



# EMPLOYMENT TRIBUNALS

**Claimant**  
Mr Rob Andrews

-v-

**Respondent**  
Datatank Limited

**Heard at:** Nottingham      **On:** 11 April 2019

**Before:** Employment Judge Evans

## Representation

For the Claimant:                      Ms Firth (Counsel)  
For the Respondent:                      Ms Pitt (Counsel)

## JUDGMENT

1. The Claimant was unfairly dismissed. However, if the Respondent had followed a fair and reasonable procedure, there would have been a 90% chance that the Claimant would have been fairly dismissed with effect from 30 April 2018.
2. The Respondent did not breach the Claimant's contract of employment. His claim for breach of contract fails and is dismissed.

## REASONS

### Preamble

1. The Claimant was dismissed by the Respondent with effect from 30 April 2018. On 30 August 2018 he presented a Claim Form to the Employment Tribunal in which he brought complaints of unfair dismissal and for breach of contract.
2. Those complaints came before the Employment Tribunal in Nottingham at a hearing held on 11 April 2019 ("the Hearing"). The parties were represented at that hearing as set out above. Before the hearing the parties had agreed a bundle of documents, the numbering of which ran to page 185. All references to page numbers in these reasons are to the bundle page numbers unless otherwise stated. At the beginning of the hearing the representatives informed me that they had agreed that pages 127 to 129 should be removed from the bundle and so I removed these pages from the bundle that had been supplied to me without reading them.
3. The Claimant provided a witness statement for himself and gave oral evidence. The Respondent provided witness statements for the following individuals who also gave

oral evidence: Tim Bennett (the Managing Director of the Respondent) and Zoe Atkinson (Director of HR4You). I was also provided with a witness statement for Karen Kirby (Director of KK + Plus Limited). She did not attend the Hearing to give oral evidence.

4. Submissions did not finish until 4.10pm. I therefore did not have time to reach a decision and give judgment on the day so I reserved my judgment.

#### **The discussion at the beginning of the Hearing and the issues**

5. The issues between the parties which potentially fell to be determined by the Tribunal were agreed to be as follows at the beginning of the Hearing.

#### **Breach of contract claim**

- 1) Was the Claimant's contract of employment varied so that he was entitled to be paid for his notice period without attending work?

#### **Unfair dismissal claim**

- 2) Has the Respondent shown the reason for dismissal? The Respondent says the reason was redundancy or, in the alternative, some other substantial reason ("SOSR"). The Respondent contends that the requirements of the Respondent's business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish.
- 3) Was the reason for dismissal a potentially fair reason? The Respondent says it was redundancy; the Claimant does not accept there was a redundancy situation.
- 4) Was the dismissal fair pursuant to section 98(4) of the Employment Rights Act 1996 ("the 1996 Act") (including whether the dismissal was procedurally fair)? The Claimant argues that it was not because:
  - a. There was a failure to inform and consult at an appropriate point;
  - b. Such consultation as was undertaken was not meaningful (reflected in the short space of time between meetings);
  - c. Such consultation as was undertaken was not reasonable because of a lack of notice of meetings, the fact that no written records were kept of the meetings, the fact that the Claimant was not offered a companion, and the fact that there was no written confirmation of what had happened in the meetings;
  - d. The Claimant was not given a right of appeal;
  - e. The Respondent failed to seek alternative employment for the Claimant and he could have continued in employment doing a GDPR role.
- 5) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway?
- 6) If the dismissal was unfair would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to the 1996 Act section 122(2); and if so to what extent?
- 7) If the dismissal was unfair, did the Claimant, by blameworthy or culpable actions, cause or contribute to his dismissal to any extent; and if so, by what proportion, if

at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to the 1996 Act section 123(6)?

6. At the beginning of the Hearing Ms Firth raised a point that had not previously been raised by the Claimant or his representatives. This was that the Respondent should have considered making another employee redundant and not the Claimant. In particular, Scot Gilmartin, Client Services Manager, or Tim Bellamy, Business Intel Manager, should have been selected for redundancy because it might have been possible for the Claimant to do one or other of their roles. Ms Pitt objected to this line of argument being pursued: it had not been raised before and so the evidence necessary to deal with it (including documentary evidence concerning job descriptions and the like) had not been assembled by the Respondent.
7. I indicated to Ms Firth that if the Claimant wished to pursue this argument she would need to make an application to amend. I said that if the application were successful then it would be necessary for the Hearing to be adjourned and that there might well be costs consequences for the Claimant as the result of any adjournment. I asked Ms Firth if the Claimant wished to make an application to amend and she said that he did not.

### **The Law**

8. Section 94 of the 1996 Act gives an employee the right not to be unfairly dismissed.
9. Section 98(1) of the 1996 Act provides that when a Tribunal has to determine whether a dismissal is fair or unfair it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2) of the 1996 Act. The burden of proof to show the reason and that it was a potentially fair reason is on the employer.
10. A reason for dismissal is a set of facts known to, or beliefs held by, the employer which cause it to dismiss the employee.
11. If the Respondent persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses.
12. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).
13. In considering this question the Tribunal must not put itself in the position of the Respondent and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the Respondent. Rather it must decide whether the decision to dismiss the Claimant fell within the band of reasonable responses which a reasonable employer might have adopted. A claim will not succeed just because the Tribunal takes the view that the decision to dismiss was harsh if it nonetheless fell within the range of reasonable responses.
14. When the reason for dismissal is redundancy, the Tribunal should have regard to the standards set out by the Employment Appeal Tribunal in Williams and ors v Compair Maxam Ltd 1982 ICR 156 in deciding whether the dismissal is fair under section 98(4):
  - 14.1. Employees should be warned and consulted about the redundancy;
  - 14.2. The selection criteria should be objectively chosen;

- 14.3. The selection criteria should be fairly applied;
  - 14.4. If there is a union, its view should be sought;
  - 14.5. The employer should look to see if there is alternative work for the employees.
15. LJ Glidewell provided guidance in relation to what constituted fair consultation in R v British Coal Corporation and Secretary of State for Trade and Industry ex part Price [1994] IRLR 72. Fair consultation means consultation when the proposals are still at a formative stage, adequate information, adequate time in which to respond, and conscientious consideration by the employer of the response. LJ Glidewell's words were quoted with approval in the context of consulting a trade union in King v Eaton Ltd [1996] IRLR 199.
16. If the Tribunal concludes that the dismissal is unfair, section 123 of the 1996 Act provides for a compensatory award to be made. Section 123(1) provides:
- Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*
17. It is therefore necessary for the Tribunal to consider whether the compensation awarded should be reduced to reflect the chance that the Claimant might have been dismissed fairly at a later date in any event or if a fair and reasonable procedure had been used.
18. In addition, section 123(6) of the 1996 Act requires the Tribunal to reduce the amount of the compensatory award by such amount as it considers just and equitable if it concludes that the Claimant caused or contributed to their dismissal. In addition, section 122(2) of the 1996 Act requires the Tribunal to reduce the basic award if it considers that it would be just and equitable to do so in light of the conduct of the Claimant prior to dismissal.

### **Findings of Fact**

19. I am bound to be selective in my references to the evidence when explaining the reasons for my findings. However, I wish to emphasise that I considered all the evidence in the round when reaching my conclusions.

#### **Background**

20. The business of the Respondent is to provide fraud detection services and software to local government. The Claimant was employed by the Respondent as its Sales and Marketing Manager in June 2013 and held that position when he was dismissed.
21. The revenue of the Respondent declined in 2017. The senior management team ("SMT") of Mr Bennett, Mr Cogger and Ms Keane met in October 2017 and decided it was necessary to restructure the business to reduce overheads. A reduction of resources in each department was agreed and the restructure was to begin in December 2017 and be completed before the financial year end (31 March 2018). The commencement of the restructure was in fact then delayed because the SMT decided it would be "insensitive" to implement the restructure around the Christmas period.
22. In January 2018 the Respondent had 12 employees. By the date of the Hearing it had 8. The reduction in 4 was accounted for by: the termination of the Claimant's employment, two employees being made redundant and a fourth employee leaving the Respondent's employment and not being replaced.

23. Following the termination of employment of the Claimant, his duties as Sales and Marketing Manager were divided between various other employees. These were Ms Oxspring, Mr Wells, Mr Marsh and Mr Gilmartin (who subsequently left the employment of the Respondent).

Consultation, unpaid leave and discussions about termination terms

24. On 9 January 2018 the Claimant made a request for unpaid leave to visit his partner in Australia which he confirmed in writing on 10 January 2018 (page 20). On 19 January 2018 the Claimant and Mr Bennett met. The request for a month's unpaid leave was approved and Mr Bennett also explained to the Claimant that his position was at risk of redundancy as a result of a restructuring exercise. I find that the reason that redundancy was raised on this day ahead of the more formal consultation meeting which happened on 22 January 2018 was that Mr Bennett thought that the Claimant should be aware of his potential redundancy when the Respondent took a decision about his unpaid leave (because he might, for example, wish to withdraw his request for unpaid leave). Mr Bennett accepted in cross examination that by 19 January 2018 the termination of the Claimant's employment by reason of redundancy was a fait accompli "barring a miracle".
25. On 22 January 2018 Mr Bennett and the Claimant met. Mr Bennett formally informed the Claimant he was at risk of redundancy. The Claimant contends that in this meeting Mr Bennett told him that it would be "peevish" on his part to stop the Claimant travelling to Australia and he would not therefore expect the Claimant to work his notice period. (It should be noted that at the beginning of his oral evidence he corrected his witness statement and said that Mr Bennett had said that to him on 19<sup>th</sup> January but he retracted this correction during the course of his cross examination.) The Claimant contends that at this meeting Mr Bennett told him that his last day at work would be 31<sup>st</sup> January. Mr Bennett denies either that he said the Claimant's last day of work would be 31<sup>st</sup> January or that he agreed that the Claimant would not be required to work his notice period.
26. Mr Bennett then emailed the Claimant later on 22 January 2018 (page 21). In that email he said:

*...This restructure will mean a reduction in the current sales resource which will be absorbed by senior management. It is for this reason that I must inform you that your position of Sales manager/Account Manager is at risk of redundancy.*

*As discussed, to ensure the process is fair and carried out efficiently, our consultation process requires you submit any suggestions in relation to avoiding redundancy.*

27. The Claimant replied to that email on 23 January 2018 (page 192). He stated:

*Following your email below I have considered your comments and do not propose to submit any suggestions regarding alternative work etc.*

28. Pausing here, I prefer the evidence of Mr Bennett to that of the Claimant in relation to the meeting on 22 January 2018. That is to say I find that at that meeting Mr Bennett did not say either that the Claimant would not be required to work his notice period or that his last day at work would be 31 January 2018. I prefer the evidence of Mr Bennett in relation to this issue because:

- 28.1. There is no mention of either of these points either in Mr Bennett's email of 22 January 2018 or in the Claimant's reply of 23 January 2018; and

- 28.2. It is clear that the Claimant's recollection of what was said and when is not entirely clear – hence his confusion during the Hearing about whether the “peevish” comment was made on 19 or 22 January 2019.
29. However I accept that there may well have been discussions at this point focusing on when the Claimant's employment would end – that is to say discussions which reflected a possibility that the Claimant *might* not be required to work the whole of his notice period.
30. The Claimant and Mr Bennett spoke briefly on 26 January 2019. The Claimant raised tax related issues including whether a PILON could be made. The Claimant told Mr Bennett that there would be tax advantages to such a payment. Mr Bennett said he would look into it. Again this reflects a lack of certainty in relation to when the Claimant would be attending work during his notice period: if it had been understood that he would be working up till the end of his notice period then discussions in relation to a PILON would have made little sense.
31. The Claimant contends that by the end of this meeting there was a “complete agreement” not only that he would not have to work during his notice period but also that he would be paid for the whole of it in three monthly instalments. The Claimant contends that this was notwithstanding Mr Bennett having only just realized that his notice period was 3 months. The Respondent denies that there was any such agreement.
32. I find that there was no “complete agreement” that the Claimant would be paid but not required to work for the whole of his three month notice period by the end of their discussion on 26 January 2018. This is because such an agreement was inconsistent with the subsequent correspondence, was unlikely to have been reached before the meeting on 29 January 2018, and was inconsistent with the previous agreement reached just a week before that the Claimant would take a month's unpaid leave.
33. The Claimant and Mr Bennett met again on 29 January 2019. The Claimant confirmed he had no suggestions to avoid his redundancy and Mr Bennett confirmed the Respondent had no vacancies and no plans to recruit. Following the meeting on 29 January 2018 Mr Bennett sent the Claimant an email (page 22). In this he stated:
- Following your meeting last week, it has been decided your role within Datatank will be made redundant as of 31<sup>st</sup> January 2018.*
- As we are required to provide 3 months' notice, your termination date of employment with Datatank will be 30<sup>th</sup> April 2018.*
- In addition to your monthly pay, the following two items will be included in your April pay.*
- Holiday pay – 8.3 days (subject to PAYE/NI)*  
*Redundancy pay – 6 weeks @ £489 = £2934 (tax free payment)*
- The subject of 'payment in lieu' we are in the process of discussing, which I hope we can conclude soon.*
34. I find that the state of play as of 29 January 2018 was somewhat confused and not as clear as either the Claimant or the Respondent suggested at the Hearing. I find that by 29 January 2018 the position was that the Claimant's role would not exist post 31<sup>st</sup> January, that it was agreed he was entitled to 3 months' notice, that he would be taking a month of unpaid leave and that a PILON *might* be made. I make these findings because they reflect the email of 29 January 2019. I find that at this point the possibility of the Claimant being paid a PILON and not being required to

work the whole of his notice period was being discussed (but nothing had been agreed in relation to it). This is the most natural reading of the above email with its references to the Claimant's role being made redundant "as of 31<sup>st</sup> January 2018" and to a "payment in lieu" being discussed.

35. These findings that no agreement had been reached are also consistent with the email of 29 January 2018 from Mr Bennett to the Claimant (in relation to which both parties waived any privilege) at page 23 of the bundle. This is because:

35.1. It second paragraph says "Regarding payment dates, etc in this document we can complete once we have agreement" – this suggests the absence of any agreement about the exact terms on which the Claimant's employment would end;

35.2. The draft agreement is marked "subject to contract" and in any event could not be regarded as an offer which could have been accepted without further ado: the termination date has not been inserted ("??/??/2018" on page 25, the number of days holiday to be paid on termination have not been inserted, again on page 25, etc).

36. I do not accept that the draft settlement agreement simply reflected a lack of agreement in relation to the PILON and was consistent with a clear agreement that the Claimant would be paid for the whole of his notice period whilst not being required to work any of it.

37. On 30 January 2018 the Claimant indicated dissatisfaction in a phone call to Mr Bennett with the fact that Mr Bennett was arranging for his company car to be repaired only now that he was leaving the Respondent. Mr Bennett was irked by the call and sent the Claimant an email (page 34) in which he referred to the way in which the Claimant had spoken to him as "annoying and discourteous".

38. On 30 January 2018 the Claimant emailed Mr Bennett saying the cost of advice in relation to the settlement agreement would be £300. He said:

*Can you please advise that Datatank will pay the £300 and that it's ok to proceed?*

39. On the same day Mr Bennett received advice from the Respondent's accountants to the effect that a PILON should not be made and that HMRC "will hold the company responsible for all National Insurance and Tax payments that the Claimant would have normally made under PAYE". I accept as true Mr Bennett's evidence that this was the advice he received because it is highly plausible that this is the advice he would have received. Mr Bennett consequently did not wish to enter into a settlement agreement. He therefore did not reply then or subsequently to the Claimant's email of 30 January 2018. I find that Mr Bennett did not update the Claimant in relation to the position because he continued to be irritated by the Claimant's phone call in relation to the company car.

40. The Claimant and Mr Bennett then met on 2 February 2018. They discussed a business idea that Mr Bennett had had for a product to deal with the implications of the General Data Protection Regulations ("GDPR") which were due to come into force 3 months later. I find that Mr Bennett indicated that he would like the Claimant to do work related to this possible new product during his notice period and that he also indicated that it might result in developments which would create a role for the Claimant. I find (in accordance with the Claimant's oral evidence) that it was at this meeting that the Claimant told Mr Bennett that he would be in Australia for six weeks (rather than one month) and so would require six weeks unpaid leave. I find that Mr Bennett agreed to this but also said that he would require the Claimant to return to work and work the remainder of his notice period after the six weeks of unpaid leave.

I find that the possibility of a GDPR product being developed was not further investigated by the Respondent because the Claimant did not work during his notice period after 6 February 2019.

41. The Claimant again referred to a PILON being made. He was of the view that there was an agreement that such a payment would be made. Mr Bennett told him that the Respondent was not prepared to make such a payment in light of the advice it had received from its accountants.
42. I find that the Claimant was very angry and disappointed by what happened in this meeting because it was at this point that it became clear to him that he would not be able to receive a PILON and so not return to work after his trip to Australia – an outcome which he could have regarded as being at least possible whilst the draft settlement agreement was being discussed. It was shortly after this meeting that the Claimant's union representative became involved.

### The grievances

43. On 5 February 2018 the Claimant emailed the Respondent (page 132). He said he had been advised by his trade union representative that:

*...the redundancy process is a sham and I am being victimised and targeted following the "accusations" made toward me in late October 2016.*

44. The Claimant said he would be raising a grievance and that because the situation was causing him "stress and anxiety" he did not feel able to attend a meeting with Mr Bennett scheduled for that afternoon.
45. On 6 February 2018 the Claimant attended a meeting with a colleague. He did not attend work again after that date.
46. On 7 February 2018 Ron Stanley describing himself as a "Trade Union rep", emailed Mr Bennett alleging "bullying and harassment" (page 37). The thrust of the grievance was that Mr Bennett was bullying and intimidating the Claimant to work his notice period after a verbal agreement had been reached which would have resulted in a PILON and after the Claimant had made travel plans. Contrary to what the Claimant had said in his email of 5 February 2018, it did not suggest that the redundancy was not genuine.
47. The grievance was heard by an Independent HR Consultant, Zoe Atkinson, of "HR 4 You". It was rejected by a letter dated 22 February 2018 (page 38) after a meeting on 19 February 2018. The Claimant appealed, again with the assistance of Mr Stanley (page 49).
48. It should be noted that again the grievance in the main related to the non-payment of a PILON after an agreement to make such a payment had allegedly been reached. No significant issue was taken with the redundancy process more generally.
49. After much to-ing and fro-ing about who should hear the grievance appeal, "green shoot HR" was appointed to deal with it. As such the appeal which took place on 29 June 2018 was heard by Karen Kirby, an HR Consultant. She rejected the appeal.

### Conclusions

#### The principal reason for dismissal

50. In light of my findings of fact above, I conclude that the principal reason for the Claimant's dismissal was that the Respondent had decided it no longer needed an employee to fulfil the role carried out by the Claimant and the work that he did could



be shared out amongst other employees. There was therefore a diminution of the requirements of the business for employees to carry out work of a particular kind.

51. In reaching this conclusion I note that no evidence of any significance was produced to support the allegations of the Claimant in his email of 5 February 2018 to the Respondent. In particular I note that he did not deal with this alleged alternative reason for his dismissal in either his written witness statement or oral evidence in any significant way. I conclude that he himself did not in fact believe that he had been made redundant as a result of events in October 2016.

Whether the reason for dismissal was a potentially fair one

52. The factual reason for dismissal means that the reason for dismissal was redundancy which is a potentially fair reason.

Whether the dismissal was fair or unfair in accordance with section 98(4) of the 1996 Act

53. In the list of issues agreed before the Hearing the Claimant contended that the dismissal was unfair because of:

54. **Inadequate information and consultation:** I conclude that the Respondent did not carry out reasonable consultation or provide the Claimant with information at a reasonable time. This is because the decision to carry out the restructure which resulted in the Claimant's dismissal by reason of redundancy had been made before the end of 2017. The Respondent could have begun consultation in 2017 but failed to do so. The impending festive season was not a reason to delay until mid to late January. Further, by the time the Respondent first raised the possibility of redundancy with the Claimant in any meaningful way on 19 January 2018 the dismissal of the Claimant by reason of redundancy was a *fait accompli* "barring a miracle" (the words of Mr Bennett). Consequently the consultation that was carried out was neither genuine nor meaningful. It was simply too late.

55. **Other defects in consultation:** I do not find that reasonable notice was not given of the meetings that were held, taking into account the seniority of the Claimant and the small size of the Respondent. Nor do I find that the fact that no notes were taken at the meetings or that written confirmation was not formally provided after them meant that the consultation was not "reasonable", again taking into account the small size of the Respondent. Equally, I do not find that the fact that the Claimant was not offered a right of accompaniment meant the process unreasonable. The Claimant was a senior employee and he had no right to be accompanied at the meetings – and nor did he ask to be accompanied.

56. **Failure to offer him a right of appeal:** the Respondent gave the Claimant three months' notice of the termination of his employment by the email sent to him by Mr Bennett on 29 January 2018 (page 22). The email did not offer the Claimant the possibility of appealing against his dismissal. The ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 does not apply to redundancy dismissals. However, the Respondent's employee handbook does confer a right of appeal (under the heading "General Dismissal and Appeal Process") at page 123 which applies to all dismissals. Further, any reasonable employer who is proposing to dismiss an employee by reason of redundancy will give the employee a right of appeal so that the decision to dismiss can be scrutinized.

57. **Alternative employment:** I conclude in light of the evidence that I heard that there was no alternative employment that the Respondent could have offered the Claimant and that this was an issue which the Respondent had considered. It was a small business with 12 employees in the process of reducing its headcount (now it has 8 employees). I conclude that there was no GDPR role that could have been offered to

the Claimant. Rather what the Respondent had proposed was that the Claimant investigate (i.e. conduct market research into) the possibility of such a product. The Claimant did not conduct the market research (because he did not return to work after 6 February). The Respondent did not further consider the possibility of a GDPR product.

58. Taking matters in the round, I conclude the dismissal was unfair by reference to section 98(4) of the 1996 Act. In summary the procedure followed by the Respondent was not a reasonable procedure because of:

- 58.1. The defects in information and consultation outlined above; and
- 58.2. The failure to offer the Claimant a right of appeal

59. The Tribunal therefore concludes that the Claimant was unfairly dismissed.

60. **Polkey:** the Claimant's redundancy resulted from a decision to dispense with his role within the Respondent and to re-allocate his work to other employees. The Claimant did not suggest in the ET1 claim form or his witness statement that his position as Sales and Marketing Manager had not in fact been removed from the Respondent's structure or that there was another employee with whom he should have been pooled in any selection for redundancy or who should have been "bumped". The organogram at page 162 of the bundle also does not suggest that there were more junior employees within his department who might in theory have been "bumped". Further no such issues were raised by the Claimant between 19 and 29 January 2019 in the meetings he attended with Mr Bennett.

61. I conclude that if the Respondent had fairly consulted with the Claimant – which would have required consultation to begin at an earlier stage, before his dismissal was a *fait accompli* – and had given him a right of appeal, there would still have been a 90% chance that he would still have been given notice and dismissed with effect from 30 April 2018. That is to say it is highly likely that he would have been dismissed fairly in any event from that date.

62. **Contribution:** Ms Pitt suggested that the failure of the Claimant to suggest alternatives to redundancy was a basis to reduce his basic and compensatory awards. I conclude that it was not. He was not guilty of culpable and/or blameworthy conduct in this respect. Realistically, his failure to suggest alternatives reflected the Respondent's failure to consult. I conclude that any compensatory award should not therefore be reduced on the basis that it would be just and equitable to do so because the Claimant caused or contributed to his dismissal and that any basic award should not be reduced on the basis that it would be just and equitable to do so in light of his conduct prior to dismissal.

Breach of contract

63. The issue that it was agreed that I would need to decide in order to determine this claim was whether the Claimant's contract of employment was varied so that he was entitled to be paid for his notice period without attending work.

64. To look more closely at the issue, the Claimant's contract of employment was at page 103 and the parties agreed that it did not contain any right for the Claimant to be paid during his notice period without attending work. The question, therefore, was whether the Claimant and Respondent had agreed a variation to the contract of employment which meant that the Claimant had such a right.

65. The Claimant's argument in this respect was that Mr Bennett expressly agreed such a variation. It is correct to say that such a variation could have been agreed orally by Mr Bennett with the result that it would have bound the Respondent even though it

had not been reduced to writing. However, in light of my findings of fact above I conclude that no such variation was agreed.

66. Rather I conclude that there were discussions about whether the Claimant might not be required to work the whole of his notice period and also in relation to whether he might enter into a settlement agreement under which he would receive a PILON. However those discussions did not result in any agreement. Rather having received advice from the Respondent's accountants, and having been irritated by the Claimant's phone call about his car, Mr Bennett simply told the Claimant on 2 February 2019 that he would agree to the Claimant taking 6 weeks' unpaid leave but after that he would have to return to work for the balance of his notice period.
67. The Claimant's claim for breach of contract therefore fails and is dismissed.

Remedy hearing

68. If the parties are unable to resolve issues relating to remedy between themselves there will be a remedy hearing on **13 June 2019** at the Employment Tribunal in Nottingham. This hearing was listed at the conclusion of the Hearing and will begin at 10am.
69. I made the following orders in relation to the preparation necessary for the remedy hearing at the conclusion of the Hearing:
- 69.1. The parties are to send to each other documents relevant to the issue of remedy three weeks before the date of the remedy hearing;
- 69.2. The Claimant is to prepare a bundle containing all documents relevant to the issue of remedy two weeks before the remedy hearing and is to send one copy of that bundle to the Respondent;
- 69.3. Witness statements relevant to the issue of remedy are to be exchanged one week before the remedy hearing;
- 69.4. The Claimant is to serve and file an updated schedule of loss one week before the remedy hearing;
- 69.5. The Claimant is to bring two copies of the bundle and two copies of all witness statements for the use of the Tribunal at the remedy hearing.

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Employment Judge Evans

Date: 16 May 2019

JUDGMENT & REASONS SENT TO THE PARTIES

FOR EMPLOYMENT TRIBUNALS