THE EMPLOYMENT TRIBUNALS

Between:

Claimant: **Mr S G Maharg**

Respondent: **DMC Imaging**

Hearing at London South on 29 August 2018 before Employment Judge Baron

Appearances

For Claimant: **Tim Dracass - Counsel**

For Respondent: **Zain Malik – Trainee Solicitor**

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

1 The Tribunal declares that the complaint made by the Claimant under section 111 of the Employment Rights Act 1996 that he was unfairly dismissed is well-founded;

2 That the Claimant was dismissed in breach of contract and that the Claimant is entitled to damages to be assessed;

3 That the matter be adjourned to a date to be fixed to determine remedies for the Claimant.

REASONS

1 The Claimant presented a claim form to the Tribunal on 15 March 2018 in which he claimed that he had been unfairly dismissed. He also made a claim for notice pay, and for damages for loss of pension contributions and the use of a company car. The factual allegations were set out in some detail in the Particulars of Claim. A response was presented on behalf of the Respondent in which it was denied that there had been a dismissal and it was averred that the Respondent had resigned without notice.

2 I heard evidence from the Claimant. Mr Curran, sometime Managing Director of an associated company of the Respondent, was present at the hearing. He provided a witness statement but was not cross-examined on it. On behalf of the Respondent I heard evidence from John Batchelor, Anil Gupta and Dr Ravi Gupta. I was provided with an agreed bundle of nearly 200 pages, and I have taken into evidence those document to which I was referred.

3 The issues to be decided had been agreed between the parties as follows:

The Complaints

1. By a claim form presented on 15 March 2018, the Claimant, Mr Simon Maharg, brought a complaint of unfair dismissal and wrongful dismissal. The Respondent resists the claims.

PRELIMINARY ISSUES

S111A Employment Rights Act 1996

2. Does the Tribunal find that evidence of the meeting of 9 January 2018 amounts to evidence of pre-termination negotiations? In particular, did the meeting fall within the definition set out in s. 111A(2) – namely, an offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee?
3. If so, does the Tribunal find that such evidence is (*prima facie*) inadmissible in relation to the Claimant's unfair dismissal claim (only) under section 111A ERA 1996?
4. If so, is the Tribunal of the opinion that anything said or done within the meeting of 9 January 2018 was improper, or connected with improper behaviour, under section 111A(4) ERA 1996?
5. If so, to what extent does the Tribunal consider it just for the Claimant to rely on evidence of the meeting of 9 January 2018?

SUBSTANTIVE ISSUES

Unfair or Constructive Unfair Dismissal

Dismissal (s. 95 ERA 1996)

6. Was the Claimant dismissed within the meaning of s. 95 (1) ERA 1996 and if so, when?
    a. The Claimant's primary case is that he was expressly dismissed by the Respondent at the meeting on 9 January 2018 (s. 95 (1) (a)) .
    b. The Claimant's alternative case is that he was constructively dismissed by the Respondent by reason of its conduct relating to the 9 January 2018 meeting and/ or its conduct thereafter which amounted to a fundamental breach of contract entitling the Claimant to accept the breach and terminate the contract without notice (s. 95 (1) (c)).
    c. The Respondent's case is that the meeting on 9 January 2018 was to have a pre-termination negotiation meeting (section 111A ERA 1996) with the proposed termination date in the settlement agreement to be 9 January 2018. The Respondent contends that the Claimant was not dismissed on this date and that he resigned on 2 February 2018.
7. In respect of the Claimant's alternative case of constructive dismissal:
    a. Does the Tribunal find that the Respondent's conduct relating to the meeting of 9 January 2018 and/ or its conduct thereafter amounted to a fundamental breach of contract (the Claimant relies on the implied term of trust and confidence) which entitled

the Claimant to terminate the contract without notice?

b. Did the Claimant accept the Respondent's fundamental breach and terminate the contract in response to it, and if so when?

c. Did the Claimant act so as to have waived the breach and/ or affirmed the contract?

Fairness (s. 98 ERA 1996)

8. If the Claimant was dismissed (either expressly or constructively) what was the reason for his dismissal? Was it a potentially fair reason and did the Respondent act reasonably in treating that reason as a sufficient reason to justify his dismissal

9. Note - If the Tribunal finds that the Claimant was summarily dismissal on 9 January 2018, the Respondent concedes, and the parties agree, that that the dismissal was both procedurally and substantively unfair within the meaning of s. 98 (4) ERA 1996

10. Did the Claimant cause or contribute to his dismissal by culpable and/or blameworthy conduct?

11. What remedy for unfair dismissal, if any, should the Claimant be awarded?

Wrongful dismissal

12. Was the Claimant wrongfully dismissed by virtue of the Respondent dismissing him without notice, in breach of his contractual notice period (3 months)?

13. If so, what level of compensation for wrongful dismissal should be awarded?

Breach of relevant ACAS Code (s. 207A TULRA 1992)

14. Did either party unreasonably fail to comply with a relevant ACAS Code of Practice, namely:

    a. The ACAS Code of Practice on Disciplinary and Grievances Procedures; and/ or

    b. The ACAS Code of Practice on Settlement Agreements?

15. If so, what level of increase/ reduction to the Claimant's compensation does the Tribunal consider it just and equitable to make?

4 Section 111A of the Employment Rights Act 1996 is as follows:

111A Confidentiality of negotiations before termination of employment

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.

This is subject to subsections (3) to (5).

(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

> (4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.
> (5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.

5 I was referred to *Faithorn Farrell Timms LLP v Bailey* [2016] IRLR 839 and *Basra v. BJSS Ltd* [2018] ICR 793 EAT. Mr Malik relied upon paragraphs 44-48 and 65 from the judgment of HHJ Eady. I reproduce the headnote as a summary:

> Section 111A renders inadmissible evidence of any offer made or discussions held with a view to terminating the employment on agreed terms and that must extend to the fact of the discussions, not simply to their content (even if this would not be the case under without prejudice privilege). Further, the application of s.111A is not limited to the evidence of the negotiations from those who were directly involved. It will be fairly common place for a manager to have to report back to a board, higher management or HR on any such discussions; it would run counter to the purpose of s.111A if evidence of those reports was ruled to be admissible. Taking the wording of s.111A as the touchstone, the focus has to be on the subject matter of the evidence in question. If it is properly to be characterised as evidence of an offer or discussions held for the required purpose then (unless rendered admissible by any of the exemptions) it is inadmissible in any claim of unfair dismissal.
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> Section 111A confidentiality cannot be waived. The section cannot be read so as to permit agreement to the admission of evidence otherwise rendered inadmissible by the provision. Parliament apparently chose not to allow for an exception where the parties so agree (although it has provided for other exceptions). It could have imported the without prejudice rule into s.111A; instead it chose to create an express provision relating to the admissibility of evidence in quite specific circumstances. The section must be looked at on its own terms; not through the lens of common law without prejudice privilege. That also informs the approach to "improper behaviour" and s.111A(4). The ACAS statutory Code of Practice states that "What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle." That is the correct way of approaching s.111A(4). Parliament allowed for a potentially broader approach to the behaviour in issue.

6 In *Basra* Choudhury J in the EAT decided that 'where there was a dispute as to the effective date of termination the tribunal would not be able to decide what evidence should be excluded until that date had been established; that the proper approach in such a case was to determine, as a preliminary question, when the contract was terminated, considering all the evidence relevant to that issue, which might include evidence of any negotiations about termination'.[1]

7 The background facts can be set out quite simply. As I understand it, the Respondent is one of three companies in the DMC Healthcare Group. Anil Gupta and Dr Ravi Gupta each describe themselves as a 'Director and Investor' of the Respondent. John Batchelor described himself as the

[1] Quoting from the headnote.

Finance Director to the Respondent. The Claimant was appointed as the Managing Director of the Respondent from 4 November 2013.[2]

8 Mr Gupta, Dr Gupta and Mr Batchelor decided to hold separate meetings with the Managing Directors of each of the three companies at the RAC clubhouse in Pall Mall. An email was sent to the Claimant on 27 December 2017 headed 'Meeting – 2018 Update' inviting him to the meeting 'with the Board members with regards to the above mentioned subject.' The Claimant asked for clarification and the reply was:

> I will provide you with more information shortly. This will be mainly discussing and presenting vision and actions as we head into 2018.

9 The promised further information did not materialise. The Claimant had no idea that his future employment by the Respondent was the only item on the agenda. It is what occurred at that meeting which is the central factual issue before me. I set out the competing versions of events, and what occurred after the meeting before setting out my conclusion. There were no contemporaneous notes taken, but each of Mr Batchelor and the Claimant later produced notes, to which I refer below.

10 The evidence of the Claimant was to this effect. He said that at the outset of the meeting Mr Batchelor told him that the purpose of the meeting was to discuss his continuing role in the Respondent and that because of poor sales and continuing losses the Respondent had decided to terminate the employment with immediate effect. It was stated that all of the directors had agreed that decision. There was then a discussion about the practicalities and the Claimant asked if he was being put on garden leave, to which Mr Batchelor replied that the position had been terminated with immediate effect. There was then a discussion about a consultancy arrangement to deal with outstanding projects. At some stage after being told that he was dismissed there was mention of a settlement agreement and at the end of the meeting Mr Batchelor provided the Claimant with a copy of the proposed document in a sealed envelope.

11 The evidence of Mr Batchelor was that at the outset of the meeting he 'made it clear that the discussion carried protection in that the content could not be discussed if the situation were to ever result in legal proceedings'. He said that there was a discussion about the employment terminating 'on a mutually agreed date to be determined'. The Claimant was told he needed to obtain legal advice on the proposed terms. Mr Batchelor denied that the Claimant was told that the board wanted to terminate the employment with immediate effect. I comment on the evidence of Mr Gupta and Dr Gupta below.

12 The settlement agreement is in a standard form. It was headed 'Subject to contract'. Importantly included in it was a termination date of 9 January 2018, and also the amount of compensation of £20,000.

13 The Claimant, who lives in Hampshire and works principally from home, had intended to go to the Respondent's premises in London SE15 after the

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[2] The Claimant also held shares in the Respondent which are not the subject of these proceedings.

meeting, but did not do so because of what had occurred at the meeting. The Claimant immediately sent a text message to his wife to say that he had been dismissed.

14 Later in the day on 9 January Mr Batchelor sent an email to the Claimant asking him to make contact to discuss 'the agreement, handover, announcement to and interaction with your team plus any other queries you have.' The important aspect of that email is that it did not simply refer to having a discussion about a proposal to end the Claimant's employment by consent, but it referred to a handover and announcement to staff.

15 Apart from seeking to effect a handover of one particular project on 10 January 2018 the Claimant did not undertake any further work for the Respondent. The Claimant sent an email to Mr Batchelor on 10 January saying that he had provided certain details to the other party to the proposed transaction, and said that there was quite a lot of work remaining to be done, and that one of the Respondent's employees 'does not have the band width, and to be frank, the necessary bid writing skills, to complete this.' The Claimant then mentioned the possibility of a consultancy agreement 'to tie up loose ends and possibly work on areas such as this.'

16 Mr Batchelor responded saying that the Respondent would be interested in exploring the consultancy arrangement. The Claimant replied saying as follows:

> I am acutely aware that since my employment was terminated by the Board as of yesterday, 9th January I am not in a position to respond to further points of clarification etc from framework and tender bids. I submitted the financial information last night but they have requested clarification on another point.

17 In paragraph 14 of the response it was stated as follows:

> The Claimant was expected to return to work had he not accepted the terms of the agreement, however he did not return and was considered as being AWOL.

The Respondent did not at any stage make contact with the Claimant asking him why he was not working or where he was.

18 The Claimant instructed solicitors who wrote to Mr Batchelor on 11 January 2018, only two days later. The letter referred to 'the summary termination' of the Claimant's employment as being both unfair and wrongful. The contents of the letter as to what had occurred at the meeting of 9 January 2018 unsurprisingly reflected the evidence given by the Claimant at this hearing. The point was made that the employment had been terminated first, and then there was discussion about ongoing projects, and it was said that Mr Gupta suggested a consultancy arrangement. Towards the end of the letter, the Claimant's solicitors said that the Respondent would need to contact the Claimant about the return of the company car, mobile phone and any other company property and information.

19 No reply was received until 16 January 2018 when Mr Batchelor sent a short email as follows:

> . . . [Y]our client has not been dismissed, as alleged or at all. Your client remains an employee of DMC Imaging Limited. The meeting on 9th January was "off the record" therefore we will write to you regarding this under separate cover.

20 A further email was sent an hour or so later on a without prejudice basis in which it was reiterated that the meeting had been held under section 111A 'on the basis that there was no dispute with' the Claimant. Liability was denied. There were then further exchanges of correspondence which did not take the matter further.

21 The Respondent paid the Claimant's normal salary for January direct into his bank account as usual. On 29 January the Claimant's solicitors wrote to Mr Batchelor again saying that payment was accepted only for the period to 9 January. Mr Batchelor replied to that letter again saying that the employment had not been terminated.

22 The Claimant's solicitors replied on 2 February 2018. The Respondent places considerable reliance on that letter. It is too long to set out in full. The position the Claimant's solicitors took was that there had been a repudiatory breach by the Respondent on 9 January 2018 and then said that the Claimant had accepted that breach as being 'clearly communicated within the correspondence following the meeting of the 9th January 2018 . . . .' The letter then continued by saying that in the alternative the Respondent's actions in the meeting and thereafter amounted to a fundamental and repudiatory breach 'which has been accepted by' the Claimant. It is the Respondent's case that that letter constituted a resignation by the Claimant.

23 The Claimant made detailed notes of the meeting of 9 January a few days after the meeting. The notes record that at the outset of the meeting he was told by Mr Batchelor that 'the Board of Directors had decided to terminate my employment and had prepared a settlement agreement.' The notes then state that Mr Gupta then said that 'all Directors had agreed with the decision to terminate and offer a settlement agreement.'

24 Mr Batchelor also made notes some time after the meeting. They record that the Claimant was told that the meeting was to discuss his performance. They then continue as follows:

> It was further stated that we wanted to discuss his continued employment and explore options. It was stated to Simon that the content of the meeting could not be discussed if the situation reached legal proceedings in the future.

25 Mr Batchelor had been taking advice from Peninsula Business Services Limited before the meeting was held. Those notes were submitted to Peninsula for approval.

26 The Respondent had a capability procedure. The Respondent did not seek to follow that procedure (nor indeed any procedure), and the Claimant did not seek to appeal the decision to dismiss him.

27 I had the benefit of seeing and hearing the witnesses give evidence. I prefer the evidence of the Claimant whose evidence was totally clear and consistent. At one point in reply to questions from Mr Malik the Claimant accepted that the proposed settlement agreement constituted an offer to terminate the Claimant's employment and was headed 'subject to contract'. When it was then put to him that the agreement was of no effect the Claimant immediately responded by saying that it was absolutely clear

that his employment had already been terminated and only then was the proposed agreement presented to him.

28 I was not impressed by any of the three witnesses for the Respondent. Mr Batchelor said on several occasions that he could not recall what had been said in any detail. The constant theme was that at all times during the meeting it was made clear to the Claimant that the Respondent was offering a settlement agreement. Mr Gupta was certain that there had not been any reference at the meeting to section 111A, and he said that that omission had concerned him. When pressed as to whether there had been any mention of the meeting being on a without prejudice basis he said he could not remember whether that phrase or some other the terminology was used. Mr Gupta was also unable to recall exactly what Mr Batchelor had said about the termination of the employment. Dr Gupta was clear in his short cross-examination that Mr Batchelor had not said that the board had decided to terminate the employment of the Claimant with immediate effect.

29 I prefer the evidence of the Claimant and find that at the outset of the meeting the Claimant was specifically told that his employment was being terminated. The Claimant's evidence is consistent with the contemporaneous documentation, and the actions of those involved following the meeting. The next issue therefore is whether or not what occurred falls within section 111A. Mr Dracass submitted that the consequence of what occurred was that the discussions which the Respondent contends fall within that section were not ones held before the termination of the employment with a view to it being terminated on agreed terms – quoting the statutory language. He added:

> Put simply, the language of s. 111A does not cover (and was not intended to cover) a scenario where an employee is called to a meeting and is told he is being dismissed with immediate effect.

30 Mr Malik did not dissent from that proposition as a matter of law, but submitted that I should prefer the evidence of the Respondent's witnesses and find that Mr Batchelor had not said that the Claimant was in fact being dismissed. It was clear, he said, that there was not a summary dismissal. I have already said that I prefer the evidence of the Claimant.

31 What occurred at that meeting was in my judgement a breach of contract by the Respondent, or potential breach of contract, in that the Respondent terminated, or at least purported to terminate the contract, without the requisite notice. I invited further submissions from the parties as a consequence of my factual findings and in particular whether the decision of the Supreme Court in *Société Générale v. Geys* might have any impact on the legal outcome. I am very grateful to both Mr Dracass and Mr Malik for the detailed submissions and the care that has gone into them. I trust that they will forgive me if I only summarise the essential points and do not mention each of the authorities relied upon. I will not comment on submissions insofar as they relate to the making of findings of fact.

32 Mr Dracass submitted that my factual finding had five consequences. The first is that there were unambiguous words of dismissal and that the Claimant was entitled to take them at face value irrespective of the intention of Mr Batchelor. The second and third points can be merged

together. Mr Dracass submitted that the effect was to terminate the employment without notice for the purposes of Part X of the Employment Rights Act 1996. Mr Dracass drew a distinction between the effective date of termination for those purposes and the ending of the contract of employment within the ordinary principle of the common law. Thus any issue as to acceptance of repudiation for common law purposes as considered in *Geys* was irrelevant for the purposes of the 1996 Act.

33 The fourth point is that it is necessary to consider the precise timing of the dismissal as that is potentially relevant to the issue as to whether section 111A of the 1996 Act applied to the meeting on 9 January 2018. Finally, Mr Dracass submitted that following his earlier points section 111A did not in fact apply.

34 Mr Malik stated that the Respondent denied any repudiation of the contract. He submitted that the Claimant had not set out the specific conduct of the Respondent at the meeting on 9 January 2018 on which he relied, and that during later correspondence the Claimant was relying on the Respondent's refusal to accept his contention that he had been dismissed on 9 January 2018 as the repudiatory breach. That, he said, was not sufficient to amount to a repudiatory breach.

35 Mr Malik further submitted that the Claimant delayed the acceptance of any repudiation which there may have been for the following reasons. The Claimant took legal advice on the proposed settlement agreement. On 10 January 2018 the Claimant enquired about working on a consultancy basis. He also worked on number of projects on 10 January.[3] The Claimant submitted his expenses in accordance with the proposed settlement agreement. There was a clear acceptance of any repudiation by the letter from the Claimant's solicitors of 2 February 2018, which accorded with the P45 being issued with a termination date of 2 February 2018. The Claimant was paid his January salary and did not return any part of it.

36 Mr Malik submitted that as the employment came to an end on 2 February 2018 everything before that had to be 'pre-termination negotiations' within section 111A, and therefore inadmissible. He said that the Claimant had not relied on section 111A(4), but if he did then the Tribunal must first consider whether there had been improper behaviour and then the extent to which the Claimant may rely on that behaviour. Mr Malik provided me with extracts from Hansard relating to the debates in both Houses.

37 I now turn to my conclusions. I agree with Mr Dracass that the question of the effective date of termination for the purposes of the claim of unfair dismissal is separate from the termination at common law. Mr Dracass cited *Robert Cort & Son Ltd v. Charman* [1981] ICR 816 EAT. That was a simple case in which the employee was summarily dismissed with payment in lieu of notice. The EAT held that the effective date of termination 'was the date of the summary dismissal rather than the expiry of the period in respect of which salary was paid, irrespective of whether or not the contract

[3] I do not accept that the document at **[133]** is evidence of the Claimant being involved in any more than the one project referred to above.

of employment continued for some purposes after the employer's repudiation.'[4] *Robert Cort* remains good law.

38 The impact of *Geys* was considered by the Court of Appeal in *Rabess v. London Fire and Emergency Planning Authority* [2017] IRLR 147. That case concerned the ascertainment of the effective date of termination in the context of limitation for the purposes of the 1996 Act. The facts are not material. At paragraph 24 Laws LJ said the following:

> *Geys* was wholly concerned with common law contractual questions. There was no issue there as to the application of the EDT under s.97; indeed, no issue under the Employment Rights Act 1996 at all. *Robert Cort* was simply not considered. That was so in *Geys* where the Supreme Court held that a repudiatory breach of an employment contract would not terminate the contract unless and until the innocent party elected to accept the repudiation. This does not bear at all on the interpretation of statutory rights arising under the 1996 Act.

Nothing could be clearer.[5]

39 I have concluded as a fact that at the outset of the meeting on 9 January 2018 the Claimant was unequivocally told that his employment was at an end. That had the effect of terminating the contract for statutory purposes. The common law issues of a repudiatory breach, acceptance, waiver and affirmation simply do not apply in such circumstances. I therefore do not need to comment on the submissions of Mr Malik about such matters. I have noted the submissions made by Mr Malik in reply to those of Mr Dracass on the point, but they are again to the effect that there was no dismissal at the meeting on 9 January 2018.

40 Having found what occurred as a fact, and also the legal consequences, I must consider whether the provisions of section 111A have any relevance. The issue as to the precise time of the termination of employment arose in *Octavius Atkinson & Sons Ltd v. Morris* [1989] IRLR 158 CA. It was held that the employment ended at the moment that the employee was told that that was the case.[6] On that basis I find that the employment of the Claimant ended shortly after the meeting on 9 January 2018 had commenced at the time he was told that he was being dismissed. That was before there was any mention of any proposed settlement agreement.

41 I therefore conclude on the preliminary point as to the applicability of section 111A that the evidence set out above concerning the meeting on 9 January 2018 is admissible. There were no 'pre-termination negotiations' as defined in section 111A(2).

42 After that finding the question as to whether the Claimant was unfairly dismissed is straightforward. I have found that there was an actual dismissal within section 95(1)(a) of the 1996 Act. The burden is therefore on the Respondent to show the actual reason for the dismissal, and that it

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[4] The quote is taken from the headnote

[5] I was also referred to the substantial discussion of the point in Harvey at D1 paragraphs [727] – [741].

[6] The employee was dismissed in the middle of the day. The ET had held that the employment ended at the end of the day, and the EAT that it ended at the time when the employee finished his lengthy journey home from work.

was a potentially fair reason. The Respondent has conceded that on the basis of the findings I have made the dismissal was unfair.

43 The matter will be listed for a hearing as to remedies. Any matters concerning the ACAS Code or contributory conduct are to be dealt with on that occasion.

44 I also inevitably find that the dismissal was in breach of contract in that the Claimant was not given the notice of three months required by his contract of employment. There was no suggestion by the Respondent that the Claimant had been guilty of gross misconduct so as to disentitle him from receiving such notice.

45 Section 112 of the Employment Rights Act 1996 provides that where there has been a finding of unfair dismissal then the Tribunal shall explain to the Claimant the remedies which are potentially open. This I now do. The summary below is not intended to be an exhaustive exposition of the law, but merely a guide.

46 The first remedy is that of reinstatement. The effect of such an order is that the Respondent is to treat the Claimant in all respects as if he had not been dismissed. The second order is that of re-engagement. The effect of that order is that the Claimant is re-employed by the Respondent in such post, from such date, and on such terms as the Tribunal may order. The post is to be comparable to the post from which the Claimant was dismissed or other suitable employment. The Tribunal has a discretion as to whether to make either of such orders and in exercising that discretion the Tribunal must consider whether it is practicable for the Respondent to comply with such order, and also whether the Claimant caused or contributed to the dismissal. The Claimant is not entitled to either of such orders as a matter of right.

47 The final order is that of compensation which comprises a basic award, and a compensatory award. The basic award is an arithmetical calculation based upon the Claimant's age, length of service and salary subject to a statutory maximum. The amount may be reduced where the Tribunal considers that it is just and equitable to make such reduction due to any conduct of the Claimant. The principal provisions as to the amount of the compensatory award are in sections 123(1) and (6) as follows:

> **123 Compensatory award**
> (1) 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.
> (2) – (5) . . .
> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

48 The Claimant is requested to inform the Tribunal and the Respondent within 14 days of the date upon which this document is sent to the parties as to whether he wishes to apply for an order for (a) reinstatement or re-engagement, or (b) compensation. If he is to seek reinstatement or re-engagement then a preliminary hearing to be held by telephone will be

arranged to discuss the appropriate case management orders. If the Claimant elects for compensation then the parties are requested to inform the Tribunal of dates of unavailability from a date commencing six weeks from the date when this document is sent to the parties. I will then have the case listed for a remedies hearing and make case management orders. In connection with availability and listing, this matter is to be treated as being part-heard and therefore to take priority over 'new' cases.

Employment Judge Baron

Dated 29 October 2018