Case Number: 2501830/2019

THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Rutherford**

Respondents: **SITS Group Ltd (1) Pivotal Networks Limited (2)**

Heard at: **North Shields Hearing Centre** **On:** **27, 28 & 29 January 2020**

Before: **Employment Judge Arullendran**

Representation:

Claimant: **Mr R Gibson (solicitor)**
Respondents: **Mr R Quickfall (counsel)**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claimant's claim for unfair dismissal against the second respondent is not well-founded and is dismissed.

2. The claimant's claim for unfair dismissal against the first respondent is well-founded and the respondent is ordered to pay to the claimant the following:

   Basic Award
   £2,787.34 less 90% £2,508.61 £278.73

   Compensatory Award
   £300.00 less 90 % £270.00 £30.00

   Total = £308.73

3. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

REASONS

1. The issues to be determined by the Employment Tribunal were set out in the case management summary dated 25 September 2019 as being:

   1.1 Was the claimant an employee of the second respondent for the purposes of section 230 ERA 1996?
   1.2 What with the terms of the contract between the claimant and the second respondent?
   1.3 What, if any, were the express oral terms of the contract between the claimant and the second respondent?
   1.4 What, if any, terms can be implied into the contract between the claimant and second respondent?
   1.5 Was the contract between the claimant and second respondent a contract of employment? The Tribunal will consider matters including
      1.5.1 did the claimant provide his services to the second respondent in consideration for remuneration from the second respondent all was the claimant entitled to receive dividends regardless of whether he had any work to do for the second respondent?
      1.5.2 Was there mutuality of obligation between the claimant and the second respondent?
      1.5.3 Was the claimant required to provide personal service to the second respondent?
      1.5.4 What control did the second respondent have over the claimant's activities?
   1.6 What did the claimant do on 12 February 2019?
      1.6.1 The respondent says the claimant sought to derail the merger of respondent 1, respondent 2 and a third party by seeking a guarantee that he would not be dismissed following the merger and/or the respondent says the claimant unreasonably refused to sign the paperwork allowing the merger to go ahead and thereby made his continued employment untenable/impossible
      1.6.2 The claimant says he merely asked whether he would be made redundant after the merger and he did not receive an answer
   1.7 What was the principal reason for the dismissal on 14 February 2019 and was it a potentially fair one in accordance with section 98 (1) and (2) of the ERA?
      1.7.1 The respondent asserts that it was a reason relating to the claimant's conduct under section 98 (2) (b) ERA i.e. the claimant's conduct during events of 12 February 2019, which the respondent alleges amounts to a breach of the implied term of mutual trust and confidence and/or a breach of the claimant's fiduciary duties as a director of the first respondent and second respondent or (in the alternative)
      1.7.2 Some other substantial reason under section 98 (1) (b) ERA i.e. the claimant's conduct during events of 12 February

2019 which led to a breakdown in the employment relationship between the parties

1.8 If so, was the dismissal fair or unfair in accordance with ERA section 98 (4), and, in particular did the respondent in all respects act within the so-called "band of reasonable responses"?

1.9 Was the dismissal procedurally fair? (It is conceded that the respondent did not comply with the ACAS code in the procedure followed to dismiss the claimant)

1.10 Would the claimant have been dismissed following a fair procedure?

1.11 If yes, when would claim to have been dismissed if fair procedure had been followed?

1.12 If there is any doubt, what is the chance that the claimant would have been dismissed if a fair procedure had been followed?

1.13 If the dismissal was unfair, to what extent did the claimant's conduct on 12 February 2019 contribute to his dismissal on 14 February 2019?

1.14 Are dividends payable by the first respondent and/or the second respondent to be included in remuneration for the purposes of Chapter II of Part XIV ERA (a week's pay)?

1.15 What is a week's pay for the purposes of calculating the basic award?

1.16 Did the claimant work normal hours for the purposes of section 221?

1.17 Was the claimant entitled to receive the national minimum wage from either the first respondent or the second respondent?

1.18 If so, what national minimum wage rate was applicable at the relevant time for the purposes of calculating the basic award?

1.19 Did the claimant earn in excess of the statutory cap on a weeks' pay of £508?

1.20 What losses should the Tribunal take into account in calculating the compensatory award?

1.21 In particular, is the loss of dividends a loss sustained by the claimant in consequence of any dismissal insofar as that loss is attributable to any action taken by the first respondent and/or the second respondent for the purposes of calculating the compensatory award under section 123 ERA?

1.21.1 The claimant says that dividends are to be included

1.21.2 The respondent says that the claimant received dividends from the first respondent and second respondent as a shareholder and not as an employee

1.22 For what period should the claimant be compensated for following his dismissal?

1.23 What has the claimant earned since he was dismissed?

1.24 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway?

1.25 Would it be just and equitable to reduce the amount of the claimant's basic award because of any conduct before the dismissal pursuant to ERA section 122 (2) and if so, to what extent?

1.26 Did the claimant cause or contribute to his dismissal to any extent and, if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award pursuant to ERA section 123 (6)?

2. I heard witness evidence from the claimant, Jeff Hodgson (chair of the board for the first and second respondents) and Paul Watson (managing director of the first and second respondents). The witness statements from these witnesses were tendered as their evidence in chief and the findings of fact have been made on the balance of probabilities after considering all of the witness evidence.

3. I was provided with a voluminous joint bundle of documents consisting of approximately 568 pages in 2 lever arch files, although in reality there were more than 568 pages as many of the pages had been inserted after the bundle had been produced and had been provided with suffixes to the page numbers as a result. The majority of the documents were not referred to by the parties. Further documents were added to the bundle during the course of this hearing by the respondent, without any objection from the claimant and these were inserted into the bundle from pages 568A to 676. However, Mr Gibson indicated that he was extremely unhappy that the respondent had failed to disclose documents in accordance with the Tribunal directions and not until the last minute. Mr Gibson says he requested financial documents, including the relevant accounts, from the respondents on several occasions but was told that they were not ready or were not available. However, the last set of accounts appear to have been signed by the respondent on 1 August 2019 and Mr Gibson says that the respondents have sought to conceal these documents. Mr Watson's explanation is that he was genuinely mistaken and believed the accounts were not ready, although he accepts he signed them on 1 August 2019. I find Mr Watson's explanation to be disingenuous given that he personally signed the accounts on 1 August 2019 as he has provided no good reason for why he would have forgotten this. However, it does not follow that the whole of Mr Watson's evidence should be regarded in the same light as being disingenuous and I have examined all of the evidence before making a decision in respect of each individual issue.

4. The claimant and the respondent made closing submissions with reference to written skeleton arguments which have not been reproduced in this decision, but have been considered in their entirety. Both sides supplemented their skeleton arguments by making oral submissions upon conclusion of the evidence.

5. The respondent has brought proceedings in the County Court against the claimant for the recovery of a loan and the claimant has submitted a

counterclaim in the County Court for six months' notice from 14 February 2019 to 14 August 2019 plus the balance of an extraordinary dividend in the sum of £100,000. At the case management hearing on 25 September 2019, the parties were given until 28 October 2019 to make an application to the Employment Tribunal for a stay of these proceedings pending the outcome of the claims in the County Court, however neither party made such an application. Employment Judge Deeley advised the parties at the preliminary hearing on 25 September 2019 the any findings of fact made by this Tribunal may bind the parties in any proceedings in the civil courts. I note that, as both parties are professionally represented, they will have had the opportunity to obtain legal advice about the implications of not staying proceedings in one forum whilst there are concurrent proceedings in a separate forum.

6. On the first morning of the hearing I raised with the parties the issue of whether there has been an illegal performance of the contract of employment, as raised by Employment Judge Deeley at the preliminary hearing on 25 September 2019, on the basis that the parties appear to argue that the claimant had been employed 37.5 hours per week for the sum of £9996 per annum, which would be less than the National Minimum Wage, and that the claimant received an income in the region of £100,000 in dividends, rather than wages, because this was the most tax efficient way of receiving the money. The claimant and the respondent do not regard this as an illegal performance of the contract of employment and the parties say that they were advised professionally by an accountant as to the best way to avoid paying tax.

The facts

7. It is common ground that the claimant was director and shareholder of the first respondent and the second respondent and there are three other directors/shareholders who are common to both companies, Mr Watson, Mr Cambers and Mr Henderson. The first respondent company was formed in March 2008 and is a specialist in virtualisation consultancy practice. The first respondent has around 24 employees, including the directors.

8. The second respondent started trading in 2011 and undertakes network related work, which complements the work of the first respondent. The second respondent has 7 employees, not including the directors, and some of its functions, such as finance, administration, marketing and contract management are facilitated by employees from the first respondent and the services are provided to the second respondent for a fee which is payable to the first respondent.

9. It is common ground that the first and second respondents are limited companies, not subsidiaries, and produce their own set of accounts at the end of each financial year. The staff are employed by either the first respondent or the second respondent, but none of them are employed by both companies and it is common ground that employees from the first

respondent who provide back-office support to the second respondent do so in return for a fee which is payable to the first respondent.

10. The statutory directors were given specific titles and held specific roles, for example Mr Watson is the managing director and the claimant was the operations director. It is common ground that the statutory directors held similar roles in both companies. Geoff Hodgson is the chair of the board of both respondent companies and it is common ground that he is not an employee of either company.

11. It is common ground that, at the time the first respondent company was set up in March 2008, the parties did not enter into any written service agreement or contract of employment with each other. The parties do not have any service agreements or contracts of employment with the second respondent and it is common ground that Mr Hodgson regularly advised the directors that they needed contracts; he drew up a document outlining the main points required in a director's service contract in February 2015, which can be seen at page 76A of the bundle, but nothing was progressed and no contracts were ever signed by the parties.

12. The claimant has produced a document which purports to be a contract of employment with the first respondent, which can be seen at pages 39 to 57 of the bundle. The claimant says that he was tasked with producing the contracts by the directors, however the respondent's evidence is that the claimant was never asked to draft any contracts and that if they were going to prepare contracts they would have used a specialist adviser conversant with employment law to draft the contracts. The claimant says he drafted the contract and placed it in the directors' folder on SharePoint and then circulated a link to the other directors, however the respondent's evidence is that they knew nothing about the contract on SharePoint and had not received any communication from the claimant about it. The respondent's uncontested evidence is that Mr Hodgson checked the personnel files at the start of this litigation and found no reference to any contract of employment. At paragraph 6.1 of the contract, which can be seen at page 42 of the bundle, the terms relating to salary are "*your salary will be £9996 PAYE + £64,236 dividends per annum payable in equal monthly instalments in arrears on or before the last working Friday of each month up to and including that day."* When I asked the claimant how he had arrived at the figure of £64,236 he said that he had taken his dividend payment and used a grossing up calculator available online, but he did not check the figure with anybody before writing it into the contract. The claimant says that he signed his copy of the contract of employment, however no signatures appear at page 52 of the bundle and the respondent's uncontested evidence is that no contracts, signed or otherwise, were present in any of the directors' personnel files or online. The claimant says he produced the contract at page 39 of the bundle in or around 2017 and this accords with the findings made by the respondent during their investigation in respect of disclosure of documents in preparation for this litigation. I prefer the evidence of the respondent that no contract of employment or service agreement had been drafted or

agreed between the parties at any time during the claimant's employment because this is entirely consistent with the fact that the document appearing at page 39 of the Tribunal bundle is unsigned by either party and appears to have entirely incorrect figures in respect of the dividend payments at paragraph 6.1. It is also consistent with the evidence of Mr Hodgson that neither respondents produced any contractual documentation that no human resources or employment law specialists were instructed by the board of directors to draft any contractual documents. It is highly unlikely that any contract of employment would make provision for dividend payments to be paid as a salary, but in any event, the fact that the claimant has grossed up the dividend payment has produced a figure which has not been agreed between the parties as the dividend is payable net of corporation tax. It is clear that this document was never agreed between the parties.

13. The claimant was an employee of the first respondent and Mr Watson's evidence is that the parties agreed that they would devote all of their time to the first respondent when they set up the company in 2008 and, although the working situation was quite fluid in the beginning and the directors worked some weekends, it was envisaged that the directors would work five days a week on a full-time basis. However, there was no agreement between the parties as to what proportion of time would be spent as an employee and what proportion of time be required for the directors to carry out duties as owners/shareholders in order to maximise the profits of and manage the business. The claimant carried out some of his day-to-day work as an employee of the first respondent, however he also worked in his capacity as a director/shareholder by attending directors' meetings and carrying out tasks as the owner/shareholder of the business. The evidence shows that all four directors worked in the same way and a significant proportion of the time was taken up as the owners of the business making decisions in their capacity as directors/shareholders, particularly financial decisions, such as bringing in new business and exploring the possibility of merging with or taking over other businesses. In the circumstances, the claimant did not work full-time or 37.5 hours per week, as claimed, as an employee for the first respondent. This is simply a figure the claimant has produced for the purposes of drawing up a contract.

14. The claimant says that he worked as an employee for the second respondent from time to time as the operations director and in particular in relation to the customer relationship management system (CRM). It is common ground that the second respondent had a separate managing director from when it was set up in 2011 until 2015 when Mr Watson stepped in after the previous managing director left the business. Mr Watson's uncontested evidence is that he spent approximately 90% to 95% of his time working within the first respondent and that he was not an employee of the second respondent. The respondents' evidence is that none of the directors were employees of the second respondent, but they provided their services as directors/shareholders to the second respondent on an ad hoc basis, as and when required. I prefer the evidence of the

respondents that the claimant was not an employee of the second respondent at all and provided his assistance to the second respondent on an ad hoc basis because he was one of the owners of the business and he was looking out for his financial interest in that business as one of the owners.

15. The claimant approached the directors in or around approximately 2017 to find out whether they would buy him out as he wanted to sell his shares and wanted to make a fresh start in his life. The parties did not agree on the price for the shares and therefore the claimant continued in his capacity as operations director and shareholder.

16. The respondents were unhappy with the claimant's performance and commitment to the businesses from 2014 onwards and Mr Watson's uncontested evidence is that the claimant has shown no interest in developing the business, never attended any company events with customers or distributors, never visited customers to attempt to understand any challenges they faced and generally did not act as a company director. The respondents had concerns about the claimant's long-term commitment to the business and his attendance at the first respondent's office was sporadic. The respondent had concerns that the claimant would often work from home without informing or agreeing that with anyone within the business and that such occasions coincided with events such as holidays, birthdays and social events and this resulted in complaints about the claimant from some of the employees who were unable to contact him. The respondent became aware that the claimant was not requesting holidays following the agreed process which was being used within the first respondent and was carrying holidays forward without discussing the issue with Mr Watson, which can be seen at pages 141A to C, 142 and 146 of the bundle. The respondent's evidence is that the claimant was averaging a three-day week in the last 12 months of his service, but the claimant says that it was four days a week and he needed a quiet day to concentrate. It is common ground that Mr Hodgson discussed the respondent's concerns and the fact that the staff had made complaints about the claimant not being available on the days he was absent from the office with the claimant on several occasions and the claimant promised that his behaviour would improve, but the respondents view is that it did not.

17. It is common ground that, towards the end of 2017, the directors had a board meeting to discuss expanding the business and a potential merger with PCI Services Ltd (PCI) which had two existing directors in the position of managing director and operations director. The claimant was present at the directors' meetings where the details about the possible merger were discussed and, it is common ground that, the claimant agreed that the merger would be a good idea for the business, creating a single company called TruStack. The claimant's role in respect of the merger was to determine which systems needed to be decommissioned where there was duplication, identify any gaps, ensure that there was sufficient capacity to support new members of staff and to coordinate the planning activities. It

is common ground that Mr Hodgson had to discussions with the claimant what was expected from him in respect of the merger because the respondents did not feel that the claimant was performing to the required standards. Mr Watson and the other directors considered the claimant's future with the respondent business at the start of 2019 but, given how close the organisations were to completing the pending merger, the directors decided that it would be more effective for the chair, Mr Hodgson, to discuss their concerns with the claimant in an "off the record" meeting which took place in early February 2019.

18. It is common ground that the discussions which had started in 2017 about the proposed merger were due to be formalised in the signing of the heads of terms for the creation of TruStack on 12 February 2019, which the claimant was well aware of. The directors had discussed the details of the merger and the documentation for a significant period of time throughout the negotiations with PCI and the final revised documents were circulated to the directors, including the claimant, on 5 February 2019. The appointment with the solicitors to sign the relevant documents had been placed in the diary approximately two weeks before 12 February 2019, although this appointment had previously been subject to various delays during the negotiations.

19. Mr Hodgson had several discussions with the directors about the claimant's performance and attendance at work and he agreed to speak to the claimant informally on or around 4 February 2019 to explain that his fellow directors had concerns about him. It is common ground that he discussed with the claimant his timekeeping, appearance, sickness absence, complaints from members of staff and the regularity of his working from home on Mondays and Fridays. Mr Hodgson also reminded the claimant about his key role in the merger, but the claimant was not receptive to this feedback and became quite animated during the conversation. Mr Hodgson's evidence is that there was no intention on the part of the board of directors to get rid of the claimant at the start of the merger. The claimant accepts that he had spoken to Mr Hodgson on many occasions and used him as an unofficial psychiatrist in respect of the difficulties he was experiencing and he felt that the relationship between him and his fellow directors had been strained during the last year of his employment, with mistakes on both sides resulting in a lack of trust. In particular, the claimant accepted that, rather than speaking to each other about the various problems, messages were sent through Mr Hodgson about any problems they were experiencing. I prefer the evidence of the first respondent that the claimant was attending their offices three days per week and was regularly taking Mondays and Fridays off as this is entirely consistent with the uncontested evidence that Mr Hodgson spoke to the claimant about his performance and attendance. I do not accept the claimant's evidence that he was working on the days he was at home because there would not have been any reason for Mr Hodgson to speak to him about his attendance and the complaints from staff if the claimant was genuinely working from home as, it is more likely than not, that such

an explanation, if true, would have been accepted by Mr Hodgson and the other directors.

20. As the respondent companies were approaching the date of the merger, in or around January 2019, the directors discussed the requirements for communication with the staff regarding the merger and Mr Hodgson asked for two lines to be removed from the proposed statement to the effect that "no staff would be leaving" and that "nobody would be leaving the business" as a result of the merger. The claimant believed that a plan was been formulated to remove him from his position and to force him to relinquish his shares. As a result of this belief, the claimant accessed his fellow directors' emails through the first respondent IT system and made a search for any emails with the name "Muckles" because he knew that was the name of the firm of solicitors that would be used in respect of any termination of employment. Towards the end of January 2019, the claimant found on the respondent IT system an email between Mr Watson and the solicitors, as set out at page 542 of the bundle. The email states "*our preferred outcome would be for the director to leave employment and the company to pay a fair value for shares owned. We would like to offer a stage payment of monies due from shares over a 3 to five-year period provided that the director in question behaves and does not cause the company any problems."* The claimant took the reference to director to mean him and concluded that the respondents wanted to remove him as a director. The claimant made an appointment to see his solicitor to take advice about the email and the documents relating to the merger and he saw his solicitor on 11 February 2019. The claimant was advised by his solicitor, Mr Gibson, not to sign the merger documents the following day.

21. On the morning of 12 February 2019 at around 9:30 AM the claimant called the meeting with his fellow directors and asked them if he was going to be made redundant, to which the respondent did not reply. The claimant accepted in cross examination that he asked the respondents to provide him with an assurance that he was staying in the business, but denies giving the respondent an ultimatum. The respondent says that the claimant was asking for a written guarantee that he would not be dismissed, that he would have a guaranteed role in the business going forward, but if not, he would derail the merger process and "make life difficult" for the directors. Mr Watson's evidence is that the claimant was aggressive in his manner, raised his voice when he was setting out his demands and he was threatening the success of the merger. The respondent's evidence is that the claimant said that, if the respondent could not guarantee his future, then they would have to make it very attractive for him to leave, otherwise he would make it difficult for the respondent. The claimant's evidence is that he was not confrontational and there was no intention on his part to come across as blackmailing or holding a gun to the respondent head. The claimant says that he was asking the respondent to be gentle with him because he would have to uproot his family and move to France. The claimant relies on the email he sent to himself on 11 February 2019, a copy of which can be seen at pages 566 to 568 of the bundle, and says that this sets out the content of

the speech he says he made to his fellow directors on 12 February 2019. Mr Watson's evidence is that, although the claimant had a piece of paper with him at the meeting on 12 February 2019, only 6 out of the 19 issues on this email were mentioned by the claimant; i.e. that he was seen as a fee burner not a fee earner, that the relationship between him and Russ (one of the directors) was difficult, the reference to £200,000 worth of savings in personnel, that his wife would not have permission to stay in the UK, that he and his family would have to move to France and he would be uprooting his stepdaughter. The claimant's evidence in cross examination was that he did not understand the consequences in not signing the merger documents on 12 February, that he was not aware of the increased legal costs because it was a very traumatic time for him and that the loss to the respondent was the last thing on his mind. I prefer the evidence of the respondent that the claimant was aggressive and confrontational in the meeting with the other directors on the morning of 12 February 2019, given that the claimant's evidence is that he felt the relationship between him and his fellow directors had been strained for over a year and because of his actions in going behind the back of his fellow directors and reading their emails, which the claimant understands is in breach of data protection and IT requirements which led the claimant to feel he was going to be dismissed. Given that the claimant had already received legal advice not to sign the merger documents, it is more likely than not that the claimant did have some understanding of the disruption this would cause to the planned merger and he would have used this as a bargaining tool to threaten his fellow directors.

22. It is common ground that the claimant told the respondent that he would not sign the merger documents on 12 February 2019, as scheduled, and the respondent told the claimant that they would take advice about the claimant's demands and the claimant was asked to work from home. The respondent's uncontested evidence is that the merger process was delayed by a period of approximately four months as a result, that at least one member of staff left the business seeking advancement elsewhere as the respondents could not speak openly about potential opportunities for promotion after the merger and extra money had to spent on maintaining the existing infrastructure of the businesses, which has been previously been postponed as the improvements were originally going to be paid for post-merger.

23. The claimant did not return to work after 12 February 2019. Mr Watson sent an email to the claimant on 14 February 2019, as set out at pages 562 to 563 of the bundle, terminating the claimant's employment. The email also included an offer to purchase the claimant's and his wife's shares in the businesses. Mr Watson states in this email that "*there has been a board agreement that we are ending your employment with SITS Group and Pivotal Networks."* The claimant believes that this shows he was an employee of both the respondents, however Mr Watson's evidence is that he was referring to the claimant's employment with the first respondent and his directorship with both the first respondent and the second respondent being terminated. Mr Watson's uncontested evidence

is that he offered to meet the claimant twice to discuss his dismissal but he did not receive a response from the claimant. It is common ground that the claimant and his wife remain shareholders of the first and second respondent. It is also common ground that the claimant was paid his salary as normal to the end of February 2019.

24. The claimant accepted in cross examination that, as a director, he owes a fiduciary duty to the respondents and that, as such, his first duty was to act in the best interests of the company. The claimant also accepted that his signature on the merger documents was something that was required by the respondent companies and he knew that there would be a delay in the merger if he refused to sign. Mr Watson's evidence is that the board of directors felt that they were being held to ransom by the claimant as he put his own interests before those of the companies', demonstrating a total lack of commitment to the business and destroying all trust they had in the claimant to act in the best interests of the first and second respondent. The respondents' uncontested evidence is that Mr Watson had to contact PCI and explained the reasons why they could not sign the merger documents on 12 February 2019, as scheduled, and that this was extremely embarrassing from a professional point of view, causing a delay of approximately four months which led to at least one member of staff leaving their employment and extra costs being incurred in maintaining the infrastructure of the unmerged companies. None of the other directors had any guarantees about their continuing employment post-merger and all the directors received the same documents regarding the merger, including the proposed new shareholders agreement, which can be seen at pages 459 to 520 of the bundle.

25. It is common ground that the respondent did not arrange a meeting with the claimant prior to his dismissal and the respondent companies do not have an agreed disciplinary procedure. The claimant says, as he was being dismissed for his conduct, the respondent should have arranged a disciplinary hearing and applied the ACAS Code. The respondent's evidence is that, even if they had gone through a disciplinary procedure, the outcome would have been that the claimant would have been dismissed without notice in any event and that, because the claimant was dismissed for some other substantial reason, the ACAS Code does not apply. When I asked the claimant what he says should have happened as a result of his actions on 12 February 2019, the claimant said that the respondent should have confirmed that they were not making redundant.

26. It is common ground that the claimant received a salary in the sum of £9996, which is just under the limit at which national insurance payments become payable, and that all the directors were paid this salary on the advice of their accountant as it was viewed as a tax efficient means of receiving money out of the company. It is also common ground that the respondent and the claimant did not consider the provisions of the National Minimum Wage throughout the claimant's employment, although the remaining directors have increased their salaries in line with the National Minimum Wage since the merger with PCI. Dividends were paid

each month to the claimant and his fellow directors and these were agreed periodically at the board of directors' meetings and were dependent upon the profits made by the first and second respondent. An annual dividend was paid at the end of each financial year as a form of reckoning up and this payment varied each year depending on the amount of profit made by the first and second respondents, but in any event, would be either 5% or 10% of the net annual profit of each company. The respondent's uncontested evidence is that, if there was a significant reduction in cash flow before the year end, there was a possibility of the directors having to pay back a proportion of their monthly dividend and there was no guarantee, contractually or otherwise, that the directors would receive a dividend before a resolution was passed by the board of directors each month, for example as set out in the resolution from the board on page 79 of the bundle, although this is a proforma resolution and a similar one was completed by the secretary each month.

27. In the year to December 2016, the claimant and the other directors received a monthly dividend in the sum of £3667 from the first respondent. From 1 January 2017, the payments were increased to £4427. The claimant received dividends each month from the second respondent in the sum of £625.30 to December 2016 and this was increased to £926 per month from 1 January 2017. In 2017, on the advice from accountants, the directors in the first respondent transferred part of their shares to their wives and they were issued with alphabet shares for this purpose. The claimant split his 23,750 1p shares to 12,450 1p shares, 5650 I ordinary shares for himself and 5650 J ordinary shares for his wife. The claimant received £4427 each month from 1 January 2017 to 30 June 2017, thereafter he received £2177 per month for his I ordinary shares and his wife received £2250 for her J ordinary shares. On 30 June 2017 the claimant received a final dividend in the sum of £12,500 and his wife received a final dividend in the sum of £12,500. On 7 June 2018 the claimant's wife received an interim dividend in the sum of £21,251.96 and on 25 June 2018 the claimant received an interim dividend in the sum of £15,000. On 26 October 2018 the claimant's wife received an interim dividend in the sum of £30,000. The claimant received dividend payments from the second respondent in March 2019, after his employment had come to an end, but neither he nor his wife have received any dividend payments thereafter. Mr Watson's evidence is that, as an offer had been made to the claimant and his wife to buy back their shares, he considered that they were in negotiations and this was one reason why no further dividend payments were made and the respondents have not made dividend payments to the other directors because of the merger with PCI as the new company has not yet completed its first year of trading.

Submissions

28. The claimant relies on the written skeleton argument and submits that his monthly dividends from the first respondent and the second respondent are payable to him for his work and therefore should be regarded as wages and his basic award in compensatory award should be calculated

on that basis. Alternatively, the claimant submits that under section 123 ERA it is open to the Employment Tribunal to award compensation on a just and equitable basis for the losses sustained in consequence of his dismissal and attributable to the actions of the respondents. In this case the claimant submits that the respondent stopped paying dividends to him and his wife from the date of his dismissal and therefore that should be compensated as a consequence of the dismissal. The claimant submits that the contract at page 42 of the bundle is not an agreed document, but it does reflect what the claimant genuinely thought the position to be regarding his salary and dividends.

29. The claimant submits that the reason for his dismissal is correctly categorised as conduct and that his dismissal was unfair as the respondent did not apply any disciplinary process. The claimant relies on the case of Express Medicals v Donnell where there was a breakdown of the employment relationship followed by eight weeks of negotiations and a dismissal and the Employment Tribunal found that the dismissal was unfair. The claimant submits that there is every chance he would have continued working with the respondent had the matter been addressed properly and had he been given an opportunity to air his concerns. The claimant submits that he was an employee of both the first and second respondents and that there is no basis for concluding that he could have been dismissed fairly. The claimant submits that if there was some prospect that the claimant might leave at some point then a 10% reduction might be justified. The claimant submits that a 25% uplift should be applied to the compensatory award for failure to comply with the ACAS Code of Conduct on Disciplinary and Grievance Procedures. The claimant submits that there should be no reduction for contributory conduct because the claimant's actions on 12 February 2019 were not blameworthy and it was right for the claimant to raise his concerns prior to the merger.

30. The respondent relies on the written skeleton argument and submits that the claimant was not an employee of the second respondent and he did not have a written contract of employment with the first respondent. The claimant continued to receive dividend payments from the second respondent to March 2019 and thereafter the second respondent has not made any dividend payments to any of the directors, which means that the claimant has not suffered any loss. The respondent submits that the only reason why the claimant is an employee of the first respondent is because the parties agreed that he was an employee and the employment and directorship was set up in such a way because it was the most tax efficient way of taking money out of the company. The respondent submits that the claimant's salary of £9996 was referable to some degree of work done by the claimant for the first respondent, but there was no such agreement with the second respondent.

31. The respondent submits that it does not matter what the claimant had in his mind at the time his employment was terminated, but it is a question of what Mr Watson had in his mind as the dismissing officer and whether that was a reasonable belief. The planned signing of the merger documents on

12 February 2019 could not take place because of the claimant's actions and this caused significant delay and cost to the two respondents after over a year of negotiations with PCI. The respondent was faced with two impossible choices of either providing the claimant with a guarantee for his future with the company or to write a blank cheque and it is no surprise that the respondent directors concluded that the claimant was acting in his own personal interests rather than in the best interests of the companies in which he had fiduciary duties which resulted in the breakdown of trust and confidence between the parties. The respondent submits that the claimant was dismissed for some other substantial reason which is a potentially fair reason under section 98(4) ERA taking into account the size and administrative resources of the respondent undertaking, given that there are only four directors. The respondent submits that there was no obligation to follow the ACAS Code in a some other substantial reason dismissal and there were no procedures which could have taken place because the claimant had given the respondent and impossible choice.

32. The respondent submits that the claimant contributed to his dismissal through his actions on 12 February 2019 by refusing to sign the merger documents and that he is 100% to blame. However, if there was some unfairness in the process, the respondent submits that the claimant is either 50% or 75% to blame. Respondent submits that the dividend payments to the claimant and his wife were not referable to any work done and should not be included in any award. The respondent submits that no lump-sum payments have been made by the respondents to any directors since the date of the claimant's dismissal and therefore this is not an amount that the claimant can recover, particularly as it is solely referable to shared ownership.

33. The respondent relies on the case of Polkey and submits that, although there was no plan by the respondent to dismiss the claimant prior to 12 February 2019, that all changed when the respondent lost all trust and confidence in the claimant. The claimant has claimed that he had no understanding of the consequences of his actions and the respondent submits that there was no realistic prospect of the relationship continuing successfully. As the claimant has made a claim for six months' notice pay in the County Court, the respondent submits that no compensation is payable until 14 August 2019 in any event, but had the respondent held a meeting with the claimant, the outcome would have been the same. The respondents submit that if they had met with the claimant prior to his dismissal it would have become apparent that the claimant had been snooping and secretly reading the respondent's emails and this would have been another reason for the breakdown of trust and confidence which meant that the employment relationship was doomed and, whether a fair procedure have been applied not, the claimant's employment would have been terminated. The respondent submits that the claimant has contributed significantly to his dismissal. Although the respondent would not have known about the claimant secretly accessing and reading the respondent's emails before the dismissal and can only be considered in order to reduce the basic award, the respondent submits that

compensatory award should be reduced to reflect these circumstances. The respondent submits that the ACAS Code on Disciplinary and Grievance Procedures does not apply to dismissal for some other substantial reason and therefore there should be no uplift to the compensatory award.

The Law

34. In Patel v Mirza [2016] 3 WLR 399 the Supreme Court held that there were two policy reasons for the common law doctrine of illegality as a defence to a civil claim: a person should not be allowed to profit from his own wrongdoing, and the law should be coherent, not self-defeating, and should not condone illegality. Whether allowing a claim would be harmful to the integrity of the legal system depends on whether the purpose of the prohibition that had been transgressed would be enhanced by denying the claim; whether denying the claimant might have an impact on another relevant public policy; and whether denying the claim would be a proportionate response to the illegality. A range of factors are relevant to proportionality, including the seriousness of the conduct, its centrality to the contract, whether it was intentional, and whether there was disparity the parties' respective culpability. Punishment for wrongdoing is the responsibility of the criminal courts. The civil courts are generally concerned with determining private rights and obligations and they should neither undermine the effectiveness of the criminal law, nor impose additional penalties disproportionate to the nature and seriousness of any wrongdoing.

35. The Employment Appeal Tribunal (EAT) applied the guidance given in Patel v Mirza to employment rights claims in the case of Tracey Robinson v His Highness Sheikh Khalid Bin Saqr Al Qasimi UKEAT/0106/19, in which the judgment was handed down on 4 February 2020. In this case the claimant participated in the illegal performance of the contract by not paying tax up to July 2014 which made the contract unenforceable for illegality and, at first instance, the Employment Tribunal rejected her claims of wrongful and unfair dismissal. The EAT held that, from July 2014, the claimant had not participated in illegality and the Tribunal was wrong to refuse to allow the claims for wrongful and unfair dismissal.

36. Section 230 of Employment Rights Act 1996 (ERA) provides *"(1) in this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. (2) in this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is expressed) whether oral or in writing."*

37. Section 98(4) of the ERA provides *"… The determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –*
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

38. Section 122(2) ERA provides "*where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.*" I note that this provision is worded in mandatory terms and does not give the Tribunal discretion to reduce the award.

39. Section 123(1) ERA provides "*subject to the provisions of this section … The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."*

40. Section 123(6) ERA provides "*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."* I note that the just and equitable consideration applies only to the proportion by which the Tribunal reduces the award, but it does not apply to whether or not to make the reduction in the first place, nor does it entitle the Tribunal to take into account matters other than conduct that is causative or contributory to the dismissal.

41. I refer myself to the guidance given in the case of Phoenix House Ltd v Stockman [2017] ICR 84 in which the EAT held that the sanctions set out in the Trade Union and Labour Relations (Consolidation) Act 1992 section 207A for failure to comply with the ACAS Code of Practice on Discipline and Grievance did not apply to dismissal for some other substantial reason resulting from a breakdown of working relationships.

42. The claimant refers to the case of Ezsias v North Glamorgan NHS Trust UKEAT/0399/09 in which it was held that an employee who had been dismissed because of the breakdown of working relationships between himself and his colleagues (irrespective of whether he had been responsible for, or had contributed to, that breakdown) had not had action taken against him because of his conduct. Accordingly, it had been open to the Employment Tribunal to rule that such disciplinary procedures as applied when allegations of misconduct were made did not have to be invoked in his case.

43. The claimant refers to the case of Express Medicals Ltd v Donnell UKEAT/0263/15 in which the EAT held a potentially fair dismissal which had been reasoned to be unfair because of the absence of a procedure,

without identifying what that procedure was, was it inadequate. Further, having found that the relationship had come close to if not cross the point at which trust and confidence could not be salvaged, it was then perverse to hold that there was insufficient evidence on which to assess that there was a chance that the employment would not continue.

Conclusions

44. Applying the law to the facts I find that the claimant was not an employee of the second respondent and his relationship with Pivotal Network Ltd is correctly categorised as that of director/shareholder, i.e. as one of the owners of the business. It is not uncommon for business owners to get involved with the day-to-day running of a business and to provide their input and expertise in order to help with the efficient running of the business in order to maximise its profits in return for the chance to withdraw those profits from the business by way of dividend payments. At the time the second respondent was set up, the claimant and his fellow directors had been operating and working solely with the first respondent company for 3 years and the evidence is that the second respondent has its own distinct set of employees, none of whom are employees of the first respondent, and it was set up with a separate managing director who ran the business on a day to day basis. The evidence is that the services provided by the first respondent to the second respondent, such as finance and administration, were provided in return for a fee and the people carrying out those duties were never employees of the second respondent. Similarly, the claimant's input into the second respondent was on an ad hoc basis, in the same way as the other directors provided their input on an ad hoc basis, and this was done in order to protect their business interests as the owners of the business, rather than as employees. The dividend payments from the second respondent to the claimant, and indeed the other directors, were paid regardless of whether the claimant, or the other directors, did any work for the second respondent and they were paid out of the profits, which the claimant was entitled to as an owner of the business. In the circumstances, I find that the claimant did not have a contract of employment, express or implied, with the second respondent and there is no need for this Tribunal to imply a contract of employment between the parties as the claimant was a director/shareholder of the second respondent: Dugdale v DDE Law Limited UIKEAT/0169/16, as relied upon by the respondent in closing submissions. As a result, I find that the claimant's claim for unfair dismissal against the second respondent is not well-founded and is dismissed.

45. It is not in dispute that the claimant was an employee of the first respondent as well as being a director/shareholder. The parties did not reduce the employment relationship to a written contract and I do not accept that the document at pages 39 to 57 of the bundle reflects the nature of the employment relationship between the claimant and the first respondent, particularly as Mr Gibson accepted in his closing submissions that this document was never agreed between the parties. All the directors, including the claimant, spent some of their time working as

employees for the first respondent and the rest of their time performing duties as the owners of the business, however it is likely that the number of hours spent as an employee by each of the directors would differ from day to day and week to week depending on the circumstances and the needs of the business. It is unlikely that there would be a week where the claimant would not be carrying out functions as a director/shareholder and, therefore, I find that the claimant was not working 37.5 hours per week as an employee, as alleged by the claimant. The reality of the claimant's situation is that he was spending three days per week in the office and two days per week at home, when he rarely contactable by employees and fellow directors and produced very little work. Therefore, the payment of £9996 per annum does not offend the National Minimum Wage Act which provides a minimum wage of £7.83 per hour as 3 days x 7.5 hours = 22.5, 22.5 X 52 weeks = 1170, 1170 x £7.83 = £9161.10 per annum. In the circumstances, I find that the claimant was paid wages in the sum of £9996 per annum for his employment with the first respondent and he was paid slightly in excess of the National Minimum wage.

46. There is no doubt that the claimant was one of the owners of the first and second respondents and, as a director/shareholder, he was entitled to receive dividend payments out of the profits from both companies. I accept the respondent's evidence that payment of the dividends was dependent upon the amount of profit available in each company and, although some interim dividends were payable monthly, it was on the understanding that, should they be a shortfall in the cash flow before the year end, some or all of the interim dividends would be repayable to the first or second respondent. The dividend payments were not referable to any employment or work done by either the claimant or any of the other directors. To find otherwise would mean condoning the illegal performance of the contract of employment because it would mean that both the employer and employee would be failing in their responsibilities to make deductions of tax and national insurance through PAYE and pay them to HMRC and potentially perpetuate fraud: Patel v Mirza and Robinson v Qasimi. The claimant knowingly entered into the arrangement with the first respondent to receive wages at the rate of £9996 per annum on the understanding that there would not be deductions of tax and national insurance on this amount through PAYE and the respondent would not have to pay employer's national insurance. If the claimant was earning around £100,000 in wages, as claimed, for a period of 10 years, this would mean that a significant sum had not been deducted for tax and national insurance through the PAYE system. In such circumstances, it would offend against public policy to allow the parties to defraud the Inland Revenue for 10 years and this Tribunal would apply the guidance in Patel and Robinson and would decide that the claimant could not bring a claim for unfair dismissal as he had performed the contract illegally. However, as I have found that the dividend payments were not paid to the claimant as wages though the PAYE system, there is insufficient evidence in front of me on which to determine whether there has been an illegal performance of the contract and the claimant is not prevented from bringing his claim for unfair dismissal. I am guided in this finding by the principle that it is for the

criminal courts to punish any criminal activity and it is for the Inland Revenue to conduct their own investigation into this issue: Patel v Mirza.

47. Turning to the dismissal itself, I find that the reason for the claimant's dismissal was the breakdown of trust and confidence between the parties arising from the claimant's actions on 12 February 2019 in demanding a written guarantee that he would not be dismissed or for the respondent to provide an attractive settlement sum to compromise the relationship coupled with the refusal to sign the merger documents, effectively holding the respondent to ransom, in breach of the claimant's fiduciary duties as a director. I find that the respondent has shown that the reason for dismissal was some other substantial reason and not conduct, as claimed by the claimant: Ezsias v North Glamorgan NHS Trust [2011] IRLR 550, EAT, as relied upon by the claimant in closing submissions. Dismissal for some other substantial reason is a potentially fair reason under section 98(1)(b) ERA because this is a substantial reason such as to justify the dismissal of an operations director with fiduciary duties.

48. The claimant gave the first respondent an ultimatum on the morning of 12 February 2019: either guarantee his continued employment or pay a sum of money which the claimant would deem sufficiently attractive to end the relationship. The claimant knew the merger documents were due to be signed that day and deliberately withheld his signature, after taking legal advice. However, I note that the claimant never said at the time, and has not said in the course of this hearing, that he had any issues with the contents of the merger documents which had been sent to him around 5 February 2019. The sole reason the claimant refused to sign the merger documents was to ensure his future employment, not to negotiate better terms for the merger. I told the claimant when he was giving evidence that we had heard much evidence about the dismissal, but I wanted to give him a chance to tell me what he says the respondent should have done instead of dismissing him. The claimant's reply was that the respondent should have confirmed he was not going to be dismissed/made redundant. The claimant has given no evidence about what the employer might have done to assist with repairing the employment relationship or how the parties could have continued working together after 12 February 2019, particularly given that no one had a guarantee, written or verbal, that their employment would continue after the merger. I accept the respondent's evidence that they felt the claimant had "held a gun" to their head and the claimant's actions resulted in a delay to the merger and additional costs were incurred. I accept the respondent's evidence that they had not intended to dismiss the claimant prior to 12 February 2019. The respondent was entitled to take advice from its legal advisers about the possibility of ending an employment relationship and/or director/shareholder relationship. The email at page 542 from Mr Watson to his solicitor does not state that the claimant was to be dismissed. Rather, it indicates that the respondent was exploring options of how the relationship might be ended, but there is nothing to suggest that this would not be done amicably or without the claimant receiving a suitable settlement payment, particularly as Mr Watson wrote that his "*preferred*

outcome would be for the director to leave employment and the company pay a fair value of shares owned" [my emphasis]. In all the circumstances, I find that Mr Watson reasonably believed that the relationship between the claimant and the respondents had broken down to such an extent that it was irretrievable and could not be salvaged, which led to the first respondent dismissing the claimant on 14 February 2019, and that the breakdown of trust and confidence was a substantial reason of a kind such as to justify the dismissal of the claimant holding the position of operations director, given the size and administrative resources of the first respondent's undertaking. The first respondent behaved reasonably in treating this as a reason to justify the claimant's dismissal.

49. There were no written terms and conditions of employment between the parties or any written policies and procedures, such as a disciplinary procedure. This is not a case where the first respondent would have had to follow an intricate disciplinary procedure to fairly dismiss the claimant, as there is no written procedure to be followed. However, applying the principles from the guidance in Polkey v AE Dayton Services Limited [1998] ICR 142, HL, ordinary fairness requires that the respondent should have arranged and held a disciplinary meeting with the claimant prior to his dismissal. I agree with Mr Quickfall's submission that the ACAS Code does not apply to SOSR dismissals, as in this case. The claimant has not suggested, and I cannot see that it would have been necessary, that the employer should have investigated the claimant's actions on 12 February 2019. All the directors were in the meeting with the claimant when he presented his ultimatum, so there was nothing to investigate. However, the claimant should have been given the opportunity to address the issues relating to the breakdown of trust and confidence at a disciplinary hearing and there is no reason why this meeting could not have been arranged within 7 days, i.e. by 19 February 2019. Looking at all the evidence which has been presented in front of this Tribunal, the claimant would have been dismissed at the disciplinary hearing on 19 February 2019 as the claimant has insisted, to this day, that the only solution was for the respondent to guarantee his employment or pay an attractive settlement sum. Further, it is probable that the respondent would have found out that the claimant had accessed his colleagues email accounts without authorisation or permission, as it is directly linked to why he spoke to the directors on 12 February 2019, which is more than likely to have been viewed as gross misconduct by the respondent. In those circumstances, there is no evidence that the employment relationship could have been salvaged as the claimant had breached his fiduciary duties to the first and second respondents, placing his own desires before those of the companies' and the people working in those organisations, which would have resulted in the claimant being dismissed on 19 February 2019.

50. As the first respondent failed to follow a fair procedure at the time the claimant was dismissed, I find that the claimant's dismissal was procedurally unfair. However, if a fair procedure had been followed, the claimant would have been fairly dismissed on 19 February 2019. However, in terms of any losses arising from the dismissal, I find that the

claimant was paid his salary to the end of February 2019 and, therefore, he has not suffered any financial losses as a result of the dismissal. I do not accept Mr Gibson's submission that the claimant's dividends and those payable to his wife from April 2019 onwards are losses arising from the claimant's dismissal. The payment of the dividends was not dependent upon the claimant being employed and the respondent's evidence, which I accept, is that the respondent had made offers to the claimant and his wife to buy their shares and the parties were in a process of negotiation. I find that the negotiations relating to the shareholding is a separate matter and not one that this Tribunal is required to make any findings on.

51. I am satisfied that the claimant contributed to his own dismissal though culpable or blameworthy conduct in that the claimant derailed the merger process between the first and second respondents and PCI on 12 February 2019 for his personal benefit, showing a complete disregard for his fiduciary duties towards the companies of which he was the operations director. The claimant demanded that his employment be guaranteed in writing, whilst none of the other directors had any such guarantees, or for monies to be paid to him in a sum he deemed to be sufficiently attractive for him to compromise his relationships with the companies involved. I am satisfied that the claimant's actions on 12 February 2019 undermined the duty of mutual trust and confidence between the first respondent and the claimant and that the claimant was wholly to blame for this. It was unreasonable for the claimant to demand that the respondent provide him with a guarantee that his employment would continue and even more unreasonable to derail the merger talks by refusing to sign the documentation in order to leverage an agreement when the claimant had no complaints about the details of the merger itself or the merger documents. The claimant caused the breakdown of the employment relationship and his intransigence in insisting that there were only 2 options, the guarantee or a pay-off, led directly to the irretrievable breakdown of the relationship. The respondent was aware of this conduct and the claimant was dismissed as a result of the ensuing breakdown of trust and confidence. I find that the claimant was 90% to blame for his dismissal through his own culpable or blameworthy conduct and it is just and equitable, in the circumstances, to reduce his compensatory award in this sum in accordance with S.123(6) ERA 1996.

52. With regard to the basic award for unfair dismissal, this Tribunal must consider the conduct of this claimant before the dismissal in accordance with S.122(2) ERA 1996. However, under this provision, the conduct need not contribute to the dismissal, unlike under S.123(6) for the compensatory award. As such, the claimant's misconduct in accessing his colleagues' emails without authority or permission, which only came to light after his dismissal, took place prior to his dismissal and can be taken into account when deciding if it is just and equitable to reduce the basic award and by how much. In this case, I find that the claimant's conduct on 12 February 2019, as set out above, and his conduct in secretly accessing his colleagues' emails and reading them without authority or permission, is such that it is just and equitable to reduce the claimant's basic award and I

find that it is just and equitable to make that reduction in the same amount as the compensatory award, i.e. 90%.

53. The claimant's salary with the first respondent was £9,996.00 per annum. Accordingly, as week's pay is £192.23, gross. The claimant was aged 50 years at the effective date of termination and had 10 complete years of service. Therefore, the claimant is entitled to a basic award calculated at the rate of £192.23 multiplied by 14.5 weeks (9 years @1.5 weeks above the age of 41 years + 1 week). This gives a total of £2,787.34. Applying the 90% reduction, the claimant is entitled to a basic award in the sum of £278.73.

54. The claimant has not suffered any loss of earnings from the period 14 February 2019 to 19 February 2019. The claimant is entitled to an award for the loss of his statutory rights, however he has not specified on his schedule of loss how much this should be (page 38N – 38P of the bundle). I calculate this to be in the sum of £300, which is just over 2 weeks' pay. Applying the reduction of 90% to this award, the claimant is entitled to a compensatory award in the sum of £30.00.

55. The respondent is ordered to pay to the claimant the following:

Basic Award
£2,787.34 less 90% £2,508.61 **£278.73**

Compensatory Award
£300.00 less 90 % £270.00 **£30.00**

Total = £308.73

56. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 12 February 2020