Case No: 2800340/2007

EMPLOYMENT TRIBUNALS

BETWEEN:

Mrs B K Carl	and The University of Sheffield
Claimant	Respondent

held at: Sheffield

on: 26 September 2007 and 27 September 2007

Members: Mrs Bergin, Mr Smith

before: Mr G R Little Chairman

Representation

Claimant: Mrs B K Carl (Claimant in Person)
Respondent: Miss A George, Counsel

REASONS FOR A JUDGMENT AT A PRE-HEARING REVIEW

1. Written reasons are being given at the request of the Respondent's Counsel via the Tribunal Clerk at the conclusion of the hearing.

2. This was a Pre-Hearing Review to determine two questions.

- Was the Claimant an employee of the Respondent?
- Was the Claimant a worker for the Respondent?

These issues had been identified as suitable preliminary issues for a pre-hearing review at a Case Management Discussion in May 2007. That was in the context of the Claimant's claims to this Tribunal which are that she was treated less favourably because she was a fixed term employee or, in the alternative, that she was treated less favourably because she

was a part time worker. The Claimant also believed that she should be entitled to holiday pay and so was bringing a claim under the Working Time Regulations 1998.

3. The Issues

3.1 At the beginning of the Pre-hearing Review the issues were confirmed and it was noted that whilst there was a statutory definition of employment, that was limited and accordingly the Tribunal would need to have regard to principles laid down in decided cases. In particular that would involve consideration of whether there was a mutuality of obligations and whether the Respondent exercised sufficient control over the Claimant for there to be an employment relationship. Miss George, for the Respondent, explained that there would be a particular need to consider whether the Claimant has, at least in the most recent part of her time with the University, been performing work personally or whether she at least had the right to provide a substitute to provide services on her behalf.

3.2 In relation to the definition of worker, it was noted that the statutory definition is more fulsome. The two essential features were again that the work or services were performed personally and that the situation should not be one where the Claimant was undertaking a business of which the Respondent was a client or customer.

4. The Evidence

The Tribunal has heard evidence from the Claimant by reference to a witness statement and also a document she had prepared in response to the Respondent's evidence. The Respondent's evidence was given by Professor Peter Cole, Head of the Department of Journalism Studies.

5. Documents

The Tribunal had before it a bundle of documents running to some 248 pages.

6. The Tribunal find the following facts

In making these findings we limit ourselves to matters which are relevant to the preliminary issues before us.

6.1 The Claimant is a Teacher of Shorthand. Prior to her relationship with the Respondent she had been employed by the Sheffield College as a Senior Lecturer. She had never been in business on her own account.

6.2 In or about August 2002 the Claimant saw an advertisement in the Sheffield Star. This had been placed by the Respondent and the Claimant understood it to be notification of a vacancy for a job as a Shorthand Tutor in the Respondent's School of Journalism. The Tribunal has not seen the advert. The Claimant duly attended for an interview during the course of which she was told that the job was to be on a self employed basis. She was told that she would have to register with the Inland Revenue as self employed and that she would have to submit invoices to the Respondent. She was given information as to how to deal with both of these requirements. The interview was with Deborah Woodhouse, the University's Assistant Registrar and on 14 August 2002 Ms Woodhouse wrote to the Claimant confirming those matters. A copy of that letter appears at page 1 in the bundle.

6.3 On or about 10 October 2002 the Claimant was presented with a document which described itself as an agreement for services. A copy of that document appears at pages 2 and 3 in the bundle. It appears that the Claimant would have been working for the Respondent for some weeks prior to this agreement being documented. The agreement describes the Claimant as "the Contractor" who will "carry out for the University the services specified in the Schedule hereto upon the terms and conditions herein contained during the period specified in the Schedule". A copy of that schedule appears at page 11. The services are described as shorthand teaching for 20 hours per week at an hourly rate of £29.14. The agreement went on to impose an obligation of confidentiality which was to continue after the termination of the agreement. Clause 4(b) of the agreement provided:

> 'The Contractor being self employed will be responsible for the settlement of liability in respect of tax and National Insurance which may from time to time be payable by law".

The agreement granted to the Claimant access to the University's buildings, equipment and support staff. Clause 7 of the agreement provides:

> "It is acknowledged by the parties that this is an Agreement for Services and accordingly upon the termination of this Agreement for any reason it is agreed that the Contractor shall not be eligible for any redundancy payment or compensation for unfair dismissal".

Paragraph 11 provided:

> "Nothing in this Agreement makes or may be interpreted to make the relationship of employer and employee between the University and the Contractor".

Paragraph 15 provided:

> "The Contractor shall not assign the benefit of this Agreement, in whole or in part, to any third party".

6.4 The relationship continued uneventfully as far as these proceedings are concerned and in October 2003 the Claimant was issued with a further document describing itself as agreement for services. A copy of this document appears on pages 4 and 5 in the bundle. The agreement was essentially in the same form as the 2002 agreement, save that there was no clause prohibiting assignment of the benefit. In fact nothing at all was said about assignment or non-assignment of the benefit.

6.5 In October 2004 a further Agreement for Services was issued to the Claimant and a copy of that appears on pages 8 and 9 in the bundle. This is different from the earlier contracts in that there was no longer a reference to Tax and National Insurance arrangements being the responsibility of the Claimant. That was because, at the request of the Claimant, the Respondent had agreed to process payments to the Claimant through its payroll service and accordingly the Claimant began to receive payments which were net of Tax and Employees Class of National Insurance contribution. The Claimant had made this request because of the inconvenience to her of having to prepare Tax Returns. She did not employ an Accountant. At the same time as this change was made, the Claimant ceased to submit invoices to the Respondent and instead submitted a document which was a University generated document called a Certified Claim for Fees and Associated Expenses. A copy of an example of such a form appears on pages 35 and 36 in the bundle. The

Tribunal has not seen an example of the invoices previously submitted by the Claimant. The 2004 Agreement reinstated the prohibition on assignment of the benefit of the agreement.

6.6 For reasons unknown, but it is assumed to be an oversight only, no Agreement was issued to the Claimant in 2005. However, she continued to work as before.

6.7 On 15 June 2006 the Claimant wrote to the Respondent (probably to its Human Resources Department) complaining that she felt that she had been treated less favourably than a full time University Teacher with regard to pay, holiday entitlement and pension. Although the Tribunal have not seen a copy of that letter, we have seen the subsequent letter which the Claimant wrote to the Human Resources Department on 22 September 2006 which reiterated and possibly expanded upon that complaint. A copy of that letter appears between pages 13 and 15 in the bundle. The heading to that letter refers to the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and also the Fixed Term Employee (Prevention of Less Favourable Treatment) Regulations 2002. During the course of that letter the Claimant referred to "less favourable treatment during my employment" and in relation to the earlier contracts which she had been issued with, referred to her "past employment".

6.8 in a Claim Form for "Fees" which the Claimant submitted on 22 September 2006, she sought holiday entitlement. Professor Cole, the Head of the Department and the person who had to countersign by way of authorising the claim crossed out the purported claim for holiday entitlement. He did not discuss the matter with the Claimant and other than the correspondence that was then ongoing with the Human Resources Department, the Claimant did not pursue the matter.

6.9 In October 2006 the Claimant was issued with a further document which described itself as an agreement for services. A copy of this document appears at pages 21 and 22 in the bundle. This differed from the agreements which had been issued in 2002 and 2004 in that paragraph 15 now read:

> The Contractor may, by negotiation and agreement with the Head of Department, assign part of the benefit of this Agreement, to a third party".

Professor Cole signed that agreement on behalf of the University on 24 October 2006. The Claimant signed the agreement on 30 October 2006. At that time she made an addition to Clause 11 - which purported to deny any relationship of employer and employee by adding the following words "but the Contractor regards herself as an employee in accordance with the legal definition of employee". In addition, under the place where she signed the agreement she added the following "(Nothing in this agreement which I have signed should absolve the University of its legal obligations towards the Contractor)."

6.10 Professor Cole is the only witness we have heard from the University and it was he, as we have mentioned, who signed the 2006 Agreement on behalf of the respondent. Professor Cole has conceded that he did not know who had effected the change to Clause 15 and indeed he had probably not noticed that anything had been changed at the time he signed. That concession by Professor Cole came after earlier evidence which he had given - in answer to supplemental questions - which tended to suggest that the reason for the change was related to the Respondent's experience with a colleague of the Claimant's, Shiriey Wilks. Mrs Wilks was also a Shorthand Teacher with the Respondent. She may have had an agreement similar to that issued to the Claimant although the Tribunal has not seen such a document. She only worked 4 hours per week. At some point in 2005 she booked a holiday in term time and in those circumstances apparently (although the Tribunal have not

heard any direct evidence about this) sought permission to be absent. Another Shorthand Teacher was then obtained from an Agency to cover the absence of Mrs Wiiks. Again, the Tribunal has not heard any direct evidence on this. It was suggested that Mrs Wilks might have put forward her own replacement but nevertheless that person was actually supplied through an Agency. The Respondent has confirmed to us on our enquiry that Mrs Wilks was not paid for those periods when she did not work because of holiday and that it was the Respondent rather than Mrs Wilks who paid the person who provided cover. Returning to Professor Coles' initial evidence, that was so as to suggest that the arrangement with Mrs Wilks had worked so well that it was thought a good idea to give the Claimant the facility to make such an arrangement to provide a "substitute" if she so wished. It is therefore the Respondent's case that the 2006 version of Clause 15 was intended to facilitate that.

6.11 On an annual basis the Claimant was required to prepare a report with regard to the delivery of the course in the preceeding academic year. That report was submitted to the Respondent's Assistant Registrar. An example appears between pages 44 to 46 in the bundle.

6.12 The Claimant was issued with a timetable which indicated the type of Shorthand to be taught, the times of the sessions and the locations. An example appears at page 60 in the bundle. The Tribunal find that although the Claimant may have had the opportunity to make some suggestions for alterations prior to the timetable being finalised, once it was finalised she was subject to it without exception.

6.13 The Department of Journalism Studies issued a Handbook in respect its taught graduate courses - the handbook being issued to the students. Included within that handbook was a section described as Staff Profiles. The Claimant appears profiled as follows: "Kaye Carl joined the Department to teach Shorthand in 2002, after being employed for a number of years by the Sheffield College as Senior Lecturer". Her qualifications and experience are then summarised. (See page 70).

6.14 During the relationship with the Respondent, the Claimant had 4 days absence through sickness. She claimed payment for those days on her claim form and that payment was authorised by Professor Cole and duly paid to the Claimant. Professor Cole told us that that had been done as a gesture of goodwill.

6.15 Throughout the relationship, the Claimant has been a University of Sheffield "B" Staff car park holder. It might be added that this was a privilege apparently denied to Professor Cole.

6.16 When there was the need for the Claimant to travel to London for the annual National Council for the Training of Journalists examination board meeting, the Respondent paid the Claimant's expenses.

7- The Parties' submissions

7.1 The Claimant's submissions.

Mrs Car! referred us to her witness statement. She accepted that she might speak to administration with regard to her timetable to see if it could be organised any better, but that was primarily for the students' benefit not hers. The Claimant maintained that she had been integrated into the Respondent's organisation as she was referred to in the handbook. In response to the authority of Prater (see respondent's submissions) the Claimant pointed out that she would normally be issued with her contract after she had started teaching. She had always been an employee throughout her working life. The Claimant had not been consulted

about the change to Clause 15. Mrs Carl referred us to the bundle she had prepared containing authorities and information from HM Revenue and Customs. Those cases included **Ready Mixed Concrete, McFarlane v Glasgow City Council. Byrne Brothers, Torith Ltd v David Wilson Flynn** and **Secretary of State for Employment v McMeechan.** Mrs Carl pointed out that the ability to work elsewhere was something which an employee could do - in other words a second job. Here there had always been mutuality of obligation. The Claimant had always been part and parcel of the Respondent's undertaking. She was not in business on her own account. She urged the Tribunal to look at the reality not the label. As the Claimant taught for 21 hours it would not in any event be practical for her to work elsewhere.

7.2 The Respondent's submissions

The issues for the Tribunal were whether the Claimant was an employee and/or whether she was a worker. Consideration would need to be given whether the Respondent was a client of the business of the Claimant.

Employment Status. In respect of employment status there was case law. The first question was whether there was a contract. It was conceded there was in this case. However, it was then necessary to consider whether that was a contract of employment and three matters were to be considered. Was there an obligation to provide personal service? Was there mutuality of obligation? And was there control? Even if these factors were present, it would still be necessary to look at all the surrounding circumstances, such as whether the individual had been integrated into the business; what equipment was provided, financial risk, profit, how wages were paid, the availability of sick pay, holiday pay and pension and whether a disciplinary or grievance procedure and other policies applied. The position as regards doing work for others needed to be considered also. If one core element was not proved, it could not be a contract of employment.

Personal Service

As regards personal service, the Claimant started to provide services in 2002. The contract issued at that time said that there could be no assignment. No contract had been issued in 2005 but the 2006 contract had a revised provision about assignment. We were asked to accept that Mrs Wilks had a similar contract to that of the Claimant, but in 2005 Mrs Wilks had apparently asked to provide a substitute. That request had been granted and Ms George suggested that that was a possible reason for the variation being made to Clause 15 in the 2006 contract. Reviewing the case law, Ms George referred us to the **Ready Mixed Concrete** case where personal service was the core element. There could be no contract of employment without it, albeit a limited power to appoint a substitute would not be inconsistent. Such a right would have therefore to be fettered. Ms George contended that there was no fetter in the Claimant's case. Whilst it did not take place in the claimant's case - in fact it appeared that Mrs Wilks was the first to exercise the right - it was nevertheless exercised. Commenting on the McFarlane case to which the Claimant had referred us, the right had been fettered there. The substitute had to be chosen from a list. Ms George noted that the Claimant's case was that paragraph 15 had been altered simply so that the Respondent could avoid its employment law obligations and it was therefore a sham. However, there was no evidence to show this. In fact there had been a practical example of it being done - by Mrs Wilks - and the Respondent wanted to allow the same flexibility to the Claimant. As it appeared that Mrs Wilks had exercised the right prior to Clause 15 being amended, Ms George suggested that the revision to Clause 15 in 2006 was simply a reflection of what the Respondent was prepared to allow in the event. In other words, the right to provide a substitute was always there.

Mutuality of Obligation

In respect of mutuality of obligation, Ms George invited the Tribunal to consider whether that had existed between each contract. It was then necessary to consider whether it had existed during each contract. Ms George referred the Tribunal to the case of **Cornwall Country Council v Prater** [2006] IRLR362. Ms George contended that Prater did require the Tribunal to look at the position between contracts as well as during. As far as the position between contracts was concerned, there was no mutuality because there was no obligation on the Respondent to offer another contract or on the Claimant to accept anything that was offered. Ms George accepted the position regarding mutuality during the life of the contract was more complicated, however we were reminded that paragraph 11 of the contract explicitly denied the existence of any employment relationship. Accordingly, no mutuality of obligation should be found. The Claimant had purported to amend the 2006 contract. Ms George contended however on checking this point with the Claimant the Chairman was told that in fact the Claimant had not intended to amend the contract by making her annotation.

Control

With regard to control, Ms George accepted that the Claimant had been told what she should teach ie, the subject matter, and where and when she should do that. However, the Respondent had exercised no control over the detail of what was taught. Moreover the Claimant had some input into timetabling, albeit not after the semester had started. The Claimant had never been formally appraised, whereas staff were. Nor was the Claimant subject to the disciplinary or grievance procedures. If the Claimant had been proceeding under the grievance procedure she should have made her complaint to Professor Cole in the first instance, not to HR. There was no entitlement to sick pay, although it appeared she had been paid some sick pay but that was an oversight. The Claimant could work for somebody else without seeking the Respondent's permission. Other matters which needed to be considered were the method of payment and the deduction of Tax and National Insurance. It so happened that the Respondent had the facility to do this and did so at the request of the Claimant. The Tribunal were invited to disregard the material the Claimant had provided which emanated from HM Revenue as a different employment test applied for Tax purposes. The Claimant had been paid at a high hourly rate to compensate for the fact that she was not receiving such benefits as sick pay or holiday pay. The Claimant had not been in receipt of holiday pay. The Claimant may not have obtained her own insurance cover but nevertheless paragraph 16 of the Agreement provided for her to indemnify the Respondent from any damage or claim resulting from the activities under the Agreement. It was the Claimant's responsibility to read and understand the contract and she could not plead ignorance. With regard to integration, it was accepted that the Claimant was referred to in the handbook. However this had been done for another freelance person as well. The Claimant did not undertake work in relation to admission or tutoring and did not attend committee meetings. She was not invited to do that work because she was not an employee. She had no pension. It was only in 2006 that the Claimant had raised concerns about her status. It was therefore permissible to infer that she had accepted her status as being self employed hitherto.

Worker Status

As regards the question of worker status, again the issue of personal service was important. Ms George contended that the Respondent was purchasing the services of the Claimant, the latter being a business for those purposes. On enquiry from the Chairman, Ms George submitted that the 2006 version of Clause 15 meant that the Claimant could assign part of

the benefit and whilst there was a limited fetter, there was no condition that there could only be substitution in the case of incapacity. We were referred to the case of Mrs Wilks..

At the end of submissions we informed the parties that it was likely that we would need to give considerations to two cases which had not been referred to us, namely **Express and Echo Publications Ltd v Tanton** and **James v Red Cats (Brands) Ltd.** We invited any further submissions on these cases on the following day. The Claimant had no further submissions but on behalf of the Respondent Ms George made further submissions.

7.3 Respondents' further submissions

Before dealing with the two cases, Ms George explained that she wanted to give some clarity with regard to the absence of a non-assignment provision in the 2003 contract. Because that clause appeared in both the 2002 and 2004 agreements, it should be regarded as applying by default in 2003 also. In addition, whilst no written contract had been issued in 2005, Ms George contended that the same terms which prevailed in 2004, applied. With regard to the case of **James.** Ms George referred to the dominant purpose test discussed therein. In the instant case the service provided was shorthand teaching arid there was a requirement for personal service. That was the dominant purpose. Whilst there had been a requirement of personal service between 2002 and 2005, that had changed in 2006 and that in turn followed on from Mrs Wilks having a substitute in 2005. With regard to the case of **Tanton,** the clause there differed from that applicable in the Claimant's case. Ms George suggested that the common understanding was that Clause 15 was meant to give the Claimant the right to provide a substitute. There had been no requirement for the substitute to be chosen from an approved list. Accordingly, the fetter was limited.

8. The relevant law

8.1. Having regard to the parties' submissions and the Tribunal's own research - in respect of which the parties have been invited to give their submissions - the Tribunal directs itself in respect of the following law.

8.2 Employment status.

8.2.1 Statutory definition.

The applicable definition of "employee" for the purpose of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 is set out in the Employment Act 2002, Section 45(6). In fact this definition repeats that which is familiar from the Employment Rights Act 1996. Section 45(6) of the 2002 Act provides as follows:

> "(a) "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment, and
>
> (b) "contract of employment" means a contract of service or apprenticeship, whether expressed or implied and, (if it is expressed) whether oral or in writing".

8.2.2 Case Law - "The irreducible minima"

Because of the paucity of that definition it is necessary to consider decided cases in order to identify what additional tests can properly be applied to determine the question. A leading case is **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance** [1968] 2 QB497. In a much quoted passage from the judgment of **MacKenna J** as to what was meant by a contract of service, the following was said:

"a contract of service exists if these three conditions are fulfilled:

(i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service of his master.

(ii) he agrees expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

(iii) the other provisions of the contract are consistent with it being a contract of service".

Those first two elements have subsequently been referred to as the "irreducible minima".

8.2.3 Personal Service

Elsewhere in Ready Mixed Concrete the Learned Judge says:

"Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be"

In **Express and Echo Publications Limited v Tanton 1999 IRLR367** a clause in a document which was headed "An Agreement for Services" provided that:

"in the event that the contractor is unable or unwilling to perform the services personally, he shall arrange at his own expense entirely, for another suitable person to perform the services"

The Court of appeal held that where a person who works for another was not required to perform his services personally, then as a matter of law, the relationship between the worker and the person for whom he worked, was not that of employer and employee. A right to provide a substitute was inherently inconsistent with the existence of a contract of employment. If there was an inherently inconsistent term in the agreement, then what actually happened might not be decisive. Non-enforcement of a term should not justify a conclusion that it was not part of the agreement.

A superficially different approach was taken by the EAT in the case of **McFarlane and Another v Glasgow City Council** [2001] IRLR7. However, here the relevant clause in Mrs McFariane's contract, provided that if she was unable to take a gym class she could arrange for a replacement from a register of coaches maintained by the Council. The EAT distinguished the decision in Tanton and said that that case did not oblige a Tribunal to conclude that under a contract of service the individual had always and in every event, however exceptional, personally to provide his or her services. Tanton indicated that the contract could not be a contract of service if it contained the provision that the individual need not perform any services personally. The clause in Tanton was extreme, but Tanton was not to be understood as the Court of Appeal departing from the observations made in Ready Mixed Concrete that limited or occasional delegation would not be fatal to a finding of employment. Tanton was distinguished on the facts as Mrs McFarlane could only send a substitute if she was unable to work, rather than if she was unwilling to work and in any event the substitute had to be someone from the Council's own register. The Council therefore had a power of veto.

8.2.4 Mutuality of Obligations

been referred by the Respondent. However, and contrary to the Tribunal's understanding of Ms George's submissions, the Tribunal understand the Court of Appeal in Prater to be saying that mutuality of obligation is to be looked for whilst a particular contract is being performed rather than in any gap between contracts being issued. Quoting from the head note, the Court of Appeal say this:

> "Where there is a series of individual engagements, all that is necessary to support a finding of sufficient mutuality of obligation to render each engagement a contract of service is that, once a contract was entered into and whilst it continued, the worker was under an obligation to do the work and the employer was under an obligation to pay for the work being done. The argument that there has to be a continuing obligation to guarantee to provide more work and an obligation on the worker to do that work could not be accepted".

We accept that Prater also dealt with the question of bridging gaps between the contracts, but that was in the context of continuity of employment and Mrs Carl does not need any particular length of service to bring the claims she seeks to. In any event, this Pre-hearing Review is not seized of such matters.

8.3 Worker status

The Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 define what is meant by worker in Regulation 1(2). The Working Time Regulations 1998 provide the definition of worker in Regulation 2. in each case that definition is the same and is as follows:

> ""Worker" means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under -
>
> (a) a contract of employment: or
>
> (b) any other contract, whether express or implied and (it if 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".

In James **v** Redcats (Brands) Limited [2007] IRLR 296 Mrs James worked as a courier for the Respondent. Her contract provided:

> "you need to ensure that a suitable alternative courier is available to carry out the terms of this agreement when you are unable. This might happen during holidays or if you are ill. You can have more than one alternative. You will need to discuss and agree the identity of your replacement with your courier link contact".

The EAT held that Mrs James had not been contracting with the Respondent as a customer of her own business. It was necessary for the Courts to determine whether the essence of the relationship was that of a worker or somebody who was employed in a business undertaking, albeit in a small way. Some assistance could be gleaned from cases which analysed the definition of employment in the discrimination legislation and which have asked whether the dominant purpose of the contractual arrangement is provision of personal

services, or whether that is an ancillary or incidental feature. The dominant purpose test was really an attempt to identify the essential nature of the contract.

> "Was the obligation for personal service the dominant feature? Was the contract in essence to be located in the employment field, or is it in essence a contract between two independent business undertakings?"

9. The Tribunal's conclusions

9.1 Employment Status 9.1.1

Personal performance

It has been a significant part of the Respondent's case that the Claimant was under no obligation to provide the contracted services personally and therefore she fails to meet one of the two "irreducible minimum" requirements for employment status as defined in Ready Mixed Concrete. However, the Tribunal must first enquire whether there is a factual basis for this argument. In the first place we observe that whilst the Respondent's case is couched in terms of a right to substitute, the contractual documents which they prepared actually refer to the issue of assignment of the benefit of the agreement. This might be thought to be something somewhat different from a right to substitute who does the work for the contractual provider. In any event, even if it is correct to regard assignment and substitution as interchangeable (which we doubt) the contract documentation in 2002 expressly prohibited the assignment of the benefit of the agreement whether in whole or in part. The 2003 document was entirely silent on the point. The 2004 document again contained an absolute prohibition and there was no document at all to govern the parties relationship in 2005. Therefore it is only in the 2006 agreement that the Respondent is able to contend that the Claimant had the right to provide a substitute. We acknowledge however, that the Respondent has argued that whilst there was no document in 2005, the arrangement apparently reached with the Claimant's colleague Shirley Wilks in that year, affords to the Claimant a similar right. However, we have heard no direct evidence concerning Mrs Wilks and we have not seen her contract. We are simply told by Professor Coles what he understands happened and that he believed that Mrs Wilks had the same form of contract (when one was issued) as did the Claimant. We reject the idea that whatever arrangements were made with Mrs

Wilks automatically gave the Claimant the right to substitute. If that had been the Respondent's intention it is clear that the Claimant was not so advised by them during 2005. Moreover, despite the change made to Clause 15 in the 2006 contract, the Claimant was not told of the change, still less the reason for it. As the Respondent's witness Professor Cole did not know who decided to change Clause 15 in 2006 and therefore could not be certain why the change had been made, we observe that the Respondent's case that the reason was because the arrangement with Mrs Wilks had worked so well is a rather speculative argument. If it had worked well, who had it worked well for? It seems that the main beneficiary would be Mrs Wilks who was allowed to go on holiday during term time, when strictly speaking she should have been working for the Respondent. The Respondent had further administrative work to do in relation to, if not choosing the substitute from an Agency, then at least in inducting and paying the substitute. Would it necessarily benefit the students to have a break in the continuity and be taught for a short period by a different person? We think not. In those circumstances the Respondent's motive for ensuring that this arrangement extended to the Claimant seems rather doubtful. Moreover, we cannot close our eyes to the fact that at the time when the revised Clause 15 was introduced, the Respondent was aware from the grievance which the Claimant had launched in June of that

year, that she was basing that grievance on laws which would at the least require her to be a worker and at the most require her to be an employee.

We then turn to the actual wording of the 2006 version of Clause 15. We remind ourselves that that is as follows:

"The contractor may, by negotiation and agreement with the Head of Department, assign part of the benefit of this agreement to a third party".

As we have said, we doubt whether that is a right of substitution in any event. It certainly differs from the language of the clauses in the cases we have been looking at. To our way of thinking 'assignment' means the permanent disposal of a part of the agreement; in other words selling to a third party the right thereafter to provide part of the service hitherto provided by the Claimant. That would therefore be on a permanent basis and not, as would be implicit in a substitute arrangement, on a temporary or "as and when required" basis. We also remind ourselves of the legal doctrine that the words of a written document are to be construed more forcibly against the party using them. Accordingly, if the Respondent had wanted to give the Claimant the ability to provide a substitute, it should in our judgment have said so. We are therefore unwilling to accept the somewhat distorted meaning which the Respondent now seeks to give to its own document. Accordingly, we conclude that there was no contractual right to substitute afforded to the Claimant at any material time. Quite obviously the Claimant never sought to offer a substitute.

However, if we are wrong in relation to the position in 2006 and the revised Clause 15 is properly to be construed as the right to provide a substitute, then in any event we find that the clause comes within the McFarlane category rather than the Tanton category. The revised Clause 15 makes no reference to the circumstances in which the "substitution" can take place and applying the strict rule we have referred to the "substitution" can take place and applying the strict rule we have referred to above, we construe it as being limited to a case of inability to perform only rather than unwillingness to perform. In any event as the clause refers to negotiation and agreement with the Head of Department as a precondition; that is similar to the McFarlane requirement to pick from an approved list rather than the unfettered choice afforded to Mr Tanton. Accordingly, we would conclude - again bearing in mind that the Claimant never ever suggested providing a substitute - that at the very most there was a limited or occasional power of delegation and one which on the general principles of Ready Mixed Concrete would not be inconsistent with an employment relationship being found.

9.1.2 . Other aspects of mutual obligation

As we have said when setting out the relevant law, we cannot accept the Respondent's contention - if that is being what is being contended - that mutuality of obligation should be looked at in relation to gaps between contracts rather than whilst the contract is actually being performed. If therefore we look at what was actually happening in each year from 2002 onwards, the Claimant was during the academic year, being required to teach shorthand to the Respondent's students. It is not in dispute that on every occasion when the Respondent required that teaching to be done by the Claimant, she did it. Moreover, throughout the duration of those agreements the Respondent continually provided work for the Claimant to do and paid her. It could hardly do otherwise in circumstances where the Claimant was timetabled to teach shorthand and the Respondent's students were required to attend such sessions. We therefore have no hesitation in finding that mutuality of obligation existed.

9.1.3. Control

We find that there are elements of control in the form of the agreement itself. For instance. Clause 2 provides that the contractor shall provide the services at the times and places agreed. The Claimant is to be responsible for the satisfactory performance of the services. The agreement imposes a restrictive covenant on the Claimant with regard to non-disclosure of confidential information both during and after the relationship. The Respondent concedes that it did exercise control in terms of what it required the Claimant to teach, ie the subject matter, and where and when that teaching should be. That control should not exist because the Respondent did not tell the Claimant precisely how to teach shorthand is, we think, a spurious argument. In the present day where, for instance, technology abounds, it would often be the case that an employer is unable to exercise the type of control which in earlier days might have been effected by "looking over the employer's shoulder". An employer may now be employing someone to do a job which he, the employer, does not understand the detail of.

Again we consider that the timetable itself shows precisely the control which was being exercised. The Claimant was not able to make her own decisions as to when in a given week she taught a particular group of students or where she taught them.

should look before it was finally concluded, she quite clearly had no facility to make any changes once the timetable was up and running. She could not for instance in a given week decide that it would be more convenient if all her teaching was done in the afternoon if the timetable said it had to start at 9 o'clock in the morning.

Accordingly, we conclude that the "irreducible minima" of mutuality of obligation and control existed and do exist in this case.

9.1.4 Are there any other factors or terms which are inconsistent with an employment contract?

The Language of the agreement

Obviously the agreement is couched in terms of being a contract for services. It uses the terminology of "contractor" and "services" and it also includes, as we have noted, a disclaimer that anything in it may be interpreted as constituting a relationship of employment and employee. However, we find that that is not in itself enough. It is necessary for the Tribunal to look past labels which the parties or one of them has applied if everything else points in the opposite direction.

The initial negotiations

Here we have heard the Claimant's unchallenged evidence, that she applied for what she considered to be a job. It is clear from the letter which was written to her by the Assistant Registrar on 14 August 2002 that rather than going to that interview as a business person offering her services and negotiating a deal with the Respondent, the Claimant was in fact being told by the Respondent that she would have to become "self employed" and she was given advice as to how to achieve this for Tax purposes. She was even told how to prepare invoices to submit. Until she went to that interview the Claimant had never been self employed and had no pretensions to be self employed. However, we find that she had the trappings of self employment thrust on her. We remind ourselves that even though initially the Claimant was asked to submit invoices, this subsequently changed so that she submitted claim forms. Although submitting claims for fees might also be regarded as being inconsistent with employment, it is somewhat less inconsistent than submitting invoices. However, this mechanism was again a requirement of the respondents rather than

something done by the Claimant of her own volition. We also find that there were no negotiations either at the initial stage or thereafter as to what rate should be paid to the Claimant. We consider that if it had been a business arrangement, a contractor is unlikely to have gone to a contract meeting without any idea of what it would want to be paid and still less likely that it would have accepted the first figure, indeed the only figure, that the University offered.

The method of payment-Tax and National Insurance

Whilst we accept that this is not conclusive in itself, it is the case that since approximately 2004 Tax - presumably on a PAYE basis, but we have not seen any pay-slips and on the Claimant's evidence National Insurance at the employee's rate, were deducted at source by the Respondent.

"Perks"

The Claimant was afforded the extremely valuable benefit of a place in the University car park. That, Professor Cole wryly noted was something which had not been accorded to him.

Integration

We have quoted earlier the entry about the Claimant in the handbook issued to students. Again, whilst this is not conclusive in itself, we find that this tends to show that the Claimant was a part of the Respondent's organisation and had been integrated in the way which a contractor would not have been.

Grievance Procedure

The Respondent has contended that the Claimant was not subject to either the grievance, disciplinary or indeed any other policy of the University. Clearly there was never any need to invoke the disciplinary procedure. However we view the Claimant's grievance raised in June 2006 and further articulated in September 2006 as being more in the nature of a grievance which an employee would bring than a means of pursuing a contractual dispute between two businesses. Ms George's contention that it could not have been the employee's grievance procedure because the Claimant went to HR rather than her Head of Department is, we think, with respect, splitting hairs. It follows therefore that the Claimant submitted a grievance and no one suggested to her that she was not entitled to.

Expenses

The Respondent paid the Claimant's expenses when she had occasion to travel to London to attend meetings of the NCTJ examining board. Again we consider that to be consistent with employment, but inconsistent with the Claimant conducting her own business.

Sick Leave

Although Professor Cole explained that the payment had only been made on a goodwill basis, the fact is that when, on 4 days only, the Claimant was unable to attend work because of sickness, she was nevertheless paid for those days absence.

9.1.5 Conclusion on employment status

Accordingly, having found the irreducible minima to have been satisfied, we find nothing else which could be regarded as inconsistent with employment status and accordingly we find the Claimant to have been, since 2002 and to date, an employee

of the Respondent within the meaning of the Fixed Term Employee (Prevention of Less Favourable Treatment) Regulations 2002.

9.2 Worker status

If we are right in our conclusion on employment status, then the Claimant is, without more, to be regard as a worker. However, if we should be found to be wrong on employment status, we have gone on to consider the question of worker status independently of employment status.

9.2.1 Personal Service

This is again an important ingredient in the relevant statutory definition of worker. In this context we have considered the case of **James v Redcats (Brands) Limited.** Again we note the disparity between the language of the clause which applied in Mrs James' case and that which appears in the 2006 agreement in Mrs Carl's case. Our reservations, indeed doubt, as to the meaning which the Respondent contends for in respect of the 2006 Clause 15 apply equally to our conclusions on the issue of worker. If the dominant purpose test is applied in the Claimant's case, we take the view that having regard to the personal interaction and relationship between a Tutor and her students, it was important as far as the Respondent was concerned, that that was stable. We cannot accept that the Respondent would have accepted a succession of substitutes teaching shorthand to its students in substitution for the Claimant herself. As we have said, we do not believe that to be what the 2006 Clause 15 means in any event. For all these reasons we are satisfied that the Claimant meets the "perform personally" element in the statutory definition.

9.2.2 Was the University the client or customer of a business undertaken by the Claimant?

We consider that it would be fanciful to suggest that this was the case. As we have said above, quite clearly the Claimant was not a business when she was interviewed by the Respondent in August 2002, but rather purported self employment was forced upon her. The reality was that the Claimant was not undertaking a business, still less was the University a client or customer of a business. Accordingly, we find independently of our finding in relation to employment, that the Claimant was a worker within the meaning ascribed to that term in the Part Time Workers Regulations and in the Working Time

Chairman

Date issued: 17th October 2007.

Regulations.