EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Gotaro Kojima	**v**	**Japan Green Medical Centre Limited**

Heard at: London Central **On**: 7th - 9th March 2016

Before: Employment Judge Mr A. Spencer

Representation

For the Claimant: Mr Anderson (Counsel)
For the Respondent: Ms Davis (Counsel)

RESERVED JUDGMENT

The judgment of the tribunal is:

1. **The claim for unfair dismissal is successful; and**

2. **Pursuant to section 114 Employment Rights Act 1996 the Respondent shall reinstate the Claimant by 26th June 2017; and**

3. **The amount payable by the Respondent in respect of any benefits which the Claimant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment on 19th August 2016 and the date of reinstatement on 26th June 2017 is £60,775.44; and**

4. **The claim for wrongful dismissal is unsuccessful.**

5. **The Respondent's employer's contract claim is unsuccessful.**

6. The Respondent shall pay to the Claimant the sum of £1200 in respect of the tribunal fees incurred by the Claimant.

REASONS

Introduction

1. The Claimant is a doctor who qualified in Japan and who worked for the Respondent (a company running medical clinics in London for Japanese patients) until he was dismissed on 19 August 2016.

2. By a claim presented to the Employment Tribunal on 31 October 2016 the Claimant brought claims of unfair dismissal and wrongful dismissal.

3. Further, on 20 December 2016 the Respondent presented an employer's contract claim against the Claimant.

The Issues

4. Both parties presented very different lists of issues at the outset of the hearing. However, the differences arise from a difference in approach. The Claimant's list succinctly identifies the legal questions/issues whereas the Respondent's list identifies the numerous factual issues raised from the lengthy details given in the Claim Form and Response. It was agreed by both counsel at the outset of the hearing that there was no real difference between the parties about the essential issues which are:

Unfair Dismissal

5. There were no issues as to whether the Claimant had the necessary length of continuous service to have the right to bring his claim. Nor was there any dispute that the claim was presented in time.

6. There was no dispute that the Claimant was dismissed by the Respondent with effect from 19 August 2016.

7. There was a significant preliminary jurisdictional issue regarding illegality. The Respondent asserted that the Claimant's contract of employment was based on an illegal act and that the Claimant had thereby lost the right to bring his claim. The illegal act was said to be the Claimant's participation in a scheme, which involved a deception to obtain a visa to enable him to enter and work in the UK. The Claimant contended that the visa arrangements were legitimate, that there was no illegality on his part or alternatively contended that any illegality did not deprive him of his right to bring the claim.

8. The second disputed issue was the reason for dismissal. The Respondent contended that as the Claimant's visa (which permitted him to work lawfully in the UK) expired on 19 August 2016 the Claimant could not

lawfully continue to work for the Respondent thereafter. The Respondent relied on this as a potentially fair reason to dismiss within section 98(2)(d) Employment Rights Act 1996 (ERA). The Claimant did not concede this. The Claimant did not assert that there was some other reason for his dismissal but asserted that it was lawful for the Claimant to have continued employment after 19 August 2016 as by this stage his visa had been extended and so section 98(2)(d) was not engaged. The Respondent did not seek to assert in the alternative that they had some other substantial reason to dismiss the Claimant. They relied entirely on section 98(2)(d) ERA.

9. Subject to my decision on the issues set out above, I had to determine whether the dismissal was fair considering both the substantive and procedural fairness of the Respondent's decision to dismiss.

10. With regard to remedy, the Claimant sought reinstatement. The Respondent opposed this on the basis that it would not be practicable or just in the light of the Claimants conduct to make an order for reinstatement.

11. Further, with regard to assessment of compensation the Claimant sought to assert that he was employed under a fixed term contract of five-year duration. The Respondent asserted that any fixed term was only three years. This issue is relevant to the assessment of compensation for lost earnings and benefits. Further, the Respondent sought reductions to any award on the grounds of:

    11.1 It being unlawful to have continued to employ the Claimant beyond 15 September 2016 (and so any compensation for loss of earnings should be limited to this date); and

    11.2 Conduct on the part of the Claimant which contributed to his dismissal; and

    11.3 Failure to mitigate loss; and

    11.4 Considerations of justice and equity.

Breach of Contract (Wrongful Dismissal)

12. Again (save for the jurisdictional issue set out below) there were no issues regarding the Claimant's right to bring the Claim under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 nor was there any issue as to whether the claim had been presented in time.

13. The same preliminary jurisdictional argument had to be determined with regard to illegality and the question of whether this deprived the Claimant of his right to bring the claim.

14. Subject to this I had to determine:

14.1 What was the length of notice that the Claimant was entitled to be given under his contract of employment? ; and

14.2 Had the contract or any contractual provision in relation to notice been frustrated because the Claimant could not lawfully continue to work for the Respondent after the expiry of his visa (this argument being asserted by the Respondent)? ; and

14.3 Had the Respondent given the Claimant insufficient notice (and thereby breached the Claimant's contract)? ; and

14.4 What damages should be awarded? Again, the Respondent's arguments regarding failure to mitigate loss required consideration.

Respondent's Counterclaim/Contract Claim

15. The Respondent sought to bring an employer's contract claim on the basis that the Claimant had allegedly been overpaid salary following a request made by the Claimant after termination of his employment to retrospectively treat a period of holiday absence as sickness absence. This was said by the Respondent to have the effect of creating an overpayment of salary to the Claimant before his employment ended which the Respondent claimed from the Claimant.

16. The Respondent accepted that if the Claimant's contract was unenforceable due to illegality it could not succeed with the claim.

17. The issues I had to determine were:

17.1 Whether on the facts the Claimant had made the request and whether this created the overpayment contended by the Respondent; and

17.2 Whether the tribunal had jurisdiction to entertain the claim under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 on the basis that either:

17.2.1 The contract of employment was unenforceable due to illegality. The Respondent accepted that if the Claimant's contract was unenforceable due to illegality it could not succeed with the claim; or

17.2.2 The claim did not arise until after the termination of the claimant's employment.

Evidence

18. For the Respondent I heard evidence from:

18.1 Dr Yoshihiro Takaya, a Director and Principal Doctor of the Respondent; and

18.2 Dr Nobuyuki Kodani, a Director of the Respondent and also a Director of a related company called Kurashiki Medical Centre (KMC). Dr Kodani was assisted by an interpreter; and

18.3 Ms Akiko Kato, HR Manager for the Respondent.

19. The Claimant gave evidence and called no other witnesses.

20. All four witnesses verified the evidence contained in their witness statements. I had the benefit of seeing the evidence of each witness tested under cross-examination and had the opportunity to put questions to the witnesses.

21. I also considered various documents including an agreed tribunal bundle, the Claimant's written opening submissions, a cast list from the Respondent, a chronology and cast list form the Claimant, statements of issues from each party, an authorities bundle from the Claimant's counsel and a legal bundle, additional case authorities from the Respondent's counsel and written closing submissions from both counsel. I also gave both counsel an opportunity to make oral submissions.

Findings of Fact

22. Page references are to the corresponding numbered pages in the tribunal bundle. Any extracts quoted from the documents are quoted from the English translations in the tribunal bundle.

23. The Respondent, Japan Green Medical Centre Limited is a UK registered limited company. The Respondent is a private healthcare provider of Japanese style GP services to Japanese expatriates in the UK. The Respondent operates from two clinics, one in London and one in Acton and employs some 51 members of staff in the UK.

24. In addition to the Respondent company there are two other relevant corporate entities:

24.1 Japan Green Medical Centre Japan Co Limited (JMGC Japan) which is a Japanese based subsidiary of the Respondent; and

24.2 Kurashiki Medical Centre (KMC) which is a medical corporation formed under Japanese law and is the parent company of the Respondent Company.

25. The Claimant qualified as a Doctor in Japan. The Claimant practiced medicine in Japan until May 2007 then moved to the USA in June 2007 to start an internal medicine residency in New York. The Claimant started a

geriatric Medicine fellowship in Hawaii in July 2010, which ended in June 2013 when he moved to the UK to work for the Respondent.

26. The Respondent requires Japanese speaking and Japanese qualified doctors to provide services to its patients in the UK. Unless such individuals have a right to work in the UK by some other route they are required to obtain a visa from the UK Visas and Immigration Department at the Home Office (UKVI) which permits them to enter and work in the UK.

27. There are various types of visa but the type at the heart of this case is referred to as a Tier 2 Intra-company Transfer Visa (Tier 2 ICT Visa). Such visas are intended to be used by migrant workers who have been working for multinational organisations aboard and who are being transferred by the overseas employer to work for a related UK entity. This requires the migrant worker to have been working for the overseas organisation for a period of time before they transfer to work for the related UK entity.

28. The overseas organisation with whom the migrant worker works is referred to as the migrant worker's "sponsor" and must confirm to UKVI as part of the visa application process that the worker has worked for their organisation for the requisite period of time. The Tier 2 ICT Visa is merely one method of bringing migrant workers to the UK. Another option would have required the Respondent to first advertise the job vacancy within the UK and to show that they were unable to fill the vacancy with a UK worker. This requirement is referred to as the "resident labour market test" (RMLT). Using the Tier 2 ICT transfer route avoided the Respondent having to carry out the RMLT.

29. The Tier 2 ICT Visa was used by the Respondent to bring doctors to the UK and to permit them to work in London for the Respondent. The method used by the Respondent was that once a suitable doctor was found JGMC Japan were instructed to pay a nominal payment of ¥50,000 per month (currently equivalent to about £380) into the bank account of the doctor for a period of 12 months. The doctors were never issued with a contract of employment by JGMC Japan and never undertook any work for the company. Instead, they continued to work for other employers while waiting out the 12-month period before they applied for a Tier 2 ICT Visa. JGMC Japan would support that application by issuing a certificate of sponsorship to UKVI to confirm that the migrant worker had worked for JGMC Japan for the requisite 12-month period. The visa was granted and the migrant worker was permitted to enter and work in the UK at the Respondent's clinics. JGMC Japan was set up to facilitate the scheme and did not in fact provide any medical services in Japan or elsewhere.

30. The scheme was set up in this way following advice from Ms Fumie Yamamura, the Inward Investment Officer of the British Consulate in Osaka Japan. Mr Junji Genko was the Managing Director of the Respondent from December 2007 to January 2016. Mr Genko set up JGMC Japan in 2010 for this purpose. Mr Genko dealt with recruitment on

behalf of the Respondent. However, Mr Genko did not operate the visa scheme in a clandestine way. It appeared to be common knowledge amongst those in senior management roles within the Respondent group of companies. This is apparent from the fact that many of the emails that the Claimant received regarding the scheme were copied to others within the organisation.

31. Since 2010, 12 workers (including the Claimant) were successfully brought to the UK to work for the Respondent under Tier 2 ICT visas using this method.

32. The Tier 2 ICT Visas were generally issued for a three-year period. However, there is scope to apply to UKVI for an extension beyond the three-year term.

33. The scheme described above was unlawful and in breach of UK immigration laws. The arrangements with JGMC Japan and the payments made to the doctors from that company were a device intended to create a fiction that a worker had been employed by the overseas entity to enable him/her to obtain the Tier 2 ICT Visa when in fact they had never really been employed by or provided any work to JGMC Japan. It was a scheme that was instigated by the Respondent to further their business objectives in the UK. No doubt, the fact that an officer of the British Consulate was involved in the inception and performance of the scheme lent it a degree of credibility and perhaps allowed those operating the scheme to convince themselves that it was acceptable and to ignore its obvious shortcomings. However, the scheme was unlawful nevertheless.

34. The Claimant toured the Respondent's clinic in 2010 whilst on holiday in the UK and met a Dr Nagano of the Respondent. In September 2010, the Claimant sent an email to Dr Nagano confirming that he was interested in working for the Respondent in London (page 92). The Claimant received a favourable response. Dr Nagano put the Claimant in touch with Mr Genko.

35. On 13 February 2011, the Claimant met Mr Genko for the first time at a hotel in Japan for a job interview. This was the only time the Claimant met Mr Genko before commencing work for the Respondent. The interview went well and Mr Genko confirmed that he would like the Claimant to work for the Respondent in London. At the time, the Claimant was employed at the University of Hawaii. Mr Genko mentioned to the Claimant the need for him to be registered as an employee of JGMC Japan before he could obtain a visa and work in the UK.

36. On 14 February 2011, the Claimant sent an email to Mr Genko expressing his delight at the fact that he was going to come to work for the Respondent. No firm timescale had been agreed by this stage. The Claimant confirmed that he would update the Respondent about the duration of his employment at the University of Hawaii and the progress of his PhD course (page 98).

37. Ms Kato joined the Respondent as Personnel Officer in June 2011 and reported to Mr Genko. At the time, the Respondent was in the process of bringing over its first migrant worker, Mr Okamoto, using the Tier 2 ICT Visa route. Upon learning of the scheme Ms Kato's initial reaction was to be concerned as to whether it was legitimate. She was asked by Mr Genko to speak to Ms Yamamura at the British Consulate. Ms Yamamura and Ms Kato spoke on several occasions with Ms Yamamura providing guidance to Ms Kato and showing her the process. Ms Yamamura regularly checked forms completed by Ms Kato. This official involvement allayed Ms Kato's concerns and she came to accept that the method was proper.

38. The Claimant sent an email to Mr Genko on 8 October 2011 (page 102). In that email he refers to an original plan that he would start work for the Respondent in 2013 or 2014 when he completed his PhD course in Japan. However, he refers to the fact that his PhD course might end one year earlier than he envisaged and enquires about the possibility of starting work for the Respondent in 2012. The Claimant also stated in his email "*I remember it is required for me to register as an employee of your company in Japan 1 year before [I come to the UK]"*. The Claimant's use of the word "register" as opposed to "work for" in his translation of his email is telling. It indicates that the Claimant already knew by this stage that the arrangement was a mere device to enable him to work in the UK. Had he genuinely understood or believed that he actually had to work for JGMC Japan in Japan or elsewhere he would have asked about what work he would have to do for JGMC Japan particularly as he was working in Hawaii at the time and appeared to have no intention of returning to work in Japan and was instead intending to move to work in London shortly after his work in Hawaii ended.

39. Mr Genko replied to the Claimant on 13 October 2011 to confirm that it would not be possible for him to start work early. The reason given by Mr. Genko in his email is *"because of requirement of registration at JGMC Japan for at least 1 year to obtain VISA, and current doctor's work schedule, I'd like you to start working [at JGMC] from 2013-2014 as planned first".* He also stated *"In 2012, I'd like to contact you for JGMC Japan employment registration."*(page 104).

40. Mr Genko sent an email to the Claimant on 31 January 2012 (pages 106 and 108). The wording and content of the email says a great deal about both parties understanding of the arrangement with regard to the visa scheme and JGMC Japan. I have been provided with two alternative certified translations of the email. They differ slightly. In the translation at page 106 (which the Respondent relies on) Mr Genko states:

> "*I think that it will soon be time for us to ask you to register as a part-time service employee under a Medical Adviser Contract with JGMC Japan in readiness for obtaining your ICT VISA.*

This is not actual employment, but only for the purpose of utilising the ICT (Inter Company Transfer) allocation to obtain a visa as an internal transferee. You will be paid ¥50,000 monthly as a salary and when the period of your registration exceeds twelve months, it will become possible to apply for an ICT-VISA.

As to the pay, in the event that you are actually employed in London, it should be applied towards the cost of your relocation, whereas if you decide, because of your own circumstances, not to travel to the UK, you will be required to pay the net salary back to us since this is not compensation for real employment."

41. The translation at page 108 which the Claimant relies on reads as follows:

" I think it is perhaps time for you to register as a part time employee with JGMC Japan on a Medical Adviser contract, in preparation for obtaining an ICT visa.

This would not involve any actual work, and is purely in order to use the ICT (intra company transfer) framework when you obtain your visa, by making it an intra-company transfer.

You will be paid ¥50,000 every month as a salary and, once you have been registered for more than twelve months, you will be able to apply for an ICT visa.

If you do work for us in London, we will ask you to count this salary as relocation expenses, but if you personally decide not to come to the UK, we will ask you to repay the net amount you have received, as it is not remuneration for actual work"

42. I would require expert evidence to guide me in deciding which translation is accurate. It is outside my knowledge and expertise. I do not have the benefit of such expert evidence nor have I seen the translators cross-examined. However, it matters not. Even on the Claimant's translation it is clear that:

    42.1 The registration with JGMC Japan was solely for the purposes of obtaining the Tier 2 ICT visa; and

    42.2 The Claimant would not actually have to do any work for JGMC Japan; and

    42.3 In the event that the Claimant did not come to the UK he would have to pay back the net sum he received, as it was not remuneration for actual work.

43. The Clamant is a highly educated man. I find it deeply implausible that he genuinely thought that he was to be employed by JGMC Japan on some sort of retainer arrangement as he sought to suggest under cross-

examination. His evidence in this regard was unconvincing and I do not accept it. Had he genuinely thought that he would be required to work for JGMC Japan he would have asked what the duties were and what kind of commitment he was expected to make in return for the salary particularly as he was engaged on a full time basis in Hawaii at the time and the salary from JGMC Japan was merely for a nominal sum and bore no relation to the substantial salary that a man of his skills and experience could command. He subsequently did not one shred of work for JGMC Japan and had no contact with them. He was aware from the outset that the arrangement with JGMC Japan was a mere device to obtain the Tier 2 ICT Visa. Just as Ms Kato had when she learned of the arrangement the Claimant must have thought it odd at the very least but was willing to participate in the process nevertheless. No doubt he followed the same path as Ms Kato in that the scheme must have seemed wrong at first but, just as Ms Kato had, the Claimant no doubt came to accept that this was the way things were done by the Respondent and came to accept it and to overlook its obvious shortcomings. The Respondent held the view that the workers themselves were blameless as they later represented that this was the case to UKVI.

44. Masahiko Sakai of the Respondent contacted the Claimant by email on 5 February 2012 on behalf of Mr Genko asking the Claimant to provide details to register the Claimant *"as a part time employee for the UK ICT-VISA application".*(page 110)

45. The Claimant was paid the monthly sum of ¥50,000 (gross) from March 2012 (page 111).

46. In January 2013, Mr Genko contacted the Claimant by email referring to the Claimant coming to work in the UK in February 2013 (page 113). There appears to have been a misunderstanding over dates as the Claimant replied to confirm that as his contract in the US was due to end in June 2013 and as he was then due to return to Japan for a short time to deal with his PhD he wished to start work in the UK in either summer 2013 or spring 2014 (page 115)

47. Mr Genko replied on 24 January 2013. He explained that the Respondent needed the Claimant to start work in summer 2013 as the Respondent had made arrangements with other doctors with this date in mind. The emails refers again to the visa arrangement as follows *"we registered you at JGMC Japan in February 2012 so that you will be able to obtain VISA in March-April 2013 and you will be able to come to the UK the soonest possible".(*page 117).

48. The Claimant replied on 26 January indicating that he would be able to start work in July 2013. His email raises an enquiry about the duration of the employment in the UK. The Claimant asked *"How long will my employment be as you mentioned that there is a limit for the number of doctors at your clinic?"*(page 119). It is clear from the fact that the Claimant was making this enquiry that there had been no specific

agreement between the two men by this stage as to the duration of the Claimant's employment within the UK.

49. Mr Genko replied by email on 28 January to say:

> *"According to the visa restrictions, the current rules allow ICT-VISA for 5 years at most, but depending on the conditions, it can be extended up to 9 years at most. However, we are not able to guarantee due to frequent changes [in visa rules]. It is not possible to obtain permanent leave under the current rules. According to our clinic's employment style, it will be judged whether or not the employment will be renewed every year based on Appraisal. Although the employment duration is not fixed as long as visa permits, I think it depends on how the employee works. (I appreciate if you could inform us of any fixed duration of employment (for example 3 years) you may want, so that we could make a plan accordingly."*(page 121)

50. It is clear from this email and the other emails and contemporaneous documents that the Claimant's employment was to be for an indefinite term and its duration would depend on the Claimant's performance. However, both parties knew that however long they wanted the arrangement to continue this was ultimately dictated by the visa situation and the Claimant would require a valid visa to continue working for the Respondent.

51. The Claimant sent an email to Mr Genko on 14 February 2013 in which he confirmed that he would like to work for the Respondent for as long as possible but for at least 3 years. (page 129).

52. Mr Genko's reply to the Claimant dated 14 February 2013 again refers to duration of the employment in the following terms *"….insofar as duration of your employment is concerned, it would be ideal if you could stay for as long as possible provided that you proved yourself to be of benefit to the clinics"* (page 128). The email refers to an offer letter that is attached. The offer letter makes no specific reference to the duration of the employment but appears to be for an ongoing and indefinite term as it refers to annual salary reviews and annual entitlements to holiday, study leave and sick leave (page 131).The offer letter also repeats what was said before that the payment the Claimant received from JGMC Japan *"does not include remuneration for actual work done"* and the fact that the payment will be treated as an allowance toward relocation costs.

53. The Claimant accepted in cross-examination that he had received no promise of employment in excess of three years before he agreed his contract of employment or commenced employment.

54. In early 2013, Mr Genko told Ms Kato that the Claimant was going to be working for the Respondent and asked her to deal with matters. Ms Kato issued a Certificate of Sponsorship (CoS) to UKVI upon Mr Genko's instruction.

55. The UK Border agency issued a Certificate of Sponsorship Details dated 17 June 2013. It includes a section on work dates, which confirms a start date of 1 August 2013 and end date of 31 July 2016 (page 142). Ms Kato had been instructed by Mr Genko to specify the three-year term when submitting the CoS. This was the norm and was all that Ms Kato understood was permitted until 2014. Since then on only one occasion had Ms Kato been instructed to apply for a longer term. She was instructed to apply for a 5-year period for a head nurse in 2014.

56. The Claimant continued to the receive payments from JGMC Japan until June 2013 (page 143).

57. In early July 2013, while he was in Japan, Ms Kato gave the Claimant all the documents he required in relation to his application for the Tier 2 ICT Visa including JGMC Japan's CoS. Ms Kato had completed the paperwork for the Claimant and marked it up with post it notes for the Claimant to sign. The Claimant signed the documentation having looked through it and took this to the UK embassy in Tokyo to submit the application. This was the Claimant's only interaction with the UK authorities in relation to obtaining the visa.

58. Neither party has provided me with a copy of the documentation that the Claimant completed in order to make the visa application and so I am unable to see what representations the Claimant made to the UK authorities in order to secure his Tier 2 ICT Visa. However, I find it inconceivable that the process would not have involved the Claimant verifying that he met the requirements to qualify for the ICT visa and I find that the Claimant's conduct in submitting the visa application facilitated the unlawful scheme operated by the Respondent. Ultimately, the Claimant was applying for the visa on his own behalf. Further, the Claimant knew that his application was based on the fiction that he had worked for JGMC Japan for 12 months before making the application when in fact he had not done so. The Claimant's culpability was however, much less than that of the Respondent who had conceived of the scheme in the first place and was openly operating the scheme as an essential part of its business model as it was an essential requirement of their business to employ Japanese speaking and qualified doctors who could enter and work in the UK.

59. The Claimant's visa application was successful. The Claimant's Tier 2 ICT Visa was issued and records that is valid for three years from 20 July 2013 to 19 August 2016 (page 144). Both parties knew at this stage that the Claimant could not remain employed by the Respondent after 19 August 2016 unless his visa was extended beyond this date.

60. Ms Kato was instructed by Mr Genko to prepare a contract of employment for the Claimant using a template document. She did so and the Claimant was issued with a contract of employment (pages 145 - 155). This confirms that the Claimant began employment with the Respondent on 20

July 2013 (page 146). The contract is not expressed to be for a fixed term. It is a contract for an indefinite term that could be terminated by either party giving notice in the usual way. It was an express term of the contract that once the Claimant had completed an initial three month probationary period he would be entitled to one month's notice of termination of employment if his employment were terminated within the first four years of the contract (page 152). It was also an express term of the contract that in the event that the Claimant had taken more paid holiday than his accrued entitlement as at the date his employment terminated the Respondent would have the right to deduct the excess holiday pay from any payments due to the Claimant (page 148). It was also an express term of the contract that the Respondent would be entitled to dismiss the Claimant in the event that he was no longer able to work lawfully within the UK (page 152). The Claimant signed the contract on 9 August 2013 (page 155).

61. Both parties knew from the outset that the Claimant's continued employment with the Respondent was dependent on the Claimant having the right to work lawfully in the UK and that the Claimant's employment must end if and when he no longer had that right. During cross-examination, the Claimant accepted that he had this understanding from the outset.

62. The Claimant's employment went well. He received salary increases to reflect this.

63. The Claimant was issued with two further contracts in November 2013 (pages 156 – 166) and May 2014 (page 167 – 177). Again, Ms Kato prepared these from the same template. However, the contracts were issued to record the salary increases and other than this change, the terms were not changed in any material respects.

64. In 2014 the Claimant told Dr Takaya at a meeting that he wanted to study part time for a PhD in the UK and this would not affect his work other than that on occasions he might need to leave early or take days off as holiday to attend university. Dr Takaya agreed to this on the basis that it was up to the Claimant how he spent his time outside work as long as his studies did not affect his work. The Claimant subsequently began his studies at UCL.

65. A note relating to the Claimant's appraisal with Mr Genko and Dr Takaya in 2015 refers to the possibility of extending the Claimant's employment and records Mr Genko as saying *"[Mr Genko] replied that the visa is scheduled to be extended unless an extraordinary problem occurs".*(page 179).

66. The Claimant began to get anxious about his future by about April 2015 as rumours were circulating that two new doctors were coming to the UK to work for the Respondent. The Claimant knew that the clinic was at full

capacity and there were no vacant consulting rooms. He and colleagues were concerned about their job security.

67. In September and October 2015. Dr. Kodani came to the UK to resolve a problem with Mr Genko. Reports had been received that staff at the Respondent were at breaking point due to a culture of bullying by Mr Genko and his management team. Dr Kodani investigated the matter and concluded that the reports were true. Mr Genko and his managers subsequently left the Respondent's employment.

68. The Claimant was contacted in January 2016 regarding a possible job opportunity in Japan (page 182). He declined and replied by saying "*I…because I have contracts with a research facility and work place [=JGMC] until 2018, unfortunately it is difficult for me to go back to Japan early*" (page 182).

69. The Claimant is clearly a talented individual who would have no difficulty finding work in Japan. He accepted during cross-examination that when he had returned to Japan on holiday in early February 2016 he had received four or five job offers that he rejected. That was reasonable at the time as the Claimant had been given to understand that his employment would be extended by the Respondent.

70. In February 2016, Dr Kodani understood that he was to replace Mr Genko at the Respondent. When he was approached by the Claimant and asked about whether the Claimant's visa would be extended so he could continue working for the Respondent beyond August 2016 Dr Kodani (who was impressed by the Claimant) replied that his performance was good and he did not see a problem with it. Dr Kodani recalls the Claimant being delighted by this letting out a cry of joy and pumping his fist in celebration.

71. The Claimant understood by this stage that his visa and his employment with the Respondent was very likely to be extended beyond August 2016.

72. The situation changed because of a decision reached at a board meeting in London on 11 March 2016. The meeting was attended by Dr Kodani who reported to the board that he had told the Claimant that he would be extending his stay in the UK. Dr Kodani was told by the rest of the board that this would not be possible. The Claimant was expected to return to Japan after three years and two other doctors had already been recruited and were scheduled to come to work for the Respondent. There were no additional consulting rooms or sufficient budget in the UK to accommodate the Claimant.

73. I do not accept the Respondent's contention that there was a strict rule or requirement that doctors would work from the Respondent in London for a strict term of 3 years. The board members in Japan may have assumed that a three-year term was expected but this was certainly not the understanding that had been given to the Claimant and not what he had been led to expect.

74. Mr Kodani was understandably embarrassed by the situation. He sent an email to the Claimant on 11 March 2016 in which he stated apologetically that *"it was decided at the Board Meeting today that the extension of your employment will in principle not be permitted."* The reason he gave was *" there is a wide divergence of opinion between us regarding the current state of finance and the future business development of JGMC and the conclusion was that we cannot go down the route of expansion at present"* (page 186).

75. By this time, the Claimant was studying at for his PhD at UCL on a part time basis. He sent an email to his supervisors at UCL on 11 March 2016 confirming that his employers were no longer going to extend his visa. He confirmed that his visa was due to expire in August and asked whether he might be able to change his PhD course from part time to full time and apply for a student visa so that he could remain in the UK (page 188). The Claimant clearly knew by this time that his employment would end when his visa expired on 19 August 2016. The Claimant's enquiry to UCL was clearly made as a contingency plan with a view to him and his family remaining in the UK after his employment with the Respondent ended. The Claimant received a positive response to his enquiry (page 188). The Claimant clearly wanted to remain in the UK regardless of whether he could continue working for the Respondent.

76. The Claimant met with Dr Kodani on 14 March 2016. The Claimant explained his situation and expressed his dissatisfaction at his contract being terminated earlier than he had been led to believe. He also suggested the possibility of him continuing to work for the Respondent on a part time basis. Dr Kodani, responded negatively indicating that this would not be possible.

77. The Claimant contacted a competitor of the Respondent named Iryo in Mid-March 2016 to enquire about working for them (pages 193-195). This is inconsistent with the Claimant's assertion that he did not know that his employment with the Respondent was to end by this stage.

78. The Claimant sent an email to Dr Kodani on 17 March 2016. He asked whether it was correct that his employment (and visa) would have been extended were it not for the fact that the Respondent had already arranged for a new doctor to come over (page 198).

79. Dr Kodani replied by email on 17 March 2016. he confirmed: "*That is right. At the Board Meeting, it has been decided not to extend this company's business. Because of the excessive number of doctors compared with the number of the consultation rooms at the clinic, financial constraint from the first half of the business year and the fact that Dr Nagamatsu will take place of Dr Takesako and Dr Kinjo strongly requested to start working at JGMC in August, the board members concluded to terminate my* [sic] *employment. I do not recognise any problem with your evaluation"* (page 199)

80. The Claimant and Dr Takaya met on 17 March 2016. Again, it is clear from the content of the discussion that the Claimant was aware that his employment was to end when his visa expired in August 2016. He opened the conversation with an explanation that he would incur loss of salary as a result of the termination of his employment and his return to Japan. He enquired whether the Company would meet those expenses. When asked for details of his expenses he confirmed that they totalled approximately £10,300 to £10,600 and included rent on a property in London, a term's fees in advance for his child's nursery and an air ticket home to enable him to seek new employment. Dr Takaya confirmed that he would discuss the request with the Respondent's directors. (page 202).

81. The Claimant spoke with Dr Takaya again on 24 March (page 204). Dr Takaya confirmed that he had obtained agreement in principle from the board to meet the Claimant's expenses. However, the Claimant met this with a request for an increased payment of £30,000. He also indicated that if his request was not met he would make matters known to friends and acquaintances and implied that this would damage the Respondent's reputation in London. Dr Takaya agreed to discuss the request internally. Again, it is clear from the Claimant's comments at this meeting that he knew full well at this time that his employment was to end. He referred to this by saying *"I expect that Dr. Kodani has told you that [my departure] has all been tied up but I had been making plans since last year on the basis that my contract would be continued…."*

82. As requested by Dr Takaya on 24 March the Claimant sent an email to Dr. Takaya on 29 March 2016 setting out how he arrived at the figure of £30,000.

83. The Claimant met with Dr Takaya and a Mr Murakami (a consultant working for the Respondent) on 21 April 2016 (page 365). The meeting was led by Mr Murakami. The Claimant's note of the meeting (which I accept as accurate in this regard) records Mr Murakami confirming to the Claimant that KMC could guarantee to offer him jobs at either the company's medical centre in Kurashiki, Japan or with another group company in Shanghai (p365). The Claimant also asked when his employment would terminate. Mr Murakami answered by saying this would be at the same time as the Claimant's visa terminated. The Claimant asked whether it would be possible to extend his visa and his employment with the Respondent (p373). Mr Murakami replied to say it would not be possible for the Claimant to continue to work for the Respondent.

84. At the end of the meeting, the Claimant handed over a letter dated 21 April 2016 (page 213). This was drafted by the Claimant but edited by his solicitor. It was sent largely for the purpose of asking on what grounds the Respondent was terminating his employment and referred to the fact that the Claimant had been told by Dr Kodani that the reason was financial constraints and that Mr Takaya had told the Claimant at a meeting on 17

March 2016 that the company had "changed the rules" and decided to terminate the employment of all the employees (including the Claimant) who came to work for the Respondent under a Tier 2 ICT Visa (page 213).

85. The Claimant was still in no doubt by this stage that his employment with the Respondent was to end in August 2016. He confirmed this in an email that he sent on 26 April 2016 with a view to securing another job. He referred to the fact that *"I was informed last month that my employment will be terminated this Summer".*(page 216).

86. As to the reason for the decision to terminate the Claimant's employment it is clear that at this stage the reason was that the Respondent had already made arrangements to replace the Claimant when his visa expired in August 2016 and could not accommodate both the Claimant and his replacement as they did not wish to expand the operation in the UK. When that decision was made it appears that the decision makers had not known that the Claimant had been told that it was likely that his employment would be continued beyond August 2016.

87. The Claimant wrote to Dr Takamoto at KMC on 4 May 2016 (page 223). His letter sets out his circumstances, indicated that he considered the Respondent's conduct to be unlawful and asked for Dr. Takamoto to intervene.

88. The Respondent held a board meeting in London on 24 and 25 May 2016. The situation with the Claimant was discussed and it was agreed to offer the Claimant a one-year extension to his employment in the UK.

89. Following the relevant part of the board meeting on 24 May Dr Takaya sent an email to the Client the same day confirming that consideration would be given to applying to extend the Claimant's Tier 2 ICT visa. Dr Takaya asked the Claimant to meet with Mr Komatsu (a director) to discuss this further on either 25 or 26 May (page 231).

90. The Claimant was clearly very upset with the Respondent by this time. He adopted an inflexible position by responding to Dr Takaya on 25 May to confirm that he was only be prepared to attend a meeting or a discussion once the Respondent had *"renewed my visa unconditionally, as originally promised, and once the visa has been delivered to me"* (page 231).

91. On 5 June 2016 Mr Komatsu emailed the Claimant to confirm that it had been decided at the recent board meeting to extend the Claimant's visa *"on the same basis as it is now*" and that the details of the Claimant's future work with the Respondent were to be discussed with Dr Takaya (page 257).

92. The following day on 6 June 2016 Mr Komatsu sent an email to the Claimant confirming that it had been decided to extend the Claimant's visa by one year (page 256). Mr Komatsu confirmed that the Respondent had decided that this was possible (i.e. they could accommodate the

Claimant). He also confirmed that the Respondent would begin the process of renewing the Claimant's visa. The Claimant replied by email on 6 June to accept the offer and to confirm that he would like the Respondent to begin the process for renewing the visa for one year (page 259).

93. On 7 June 2016 Mr Komatsu sent an email to the Claimant to acknowledge the Claimant's acceptance of the Respondent's offer. His concluding paragraph clearly confirms that the intention at this time was for the Claimant to continue working for the Respondent for another year (page 261).

94. By this stage, the parties had agreed to settle their differences on the basis that the Claimant's Tier 2 ICT Visa would be extended for one year and the Claimant would continue to work for the Respondent in the UK for that further year. However, that resolution was to change imminently.

95. Following the board meeting in late May the Respondent had agreed to seek a legal opinion on the legitimacy of the Tier 2 ICT visa arrangement. Counsel's opinion was obtained on 9 June 2017 from Rory Dunlop of 39 Essex Street Chambers (pages 264 – 267). It is clear from that opinion that the Respondent's visa arrangements were in breach of UK immigration laws and that it was very likely that if UKVI became aware of the practice they would revoke JGMC Japan's sponsorship licence and would probably exercise their power to curtail the existing visas of all those who had entered the UK under the scheme. Counsel considered that a criminal prosecution was possible but unlikely given his experience was that UKVI focussed on removing illegal migrants rather than prosecuting them. Counsel's advice was unequivocal and strongly advised the Respondent to cease the practice.

96. Dr Takaya decided that it would be best for the Respondent to voluntarily "self-report" the practice to UKVI rather than to conceal it and risk being found out at a later stage.

97. The Respondent's solicitors, Sugiyama & Co wrote to UKVI on 17 June 2016 to report the practice to UKVI (page 272 - 277). That letter includes a full and frank explanation of the practices regarding Tier 2 ICT visa applications. It provides full details of the twelve employees who had obtained such visas and set out the steps that the Respondent intended to take to address matters. In addition to ceasing the practice. Those steps included not applying to extend any existing Tier 2 ICT Visas for those who were still working in the UK. This proposal was no doubt a part of the Respondent's strategy to reduce the likelihood of the UKVI taking steps to prosecute them or to remove their ability to obtain visas for their employees in the future. The Respondent was therefore going back on its commitment to extend the Claimant's visa as part of its strategy for reducing the likelihood of or severity of a sanction from the UKVI. The letter also included a comment regarding the employees knowledge of the propriety of the scheme stating *"… the workers did not understand there*

was anything wrong with the scheme"(page 277). The Respondent accepted that it had been the driving force behind the scheme.

98. As a result of the Respondent's decision no application was made to extend the Claimant's visa. The Claimant did not know this at the time and was understandably anxious about the progress of his visa renewal. He sent mails to enquire about progress but did not receive a satisfactory response.

99. The Claimant instructed his solicitors, Burlingtons, to write to the Respondent. They did so on 30 June 2016 (pages 284 – 286). Legal action was threatened unless the Respondent renewed the Claimant's visa and employment for two years (this despite the previous agreement to extend for one year).

100. Sugiyama & Co replied to Burlingtons on behalf of the Respondent on 11 July 2016 (pages 289-291). The letter confirmed that the Respondent had self-reported itself to UKVI. The letter also confirmed that UKVI were investigating and that a response was awaited. The letter also accused the Claimant of criminal conduct in making a false representation to obtain his visa in the knowledge that the Respondent's visa arrangement were unlawful. This allegation was made despite the fact that on 17 June 2016 the Respondent's solicitors had represented to UKVI that the workers who had participated in the scheme (including the Claimant) were blameless. In those the circumstances it was said that the Respondent would not apply to extend the Claimant's visa and that his employment could not continue his employment after 19 August 2016 (page 290). The Claimant was therefore aware on 11 July 2016 that his employment would end on 19 August 2016. It is clear that by this stage the Respondent had made a firm decision not to continue to employ the Claimant and was positioning itself for this litigation despite their position with regard to the Claimant's illegality directly contradicting their recent representations to UKVI.

101. The Claimant had become unwell by this stage. He was signed of sick by his GP for one month from 12 July 2016. The Claimant had in fact been suffering from anxiety since about April 2016 due to his work situation.

102. On 14 July 2016, the Claimant received a notice from UCL to confirm that he would be registered as a full time student at UCL with effect from 19 August 2016 (page 295). This would enable the Claimant to apply for a student visa to remain in the UK with his family.

103. In mid-July 2016, the Claimant took advice from a UCL visa advisor regarding the possibility of obtaining a student visa to enable him to remain in the UK after his visa Tier 2 ICT visa expired in August 2016. This would permit the Claimant to remain in the UK for the purpose of his studies and would buy the Claimant further time to resolve matters with a view to continuing to work for the Respondent.

104. After completing their investigations, UKVI responded to Sugiyama & Co by letter dated 4 August 2016. The decision was to make an exception and to maintain the Respondent's status as an A rated sponsor. This was on the basis that the Respondent would have a period of three months within which to withdraw Tier 2 ICT sponsorship from any individual currently working under Tier 2 ICT Visas and to assign Tier 2 (General) CoS to enable them to continue being sponsored under Tier 2 (General) visas instead. The Respondent would also have to undertake a full resident labour market test (RLMT) before assigning a new CoS to those individuals (and to undertake the same test for future workers). The RLMT is a way of protecting the settled workforce in the UK by requiring an employer to advertise a job to give settled workers an opportunity to apply for the job before a migrant worker is recruited. The process requires the following steps:

104.1 Advertising the vacancy for least 28 days. In most cases the requirement is to advertise the vacancy using the Jobcentre Plus Universal Jobmatch service and at least one other of certain prescribed methods; and

104.2 The Respondent then confirming after this period that no suitable settled worker had been identified to fill the post by applying for a Tier 2 (General) CoS by following an application process which runs on a monthly cycle (with applications to be submitted by the 5th day of each month being decided on the 11th day of the same month (the allocation date)).

105. By this stage the Claimant's visa had only 15 days left to run. The Respondent correctly concluded that there was insufficient time to conduct the RLMT for the Claimant's role and therefore a Tier 2 (General) Visa could not be obtained before the Claimant's existing visa expired. The Respondent took no steps the contact UKVI to see if there was anything that could be done to extend the Claimant's existing visa on a short-term basis to allow sufficient time for the RLMT to be undertaken.

106. On 10 August 2016 the Claimant's solicitor telephoned UKVI. No evidence was given by the Claimant's solicitor but the attendance note of the conversation appears in the bundle (page 381) and the content is in fact relied on by the Respondent. The Claimant's solicitor enquired whether it was possible for the Claimant to apply for a Tier 2 (General) Visa following the conclusion of a RLMT even if he had applied for a Tier 4 (General) Student visa. Burlingtons were told that this was possible and that if the Claimant applied for the Tier 4 visa category it would have the effect of extending his current visa. It was confirmed that he could, before the Tier 4 (General) student visa application was decided make a Tier 2 (General) visa application with a covering letter explaining that he wanted the new Tier 2 (General) visa application to proceed rather than the Tier 4 (General) student visa application. Contrary to the Claimant's evidence (which I do not accept in this regard) UKVI did not say that there was no

problem in doing this. In fact, the attendance note records that UKVI's view was that whilst this was possible it was "*complicated".*

107. On 16 August 2016, the Claimant had an appointment with a visa advisor at UCL who assisted the Claimant in submitting an application for a Tier 4 (General) student visa. The effect of this by virtue of section 3C Immigration Act 1971 was to make it lawful for the Claimant to continue to work for the Respondent at least until his application for the Tier 4 (General) student visa was determined.

108. On 16 August 2016, the Claimant's solicitors wrote to the Respondent's solicitors (page 313 - 314). In that letter, they confirmed that the Claimant and his family had made their life in the UK and wished to stay here. It was recognised that it would be very difficult for the Claimant to obtain a Tier 2 (General) visa with another employer and so it was said that *"As a backup plan"* the Claimant had submitted an application for a Tier 4 (General) student visa in accordance with Section 3C Immigration Act 1971. It was said that this enabled him to stay (and therefore to work) in the UK until the Tier 4 (General) student visa application was decided. It was suggested that once the Respondent had undertaken an RLMT the Claimant could, at that point, apply to transfer his Tier 4 (General) student visa to a Tier 2 (General) visa and thereafter continue to work for the Respondent.

109. Had the Respondent agreed at this point to conduct an RMLT in respect of the Claimant's job the earliest date by which they could apply for the CoS having first completed the RMLT would be 5th October 2016 as it would not have been possible to complete the RMLT in time to apply by the 5th September for the application to be determined on the 11th September 2016 allocation date.

110. The Respondent's solicitor replied by letter dated 17 August robustly rejecting the Claimant's suggestion. It was said that his application for the student visa had been made under "false pretences" as the Claimant had made the application despite his admission that he had no genuine intention to study and intended to work in the UK. The application for the student visa was said to amount to a deception contrary to section 24A(1) Immigration Act 1971. It was made clear that the Respondent would not employ a worker who had taken such action.

111. In late August 2016, the Claimant's wife enrolled on an etiquette course scheduled to take place on 24 September 2016 (p317). This was another indication that the Claimant and his family had decided to remain in the UK.

112. The Claimant's final salary payment is recorded in a payslip dated 31 August 2016. A deduction was made from the salary to reflect the fact that the Claimant had taken too much holiday entitlement. The Claimant accepted that the Respondent had the right to do so under the terms of his contract.

113. The Claimant's Tier 4 Student Visa was issued on 15 September 2016 and is valid until 10 September 2019 (page 324). The Claimant and his family have remained in the UK with the Claimant continuing his studies for his PhD at UCL on a full time basis.

114. Burlingtons telephoned UKVI again on 23 September 2016. Again, the only evidence I have of this is the relevant attendance note (page 382). They asked UKVI whether it was acceptable for someone on a Tier 4 (General) student visa to switch to a Tier 2(General) visa. Burlington's were told that this was possible but the Claimant would need to meet three qualifying conditions, two of which he would probably not satisfy.

115. On 10 November 2016, the Claimant sent an email to Ms Kato (p332). In it, the Claimant indicated that he had taken 21.5 days of his holiday entitlement in the period from 12 July to 19 August 2016 when he had in fact been unfit to work due to sickness during this period. He had not wanted the Respondent to know this at the time and supported this with a sick note. The Claimant asked Ms Kato "*Is it possible to re-calculate my August salary taking into account my sickness written above and the sicknote*" and to adjust his August salary accordingly. Although it is not stated in the email, the enquiry was clearly intended to see if it might result in the Claimant becoming entitled to a payment for accrued holiday pay by retrospectively converting his holiday absence into sick leave.

116. On 18 November 2016, Ms Kato replied to the Claimant's email dated 10 November (page 336). Rather than treating the Claimant's email as an enquiry, it had been actioned as a request. It was said that the effect of this was twofold:

116.1 To retrospectively reduce the amount of paid holiday that the Claimant had taken as at his termination date so as to result in an entitlement to payment for accrued but untaken holiday; and

116.2 The retrospective allocation of the absence as sickness as opposed to holiday resulted in a significant overpayment of salary to the Claimant as he had been entitled to only receive SSP for much of the period (whereas he had received full pay at the time).

117. When the figures were reconciled, the Respondent claimed that the Claimant owed them the balance of £1,643.43 (gross) and requested payment of this sum.

118. I accept that the Claimant would find it very difficult indeed to find another job in the UK given that his UK medical licence was to treat non UK nationals only and he would need to find an employer who would be willing to sponsor him for a Tier 2 visa and who also provides GP services to non UK nationals. There are only three medical providers in London (including the Respondent) who would register the Claimant with the GMC. One of the remaining two will only hire employees from a specific

medical school in Japan (which the Claimant did not go to) which left only one, the London Iryo Centre. The Claimant had contacted the Iryo Medical centre in April 2016 and was told that there were no vacancies. The Claimant contacted them again on 21 February 2017 to ask if they had any further vacancies but had not heard from them by the time of the hearing before me.

119. The Claimant also met with a Dr Takashi Ito who runs his own practice in London and the medical director of the Central Japanese clinic but was told that they were not looking to expand.

120. The Claimant has also been applying for jobs within UCL but has, as yet, been unsuccessful

121. The Claimant's situation regarding work is difficult. While he is on a Tier 4 Student visa, he may only work up to 20 hours per week during term time and during holidays. He will require an employer to sponsor him for a Tier 2 (General) visa to be able to work full time.

122. The Claimant is looking for part and full time jobs in the UK.

123. The Claimant's health problems also limit his ability to work. He still suffers from anxiety as has been signed off as unfit for work until 9 March 2017 (p351).

124. The Claimant has made a conscious decision not to return to Japan and has decided to settle himself and his family in the UK. This is a life choice made by the Claimant. He could have chosen to return to Japan and it is clear from the evidence that his prospects of finding work if he does so will be significantly greater than if he remains in the UK.

Discussion/Conclusions and Applicable Law

The Preliminary Issue: Illegality

125. I start with the question of whether the Claimant's contract of employment was void and unenforceable due to illegality. This preliminary issue applies to all claims.

126. The Claimants' rights to bring his claims are dependent in both cases upon there being a contract of employment in place. For example:

126.1 Section 94 ERA gives the right not to be unfairly dismissed to an employee. In this regard an employee is a person employed under a contract of employment (see section 230(1) ERA); and

126.2 The Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") gives this tribunal jurisdiction to determine claims for breach of an employee's contract of

employment. Again, the existence of an enforceable contract of employment is an essential precursor to a claim.

127. The same is true in respect of the Respondent's counterclaim that is also brought under the Order.

128. Contracts of employment may either be or become unlawful in various ways.

129. In general terms if the underlying contract of employment is unenforceable through illegality no contractual rights and few, if any, statutory rights can be enforced under it.

130. It is common ground that the Claimant, as a Japanese National, would require a sponsor and a visa that permitted him to work full time if he was to comply with UK Immigration law.

131. The Respondent asserts that:

131.1 The Claimant submitted an application for his Tier 2 ICT visa in about early July 2013; and

131.2 Such application required him to be transferring to work in the UK from a related entity in Japan for which he had worked for at least 12 months; and

131.3 The Claimant knew (or ought to have known) that he had not genuinely been an employee of JGMC Japan; and

131.4 The method of obtaining the ICT visa was therefore unlawful and in breach of the following:

(a) Section 24A(1)(a) Immigration Act 1971
(b) Section 24B Immigration Act 1971
(c) Section 25 Immigration Act 1975
(d) Section 26(1)(c) Immigration Act 1971
(e) Part 6A of the Immigration Rules
(f) Part 9 of the Immigration Rules
(g) The UKVI sponsor's guidance

132. It is said by the Respondent that the Respondent's method of bringing doctors to the UK of Tier 2 (ICT) Visas was unlawful. I accept this. It is evident from various documents including the Counsel's Opinion from Mr Dunlop dated 9 June 2016 and it is implicit from the UKVIs letter dated 4 August 2016 that they took the same view.

133. The Respondent has not produced direct evidence to show that the Claimant took action that infringed any of the relevant provisions. Surprisingly, the Respondent has not sought to provide me with a copy of the Claimant's visa application or even a blank copy of the application

form so I can see what questions the Claimant may have answered and what representations he made.

134. The Respondent asserts that the illegality was such that the Claimant's contract of employment with the Respondent was unlawful when it was entered into because the Claimant had obtained a Tier 2 (ICT) visa based on an entirely false premise, namely that he had not as a matter of fact or law been employed by an overseas connected company for the 12 months immediately prior to the commencement of his work with the Respondent. It is said that this is a case where the the contact of employment was expressly or implicitly prohibited by statute and is therefore void from inception and unenforceable. In support of this the Respondent's counsel cited *St John Shipping Corp v Joseph Rank [1957] 1QB 267 at 283*, *Hall v Woolston Hall Leisure Ltd [2000] 578* at paragraphs 28 to 31, *Zarkasi v Anindita & Anor [2012] ICR 788 (EAT)* and *Corby v Morrison t/a The Card Shop [1980] 218 (EAT).*

135. The Claimant's position was that it was for the Respondent to satisfy me on the evidence that the Claimant had committed the offence(s) (i.e. the unlawful act(s) or illegality relied upon) and that in the absence of sufficient evidence I should not simply assume that the Claimant must have made an untrue declaration in the visa application forms.

136. Should I find that there was illegality the Claimant sought to rely on the recent decision of the Supreme Court in *Patel –v- Mirza [2016] UKSC*. The Claimant submitted that this case sets a new approach for the courts and tribunals to follow when illegality is asserted and that I must follow that new approach. It is said to be in essence a public policy issue and that the case requires me to take into account three key factors when assessing whether to deprive the Claimant of his cause of action. They are:

136.1 Would allowing the claim undermine the public policy against the illegality?

136.2 Is there other relevant public policy that may be undermined in denying the claim?

136.3 Is denying the claim a proportionate response to the illegality?

137. The Respondent's primary assertion about *Patel-v Mirza* is that the case is of no application to the present case. Ms Davis asserts that the case does not affect the well-established principle that a contract that is either explicitly or implicitly prohibited by statute is unlawful in inception and unenforceable.

138. I began by considering whether there was illegality on the part of the Claimant. I refer to my findings at paragraph 58 above. For the reasons given in that paragraph, I find that the Claimant's actions were illegal. The Claimant took an active role in obtaining a Tier 2 ICT visa in circumstances where he did not meet the eligibility criteria as he had not

worked for JGMC Japan. The degree of culpability on the part of the Claimant is irrelevant at this point. His actions were either unlawful or they were not. I find that they were unlawful.

139. I next considered whether this is a case where the Claimant's contract was either explicitly or implicitly prohibited by statute and unlawful in inception. I was referred by the Respondent's counsel to the EAT's decision in *Zarkasi v Anindita & Another*. Factually, that case bears similarities to the present case although it can certainly be said that the Claimant's participation in the illegal acts in *Zarkasi* by deliberately and fraudulently pretending to be someone else to obtain a visa is far more culpable than the Claimant's actions in the present case. Nevertheless, the EAT does not appear to have questioned the tribunal's conclusion that a contract of employment of a worker who committed illegal acts to obtain a visa to permit entry to and work within the UK was an example of a contract that was unlawful as being proscribed by law when it was first entered into.

140. I accept that this case therefore does represent an example of such a case as Ms Davis contends.

141. The next key question is whether, as Ms Davis contends, the *Patel –v- Mirza* decision does not apply to cases such as this where the contract is either explicitly or implicitly prohibited by statute. I was not taken to any particular parts of the *Patel –v Mirza* judgments to support this contention. I do not accept it. The *Patel -v- Mirza* case represents such a root and branch review of the law relating to illegality that I cannot accept that the Supreme Court intended it to be of the limited application contended by the Respondent. Indeed, the discussion of the evolution and historical difficulties of the approach to illegality at paragraphs 1 to 94 in the leading judgment of Lord Toulson is prefaced at paragraph 3 by a summary of the various circumstances in which illegality arises in the context of a contract. He states:

> *"3. Take the law of contract. A contract may be prohibited by a statute; or it may be entered into for an illegal or immoral purpose, which may be that of one or both parties; or performance according to its terms may involve the commission of an offence; or it may be intended by one or both parties to be performed in a way which will involve the commission of an offence; or an unlawful act may be committed in the course of its performance. The application of the doctrine of illegality to each of these different situations has caused a good deal of uncertainty, complexity and sometimes inconsistency."*

141. Thus, express reference is made from the outset of the Judgment to a contract that is prohibited by a statute. The remaining discussion in paragraphs 1 to 94 does not seek to isolate or exclude such cases from the scope of the discussion. I also note that the discussion includes

reference to some of the cases cited by Ms Davis and to other cases concerning contracts of employment. For example, express reference is made to the case of *Hounga –v- Allen [2014] 1 WLR 2889* which is also a case arising in the context of employment and where the illegality involved entry to the UK on false identity papers. Lord Toulson also makes reference to the same case at paragraph 103 of his Judgment in the section dealing with the approach to be adopted in future cases. Had he not intended that approach to apply to cases such as this he would have stated this. I do not accept the Respondent's contention that *Patel –v- Mirza* is not applicable in the present case.

142. As Lord Toulson puts it at paragraph 109 of his Judgment the correct question in illegality cases is no longer whether the contract should be regarded as tainted by illegality but whether the relief claimed should be granted. This is essentially an exercise in public policy considerations and involves consideration of whether the policy underlying the rule which made the contract illegal would be stultified if the claim were allowed (see paragraph 115 of Lord Toulson's judgment). The test to be applied is summarised in paragraph 120 of Lord Toulson's judgment where he says:

"120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

143. It is also said that in applying the proportionality test certain factors may be helpful to consider. Specifically, it is said at paragraph 107 of Lord Toulson's Judgment that *"Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."* It is also said that the list of factors put forward by Professor Andrew Burrows (see paragraph 93 of Lord Toulson's judgment) may be helpful to consider.

144. Taking these considerations into account my conclusions in relation to the three key factors are as follows:

(a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim,

145. The underlying purpose of the various provisions of the Immigration Act and other rules is simple. They exist for the purposes of controlling the migrant workforce and in particular, to prevent migrant workers from working within the UK unless they meet the requirements set by the policy makers in the legislature and in government. The legislation contains sanctions in the event of breach. Those sanctions are severe. They include criminal sanctions and the possibility of the transgressor being removed from the UK. The purpose of the legislation and the supporting rules and guidance is not however to deprive employees from enjoying the rights given to them by UK law or to allow those employing such workers to treat them in ways which would otherwise be unlawful. I recognise that to deprive those working illegally of the employment rights that they would otherwise enjoy but for that illegality is a powerful incentive to dissuade individuals from breaching the Immigration laws and rules and as such, it can be argued that the underlying purpose of the immigration legislation would be undermined by denial of the claim. However, it was open to parliament to have expressly incorporated into the legislation provisions depriving an illegal worker of such rights. Parliament did not do so. Given the severe sanctions for breach of the Immigration laws I do not consider that it would stultify the purpose of those laws to grant the Claimant the right to enforce his claims in this case. Those sanctions will be unaffected by my decision.

(b) Any other relevant public policy on which the denial of the claim may have an impact

146. I was not referred to any particular relevant public policies by the parties. However, there is clearly another public policy interest engaged here in upholding the employment rights granted to qualifying employees and workers under UK law and ensuring that employees and workers are treated in accordance with the standards prescribed by UK employment law. Denial of the claim would send a clear message to employers of those working unlawfully in the UK that it is acceptable to ignore UK employment rights.

(c) Would denial of the claim be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts?

147. Doubtless, denying the Claimant the relief he seeks will operate as a severe deterrent to others in his position and will encourage compliance with the Immigration legislation and rules.

148. It is also clear that the illegality was central to the performance of the contract. The Claimant could not have worked for the Respondent at all had he not obtained the visa. However, these are not the only factors to consider.

149. The Claimant's conduct was potentially serious. However, the normal punishment for his conduct is criminal prosecution and/or removal from the UK. I note that the UKVI have not deemed the Claimant's conduct so serious as to take steps to either prosecute the Claimant or to remove him from the UK. I also take into account that the Respondent itself asserted in their solicitor's letter to the UKVI dated 17 June 2016 that it is likely that their employees (including the Claimant) would have been entitled to a visa if the Respondent had not inappropriately used the Tier 2 ICT visa route and had instead applied for visa using the correct route. The Claimant's culpability in this case is, in my view, at the lower end of the spectrum and is of significantly lesser extent than in other similar employment cases (including *Zarkasi* and *Hounga*). The Claimant knowingly participated in a scheme which, whilst illegal, was conceived of and operated entirely at the instigation of his employer. He was wrong to go along with the scheme but one can see why he did so given the fact that the scheme had the apparent backing of the UK authorities in Japan and was, by that stage an open and established scheme operated by the Respondent with the knowledge of their senior management. The Claimant's culpability is significantly less than that of the Respondent who conceived of the scheme and operated the scheme on multiple occasions. The Respondent themselves expressed the view that the Claimant was blameless when self-reporting the matters to UKVI.

150. I also take into account the fact that allowing the Claimant his relief is not, in my view, allowing him to profit directly from his illegal conduct. Any relief will arise due to unlawful conduct on the part of the Respondent not as a direct result of any illegal act on the Claimant's part.

151. Finally, taking a step back and considering all the above factors in the round so as to address the public policy considerations engaged I come to the view that it would be more damaging to the integrity of the legal system to allow the Respondent to benefit from the illegality in this case to the detriment of the Claimant particularly in circumstances where that illegality arose at the instigation of the Respondent. It sits very ill in the mouth of the Respondent to rely on its own illegal scheme to defeat what would otherwise be a legitimate claim. I come the conclusion that it would be inequitable and more damaging to the integrity of the legal system to deprive the Claimant of the relief sought. Furthermore, denying

the Claimant his claims would be a disproportionate response in these circumstances. For those reasons, I find that the relief should be granted and should not be denied on grounds of illegality. This decision applies to both the Claimant's complaint of unfair dismissal and the complaint of wrongful dismissal.

152. The same considerations must be applied to the Respondent's counterclaim. Taking the three key considerations in turn:

(a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim,

153. I repeat the points made at paragraph 145 above. I do not consider that the Immigration laws would be stultified by granting the Respondent the relief sought.

(b) Any other relevant public policy on which the denial of the claim may have an impact

154. Again, I repeat the points made at paragraph 146 above save that it is of course the rights of an employer under the law that are relevant here.

(c) Would denial of the claim be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts?

155. Here the Respondent's position differs to that of the Claimant. It was the Respondent who conceived of the unlawful visa scheme and operated it repeatedly to further its business objectives. The Respondent has accepted when self-reporting to UKVI that it was entirely responsible for the scheme and that their workers were not to blame. I consider that the different level of culpability on the part of the Respondent shifts matters. I consider that it is not disproportionate to deny the Respondent the right to pursue its counterclaim nor would it be damaging to the integrity of the legal system to deprive the Respondent of the relief sought on the facts of this case. I therefore find that the Respondent should be deprived of the benefit of its claim on grounds of illegality.

Conclusions: Unfair Dismissal

156. I turn first to the reason for dismissal.

157. The applicable law is set out in section 98 ERA. The applicable parts of the section are:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

……..

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

158. The Respondent seeks to rely on section 98(2)(d) in this case. It is for the Respondent to show that the circumstances set out in the section are made out on the facts. If successful, the Respondent will have established a potentially fair reason for dismissal,

159. This is an unusual case in that the reason for dismissal has changed over time. Had one taken a view on the reason for dismissal in mid-March 2016 when it was initially made clear to the Claimant that his employment was to end the reason at that stage would have been as set out in paragraph 86 above. At that stage illegality was not a factor in the Respondent's decision-making.

160. I find that the Claimant was given notice of termination of employment on 11 March 2016. However, I also find that the subsequent agreement between the parties in early June 2016 was sufficient to amount to a mutual agreement to withdraw that notice of termination. It is not open to the employer to unilaterally withdraw notice once it has been given but it is open to the parties to either agree to withdraw the notice or to postpone the date of termination if they agree (see *Riordan –v- War Office 1961 1 WLR 210 CA*). I find that the parties entered into such an agreement in this case with the effect that the notice was withdrawn by agreement and the parties agreed to extend the Claimant's employment by a further one year to August 2017. Whilst this extension of employment was subject to obtaining an extension to the Claimant's visa, both parties

envisaged that this would be possible when the agreement was reached in early June 2016.

161. The Respondent then gave the Claimant further notice of termination on 11 July 2016. By this time, the reason for the Respondent's decision had changed. I do not accept that the reason for dismissal was because it would contravene the Immigration Act 1971 to continue to employ the Claimant thereafter. The reasons for this are:

161.1 Section 98(2)(d) was not engaged as at 19 August 2016 for the simple reason that as at this date is was still lawful for the Respondent to have continued to employ the Claimant without contravention of a duty or restriction imposed by or under an enactment. By this time, the Claimant had applied for the Tier 4 Student Visa. I accept that by virtue of section 3C Immigration Act 1971 this had the effect of making it lawful for the Respondent to continue to employ the Claimant at least until that application had been determined. In passing, I confirm that I do not accept the Claimant's assertion that the UKVI's letter dated 4 August 2016 had the effect of making it lawful to continue to employ the Claimant for a period of three months. The letter refers to a period of grace of three months to withdraw sponsorship from those on Tier 2 ICT visas and to assign Tier 2 General visas instead. It does not have the legal effect of extending visas. Consequently, as at 19 August 2016 section 98(2)(d) was not engaged as the Respondent could have continued to employ the Claimant at least for a further short period of time without contravention of the Immigration Act 1971. In the event that period ended on 15 September 2016 when the Claimant's Tier 4 Student Visa was issued.

161.2 I am not persuaded by the Respondent's argument that the Claimant's application for the student visa was in itself unlawful and that this had the effect of rendering it unlawful for the Respondent to continue to work for the Respondent after 19 August 2016. The argument raised by the Respondent was that the Claimant's application for the student visa was, in itself, unlawful as the Claimant had no genuine intention of remaining in the UK to study full time as his intention was in fact to continue to work for the Respondent. I accept that the Claimant's clear wish was to remain in the UK, to work full time for the Respondent and to continue to study for his PhD on a part time basis as before. I accept that the application for the Tier 4 (General) Student visa was the Claimant's "back up plan". However, that does not, in my view, render his application for the student visa unlawful. The Claimant did genuinely intend to remain in the UK and study full time in the event that he could no longer continue to work for the Respondent. That

is in fact precisely what he has done. I am not persuaded that this rendered the application for the student visa unlawful; and

161.3 It was open to the Respondent to either seek to extend the Tier 2 ICT visa temporarily and/or to go through the RMLT and to apply for a Tier 2 General Visa. The Respondent chose not to take either step. That choice rendered it unlawful to continue to employ the Claimant beyond 19 August 2016 (although this was extended to 15 September 2016 by the Claimant's application for his student visa). However, it was the Respondent's underlying decision that created that situation. The principal reason for dismissal was that the Respondent made a conscious decision not to seek to extend the Claimant's visa as part of its offer to UKVI when the Respondent self-reported to UKVI in June 2016. The Claimant's employment ended because of that decision.

162. It follows from these findings that the Respondent has failed to discharge the burden of demonstrating that section 98(2)(d) was engaged in this case.

163. I have not been asked to consider, in the alternative, whether section 98(1)(b) applied in that the Respondent's decision amounted to "some other substantial reason" to justify the decision to dismiss. The Respondent does not seek to rely on this provision in the alternative and hangs its hat entirely on section 98(2)(d). It follows from this that the Respondent has failed to demonstrate that it had a potentially fair reason to dismiss the Claimant and therefore the claim for unfair dismissal must succeed.

164. If I am wrong on this point, I would have found the dismissal to be unfair both procedurally and substantively unfair when applying the test under section 98(4) ERA in any event. This is a case where the Respondent made a unilateral decision not to seek to extend the Claimant's visa (and with it his employment) despite their earlier agreement to extend it for a further one year. If the Claimant's continued employment would contravene the law that came about because of the Respondent's actions in establishing the illicit visa arrangements in the first place. The Respondent's decision to go back on their commitment to extend the Claimant's employment was made without any consultation with the Claimant and without giving the Claimant any opportunity to put his case before the decision was made. I reject the Respondent's contention that the correspondence between solicitors from late June 2016 onward amounted to some kind of consultation process. That correspondence quickly became combative and was when the parties began to adopt the positions they have taken in this litigation. It was pre-action correspondence and not part of some consultation procedure that was approached by the Respondent with an open mind before making a

decision. They had clearly made that decision by the time that correspondence was written and were seeking to robustly defend that decision in the correspondence. It was open to the Respondent as soon as they took the decision to self-report in June 2016 to begin the process for transferring the Claimant from the Tier 2 ICT Visa to a Tier 2 (General) visa. Had they done so at that stage there would have been sufficient time to go through the RMLT process and to obtain a Tier 2 General Visa before the Claimant's employment ended. Based on the contents of the Respondent's letter to UKVI dated 17 June 2016 and the UKVIs reply dated 4 August 2016 it is highly likely that the Claimant would have been granted such a visa to enable him to continue working for the Respondent for the one year period that had been agreed in June 2016. I do not consider that the Respondent's actions can be said to be within the scope of the actions of a reasonable employer.

165. I must therefore go on to consider the issues in relation to remedy.

166. Firstly, I consider the question of whether to grant an order for reinstatement as the Claimant seeks this.

167. Reinstatement under section 114 ERA is the first remedy a tribunal should consider. In considering whether to make an order for reinstatement the tribunal must take into account the factors at section 116 ERA which states:

116 Choice of order and its terms.

(1)In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a)whether the complainant wishes to be reinstated,

(b)whether it is practicable for the employer to comply with an order for reinstatement, and

(c)where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

168. The Claimant wishes to be reinstated. Further, there is no argument that the Claimant caused or contributed to the dismissal and so the key issue is whether it is practicable for the Respondent to comply with an order for reinstatement. The Respondent asserts that it is not practicable because:

168.1 There is no vacancy for the Claimant; and

168.2 There is a lack of trust between the parties for three specific reasons.

169. I consider that it is appropriate to make an order for reinstatement in this case.

170. I am not persuaded by the Respondent's assertion that there is no vacancy for the Claimant. The Respondent plainly had a vacancy for the Claimant in June 2016 as they agreed at that time to extend the Claimant's employment for a further year. No evidence was given to explain why the Respondent's circumstances have apparently changed since then and so I reject the Respondent's claim that there is no vacancy.

171. With regard to the issues over lack of trust three reasons are advanced by the Respondent:

171.1 The first reason is that Claimant covertly recorded two meetings with Dr Takaya which is said to demonstrate his lack of trust in Dr Takaya and to undermine Dr Takaya's trust in the Claimant. I accept that the Claimant did covertly record the meetings and that such action was not appropriate. However, there is no real evidence to persuade me that this behaviour was considered so offensive by Dr Takaya as to make it impracticable for the two men to work together; and

171.2 The second reason is the Claimant's failure to disclose to the Respondent until 16 August 2016 that he intended to apply for a Tier 4 (General) Student visa and to remain in the UK. In particular, the Respondent complains of the Claimant's failure to disclose that fact at the point in time where he was requesting financial compensation for relocation to Japan. I accept that the application for the Tier 4 student visa was, as the Claimant put it, his "back up plan". He wanted to continue to work for the Respondent. He also wanted to himself and his family to remain in the UK. Had he been unable to continue to work for the Respondent he would have remained in the UK and studied for his PhD to a full time basis. It was disingenuous of the Claimant to seek compensation for returning to Japan when he did not have any real intention of returning. However, again I am not persuaded on the evidence that this behaviour was considered so offensive by the Respondent as to make it impractical for the Respondent to reinstate the Claimant. Dr Kodani was cross-examined on the question of whether he had a lack of trust in the Claimant now. He agreed that he could envisage working with the Claimant again; and

171.3 The third and final reason was the fact that the Claimant had made threats to Dr Takaya on 24 March 2016 about damaging the Respondent's reputation (see paragraph 81 above). Whilst those threats were ill advised, they did not prevent the Respondent from agreeing in June 2016 to extend the Claimant's employment for a further year. Again, I am not persuaded on the evidence that this behaviour was considered so offensive by the Respondent as to make it impractical for the Respondent to reinstate the Claimant.

172. The Respondent did not seek to suggest in their Counsel's closing submissions that it would not be practicable to obtain the required Tier 2 (General) visa for the Claimant to enable him to continue working for the Respondent. There is evidence before me that suggests that this may not be possible (see paragraph 114 above). However, that evidence is hearsay evidence of a conversation and not a definitive statement of the legal position. I hesitate to place too much reliance upon it particularly as it was not an argument made by the Respondent. Should it prove impossible to secure the necessary visa for the Claimant the Respondent will no doubt apply for a reconsideration of this decision.

173. The contents of an order for reinstatement are prescribed by statute and I have no discretion to vary those statutory requirements. The statutory requirement is worded as follows:

114 Order for reinstatement.

(1)An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2)On making an order for reinstatement the tribunal shall specify—

(a)any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b)any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c)the date by which the order must be complied with.

(3)If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4)In calculating for the purposes of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the

complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of—

(a)wages in lieu of notice or ex gratia payments paid by the employer, or

(b)remuneration paid in respect of employment with another employer,

and such other benefits as the tribunal thinks appropriate in the circumstances.

174. I begin by considering the date by which the order must be compiled with. I take into account the fact that the Claimant and Respondent will need to successfully obtain a Tier 2 (General) visa before the Claimant can begin work and that the Respondent will need to go through the RMLT process before that takes place. I consider that a period of at least 12 weeks will be sufficient in this regard and therefore the date shall be Monday 26 June 2017. If the parties can obtain the necessary visa before that date it is open to them to reach agreement for the Claimant to commence work earlier and for the compensation payable to the Claimant to be reduced accordingly by agreement or perhaps by seeking a reconsideration of my Judgment.

175. My calculation of the sum payable under section 114(2)(a) is set out below.

176. The Claimant's employment ended on 19 August 2016. He has been paid up to that date. His net weekly basic pay was £1381.26

177. The period from 20th August 2016 to the date of this Judgment is 32 weeks. 32 weeks at £1381.26 per week is a loss of £44,200.32. There is a further 12 weeks before the date by which the Respondent must reinstate the Claimant. The further loss that he will suffer in that period with be £16,575.12 (i.e. 31 weeks x £1381.26 per week = £16,575.12). This brings the total sum payable pursuant to section 114(2) to £60,775.44.

178. There are no mitigating earnings to take into account and there is no evidence that there are any other benefits which the Claimant might reasonably be expected to have had but for the dismissal for the period between the date of termination of his employment and the date of reinstatement.

179. There is also no evidence to suggest that the Claimant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed and so my order need not identify such improvements.

Conclusions: Wrongful Dismissal

180. I refer to my conclusions above regarding the illegality issue. The claim does not fail on the basis of illegality.

181. It was an express term of the Claimants contract of employment that he was entitled to be given one months' notice of termination of employment by the Respondent.

182. I find that the Respondent gave notice to the Claimant on 11 July 2016 that his employment would end on 19 August 2016. It follows from this that the Respondent gave sufficient notice and did not breach the Claimant's contract of employment in this respect. Thus, the claim for wrongful dismissal fails.

Conclusions: Employer's Contract Claim

183. I have found that this claim fails due to illegality (see above). However, if I am wrong on that point I do not accept that the Claimant's email dated 10 November 2016 amounted to anything other than an enquiry as to whether the Respondent might consider retrospectively adjusting his holiday entitlement. The Respondent acted in a heavy-handed fashion by seizing on this as justification for retrospectively adjusting the Claimants pay and demanding payment from the Claimant as soon as they realised that this would result in an overpayment.

184. Further, I am not satisfied that the Claimant's enquiry was capable of creating a contractual entitlement on the part of the Respondent to the money concerned. The Respondent has not directed me to any express or implied term of the contract under which they claim to be entitled to the money. The term referred to at paragraph 60 above extends only so far as to allow the Respondent make a deduction from the Claimant's final salary rather than create a separate freestanding contractual right to payment.

Employment Judge Mr A Spencer
1 April 2017