EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103884/2018

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Held in Glasgow on 21, 22 and 23 November 2018 (Final Hearing)

Employment Judge: Ian McPherson
Members: Iain MacFarlane
10 **Peter Kelman**

Mr Anatoliy Arkhipov — **Claimant**, **In Person**

15 **Manpower UK Limited** — **Respondents**, **Represented by:** **Mr Alan Sutherland- Solicitor**

20 **WRITTEN REASONS FOR**
JUDGMENT OF THE EMPLOYMENT TRIBUNAL
dated 12 December 2018, and entered in the Register
and copied to parties on 13 December 2018.

25 ## Introduction

1. This case called before us, as a full Tribunal, on the morning of Wednesday, 21 November 2018, for a 3-day Final Hearing for full disposal, including remedy if appropriate, further to a Notice of Final Hearing previously intimated to both parties by the Tribunal dated 24 October 2018.

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2. It had previously called before me, as an Employment Judge sitting alone, on Tuesday, 25 September 2018, for a Case Management Preliminary Hearing, following upon two earlier Preliminary Hearings before other Judges, namely on 12 July 2018 before Employment Judge Muriel Robison, and on 7 August
35 2018 before Employment Judge Jane Garvie.

3. At this Final Hearing, we had, within our case papers, my written Note and Orders dated 28 September 2018, issued to both parties under cover of a letter from the Tribunal dated 5 October 2018, as also the **Rule 52** Judgment that I signed, on 28 September 2018, dismissing two parts of the claim, which the claimant had withdrawn, being direct discrimination because of the claimant's race / nationality, and discrimination by association by reason of the claimant's wife's disability.

Claim and Response

4. By ET1 claim form, presented by the claimant acting on his own behalf, on 9 April 2018, following ACAS early conciliation between 1 and 10 March 2018, the claimant complained of being unfairly dismissed and unlawfully discriminated against by the respondents.

5. The claimant indicated that he sought reinstatement to his old job, as a Business Development Representative, which he stated had ended on 19 January 2018, and compensation from the respondents for "***forced unfair dismissal from March 5, 2018***". We pause to note and record that it is not clear to us why the claimant cites that later date, when the principal act he complains of is his alleged dismissal by the respondents on 19 January 2018.

6. His ET1 claim form was accepted by the Tribunal, on 11 April 2018, and a copy served on the respondents on that date for reply by 9 May 2018. Along with his ET1 claim form, the claimant included a six-page typewritten witness statement, and he referred to 16 documents in a Bundle.

7. On 9 May 2018, Ms. Helen Donnelly, solicitor with Navigator Employment Law Limited, Edinburgh, lodged an ET3 response on behalf of the respondents resisting the claim.

8. The respondents, who do not admit that the claimant was dismissed, say that his employment by them is continuing, although not on assignment, and they state that the claimant has not claimed his laid off / short time ("LOST")

payment. Further, the respondents deny that he was unfairly dismissed, and also deny that they have unlawfully discriminated against the claimant as alleged, or at all.

Final Hearing before this Tribunal

9. At this Final Hearing, which commenced at around 12.42pm, on the afternoon of Wednesday, 21 November 2018, the Tribunal having spent the morning session, in chambers, from 10.00am, reading the 3 witness statements previously lodged by parties, the claimant appeared, unaccompanied, and continuing to act, as previously, as an unrepresented, party litigant.

10. He confirmed to us that he was the only witness being led on the claimant's behalf, and that his evidence was set forth in his previously intimated witness statements. These were his witness statement, attached to his ET1 claim form, a document entitled "***Thesis***" presented to Judge Garvie on 7 August 2018, and his further witness statement dated 21 November 2018. The latter was a rewrite of the original. He invited us to have regard to all 3 of his witness statements before the Tribunal.

11. The respondents were represented by Mr Alan Sutherland, solicitor with Navigator Employment Law Limited, Edinburgh, appearing in place of his colleague, Ms Helen Donnelly, who had appeared at the three earlier Hearings at the Tribunal. We were advised by him that Ms Donnelly was unwell with bronchitis.

12. Mr Sutherland was accompanied by Ms Megan Corless, Employee Relations Adviser with the respondents, who was there to instruct the respondents' solicitor, and observe the proceedings. She was not there as a witness for the respondents.

13. We were advised that the respondents were to lead two witnesses, Ms Colleen McCaffrey, HR Consultant, and Ms Debbie Meechan, HR Business Partner, but not Mr Mark Scanlan, Head of Telemarketing. The respondents

had previously intimated witness statements from their two identified witnesses. Neither party had applied to the Tribunal for a Witness Order in respect of Mr Scanlan.

5 14. We had a set of 60 documents in a large Bundle, entitled "***List of Productions***", lodged by the respondents, running to some 337 pages, and it included the claimant's updated Schedule of Loss, the respondents' updated Counter Schedule, and parties' List of Issues. We were advised by Mr Sutherland that it was intended as a Joint Bundle.

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15. The latter (being document 58, at pages 306/309) was not an agreed list, but an amalgamation of issues identified by both parties. It ran to 3 type-written pages, and, suffice it to say here, we did not find it to be user friendly for the Tribunal. We return to it later, when considering "***Issues before the***
15 ***Tribunal."***

16. Meantime, we note ***,*** as explained in Ms Donnelly's email to the Tribunal, on 14 November 2018, forwarding the List of Issues to the Tribunal, in compliance with a case management order made by me on 28 September
20 2108, the claimant's issues are noted as (C) , and the respondents' as (R), on the basis that Ms Donnelly explained the claimant was not open to discussion, and the respondents regard some of the issues raised as not relevant to the applicable legal tests and citing remedies which are not available in this case.

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17. The claimant lodged his own purple A4 ring binder folder, containing various documents, being his witness statement dated 21 November 2018, his reply of 6 September 2018 to the respondents' response to Judge Garvie's Questions Order, and his skeleton argument for this Tribunal, and his list of
30 authorities, together with his lists of questions for Ms McCaffrey and Ms Meechan.

18. From our pre-reading of the witness statements, and documents included in the respondents' Bundle, at the start of the proceedings, the presiding Employment Judge enquired whether the respondents intended leading any more witnesses, in particular enquiring about Ms Jillian McMenemy, who had issued the grievance response of 25 May 2018, at page 173A of the Bundle, and Ms Ismay McPherson, who had issued the Mandatory Reconsideration (Appeal) outcome of 20 August 2018, at pages 179A/C of the Bundle..

19. In response, Mr Sutherland stated that the respondents were leading only the two identified witnesses, whose witness statements had been lodged with the Tribunal, and that we should take the respondents' Bundle documents as read, even if there was no witness to speak to them, as they form part of the respondents' evidence to the Tribunal, even if not the best evidence.

20. Mr Sutherland invited the Tribunal to take account of theses decision letters, even although the respondents are not leading those decision makers in evidence before the Tribunal.

21. When asked about his estimated time for cross-examination of the claimant, which Ms Donnelly had previously expected to conclude on the afternoon of the first day, Mr Sutherland stated that that was about right, and he hoped to finish with the claimant within a couple of hours.

22. In the event, his cross-examination did not conclude on day 1, and he estimated a further 2 to 3 hours on day 2. He requested, and we allowed, additional time for him to conclude his cross-examination of the claimant.

23. The claimant stated that he still estimated up to one hour to cross-examine each of Ms McCaffrey and Ms Meechan, and that he sought to cross-examine them, having read their previously intimated witness statements, on the basis of the questions he had already drafted, and included in his folder lodged with the Tribunal, and copy given to Mr Sutherland for the respondents.

24. Mr Sutherland gave an undertaking to the Tribunal that he would not look at the claimant's pre-drafted lists of questions, nor disclose them to his two witnesses.

5 25. Given the number of questions to be posed to each of these two witnesses, the presiding Judge advised the claimant that if he needed more than his estimated one-hour for cross-examination, then he could invite the Tribunal to allow him additional time, having regard to **Rules 2 and 5 of the Employment Tribunals Rules of Procedure 2013.**

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26. The claimant requested, and we allowed, short extensions of time for him to conclude his cross-examination of these two witnesses for the respondents.

27. In the course of the Final Hearing, we allowed an additional page to be added
15 to the respondents' Bundle, it being jointly agreed to do so, by both parties, to include, as document 41a, at page 215a, the respondents' P60 end of year certificate 2017/18 issued to the claimant for the tax year to 5 April 2018.

28. In writing up our Judgment, we also noted that the Bundle is missing two other
20 documents intimated by the claimant, on 13 and 14 November 2018, to Ms Donnelly and the Tribunal, being copy P45 from PTW International dated 26 September 2018, confirming him leaving their employment, on 2 September 2018, and letter of 7 September 2018 from the DWP (Job Centre Plus) to the claimant, confirming payment of JSA from 4 September 2018. We have taken
25 these additional documents into account in making our findings in fact.

29. Further, we note and record that, at the start of proceedings on day 3, the presiding Judge raised with both parties' the claimant's e-mail of 22 November 2018 at 01:13, which had only been handed to the Judge by the
30 Tribunal clerk, after the close of proceedings on day 2. Mr Sutherland confirmed that the respondents were satisfied that the additional documents, in Ms Donnelly's email of 2 October 2018 to the claimant, marked "***Final bundle 3 of 3",*** were all included in the respondents' Bundle, lodged with the

Tribunal, with the exception of document 22a, at pages 120a/e, being the claimant's appeal letter of 7 February 2018, which had not been duplicated, on account of it already being in the Bundle as document 16, at pages 97 to 101.

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30. Having had an adjournment for Mr Sutherland to take his client's instructions, on point 2 of the claimant's email to the Tribunal of 2 November 2018 (not copied to the respondents' representative, as it should have been under **Rule 92**), Mr Sutherland confirmed as correct the claimant's statement that the first time he saw "t***he protocol of the meeting with Mr Scanlan***" of January 19, 2018, was when Ms Donnelly emailed it to him on 2 October 2018 as part of the additional documents for the Bundle, as document 15a / pages 96a/c.

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31. Further, we also note and record, at this point, that on day 3, as part of the claimant's closing submissions to the Tribunal, he referred to the fact that the respondents' Bundle was incomplete, as it did not include Judge Garvie's written Note and Orders of 8 August 2018, as issued to parties, on 14 August 2018.

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32. The Judge acknowledged that he had himself identified that omission, as also the failure to include the **Rule 52** part-withdrawal dismissal Judgment signed by him on 28 September 2018, but he re-assured the claimant that while not in the respondents' Bundle, the Tribunal had access to them in the casefile, and so no prejudice was caused to either party by their omission from the respondents' Bundle.

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Evidence heard at this Final Hearing

33. As previously ordered at the Case Management Preliminary Hearing, held on 28 September 2018, written case management orders had thereafter been issued on 5 October 2018 for compliance by both parties in advance of this Final Hearing. These included a ruling as to the running order of parties' evidence, claimant first, then respondents, as both dismissal and discrimination were denied by the respondents, and about previously

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exchanged witness statements being taken as read, and so not requiring oral evidence in chief.

34. We heard sworn evidence from the following persons:

(1) **Mr Anatoliy Arkhipov: Claimant**.

(2) **Ms Colleen McCaffrey: Respondents' HR Consultant.**

(3) **Ms Debbie Meechan: Respondents' HR Business Partner**.

Findings in Fact

35. We have not sought to set out every detail of the evidence which we heard, nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are set out below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

36. On the basis of the sworn evidence heard from the various witnesses led before us over the course of this Final Hearing, and the various documents included in the Bundle of Documents provided to us, the Tribunal has found the following essential facts established: -

(i) The respondents are an employment business which places its employees on assignments with various clients. According to the ET3 response, the respondents employ around 25,000 people in Great Britain, of which 32 are employed at the place where the claimant formerly worked, at Micro Focus, Erskine Ferry Road, Bishopton, Renfrewshire.

(ii) The claimant commenced employment with the respondents on 15 June 2015. Initially, he was placed on assignment as a Business

Development Advisor as part of the Russian Marketing and Sales team with Hewlett Packard Enterprises.

(iii) Hewlett Packard Enterprises and Micro Focus merged in September 2017. From November 2017, the claimant's assignment was with Micro Focus as a Business Development Representative for Russia and the Commonwealth of Independent States in the telemarketing department.

(iv) According to the ET3 response, the claimant's monthly gross wages before tax were £2,117.73 (and not £2012, as per the ET1), and his monthly net, normal take home pay was £1713.53 (and not £1642, as per the ET1). That equates to gross weekly pay of £488.70, and net weekly pay of £395.43.

(v) As at the end of his assignment with Micro Focus, which ended on 19 January 2018, the respondents paid the claimant, on or around 31 January 2018, the sum of **£2,215.38**, representing pay in lieu of notice of £2,076.92, and holiday pay of £138.46. Copy of the claimant's final pay advice was produced to the Tribunal.

(vi) The 6 weeks' notice paid to the claimant was in accordance with the variation document governing his assignment, and it was not a payment to terminate his employment with the respondents. Holiday pay was paid so that the respondents could recharge the client accordingly, following the end of the claimant's assignment to them.

(vii) No P45 was issued to the claimant by the respondents, and at the end of the tax year 2017/18, he was issued with his P60 certificate from the respondents, as still being employed by them at that time.

(viii) As at the date of this Final Hearing, the Tribunal finds that the claimant was and remains an employee of the respondents. While the ET3 response (at section 4.1) referred to the claimant's employment ending

on "***31/12/2018***", neither party presented any evidence to the Tribunal at this Final Hearing to vouch that date as the effective date of the claimant's termination of employment with the respondents.

5 (ix) While the claimant asserts that his employment with the respondents terminated on 19 January 2018, the Tribunal finds that the claimant was not dismissed by the respondents, on 19 January 2018, as alleged, or at all, following the end of his assignment within Micro Focus.

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(x) As at the close of the Final Hearing before this Tribunal, the claimant remained an employee of the respondents, he not having resigned from their employment, and they not having dismissed him from their employment.

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(xi) Termination of an assignment does not equate to the termination of an employee's employment with the respondents, and this distinction is explained in the respondents' Employee Handbook, and it was emphasised to the claimant in writing at the time of the ending of his

20 assignment with Micro Focus.

(xii) At this Final Hearing, the respondents denied that they had dismissed the claimant. We find that he was not dismissed by them. The claimant remained employed by the respondents, although not an

25 assignment, and he had not claimed his LOST payment.

(xiii) The respondents' Employee Handbook, in a section entitled "***End of Assignment or Termination of Employment?"*** states as follows: ***"Because of the nature of working with Manpower it is important***

30 ***to understand that there is a difference between your assignment with a client being terminated and your employment with Manpower being terminated. An assignment ending does not mean your employment has come to an end unless there is a fair reason for us to bring your employment to an end."***

(xiv) The claimant's employment status with the respondents was explained to him on various occasions on and after 19 January 2018, but the claimant appears to have failed to understand the distinction between end of assignment, and termination of employment.

(xv) Up until the claimant received the outcome of his grievance appeal to the respondents, on or about 20 August 2018, the claimant continued to interact with the respondents, indicating to them that he did not truly believe that he had been dismissed from their employment on 19 January 2018, or at all.

(xvi) On 12 January 2018, Jennifer Anderson, EMEA Demand Generation Leader at Micro Focus sent an email to Mark Scanlan, the respondent's head of telemarketing, stating that the Russian telemarketing team had lost all confidence in the claimant, and they had requested his immediate removal from the service. Ms Anderson expressed a deep concern that the service was at risk from being removed from Erskine and offered to a third party in Russia.

(xvii) Further, Ms Anderson set out the issues that the Russian team had with the claimant, stating that the respondents had attempted to address them in the past but to no avail. She explained that this had the effect of irreparably damaging the claimant's reputation and so she had no alternative but to request his removal.

(xviii) On 19 January 2018, the claimant attended a meeting with Mark Scanlan and Colleen McCaffery, an HR Consultant with the Respondents. At this meeting, the claimant was informed that his assignment with Micro Focus was ending with immediate effect.

(xix) The reasons given for this decision were as follows: -

"The Micro Focus stakeholder has lost confidence in your ability to do the role and have requested your removal from the assignment. This is due to:

- ***creating your own campaigns without permission from sales or marketing.***
- ***consistently ignoring requests not to contact strategic customers (referred to sales and marketing as "black list")***
- ***contacting partners to request assessment of "HPE / Micro Focus employees' performance."***

(xx) It was explained to the claimant that the problem arising from these criticisms had been that the Russian Marketing and Sales Team had stated that they may remove business from the respondents unless the claimant was removed from the assignment.

(xxi) It was further explained to the claimant that he would remain an employee of the respondents and that alternative work would be sought. The claimant advised that he wanted to remain working in Erskine and that he would be interested in another role within the Inside Sales section of the respondents' business, and he advised that he would send over his CV.

(xxii) In an email sent on the same day as this meeting, 19 January 2018, Colleen McCaffery, HR consultant, confirmed to the claimant that he remained employed with the respondents and he was currently on their "***Laid-Off Short Time process***" ("***LOST***"). She also directed the claimant to the respondents' Facebook page which contained their vacancies.

(xxiii) On 23 January 2018, the claimant applied for the job of Inside Partner Business Manager. While on assignment with Micro Focus, the claimant had communicated entirely in Russian. As this was an

application for an English-speaking role, the claimant had to undergo an English language test. This test is applied to all applicants for whom English is not their first language when applying for English speaking roles within the respondent's business.

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(xxiv) The claimant was tested via roleplay and a written exercise. For the roleplay, the claimant scored 5 / 6 out of a maximum of 9, which meant his English language skills were classed as ***"modest***". This score fell below the minimum requirement of language proficiency to work in an English-speaking role within Inside Sales, which was 8 out of 9 or "***very good".***

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(xxv) For the written exercise, the claimant scored 13 out of 20, again lower than the minimum requirement which was 16 out of 20. Due to these scores, the claimant was marked as unsuccessful in his test and his application was not progressed. This was communicated to him by Laura Christie, Recruitment Consultant, via email on 24 January 2018.

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(xxvi) On 30 January 2018, the claimant wrote to Colleen McCaffery stating that he was still searching for jobs and pointed out that he had submitted applications. He said he had submitted one for the role of Sales Support Agent within Inside Sales and asked her to consider his application.

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(xxvii) On 2 February 2018, Colleen McCaffery responded to the claimant, stating that as he had not met the minimum requirements to apply for any English-speaking roles within Inside Sales, his application would not proceed further, but she encouraged him to apply for other suitable roles.

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(xxviii) Thereafter, on 7 February 2018, the claimant submitted a letter which he entitled "***Appeal"***. He stated that he believed he had been dismissed and he outlined why he felt this was unfair. Principally, the claimant stated that he believed that Mark Scanlan had made the

decision to “***dismiss him***”, and that he had done so for the sake of “***personal ambitions and preferences***”.

(xxix) Applying to Ms. McCaffery’s email of 2 February 2018, the claimant responded on 20 February 2018, stating that her refusal to consider his application due to insufficient English forced him to ask the question as to whether he had been dismissed or made redundant. Additionally, he wanted to know who to write to in order to appeal the decision.

(xxx) On 21 February 2018, Colleen McCaffery responded by clarifying that the claimant was and remained an employee of the respondents and accordingly, if he did have any issues to raise with the respondents, they would deal with them. She then went on to provide an extensive summary and explanation of events so far.

(xxxi) In particular, Ms McCaffery referred to section 1.2 of the claimant’s terms and conditions which states: ***“by reason of the relationship between Manpower and its Clients, the Client may, of its own volition, ask at any time that you be removed from your assignment.”***

(xxxii) She expressed her regret that the respondents were unable to place the claimant in a role with Inside Sales, but the high level of competency in English required for the role meant that he was not suitable.

(xxxiii) Further, Ms McCaffery stated that she had made contacts in the wider network of the respondents but at present no suitable roles were available.

(xxxiv) She stated that she would continue to liaise with the network to find suitable employment and finally she explained that if this proved unsuccessful the claimant would be eligible to claim a payment, equivalent to a statutory redundancy payment, pursuant to the

Employment Rights Act's layoff and short-time working provisions (***LOST***). She offered to meet with the claimant to explain these rights further.

5 (xxxv) Thereafter, on 23 February 2018, the claimant wrote to Colleen McCaffery expressing that he felt he had been made redundant unfairly.

(xxxvi) On 27 February 2018, Colleen McCaffery emailed Debbie Meechan, 10 HR Business Partner for the respondents, making enquiries as to whether there were any suitable roles for the claimant. She also emailed the claimant on the same day to say that she had found no suitable roles so far, but she was still searching and again directed him to a link where vacancies were listed.

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(xxxvii) The claimant responded to Ms McCaffery's email on 28 February 2018, stating that he had looked at the vacancies and applied for the role of Partner Business Manager as part of Inside Sales. Ms McCaffery responded via email that same date, repeating that the 20 claimant had not passed the language competencies for roles in Inside Sales and so his application could not be progressed.

(xxxviii) On 1 March 2018, Debbie Meechan forwarded the claimant's CV to a colleague, Sharon Dunn, an HR consultant, and on 6 March 2018, 25 Sharon Dunn emailed a response to Ms Meechan stating that she had spoken to the claimant about a role based in Greenock.

(xxxix) However, the claimant had stated that he was not interested in the job because the salary was too low, and he wanted a position which paid 30 £27,000. Sharon Dunn confirmed that she had said that she would let him know if something arose.

(xl) The claimant was invited by the respondents to attend a grievance hearing on 13 March 2018. He attended the meeting, which was

chaired by Jillian McMenemy, Contract Manager. At this meeting, the claimant elaborated on his complaint that he had been dismissed unfairly and made redundant.

(xli) However, throughout the course of the grievance hearing, the claimant made no reference to any discriminatory or potential discriminatory reason as to why he had been made redundant as he thought. The claimant's assertions were that the decision was unfair based on the fact that he had always been a strong performer, and this had not been taken into consideration.

(xlii) Jillian McMenemy explained to the claimant that he had not been dismissed or made redundant, and she explained his eligibility to claim a LOST payment which is the payment equal to a statutory redundancy payment to any employee placed on short time working for a required length of time.

(xliii) The claimant said he did not want that LOST payment because then he would be admitting he was redundant. Although informed regularly of his entitlement to a LOST payment, the claimant chose not to take that payment from the respondents.

(xliv) Ms McMenemy's grievance outcome response was issued to the claimant by letter dated 25 May 2018, a copy of which was produced to the Tribunal.

(xlv) Thereafter, the claimant sought to appeal that grievance decision. Ultimately, that appeal was unsuccessful, and there was produced to the Tribunal a copy of Ms Ismay McPherson's mandatory reconsideration (appeal) outcome letter of 20 August 2018.

(xlvi) At this Final Hearing, the claimant asserted that he had made every effort to mitigate his losses. In his updated Schedule of Loss, he spoke of 13 applications to the respondents, all of which were denied,

and that he had not received any formal offer of alternative employment from the respondents.

5 (xlvii) Further, despite attending the Job Centre weekly, the claimant spoke of being unable to find another permanent job. In March 2018, the respondents offered the claimant an assignment to another job but, as it was at a salary of £16,000, the claimant declined to accept that offer of assignment.

10 (xlviii) The claimant obtained temporary employment with Pole to Win UK Limited from 18 June 2018 until 2 September 2018, for which he received total remuneration of £5,725.57. Although he found himself that alternative employment, the claimant did not then resign from the respondents' employment, and he continued on the respondents' 15 books as a zero-hours employee, without having any entitlement to receive pay or work from the respondents.

(xlix) From time to time, the claimant was in receipt of State benefits – Jobseekers Allowance from 19 March 2018 to 19 June 2018, and 20 again from 4 September 2018 until 24 September 2018, but the DWP letter produced at page 288 of the Bundle refers to Jobseekers Allowance not being available to the claimant from 25 September 2018, due to his National Insurance contributions running out.

25 (l) On 13 November 2018, the claimant lodged an updated Schedule of Loss, copy produced to the Tribunal at pages 300 to 302 of the Bundle, as follows:

SCHEDULE OF LOSS (Update)

30 *The calculation of losses and compensation was made without deduction taxes and obligatory payments of national insurance contribution and based on Chapter II Remedies for unfair dismissal, ERA 1996.*

UNFAIR DISMISSAL and DISCRIMINATION

BASIC AWARD (Section 119 Basic award. ERA 1996)

Effective Date of Termination (EDT)	*19.01.2018*
Age at EDT	*58*
Number of years' service at EDT	*2 years 7 months*
Date of hearing: 21-23 November 2018	
Statutory week's pay	*£ 489.00*
(6 weeks notes in accordance with variation & SED + 3 weeks by the law) x £489.00 per week	***£ 4,401.00***

5 ***COMPENSATORY AWARD (Section 123 Compensatory award. ERA 1996)***

Claimant made every effort to mitigate his losses. Thirteen applications for work were submitted to the Respondent. However, Respondent impeded their consideration, has undertaken discriminatory actions for rejection and all
10 *applications were denied. Neither the contract nor the offer to work were not provided from Respondent side. More than, Claimant has not received any one formal offer of alternative employment from Respondent.*

Claimant is still seeking for a work and had only 10 weeks temporary fixed term work
15 *in June – August 2018 but have been unable to find a permanent job.*

PAST LOSSES

Gross monthly pay (GMP): £2117.73
20 *Gross weekly pay (GWP): £529.43*

Loss of earnings
No. of weeks from EDT to date of hearing: 44 weeks
44 x £529.43 = £23,294.92

Less:

Income received (ref C's P45 for June - September 2018)

10 weeks temporary work £5,725.57

JSA 19.03.2018 – 19.06.2018: £772.78

JSA 04.09.2018 – 21.11.2018 (11 weeks x 73.10): £804.10

Less Total £ 7,302.45

Total past loss: £23,294.92 - £ 7,302.45 = £15,992.47

Job seeking expenses

I attend the Job centre weekly for which my travel costs are £1.50. I have attended four job interviews, which incurred travel expenses of £15.00. I have also incurred expenses for buying local newspapers and for postage costs. I wish to claim a sum of £50 as an estimate of these losses. If needed, I can provide full details of my expenses. ***£50.00***

FUTURE LOSSES

I have an ongoing loss of £2,117.73 per month. I estimate that this loss will continue for a period of 6 months. Although I am a skilled employee, the local job market is difficult and I am unable to travel extensive distances to work because I have to care for my disabled wife in the evenings. The average period of unemployment for a skilled worker in my area is 7 months.

TOTAL FUTURE LOSS (6 months x £2,117.73)	***£12,706.38***

LOSS OF SATUTORY RIGHTS (sic)

I will have to work two years to regain protection from unfair dismissal and I submit it would be appropriate to award £500 to reflect my loss of statutory rights	***£500.00***

TOTAL COMPENSATORY AWARD ***(£15,992.47 + £50.00 + £12,706.38 + £500.00)***	***£29,248.85***
TOTAL LOSSES ***(£ 4,401.00 + £29,248.85)***	***£ 33,649.85***

AWARD FOR FAILURE TO PROVIDE REASONS FOR TERMINATION OF CONTRACT & ACAS codes

5 *Claimant was not provided with a written statement termination of contract and terms and conditions of employment as required by Section 1 of the Employment Rights Act 1996.*
The Respondent did not provided a written statement and failure to follow the ACAS code.
10 *I argue that an increase of 20% should be made for increment the compensatory award for the Respondent's failure to follow their own Rules and ACAS Code of Practice.*

TOTAL INCREASE	*£ 6,729.97*
TOTAL AWARD (INCLUDING UPLIFT 20%)	*£ 40,379.82*

15 ***NOTICE PAY***
I have been payed PILON and HOLIDAY PAY at my last working month (January 2018)

PILON	*£ 2,076.92*
HOLIDAY PAY	*£ 138.46*
	£ 2,215.38

Based on 52 working weeks in 2018
20 ***TOTAL GROSS PAY CLAIM for UNFAIR DISMISSAL and DISCRIMINATION by this case £ 38,164.44***
Net Pay = (Gross Pay - Total Deductions) in this case £ 30,770.00

(li) The claimant enclosed with that updated Schedule of Loss a copy of his P45 from Pole to Win UK Ltd, dated 26 September 2018, vouching his leaving date of 2 September 2018, and total pay earned of £5,725.57.

(lii) While that updated Schedule of Loss included a claim for an award for the respondents' asserted failure to provide him with a written statement of terms and conditions of employment, as required by **Section 1 of the Employment Rights Act 1996**, in the course of his oral closing submissions to the Tribunal, the claimant accepted that his ET1 claim form had indicated no such head of claim, and he clarified to the Tribunal that he was not seeking leave of the Tribunal to make an application to amend his ET1 claim form to include such a head of claim.

(liii) On 14 November 2018, the respondents lodged a Counter Schedule, copy produced to the Tribunal at pages 303 to 305 of the Bundle, as follows:

Respondent's Counter schedule as at 14 November 2018

Gross yearly salary: £25,412.76
Gross monthly pay (GMP): £2,117.73
Gross weekly pay (GWP): £488.70
Net monthly pay (NMP): £1,713.53
Net weekly pay (NWP): £395.43
Date of commencement of employment: 15.06.2015
Date of termination of employment (EDT) (if found to be dismissed): 19.01.2018
Length of service: 2 years 7 months
Age at termination: 58 years
Date of hearing: 21-23 November 2018

Basic award:

Gross weekly pay: £488.70
2 (full years' service) x
£488.70 x 1.5 (multiplier for 41+ yrs) =
Basic award: ***£1,466.10***

Compensatory Award
(The Claimant has calculated his compensatory award on the basis of gross income. Net income is applicable)

Past Losses:
No. of weeks from EDT to date of hearing: 44 weeks
44 x £395.43 = £17,398.92
Less:
Income received (ref C's payslips for July (£19.74.89 and August 2018 (1916.12) and P45)
= £5,725.57
JSA 19.03.2018 – 19.06.2018 = £772.78
JSA 04.09.2018 – 21.11.2018 = £804.10*
Payment for notice of termination of assignment: £2,717.35
Payment for holiday pay: £138.46
£17,398.92 – £5,725.57 – £772.78 - £804.10 - £2,717.35 - £138.46 =*
Total past loss: £7,240.66

Future Loss:
24 weeks x £395.43 = £9,490.32 (the Respondent disputes that the period is as lengthy as this. This calculation is based on the Claimant's own estimate)
*Less 24 x £73.10 JSA available to be claimed= £1,754.40**

Total future loss: £7,735.92

Total actual compensatory losses as claimed (£7,240.66 + £7,735.92): £14,976.58

5

Claim total:

Basic (£1466.10) + Compensatory sums (£14,976.58) = £16,442.68

Mitigation

10 *The Claimant failed to mitigate his losses by refusing an assignment offered to him in March 2018, This role had a salary of £16,000 (NWP £274.63)*

No. of weeks since April 2018 (approximate commencement of proposed new role to date of hearing) 34

15 *34 x £274.63 =* ***£9,337.42***

No of weeks C claims as period of future loss = 24

24 x £274.63 = ***£6,591.12***

Total amount by which Claimant could have mitigated losses (past and future): £15,928.54

20 *Earnings and JSA claimed (or available for claim) in period of loss claimed:*

£5,725.57 (earnings) + £772.78 (JSA) + £804.10 (JSA) + £1,754.40* (future JSA) = £9,056.40 (income)*

25 ***Compensatory sums (£14,976.58) discounting subtractions for income (£9,056.40) = £24,032.98***

Total Losses: £24,032.98 - £15,928.54 = £8,050.44

30 ***Claim total***

Basic (£1466.10) + Compensation (£8,050.44): £9,516.54

This loss schedule assumes the Claimant has and will claim the benefits available to him but the Respondent has not yet received vouching for all of the relevant periods of past loss does not assume claims will be made in future.

5

**Page 288 of the bundle of productions consists of a letter which states that JSA will not be available to the Claimant from 25 September 2018 due to his NI Contributions running out. We would ask the Claimant to provide any documentation he has which updates this status.*

10

The Respondent also does not accept that it will take the Claimant as much as a further 24 weeks to obtain new work so the sums claimed for future loss are subject to dispute.

15 **Tribunal's Assessment of the Evidence**

37. In considering the evidence led before the Tribunal, we had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the Bundle of Documents lodged and used at this Final Hearing, which evidence and our
20 assessment we now set out in the following sub paragraphs: -

(1) Mr Anatoliy Arkhipov: Claimant.

(a) As per the case management orders made by the presiding Employment Judge, at the Case Management Preliminary Hearing held on 25 September 2018, it had been ordered that,
25 by joint agreement of both parties, and in terms of **rule 43 of the Employment Tribunal Rules of Procedure 2013**, witness statements for the claimant and the respondents' witnesses would stand as their evidence in chief.

(b) It was further ordered that witnesses would not be required to
30 read their witness statement aloud to the Tribunal, but their oral evidence would proceed, straight after the administration of the oath or affirmation, and them confirming it was their witness

statement, to cross-examination by the other party's representative, and questions by the Tribunal in the usual way.

(c) Along with the documents referred to therein, the Tribunal pre-read the claimant's witness statement attached to his ET1, as reproduced at pages 14 to 19 of the Bundle, as also his ***"THESIS"*** of 7 August 2018, to Employment Judge Garvie, at pages 77a-f of the Bundle, and his 7 page, 46 paragraph witness statement dated 21 November 2018, included as part of his purple A4 ring binder folder produced to us at the start of this Final Hearing.

(d) The claimant's evidence started at around 2.17pm on the afternoon of Wednesday, 21 November 2018, when he was sworn, and confirmed that he had no need to correct anything in his witness statement before the Tribunal. Aged 59, the claimant advised the Tribunal that he is of Russian origin, having been born in the Soviet Union, but he has held a UK passport since 2011. His first language is Russian.

(e) The claimant spoke of feeling ***"some discomfort"*** when the respondents had referred to him as not being a British original, but he also advised us that he was not relying on being specifically Russian. Referring to paragraph 38 of his witness statement, dated 21 November 2018, the claimant stated that discrimination was ***"based on original and nationality grounds"***.

(f) Describing his current circumstances, as at the date of this Final Hearing, the claimant stated that he was not employed by the respondents, Manpower UK Limited, as they had dismissed him on 19 January 2018, albeit he stated that he has not received any P45 from them.

(g) He spoke of having obtained other temporary employment, between 18 June and 2 September 2018, with Pole to Win UK Limited, and having generally made "***strenuous efforts***" to secure alternative employment elsewhere, for which he had produced some mitigation evidence for the Tribunal.

(h) Having seen the respondents' figures, in their updated Counter-Schedule, at pages 303 to 305 of the Bundle, the claimant confirmed that he adhered to the figures in his own updated Schedule of Loss, at pages 300 to 302 of the Bundle.

(i) The claimant was cross examined by the respondents' solicitor, Mr Sutherland, from around 2.40pm until close of play at 4.02pm on the afternoon of Wednesday, 21 November 2018, and his evidence was continued, part heard, for further cross examination of two/three hours the following day.

(j) The claimant was then further cross examined from around 10.18am, on Thursday, 22 November 2018, until around 11.31am, when his cross examination concluded, and the Tribunal adjourned, to consider, in chambers, whether it had any questions for the claimant.

(k) Questioning from the Tribunal then took place between around 11.50am and 12.08pm, following which the claimant raised a few, further points, by way of a very brief re-examination, insisting that all three bullet points in Michael Scanlan's end of assignment note of 19 January 2018 were false (at page 96A of the Bundle), and that he did not accept the allegations made against him. He spoke of Mr Scanlan's decision to end his assignment as having been made on ***"false accusations"*** in him being dismissed for those false accusations.

(l) In the course of his cross examination, the claimant disputed many of the points put to him by Mr Sutherland, solicitor for the respondents, and stated that he did not accept that assignments can change, or end, from time to time, and he stated that his contract was "***without end***".

(m) Further, the claimant stated that he believed the LOST process should not apply to him, and he further stated that he did not accept that it could apply to him. He insisted that the respondents had dismissed him, and that they did not give him another job, and they did not give him a new assignment.

(n) In particular, when Mr Sutherland stated to the claimant that he ***"wilfully refuses to accept the obvious"***, the claimant replied stating that he did not accept the respondent's argument that there is a difference between end of assignment, and end of employment. He then further stated that, if the Tribunal refused his claim, then he would "***probably appeal the Tribunal's decision",*** stating that he would need to think about it, as it is very important to him.

(o) Generally, where there is a conflict between the claimant's recollection, and that of witnesses for the respondents, we preferred the latter, as their recall of events was clear and confident whereas, for much of the claimant's evidence to the Tribunal, his position to us was confused and confusing.

(2) Ms Colleen McCaffrey: Respondents' HR Consultant.

(a) The Tribunal pre-read Ms McCaffrey's 7-page, 38 paragraph witness statement, dated 16 October 2018, and the documents referred to therein.

(b) Aged 33, she is an HR consultant employed by Manpower UK Limited, and we heard her evidence on the afternoon of Thursday, 22 November 2018, starting at 12.19pm, when she

was sworn in, and confirmed that nothing needed changing in her witness statement, which she confirmed was accurate.

(c) Cross examined by the claimant, in person, from around 12.23pm, the Tribunal adjourned for lunch between 1.12pm and 2.10pm, when the claimant further cross examined her, until his cross examination concluded at around 2.50pm, when the Tribunal adjourned into chambers, for private discussion, about any questions for the witness, returning at 3.00pm, with questions from the Tribunal, until about 3.16pm, with a brief re-examination by Mr Sutherland, before proceedings adjourned for the day, at 3.20pm, to resume the following morning.

(d) In his cross examination of the witness, Ms McCaffrey, the claimant had been instructed by the presiding Judge to ask questions designed to test her evidence provided in her witness statement to the Tribunal. The claimant did so, by in large, following the pre-set series of cross examination questions which he had included in his purple A4 ring binder folder produced to the Tribunal.

(e) This approach made it easy for the Tribunal to follow his cross examination and what he was saying to the witness, but both this witness, and the following witness, Ms Meechan, for the respondents, found it difficult to understand the claimant's questioning, and he often had to repeat questions to them for clarity, as they had not had sight of his questions.

(f) Despite the presiding Judge's oft repeated guidance to the claimant to ask small, bite size questions of the witness, his questioning style of this witness, and Ms Meechan, as per his pre-written questions tended to be long and rambling, and he often asked questions which were not relevant to the witness, but for which he simply wanted an answer from the respondents.

(g) Mr Sutherland, solicitor for the respondents, advised us that he did not wish to repeatedly object, given the claimant is an unrepresented, party litigant, but he questioned the relevance and necessity of many of the claimant's questions in cross examination.

(h) This witness answered the claimants' questions in cross examination as best as she could, and she did not depart from what was in her own witness statement, and the documents referred to therein, to which she made reference in the course of her answers to the claimant.

(i) Several of the documents to which she was referred to by the claimant she stated that she had not seen before, so we had to ensure that she had the opportunity to read them, before being asked specific questions by the claimant. The claimant frequently had to be reminded to signpost the witness to documents in the Bundle that he wished to question her about.

(j) Generally, we found this witness to be a credible and reliable witness, whose evidence was consistent with the contemporary documents in the Bundle.

(3) Ms Debbie Meechan: Respondents' HR Business Partner.

(a) The Tribunal pre-read Ms Meechan's 5-page, 25 paragraph witness statement, dated 16 October 2018, and the documents referred to therein.

(b) Aged 45, and an HR Business Partner with the respondents, we heard Ms Meechan's evidence on the morning of Friday, 23 November 2018, when she was sworn in, and confirmed that only one paragraph in her witness statement needed changed, and that was paragraph 23, where her reference to after a meeting on 20 April 2018 was an earlier date, possibly 4 April 2018.

(c) Cross examined by the claimant, in person, from around 10.39am, until 12.06pm, the claimant was reminded to refer the witness to paragraphs in her witness statement, any appropriate Bundle references, and to ask bite size questions. As with the previous witness, Ms McCaffrey, the claimant did not always follow the presiding Judge's guidance, and the witness sometimes found it difficult to follow the claimant's line of cross-examination.

(d) Indeed, in the course of his cross-examination of Ms Meechan, the claimant had to be reminded by the Judge that cross examination is for him to test the witnesses' evidence from her witness statement, and not for him to give evidence on his own behalf.

(e) Further, following objection from Mr Sutherland, solicitor for the respondents, as the witness was not the grievance decision maker, the Tribunal ruled that it was not appropriate for the claimant to ask this witness questions about that grievance process.

(f) The Tribunal adjourned, into chambers, at around 12.06pm, for private deliberation, before Tribunal questioning of the witness took place between 12.19pm and 12.30pm followed by a brief re-examination by Mr Sutherland, solicitor for the respondents, between 12.30pm and 12.35pm, when evidence for the respondents was closed.

(g) This witness, as for Ms McCaffrey before her, did her best to answer the claimant's questions, under reference, where appropriate, to relevant documents in the Bundle before the Tribunal.

(h) Like Ms McCaffrey, we found this witness to be a professional witness, speaking to matters within her knowledge and

experience, and doing so in a straightforward, matter of fact way, without any evident ill will or malice towards the claimant.

(i) Accordingly, we found this witness to be a generally credible and reliable witness, whose evidence was again consistent with the contemporary documents of the Bundle.

Parties' Closing Submissions

38. We heard closing submissions from both parties. In terms of the case management orders made by the presiding Employment Judge, at the Case Management Preliminary Hearing held on 25 September 2018, the Tribunal had ordered the respondents' representative to intimate an outline written skeleton argument, including hyperlinks to any cited case law authorities to be relied upon by them, so as to allow the claimant, as an unrepresented, party litigant, time before the start of the Final Hearing to consider the relevant case law, read the authorities cited by the respondents, and decide whether he wished to refer the Tribunal to any additional authorities not cited by the respondents.

39. The Judge did so, in terms of the overriding objective, under **Rule 2,** for the assistance of the claimant, as an unrepresented party litigant, and so as to ensure that both parties were on an equal footing, and for the efficient and effective conduct of the Final Hearing,

40. Further, the Tribunal had also ordered, at that Case Management Preliminary Hearing, that the claimant should intimate to the Tribunal, and copy to the respondents' representative, any further legal authorities that he wished to refer to or rely upon, and the Tribunal had allowed him, if so desired, to lodge his own written skeleton outline of his closing submissions to be delivered to the Tribunal, which failing he could make his own submissions orally, and reply orally, to the respondents' representatives' closing submissions.

41. it was further directed that the Tribunal would hear first from the respondents' representative, and thereafter from the claimant, in person, and a Timetabling

Order was made, in terms of **Rule 45**, restricting each parties' oral closing submissions to no more than one hour each.

42. On 16 November 2018, Ms Donnelly, solicitor for the respondents, intimated to the Tribunal, with copies sent to the claimant, her written skeleton submissions for the respondents, along with her list of two authorities, being as follows:

    (i) **R.G. Buffrey & others v Manpower PLC [2003] UKEAT/0443/02/RN**

    (ii) **East Kent Hospitals University Foundation Trust v Mrs P. Levy [2018] UKEAT/0232/17/LA.**

43. On 19 November 2018, the claimant intimated to the Tribunal, with a copy sent to Ms Donnelly for the respondents, his own list of authorities, as follows:

    (i) **Publicis Consultants UK Limited v O'Farrell [2010] UKEAT/0430/10/DM**

    (ii) **Société Générale, London Branch v Geys [2011] EWCA Civ.307; [2011] IRLR 482**

    (iii) **Adecco Group UK & Ireland v Gregory & Another [2015] UKEATS/002/14/SM**

    (iv) **Sandle v Adecco UK Limited [2016] UKEAT/0028/16/JOJ**

    (v) **Gisda Cyf v Barratt [2010] UKSC 41; [2010] ICR 1475; [2010] IRLR 1073**

    (vi) **Balbinder Singh Chagger v Abbey National PLC & another [2009] EWCA Civ.1202; [2010] ICR 397; [2010] IRLR 47**

(vii) HM Government, Cabinet Office (November 2016): **Code of Practice on the English Language Requirements for Public-Sector Workers** (issued under **Part 7 of the Immigration Act 2016**)

5 **(viii) Employment and Human Rights Commission Guidance**: Your Rights to Equality at Work: when you apply for a job (Guidance for Employers, Volume 1 of 6, updated May 2014): **Equality Act 2010: Employment Statutory Code of Practice.**

10 (ix) Letter from Personal Tax Customer, Product & Process Directorate, **HM Revenue & Customs**, dated 16 December 2016, referring to the legal obligation on an employer to issue a P45 when a member of staff leaves employment, as contained in the secondary legislation within **Regulation 36 of the Income Tax (PAYE) Regulations 2003 (SI**
15 **2682)**

44. The claimant provided his written skeleton outline submission as part of his purple coloured A4 ring binder folder while, on the evening of 22 November 2018, Mr Sutherland, solicitor for the respondents, intimated to the Tribunal, with a copy to the claimant, of his updated skeleton submissions for the
20 respondents for use at the following morning's Hearing on Submissions. Running to 39 paragraphs, over 9 typewritten pages, it superseded Ms Donnelly's document of 16 November 2018, the claimant's skeleton submissions run to 20 pages, across sections A to G.

25 45. As copies of both parties' written closing submissions are held on the casefile, and we referred to them in coming to our Judgment, it is not necessary to repeat their full terms here. Later, in these Reasons, we do, however, reproduce the concluding paragraphs from both parties' written closing submissions, for they helpfully put, in short compass, the main points of their
30 closing arguments to us.

46. In coming to our Judgment, we derived no practical assistance in determining this case from the claimant's documents, numbers 7 and 9, in his list of

authorities. As regards document 7, being the Code of Practice on the English language requirements for public sector workers, its status, as per page 3 of that Code of Practice, is that it is the document aimed at public authorities and to assist them in meeting their statutory duty under **Part 7 of the Immigration Act 2016**, but it is not intended to prescribe the process for every type of public facing role and it is not a definitive statement of the law.

47. However, it provides principles and examples which public authorities can consider when fulfilling their legal duties and obligations. At the start of this Final Hearing, when the Judge asked the claimant about this document, he told us that he accepted that the respondents are not a public sector employer, but he felt the Code of Practice is good practice for them to have followed anyway.

48. Further, as regards the claimant's document number 9, it is clear that it relates to a Freedom of Information request, and an answer from HM Revenue & Customs, to a query from a Mr Honeyman, that is received on 28 October 2016, and answered on 16 December 2016, and while giving some answers to the questions asked about an employer's legal obligation to issue the P45, it is generic guidance, and not specifically related to the facts and circumstances of the claimant's complaint before this Tribunal, and that, following what he saw as his dismissal by the respondents on 19 January 2018, he did not receive a P45 from the respondents.

49. On the morning of Friday, 23 November 2018, we heard oral closing submissions from firstly, Mr Sutherland, solicitor for the respondents, and then from the claimant, offering each an opportunity to reply to the others oral submissions to us. As those oral submissions were generally consistent with their respective written skeletons, we do not record them here *verbatim*, as it is disproportionate to do so.

Reserved Judgment

50. In concluding proceedings, on the afternoon of Friday, 23 November 2018, we reserved our Judgment, and the Employment Judge advised both the claimant and Mr Sutherland that we would issue our full, written Judgment, with Reasons, in due course, as soon as possible after private deliberation at a Member's Meeting to follow on that afternoon, or at a later date.

51. By letter from the Tribunal, sent to both parties, dated 27 November 2018, they were updated as to our progress, in chambers for private deliberation, and while some progress was made, we did not conclude our private deliberations. They were further advised that the Judge would seek to progress a draft Judgment and Reasons, within the following four weeks, for issue within that period to both lay members for comment and, hopefully, early agreement, possibly by correspondence, rather than by reconvening again in chambers.

52. Following consultation with the lay Members of the Tribunal, the Tribunal unanimously agreed the terms of our Judgment dated 12, and issued to both parties on 13, December 2018. We reserved our Reasons to be issued in writing, at a later date, in terms of **Rule 62 of the Employment Tribunals Rules of Procedure 2013**.

53. That written Judgment, and now these Written Reasons, represent the final product from our private deliberation, on the evidence led, and closing submissions made to us, by both parties, and us thereafter applying the relevant law to the facts as we have found them to be in our findings in fact, as set forth earlier in these Reasons.

54. It represents our unanimous view, as a specialist Tribunal acting as an industrial jury, with our membership coming from disparate employment backgrounds and experience. The Judge apologises to both parties for the delay in preparing these Written Reasons, occasioned by a combination of factors, including other judicial commitments, and he is obliged to both lay Members for their input.

Issues before the Tribunal

55. We did not have before us, any agreed List of Issues, adjusted between the parties. Instead, as we mentioned earlier in these Reasons, at paragraphs 14 to 16 above, we had the List of Issues submitted by Ms Donnelly, on 14 November 2018, reading as follows: -

CLAIMS UNDER ERA 1996

1.1 ***Unfair dismissal***

1.1.1 *Did the Respondent have a contractual right to place the Claimant on Lay Off/Short Time Working? (R)*

1.1.2 *On what basis did the employer transfer Claimant to the "Laid Off/Short Term process" according to the letter dated January 19, 2018, when it is not stipulated by contract? (C)*

1.1.3 *Taking into account the absence of "Laid Off/Short Term process" in the contract, did Respondent breach of contract when make transfer of Claimant to "Laid Off/Short Term process"? (C)*

1.1.4 *It is necessary to include and consider Respondent's answers on six questions posed by Judge Garvie to the Respondent on the preliminary hearing at August 7, 2018. (C)*

1.1.5 *Was the Claimant dismissed from his employment? (R)*

1.1.6 *If the Claimant was dismissed, what was the effective date of termination of his employment? (R)*

1.1.7 *If the Claimant was dismissed from his employment, what was the reason for his dismissal? (R)*

1.1.8 *If the Respondent refuses to acknowledge the fact of dismissal, is it sufficient evidence, justification and confirmation that the dismissal did not take place? (C)*

1.1.9 *Was the dismissal of Claimant related to the staff redundancy process? (C)*

1.1.10 *If the Claimant was dismissed from his employment was the reason for his dismissal fair in the circumstances having mind to the size and administrative resources of the Respondent? (R)*

1.1.11 *If the Claimant was dismissed from his employment, did the Respondent follow a fair process to dismiss him? (R)*

1.1.12 *Why and on what basis did the Respondent not follow the procedure approved by ACAS when starting the staff redundancy? (C)*

1.1.13 *If the Claimant was dismissed, was the Respondent's decision to dismiss him within the band of reasonable responses? (R)*

5 1.2 ***Failure to provide written reasons for dismissal***

1.2.1 *If the Claimant was dismissed from his employment, did he request written reasons for his dismissal? (R)*

1.2.2 *If so, did the Respondent provide him with these reasons within 14 days? (R)*

10 2. ***CLAIM UNDER THE EQUALITY ACT 2010:***

2.1 *The Claimant relies upon the protected characteristic of race (which includes nationality). (R)*

2.2 ***Indirect Discrimination – race***

2.2.1 *What is the applicable racial group with which the Claimant identifies*
15 *for the purposes of this claim? (R)*

2.2.2 *In not offering the Claimant a job within the Inside Sales team, following the ending of his assignment with Microfocus, did the Respondent indirectly discriminate against the Claimant on the grounds of race? (R)*

20 *The Claimant's claim is that the Respondent applied a provision, criterion or practice (PCP), namely the requirement to undergo an English Language Proficiency Test as part of his application for a role within the Inside Sales Team. (R)*

2.2.3 *On what basis of the law or regulation does the Respondent conduct*
25 *language testing of candidates for vacancies? (C)*

2.2.4 *Why the selection process of candidates for testing was carried out and based on nationality and ethnic characteristic? (C)*

2.2.5 *Does the policy of selection for regular language testing on a national basis mean racial segregation? (Equality and Human*
30 *Rights Commission Statutory Code of Practice: Employment Part 1) (C)*

2.2.6 *Has Respondent a legal right to make conclusions about the level of candidate's language knowledge, not being as an educational institution or test centre? (C)*

35 2.2.7 *On what basis Respondent reject Languages University Diploma in the process of considering applications from candidates? (C)*

2.2.8 *Was the PCP applied neutrally, i.e. to those within and outside of the Claimant's racial group?*

2.2.9 *Did the PCP put the Claimant, and those of the racial group with which he identifies, at a disadvantage? (R)*

5 2.2.10 *What was that disadvantage? (R)*

2.2.11 *What aim did the Respondent have in applying this PCP? (R)*

2.2.12 *Was this a legitimate aim? (R)*

2.2.13 *Was the PCP a proportionate means to achieving that aim? (R)*

2.2.14 *Would the Respondent have handled the matter differently if the*
10 *matter had concerned an employee who was not of the same racial group as the Claimant in circumstances that were not materially different? (R)*

ADDITIONAL QUESTIONS FROM CLAIMANT

Considering all the issues of the case as a holistic picture, should the
15 *Tribunal consider and evaluate the whole process and establish that:*

2.2.15 *Are the events (reduction - dismissal - discrimination) related to the actions of the employer, which can be defined as an indivisible and consistent chain? (C)*

2.2.16 *What are the motives behind the Respondent's actions? What was*
20 *the purpose of the Respondent? (C)*

2.2.17 *Whether the actions of the employer in respect of Claimant are victimization and personal persecution? (C)*

3. ***REMEDY***

3.1 *Unfair dismissal, failure to provide written reasons, discrimination: (R)*

25 3.1.1 *Is the Claimant entitled to compensation for loss of earnings? If so, in what amount? (R)*

3.1.2 *Is the Claimant entitled to sums in compensation for failure to provide written reasons for dismissal? If so, in what amount? (R)*

3.1.3 *Did the Respondent submit to the Claimant any formal employment*
30 *proposal or offer for the alternative work? (C)*

3.1.4 *Has the Claimant refused reasonable offers of assignment? (R)*

3.1.5 *Has the Claimant mitigated his losses? (R)*

3.1.6 *If the Claimant has not mitigated his losses, are any deductions to any compensation due? (R)*

3.1.7 *Are deductions to any compensation due in accordance with Polkey v Dayton Services Ltd? (R)*

3.1.1 *Are any deductions to any compensation awarded due by reason of contributory fault? (R)*

3.1.2 *If so by what percentage? (R)*

3.1.3 *Is the Claimant entitled to an award for injury to feelings and, if so, at what level? (R)*

3.1.4 *If the Claimant illegal and unfair dismissed, whether Claimant is entitled to reinstatement to a previous job? (C)*

3.1.5 *If the Claimant was unfairly dismissed, should an order for re-engagement within the meaning of s115 ERA 1996 be made? (R)*

3.1.6 *Is it practicable for the employer to comply with an order for reinstatement (s117(4)(a) ERA 1996)? (R)*

3.1.7 *Is it practicable for the employer to comply with an order for re-engagement (s117(4)(a) ERA 1996)? (R)*

3.1.8 *If confirmed that the Respondent did not provided with a written statement for termination of contract and failure to follow the ACAS code, whether should be increase on 25% the compensatory award for the Respondent's failure to follow their own rules and ACAS Code of Practice? (C)*

3.1.9 *Should the Respondent adjusted the employment policy and bring the policy into border with current employment law legislation, with a point of view to exclude the substitution of concept "end of employment" with notion as "end of assignment"? (C)*

3.1.10 *Should the Respondent be recommended and oblige to change the recruitment policy with regard to the recruitment of staff from different ethnic groups applying the equal rights and opportunities policy? (C)*

56. In **St Christopher's Fellowship v Walter-Ennis** **[2010] EWCA Civ.921**, Lord Justice Mummery, in the Court of Appeal, stated that issues in a case must not be over elaborate or numerous. As we did not find the parties' list of issues to be user friendly, in considering matters in our private deliberation, we re-drafted the issues for consideration into something far shorter which

we felt was more appropriate and proportionate to the issues before us, at this Final Hearing, as follows: -

(1) Was the claimant dismissed by the respondents on 19 January 2018 as alleged?

(2) If not, what happened to him on that date?

(3) If not, does the claimant remain an employee of the respondents, or has the employment relationship between the parties ended at some later date after 19 January 2018?

(4) If the claimant was dismissed, on 19 January 2018, was his dismissal by the respondents fair or unfair?

(5) If it was an unfair dismissal, what remedy should be ordered by the Tribunal?

(6) If he was dismissed on 19 January 2018, did the respondents fail to provide the claimant with written reasons for dismissal?

(7) If so, what remedy should be ordered by the Tribunal for that failure?

(8) Was the claimant discriminated against by the respondents, as alleged, or at all, by the respondents' application of the English language proficiency test?

(9) If so, what remedy should be ordered by the Tribunal?

Relevant Law

57. In his skeleton submissions on behalf of the respondents, dated 22 November 2018, Mr Sutherland referenced the relevant law, and reproduced the applicable statutory provisions from **sections 92, 95 and 98 of the**

Employment Rights Act 1996 (relating to the right to written reasons for dismissal; circumstances in which an employee is dismissed; and general: fairness of a dismissal), as also **sections 9 and 19 of the Equality Act 2010** (relating to race, and indirect discrimination).

5 58. We refer to those relevant statutory provisions, as reproduced there, and do not consider it appropriate or proportionate to repeat them here. As per **Rule 62 of the Employment Tribunal Rules of Procedure 2013**, we consider this paragraph of our Reasons to be a concise statement of the relevant law, and that we need not saying anything more elaborate or detailed.

10 **Discussion and Deliberation**

59. In coming to our Judgment, we carefully considered each of the issues we had identified, as listed above at paragraph 56 of these Written Reasons. In doing so, we had regard to the whole evidence led before us, the relevant law, and to parties' competing closing submissions, from each of Mr
15 Sutherland for the respondents, and the claimant himself acting as an unrepresented, party litigant.

60. From Section G, the conclusion of the claimant's own written skeleton argument, we noted how he had set out his case to us, as follows: -

20

"***For the reasons given above Claimant asks Tribunal to admit that:***

- ***Claimant dismissed from role from 19.01.2018 and this***
25 ***decision was wrongful and unfair. Despite Claimant repeated requests to provide him in writing the reasons for dismissal, Claimant did not receive a proper written statement giving the reason for dismissal.***

30 - ***The facts cited as grounds for dismissal are false.***

- ***Respondent was not followed the legal procedure of redundancy.***

- ***The employer did not offer any alternative work to Claimant. In addition, Claimant believes that he effected indirect discrimination on protected grounds.***

Therefore, Claimant expects a fair and detailed consideration of the case and hopes that this statement will be accepted as the basis for the Tribunal's decision.

The Tribunal is invited to grant orders for remedies.

There is no any little doubt that the availability of statutory remedies for unfair dismissal represents a major aim for Claimant. In particular, Claimant who is dismissed unfairly should be reinstated to his former position or should be awarded compensation extending beyond payment for the notice period.

For employee in many situations dismissal is a disaster. It may make inevitable the breaking up of professional skills and the uprooting of homes, what could harm his family. Because Claimant is not a young person, he may be faced with the greatest difficulty in getting a new work at all.

Claimant would like to ask the Tribunal to set aside the illegal unfair dismissal and indirect discrimination."

61. While we carefully analysed the claimant's case as put to us, in his witness statement, and in his skeleton argument, we did not accept it as well-founded. Put simply, while he clearly believes it to be so, we did not find that he had been unfairly or wrongfully dismissed from his employment, nor unlawfully discriminated against by the respondents. We do recognise that he is

convinced that he is in the right, and the respondents have done him a wrong. That is his perception of the reality of the situation, but, like the respondents, we do not see matters as the claimant seems to.

5 62. In delivering his oral submissions to us, we advised the claimant that we had pre-read his witness statement, and his written closing submissions, and so, to make best use of his allocated time, he should not read them out , but instead concentrate on his oral reply to the points made by Mr Sutherland in his arguments for the respondents, and the two cited cases relied upon by 10 him.

63. As an unrepresented party litigant, and as often happens in such situations, the claimant tended to go off script, and deal with matters as they occurred to him, and not necessarily related to the claim before us for our judicial 15 determination. He described as "***far from the truth"*** the respondents' assertion that he was still an employee, when they had not yet found him an alternative assignment, and he complained that they had "***deprived me of my work and livelihood***".

20 64. Further, the claimant advised us that there were two types of dismissal in his case, both constructive, and actual, and that it is possible to have both in the same case. We granted him an extension of time to conclude his oral submissions, and in closing he invited us to uphold his whole claim, and award him compensation in light of his updated Schedule of Loss.

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65. In our private deliberation, we agreed, having heard Mr Sutherland's reply for the respondents, that there was no constructive dismissal complaint before us, and that the claim was, and always had been, about what the claimant saw and argued was an actual dismissal by the respondents on 19 January 30 2018.

66. During his oral submissions to us, we note and record here that the claimant referred us, at paragraph 33 of his written skeleton argument, to **Section 107**

<u>of the Employment Rights Act 1996</u> (pressure on employer to dismiss unfairly), and he asserted that the respondents had "***acted under pressure and based on blackmail from outside***."

5 67. While, in our private deliberation, we accepted the respondents' evidence that the claimant's assignment had been ended at the client's request, it was clear to us that the respondents were acting on instructions from Micro Focus, who were entitled to request the claimant's removal from the assignment. In these circumstances, the claimant's reference to **<u>Section 107</u>** seemed 10 misconceived, and not well-founded. In any event, there was no **<u>Section 107</u>** complaint pled as part of his claim before the Tribunal.

68. The respondents relied upon the Employment Appeal Tribunal's judgment, by His Honour Judge Burke QC, in **<u>Mr R G Buffery and others v Manpower</u>** 15 **<u>PLC</u> [2003]UKEAT/0443/02**, to demonstrate that the termination of an assignment or an absence of work does not terminate the contract of employment an employee has with, in this case the respondents, or entitle an employee to terminate their contract or treat it as terminated.

20 69. From the evidence led before us, we were satisfied that the respondents had a contractual right to layoff an employee without work and without remuneration, but the contract of employment remains in existence unless and until the employee resigns and claims a redundancy payment, which the claimant here did not do, despite regular information about his entitlement to 25 a LOST payment from the respondents.

70. In coming to our Judgment, we were unanimously agreed that Mr Sutherland's submissions were to be preferred, as being drafted on the basis of a proper application of the law to the facts as we have found them to be. 30 In particular, we agreed with his conclusion, in the last paragraph of his written skeleton argument, which we repeat here *<u>verbatim</u>*, as it neatly encapsulates our own views:

"***C was not dismissed by R, unfairly or at all. C was transferred to the LOST process after the hiring client requested his removal from assignment. It was within the provisions of C's contract of employment both to be removed from assignment and to be placed on LOST. C was not dismissed on 19 January 2018 as a result of the meeting of that day, the email of the same day or the payments made to him under that process. C did not believe himself to be dismissed at that point and continued to interact with R as his employer. R did not apply, on a neutral basis, a PCP which disadvantaged C due to race. Even if it did, R's application of the PCP was a proportionate means of achieving a legitimate aim. C has failed to mitigate his losses by unreasonably turning down offers of work and if he is found to have been dismissed his award should be reduced due to this failure to mitigate his loss and due to his contribution to his own dismissal."***

71. Accordingly, we answered the list of issues before us, as follows:

(1) Was the claimant dismissed by the respondents on 19 January 2018 as alleged?

On the facts before us, we decided that the claimant had not been dismissed, on that date, but that his assignment had come to and end, not his employment with the respondents.

(2) If not, what happened to him on that date?

As stated above, his assignment had come to and end, not his employment with the respondents, which continued up to and including the date of this Final Hearing.

(3) If not, does the claimant remain an employee of the respondents, or has the employment relationship between the parties ended at some later date after 19 January 2018?

Again, on the facts before us, we decided that, as at the date of this Final Hearing, his employment had not been terminated by the respondents, and while they had not found him a further assignment he was willing to work, they had not dismissed him at any later date after 19 January 2018.

(4) If the claimant was dismissed, on 19 January 2018, was his dismissal by the respondents fair or unfair?

In light of our answers to the earlier questions, this question did not arise for our consideration. As there was no dismissal, we did not need to go and consider whether it was fair, or unfair.

(5) If it was an unfair dismissal, what remedy should be ordered by the Tribunal?

Again, in light of our answers to the earlier questions, this question did not arise for our consideration, as we did not find the claimant had been dismissed, let alone unfairly dismissed, and so remedy for an unfair dismissal did not require to be addressed by us.

Had we required to assess financial compensation for the claimant, we would not have awarded anything like the sums sought by the claimant, on account of his own contribution towards his situation, and his failure to properly mitigate his losses.

Further, given the breakdown in trust between claimant and respondents, even if we had upheld his complaint of unfair dismissal, we would not have ordered reinstatement, or reengagement, regarding both as impractical.

As the claimant was removed from the Micro Focus assignment, at the request of the client, we can readily see why the respondents would find it impractical to reinstate him there.

(6) If he was dismissed on 19 January 2018, did the respondents fail to provide the claimant with written reasons for dismissal?

In light of our answers to the earlier questions, this question did not arise for our consideration. The claimant was not dismissed by the respondents on 19 January 2018. He was provided with an explanation for his removal from the assignment, and letters from the respondents also explained his status as a continuing employee.

(7) If so, what remedy should be ordered by the Tribunal for that failure?

As there was no such failure, the matter of remedy dd not arise for our consideration.

(8) Was the claimant discriminated against by the respondents, as alleged, or at all, by the respondents' application of the English language proficiency test?

On the evidence before us, there was no basis for any finding of unlawful discrimination by the respondents against the claimant on the grounds of race, or at all. Their use of the English language proficiency test was an appropriate and proportionate business tool for the respondents to use in their business.

(9) If so, what remedy should be ordered by the Tribunal?

As there was no unlawful discrimination by the respondents, on account of the claimant's Russian nationality, or otherwise, the matter of remedy did not arise for our consideration.

Disposal

72. For the foregoing reasons, in coming to our Judgment, we unanimously found that: -

(1) The claimant was not dismissed by the respondents, on 19 January 2018, as alleged, or at all, following the end of his assignment within Microfocus, and, as at the close of the Final Hearing before this Tribunal, the claimant remained an employee of the respondents, he having not resigned from their employment, and they not having dismissed him from their employment.

(2) Accordingly, there having been no dismissal of the claimant by the respondents, his complaint of having been unfairly dismissed by the respondents, contrary to **Sections 94 and 98 of the Employment Rights Act 1996**, was not well-founded, and it failed, as did his further complaint of the respondents' failure to issue him with a written statement of reasons for dismissal, contrary to **Section 92 of the Employment Rights Act 1996.** Both those parts of his claim against the respondents were dismissed by the Tribunal.

(3) Further, in respect of the English language proficiency test used by the respondents, in respect of a role of Inside Partner Business Manager within their Inside Sales team applied for by the claimant on 23 January 2018, and the claimant's failure on 24 January 2018 to pass that test, we found that the claimant's complaint of unlawful indirect discrimination against him by the respondents on the grounds of race, contrary to **Section 19 of the Equality Act 2010**, was not well-founded, and it failed, and accordingly that part of the claim against the respondents was also dismissed by the Tribunal.

Postscript, and Further Procedure: Reconsideration

73. Following issue of our written Judgment only, on 13 December 2018, the claimant wrote to the Tribunal, by email sent at 12:24 on 17 December 2018, but without intimating his correspondence to the respondents' representative, in terms of **Rule 92 of the Employment Tribunals Rules of Procedure 2013**.

74. In his email to the Tribunal, the claimant stated, as follows:

"I received Tribunal Judgment of the Employment Tribunal dated 13 December 2018.

I have to say, that I completely disagree with this decision and intend to appeal to the Employment Appeal Tribunal (EAT).

I think Error in law occurring at the trial and objected to at the time by the Claimant making the application and that substantial justice has not been done.

Therefore, I earnestly ask you to send to my address the Written Statement of Reasons Tribunal Judgment."

75. When that email was brought to the presiding Judge's attention, on 18 December 2018, a reply from the Tribunal was instructed, which was issued to the claimant, with copy sent to the respondents'' representative, by email from the clerk to the Tribunal, sent at 12:47 on 19 December 2018, advising that our Written Reasons would follow at a later date.

76. Now that these our finalised Written Reasons are issued, the claimant may request the Tribunal to **reconsider** its Judgment, but any such application must be made **within 14 days of the date that these Reasons for our Judgment are sent to him**. Further, any application to **appeal** to the Employment Appeal Tribunal must be made **within 42 days of the date that these Reasons for our Judgment are sent to him.**

77. If the claimant requests us to reconsider our Judgment issued on 13 December 2018 , then, in terms of **Rules 70 and 71 of the Employment Tribunal Rules of Procedure 2013**, he must make written application to the Tribunal, copied to the respondents' representative, **within 14 days of the date that these Reasons for our Judgment are sent to him,** explaining why it is necessary, in the interests of justice, for the Tribunal to reconsider its Judgment.

78. In particular, it will be required by the Tribunal that the claimant provides further and better particulars of what he means, in his email of 17 December 2018, when he stated that: ***"I think Error in law occurring at the trial and objected to at the time by the Claimant making the application and that substantial justice has not been done."***

79. Reconsideration by the Tribunal is a quite different process from appeal to the EAT, and the claimant will need to decide whether to follow either or both processes, and he should note that both processes are subject to strict time limits.

80. Further information on both processes is set forth in the Tribunal's letter to both parties dated 13 December 2018, enclosing a copy of the Tribunal's Judgment, and reference should be made to that letter, and the information there provided about reconsideration and appeal.

Employment Judge: I McPherson
Date of Reasons: 01 April 2019
Entered in register: 02 April 2019
and copied to parties