EMPLOYMENT TRIBUNALS

Claimant: **Mr Syed Anwar**

Respondent: **Teleperformance Limited**

Heard at: **North Shields** **On: 20 & 21 September 2018**

Before: **(1) Employment Judge A.M.S. Green**
(2) Ms M Clayton
(3) Mrs A Tern

Representation
Claimant: Mr R Owen – Legal Representative
Respondent: Mr A Crammond - Counsel

RESERVED JUDGMENT

The Unanimous decision of the Tribunal is:

1. The Claimant was unfairly dismissed, and the Respondent shall pay him **£3686.65.** The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

2. The Claimant's claim for breach of contract is upheld. The Respondent shall pay the Claimant **£1028.46**

3. The Claimant's claim for holiday pay is allowed. The Respondent shall pay him **£475.38.**

4. The Claimant's claim for race discrimination is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent as an Assistant Contract Centre Manager from 28 August 2010 until 5 December 2017 when he was summarily dismissed. He is a Pakistani national and a family member of an EEA National as that term is understood by the Immigration (EEA) Regulations 2016, regulation 7(1) (the "2016 Regulations"). The Respondent is an organisation engaged in the provision of contract centres services throughout the world.

The claims and the responses

2. The Claimant presented his claim to the Tribunal on 27 February 2018. He claimed ordinary unfair dismissal, race discrimination, breach of contract (failure to pay notice pay) and failure to pay accrued holiday pay.

3. He claimed that during his employment, he was paid less than his white colleagues who worked at the same level and on the same terms and conditions other than salary. He alleged that this amounted to race discrimination contrary to Equality Act 2010, section 13 ("EqA"). The Respondent denies less favorable treatment. The Respondent justified the dismissal because the Claimant was unable to produce relevant documentation to show that he was entitled to work in the United Kingdom. The Respondent claimed that the Claimant had an ongoing contractual obligation to provide the Respondent with evidence of his eligibility to work in the United Kingdom. In the absence of such evidence, the Respondent claimed that it had a contractual right to terminate the Claimant's employment with immediate effect and/or to suspend him without pay. The Respondent relies on the "some other substantial reason" to justify the dismissal in terms of Employment Rights Act 1996, section 98(1)(b) ("ERA"). The Claimant claimed that he was dismissed without notice after seven years' service and he should have been paid seven weeks' notice pay, together with accrued holiday pay to take into account that period. The Respondent denies those claims.

The issues

4. The Tribunal must determine following issues:

Unfair dismissal

a. What was the reason for the dismissal? The Respondent asserts that it was some other substantial reason, namely the Claimant's inability to provide the relevant documentation to show that he was entitled to live and work in this country.

b. Was the reason to dismiss a fair sanction, that it was within the range of reasonable responses for a reasonable employer in all the circumstances?

c. What steps if any, should the Respondent have taken to explore the Claimant's assertions that he was entitled to live and work in this country, did have the relevant paperwork but was waiting for confirmation from the relevant authorities in respect of renewed visas?

d. Did the Claimant contribute to his dismissal in any way by his own conduct in failing to provide the Respondent with the relevant documentation within a reasonable period of time?

Breach of contract

e. It is not in dispute that the Respondent dismissed the Claimant without notice.

f. Does the Respondent prove that it was entitled to dismiss the Claimant without notice in all the circumstances of the case?

g. To how much notice was the Claimant entitled? It is not disputed that the Claimant worked for the Respondent for seven years and would thus be entitled to 7 weeks' notice.

Accrued holiday pay

h. Was the Claimant paid his full holiday pay entitlement up to and including the effective date of termination? Furthermore, should the Claimant be paid holiday pay to take account of the fact that he should have been dismissed with notice?

Race discrimination

i. Was the Claimant paid less that those colleagues doing the same work, but who were of different colour or racial origin? If so, was the reason why he was paid less because of his colour or racial origin? Does the Claimant prove primary facts from which the Tribunal could infer that the difference was because of the Claimant's colour or racial origin?

<u>Documentation and hearing</u>

5. The parties produced a paginated and indexed hearing bundle. We were provided with additional documents which we admitted into evidence at the hearing. The following people adopted their witness statements and gave oral evidence:

   a. The Claimant;

   b. Laura Henderson – a former colleague of the Claimant;

   c. Kirsti McKernan – employed by the Respondent as a Senior Contract Manager;

   d. Louise Wilson – employed by the Respondent as Operations Director for their two Gateshead sites.

   The representatives made closing submissions.

<u>Basis of our decision</u>

6. We have based our decision on the oral and documentary evidence, the submissions and our records of proceedings. The fact that we have not referred to every document produced by the parties in evidence does not mean that we have not considered them. I also notified the parties and their

representatives that I am an immigration judge and have a detailed understanding of immigration law.

Burden and standard of proof

7. The Claimant must establish his claims for unfair dismissal, breach of contract and holiday pay on a balance of probabilities. Regarding his race discrimination claim, where the Claimant proves facts from which the Tribunal could conclude in the absence of an adequate explanation that the Respondent has unlawfully discriminated against the Claimant (i.e. a prima facie case), the Tribunal must uphold the complaint unless the Respondent proves that it did not discriminate.

Findings of fact

8. We have kept a detailed record of proceedings and do not propose to recite all the oral evidence that we heard. Having considered the evidence and submissions, we make the following findings of fact.

The Claimant's immigration status, his dismissal and his appeal

9. There was no dispute that the Claimant was a family member as that term is understood by the 2016 Regulations. He was granted a family member residence card pursuant to the Immigration (EEA) 2006 Regulations. His card was valid until 13 November 2017 [188]. Speaking as an experienced immigration judge, under EU law his residence card was merely evidence of his underlying right to work in this country by virtue of being a family member of an EEA national exercising Treaty rights. His right to live and work in the United Kingdom is derived from EU law and, in particular, freedom of movement of workers. He was under no general obligation to have a family residence card in order to live and work in this country. The fact that his family member residence card had expired did not mean that he had lost the right to live and work in this country. It is important to understand that his case is fundamentally different to third country nationals who are subject to immigration control and derive their right to live and/or work in this country under the Immigration Rules and the grant of leave to remain or leave to enter. The Claimant was not subject to that regime. It is quite apparent that Respondent did not understand differences between the operation of the EEA regime and the Immigration Rules and because of that, they got themselves into difficulties. For example, they frequently conflated the term "visa" with residence card suggesting they believed that the terms were synonymous. They are not in the context of the 2016 Regulations. They also incorrectly believed that the Claimant was contractually obliged to provide evidence of his entitlement to work on an ongoing basis; he had no such obligation (see our reasons below).

10. The Claimant applied to the Home Office for permanent residence on 21 November 2017. He was entitled to do this under the 2016 Regulations because he had continuously resided in the United Kingdom for at least five years. It is common knowledge that many people are doing this because of

the uncertainties of Brexit. Once a person is granted permanent residence, they can then apply for British citizenship.

11. The Respondent was concerned about whether it could continue to employ the Claimant because it knew that his family residence card was due to run out on 13 November 2013. It had a monitoring system which kept a tally on its employees who were subject to immigration control or who were in this country under the 2016 Regulations. It was a "traffic light system" that would flag up key dates in advance so that HR could monitor these. Ms McKernan explained how it worked when she gave her evidence. She said that the visa tracker was used by HR to track immigration status and where a particular employee was with their application. Information was circulated weekly and fortnightly. It also alerted individuals to provide more information. If a person had an amber warning against them it meant that their visa or residence card was due to expire within the next 3 to 6 months. If a person had a red warning against them it meant that their visa or residence card was due to expire within the next three months. Under cross examination, Ms Kernan admitted that she believed that the Claimant had the right to work in the United Kingdom and there were no restrictions on his staying in this country although she believed that the Respondent required evidence of the right to work. She thought that if the Home Office imposed a penalty it could fine the Respondent. This would also damage the Respondent's reputation and the fact of the fine could be published in a local newspaper. Under cross examination it was put to Ms McKernan that the penalty would only be imposed if the individual employee did not have a right to work. She replied, "we ask for evidence".

12. The Respondent is a large employer with many international employees and it wanted to ensure that it did not contravene immigration law by employing staff who were not entitled to work in this country. It was fully aware of the criminal and civil penalties that would follow from breaking the law. They cannot be criticised for that and it was entirely right and proper that they should operate such a system. The Claimant was one of those employees identified in the system and he was repeatedly reminded that he needed to provide evidence that he was eligible to work in this country.

13. In her evidence, Ms McKernan explained that she had received an email from HR on or around 2 June 2017 telling her that the Claimant's residence card was due for renewal and this was an advisory warning. She emailed the Claimant on 21 June 2017 [109]. The Claimant responded that he would be applying for the card in September or October because he understood that he could only apply one month from the expiry date, but he was going to double check the UKBA website. They spoke again in September and he repeated that he could only apply one month before his current card expired. She stated that the Claimant would have received a visa reminder from HR via the Respondent's online communication on or around 1 September 2017. This would have clearly stated that if he did not provide the required documentation, he could be suspended without pay for 5 days. The maximum period of suspension without pay would be two weeks. It would have also informed him that if he did not provide the relevant documentation during this period, his employment could be terminated.

14. The Claimant had the opportunity to travel to Cork on business between 15 and 16 November 2017. This was after his residence card expired. He

went to the airport, cleared security but was informed by the airline staff that if he travelled to Ireland, he might face difficulties returning to the United Kingdom because his residence card had expired. He did not travel to Cork and he notified Ms McKernan of this on 14 November 2017.

15. On 14 November 2017, the Claimant attended a police station where he was interviewed about his immigration status. Following this, Ms McKernan asked the Claimant to send her documents showing that he was married to an EEA national. He sent her his marriage certificate and his wife's residence card. Ms McKernan thought this was enough to evidence his right to work in the United Kingdom. At this time, the Claimant was not suspended. He was on paid leave to give him time to sort out his immigration status.

16. Ms McKernan messaged the Claimant because she was worried that he had not updated her about his visa situation. He replied confirming that he had booked an appointment at the embassy in London the following Monday and he was going to see his solicitor on the Tuesday regarding his application.

17. Emails passed between Ms McKernan and Dominica Szenejko in HR on 16 November 2017 updating her of the situation [113A]. Ms Szenejko confirmed that the Claimant did not need to renew his residence card to live in the UK, but the Respondent needed proof of his right to work in this country. Ms McKernan referred to Home Office guidance on this and believed that because his residence card had expired, the Claimant needed to provide proof of his right to work in the UK in line with government guidance. The Claimant was unable to do this. She accepted that the Claimant had the right to work but had not provided the necessary proof of that right.

18. Jackie Brown, the Respondent's regional HR manager, advised Ms McKernan that she should immediately suspend the Claimant. Ms McKernan wrote to the Claimant on 17 November 2017 suspending him [118]. He was informed that:

    Your Visa expired on 13/11/17 and we have received no updates, as a result the entitlement to work we have on file for you is no longer valid and continuing to employ you would mean that we are in breach of Home Office guidelines and could receive substantial penalties.

    He was warned that if during the two weeks of his suspension he did not provide proof of his entitlement to work, the Respondent would terminate his employment.

19. The Claimant told Ms McKernan that he had applied for permanent residence on 21 November 2017. Ms McKernan replied stating the the Respondent required official documented proof of his submission via his confirmation letter or email showing his application number. This had to be provided on or before 30 November 2017 [119]. The letter had to be resent the Claimant as he did not initially receive it. Under cross examination Ms McKernan said that she re-sent the letter because she wanted the Claimant to have enough time to deal with what was required in providing the necessary evidence.

20. On 29 November 2017, the Claimant emailed Ms McKernan a copy of UK Visas and Immigration's acknowledgment of receipt of his application [132]. HR performed an employer check, using the case number provided. This resulted in notification that the Home Office would not provide the Respondent with a statutory excuse against a civil penalty if it continued to employ the Claimant [136]. It confirmed that a Certificate of Application had not been issued to the Claimant. It also stated:

    A person claiming to exercise Treaty rights can choose to make an application to the Home Office for a residence document, but they are not required to do so. When such an application is being processed the Home Office issues a Certificate of Application, which provides a statutory excuse against a civil penalty for six months from the date of issue.

    In the absence of a Certificate of Application it will be their responsibility to present an employer with acceptable documents to confirm this. Details of acceptable documents can be found in two lists within the Code of Practice. Please see Preventing Illegal Working Guidance on the Gov.uk web site for further information.

    While the person named above may have a right to reside and work in the UK, the Home Office has not issued a Certificate of Application to provide you with a statutory excuse against a civil penalty.

21. The Claimant did not ask the Respondent to query this with the Home Office and he did not give Ms McKernan any reason to believe that the Respondent or the Home Office had made a mistake.

22. On 1 December 2017, Ms McKernan notified the Claimant that he had to provide the Respondent with the required documentation demonstrating his right to work in the UK [139]. She confirmed that his suspension had been extended to 4 December 2017. She invited him to a meeting on 5 December 2017. If he was unable to provide the required documentation on or before 5 December, the Respondent "could" terminate his employment.

23. The meeting took place on 5 December 2017. The minutes are exhibited in the bundle [141-145]. Despite being notified that he could bring a companion, the Claimant attended the meeting on his own. The Claimant did not provide any documentation proving his right to work. Ms McKernan notified him that she had to terminate his employment. If the Respondent continued to employ the Claimant without a statutory excuse, it ran the risk of a civil penalty. She advised the Claimant of his appeal rights.

24. On 6 December 2017, Ms McKernan wrote to the Claimant notifying him that his employment had been terminated with immediate effect from 5 December 2017. She stated the following, amongst other things:

    Your employment status at Teleperformance is conditional upon you having a right to work in the UK.

Your visa expired on 13/11/17 and you informed us that your new application was submitted on 21/11/17. We asked for proof of right to work from you by 30/11/17 which was extended to 4/12/17.

Thank you for attending the meeting on 5/12/17 at 3pm in Baltic Place.

Prior to this meeting we had repeatedly requested that you provide us with documents required from lists set out in the current Home Office Guide: "An employer's guide to acceptable right to work documents" to satisfy the conditions of your employment with Teleperformance.

…

As at the time of the meeting you were unable to supply us with acceptable proof of your right to work documents, therefore we have made the decision to terminate your employment, effective 5/12/17.

25. The Claimant appealed this decision in a letter dated 11 December 2017 [152-153]. He listed four grounds of appeal:

    a. The correct suspension procedure was not followed.

    b. He was given insufficient opportunity to explain himself.

    c. The decision to suspend and to terminate was not in accordance with the law.

    d. The Respondent did not handle his case with due diligence and portrayed a lack of duty of care towards him.

26. He particularised each of the grounds of appeal. We note the following:

    On 15/11/17, I was informed over the phone by Kirsti McKernan that I am suspended from work and not allowed to attend work because of lack of evidence of my right to work in the UK. Since then Kirsti requested further information/documentation

27. Louise Wilson was appointed the appeal officer and she wrote to the Claimant on 15 December 2017 to schedule his appeal hearing for 20 December 2017 [163]. The hearing took place on 20 December 2017. Despite being offered the right to a companion, the Claimant was not accompanied at the hearing. Minutes of the hearing were kept [165]. We noted under cross examination that this was the first time that Ms Wilson had conducted an appeal. She had not been formally trained to deal with right to work issues. She understood that the issue was not about whether the Claimant had a right to work but if he had provided evidence of his right to work. She understood from HR that the Respondent required evidence which could be provided via the Certificate of Application. Before the appeal, she knew that the Claimant had applied for permanent residence. She knew that he had provided his biometrics data and his application had been acknowledged by the Home Office. She was also aware of the Home Office notification refusing to provide the statutory excuse. She thought this

meant that the Respondent were not protected. She understood this to mean that the Respondent could be fined for employing someone without the correct right to work. However, she also admitted that she knew that Claimant had a continuing right to work. Mr Owen put it to her that she was aware from a legal point of view that the Respondent was not at risk from a penalty because the Claimant had a right to work. She replied that she was not legally qualified. However, she also stated that she had looked at the Home Office website and had spoken to HR and look through the Home Office guidelines, and the ACAS website. She had not contacted the Home Office directly. This was HR's responsibility.

28. The Home Office sent the Claimant a Certificate of Application by letter dated 2 January 2018 [171]. They acknowledged receipt of his application for a permanent residence card. The letter said the following, amongst other things:

> *You are permitted to accept offers of employment in the United Kingdom, or to continue in employment in the United Kingdom, whilst your application is under consideration and until either you are issued with residence documentation or, if your application is refused, until you are appeal rights exhausted.*
>
> *An employer may ask to see this document as evidence of eligibility to work, so you should keep it in a safe place until the application has been decided as it may not be replaced.*
>
> *Note for employers*
>
> *This document may form part of a statutory defence against liability to pay a civil penalty under section 15 of the Immigration, Asylum and Nationality Act 2006 for employing an illegal migrant worker. However, it should only be accepted for this purpose if presented within 6 months of the date of issue and provided can demonstrate that the document has been verified by the Home Office Employer Checking Serv*

29. On 5 January 2018, the Claimant emailed Ms Wilson [173]. He noted that he had yet to receive the official outcome his appeal and he asked her to factor in a screenshot which he attached to the email. He said that he had received the Certificate of Application from the Home Office confirming his entitlement to work in the United Kingdom for a period of six months.

30. Ms Wilson wrote to the Claimant on 5 January 2018 [174]. She confirmed receipt of the letter from the Home Office which he had sent to her in his email of the same date. She went on to say that she would take it into consideration when concluding "whether on 5 December 2017 the termination of his employment was indeed lawful". She also noted that she wished to make sure that her investigation into the points that he raised at his appeal hearing were given due care and attention.

31. On 11 January 2018, Ms Wilson wrote to the Claimant confirming the original decision to dismiss him [175]. She referred to each of the bullet point grounds of appeal that he had relied upon. She found the following:

a. That his right to work evidence was out of date when he was due to travel to Cork. She referred to the fact that the Claimant had informed Ms McKernan that because he was married to an EEA national, he did not require a right to work visa. This was on the advice of his solicitor. However, Ms McKernan had been advised that the Respondent were unable to use evidence of being married to an EEA national has a right to work and an excuse from employing such a person thereby risking a fine of up to £20,000

b. Ms McKernan and had no option but to suspend the Claimant to enable him to provide the requisite evidence.

c. He was suspended between 16 November 2017 and 5 December 2017. This provided him with just less than three weeks or 14 working days to provide the required evidence. Her investigations found that it was usual in such circumstances not to dismiss an employee immediately but to allow them 2 weeks to provide the requisite evidence. The Claimant was given more than two weeks.

d. The Claimant provided a reference number following his application for his work Visa on 21 November 2017. This was provided to the Respondent 28 November 2017 but was insufficient to confirm his application was in progress and the Respondent can no longer continue to employ him. For that reason, the Respondent had no alternative but to take formal proceedings and to consider at a formal meeting whether it could continue to him ploy him without a valid visa to work in the United Kingdom.

e. Regarding the duty of care throughout the matter, Ms Wilson concluded that Ms McKernan took the correct action and quickly once she had been informed of the Claimant’s ordeal of being interrogated about his travel to Ireland. Ms McKernan ensured that the Claimant was given paid holidays to arrange advice and appointments with his solicitor. The Claimant had regular contact throughout this time with Ms McKernan from 16 November 2017 through email and text.

32. Ms Wilson concluded her letter with the following:

Having considered the points raised in the appeal meeting I have decided to uphold the decision made to dismiss you 5 December 2017, and that this decision was lawful at that time as you are unable to provide us with proof of your right to work, giving the business and excuse to continue to employ you. As this is your only stage of appeal I can confirm that there is no further right of appeal.

I would like to add that should your situation change and you wish to apply for a role with the company, as long as you can provide us with the evidence we require to legally employ you, that this matter would not be an obstacle to re-employment. It is noted that you have provided us with a new application reference number, which if you do apply for a role we, like any other employer, we can use this to conduct an ECS check with the Home Office.

Finally, I hope you understand that the actions taken were felt to be in the best interests of the business and yourself at this time.

33. Under cross-examination, Ms Wilson said that she did consider the terms of the Certificate of Application before reaching her decision to uphold the dismissal. However, she understood that the remit of her appeal was limited to the specific grounds that had been identified by the Claimant in his letter of 11 December 2017. At the time when he was dismissed, he had not provided the correct documentation and she believed that the decision to dismiss was correct. She accepted that she could have reversed the decision although she accepted that given the Certificate of Application had been issued, the Respondent was not at risk of a financial penalty.

34. Ms Wilson told me that she understood the Certificate of Application to mean that he had provided the evidence which the Respondent needed and had asked for and that the Respondent was protected.

Race discrimination

35. In his amended particulars of claim [36] the Claimant alleges that he was treated less favourably than his comparator colleagues over five years prior to his dismissal. The treatment was that he was paid less despite being more experienced, having a higher workload, having more departments to manage and having a better performance. The reason for his treatment was his race because he was the only Pakistani and non-white contact centre manager. He identified the following comparators:

    a. Kirsty Fingland;

    b. Daniel Henshaw;

    c. Paul Handyside;

    d. Lucy Kinnon;

    e. Joanne Jones;

    f. Laura Henderson.

36. When the Claimant was dismissed, he was earning £24,720 per year in his role as Assistant Contact Centre Manager based at the Respondent's Gateshead office. He had completed 7 years service when he was dismissed. He was appointed to his role 9 September 2013 and worked 40 hours per week.

37. None of the Respondent's witnesses were cross examined on the Claimant's race claim. There was a paucity of evidence from the Claimant that he was a good performer as claimed. We also note that he never raised a grievance concerning his alleged pay inequality.

38. The Respondent produced a table in its response to the Claimant's further particulars setting out the salaries of the Claimant and his named

comparators going back five years and it was clear that some of his comparators were paid less than the Claimant.

Remedy

39. During his disciplinary hearing, the Claimant accepted that if HR were suggesting that the Respondent needed to terminate his employment that would be fine [146] and that he had jeopardised his own livelihood though his own actions. Furthermore, under cross examination, the Claimant accepted that prior to the meeting on 5 December he had not provided the Respondent with evidence of his entitlement to work and it had been reasonable for the Respondent to conduct the ECS check. He also accepted that it was reasonable for the Respondent to be concerned about the lack of evidence of his entitlement to work and that he understood that he could be dismissed. He also understood that he could not be suspended indefinitely pending proof of his eligibility to work being provided. He was effectively accepting that his failure to provide the necessary information was culpable conduct on his part. He was the author of his own misfortune.

40. On 5 December 2017, the Claimant told Ms McKernan that he had other entrepreneurial ideas that he wanted to pursue, and his wife earned enough money for them to live off. He intended to leave the Respondent to explore other activities. He had established a business to sell things on E-bay called the Subscription Box. He incorporated a company on 13 December 2017 called Urbanity Box Limited. He is the sole director and shareholder. He had also set up a website for the company. In his evidence he said that he intended to leave the Respondent some time in 2018 or 2019. We do not accept this and we think it more likely than not that had a settled intention to pursue his other business activities far sooner (e.g. when his notice would have expired).

41. He attended at least 5 job interviews. He waited to get his documents back from the Home Office before attending interviews. He had received some job offers. One was with British Airways [195] but the start date was wrong. It was on a minimum wage salary. The Citizens Advice Bureau had offered him a position to work on the consumer legislation line on a salary of £17,500 per year. He had been offered a job as an assistant operations manager for a company in South Shields for £20,000 per year. He had been offered another job as a customer service advisor on the minimum wage. He had not taken it because of the start date. He had also signed up to employment agencies and had attended the Job Centre and Manpower. He secured a new position in teleperformance working for a competitor on 7 May 2018. He is paid £30,000 gross per year. It is a six-month fixed term contract. He said that things were going well. The contract might be extended if the client required it. He had not provided any payslips because he did not think he needed to. He was making more money than what he was paid by the Respondent. His wife has applied for Universal Credit. She works.

Applicable Law

Breach of contract

42. Any dismissal by an employer in breach of contract will give rise to an action for wrongful dismissal at common law. In this case, the Claimant asserts that the Respondent has dismissed him with no notice where summary dismissal is not justified. He also claims that the Respondent breached his contract by suspending him without pay. The Respondent asserts that the Claimant committed a fundamental breach of contract by not providing proof of his entitlement to work in this country and it was entitled to terminate his contract of employment without notice.

Unfair dismissal

43. Section 98 ERA indicates how a Tribunal should approach the question of whether a dismissal is fair. There are normally two stages:

    a. first, the employer must show the reason for the dismissal and that it is one of the potentially fair reason is set out in section 98 (1) and (2) ERA;

    b. if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair under section 98 (3A) and (4) ERA. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reasons given.

44. Section 98 (1) (b) ERA provides a potentially fair reason for dismissal: "some other substantial reason". The Respondent relies upon this potentially fair reason in justifying the Claimant's dismissal. This is a catchall category of dismissal. It provides a residual potentially fair reason for dismissing an employee if the reason for the dismissal does not fall within the four specific categories set out in section 98 (2). The employer is required to show only that the substantial reason for dismissal was a potentially fair one. Once the reason has been established, it is up to the Tribunal to decide whether the employer acted reasonably in dismissing for that reason. As in all unfair dismissal claims, a Tribunal will decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt.

45. We are reminded that in **Hounslow London Borough Council v Klusova 2008 ICR, CA**, the Court of Appeal held that an employer's a genuine but mistaken belief in the unlawfulness of a Russian national's continued employment under the Immigration Rules was some other substantial reason for dismissal. The employer's failure to consult the employee over its concerns as to the lawfulness of her employment or to consider Home Office guidance on immigration checks was not so serious as to evidence a lack of a genuine belief in the unlawfulness of her continued employment.

46. We are also reminded that in **Afzal v East London Pizza Ltd t/a Dominos Pizza, UKEAT/0215/17** an employment tribunal was wrong in deciding that the dismissal of an employee – with no right of appeal – for failing to provide evidence of his entitlement to work in the UK was fair because 'there was

nothing to appeal against'. While the employer was justified in urgently dismissing the employee when it did, since it had a genuine belief that his employment was by then illegal, if evidence had been produced upon appeal that the employee was entitled to work at all material times, the employer could immediately have rescinded the dismissal without fear of prosecution or penalty.

47. In **Afzal**, the claimant was from Pakistan and was employed from 2009. He married a European national and acquired time-limited leave to work in the UK, which expired on 12 August 2016. So long as he applied by that date, he was entitled to work while his application for permanent residence was being considered. In both June and July, ELP reminded him to provide evidence that he had made an in-time application and to do so before 11 August to avoid last minute problems. On 12 August, the claimant sent his employer an e-mail which he said contained evidence of the application. However, ELP could not open the attachments. Concerned about their exposure to criminal or civil penalties, ELP sent him notice of dismissal with no right of appeal, which he received on 15 August. Subsequently, satisfactory evidence of A's right to work was presented and ELP offered to re-engage A, although as a new starter (i.e. no continuity of employment or back pay).

48. The employment tribunal found that ELP genuinely believed that the claimant's employment was prohibited by statute (in fact, it wasn't), which therefore amounted to some other substantial reason. It was both reasonable for ELP to hold this belief (given the lack of evidence in this regard) and for it to act decisively on 12 August for fear of exposure to criminal and civil penalties. Whilst it is generally good practice to include a right of appeal, there was in the instant case "nothing to appeal against".

49. The Employment Appeal Tribunal held that in modern employment practice the provision of an appeal against dismissal is virtually universal, but there will be cases where an employment tribunal can conclude that a dismissal was fair despite the absence of an appeal – if in the exceptional circumstances of the case, appeal 'would have been futile [and] could not have altered he decision to dismiss' (per Lord Bridge in **Polkey v AE Dayton Services Ltd**). Here, ELP's genuine belief that A's employment was illegal justified his urgent dismissal but turned out to be wrong. If an appeal had been offered, there were various ways in which A could have established his right to work, because he had made the application in time. Had he done so, there was no reason why A should not have been reinstated.

50. Section 123 (6) ERA provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. We are reminded that in **Nelson v BBC (No. 2) 1980 ICR, CA** the Court of Appeal said that three factors must be satisfied if the Tribunal is to find contributory conduct:

    a. the relevant action must be culpable or blameworthy;

    b. it must have actually caused or contributed to the dismissal;

c. It must be just and equitable to reduce the award by the proportion specified.

51. The Tribunal must consider the issue of contributory fault in any case where it was possible that there was blameworthy conduct on the part of the Claimant. We also remind ourselves that conduct by the employee capable of causing or contributing to dismissal is not limited to actions that amount to breaches of contract or that are a legal in nature. In **Nelson** the court said that it could also include conduct that was perverse or foolish, bloody-minded or unreasonable in all the circumstance. Whether the conduct is unreasonable depends on the facts.

Accrued holiday pay

52. The general rule is that statutory annual leave cannot be replaced by a payment in lieu. This is set out in regulations 13 (9) & 13 A (6) of the Working Time Regulations 1998 ("WTR"). The main exception to this rule arises where the worker is owed outstanding holiday on termination of his or her contract. This is set out in regulations 14 (1) & (2) WTR. Payment in lieu is permitted where the worker's employment is terminated during the leave year and on the termination date, the proportion of statutory annual leave he or she has taken is less than the proportion of the leave year that has expired.

Race discrimination

53. Section 13 (1) of EqA defines direct discrimination as follows: "a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. In this case, the Claimant alleges that he was paid less than his white comparators and he has been discriminated against because of his race and/or colour.

Remedy

54. The Clamant only seeks compensation. As we do not accept that he was discriminated against because of his race/colour, we do not propose to set out the applicable law relating that head of claim. We discuss below the applicable law relating to unfair dismissal and wrongful dismissal.

55. Section 118(1)(a) ERA provides that the Tribunal may award compensation as a basic award. This is calculated in the same way as a statutory redundancy payment and is intended to compensate employees for loss of job security.

56. Section 118(1)(b) ERA is intended to compensate the employee for financial loss suffered as a result of unfair dismissal subject to the statutory maximum £83,682- or one-year's pay, whichever is the lower. There is no formula for calculating a compensatory award other than what the Tribunal considers to be just and equitable.

57. In considering what is just and equitable, the Tribunal normally addresses the following heads:

a. Immediate loss of earnings (i.e. loss between the dismissal and the hearing at which the Tribunal decides on compensation).

b. Future loss of earnings (i.e. estimated loss after the hearing).

c. Expenses incurred because of the dismissal.

d. Loss of statutory employment protection rights. This covers, for example, the fact that an unfairly dismissed employee will be unable to bring another unfair dismissal claim until he or she has had two years' continuous employment in a new job.

e. Loss of pension rights.

58. The employee must provide evidence of his or her loss. The Tribunal is under no duty to take any particular point into account on compensation unless the Claimant produces evidence in support.

59. Having assessed the total loss suffered by the employee, the Tribunal will then consider adjusting that figure. In this case, the potentially relevant adjustments are as follows:

a. Where the employee fails to take reasonable steps to mitigate his or her loss (section 123(4) ERA).

b. Where the Tribunal considers it just and equitable to award a lesser amount that would otherwise be appropriate. This embraces the so-called "Polkey reductions", which apply where the employee would have been dismissed in any event had the procedural failings which rendered the dismissal unfair not occurred (section 123(1) ERA).

c. Where the employee has caused or contributed to his or her dismissal (i.e. is guilty of contributory conduct).

60. We are reminded that in **Digital Equipment Co Ltd v Clements (No.2) 1997 ICR 237, EAT**, the EAT laid down guidelines for the order of deductions. The correct approach is to offset any contractual or *ex gratia* termination payment (including payments in lieu of notice) in order to arrive at the employee's net loss. Sums earned by way of mitigation must be deducted. This can include a deduction for failing to mitigate loss. The Tribunal should then to make any proportionate reduction necessary to reflect contributory fault or in the case of a procedurally unfair dismissal, the chance that the employee would have been dismissed in any event ("Polkey reduction").

61. If a dismissal is both wrongful and unfair, the common practice of the Tribunal is to consider damages for the wrongful dismissal as part of the compensatory award for unfair dismissal. Where an employee's contract has been terminated without notice (as is the case here), the damages period is the equivalent to the period of notice that should have been given by the employer. Once dismissed, the employee is under a duty to mitigate his loss by taking reasonable steps to find another job. Where he or she is successful, the salary and other benefits earned during the damages period

must be deducted from the award of damages. If the employee fails to take reasonable steps to find another job, the money that might have been earned had such steps been taken will be estimated and deducted anyway.

62. The compensatory award for unfair dismissal is deductible from the award for wrongful dismissal. The basic award is probably not deductible as it represents loss of job security and not loss of earnings.

<u>Discussion and findings</u>

Breach of contract

63. To understand the Respondent's rationale for dismissing the Claimant, one must review his contract of employment and associated documents. The Claimant was issued with a contract of employment which he signed on 2 September 2010 [78 & 79]. The contract states, amongst other things

> *This offer is made on terms and conditions set out in this Contract and is subject to the receipt of satisfactory references, evidence of appropriate qualifications and eligibility to work in the UK…*

64. There was no dispute between the parties that the Claimant satisfied this condition of eligibility and commenced employment. When he was cross examined, he was asked what he understood this provision meant. He said that he was required to provide evidence of his eligibility to work in this country at the time his employment started. We agree with the Claimant's interpretation. His offer of employment was conditional, and he satisfied the conditions of the offer. However, we find that this provision cannot be taken to mean that he had an ongoing obligation to prove his eligibility to work in the UK. The condition was relevant only to the commencement of his employment. Its wording is clear and unambiguous.

65. The Respondent believed the Claimant was contractually obliged to provide evidence of his entitlement to work in the UK on an ongoing basis. We were referred to his contract of employment. It says that in addition to his terms and conditions of employment, the Claimant was provided with the "Teleperformance Employee Handbook" (87AA) (the "Handbook").

66. Clause 1.1 of the Handbook provides that it is intended to provide every employee with general information regarding employment matters at the Respondent. It then states "the handbook is non-contractual, subject to change and should be read in conjunction with your terms and conditions" [87AH]. Section 2.1 states, amongst other things:

> *Conditions of your employment include receipt of satisfactory employment references, satisfactory checks where applicable…and confirmation of your ongoing eligibility to work in the UK within the terms offered.*
>
> *As part of immigration terms, Teleperformance have the right to terminate employment immediately if an employee does not have the right to work in the UK or cannot provide evidence of the right to work. This is on the basis that their employment is conditional on having a right to work in the UK, rather than they they have committed*

> *misconduct. In this circumstance, Teleperformance also have the right to suspend the individual without pay if evidence is not provided or forthcoming.*

67. As a matter of general law, we accept that the Respondent would be entitled to terminate the Claimant's employment if he was not eligible to work in the UK. For example, that could arise if his EEA national spouse stopped exercising Treaty rights. Indeed, the Respondent would be committing a criminal offence if it continued to employ him under such circumstances, but this was not the case with the Claimant. He was entitled to work in the United Kingdom because he was a family member of an EEA national exercising Treaty rights. Indeed, the Home Office notification refusing to issue a statutory excuse referred to the fact that family members of EEA nationals exercising Treaty Rights are not required to have a residence card. It was a matter for them if they wanted to apply for one.

68. In his evidence under cross examination that the Claimant thought that the Respondent had the right to terminate his employment if he could not provide evidence of his right to work. Notwithstanding this, it is clear to us that this was a mistaken belief. In fact, later in his evidence, he said that he believed that he always had the right to work. He was, however, well aware that he had jeopardised his livelihood.

69. The Handbook had no contractual force and did not confer on the Respondent the right to terminate the Claimant's employment if he was unable to provide evidence of his right to work in this country nor did it give it the right to suspend the Claimant without pay if evidence of his eligibility to work was not provided or forthcoming.

70. Notwithstanding the limitations of the Handbook, can it be said that the Claimant was contractually obliged to provide evidence of his eligibility to work in this country where that obligation is derived from another source? We fully acknowledge that in an employment relationship there is no requirement for there to be a written contract of employment. Contractual rights and obligations can be express or implied. They can be derived from custom and practice. We also accept that contracts can be varied. We also remind ourselves that under English law, contractual obligations must be supported by consideration to be enforceable. Set against this background, we have not seen any evidence from other sources conferring a contractual obligation on the Claimant to provide proof of his eligibility to work in this country from any other source.

71. The Respondent did not have a contractual right to terminate the Claimant's employment on the grounds that it purported to rely upon. In terminating his contract of employment without notice, the Respondent acted in breach of contract. Furthermore, the Respondent was not entitled to suspend the Claimant for two weeks without pay in purported reliance on the Handbook.

Unfair dismissal

72. On the evidence, we accept that at the date of the dismissal, the Respondent had a genuine but mistaken belief that if it continued to employ the Claimant without proof of his entitlement to work it would break the law. This amounts to some other substantial reason and is, therefore, a

potentially fair reason to dismiss the Claimant. However, we do not believe that a reasonable employer would have dismissed the Claimant because he sent the Certificate of Acceptance to Ms Wilson before she had reached her decision on the appeal. She fully understood its significance: it confirmed his right to work in the United Kingdom. The Claimant had produced the evidence that the Respondent was looking for. Consequently, there was no reason for Ms Wilson to uphold the decision to dismiss. We suspect that she confused herself in what she thought her remit was when considering the appeal. She told us that she limited herself to addressing the specific grounds of appeal set out in the Claimant's letter of 11 December 2017. We believe that she was wrong to do that as the Claimant must have intended her to uphold his appeal when he sent her the Certificate of Acceptance. What other reason would he have for sending her that document?

Breach of contract

73. The Claimant was entitled to be given 7 weeks' notice of termination of employment by the Respondent. He was summarily dismissed by the Respondent on 5 December 2017. The Respondent was not entitled to dismiss the Claimant without notice as the Claimant was not guilty of a repudiatory breach of contract. He was not contractually obliged to provide the Respondent with evidence of his entitlement to work in the United Kingdom. The Respondent was not contractually entitled to suspend the Claimant without pay.

Race discrimination

74. The Claimant has not established that he was paid less than his white comparators as claimed. Indeed, the evidence is that he was paid more than many of them. He was not discriminated against because of his race/colour.

Accrued holiday pay

75. The Claimant is entitled to payment of holiday pay accrued on termination of his employment. This includes his 7-week notice period although he has not particularised how this is to be calculated and we have not calculated the period in our award,

Remedy

76. Given that the Claimant was under no contractual obligation to provide ongoing evidence of his entitlement to work in this country, could it still be said that he contributed to his own dismissal? We believe that he was guilty of blamable conduct. Indeed, in his evidence he admitted this. We find it just and equitable to apply a 50% reduction to his compensatory and basic awards. We also believe that he had a settled intention to leave the Respondent's employment regardless of the issues with his residence card as evidenced by his activities in establishing a company and a website. This was much more than a hobby and must reduce his period of loss. We consider it just and equitable to conclude that his period of loss should be curtailed to 23 January 2018 which was when his notice period expired. We believe that he has not taken reasonable steps to mitigate his loss by delaying taking alternative employment based on his explanation that he was waiting for his documentation from the Home Office or that start dates

or minimum wage jobs were unacceptable to him. He had his Certificate of Application from the Home Office in early January 2018. He could have used this as evidence of his entitlement to work for up to six months from the date of its issue and this would have been adequate comfort for any prospective employer. However, given that his period of loss has been curtailed to 23 January 2018, we have no applied a reduction. We do not think that a Polkey reduction is appropriate in this case because this is not a case of a procedural failure rendering the dismissal unfair. Turning to holiday pay, other than what is claimed in the schedule of loss, we cannot award more than what is claimed as the Claimant has not quantified the loss for his notice period nor provided supporting evidence. We have limited our award to what is claimed. The Claimant has not claimed state benefits. There is no recoupment.

77. We have set out the award of compensation in the following table:

Head of claim	**Amount (£)**
Unfair dismissal – Basic award	3423
Deduction Contributory conduct (50%)	1711.15
Total for basic award	1711.85
Unfair dismissal – compensatory award (includes notice period under wrongful dismissal) – this takes account of the fact that we believe that the Claimant had intended to leave to Respondent on establishing his online business. We have limited future loss to his notice period. Loss of statutory rights	3599.61 350
Deductions	
Failure to mitigate	0
Polkey reduction	0
Failure to follow ACAS Code – this was not a conduct dismissal.	0
Contributory conduct (50%)	1974.80
Total for compensatory award	**1974.80**
Total for unfair dismissal	**3686.65**
Breach of contract – unpaid wages during suspension (2 weeks)	1028.46
Unpaid holiday pay	475.38
Other expenses – not particularized or vouched for	0
Grand total	**5190.49**

Employment Judge A.M.S. Green

Date 10 December 2018

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2500389/2018**

Name of case(s): **Mr S Anwar** v **Teleperformance Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **13 December 2018**

"the calculation day" is: **14 December 2018**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.