a statement to me within the statutory 21 days defined in Regulation 9.'

66. A meeting to discuss the claimant's request took place on 28 June 2013 attended by the claimant and Mrs Furby-Carl. This meeting was attended, on behalf of the respondent, by Miss Allen, Denise Falconer (who chaired the meeting) and Katrina Gillett (who attended in a HR capacity). Miss Allen gave unchallenged evidence that, "it quickly became clear during the meeting that the issue was in fact about his appeal against Michael's categorisation as a Bank Worker for his work within the School of English."

67. There appears to be no minutes of the meeting. Following the meeting, Professor Fitzmaurice wrote to the claimant (pages 334 to 336). It was common ground between the parties that the claimant's request under the 2002 Regulations related to both his role in ScHARR and in the English School. In relation to the latter, Professor Fitzmaurice took the view that the claimant's classification as a Bank Worker was still appropriate. She made reference to the procedure carried out under the Regularisation Agreement and that the claimant's appeal had been rejected. She then sets out the reasons why she continued to maintain the claimant not to be an employee. She concluded by saying: 'in terms of engagements with the School in the academic year 2013/14, the School's requirements are currently very unclear given the likely uncertainty over student numbers and budget constraints. Consequently, we do not know what our requirements might be for undergraduate seminar teaching but we expect them to be reduced. When our requirements are clearer, due consideration will be given to those available to provide teaching.'

68. On behalf of ScHARR, Professor John Nicholl wrote to the claimant on 1 July 2013 (page 332 to 333). He clarified that the claimant's employment with ScHARR is on a fixed term contract with an end date of 30 September 2013. Professor Nicholl went on, 'the reason for this fixed term contract is due to student demand being particularly uncertain beyond the generally accepted fluctuations over time. As you are aware, you have been employed to undertake teaching on the MSc in Psychotherapy, which closed for the recruitment of students in January 2012 and as such the teaching required has been for those students enrolled onto the course prior to this date who are completing their studies. You will be aware a number of distance learning students on this course have recently completed their studies and only two students remain for visitation supervision.' Professor Nicholl also said that alternative employment had been considered but nothing was available. He then mentioned that continuity of service had been recognised with effect from 1 August 2006. He says, 'I understand that this was following discussions that took place between yourself, Mrs Juliette Jukes (Senior HR Advisor) and Professor

Akehurst (Dean of ScHARR at the time) in which your engagements on an hourly paid basis were recognised.'

69. The claimant then issued proceedings on 10 July 2013. It was clarified at the case management discussion before Employment Judge Little to which we have already referred that the Tribunal is directly concerned with issues around the claimant's work for the English School. Plainly, however, the Respondent's dealings with the claimant in connection with his work within ScHARR may have a bearing upon the Tribunal considerations and findings. Hence, directions to deal with that issue were given at the conclusion of the hearing on 19 March 2013.

70. We now turn to a consideration of relevant law. By Regulation 3 of the 2002 Regulations, a fixed term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee as regards the terms of his contract or to be subject to any other detriment by any act or deliberate failure to act of his employer. In determining whether a fixed term employee has been treated less favourably than a comparable permanent employee, the pro rata principle (as defined by Regulation 1) shall be applied unless it is inappropriate.

71. By Regulation 3(3)(b), the right not to be treated less favourably applies only if the treatment is on the grounds that the employee is a fixed term employee and the treatment is not justified on objective grounds. Regulation 3(3)(b) is subject to Regulation 4 which provides that where a fixed term employee is treated by his employer less favourably than the employer treats a comparable permanent employee as regards any term of his contract, the treatment in question shall be regarded as justified on objective grounds if the terms of the fixed term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employees' contracts of employment. There are, therefore, two ways in which an employer can objectively justify less favourable treatment of a fixed term employee: firstly, by showing an objective reason for not giving the fixed term employee a particular benefit or for giving him a benefit on inferior terms; secondly, by showing that the value of the fixed term employee's total package of terms and conditions is at least equal to the value of the comparable permanent employee's total package of terms and conditions.

72. Accordingly, to succeed with his claim, the claimant must establish that he was an employee of the respondent at the date of the alleged less favourable treatment and that he was a fixed term employee at that date. He must identify an actual comparator who is a permanent employee of the respondent engaged in the same or broadly similar work, working or based at the same establishment (or another establishment maintained by the employer). We must then consider (with application of the pro rata principle if appropriate) whether the claimant has been treated less favourably than his comparator upon the grounds of his status as a fixed term employee and if so then whether the treatment was justified on objective grounds.

73. We must consider therefore whether there is a good reason for treating the employee less favourably. Less favourable treatment will be justified on objective grounds if it can be shown to be pursuant to a legitimate aim, be reasonably necessary to achieve that aim and is an appropriate way of achieving it. As we say, objective justification can also be demonstrated by the employer showing that the value of the fixed term employee's total package of terms and conditions is at least equal to the value of the comparable permanent employee's total package of terms and conditions.

74. We must also consider whether the claimant brought his complaint in time and if not whether it is just and equitable to allow the complaint to proceed out of time. By Regulation 7(2) a Tribunal shall not consider a complaint unless presented before the end of the period of three months beginning with the date of the alleged infringement of rights conferred by the Regulations or where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them. For the purposes of calculating the date of the less favourable treatment or detriment, where a term in a contract is less favourable, the treatment shall be treated as taking place on each day of the period during which the terms is less favourable. A deliberate failure to act shall be treated as done when it was decided upon.

75. We observe at this stage that the respondent does not take issue with the claimant's contention that Dr Buxton is an appropriate comparator for the purposes of the 2002 Regulations (a concession made by the respondent's Counsel at the outset of the hearing). Were that concession not to have been made, we would have held in any event that Dr Buxton was an appropriate comparator. On any view, he is engaged in broadly similar work to that of the claimant. Like the claimant, following his graduation from the respondent, Dr Buxton taught modules relevant to his own discipline. He was doing similar work to the claimant (albeit in different subjects) and has a similar level of skills and qualifications.

76. We now turn to the issue of successive fixed term contracts. We need to set out Regulation 8 of the 2002 Regulations:

(1) This Regulation applies where –

(a) An employee is employed under a contract purporting to be a fixed term contract, and

(b) The contract mentioned in sub-paragraph (a) has previously been renewed, or the employee has previously been employed on a fixed term contract before the start of the contract mentioned in sub-paragraph (a).

(2) Where this Regulation applies then, with effect from the date specified in paragraph (3), the provision of the contract mentioned in paragraph (1)(a) that restricts the duration of the contract shall be of no effect, and the employee shall be a permanent employee, if –

(a) the employee has been continuously employed under the contract mentioned in paragraph (1)(a), or under that contract taken with the previous fixed term contract, for a period of four years of more, and

(b) the employment of the employee under a fixed term contract was not justified on objective grounds –

(i) Where the contract mentioned in paragraph (1)(a) has been renewed, at the time when it was last renewed;

(ii) Where that last contract has not been renewed, at the time when it entered into.

(3) The date referred to in paragraph (2) is whichever is the later of –

(a) The date on which the contract mentioned in paragraph (1)(a) was entered into or last renewed, and

(b) The date on which the employee acquired four years' continuous employment.

(4) For the purposes of this Regulation Chapter 1 of Part 14 of the 1996 Act shall apply in determining whether an employee has been continuously employed, and any period of continuous employment falling before 10 July 2002 shall be disregarded.

77. There is then a provision in Regulation 8(5) concerning collective workforce agreements. We do not believe these to be of any relevance to the case. The Regularisation Agreement was not concerned with modification of the application of Regulation 8 of the 2002 Regulations but, rather, simply provided a mechanism for the determination of employment status.

78. Regulation 8 of the 2002 Regulations therefore provides that an employee on a fixed term contract will be regarded as a permanent employee if:-

78.1 The employee is currently employed under a fixed term contract and that contract has previously been renewed, or the employee has previously been employed on a fixed term contract before the start of the current contract.

78.2 The employee has been continuously employed on a fixed term contract for four years or more, discounting any period before 10 July 2002 and

78.3 At the time of the most recent renewal employment under a fixed term contract was not justified on objective grounds.

78.4 An employee who considers that, by virtue of Regulation 8, he is a permanent employee may present an application to the Employment Tribunal for a declaration to that effect.

79. For the purposes of Regulation 8, continuity of employment is to be determined in accordance with the rules governing continuous employment set out in sections 210 to 219 of the 1996 Act.

80. Under these provisions (which have relevance to both aspects of the claimant's claims under the 2002 Regulations and have indirect relevance to whether his claims under the 2000 and 2002 Regulations have been brought in time), only weeks governed by a contract of employment count for the purposes of continuity. Gaps of less than a week in length between the expiration of one fixed term contract and the beginning of another will not break continuity of employment. However, gaps of more than a week

will break continuity unless they can be shown to fall within one of the exceptions found in section 212(3). That provision sets out the circumstances in which continuity is regarded as being preserved during an interval between two contracts of employment of more than a week where there is no contract in existence during the gap. These circumstances include those where the break amounts to a temporary cessation of work under section 212(3)(b) or where it constitutes an 'an arrangement or custom' within the meaning of section 212(3)(c).

81. There are three essential elements to section 212(3)(b):-

81.1 There must be a cessation of work.

81.2 The cessation must be temporary.

81.3 The reason for the employee's absence must be the cessation of work.

82. Both unexpected and predictable and regular cessations are covered by section 212(3)(b). All that matters is that there should be a period when there is no contract of employment and that the reason for this is that there is no work for the employee to do. Cessation of work means a cessation of paid work. The cessation in work is considered from the point of view of the individual employee and with the benefit of hindsight looking at the pattern of engagements. The question is whether the cessation of work on account of which the employee was absent was temporary. That is not to say however that the intentions of the parties at the time that these cessations started are not relevant. All relevant factors must be taken into account. Plainly, if both employer and employee expected a cessation to be short lived, that would be relevant but not decisive. How long a cessation lasts, relative to the antecedent and subsequent periods of employment, would be another relevant factor. A key factor in determining whether or not a cessation in work is temporary will be the length of the cessation relative to the periods in work.

83. This issue was considered by the House of Lords in **Ford v Warwickshire County Council [1983] 2 WLR 399**. In this case, it was held that the word 'temporary' (in the context of the equivalent provision to section 212(3)(b) of the 1996 Act in the Employment Protection (Consolidation) Act 1978) was used in the sense of 'transient' and therefore continuity of employment for the purposes of the legislation in relation to unfair dismissal was not broken unless and until, looking backwards from the date of the expiry of the fixed term contract on which the employee's claim was based, there was discovered between one fixed term contract and its immediate predecessor an interval that could not be characterised as short relative to the combined duration of the two fixed term contracts. Such characterisation is a question of fact and degree and therefore one primarily for an Employment Tribunal to determine. Such cases require the Tribunal to look back from the date of the expiry of the fixed term contract in respect of the non-renewal of which the employee's claim is made over the whole period during which the employee has been intermittently employed by the same employer in order to see whether the interval between one fixed term contract and the fixed term contract that next

proceeded it was short in duration relative to the combined duration of those two fixed term contracts during which work had continued. The Tribunal must then ask itself whether, with hindsight, the employee has been absent from work on account of temporary cessation of work

84. Section 212(3)(c) provides that where an employee is absent from work in circumstances such that, by arrangement or custom, he or she is regarded as continuing in employment for any purpose his or her continuity of employment will be preserved. An 'arrangement' for the purpose of the statute is one by which an employee is regarded as remaining in employment for any purpose, even though his or her contract has terminated. It is logical that any such arrangement must have been made before the absence began in order for section 212(3)(c) to apply. An arrangement reached between the parties after a period of absence has already started would amount to an agreement concerning continuity which is not permitted under the 1996 Act.

85. Continuity may be preserved under section 212(3)(c) by 'custom' as well as by 'arrangement.' To be binding, a custom or usage must be 'notorious, certain and reasonable.' It has been established, in the context of teaching, that where there is a succession of fixed term contracts and everyone anticipates that renewal will take place, a custom could well be established. To fall within section 212(3)(c), the employee must be absent from work in circumstances that, by arrangement or custom, he or she is regarded as continuing in the employment of his or her employer for any purpose. This requires tribunals to find whether there was some discussion or agreement (or custom) to the effect that the parties regarded the employment relationship as continuing for some purpose, despite the termination of the contract of employment.

86. The 2002 Regulations apply only to employees rather than to a wider category of 'workers.' Under section 45(6) of the Employment Act 2002 an 'employee' is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment which is defined as a 'contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.' This definition is identical to that contained in section 230 of the 1996 Act.

87. Various tests have been developed by the Courts to distinguish a 'contract of service' from a 'contract for services.' These tests have developed over the years and have introduced the concept of 'the irreducible minimum' without which no contract of employment can exist. This concept was endorsed by the House of Lords in **Carmichael and Another –v- National Power PLC [2000] IRLR 43.** The irreducible minimum consists of control, mutuality of obligation and personal performance. It is of note that the claims in that case were not advanced upon the basis that when work was undertaken by the putative employees they did so under successive contracts of employment.

88. We take the concept of control first. There are many forms of control: for example, practical and legal, direct and indirect. This concept does not require that the work be carried out under the employer's actual supervision or control. In a more general sense, it requires that ultimate

authority over the employee in the performance of his or her work rests with the employer so that the employee is subjected to the latter's orders and directions. Some element of direct control over what the worker does is needed.

89. The next essential element is that of mutuality of obligation. This is usually expressed as an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered. Relevant considerations include whether there are any notice requirements or whether a worker is free to leave at any time in favour of alternative work. If there is no mutuality of obligation between the parties, then it is highly unlikely that there will be a contract of employment in existence. For a contract of employment to exist at all, the parties must be under some obligation towards each other.

90. The mutuality of obligation test is most often relevant where an individual has carried out work on a casual, irregular or sporadic basis over a period of time. Such work may be variable but fairly constant or may be periodic with long gaps between each stint as in the case of seasonal workers. The question is whether mutuality of obligation subsists during those periods when the individual is not working, giving rise to a continuous 'global' contract of employment spanning the separate engagements. Even if no global contract exists (as in the instant case), there may be a contract of employment in relation to each individual assignment. If so, the worker may be regarded as an employee in respect of each engagement, even though the employment relationship ends when each engagement is completed.

91. In **Cornwall County Council v Prater [A2/2005/1312]** the Court of Appeal considered the status of a teacher who was engaged by a local authority. She was engaged to work in performing multiple individual teaching assignments of varying duration under a succession of separate contracts. The Court of Appeal held that during each individual assignment, there was sufficient mutuality of obligation and that she was engaged pursuant to contracts of service. The Court of Appeal held that once the employee had accepted pupils offered to her by the council, she was obliged to fulfil her commitment to that particular pupil and the council was obliged to continue to provide that work until the particular engagement ceased. There therefore arose sufficient mutuality of obligation by virtue of the employee's obligation to teach the pupils and the obligation on the part of the council to pay her for teaching the pupils whom they continued to make available for teaching by her. There was a mutuality of obligation in each engagement as the council would pay her for the work which she in turn agreed to do by way of giving tuition to the pupil for whom the council wanted her to provide tuition. The Court of Appeal therefore held that to be sufficient mutuality of obligation to render each contract one of employment. The council were not obliged to offer her any work and if work was offered she was not obliged to accept that offer. It formed no part of the employee's case that there was a global contract of employment. Her case was that the individual commitments or engagements once entered into constituted contracts of employment. The Court of Appeal agreed with her.

92. The issue of the status of an employee working on a succession of individual assignments was considered by the Employment Appeal Tribunal in **Drake v IPSOS Mori UK Limited [UK EAT/0604/11]**. That case cited with approval the judgment of the Employment Appeal Tribunal in **Stevenson v Delph Systems Limited [2003] ICR 471**. In that case, it was held that the issue of whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work as available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed. The only question then is whether there is sufficient control to give rise to a conclusion that the contractual relationship which does exist is one of a contract of service or not. It was held that the question of mutuality of obligation poses no difficulties during the period when the individual is actually working. For the period of such employment a contract must exist as the individual undertakes work and the employer in turn undertakes to pay for the work done.

93. The third limb of the test is that of personal performance. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service. However, a limited or occasional power of delegation may not be. A worker's ability to choose at will whether to perform a contract himself or pay someone else to do it or ask someone else to do it for him is inconsistent with the contract of service. Relevant to this issue is the power or control over the worker's power of substitution by the employer. The greater the restriction upon the ability to substitute and the more limited the power, the more consistent that is with an obligation of personal service. The Tribunal should be wary of situations where wide delegatory powers are in practice never, or very infrequently, used and are merely a sham by which an employer hopes to avoid giving workers the protection afforded by employment status.

94. This issue was considered by the Supreme Court in **Autoclenz Limited v Belcher & Others [2011] ICR 1157**. In this case, the employer argued that the claimants (who were engaged as car valeters) were subcontractors and not 'workers' under section 230(3) of the 1996 Act because they worked neither under a contract of employment nor under a contract whereby they undertook 'to do or perform personally any work.' The contracts contained clauses allowing them to supply a substitute to carry out the work on their behalf and stating that there was no obligation on the employer to offer work or on the valets to accept work. The Supreme Court endorsed a line of case law to the effect that the standard for providing a 'sham' clause in the employment context is not as stringent as it is in ordinary contract law. Cases such as **Protectacoat Firthglow Limited v Szilagi [2009] ICR 835, CA** held that, whereas in the context of commercial contracts, a clause will only be disregarded as a sham if it is the product of the contracting party's common intention to deceive others, no such intention to deceive is required in employment contracts. The Supreme Court held that a clause may be disregarded if it simply does not represent the true intentions of the party. The Employment Tribunal should therefore discern the true intentions or expectations of the parties (and therefore their implied agreement and contractual obligations), not only at

the inception of the contract but at any later stage where the evidence shows that the parties have expressly or impliedly varied the agreement between them. The court noted the disparity in bargaining power between employer and employee. The true agreement therefore has to be gleaned from all the circumstances of the case of which the written agreement is only a part.

95. When **Autoclenz** was before the Court of Appeal, Lady Justice Smith (whose judgment was endorsed by the Supreme Court) indicated that a Tribunal will have to examine all the relevant evidence, including the written term itself, read in the context of the agreement, to determine whether a substitution clause accurately reflects the working relationship. It should consider evidence of how the parties conducted themselves in practice and what their expectations of each other were. The mere fact that the parties have conducted themselves in a particular way does not of itself mean that the conduct accurately reflects their legal rights and obligations. The fact that a right of substitution was never exercised in practice would not necessarily mean that it was not a genuine right. Applying these principles to the facts of the case, it had been determined by the Employment Tribunal that although the contracts contained clauses allowing substitution that was not reflective of the true legal obligations of the parties as the valets were expected to turn up and to do the work and were fully integrated into the employer's business. The Supreme Court held that the Tribunal had been entitled to come to that conclusion. The Supreme Court's decision therefore suggests that attempts to evade the application of employment law by inserting substitution or obligations clauses into contracts are unlikely to succeed where those clauses did not reflect the reality of the working relationship. The Court of Appeal determined that there was no intention or realistic expectation that the right of substitution should ever be exercised.

96. It is well established that a contract of employment cannot be altered merely by attaching a different label to it. The Tribunal must look at the reality of the worker's situation. The focus of the Tribunal's enquiry must be to discover the actual legal obligations of the parties. We must examine all of the relevant evidence. Evidence of how the parties conducted themselves in practice may be persuasive. Rights and obligations in agreements, however, may be genuine and not a sham even if, in practice, those rights and obligations are rarely exercised. In those circumstances, the question arises as to whether an inference should be drawn that no one ever intended that those rights and obligations should be exercised.

97. There are other considerations upon this issue. One of these is financial consideration. A person in business on his or her own account will carry the financial risk of that business. Another element indicative of employment is incidence of income tax and national insurance contributions. It is important to remember, however, that financial considerations are only one factor and tax treatment of payments is not generally regarded as strong evidence one way or the other. Other miscellaneous factors include whether the worker is able to carry out work for others and whether an employer has the power to appoint or dismiss a

98. We now turn to the 2000 Regulations. The scheme is similar to that in the 2002 Regulations concerning fixed term employees. The rights in the 2000 Regulations are afforded to a wider class of individuals extending, as they do, to 'workers.' A 'worker' is an individual who has entered into or works under or, where the employment has ceased, worked under a contract of employment or any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. The 2000 Regulations therefore cover a wide range of individuals not extending to self employed people who are genuinely pursuing a business activity on their own account.

99. Claims must be presented to the Employment Tribunal within the period prescribed in Regulation 8 of the 2000 Regulations. This is couched in very similar terms to those of Regulation 7 of the 2002 Regulations.

100. The Tribunal must consider whether the claimant was a worker employed by the respondent at the date of the alleged less favourable treatment. If so, by then he must be engaged as a part time worker at the date of the alleged less favourable treatment. Again, the complaint must be in time or it must be just and equitable to allow the claimant to proceed out of time. The claimant must identify an actual comparator employed by the same employer under the same type of contract and engaged in the same or broadly similar work and who works or is based at the same establishment or at a different establishment controlled or run by the employer. The Tribunal must then consider whether the claimant has been treated less favourably than a comparator as regards the terms of his contract or any other detriment as a result of an act or deliberate failure on the part of the employer. Again, the pro rata principle must be applied before the Tribunal goes on to address the question as to whether the less favourable treatment was upon the grounds that the claimant is or was a part time worker. If so, it is open for the employer to defend that treatment upon objective grounds.

101. The time limit for bringing complaints under both the 2000 and 2002 Regulations is not absolute. The Tribunal has discretion to extend the time limit where the Tribunal considers it just and equitable so to do. This is the same formulation as in the Equality Act 2010. Case law has held that there is no presumption that the Tribunal should extend time. On the contrary, a Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of the discretion is therefore the exception rather than the rule.

102. In exercising the discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in section 33 of the Limitation Act 1980 which deals with the exercise of discretion in the Civil Courts in personal injury cases. This obliges a Court to consider the prejudice each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and in particular the length of, and reasons for the delay; the extent to which the cogency of the evidence is

likely to be affected by the delays; the extent to which the party sued has cooperated with any requests for information; the promptness with which a claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by a claimant to obtain appropriate advice once he or she knew of the possibility of taking action. The relevance of these factors depends upon the facts of the individual cases and the Tribunal does not need to consider all of the factors in each and every case. In British Coal Corporation –v- Keeble [1997] IRLR 336 EAT, it was held to be just and equitable to allow Claimants to bring their complaints concerning a discriminatory voluntary redundancy payment scheme outside the requisite three month time limit, notwithstanding that the reason for the delay was the Claimant's mistake of law as to their position. It was held that if the only reason for a long delay is wholly a understandable misapprehension of the law, that must have been a matter which Parliament intended the Tribunal to take into account when considering 'all the circumstances of the case.'

103. As we said in paragraph 3, this case benefited from a case management discussion before Employment Judge Little which took place on 31 October 2013. The claimant's position is that he was an employee of the respondent for the purposes of the 2002 Regulations. This the respondent disputes. The claimant brings two complaints under the 2002 Regulations. The first is that as a fixed term employee he was treated by the respondent less favourably than the respondent treated a comparable permanent employee as regards the terms of the claimant's contract. The specific terms are those in relation to pay, annual leave, reduction of hours and access to a pension scheme. As we have said there is no issue that Dr Buxton is an appropriate comparator for the claimant's claim. The second complaint under the 2002 Regulations is for a declaration that he is a permanent employee.

104. The claimant complains that contrary to the 2000 Regulations he was treated by the respondent less favourably than the respondent treated a comparable full time worker as regards the same terms of his contract. The claimant advances Dr Foley as an appropriate comparator.

105. There is a jurisdictional issue as the respondent contends that the claimant presented his complaints out of time. As we have said, the relevant provisions are to be found in regulation 7 of the 2002 Regulations and regulation 8 of the 2000 Regulations.

106. We shall firstly deal with the question of the claimant's status as an employee. It forms no part of the claimant's case that he was continuously employed in the English School under a global or 'umbrella' contract of employment. His case is he was an employee when actually working and that his continuity of employment was preserved during gaps between those periods of work pursuant to section 212(3) of the 1996 Act. Thus, he was working on successive fixed term contracts and has been continuously employed for more than four years post-10 July 2002.

107. Clearly, there was a contract while each assignment was continuing. There was an agreement that the claimant would undertake work in return

mutuality of obligation to render that contract a contract of employment given that other appropriate indications of an employment contract are present.

108. Firstly, the respondent would routinely offer the claimant work in the English School. The claimant was under no obligation to accept each engagement. However in practice he did. Once that was accepted, the clear expectation of both parties was that he would do the work and fulfil the engagement.

109. Secondly, the claimant was under the control of the respondent. The respondent dictated which modules the claimant would teach. While he had a greater freedom and autonomy in some modules than others, ultimately the claimant was accountable to the respondent. The claimant was teaching the respondent's students. He was asked by the respondent to deliver modules dependent upon student demand. The claimant also was in practice expected to attend module meetings at the outset of the academic year. It is plain that the claimant was fully integrated within the English School. Once he accepted an assignment, the respondent provided the students for the claimant to teach and provided the facilities for him so to do.

110. We find that the clear expectation of both parties was that the claimant would provide the work personally. As we said in paragraph 45, there was simply no evidence that the claimant had ever provided a substitute to do the work that he had agreed to undertake nor was there any evidence of anyone else in the claimant's position having exercised the apparent right afforded to them to provide a substitute to do their work. Professor Fitzmaurice had no personal knowledge or experience of substitution at anyone's instigation. We accept the claimant's evidence that he had a duty to the students to deliver the entire module himself and that if for any reason he was unable to attend a seminar or lecture, he would do this himself later. We refer to paragraph 41. We also accept the claimant's unchallenged evidence that those modules of his own devising could only be taught by the claimant himself. We also accept the claimant's evidence that the sending of substitutes would present difficulties even for core modules with a teaching team in place for the reasons given by him which were recorded in paragraph 41 above. Further, difficulties would be created by the flexibility and autonomy given to the tutors in selecting non-core texts on core modules anyway.

111. The Tribunal therefore concludes that the substitution clause in the documentation is not reflective of the true legal obligations of the parties. In our judgment, the claimant was expected to turn up and provide the modules. He was fully integrated into the respondent's business. He was subject to a considerable degree of control by the respondent who would provide the students and the facilities to teach the modules under the respondent's ultimate control and direction. The respondent was answerable to the students for the quality of the courses being taught. The claimant bore no financial risk. Any financial issues a student may have had were between the student and the respondent. It was in practical terms difficult if not impossible to envisage a substitute being sent in the place of

the claimant. This never happened in practice and, in the Tribunal's judgment, was never likely to either given the nature of the claimant's work.

112. In conclusion, therefore, the Tribunal finds that the claimant was engaged to work for the respondent pursuant to a contract of service. He was an employee of the respondent during each of the individual assignments which he accepted. This is an inevitable finding given the evidence of Professor Fitzmaurice: we refer to paragraph 46.

113. We now turn to the issue of continuity of employment. We hold that there was continuity of employment up to January 2010 pursuant to section 212(3)(b) of the 1996 Act. Plainly, there was a cessation of work (between the autumn and spring semesters of the same academic year and then between the spring semester of an academic year and autumn semester of the next academic year) from the time that the claimant commenced working for the respondent in academic year 1998/99. The cessation in each case was temporary. The cessation lasted for the duration of the vacations. The claimant's absence from work was due to that cessation of work. Looking back with hindsight, when comparing the length of the cessations between terms to the terms themselves, this was a temporary or transient state of affairs. The claimant worked to a regular pattern. Academic-year-in-year-out, he was expected to and did accept assignments each autumn and spring semester. These were predictable and regular cessations. Both parties expected it to be short lived and both plainly expected the claimant to resume teaching following each vacation.

114. Mr Williams is correct when he says that, as a matter of fact, the claimant did not work in the English School between January 2010 and September 2010. However, we hold that continuity was preserved between January 2010 and September 2010 by virtue of section 212(3)(c) of the 1996 Act. This provides where an employee is absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in employment for any purpose, his employment continuity will be preserved. It will be recalled that module LIT213 which would have been taught in the spring semester of 2010 was, by arrangement, moved to the autumn semester of the academic year 2009/2010. The claimant's unchallenged account was that this move was at the respondent's behest and for the respondent's convenience. That arrangement was made before the absence in January 2010 began. We hold that that arrangement serves to bridge continuity of employment between January 2010 and September 2010.

115. The claimant worked the autumn semester of academic year 2010/11. He has therefore, in our judgment, continuity of employment to January 2011.

116. We hold there to be no arrangement for the purposes of section 212(3)(c) to bridge the gap in continuity between January 2011 and the autumn semester in academic year 2011/2012. For the previous academic year, there had been an arrangement (by virtue of the moving of LIT213 to the autumn semester in academic year 2009/2010). There was no such arrangement in the following academic year 2010/11.

117. Therefore, to bridge the gap in continuity between January 2011 and September 2011, the claimant needs to bring himself within either section 212(3)(b) or the alternative limb of section 212(3)(c) which requires an absence from work in circumstances such that by custom he is regarded as continuing in employment for any purpose.

118. We find that the claimant cannot avail himself of section 212(3)(b) to plug the gap in continuity between January 2011 and September 2011. The gap is, with hindsight, simply too long. A nine month absence when set against the duration of the academic terms cannot be regarded as temporary or transient. We refer to the **Ford** case cited above.

119. However, we hold that the claimant can avail himself of section 212(3)(c) given that by custom, he worked each autumn semester without a break from around the year 1998. In the Tribunal's judgment, this custom or usage had become notorious, certain and reasonable by this stage. As we say in paragraph 87, in the context of teaching, where there is a succession of fixed term contracts and everyone accepts and anticipates that renewal will take place, a custom could well be established.

120. Continuity is therefore preserved to September 2012. Unfortunately for the claimant, by September 2012 this notorious, reasonable and certain practice over a period of fourteen years of renewal each autumn semester then came to an end. The claimant must have known that nothing had been offered to him for the autumn semester of the academic year 2012/2013. He continued to be so aware. He could not have known that autumn that an assignment would be offered for the spring semester of academic year 2012/13. At around September 2012, we find, the respondent had taken the view that the employment relationship was no longer continuing for any purpose following the termination of the contract of employment at the end of the autumn semester ending in or around January 2012. At that stage, there was no arrangement. Custom was departed from. The cessation of work, with hindsight, was one of 13 months duration and on any view cannot be regarded as transient or temporary in the context of academic terms.

121. In our judgment, therefore, there is nothing enabling the claimant to preserve continuity of employment after September 2012. The claimant was without work in the English School between January 2012 and February 2013. For the first time, there was no teaching assignment in the autumn semester. That being the case, continuity of employment had ended and the claimant should have brought his complaint of less favourable treatment pursuant to the 2002 Regulations by mid-December 2012 at the very latest. He did not bring his complaint of less favourable treatment until July 2013. His complaint of less favourable treatment (excluding that which arose during the spring semester of the academic year 2012/2013) has therefore been presented out of time.

122. In this case, there is no scope for a just and equitable extension of time. At paragraph 19 of page 44 of the claimant's representative's submissions, it is said, 'The claimant is not asking for a just and equitable extension to bridge a break of continuity since according to the relevant legislation continuity, together with the terms of the contract, was preserved.' There is

no presumption that the Tribunal should extend time to hear an out of time complaint. As we said above, it is for the claimant to convince us that it is just and equitable to extend time. It is difficult to see how a claimant can convince a Tribunal to grant a just and equitable extension if that claimant expressly disavows the need for one and positively asserts that he or she does not seek it. It cannot be just and equitable to extend time against the express wishes of a claimant. Accordingly the Tribunal does not extend time and we hold that the claimant's complaints of fixed term worker discrimination for the period up to and including September 2012 have been presented out of time and the Tribunal has no jurisdiction to entertain them.

123. An alternative argument run by the claimant is that he was in fact an employee of the respondent, and had continuity of employment pursuant to a contract of employment up to the date upon which he was dismissed from his employment with ScHARR. It is not in dispute that the claimant enjoyed continuity of employment on a succession of fixed term contracts with ScHARR from 1 August 2006 at the very latest. As the Tribunal has found the claimant to be an employee for the work that he undertook in the English School, it follows that the claimant had two roles with the same employer. The roles in the English School were, of course, fixed term engagements with no contract of employment in the gaps in between.

124. We accept the claimant's point that his work for the English School was not akin to a bank worker. If a nurse is employed by an NHS Trust in one department and is then engaged to work in another department by virtue of being on the register of bank nurses, she will almost certainly not be an employee for the purposes of the work that she carries out in that other department. On the other hand, if an employee works for a department store in one department and is then engaged on fixed term contracts by the same employer to work as an employee in other departments in addition, then he or she will plainly be an employee of that employer for the purposes of the fixed term engagements in addition to his or her regular employment. An issue may arise as to whether, between employer and employee, there are two contracts or only one (with the fixed term work being an agreed variation of the contract).

125. The Tribunal does not consider it necessary to make a determination of these issues. Certain it is that the claimant was an employee of the respondent in both of his roles and that the employments ran concurrently. It is an academic question which we need not resolve as to whether the claimant was employed under one employment contract or two. This is because the difficulty which the claimant has is that when his work within the English School ceased in January 2012, the discriminatory course of conduct upon which he basis his claim also ceased. True it is that he still had an employment relationship with the respondent. That was in a different department. There is no suggestion that he suffered fixed term employee discrimination in that department. The continuing state of affairs or series of acts or failures to act upon which he basis his claim ended in or around January 2012 before resuming again in February 2013.

126. A claim should have been brought about the alleged fixed term discrimination ending in January 2012 by September 2012 at the very latest. The claimant knew that he had not been offered any engagements for the spring semester of the academic year 2011/2012. He therefore knew or ought to have known that the discriminatory regime (on his case) came to an end at that time. Again, the claimant has expressly disavowed a just and equitable extension of time. Therefore, albeit by a different route, we arrive at the same answer when considering the implications of the claimant's employment with ScHARR. The claims arising out of the period up to January 2012 have been presented out of time and the Tribunal has no jurisdiction to consider them.

127. There is no question that the work undertaken by the claimant in the English School in the spring semester 2013 (where he taught LIT303) forms the basis of a claim presented in time. In comparison to his chosen comparator, Dr Buxton, the claimant has suffered less favourable treatment in that his terms and conditions are inferior. He did not enjoy the same rate of pay as Dr Buxton, he did not receive holiday pay nor did he have entitlement to access the pension scheme. The respondent called no evidence to rebut the claimant's contentions about these matters. The claimant has set out, in some detail, his claims under each of these heads within the schedule of loss at pages 27-29 of the bundle.

128. The respondent has offered no objective justification for the differential between Dr Buxton's terms and conditions on the one hand and the claimant's terms and conditions on the other. Therefore, the only issue that arises is whether or not the reason why the claimant was treated less favourably in these respects was because he was a fixed term employee.

129. The respondent seeks to argue that the claimant was treated less favourably not because he was a fixed term employee but, rather, because he was classed as a casual or bank worker by the respondent. We have determined that, in law, the claimant was a fixed term employee. It was because of his status (as opposed to the label the parties seek to attach to that status) that the respondent treated him less favourably than his comparator permanent employee. We have determined that status to be a fixed term employee. It follows therefore that the less favourable treatment was because the claimant was a fixed term employee. Whatever label the respondent chose to apply to the claimant, it was his status as a fixed-term employee (taking into account the characteristics of the relationship and the rights and obligations arising under it) that was the cause of the less favourable treatment. That was the reason why he was treated as he was.

130. To allow the respondent's defence to succeed would be tantamount to permitting the practice of the labelling of an individual's status and the drafting of rights and obligations not reflective of the parties' true intentions so as to afford a defence to employment rights claims, a practice deprecated by the senior courts. Mr Williams submitted that, following the regularisation process, the respondent honestly believed the claimant to be a bank worker. He submitted that this was a legitimate process and that that process was not a sham. Our findings, particularly upon the issue of substitution, are to the contrary. The respondent recognised the reality of

the position in the Regularisation Agreement (see paragraph 46). Such acknowledgement is at odds with the labelling of the claimant as a bank worker. It follows as a matter of logic that the respondent does not and did not genuinely believe the claimant to be a bank worker. We have found that the agreements reached upon this issue do not reflect the true intentions of the parties. To allow this defence would be tantamount to sanctioning the effective contracting out of employment rights. To allow an employer to contend that an agreement entered into with the employee affecting issues of status and which are not reflective of their true intentions is the very mischief about which the Supreme Court were exercised in **Autoclenz**. In the final analysis, the claimant was in law a fixed term employee. That status was the substantive cause of the less favourable treatment. We find that this was an attempt by the respondent to draft its way out of its employment obligations. It follows therefore that the claimant's claim under the 2002 Regulations succeeds in part.

131. We now turn to the second claim brought under the 2002 Regulations: that being for a declaration that he was a permanent employee. During the course of the hearing in March 2014, we raised the question of the application of regulation 8 to this case. The Employment Judge was concerned that the claimant may be, by definition, a permanent employee already and therefore unable to complain of less favourable treatment on the grounds of fixed term status as he was no longer a fixed term employee. Although addressed in some detail in paragraphs 9-13 in Mr Williams' submissions, this was not pleaded by the respondent as a defence. It appears only to have been advanced at the instigation of the Employment Judge.

132. The respondent's position is a somewhat unattractive one. On the one hand, it suited the respondent to engage the claimant upon a series of fixed term contracts. It refused him permanent status when he requested it on 5 June 2013. On the other, the respondent then seeks to defeat the claimant's case upon the basis that he was, after all, a permanent employee from around July 2006 despite making no effort at all to confer that status upon the claimant. Much of the thrust of Professor Fitzmaurice's statement was taken up with an explanation as to why it suited the respondent to offer the claimant work upon a series or succession of fixed term contracts. We refer to paragraph 50.

133. The claimant's claim for a declaration that he was a permanent employee is bound to fail given our findings upon the issue of continuity. As continuity of employment was broken in September 2012, he was not employed under successive fixed term contracts for four years or more as at the date of his request and the date he presented his claim to the Tribunal. No entitlement to a declaration of permanent status therefore arises.

134. In any event, the Tribunal determines that the respondent has made out a case that it can objectively justify not conferring permanent status upon the claimant at any point after July 2006.

135. We hold that the respondent engaged the claimant upon a succession of fixed term contracts in pursuit of a legitimate aim. The respondent's business is, of course, the provision of further education to students. It is

entitled to (and indeed presumably is expected to) furnish that further education making the most expeditious use it can of its teaching resources. The respondent cannot know from one year to the next the level of demand for its courses and its funding. The use of fixed term contracts to further these aims cannot be anything other than legitimate.

136. The use of fixed term contracts is reasonable and necessary to achieve that goal. It is difficult quite frankly, to see how the respondent could achieve those aims without using fixed term contracts in order to avail itself of the bank of skilled employees available to it such as the claimant. Although we were not presented with any statistics, it is inevitably going to consume far more resources to engage that bank of employees as permanent employees. Therefore, the use of fixed term contracts is reasonably necessary to achieve the aims of the respondent and is an appropriate way of achieving it. No alternative way was suggested by the claimant.

137. Of course, once those employees are engaged on fixed term contracts, there is an obligation on the respondent not to discriminate (as we find they have done in this case). That is, however, a different issue to the question of the objective justification of the use of fixed term contracts in the first place.

138. In conclusion, therefore, we find that the respondent has objectively justified the use of fixed term contracts in this case. The respondent's defence that the claimant was already a permanent employee fails. That is cold comfort for the claimant as we find that the respondent has objectively justified the use of fixed term contracts. The claimant's application for a declaration that he is or was a permanent employee therefore fails.

139. We now turn to the claim brought under the 2000 Regulations. It inexorably follows, given our determination of employee status, that the claimant was a worker for the purposes of the 2000 Regulations. We find that Professor Foley is an appropriate comparator. Plainly, he was employed under the same kind of contract, that is to say, to provide tuition to students, and the work being undertaken was broadly similar. He was providing tuition to students as was the claimant.

140. The findings that we have already made about the time points are fatal to the claimant's complaint of part time worker discrimination for the period up to January 2013.

141. In relation to the claim arising out of the less favourable treatment for the spring semester in the academic year 2012/2013, we find that the claimant was treated less favourably than was Professor Foley. Again, we find that the claimant was on inferior terms and conditions to his chosen comparator.

142. We must address the reason why. Was it on the grounds of his part time status or was it for some other reason? Given our findings above, it is clear that the claimant was less favourably treated by reason of his status as a fixed term employee who only worked part time. In determining the claimant's status, it is very difficult to divorce the part time nature of his work on the one hand and his fixed term status on the other. His status

was the reason for the less favourable treatment. That status includes his being part time. That was very much the point of the bank: that lecturers could be called upon and offered a position tailored to suit student demand. Very often this demand was such that only part time positions could be offered. It follows therefore that his complaint under the 2000 Regulations must also succeed. Even if we are wrong in that determination, the issue is academic in any event (by reason of the rule against double recovery) given that the claimant has succeeded in part in his claim under the 2002 Regulations.

143. In conclusion therefore, we find that the claimant's complaints under the 2000 and 2002 Regulations succeed in part. The matter has already been listed for a remedy hearing. The parties may consider that the matter will benefit from a private preliminary hearing before the Employment Judge in order that suitable directions (for the provision of an update schedule of loss and other appropriate steps) may be given.

Employment Judge Brain

Date: 23.9.14

Sent to the parties on:

23 September 2014

For the Tribunal:

S Doyle