Case Number: 1600416/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Wilson**

Respondents **Wilson Devonald Griffiths John Limited**

Heard at: **Cardiff** **On: 30 January - 1 February 2017**

Before: **Employment Judge P Cadney**
Members: **Mrs C Mangles**
Ms JSouthall

Representation:
Claimant: Ms K Logue (Counsel)
Respondent: Ms C Collins (Counsel)

JUDGMENT

This is the unanimous decision of the Tribunal is that the claimant's claims of:-

i) Age Discrimination;
ii) Unfair (constructive) dismissal
iii) Wrongful dismissal;
iv) Breach of contract;

are dismissed.

The claimant's claim in respect of unpaid holiday is in part well founded and the respondent is ordered to pay the claimant 5 days unpaid holiday pay.

REASONS

1. By this claim the Claimant brings claims of age discrimination, constructive unfair dismissal, wrongful dismissal, failure to pay holiday pay and the failure to pay for his practising certificate.

2. The Claimant is a solicitor and is currently 53 years of age. At the time of his resignation and the events which concern us he was 61 years of age. In brief, in 1989 he joined as an equity partner a firm Morse Avery Naylor and Lane which subsequently became known as Avery Naylor Wilson. That firm employed Nicholas Devonald in 1994 and he was made an equity partner in 1995. That firm then split in 2001 with the Claimant and Mr Devonald forming a firm Wilson Devonald in which they were equal partners and which practised in criminal law. Jonathan Tarrant became a partner at some point later. A decision was taken to incorporate the firm on 8 September 2005 when it became Wilson Devonald Limited, and the Claimant became an employee and director and shareholder. At that time the two other directors were Mr Devonald and Mr Tarrant. On 1 April 2012 Mr Grayson Tanner was appointed as a director. At no point did the Claimant or indeed as far as we are aware any of the other directors have any service agreement or a contract of employment. Wilson Devonald Limited practised in the field of criminal law and primarily although not exclusively in criminal defence work, which primarily although again not exclusively, was remunerated via Legal Aid.

3. Initially all of the directors carried out very similar tasks as one would expect of a criminal defence solicitor such as attending the Magistrates Court on a daily basis, attending police stations, carrying out duties on the duty rota for the police station. However the Claimant's role changed at some point. The firm did not have any Higher Court Advocates at that stage (although Mr Tarrant subsequently qualified as one) and accordingly they were not able to conduct all of their own Crown Court litigation (for the avoidance of doubt they could as has always been the case attend hearings such as bail applications and appeals against sentence and conviction from the Magistrates Court, but were not able to conduct trials in the Crown Court). As a consequence for those of their cases which went to the Crown Court they instructed counsel. At some point the Claimant's role changed in that he became primarily responsible, although he carried out other duties as well, for the conduct of the Crown Court files, with the consequence that the Claimant would not attend the Magistrates Court on a daily basis or the police station. As a result the Claimant became predominantly office based and in addition to his work

on the Crown Court files carried out duties such as attending upon any new client, or a client attending with a query if the solicitor dealing with the case were at Court, assisting the secretarial staff and fielding any queries that would come from CPS, Courts, Police stations or other solicitors. In addition the Claimant was the compliance officer for legal practice and money laundering regulation officer and responsible for equality and diversity matters and became the principal point of contact for the Respondents bank and accountants.

4. The background to this case is a change in the landscape of criminal Legal Aid work. As is well known the coalition government introduced reforms to the Legal Aid system which included proposals to reduce fee income by 17.5 % split between reductions of 8.75% over two years and in addition proposed to reduce dramatically the number of firms eligible to conduct criminal defence Legal Aid work. In 2014 the directors of Wilson Devonald agreed that they would consider merging with another criminal law practice and identified a practice called Griffiths John. In his witness statement the Claimant states:

   "*I suggested that Nicholas Devonald and Jonathan Tarrant should lead the discussions regarding the merger because I am the oldest of the group and I realised that if I retired at 65 the others were likely to be in business together long after I had retired*".

5. The Claimant is now 63, Mr Devonald is 53, Mr Tarrant is 45, Mr Tanner is 41, Mr Griffiths is 41 and Mr John is 40. The negotiations were successful and the merger took place with the result that the Respondents name was changed to Wilson Devonald Griffiths John Limited. Mr Griffiths and Mr John joined as employed directions/shareholders with an equal shareholding on the same terms as the existing four directors. One of the consequences of the merger was that the firm now had with Mr Tarrant having become qualified, four Higher Court advocates and accordingly would be able to conduct a far greater proportion of its own Crown Court advocacy than had previously been the case.

6. One of the long term anticipated consequences of this was that each Higher Court advocate would be responsible for the Crown Court file relating to the particular case he was dealing with and therefore it was likely that the Claimant's role in managing the Crown Court files and instructing Counsel would diminish. This was however simply part of a much larger picture; as Mr Tarrant said in evidence, had the proposals gone ahead (as a matter of fact under the current government and the then Lord Chancellor Michael Gove, the proposals to reduce the number of firms receiving criminal Legal Aid were not pursued) the whole way in which each of the directors worked would have to be reconsidered. The firm had as it happened successfully tendered and would have been one

of the firms which received a Legal Aid franchise going forward had the reforms been pursued, but they would have covered an enormous geographical area as Mr Tarrant described it from Swansea to Cardiff in the South and as far North as Welshpool and Aberystwyth in the West. The effect of that had it gone ahead was that there would have needed to have been a reconsideration of the entire way in which the practice conducted itself.

7. It is clear that following the merger there were some difficulties in the differences of approach and style taken by the previously separate firms. In evidence, Mr Wilson stated that he in particular did not like the language that Mr Griffiths and Mr John used, particularly in front of the female employees. It does not appear however that there were any significant difficulties prior to the events which concern us.

8. Mr Wilson's evidence is that the situation changed and that he began to be frozen out as from 9 March 2015. The events which led to the meeting on 9 March are that the Respondent banked with Barclays Bank. Its relationship director was Mr Julian Hallett. There were a variety of meetings during which it was suggested that forms of insurance were necessary and the question arose of whether the directors should enter into Director's Service Agreements and also Shareholder Agreements. This resulted in a Corporate Protection Financial Review dated 2 March 2015 which among other things addressed succession planning and the information given to the author of that document Sam Lloyd (by Mr Wilson himself) was that policies should be written to a retirement age of 70 for Mr Wilson, but 65 for the other directors. It is accepted that all the directors had this document prior to the meeting on 9 March although we do not know whether all of them had read it at all or if so had taken in the retirement dates suggested by Mr Wilson himself.

9. On 9 March a board meeting was held at which the issues raised in the Corporate Protection Financial Review were discussed and the issue of Shareholder Protection and a Shareholders Agreement was raised. It is not in dispute that the issue of retirement was raised by Jonathan Tarrant and that he did so in saying words to the effect addressing Mr Wilson that "*We need to address the elephant in the room when are you going to retire?*". There is little dispute about events but distinct dispute about the tone of the meeting. Again it is not in dispute that the Claimant asked Mr Devonald "*How old am I?"* to which Mr Devonald replied that he didn't know and that the Claimant replied saying that he had no immediate plans to retire but intended to continue working until he was 65. At some point thereafter Mr John said words to the effect that "*It's nothing personal but you are the oldest"* and relatively shortly thereafter the meeting broke up with Mr Tarrant being tasked with discovering whether he could obtain

from other firms samples of Shareholder Agreements and other documents.

10. The Claimant's case, as set out in his Witness Statement, is that he understood from then onwards, that *"I realised from his reaction (Mr Devonald) and body language that I was very much alone and under threat from the other directors*". The Claimant's evidence is that following the meeting on 9 March the atmosphere in the office changed and he was ostracised by the other directors. Save for Mr Devonald the other directors did not speak to him or only spoke when he addressed them and the normal social interaction did not take place.

11. Both Mr Devonald and Mr Tarrant's evidence is that the meeting was perfectly jovial and light-hearted. Nothing was concluded, it was simply the start of a process which would have led eventually to creating a Shareholder Agreement and Director Service Agreement and perhaps entering into agreements with the bank and that nothing changed thereafter.

12. It is in truth very hard to see why the Claimant was so taken aback with the subject itself being raised, and indeed as the Claimant accepted in evidence, that to raise the issue of the retirement dates in the context of Director Service Agreements and Shareholder Agreements was a perfectly reasonable thing to do, and indeed it was anticipated in the Corporate Protection Financial Review which was the specific topic of discussion. However the Claimant stated in evidence that he objected to the manner in which it was raised and particularly the use of the phrase "*the elephant in the room*" which he contends meant explicitly that the date of his retirement was a particularly important issue for the other directors. It is very hard to see why, even if clumsily expressed by Mr Tarrant or Mr John, the Claimant should have concluded from the way that they spoke that they had formed a desire to get rid of him and that they had done that on the basis of his age. However those were the conclusions the Claimant says he drew at the time.

13. As a matter of fact, no further action was taken with respect of the Shareholders Agreement and in respect of any agreement as to any retirement dates between then and the Claimant's resignation. What did occur is that there were a number of meetings between the Claimant and Mr Devonald over coffee. It is not in dispute that during one of these meetings Mr Wilson asked Mr Devonald directly whether the other directors wanted him out, nor that Mr Devonald replied that that was not the case. There were a number of possible alterations to the Claimant's role discussed. Mr Devonald mentioned the possibility of working part time or as a consultant, but neither appealed to the Claimant and neither option was pursued. Again it is not essentially in dispute that in a conversation on

7 May Mr Wilson did tell Mr Devonald that if he was to leave he would need 12 months to put his business affairs in order. It is Mr Wilson's evidence that although he gave no specific consent for Mr Devonald to discuss this with the other directors, it was intended that he take this information back to them. As he puts it in his Witness Statement, "*by this time it was clear to me that the others were conducting themselves in a way that was provoking me to confront my position and continued involvement with the company. Furthermore it was clear to me that unless I did so the situation would in the very near future become untenable and boil over and I was going to simply be summarily dismissed*".

14. Again it is not in dispute that on 7 May 2015 Mr Devonald, having spoken to his fellow directors, came back with a counter offer to the Claimant which was that they would continue to pay him both salary and dividend until 31 December 2015, but that he would not be required to work during that period. Again there are different interpretations placed on this. The Claimant's interpretation is that effectively he was given an ultimatum that he should leave immediately, but would continue to be paid until the end of December. The Respondents is that he was having asked effectively to be allowed to work for a further 12 months and then retire, that the offer was that he should continue to be, but he would be paid until the end of December, but would have no obligation to work. Again there is no dispute that at some point the Claimant described the offer as "very generous" which Mr Devonald stated he thought was an accurate assessment of the Claimant's view of it, but which the Claimant says was said sarcastically.

15. What is also not in dispute is that the Claimant asked if he could discuss matters with his wife which he did over the weekend (7 May being a Thursday). On Monday 11th there was a further conversation between the Claimant and Mr Devonald described by the Claimant in an email of 15 May in the following way:

"*I refer to our brief discussion on Monday 11 May 2015 when you confirmed that the proposal put to me on Thursday 7 May 2015 did not in any way include the payment in whole or in part for my shares on the company and on that basis I accepted the proposal and I will trust that the agreement will be honoured.*"

It is not necessary to refer to that email in full but some aspects of it which are of significance given that it is the only contemporaneous document before us indicating the nature of the agreement is as follows:

"*Dear Nick, I would like to place some formality to our conversation of last Thursday afternoon 7 May 2015 when you put to me a proposal from the Wilson Devonald Griffiths John Limited company board. That proposal required me to cease practising with the company in consideration of*

which I would receive my drawn full financial entitlement up to and including the month of December 2015. You reluctantly referred to this proposal as "gardening leave" which both you and I agreed was distasteful as that suggests an element of wrongdoing on my behalf and I do not believe that I have in any way at any time transgressed or fallen down on my obligations to the company or its predecessors or the board."

He goes on:

"*in previous discussions you stated the intention was to absorb and distribute my role within the company spreading the responsibility and workload, in particular for the Crown Court work, between an unspecified number of fee earners*".

He then goes on at length to describe that process and concluded:

"*I had the opportunity to examine the Crown Court files that Griffiths John brought to the company and they were nothing short of disgraceful. I have monitored the Crown Court files that have been kept away from me since the merger on 1 July 2015 and even with the benefit of the standard templates that I have developed over the years and advantages offered by our digital case management system there is a woeful lack of attention to detail and a complete failure to proactively manage case files. This coupled with a misguided if not deluded opinion on the part of the fee earners as to their ability should give rise to an immediate cause for concern as this particular leopard will not change its spots even with the benefit of free Wi-Fi at the Costa coffee shop in the Uplands. My observations in particular over the last 2 months also lead me to believe that the fee earners have not engaged with, let alone embraced the concept of absorbing and spreading the responsibility of the management of Crown Court files and it is my unshakeable belief that Sandra will be left and expected to deal with all of this and it is simply not going to work. In reality the proposal you presented me left me no realistic workable option as my continued presence and day to day involvement in the company is unwanted."*

16. As a result of apparently reaching that agreement the Claimant continued to work until Friday 14 May when he ceased actively to work for the Respondent.

17. Matters appeared to be going well until September 2015 when neither the Claimant's salary or dividend was paid. The Claimant's salary was also not paid for November or December. The Respondents explanation for this, which we accept, is that in October 2016 for a number of reasons the company found itself in financial difficulties and had exceeded its overdraft with the bank. As a consequence none of the directors received their

salary or dividend in October and indeed Mr Devonald's evidence which we accept was that the directors had to make cash payments to the company itself.

18. Arising from those facts there are a number of claims.

Age Discrimination

19. The first claim is for direct age discrimination which itself also forms part of the claim for constructive unfair dismissal. The Particulars of Claim at paragraph 14 it is alleged that the Claimant's termination of employment constituted direct age discrimination because of age contrary to the Equality Act 2010 Section 13(1). The Claimant's case put simply is that from the latest 9 March 2015 the Respondent through its other directors, had decided that it wished to dispense with his services and that the reason they had decided to dispense with his service was his age. That conclusion led to a process during which he was ostracised and effectively frozen out, culminating in the offer which was in effect an ultimatum which he had no choice but to accept and that the termination of his employment was therefore an act of age discrimination and necessarily unfair, as it constitutes a fundamental breach of contract.

20. There is a preliminary issue in relation to this matter which is: what was the effective date of termination of the Claimant's employment? The Respondent contends it was 14 May 2015 when he ceased to provide any service in the capacity of an employee to the Respondent. The Claimant asserts that it was not until 31 December 2015. Looked at overall, there is no contemporaneous documentation other than the email of 15 May, and it is not in dispute that the agreement was reached orally between the Claimant and Mr Devonald. Neither has suggested that they gave any thought to the precise nature of the Claimant's status going forward.

21. It is the Respondents case that essentially the Claimant was employed to provide services as a practising solicitor. In agreement for ceasing to do so, he agreed to accept payment up until 31 December whilst he remained a director and shareholder his employment came to an end on 14 May when he ceased to provide any service as a solicitor in practice to the Respondent.

22. The Claimant's case is that viewed properly the agreement provided for him to remain an employee until 31 December. He was for example, still paid via the PAYE system. He did not receive a P45 and he received no formal notification of termination and that in effect what happened was that although he and Mr Devonald agreed that they did not like the phrase "garden leave" in effect that he was put on "garden leave" from 14 May

until 31 December and accordingly remained an employee of the Respondent.

23. Doing the best we can in the almost total absence of any contemporaneous documentary evidence, in our judgment the Claimant is right and the effect of the agreement was simply to relieve him of the obligation to provide any day to day services to the Respondent, but in the absence of any specific notification of termination that the surrounding circumstances are consistent with him continuing to be an employee albeit one who was in effect on "garden leave". Accordingly it follows that there is no time bar to the Claimant's claims for age discrimination and unfair dismissal.

24. Dealing first with age discrimination the Respondents case effectively is that the Claimant's age discrimination claim is a retrospective concoction in which he has viewed the events of March to May 2015 through the prism of, as he sees it, the breach of the agreement which occurred in the latter part of 2015 of failing to continue paying his salary and dividend in full. They point to the fact that in the email of the 15 May whilst there is a lengthy discourse about the merits or otherwise of his role as the custodian of the Crown Court files, but there is no mention at all of any suggestion that he believed that he was the victim of age discrimination or that the meeting of 9 March was of any significance whatsoever. Furthermore they point to the essential illogicality of the Claimant's case which is that the purpose of the meeting of 9 March was precisely to discuss the matters contained in the report from the bank, one of those matters was succession planning and succession planning necessarily required discussion of the retirement dates. Given that the Claimant was self evidently nearest retirement, in all probability nearly 10 years nearer the next youngest director and over 20 years nearer some of the others, that the question of his retirement was likely to arise first and therefore it is hardly surprising that the issue itself was raised, nor that it was raised in the context of his own retirement. As the Claimant himself accepted in evidence, raising the issue itself was not a matter about which he complains. If that is correct submits the Respondent, the mere fact that the language used by Mr Tarrant and or Mr John was clumsy or inappropriate does not mean that it can bear the interpretation that the Claimant has sought to put on it, that from the use of the two phrases that it can be inferred that the other directors had formed a view that they wanted to dispense with the service of the Claimant and that they wanted to do so by reason of age.

25. Even if there were any desire on the part of the other directors, which they deny, and about which they say Mr Devonald honestly reassured the Claimant, the matters canvassed as being essentially in dispute in the Claimant's own email of 15 May were his continuing role in respect of the

Crown Court files. Thus even if the Claimant is correct and that the existing directors had formed a view as to his continued presence in the company going forward, on the contemporaneous evidence that can only have been on the basis of his role and there is no hint that is on the basis of his age.

26. In our view the Respondent must be correct in this analysis. The only evidence in support of any allegation that the Claimant has been subject of age discrimination were the two comments made in the meeting and in our view for the reasons given above they simply cannot bear the weight that the Claimant places on them and in our Judgment it is impossible to draw any inference from them that the directors of the Respondent had formed any view that they wished to dispense with the services of the Claimant in any event let alone by reason of his age. In our Judgment there is no connection between the comments made at the meeting and the subsequent agreement and therefore no connection between the comments and the termination of the Claimant's employment which is the specific matter relied upon as the act of age discrimination. Accordingly it follows that the age discrimination claim must fail.

Constructive Dismissal/Wrongful Dismissal

27. In terms of the unfair dismissal claim, the Respondent contends that the Claimant was not dismissed. As is evident from the sequence of events the cause of the termination of the Claimant's employment was that a proposal was put to him which, once he had clarified that it was not intended to include the value of his shares, he agreed to.

28. In essence the Claimant submits that this was a forced resignation and the essential reason that it was forced is that he believed, as is set out in his witness statement, that if he did not agree he would be immediately and summarily dismissed. He therefore faced the prospect of what he regarded as an unfavourable agreement given that his salary was relatively modest in comparison with his dividend. He understood he would be entitled to his dividend in any event whilst he continued to be a shareholder, but that was better than the prospect of being immediately dismissed with the possibility of there being no income at all and he accordingly was effectively forced to accept the offer and to resign.

29. We have been referred to a number of authorities as to the question of forced resignation which had been summarised in the decision of *Mr O Shama v Mr Richard Ashleigh Lee t/a TMM.* It is a first instance decision and neither party placed any reliance upon the conclusions which are clearly related to its own facts, but the Respondent submits it contains an

extremely helpful summary of the authorities and the legal principles to be applied from paragraph 11.6 to 11.9.

30. The first passage we were taken to was in the case of *Jones –v- Mid Glamorgan County Council* [1997] IRLR 685 and the Judgment of Lord Justice Waite in which he states

"*At one end of the scale is the blatant instance of a resignation preceded by the employer's ultimatum: 'Retire on my terms or be fired' – where it would not be surprising to find the industrial tribunal drawing the inference that what had occurred was a dismissal. At the other extreme is the instance of the long-serving employee who is attracted to early retirement by benevolent terms of severance offered by grateful employers as a reward for loyalty – where one would expect the industrial tribunal to draw the contrary inference of termination by mutual agreement. Between those two extremes there are bound to lie much more debatable cases to which, according to their particular circumstances, the industrial tribunals are required to apply their expertise in determining whether the borderline has been crossed between a resignation that is truly voluntary and a retirement unwillingly made in response to a threat.*"

31. We were also taken to a passage in the case of *Sandhu –v- Jan de Rijk Transport Ltd* [2007] IRLR 519 which in the headnote the following is stated:

"*Resignation implies some form of negotiation and discussion; it predicates a result which is a genuine choice on the part of the employee. Plainly, if the employee has the opportunity to take independent advice and then offers to resign, that fact would be powerful evidence pointing towards resignation rather than dismissal*."

32. There are a number of other authorities to similar effect, for example in *Crowley –v- UK Chemicals Ltd* Judgment of Slynn J includes the following passage:

"*The cases to which they were referred do not decide that an employee cannot resign pursuant to an agreement with his employers. What those cases decide is that if the departure of the employee is caused by the threat of dismissal if the man does not resign, or if the agreement to resign is not a genuine one and arrived at without pressure, then there is a dismissal. But they leave open the possibility that the cause of the departure is not the threat of the dismissal, but is the agreement which is arrived at and possibly the payment of money as a result of that agreement."*

33. The Claimant submits that this was, judged by those tests, a forced resignation. He had no alternative to accept what was offered rather than risk immediate dismissal.

34. The Respondent submits that clearly this case is a voluntary mutual termination and they point to the following facts. Firstly the Claimant specifically asked Mr Devonald whether the other directors wanted him out and Mr Devonald attempted to reassure him by replying that they did not. Whilst it is open to the Claimant to choose not to believe Mr Devonald, (although given their long association it is difficult to see why he should do so), the fact of the Respondents reassurance that they did not want him to leave demonstrates that there was no pressure from the Respondent. Similarly in this case there was no threat of any disciplinary sanction. It is not alleged that the Respondent had ever suggested that the Claimant was at risk of being dismissed either immediately or at any stage in the future. Further when the proposal was put to the Claimant he asked for time to consider it, which he was given. No time limit was put on that, and he was not told that he had to give a reply by any specific date. He was able to take as long as he wished to take any advice he wished and to consider whether he wanted to accept. There was therefore, no pressure at all either in terms of an express or implied threat or in terms of the time he had, nor in terms of any limitation on any advice he could have taken as to whether or not to accept the offer.

35. It follows, the Respondent submits, that this is transparently obviously a voluntary mutual termination. It may be that in the Claimant's own mind he feared what might occur if he did not accept, but that fear was not caused by nor resulted from anything said or done by the Respondent and in the absence of that it cannot be anything other than a voluntary resignation.

36. In our judgment the Respondent is correct in this analysis and it follows that the Claimant was not dismissed. Given that he was not dismissed it follows automatically that his claim for unfair dismissal must fail.

37. It equally follows that if the claimant was not dismissed his claim for wrongful dismissal must fail.

Holiday Pay /Practicing Certificate

38. That leaves the two monetary claims. The first in respect of holiday pay and the second in respect of the practising certificate.

39. In respect of holiday pay it is not in dispute that the Claimant had prior to the events of May 2015 booked holiday in the latter part of June 2015. Nor

is it in dispute that in fact, although without agreement, the Claimant took a further 10 days holiday at or about the end of September. It is also not in dispute that the Claimant's holiday year ran to 31 December and that prior to May he had taken 4 days holiday. Accordingly during the course of the year he had taken a total of 23 days holiday from a holiday entitlement of 30 days. The question therefore is whether he is entitled to be paid the balance of 7 days holiday.

40. The Claimant submits simply that as that balance was outstanding on termination he is entitled to it. The Respondent submits that the right to paid holiday depends upon a request for the holiday being made under the Working Time Regulations and as unrequested and untaken holiday cannot be carried forward it follows simply in this case that having not requested the balance of 7 days holiday that the Claimant had lost any entitlement to it as of 31 December 2015 and therefore is not entitled to holiday pay in those circumstances. If he had continued in employment he would have lost the right to take it and he cannot be in any better position simply by reason of having his employment terminated. We have not been referred by either party to any authority in relation to their submissions.

41. This case appears to turn on the interplay between Regulations 13 and 14 of the Working Time Regulations. Regulation 14 (2) simply provides for the payment of any unpaid but untaken holiday. It does not appear to be dependant in any way on making any request for the holiday within the terms of Regulation 13.

42. In our judgment, and in the absence of any authority it does not appear that Regulation 14 (2) is dependant upon Regulation 13 and therefore we conclude that the claimant is owed 7 days unpaid holiday pay. That is, however not quite the end of the matter as the rights contained within the Working Time Regulations only apply to the first 28 days holiday. We have been shown no contractual basis for any claim in respect of the final two days, there being no contract. Accordingly judgment will be given for 5 days unpaid holiday.

43. In respect of the practising certificate it is not in dispute that whilst there is no contract and therefore no contractual right for the Claimant's practising certificate to be paid for by the firm, as a matter of practise that is what has always happened. The difficulty with the Claimant relying on custom and practice as having a contractual right is the circumstances as they arose in the latter part of 2015 bore no relation to those previous years. Clearly the firm has an interest in its solicitors practising certificates being maintained as without them they could not practise. However the Claimant had ceased to provide any actual fee earning work for the Respondent which would require a practising certificate although he had nominally remained the compliance officer and there was therefore no benefit to the

Respondent in paying for his practising certificate and certainly would be no benefit beyond 31 December at which point on any analysis he would cease to be an employee of the Respondent.

44. In the absence of any contractual right to the practising certificate being paid for and in the absence in our judgment of the argument of custom and practice having any bearing on the situation in which the Respondent found itself in September 2015, we cannot identify any breach of contract in the Respondents failure to pay for the practising certificate and accordingly that claim must also be dismissed.

45. If follows that all of the Claimant's claims have been dismissed, save for that in relation to holiday pay.

46. If the parties are unable to agree any amount owing in respect of holiday pay within 28 days of this judgment they are invited to apply to the tribunal to list thecae for an oral hearing.

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Employment Judge P Cadney
Dated: 31 March 2017

JUDGMENT SENT TO THE PARTIES ON

3 April 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.