Case Number: 2305328/2004

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE SPENCER

MEMBERS: Mr W A Tilden
Ms M Foster-Norman

BETWEEN:

Dr R Benveniste **Claimant**

AND

Kingston University **Respondent**

ON: 7 – 9 November, 12 – 16 November 2007, 7 and 8 January and (in Chambers) 9 and 16 January 2008

APPEARANCES:

For the Claimant: In Person

For the Respondent: Mr D O'Dempsey, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that :-

(i) the Claimant's claims of victimisation contrary to the Sex Discrimination Act 1975 and the Race Relations Act 1976 are not well founded and are dismissed;

(ii) the Claimant was not unfairly dismissed;

(iii) the Claimant's claim for damages for breach of contract (failure to pay full notice pay) is dismissed as the Respondent was entitled to dismiss the Claimant without notice;

(iv) the Claimant's claim under part II of the Employment Rights Act 1996 (unpaid wages) is dismissed.

REASONS FOR THE TRIBUNAL'S RESERVED JUDGMENT

Background

1. Dr Benveniste worked for the Respondent as a Senior Lecturer in the School of Maths from 14 February 1994 until her dismissal on 13 August 2004. By a claim lodged on 27 October 2004 the Claimant, Dr R Benveniste brought claims of unfair dismissal, victimisation, breach of contract and "unfair and unreasonable treatment".

2. Prior to this Claim Dr Benveniste had in April 2003 brought an earlier Claim before this Tribunal claiming sex discrimination, race discrimination and victimisation contrary to both the Sex Discrimination Act 1975 and the Race Relations Act 1976. Those proceedings were withdrawn by Dr Benveniste in 19 December 2004. In the letter of withdrawal the reason given was that Dr Benveniste believed that the strength of her claims against the University in the County Court stood a greater chance of success than her complaints in the Employment Tribunal.

3. The Claimant had also brought proceedings in the Epsom County Court alleging that the University was in breach of contract as regards her annual leave and her pattern and place of work (specifically that she should not work from home more than one day a week), and in breach of the implied term of trust and confidence. Those proceedings were struck out as having no reasonable prospect of success.

4. These proceedings have a long interlocutory history. There have been four interlocutory hearings and two appeals.

5. A Case Management Discussion was held on 17 December 2004 before Ms Hyde to clarify the issues. At that hearing Ms Hyde identified that the substantive issues were unfair dismissal, victimisation under the Sex Discrimination Act and the Race Relations Act and breach of contract. Ms Hyde identified that the protected act relied on for the purpose of the victimisation claims was a claim that the Claimant had brought against the Respondent in 2003 alleging race and sex discrimination.

In May 2005 there was a Preliminary Hearing Review before me. There were a number of matters to be addressed but in particular there was an issue as to whether the protected act should be confined to the 2003 proceedings. The Claimant did not accept that they should. I decided that the only protected act on which the Claimant could rely were the 2003 proceedings. That decision was upheld by the Employment Appeal Tribunal presided over by His Honour Judge Richardson. I also struck out the breach of contract claim relating to her pattern of work, annual leave and the implied duty of trust and confidence as being matters which were res judicata following an unsuccessful County

Court action. That decision was also upheld.

7. Following the outcome of the appeal a further Preliminary Hearing Review was held on 29 June 2006 to consider the Respondent's application that part of the Claimant's witness statement should be inadmissible. This application was refused. Finally a further Case Management Discussion was held on 12 October 2006 at which a Chairman (Mr Zuke) defined the issues for the Tribunal at the full merits hearing. That was also the subject of an appeal by Dr Benveniste. This second appeal was for the most part unsuccessful, though the Employment Appeal Tribunal made one change to the issues as defined by Mr Zuke. The Claimant's application for leave to appeal to the Court of Appeal was refused on 24 May 2007.

The Issues

8. Against that background we set out below the issues as defined by Mr Zuke (at the Case Management Discussion in October 2006) and amended by the EAT.

Unfair Dismissal

9. Can the Respondent show a potentially fair reason for dismissal? The reasons relied on by the Respondent are either conduct, or some other substantial reason, as described in paragraph 47 of the response. For the sake of clarity (because a proposed amendment to paragraph 47 has not been allowed on a previous occasion) the Respondent's pleaded case is as follows:-

> "In the alternative, the Respondent will aver that the dismissal was for some other substantial reason, namely that the Claimant, by reason of her unreasonable conduct had become impossible to manage, caused an unfair burden to fall on her colleagues and could no longer remain part of the teaching team".

10. If the Respondent shows a potentially fair reason relied upon, was the dismissal unfair having regard to section 98(4) ERA?

Victimisation under both the SDA and the RRA

11. The protected act is the Claimant's complaint to the Employment Tribunal of discrimination/victimisation made in April 2003.

12. The acts of less favourable treatment complained of as acts of victimisation are set out in paragraphs 46 – 60 of the Claimant's document headed "Information relating to the Claimant" dated 4 February 2005, which is at pages 23 – 27 of the bundle of documents presented to the Tribunal. Those acts include the Claimant's dismissal.

13. With one proviso, the issues in respect of each act are as follows:

(i) Did the treatment complained of occur? – (the proviso is that there is no

dispute that the Claimant was dismissed).

(ii) If so, was the treatment less favourable treatment of the Claimant as a result of her having done the protected act?

(iii) In respect of the acts referred to at paragraphs 46 – 51, and part of paragraph 53, does the Tribunal have jurisdiction to consider those complaints having regard to the time limit for their presentation? In other words, are they acts of victimisation extending over a period, so that they are in time? If not, would it be just and equitable for the Tribunal to consider them out of time?

Damages for Breach of Contract

14. Was the Respondent entitled to dismiss the Claimant summarily? i.e.

(a) Can the Respondent show that the Claimant actually committed the acts for which she was dismissed?

(b) If so, did that behaviour amount to gross misconduct?

15. If not, what damages is the Claimant entitled to for the diminution of her pension rights as a result of her summary dismissal.

Unauthorised Deduction from Wages

16. Under the contract of employment, did the Claimant have an entitlement to 38 days holiday at the termination of her employment? If so, the Respondent concedes that it made an unauthorised deduction from her wages in the sum of £440.88.

17. If not, was the Claimant overpaid £440.88? If she was overpaid, the Respondent did not make an unauthorised deduction in that sum.

18. Alternatively, was the Respondent authorised to deduct £440.88 from the Claimant's wages by virtue of a relevant provision of the Claimant's contract, in particular paragraph 3 of section 1.10 of the staff handbook.

The statutory provisions and the Law.

Unfair Dismissal.

18. Section 94 of the ERA sets out the well-known right not to be unfairly dismissed. Section 98 provides that it is for the Respondent to show that the reason for the employee's dismissal is a reason for dismissal which falls within section 98(2) or is "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". (Section 98A and the statutory dismissal and disciplinary procedures were not in force at the date of the Claimant's dismissal).

19. If the Respondent can establish that the principal reason for the dismissal was a genuine belief in the employee's misconduct, then this reason will fall within section 98(2). If the dismissal is potentially fair (for misconduct or for some other substantial reason) the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

20. In assessing the reasonableness of the employer's decision to dismiss the Tribunal is not entitled to substitute its own judgement for that of the employer. What we must consider is whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question.

Victimisation

21. Section 2 of the RRA deals with victimisation and provides that a person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision this Act, if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has done one of four types of protected act (which in effect all involve asserting a right not to be discriminated against). In this case the protected act is the bringing of proceedings against the Respondent in the Employment Tribunal alleging sex and race discrimination in 2003. An employer can also be held liable for acts of victimisation which occur after the date of dismissal where the act complaincd of is sufficiently connected with the employment relationship.

Section 4 of the SDA is in similar terms.

22. The basis of victimisation is less favourable treatment and involves a comparison of persons (real or hypothetical) on a like for like basis, i.e. the circumstances must be the same or not materially different on both sides. In cases of victimisation the comparison involves the comparison of a person who has done a protected act and a person who has not done the protected act. The question is whether the Claimant has been treated less favourably, by reason of the fact that she has brought a claim of unlawful discrimination, than the Respondent would treat someone who has not brought such a claim (or made such an allegation). The motivation for the act may be conscious or subconscious but must be related to the protected act. The discriminatory reason need not be the sole or even the principal reason for the act of victimisation. It is enough that it is a contributing cause in a sense of the significant influence. *See Lord Nichols in Nagarajan-v-London Regional Transport [1999]* IRLR 572.

23. In victimisation claims the reverse burden of proof in section 63A of the SDA applies to claims of victimisation under the SDA but the equivalent provision

(section 54A) of the RRA does not apply to victimisation claims under that act. This is because section 54A refers only to discrimination on "racial grounds". Discrimination by way of victimisation is therefore dealt with in the same manner as Tribunals dealt with cases of race discrimination before section 54A was introduced and in accordance with the well known guidelines in King-v-Great Britain China Centre [1992] ICR 516 and Anya-v-University of Oxford [2001] IRLR 377.)

24. Claims must be brought within three months of the act complained of. An act extending over a period is treated as done at the end of that period although this should be distinguished from a single act with continuing consequences. The concept of an act extending over a period was considered in Hendricks v Metropolitan Police Commissioner 2003 IRLR 96 and given a wide interpretation. If an application is out of time the Tribunal may still consider the claim if, in all the circumstances of the case it considers it would be just and equitable to allow the claim to proceed out of time.

Breach of contract

25. Where an employee is contractually entitled to a period of notice, an employer who dismisses an employee without giving him or her notice will be in breach of contract. An employer is entitled to dismiss an employee without any notice, where there has been repudiatory conduct by the employee justifying summary dismissal. To amount to a repudiatory breach the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract. The degree of misconduct necessary for the employee's conduct to amount to a repudiatory breach is a question of fact for the Tribunal to decide. The issue here is whether at the time of dismissal there were in fact grounds for summary dismissal and not whether those grounds were the employer's reason for the dismissal (Boston Deep Sea Fishing v Ansell 1888 39 Ch D 339.)

Wages.

26. We refer here to part II of the ERA. An employer cannot make a deduction (including a non payment) of wages properly payable to an employee. It is for the Claimant to show that she had an entitlement to the disputed wages.

Evidence

27. The Tribunal heard evidence over nine days and we had two lever arch files of documents. We obtained submissions (and submissions in reply) in writing which we read in chambers on 8th January 2008. We also met in Chambers on 9 and 16 January.

28. The Claimant's witness statement ran to some 125 pages. Although we suggested that the Tribunal should, in the interests of time, read this to itself and proceed direct to cross examination, the Claimant felt that we would better understand her case if she read it to us. We allowed her to do so and this took approximately 2 days. For the Respondent (whose statements we

read for ourselves) we heard from Sir Peter Scott, the Vice Chancellor, Ms Lanchbury, the Head of Personnel of the Respondent (now retired), Professor Morris, who was formerly Head of the School of Mathematics and the Claimant's Line Manager and from Professor Davis, who was at the relevant time Dean of the Faculty of Science (of which the School of Mathematics is part) now also retired.

29. We refused an application by the Claimant that we hear from Ms Lori Fredrics on her behalf. Her witness statement had not been provided to the Respondent till immediately before the hearing but in any event Ms Fredrics had no direct knowledge of the Claimant's experiences – but was simply relaying details of her own treatment by Kingston University.

30. The Claimant's witness statement contained a detailed account of the history of her employment from approximately 1999 onwards. Although this history clearly pre-dates the protected act on which she relies for her victimisation claim, the Claimant wished to rely on these events as supporting her case that the acts complained of were motivated in significant part by the bringing of the 2003 proceedings. She also sought to use this evidence to support her case that her dismissal was also part of a campaign of unfairness and victimisation (in the lay sense) against her and not for the reasons specified by the Respondent. However, the weight of this evidence in establishing the Respondent's motivation in their dealings with the Claimant is clearly less significant than the evidence after the protected act and, while we have considered all the evidence, we have not set out in detail the events which pre date April 2003.

Findings of Fact

31. In fact there were very few disputes of fact between the parties. What was contested was the Respondent's motivation in dealing with the Claimant as they did and the reasonableness of their actions in a number of different respects but particularly with regard to the imposition of the rule requiring the Claimant not to work away from the university more than one day a week. For ease of reference many of our conclusions on the issue of victimisation are set out together with the relevant findings of fact, rather than separately at the end of these reasons.

Before April 2003

32. The Claimant was employed as a Senior Lecturer in the School of Mathematics of Kingston University. In 1997 the Claimant applied for a Readership but was unsuccessful. She did not accept that there was a good reason why she had not been promoted. By 1998 the Claimant felt that her job did not give her sufficient opportunities to do research and she felt trapped and unhappy in her job.

33. Matters began to deteriorate in 1999. In 1998 Professor Morris had taken over as head of the School and as the Claimant's line manager. In that year's appraisal the Claimant complained again that she was not being given resources to do research or opportunities for career development. She

complained of excessive teaching and administrative burdens and inadequate resources for research. For his part Professor Morris felt that the Claimant's performance was not acceptable (72). The Claimant did not accept his criticism. She felt that his conduct was tantamount to personal harassment and complained to HR (75). Various meetings followed in an attempt to conciliate. The Claimant was supported in these meetings by her Trade Union. In the end the University offered the Claimant a sabbatical as a means of addressing her concerns as to lack of opportunities for research. The Claimant accepted the sabbatical but did not accept that she should withdraw her grievance. The acceptance of the sabbatical stated that this was on the basis she get adequate resources and that there was no "unreasonable expectation as to its outcome" (111).

34. The Claimant and the Respondent did not agree on what were "reasonable outcomes". Issues arose as to what the Claimant was required to achieve during her sabbatical. The Claimant was unwilling to commit to anything specific. The Dean, Professor Davis, stated that he would expect the Claimant to complete the research work that she had in hand and submit work for publication in a journal of international repute during her sabbatical. The Claimant for her part simply relied that "I have not decided yet precisely what I will deliver". Professor Davis' suggestion that she make a presentation as part of the school's seminar program during the second half of her sabbatical was also rebuffed, the Claimant saying that this would distract her and that she would "probably" present a seminar after her return to University.

35. Due to difficulties in covering the Claimant's teaching duties the Claimant agreed that her sabbatical, initially offered for the second semester of 99/00 should be postponed to the first semester of 00/01

36. A further issue arose about the Claimant's failure to attend the University to man the phones during the clearing process and the Claimant's annual leave. Dr Benveniste had sent an e-mail to Professor Morris on the evening of 16 August at 18:17 stating that she would be on leave from the following day. Professor Morris responded that the Claimant could not take leave as she was on the rota to man the telephones for clearing. The Claimant's response was to write to Professor Davis complaining of Professor Morris' unpleasant attitude and asking him to authorise her leave. In the end Professor Davis said that she should do what she thought correct but that she was absenting herself without her Line Manager's approval and at a time of assigned duties. The Claimant appears to have interpreted this as authorisation and took her leave. In evidence the Claimant had maintained that she refused to man the phones because her sabbatical had already started but it is clear from the documents (119,123,131) that this was not the case, and that at the time the Claimant was aware that she was not officially on sabbatical.

37. The correspondence in the bundle demonstrates, both in relation to this and other matters, that the Claimant was most unwilling to engage with management in a spirit of co-operation. Her attitude tended to the confrontational. It is also clear that the Claimant's Line Manager, Professor Morris, became increasingly exasperated by her behaviour and what he saw

as a failure to carry out her duties. In December 1999 Professor Morris wrote a handwritten note in relation to her sabbatical that the Claimant should have "specific targets and if she missed them this should be a final step in a disciplinary". The Claimant relies on this as evidence of an intention to find any means to oust her from the University and retrospective justification for her refusal to commit to agreeing outcomes for her sabbatical. However it is clear that despite the handwritten jotting this is not what the Respondent put in place. The Claimant did not agree to any targets and Professor Morris allowed this. No disciplinary action was taken. While there is no doubt that Professor Morris felt increasingly frustrated at his inability to manage the Claimant, if this was his intention he did not act on it and later on it is apparent that the Respondent had spent significant time corresponding with the Claimant in an effort to conciliate over various matters.

38. Another issue arose about whether the Claimant should share her desk while she was on sabbatical. It is not necessary to go into these numerous incidents that all occurred more than three years before the Claimant's dismissal and well before any protected act for the purposes of her victimisation claim but the pattern that emerges from the correspondence and the documents on the file is clear. The Claimant was unwilling to engage with management in any spirit of open exchange. This led to feelings of frustration on the part of management who undoubtedly took the view that she was "difficult". An email from Professor Davis to Professor Morris (112) evidences this but the fact remains that what the Respondent expected of her was reasonable.

39. In April 2001 after the Claimant returned from her sabbatical, an administrator, Trish Tollman complained to her Line Manager that the Claimant had shouted at her. Ms Tollman's Line Manager, Bernice Forbes, in turn reported this to the Dean. The Dean asked the Claimant to attend a meeting in his office to discuss the incident noting that there was a potential that the issue might lead to disciplinary action. The Claimant's response was to write to HR (Ms Lanchbury) complaining about the letter and mentioning her past history and personal harassment to which she had been subjected. There was an investigation and disciplinary hearing before Miss Caroline Gipps on 21st September 2001, the outcome of which was that the Claimant was given an informal warning and told the letter would be placed on her personnel file. During this period issues arose regarding the Claimant's annual leave, which contrary to instruction and without having got prior authorisation, she had booked to take during the clearing period after the rota for clearing had been drawn up. (142-146, 161,162)

40. In early July 2001 the Claimant spoke to HR to complain of harassment by her managers regarding her annual leave and the requirement that she obtain sickness self certificates for unexplained absences (167). Professor Morris continued to tell the Claimant that she was required to let him know why she was absent when she was not at the university. The Claimant considered that this request was a breach of contract and not in accordance with practice.(170,171). On 20 July she lodged a grievance complaining about harassment by her Managers and asked to be transferred to the Business

School. The Claimant was then told to lodge the grievance on a particular form, which she did in October. By then it was apparent that HR had formed a negative view of the Claimant (197). Ms Lanchbury described her in an email to Professor Scott as "a very difficult person" and as having been "a problem for some years". However she arranged for the grievance to be investigated by Ms Hickman who had had no prior dealings with the Claimant. It was heard by Ms Lanchbury on 14 January 2002. Ms Lanchbury did not uphold the grievance but offered the Claimant a transfer to the Business School as a means of resolving the issues.

41. On 16 January 2002 the Claimant indicated that she would appeal the outcome of the grievance. An email from Ms Lanchbury (204) shows that by then Ms Lanchbury considered that the Claimant should be dismissed on the ground that relationships had completely broken down and that she had refused a reasonable offer of secondment. She notes that she would be seeking advice from the lawyers. "This is one case where I really do think we cannot let the employee's insanity send us all to the psychiatric ward!" The Claimant relies on this email as evidence of a conspiracy by management to get rid of her. The e-mail clearly shows that Ms Lanchbury regarded the Claimant as a thorn in their sides. The fact is however, that whatever she thought, the Respondent did not in fact take action to dismiss her.

42. The Claimant appealed the dismissal of her grievance to Professor Scott but was unsuccessful. The Claimant appealed again to the Board of Governors. The Board of Governors did not uphold the grievance but were critical of some of the Respondent's actions (244 and 249). In particular the Governors felt that while the Claimant had not been harassed or victimised there had been some evidence of fault on both side in the handling of day-to-day interactions and communications. The Board of Governors did not uphold the Claimant's complaint about the handling of the Trish Tollman incident -- though they considered that (since the warning was informal) the warning should not have been on placed her file and recommended its removal from her file. The Board of Governors also noted that the issues of holiday leave had not been well managed by the School of Mathematics. The Board of Governors asked both parties to discuss a constructive way forward.

43. The Board of Governor's conclusions were communicated to the Claimant on 26 June 2002. By July however, there were further issues over annual leave. In particular the Claimant complained that the instruction from Professor Morris that she attend the University to do clearing duties and during the re-sit period prevented her from taking her full entitlement to annual leave.

44. Following the grievance appeal, the University, in particular Professors Morris and Davis, were trying to address the issues that arose with the Claimant in a positive way (251d, 247). Equally the Vice Chancellor, Sir Peter Scott, met with the Claimant to emphasise that she also was to try and rebuild working relations (251e). The correspondence in the bundle demonstrates genuine and good faith attempts on the part of management to manage the Claimant constructively.

45. On 12 July 2002, Professor Morris, Professor Davis and the Personnel Director, Ms Lanchbury met to discuss how best to manage the Claimant. The Board of Governors had criticised the arrangements for taking annual leave and it is clear that the intention of that meeting was to clarify and tighten up the process and the rules surrounding the taking of annual leave and attendance at the University.

46. It had been the Claimant's practice to attend University only for her scheduled lectures, and her student contact hours (3 hours a week) and any meetings she was required to attend. Outside of these commitments the Claimant would work from home. We accept that this genuinely caused difficulties for the management as the Claimant's students would approach other members of the faculty for help and guidance in her absence and the Respondent often did not know where she was. As Professor Davis told us, all students do not make appointments and some would come to see Dr Benveniste when she was not there. If she was not available a colleague would cover for her. At the meeting on 12 July 2002 (251g) Professors Davis and Morris agreed that the faculty would issue guidance to all academic about attendance at the University and the expectation that they should not work at home more than one day per week. It was clear that the need for the issuing of this guidance was prompted by the attendance pattern of Dr Benveniste (and one other member of the faculty of Science) but we consider that this was a reasonable management response to problems resulting Dr Benveniste working away from the University. The guidance was applied to all members of the faculty of Science so that the rules were the same for all academics within that faculty.

47. Following this meeting Professor Davis produced a guidance note for the faculty about working away from the University, annual leave and sickness absence. This guidance was discussed at a high level by the faculty management group and approved for introduction across the faculty of science. The unions were also informed and raised no objections.

48. The guidance note was circulated to staff in the faculty in October 2002 (294).It is headed "Arrangements for working away from the university, annual leave & sickness absence for academic staff". In its introduction it explains that absences might cause excessive or unexpected burdens on colleagues. It provides that staff should "not normally work at home for more than one day a week. If it is deemed necessary to do so, or it is deemed necessary to make prolonged regular arrangements for any type of working away from the university, this should be discussed, in advance, with their Head of School and an agreement reached on the frequency and length of the arrangement, the nature of the activities and the outcomes".

49. It is the Claimant's case that this was a change to her contract of employment which was unilaterally imposed upon her. In particular the Claimant relied upon the Staff handbook which provided that "The pattern of work is agreed between an individual and the Dean or Head of School (if delegated)." Since it had been her practice to work from home when not teaching or doing student contact hours, it could not be changed without her agreement.

50. As far as this Claim was concerned the questions of whether the memo was a breach of contract does not fall to be decided. The issue is res judicata as a result of the failed County Court proceedings referred to above. The Claimant's case is that it was an unreasonable instruction because it was a breach of contract (see her submissions page 37 para 123). However, the doctrine of res judicata also prevents the Tribunal from considering this argument, which relies on a different cause of action but the same issue. For the record though and for the sake of completeness the Tribunal's own interpretation of the contract is that the memo does not constitute a breach of the Claimant's contract of employment. Clause 5 of the Claimant's contract provides that the Claimant's usual place of work is the University (59) but may involve other locations as agreed. Moreover the Claimant's time was divided into 3 notional parts. Teaching time, administrative/marking time and self managed time designed for personal development. It is clear from the evidence that the one day a week from home was designed to safeguard the 20% self managed time. We do not accept the Claimant's contention that all her time outside her teaching commitments was self managed.

51. In November Professor Morris identified three members of the School of Maths (including the Claimant) whose normal practice was to work away from the university more than one day a week. These were Dr Benveniste, Dr Tsaptsinos and Mr Mark Joy. Professor Morris asked each of these members of staff to summarise the reasons why they needed to work away from the University for more than one day a week. Each of them responded (312 – 315). Having discussed their reasons with each of Dr Tsaptsinos and Mr Joy, Professor Morris gave both of these members of staff permission to work away from University more than one day a week with the caveat that this permission would be reviewed in a year's time. Mr Joy cited in his submissions research activities requiring attendance away from the University (and away from home) particularly visiting hospital sites attached to Bromley Hospital, attendance at seminars at Kings College, London and Westminster University – he was not simply working from home. Dr Tsaptsinos cited the fact that he was preparing new teaching material and a new module as well as the need for peace and quiet and the need to avoid travelling time. Dr Benveniste cited (a) the need to avoid travel and parking difficulties and (b) the distraction of having to share an office.

52. While on an initial reading the reasons of Dr Benveniste and Dr Tsaptsinos appear to have some similarities (both refer to travel time and avoiding being interrupted while working at the university), having heard Professor Morris' evidence we accept that the critical difference between the reasons provided by Dr Tsaptsinos and the Claimant was that Dr Tsaptsinos was developing a new teaching module and had undertaken to do research and to produce two conference papers and a journal paper by Easter. He therefore provided what Professor Morris regarded as a tangible outcome. Dr Joy's reasons were quite different as he was not working at home but at other places outside the university. (We understand also that Dr Tsaptsinos' permission was surrendered sometime in 2004 when his reasons ceased to apply.)

53. Professor Morris therefore asked the Claimant if she could provide some

"tangible benefits" of working from home before she should be allowed to do so more than one day a week (318). The Claimant had simply said that her home telephone voice mail communication with students continued to be good even at home. By letter dated 13 December 2002 (322) the Claimant wrote setting out her outcomes for her work but this was in reality no more than list of her duties and did not contain any reasons why working at home would be of benefit. In response Professor Morris wrote to the Claimant (329) refusing her permission to work away from the University for more than one day and asking her to comply with the new working arrangements with immediate effect. The Claimant responded (337) stating that he had no right to require her to change her working practices.

54. During this period a complaint had been put in, in October 2002 by an Administrative member of staff, Miss Tomlinson (280a) above the Claimant's alleged unreasonable behaviour in the school office, specifically that she had been shouting "and seemed to be out of control". Following an investigation, conciliation meetings had been arranged. The Claimant had not attended any of the three scheduled meetings (having been sick on two occasions and having had a minor car accident on the third occasion) and the Respondent believed that she appeared to be unwilling to co-operate in this process of conciliation.

55. Accordingly Professor Davis wrote to the Claimant (339) on 6 February 2003 to say that there was to be an informal investigation both into her reluctance to comply with the new working arrangements and her reluctance to comply with the conciliation process into the incident in the school office. Ms Smith, Personnel Manager at a Kingston University Service Company who had no previous dealings with the Claimant, undertook the investigation and her report (366a) recommended in April 2003 that there should be a formal disciplinary hearing. Professor Davis then sought a second opinion on the matter from a colleague, Professor Samoules, whose suggestion was that there was a case to answer in respect of the Claimant's refusal to comply with the new working arrangements (about not working away from University). However he also concluded that there was no clear evidence that the Claimant was unwilling to co-operate with the conciliation process as regard to the incident in the school office and that this second incident should not proceed to formal disciplinary hearing (376a and b).

56. In June Professor Morris wrote to the Claimant (375) informing her that he would take no further action regarding the incident in the school office with Ms Tomlinson. On the issue of her working away from the University he says this:-

> "The issues arising from this are serious and are affecting the efficiency of the school. However, I do not believe that this is best resolved by a disciplinary hearing. I wish to approach this in a manner of constructive engagement which I hope will resolve the issue. I believe it is appropriate for you to have the opportunity to benefit from independent support by way of staff development. This will cover topics such as time management, team working, collegial responsibilities, availability to students and the need to engage in scholarly activities. The aim would be that, as a result of this support it would be possible for you to accept that you should not work at home for more than one day a week without the agreement of your Head of School, and that your compliance with this requirement, which is accepted by all other

staff in this faculty would not be to the detriment of either your own career development or your personal aspirations.

57. Sadly the Claimant's response (378) does not indicate constructive engagement. She refused to undertake developmental training and reiterates that it is her view that the new requirement was in breach of her employment contract. She relied in particular on the clause that states "As a member of academic staff you will be expected to work flexibly and your pattern of work will be agreed between you and your Dean". There is no suggestion in this letter that the Claimant intends to adhere to the University's policy. Professor Davis responded to the Claimant's letter to express his disagreement with her views (395) but took no further action at that stage.

Post April 2003

58. In the meantime the Claimant had in April 2003 lodged a claim in the Employment Tribunal against the Respondent complaining of sex and race discrimination (including victimisation). The Claimant cited her failure to be promoted to Reader, the Respondent's attempt to vary the Claimant's contract of employment "by seeking to prevent her working from home as agreed", lack of support for research, a refusal to allow the Claimant to take holiday and other issues.

59. During the autumn of 2003 further frictions arose between the Claimant and Dr Bidgood, a senior colleague, about:

(i) The Claimant's 2003 appraisal, and

(ii) The content of a second year exam paper.

In May or June the Claimant had agreed her 2003 appraisal with a senior colleague, Dr Bidgood. In September 2003 Professor Davis had however, refused to countersign it as he considered it did not provide any satisfactory objectives and returned it to the Claimant and Dr Bidgood to have another go. Various e-mails followed but in the end no agreement was reached and the appraisal was not signed off. The Claimant's case was that she would not set clear targets in case a failure to meet them should be used a disciplinary action against her. A reading of the draft appraisal shows that the Claimant in fact set no objectives. She had simply listed her usual duties. By September all that Dr Bidgood had wanted the Claimant to do was for her to add "to do research" as one of her objectives (408c). This was not agreed and the appraisal was never signed off. Having seen the proposed objectives ("to teach modules in operational research and statistics, to perform the admin/clerical tasks assigned to me") we accept that the reason that Professor Davis refused to sign off the appraisal was that he wished objectives to be aspirational. This is a perfectly reasonable request and there is nothing that suggests that Professor Davis was influenced by the fact that she had brought tribunal proceedings or had complained in that appraisal about "management mistreatment".

60. More seriously, the Claimant and Dr Bidgood disagreed as to the content of a

year end exam paper. Draft exam papers were required to be internally moderated and Dr Bidgood had made comment on Dr Benveniste's ST1210A exam paper. It appears that Dr Bidgood considered that the exam was too easy. The Claimant disagreed. She was not willing to accept the changes. The Claimant's correspondence with Dr Bidgood is confrontational and indeed rude (see 416d). Finally the Claimant simply sent her papers to the exam section for printing without having obtained sign off, although she subsequently removed them from the print run. Thereafter the Claimant engaged in direct correspondence with the external moderator which was out with the University's procedures (which requires any correspondence with the external examiners to be through the school's Examination Officer Dr. Saebi). The Claimant continued to feel that she was correct and that the University were persecuting her in their insistence that the changes recommended by Dr Bidgood be made.

61. The Claimant withdrew her Employment Tribunal claim towards the end of December 2003. On 19 January 2004 the Claimant was asked to attend a meeting to discuss four issues. These were working away from the University, her 2003 appraisal, the exam issue referred to above and a further incident where the Claimant had refused to set an exam paper for a module she had not taught. The Claimant's case is that this meeting resurrected old issues and had only been brought up because she had now withdrawn her Tribunal claim. The Tribunal accept that there may have been some reticence by the Respondent in pursuing disciplinary matters with the Claimant while the Employment Tribunal proceedings were ongoing but this is beside the point. The issue is whether these matters were brought in a genuine attempt to deal with management issues that had arisen or whether, as the Claimant maintained, they were fabrications, designed to victimise her and/or whether they would not have been actioned had she not brought the ET proceedings. We have no hesitation in finding that the agenda items were all issues that needed discussion if the Claimant was to be properly managed. The fact is that the Claimant had maintained a non collegiate and confrontational approach on the issue of the appraisal and the exam papers and was not willing to listen to another point of view. We cannot see any causal connection with the fact that the Claimant had brought proceedings against the Respondent. They would have acted in the same way with any other member of the academic staff who had displayed such intransigence in their dealing with colleagues.

62. The meeting on 19 January was not a happy one; the Claimant was unyielding on any of the issues and Professor Morris made some ill tempered remarks describing her county court case as a hollow threat. The Claimant said that she would not compile a review paper for second year students since she did not consider this to be part of her teaching duties. Despite the fact that she was advised that other colleagues had accepted similar duties she refused a clear instruction that she should do so. The Claimant also confirmed that she would not adhere to the faculty policy that she not work away from the University more than one day a week and that she would not amend her existing appraisal document. The issue of the setting of the examination paper for ST1210 was not discussed due to time constraints. We are satisfied

that Professor Morris' ill tempered remarks were a response to the Claimant's attitude at the meeting. We do not find that they were influenced by the fact that she had brought tribunal proceedings.

63. Following the meeting Professor Morris asked the Claimant (444) to:-

- Provide further substantiating reasons why she should be allowed to work away from home; and
- Inform him whether she was willing to reconsider her decision not to compile a review paper for the second year students.

In relation to all the issues he said this. "These issues are all of concern to me as they indicate an unwillingness to fully participate in the work of the mathematics team. Your actions therefore potentially affect your colleagues and your students. You should be aware therefore that should such actions continue this may result in disciplinary action being taken against you". She was asked to respond by 30 January

64. The Claimant's case is that this letter included "inaccuracies and unjustified and derogatory statements about me" which was an act of victimisation. In her witness statement she says that the statement that her actions could potentially affect her colleagues and students was unfounded arbitrary and malicious as there was no evidence to suggest that her work was substandard or that she burdened her colleagues. We find that the statement was reasonable. Professor Morris did not say that her work was substandard. He said that her actions could potentially affect her colleagues and students. She did not accept that view but we accept that this was Professor Morris' opinion, genuinely held on reasonable grounds.

65. On 29 January 2004 the Claimant set out her reasons why she wished to work away from the University more than one day a week (453). She did not respond to the question of whether she would reconsider her decision to compile the review paper for the second year students saying that she had not had the time and would respond by 6 February.

66. On 4th February, the Dean wrote to the Claimant asking her to attend a disciplinary interview to consider her refusal to comply with reasonable management instructions in relation to (i) working away from University and (ii) compiling a review paper for second year students (456). He had not waited till the 6th February (when the Claimant had said she would respond to the point about the review paper) as he considered that her reason for not responding to his question as to whether she would compile a paper for second year students was not acceptable. He had reviewed the reasons set out in her letter of 29th January for working away from the University more than one day a week but considered that these reasons were virtually identical to the reasons previously supplied and were therefore unacceptable.

67. We accept that Professor Davis decided to call the Claimant to a disciplinary interview for genuine reasons. It was not an attempt to harass the Claimant. We find that any other employee who had behaved in this way (but who had

not brought Tribunal proceedings) would also have been asked to attend a disciplinary hearing.

68. After some delay the disciplinary interview took place on 25 March 2004 (470/479). At that hearing the Claimant did agree, under protest, that she would compile a review paper for the year two students. However, she said that she would not comply with the requirement to work away from the University no more than one day a week. The outcome was that the Claimant was given a formal written warning (492) and instructed that if she continued to fail to comply with the management instruction as to working away from the University it would result in further disciplinary action including dismissal. We do not accept the Claimant's evidence that at that meeting Professor Davis prevented the Claimant saying what she wanted to say, and that Professor Morris made false accusations against her. (This refers to the fact that Professor Morris said that there had been complaints about her home working and had cited two examples of colleagues having complained that they had had to deal with the Claimant's students in her absence). We accept the Respondent's evidence that this was not an accusation, nor was it false. They were trying to give concrete examples of how the Claimant's working away from the university impacted colleagues, a fact that the Claimant had not accepted. In a letter dated 1st April Professor Davis asked the Claimant to reconsider her position and alter her pattern of work within 10 days.

69. It became clear to Professor Davis at that meeting that the Claimant's relationship with her line manager had broken down and he recommended that both attend executive coaching in an effort to mend bridges. Professor Morris accepted this recommendation but the Claimant did not. In her view the coaching was designed to make her do what they wanted.

70. The Claimant's response was not to appeal but to lodge a grievance with the Board of Governors (495) complaining of harassment by Professors Morris and Davis, citing in particular that she had had to attend another disciplinary hearing, stating that she was pursuing a county court action and would not hesitate to take further legal action in respect of her "current mistreatment" and stating that she refused to alter her home working as she had not been given a good reason why she should change. She suggested that they await the county court's ruling on the issue of breach of contract. In support she appended a number of documents. The Chairman's response (507) was that it was not appropriate to respond as this would cut across the Respondent's procedures and because of her expressed intention in respect of legal action.

71. We did not hear from Mr Cope but the facts and background to the complaint do not suggest to us that his decision not to respond was for reasons other than those given in his letter or was significantly influenced by the now withdrawn ET complaint.

72. By May 2004 the Claimant had still not complied and continued to work away from University more than one day a week. On 21 May she was invited to a further disciplinary hearing to be held on 10 June 2004. On 10 June the Claimant notified the Respondent that she was unwell (512).She sent a

second letter setting out her case with regard to the allegations against her. On 14th June she wrote to tell the Respondent that she would be available for a disciplinary on 28 or 29 June. The meeting was rescheduled to 23 June and then rescheduled again to 29th June. A letter was sent on 22nd June inviting her to the meeting on 29th.

73. It is part of the Claimant's case that Professor Morris's refusal to sign a self certification certificate for her absence on 9th 10th June was an act of victimisation. At page 515 of the bundle there is an unsigned self certificate. Professor Morris cannot recall this and we were not referred to any other documents. No action or criticism was levelled at the Claimant for the lack of a signed self certificate and we consider that there was no detriment to the Claimant and nothing to indicate it was anything more than oversight.

74. In early June the Claimant received her County Court judgment striking out the claim of breach of contract (500).

75. On 20th June the Claimant wrote again to the Chairman of the Governors (516) requesting that the university take action in respect of a grievance against Professors Morris and Davis and Ms Lanchberry in respect of :-

i. mistreatment / harassment

ii. conspiracy to dismiss me

iii. breach of contract

and that they investigate the Vice Chancellor for his toleration of the conduct complained of.

76. On the date convened for the disciplinary hearing (29th June) the Claimant did not arrive at the appointed time. It is her case that she had not received the notice of hearing. She later went into Professor Davis' offices and handed in a letter (517). This asked for clarification whether:- "Should I continue with my established pattern/place of work, as I feel I am entitled to in accordance with the terms of my employment contract, the University will dismiss me". For its part, the Tribunal notes that the question is disingenuous as the letter of 1 April (492) had made it clear that her continued refusal to comply with the management instruction as to working away from the University could result in dismissal.

77. By letter dated 30th July the chairman of the governors (who had taken advice from Ms Lanchbury) responded to the Claimant's letter of 20th June (518). In respect of her claims of harassment he considered that these issues had already been comprehensively explored during her earlier grievance and found to be without foundation. In respect of the charge of conspiracy to dismiss he said that he could not intervene in the disciplinary process. Finally in respect of the breach of contract claim he noted that the Claimant's county court action had been struck out. This was not an unreasonable response given the history to date and the fact that the disciplinary process was ongoing. We cannot infer that an employee who had not brought ET

proceedings alleging discrimination (but who had already gone through one comprehensive grievance process about harassment from the same managers and who was currently in the middle of a disciplinary process) would have received a more favourable response from the governors.

78. By letter dated 2 July Professor Davis noted that the hearing had been convened for a time that was convenient to the Claimant and "as you have now made it abundantly clear.....that you have no intention of complying with the instruction you have been given on reasonable grounds and in the light of three failed attempts to hold a disciplinary hearing" he considered that there was no point in trying to reconvene for a fourth time and issued the Claimant with a final written warning (520). The Claimant was instructed to indicate by 12th July whether she was willing to comply and told that if she did not a further disciplinary hearing would be convened. She was warned that if her "position remains as entrenched, you should be aware that dismissal may result". Professor Davis also sought to reply to the question posed by the Claimant in her letter of 29th June. His response was that it would be inappropriate for either the Vice Chancellor or himself to provide the statement along the lines that the Claimant requested as in accordance with the University's procedures, no final decision to dismiss would be taken without a full disciplinary hearing at which the Claimant would have the opportunity to make her case. Despite this clear reply, the Claimant wrote again (522 and 523) to both Professor Scott and to Professor Davis asking them to "clarify whether I will be dismissed if I continue with my practice regarding the pattern/place of work".

79. In July a further issue arose between the Claimant and her management about annual leave. On Sunday 11 July 2004 the Claimant wrote an e-mail to Professor Morris at 22:07 stating that she planned to be on annual leave from the following day until 9 August 2004. Increasingly bad tempered correspondence followed between Professor Morris and the Claimant, with the Claimant making it clear that she believed that it was for her alone to dictate when she should take holiday. Thereafter the Claimant's correspondence becomes increasingly strident (524, 526, 531, 534, 538). It was Professor Morris' view that she should not be on holiday while there were disciplinary interviews to be attended but it was clear that the Claimant felt she was entitled to take her holiday.

80. The Claimant did not indicate by the deadline of 12th July that she was willing to comply with the guidelines. Accordingly Professor Davis wrote on 14th July (537) arranging a disciplinary hearing for 29th July. The Claimant responded that there should be no communication with her while she was on annual leave and the meeting did not take place. Instead it was rearranged for 13th August. In the meantime Professor Davis retired.

81. Following Professor Davis' retirement it was decided that the Vice Chancellor, Professor Scott would chair the hearing. Disciplinary hearings would usually be heard by the Dean but it was thought inappropriate, given this complex case with its long history, that a new dean should take over the disciplinary hearing and Professor Scott decided he should hear it himself.

82. Throughout the correspondence the Claimant repeatedly asked whether "my pattern/place of work constitutes grounds for dismissal". The Claimant makes much of the fact that she does not get a clear answer to this. In fact the University had made it clear several times that the Claimant's continuing refusal to comply with a management instruction not to work away from the University more than one day a week might result in dismissal but that it could not say whether it would result in dismissal without having heard what the Claimant had to say. No doubt the Respondent was mindful of its obligation to keep an open mind and not to arrive at a decision before hearing what the employee had to say. We are puzzled by the Claimant's repeated request for clarification on this issue when it seems to us that the position had been made perfectly plain. We cannot see that there had been any refusal to provide clarification. The university may not have said what the Claimant wanted them to say but that is not the point.

83. The Claimant did not attend the disciplinary hearing on 13 August 2004. On 10 August 2004 she wrote (541) saying there was no point attending unless she got the clarification that she wanted.

84. In the absence of the Claimant Professor Scott considered the options. He decided against rescheduling the hearing as, it seemed to him that the Claimant would not attend any rescheduled hearing. He considered abandoning the disciplinary hearings but decided that this would be wrong because the management were trying to impose reasonable arrangements and not to enforce them would discriminate against other members of staff who were in compliance. He considered suspending the disciplinary hearing while a separate investigation into the complaint of victimisation made by the Claimant was investigated. He decided that he would not do this as her complaint had already been fully investigated during her earlier grievance, with the exception of her complaint about the reasonableness of the arrangements of working from home and that was the subject of the current disciplinary hearing. Professor Scott decided to review the papers and reach a decision without a hearing. He concluded that the Claimant had continued to refuse to comply with a reasonable management instruction and that she had no intention of doing so. He decided to dismiss her with immediate effect. In the letter of dismissal he notes that:-

> "As you are entitled to six months notice under your contract of employment, you will be paid six months pay in lieu of notice and will no longer be required to work for the University".

After the dismissal

85. The Claimant's colleagues were told that she had been dismissed. They were not told the reasons.(551).

86. On 27 August 2004 the Claimant lodged an appeal but this was subsequently withdrawn on 20 September (533).

87. There followed difficulties and further acrimonious correspondence regarding the return of the University property held by the Claimant. The Claimant was

asked to attend on site to clear her office and return such belongings as she had. The Claimant simply said that she was busy and that she would come to the University when she could. As a result her termination payment was held up pending the return of University property. This was in line with the Respondent's policy for staff leaving their employment (664A).

88. In the end the Claimant received her final pay on 31 October 2004. In the final payment the Respondent deducted an amount of £440.80 on the basis that she had taken 38 days annual leave, three days in excess of her annual entitlement of 35 days. The contract of employment provides that "If a member of staff leaves, having exceeded the accrued leave entitlement, the excess will be deducted from the final salary/wages payment" (635).

89. The Respondent's annual leave policy also provides that "annual leave entitlement for one calendar year should not normally be carried over to the next. The Vice Chancellor, Dean or Head of Department may agree to the carrying forward of five days leave to the next year". It was the Claimant's case that as she had not been able to take her 35 days leave in preceding years she was entitled to 40 days leave in the 2003/2004 academic year and that the 3 days deduction was an unauthorised deduction from wages contrary to part 2 of the Employment Rights Act 1996. The Respondent did not dispute that the Claimant had not taken her full entitlement to leave in the preceding year but stated that she had not obtained permission for the carrying forward of the five days leave.

90. The Claimant received six months salary expressed by the Respondent to be in lieu of notice. The pay expressed to be in lieu of notice did not include any element for pension contributions. It is the Respondent's case that no further amount is payable to the Claimant as the Respondent was entitled to dismiss the Claimant summarily as her behaviour amounted to gross misconduct and the payment in lieu of notice was, in effect, an ex gratia payment. The Claimant's case is that the Respondent clearly stated that she was dismissed with notice and she is entitled to full damages for her notice, that she was wrongfully dismissed and she is entitled to damages. She states that the Respondent cannot now renege on their concession that she was dismissed with notice.

91. In October the Claimant wrote to Professor Scott asking him to confirm that the reasons for her dismissal were as stated in his letter of 13 August. He did so on 25th October. (561,562).

92. The Claimant claims that the Respondent's actions after her dismissal were acts of victimisation. The particular acts complained of are the fact that her colleagues were told she had been dismissed, the fact that she was not paid in lieu of notice till the end of October and the fact that she was not paid all that she believed she was entitled to. She also alleged that Professor Davis' letter of 25th October did not set out the true reason for dismissal. There is however no evidence which persuades us that their actions at this stage were on grounds that she brought ET proceedings.

Submissions

93. Extensive written submissions were lodged by both parties (the Claimant's running to over 100 pages in small typeface). They were mainly (but not exclusively) on the facts. These submissions have been considered by the Tribunal. (indeed it took us the best part of a day to read them) but no useful purpose is served by summarising them here.

Conclusions.

Unfair dismissal

94. The Claimant's case was, in a nutshell, that the instruction to change her place / pattern of work was not reasonable and was a breach of her contract. Further it was her case that she was not in fact dismissed for breaching the guidance – that this was just a pretext. The rule about attendance at the university was not introduced for a genuine business reason but was introduced in order to build a case for her dismissal (submissions para 192).

95. We are satisfied that the reason for the Claimant's dismissal was conduct, namely her refusal to obey a reasonable management instruction that she not work away from the university more than one day a week.

96. We do not accept that the instruction as to working away from the university was unreasonable. While it is true that the rule was introduced partly to deal with problems arising from the Claimant's attendance pattern, it does not follow that it was introduced for an improper motive or to build a case against her. Instead it was an even handed way of dealing with genuine concerns about the Claimant's pattern of attendance and making it clear that rules as to attendance applied to all staff save where there were circumstances that justified an exception. It was always open to the Claimant to comply with the instruction. She lived within a reasonable distance (half an hour) and other staff were content to comply. We find that the instruction was reasonable and not in breach of her contract of employment.

97. It was also the Claimant's case that the various disciplinary processes to which she was subjected were not attempts to manage her, but part of a relentless campaign to dismiss her. She relies on several emails which were disclosed as part of her subject access request and which show that management were "against her". We have no doubt that management was indeed frustrated by her refusal to comply with management instructions but the fact remains that they did not dismiss her for her early refusals to comply with process as regards leave, clearing duties, or her general intransigence over other matters (appraisal/exam papers). They dismissed her for failing to comply with the 2002 guidance and did not do so until she had been clearly told the consequences of non compliance and had been given every possible chance to comply. There was no plot. The Claimant could have remained in employment had she chosen to comply.

98. As to whether the Respondent was acting reasonably or unreasonably in dismissing her for this refusal, we have no hesitation in finding that the

decision lay within the range of reasonable responses. The instruction had first been circulated to staff in October 2002, and in November 2002 the Claimant had been told that she did not qualify for an exception to be made. Despite this she had continued to work from home. She did not accept the outcome of the county court action. By the time disciplinary proceedings were initiated in February 2004 over a year had passed since the guidance had been issued and the Claimant had made it clear that she would not comply. The Claimant was not dismissed until August 2004 and had she indicated at any time during the lengthy process that she was prepared to limit home working to one day a week dismissal could have been avoided.

Victimisation

99. The Respondent submitted that all the allegations said to arise more than three months before the submission of the tribunal proceedings were out of time and that it would not be just and equitable for the Tribunal to exercise its discretion to hear the allegations out of time. However in our view the Claimant was complaining of "an act extending over a period" as distinct from a series of unconnected or specific acts. She was, it seemed to us, complaining of am ongoing state of affairs in which management treated her less favourably on the ground that she had brought Tribunal proceedings. Since some of her allegations were in time it was necessary to examine all of the complaints to see if such an ongoing state of affairs could be established.

100. The Claimant raises some 14 separate actions taken by the Respondent which she alleges were acts of victimisation i.e. less favourable treatment on the ground that the Claimant had brought tribunal proceedings against the Respondent in the 2003. For ease of reference we have set out our conclusions as to those allegations against the relevant finding of fact above and we have concluded that the complaints of victimisation are not made out. The time issue therefore falls away.

101. It is clear that the Claimant's attendance pattern and attitude to management had become an issue some time before she initiated Tribunal proceedings for sex and race discrimination. The policy on working away from the university was introduced in the autumn of 2002. Initial steps to enforce it were taken in November 2002. That policy has not changed. Ultimately most of the Claimant's instances of alleged victimisation arise out of the efforts made by management to enforce the policy that she work at the university four days a week. The question is, how would the Respondent have treated another member of the academic staff who refused over a period of time to comply with the working away policy, but who had not brought proceedings against the university alleging unlawful discrimination. We conclude that the Respondent would also have taken action under its disciplinary processes, culminating, in the face of continued point blank refusal, in dismissal.

102. The Claimant relies on Dr Joy and Dr Tsaptsinos as comparators. However, they had given genuine reasons for the need to work from home and had been given permission to do so. (The Claimant, in her submissions also referred to Ms Potter in the music school but we had heard no evidence about

her.) We are left with a hypothetical comparator and conclude that the same steps would have been taken. We do not accept that the requirement imposed upon the Claimant that she adhere to this policy was influenced to any significant extent by the 2003 tribunal proceedings.

103. In so far as it alleged that the events after her termination amounted to victimisation, the Respondent's actions were in response to the Claimant's refusal to attend to return university property and collect her own belongings. There was no evidence from which we would infer that she would have been differently treated had she not brought her ET claim.

Notice pay

104. The Claimant was dismissed without notice but paid six month's salary "in lieu of notice". However that payment did not include pension contributions. The issue is whether the Respondent should now pay her damages representing those lost pension contributions.

105. We are satisfied that the Claimant's conduct immediately prior to her dismissal amounted to a repudiatory breach of contract, which the Respondent accepted when they dismissed her. She had made it crystal clear that she would not accept the instruction as to working away from the university – even though her claim for breach of contract had been unsuccessful. Her attitude to management was also illustrated by the email correspondence passing between herself and Professor Morris regarding her holiday in the summer of 2004. (See paragraph 79 above.) It is clear that the Claimant was not prepared to be managed. Her conduct disclosed a deliberate intention not to be bound by the terms of her employment contract and the Respondent was entitled to dismiss her without notice. She has therefore received more than her legal entitlement and no further amounts are due. The fact that the Respondent did not dismiss her for gross misconduct is beside the point. The issue is whether they had been entitled to. We find that they were. Dhopatkar v Doshi Financial Services 1999 relied on by the Claimant is of no assistance to us on this issue. We do not accept the Claimant's submission that that, by paying the Claimant salary in lieu of notice (excluding pension contributions), the Respondent must be taken as having waived their right to rely on an argument of gross misconduct.

Wages.

106. Was the Claimant entitled to 38 days holiday in the year 2003-2004? The Respondent's holiday policy (635) provides that annual leave should not normally be carried over from one year to the next. "The Vice Chancellor, Dean or Head of Department may agree to the carrying forward of five days leave to the next year." The Claimant did not obtain leave for her holiday to be carried forward. It was her case that in the School of Mathematics 5 days was automatically carried forward and there was no need for special permission. She relied on an admission by Professor Davis that there was no form for the carry forward of leave.

107. Given the clear policy in the staff handbook it was for the Claimant to establish

on the balance of probabilities that the policy in the School of Mathematics was different to the policy set out in writing in the staff handbook. It was not clear on what basis (other than the fact that no form existed) the Claimant stated that there was an automatic carry forward. Dr Benveniste put to Professor Davis that no one had ever complained that they had not been allowed to carry forward leave, but that is rather different to not needing permission. In any event Professor Davis did not deal with authorising leave and said that he always assumed that staff who carried forward leave had obtained permission. The Claimant has not established that the terms of the staff handbook had been varied either expressly or by custom and practice in the School of Mathematics.

108. We considered whether, by allowing the Claimant to be absent for 38 days in the holiday year 03/04, the Respondent had given her implied permission to carry forward 3 days leave. On reviewing the documents it quickly became apparent that the Respondent (Professor Morris) had not allowed her to take the leave. She had simply taken it. The staff handbook provided that "If a member of staff leaves, having exceeded the accrued leave entitlement, the excess will be deducted from the final salary/wages payment." (635). There was no unlawful deduction of wages.

109. All the claims are dismissed.

Employment Judge Spencer

Chairman
Date: 11 February 2008

Judgment sent to the parties and entered in the Register on: 11 : 02 : 08.

MS M Andrews for Secretary of the Tribunals