EMPLOYMENT TRIBUNALS

Claimant: Mr Rajinder Pal Singh

Respondent: Department for Work and Pensions

HELD AT: Leeds **ON:** 28th March 2018

BEFORE: Employment Judge Eeley

REPRESENTATION:

Claimant: In person
Respondent: Mr A Weiss, counsel

RESERVED JUDGMENT

1. The Claimant's claims for unpaid holiday pay and unpaid wages in respect of accrued flexi time are dismissed upon withdrawal by the claimant.
2. The Claimant's claim of unfair dismissal fails and is dismissed.
3. The Claimant's claim of breach of contract in respect of notice pay fails and is dismissed.

REASONS

Background

1. By a claim form presented on 4th December 2017 the claimant presented claims for unfair dismissal, notice pay, holiday pay and other payments. The claims were denied by the respondent. At the final hearing the Tribunal was referred to an agreed bundle running to some 317 pages and heard evidence from the following witnesses:
    a. Rajinder Pal Singh, the claimant.
    b. Balbinder Singh, the claimant's brother.
    c. Michelle Nation, Senior Executive Officer at the respondent.

d. Susan Fry, Group Manager, Income Support South at the respondent.

Findings of Fact.

2. The claimant was born in India on 25th December 1956. He came to live in the UK in August 1960 when he was a small child. He travelled to England with his mother on her passport. His father was already living in Bradford at the time.

3. The claimant was employed by the respondent as a contact centre agent from 24th November 2014 until the termination of his contract of employment on 1st August 2017. He was initially employed on a fixed term contract. Prior to starting employment and as part of the respondent's pre-employment checks, the claimant provided evidence of his immigration status via two Indian passports. The first, which had expired on 22nd January 1979, contained an official stamp (p35) stating that the claimant had 'leave to stay in the United Kingdom for an indefinite period' (hereafter "the 1979 passport"). The other passport contained an entry clearance certificate stating 'returning resident single entry'- what the claimant has referred to as a returning resident visa. This passport was due to expire on 22nd August 2019 and was current when originally provided to the respondent in November 2014 but was subsequently cancelled before the claimant was dismissed (hereafter "the 2019 passport").

4. The claimant duly started work for the respondent. For some unknown reason nothing further was said about the claimant's immigration status and consequent right to work in the UK until 2017. On 9th May 2017 an email was received by the former IS Ops Manager and Business Support Manager informing her that the claimant had in fact failed his pre-employment checks and that his dismissal needed to be considered. This matter was passed to Lisa Gayton (a Higher Executive Officer) on 10th May 2017 so that she could deal with it. She took advice and suspended the claimant on full pay on 11th May 2017 and commenced an investigation. As part of her investigation she held an investigatory meeting with the claimant on 19th May 2017 (p115-118) and also with Leisa Beal who had been a Business Support Manager at the time of the Claimant's recruitment (p128-129). She compiled an investigation report (p137-142).

5. As part of the investigation it was discovered that the passport stating that the claimant had indefinite leave to remain ("ILR") had expired on 22nd January 1979 (p35). The claimant had been asked to provide a passport with an up to date stamp in it. The claimant obtained a new passport (issue date 26th February 2016). It was biometric passport but it had no stamp in it confirming ILR nor did it confirm right of abode ("ROA"). It therefore was not evidence of his right to work in the UK. As a result of him obtaining the new biometric passport his 2019 passport was cancelled.

6. Following advice from his friend (who worked at Heathrow airport) the claimant applied to the Home Office for a certificate of entitlement to Right of Abode ("ROA") in November 2016. He did not do this as a result of any request by the respondent but rather on his own initiative. Unfortunately, the ROA application was refused on 8th March 2017 (p83). The Home Office indicated, amongst other things, that he had failed to provide evidence that his father was registered or naturalised in the UK prior to the claimant's birth and he had failed to provide his own (the claimant's) full original birth certificate to confirm details of his mother and father. He did not inform the respondent that his application for ROA had been refused until 9th May 2017 when he sent an email to Leisa Beal about it. In the course of the email the claimant expressed some frustration with the situation and indicated that he would probably have to contact his local MP as he was not sure what to do next.

7. Throughout the period of his employment the claimant received several requests from the respondent that he provide documentation to prove his right to work in the UK. He did not consult a solicitor or seek legal advice about what he needed to do to prove his right to work in the UK. Instead he looked up information on the "gov.uk" website and also consulted a friend who worked at Heathrow airport as an Immigration Officer. In the course of the investigation the claimant provided information from the NTL (No Time Limit) Guidance on the gov.uk website which stated:

   "If you were present and settled in the UK on 1st January 1973 and you did not have the right of abode, or you were not otherwise exempt from immigration control, you are deemed to have been granted indefinite leave to remain on that date, even though you may not have received formal notification of this decision (for example, an indefinite leave stamp in your passport). Provided you can show that you have resided continuously in the UK since that date and have not had your indefinite leave cancelled or revoked, you will have retained your indefinite leave status".

   On that basis the claimant felt that he had obtained ILR status and had not lost it just because his 1979 passport had expired. His view was that his ILR status had not been cancelled and he had not lost it because he had resided continuously in the UK. The real question for the respondent, however, was whether he was able to prove this ILR status.

8. As part of the investigation Ms Gayton took advice from the Civil Service HR team (p93 to 109) and also contacted the Home Office (p136) and the Employee Checking Services Helpline (p136) and was informed that the respondent could not continue to employ the claimant without evidence of right to work and to do so would be illegal. She was advised that the law had changed on 16th May 2014. She was advised that prior to this date passports which had expired and had a stamp on were accepted to prove the right to live and work in the UK. After this date the employee had to provide valid ID with the right to remain on it. She was advised that as the claimant did not have this he should not have passed the right to work checks and it was currently illegal to employ him. The helpline advised that as the passport was an Indian passport they would not legally be able to transfer the stamp across to a new passport as the stamp was placed on the ID by a representative of the UK government.

9. Having completed the investigation report Lisa Gayton concluded that there was no evidence to show that the claimant could provide valid confirmation of his right to work in the UK. She therefore decided that there was a case to answer and the file would be referred to a decision maker to consider. That decision maker was Mrs Nation.

10. On 18th April 2017 Mrs Nation wrote to the claimant inviting him to a formal meeting (p143-145). He was warned that, if proven, the allegations could constitute gross misconduct. He was forewarned that the meeting might result in his dismissal and he was given the opportunity to be accompanied by a trade union representative or work colleague.

11. The meeting between the claimant and Mrs Nation took place on 25th July 2017. He was accompanied by his brother who also worked in the department and a note taker was also in attendance. At the meeting the claimant read from his research some information from the internet (p149) regarding persons who had settled in the UK before 1973 and the definition of Naturalised British Citizen which mirrored the information quoted at the paragraph 7 above and which went on to say: "*if you wish to have your status confirmed on a BRP you must use form NTL."* The claimant was of the view that it was therefore not mandatory to have his status confirmed on the BRP, rather it was optional. The information on Naturalised British Citizens stated: "*if you have retained your other nationality and want your status confirming, and you do not hold a UK passport describing you as a British citizen, you may apply for a certificate of entitlement to the right of abode in the UK."* The claimant said that he had retained his Indian nationality and had applied to the Home Office for a ROA certificate. The application had been refused as the Home Office said that the evidence submitted was insufficient. The claimant said that further evidence was requested by the Home Office but he did not want to send original documents in the post. The Claimant asked whether he could go somewhere to get the documents stamped (i.e. certified) and Mrs Nation asked him whether he had called the Home Office to find out. He said that he had not and asked whether he should contact his MP. Mrs Nation pointed out that in an email dated 9th May 2017 (p87) the claimant had said that he would probably contact his MP and she asked whether he had in fact done so. The claimant confirmed that he had not done this at that time but had done so on 23rd July 2017, two days before the meeting with Mrs Nation (p152-153).

12. In the meeting the claimant then set about providing documentation to prove that he had been continuously resident in the UK since he first came here as a child. He provided:

    a. A school record showing that he had been enrolled in a UK primary school in 1964 and that his father was present at the time (p146 to 148).
    b. A copy of the statutory declaration his mother had made (p257).
    c. A copy of his mother's old passport showing himself and his siblings in it (p32).
    d. The declaration of citizenship in relation to his father (p 259 -262.)

e. A copy of the claimant's brother's birth certificate.
f. A document written by the claimant setting out the chronology of his time in the UK (p247).

Although the claimant provided documentation in relation to his attendance at high school and Portsmouth Polytechnic to the tribunal he did not supply this to Mrs Nation at the meeting on 25th July.

13. In addition, the claimant said that a supervisor at work had contacted the Home Office at some point during the investigation and had been advised that there was a change on 16 May 2014. After this date, passports which had expired with an indefinite leave to remain stamp were no longer accepted as evidence of the right to live and work in the UK. The claimant said that he had not been aware of the change in the law and the gov.uk website was not clear that the stamp had to be transferred to a new passport. The website uses words such as *"if you wish"* rather than *"you must"*.

14. In the course of the meeting Mrs Nation advised the claimant that she would seek advice from the legal team as well as HR and asked the claimant to keep her updated if he heard from his MP or the Home Office. The claimant asked her to consider the letter from The Home Office (p83) and compare it with guidance on the Home Office website (p119). The claimant further said that the Home Office had asked for a copy of his birth certificate but that he did not have one. He also said that he had found further evidence which he had not had when he made the original application and there used to be an appeal process to save the cost of applying again but this was no longer an option. Mrs Nation advised the claimant to contact the Home Office helpline for further information.

15. Following the conclusion of the meeting Mrs Nation contacted civil service HR to take advice (p171-185) and stated that as she understood the position, the claimant was potentially illegally employed by the department. She confirmed that the claimant had been asked for evidence of his right to work repeatedly (p53) and although he had provided further information to her at the hearing which she had considered, there was nothing substantiated by The Home Office. Mrs Nation read out the contents of the letter from the Home Office and the legal advice. She said that there was no official evidence of the claimant's right to work and she asked for HR advice on the correct legal reason for dismissal that she should use, for example Some Other Substantial Reason ("SOSR") or illegality. She confirmed that the claimant had not reverted to the Home Office since their letter dated 8th March refusing the application for right of abode. She informed the caseworker that her view was that "some other substantial reason" would be the reason for dismissal as although the claimant had produced further documents regarding the time he had spent in the UK Mrs Nation had no way of knowing if any of it was true. There was no official evidence that the claimant had the right to work in the UK and the 8th March letter was very clear in refusing the certificate of entitlement to right of abode.

16. Mrs Nation had never had a case before like this one or a case where the dismissal was by reason of some other substantial reason. There was no

guidance in the respondent's policies regarding dismissals for some other substantial reason and she believed at the time that a dismissal for some other substantial reason would 'come under' gross misconduct in the department's policies due to the claimant's repeated and prolonged failure to respond to requests for information regarding his right to work.

17. On 31st July 2017 Mrs Nation wrote to the claimant (p186-189) informing him that her decision was to terminate his employment without notice. She confirmed that in her view the claimant had failed to provide, despite numerous requests, evidence of his right to work. As a result of his repeated and prolonged failure to provide the relevant documentation to show that he had a right to work in the UK she deemed this to be gross misconduct. She said that she had taken into account of all of the evidence that he had provided to her, the research he pointed her to as well as his fears about sending original documentation to the Home Office in the post. She had also considered the 8th March 2017 letter from the Home Office confirming that his application had been refused, the reasons for this and the next steps for the claimant to take if he disagreed. She stated that she considered the claimant's repeated and prolonged failure, despite numerous requests, to provide evidence of his right to work, to be gross misconduct. She informed him of his right to appeal.

18. On the 11th August 2017 the claimant submitted a letter of appeal (p194 to 200). He stated that this was a case of 'red tape' and he did not feel that the decision maker knew what she was dealing with or talking about. He explained that because he had been resident in the UK since before 1st January 1973 he had indefinite leave to remain in the UK. The claimant said that his current passport was not due to expire until 2019 but the Indian embassy had announced that they were phasing out the old style Indian passports and he had to acquire a new style biometric one which took a long time. The claimant pointed out that he had an indefinite leave to remain stamp in an expired passport and that he had provided this with his new one but he said it was pointed out that he needed to get a right to work stamp in his new passport. The claimant said that such a stamp does not exist and so he applied for a certificate of right of abode. The claimant said that he had not been aware of the change to the law on 16th of May 2014 which meant that he could not rely on the indefinite leave to remain stamp in his expired passport. The claimant stated that he had received a letter of empathy from his MP (p167) and she was contacting the Home Office on his behalf.

19. On 29th of August 2017 Susan Fry wrote to the claimant inviting him to attend an appeal hearing (p204). In advance of the hearing Mrs Fry printed out the guidance at pages 190 to 193 of the bundle.

20. The appeal meeting took place on 8th September 2017 and Mrs Fry, the claimant and his work colleague representative and a note taker were in attendance. The minutes of the meeting are at page 209. At the start of the meeting the claimant provided Mrs Fry with a copy of a Guardian newspaper article regarding long term migrants (p213 to 215) and the letter from the Home Office (p206-207). The claimant said that he was planning a trip to India (possibly in October) to assist him in obtaining documents to support his application for a certificate of right of abode and

a 'no time limit' stamp. He was unable to confirm at the meeting that he had the necessary documentation proving his right to work. Mrs Fry said that she was concerned that the claimant did not have the information confirming that he could work with the civil service that was required by HR and the Home Office. The claimant provided her with copies of correspondence with his MP. He said that he had been provided with advice but it was up to the individual employer to determine whether or not they considered the evidence sufficient regarding right to work. Mrs Fry said that she would go back to legal team and seek clarification and guidance. She asked the claimant whether part of his appeal was that the documents the department were asking for were not legally required (i.e. because he felt he had provided adequate evidence for the department to make a decision whether or not it was sufficient). The claimant said that he had provided two types of evidence namely his original expired passport with the indefinite leave to remain stamp (the 1979 passport) and a copy of the returning residence stamp in the second expired passport (the 2019 passport).

21. On 11th September 2017 Mrs Fry called the UK Visa and immigration department to ask whether the indefinite leave to remain stamp and the returning resident stamp had to be transferred to the claimant's new passport and whether this meant that the claimant had the right to work. She was informed that this information must be in the claimant's new passport to enable him to work following the change in the law. She then called the civil service HR department to take advice (p223-229). She informed the caseworker that the claimant had provided her with an article in the Guardian newspaper and it described someone with potentially similar circumstances to the claimant who had been successful in challenging the Home Office about their decision by a judicial review. She asked if the respondent needed to get further legal advice on this point. She relayed to the HR advisor what the UK visa and immigration department had told her and that claimant had got a new Indian passport because the old ones were being phased out. They confirmed that the claimant could apply for the stamp to be transferred but the claimant had not done this because he could not find his birth certificate and was going to locate this. Mrs Fry said that the claimant had had a very long period to get the immigration information together that he had not done so. The caseworker said that she would contact the caseworker who had obtained the original legal advice and come back to Mrs Fry.

22. Later the same day the caseworker emailed Mrs Fry (p223-224) and confirmed that the previous legal advice was sound and that the claimant did not have the right to be employed by the department. The case worker stated that it was the claimant's choice whether he applied for judicial review or raised a claim to the employment tribunal. The claimant had been advised what he should do in terms of being compliant with the requirements to demonstrate the right to remain and work in the UK and he had failed to provide this documentation. Mrs Fry was advised that she had the option not to uphold the appeal.

23. On 12th September 2017 Mrs Fry wrote to the claimant to inform him that his appeal had not been upheld (p234-235). She stated that she had considered all of the evidence that the claimant had provided to her. She

also stated that she had contacted the UK Visa and Immigration Helpline for Right to Work Enquiries and was informed that the current evidence provided by the claimant did not demonstrate his right to work. She confirmed that she was satisfied that the decision to dismiss was correct because the claimant had been unable to provide the required information to show that he had the right to currently work in the UK, following being asked on several occasions. She confirmed that all the information provided and available was considered and understood by the decision maker. She advised that the Home Office had written to the claimant (p206-207) following the letter from the claimant's MP and the advice would enable claimant to get the information that he required. The Home Office had provided the claimant with information about immigration advisors who could assist him with his application.

24. On 26th of September 2017 the claimant wrote to Mrs Fry (p239) with some further points following his consideration of the minutes of the appeal meeting. The claimant alleged that the department had pushed him into obtaining the right work stamp and had this not happened there would have been no issue as his current passport would still have been valid until 2019. However, it is notable that the department had asked for evidence of his right to work and the claimant had said in his letter of appeal that he had applied for a new Indian passport because they had been phasing out his old-style sport. The claimant said that he did not need to contact an immigration advisor as he could get the right of abode application forms online and would obtain a copy of his birth certificate from the relevant office in India but that would take some time. Other than that he said that all the relevant paperwork was in order.

25. Mrs Fry was on annual leave between 25th September and 6th October 2017. On her return to work on 18th of October she wrote to the claimant (p243) acknowledging his letter but advising that she felt her appeal outcome letter covered all the main points.

26. It appears that the claimant had been chased for further proof of his right to work as far back as February 2015. He accepted in cross-examination that he had been told that the returning resident stamp was not enough. He was provided with the email dated 7th May 2015 (p55) which stated: *"civil service recruitment has advised of the following: the documentation provided by Rajinder is not valid proof of his indefinite leave to remain status. He would need to either transfer the status on to his new passport, or alternatively obtain a biometric residence card. He can apply for this by completing an NTL form which can be found at [website address quoted]. Once the application has been made, he should receive an acknowledgement letter from the Home Office within two weeks, this will contain a reference number which, if he provides it to me, will allow me to complete a right to work check for him. This will take five working days and the Home Office will be able to provide me with temporary confirmation of his leave status, which will allow us to proceed with completing his pre-employment checks. Please could you do this ASAP."* This was an email from Tawni Guest ESA enquiry team leader. He accepted in cross-examination that he had been told at the outset that the returning resident stamp was not enough and that he had been told to either transfer his ILR

stamp to a new passport or BRP and he accepted that he was told to do this as soon as possible and knew this was urgent. Despite knowing this he accepted in cross-examination that he did nothing with the information because he believed that he would not have previously got a returning resident stamp unless he had got indefinite leave to remain. He accepted that he knew the respondent's policy and did not follow it. He accepted that instead he went on to the gov.uk website to query it. He accepted that he was given an instruction by the respondent and that he chose not to follow it. He accepted that instead he spoke to his niece's friend in October or November 2015. It was put to him that he was told on 7th May 2015 what he needed to do and it took him five months to do anything about it. He justified his inaction by saying that it was because he was sure that the documentation was correct. He accepted that he did not get legal advice other than speaking to the immigration officer. When it was suggested to him that the onus was on him to provide the necessary documents he asserted that right to work checks were for the respondent and not for him. He also accepted that nobody at the respondent had told him to cancel the passport which would otherwise have been valid until 2019.

The law

27. In the course of the hearing the claimant withdrew his claim for unpaid holiday pay and unpaid flexitime pay and these were dismissed. Consequently, the only claims which remain for determination are the claims for unfair dismissal and breach of contract in the form of failure to pay notice pay.

28. In order to determine the claim for unfair dismissal the tribunal must consider whether the respondent has shown the reason for the dismissal and that it is a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1996. In this case the respondent asserts that the reason for dismissal can be characterised as either conduct (section 98(2)(b)) or "some other substantial reason" (section 98(1)(b)).

29. As set out in Abernethy v Mott Hay and Anderson [1974] ICR 323, [1974] IRLR 213,"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.'

30. The respondent referred the tribunal to the guidance provided by Langstaff J (P) in Robinson v Combat Stress UKEAT/0310/14/JOJ particularly at paragraphs 18 and 20:

"[18] Some observations. First, the reason for dismissal is a set of facts, or it may be beliefs, which the employer actually has for making the dismissal which occurred when it occurred. The section requires identification of that reason, not whether there might have been a good reason for the dismissal which in fact occurred. Second, the reason is not "capability" or "conduct" or "redundancy" or "breach of enactment", though it must be capable of falling within a category to which some or one of those labels would be appropriate. They are broad summary categories. The reason to be focussed on by the tribunal is the reason which the employer actually had, not the one which he might have had albeit that the same broad label could be applied to it.

> Third, where the reason for dismissal is a composite of a number of conclusions about a number of different events, it is the whole of that reasoning which the tribunal must examine, for it is that which the employer held as the actual reason for its dismissal of the employee.
>
> **[20]** The determination thus has to have regard to the reason. The reference to the reason is not a reference in general terms to the category within which the reason might fall. It is a reference to the actual reason. Where, therefore, an employer has a number of reasons which together form a composite reason for dismissal, the tribunal's task is to have regard to the whole of those reasons in assessing fairness. Where dismissal is for a number of events which have taken place separately, each of which is to the discredit of the employee in the eyes of the employer, then to ask if that dismissal would have occurred if only some of those incidents had been established to the employer's satisfaction, rather than all involves close evaluation of the employer's reasoning. Was it actually that once satisfied of one event, the second merely leant emphasis to what had already been decided? There may be many situations in which, having regard to the whole of the reason the employer actually had for dismissal, it is nonetheless fair to dismiss. An example might be where there had been a chain of events in which it is suspected that an employee had his "hand in the till". If only some of those events are sustained before a tribunal, nonetheless that might be quite sufficient – indeed perhaps usually would be – for a dismissal for that reason to be sustained even if the employer believed that all the events had occurred whereas the tribunal thought the employer was only entitled to consider that some had. Similarly, if an employer thought there to have been several different occasions on which racist language had been used by an employee, but a tribunal concluded that some of those incidents did not bear close examination; or if the employer thought there had been a number of sexual assaults, but the tribunal thought the number smaller, nonetheless a dismissal – "having regard to the reason shown by the employer" – might easily fall within the scope of that which it was reasonable for an employer to have done.
>
> **21]** All must depend upon the employer's evidence and the tribunal's approach to it. But that approach must be to ask first what the reason was for the dismissal, and to deal with whether the employer acted reasonably or unreasonably by having regard to that reason: that is, the totality of the reason which the employer gives."

31. Once the reason for the dismissal has been established the tribunal must consider whether the dismissal is fair or unfair within the meaning of section 98(4). The tribunal must consider whether, in the circumstances, (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. The tribunal will determine this in accordance with equity and the substantial merits of the case.

32. The tribunal will apply the test of the band of reasonable responses and will not substitute its own judgment for that of a reasonable employer in the circumstances. Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 and Foley v Post Office and HSBC Bank plc v Madden [2000] ICR 1283, [2000] IRLR 827. Furthermore, the tribunal needs to consider whether the respondent used a reasonably fair procedure.

33. In the event that the reason for dismissal is a conduct reason the tribunal will need to consider whether the respondent had a genuine belief in the claimant's guilt, based on reasonable grounds following a reasonable

investigation following the well-established principles in British Home Stores Ltd v Burchell [1978] IRLR 379.

34. The respondent's alternative categorisation of the reason for dismissal is "some other substantial reason" within section 98(1)(b). The pleadings referred to section 98(2)(d) but counsel for the respondent did not put the case on the basis of section 98(2)(d) at the final hearing. On that basis the tribunal does not need to consider whether the respondent actually had to dismiss the claimant because continued employment would actually be in contravention of an enactment. Instead the scope of the enquiry is somewhat more limited. The employer's genuine belief in a statutory prohibition can constitute "some other substantial reason" (Bouchaala v Trust House Forte Hotels Ltd [1980] IRLR 382)

35. In relation to the claim for notice pay the respondent alleges that it was entitled to summarily dismiss the claimant without notice and therefore that the claimant is not entitled to notice pay. The tribunal therefore has to consider whether or not the claimant committed a repudiatory breach of contract such that the respondent was entitled to consider itself discharged from any further obligation to perform under the contract by the giving or paying of notice.

Discussion and conclusion

36. The respondent contended that its factual reason for the dismissal was that the claimant had been asked numerous times to provide them with correct evidence of his right to work and he failed to do so. Based on the information available to them and the advice that they had been given the respondent's decisionmakers genuinely thought that the claimant had no right to work in the UK. I accept that this was the respondent's factual reason for dismissing the claimant.

37. Was the respondent's reason for dismissal a potentially fair one within the meaning of section 98 of the Employment Rights Act 1996? The respondent contended that it could be characterised either as a conduct reason (repeated failure, despite requests, to provide the necessary documents) or "some other substantial reason" (namely, the genuine belief that the claimant did not have the right to work in the UK and therefore could not continue in the respondent's employ). Both of these are potentially fair reasons for dismissal and both were in the dismissing officer's mind. I am asked to identify the principal reason, if more than one, for the dismissal. In my view, looking at the totality of the evidence the principal reason for the dismissal, insofar as one outweighed the other, was the respondent's genuine belief that that the claimant did not have the right to work in the UK and that it could no longer employ him. The fact that he had been given ample time to provide the relevant proof and had failed to follow the respondent's instructions in doing so was an aggravating factor but not decisive in itself. On that basis the respondent has shown a potentially fair reason for dismissal which can be properly characterised as "some other substantial reason."

38. Was the respondent entitled to treat this as a sufficient reason for dismissal (s98(4))? In my view it was. The respondent's managers had explored the issues thoroughly with the claimant and had taken reasonable steps to obtain advice as to what documentation was required. Advice was sought internally from HR and externally from the Home Office. There is no evidence that the respondent misinterpreted that advice. The Home Office confirmed on two occasions that the documentation provided by the claimant was not sufficient proof. The respondent is entitled to rely on that Home Office guidance rather than the claimant's lay person's interpretation of the requirements, however genuine that interpretation might be. Whilst the claimant may be right in his assertion that he did not lose his previous indefinite leave to remain status when the 1979 passport was cancelled, the issue here is whether he could provide acceptable proof of that status not whether he actually possessed that status. Unless the respondent had been provided with legally acceptable proof of his right to work in the UK it was entitled to decide that it could no longer employ him irrespective of whether the claimant had an actual but unproven right to work in the UK. Hence, the respondent's reason was "some other substantial reason" and not "contravention of an enactment" (section 98(2)(d)). For the latter it would be necessary to show that it was actually illegal to employ the claimant whereas in relation to the former it is only necessary to show that the respondent had a genuine and reasonable belief that it was illegal to continue to employ the claimant.

39. I conclude that the decision to dismiss the claimant fell within the band of reasonable responses open to the respondent. They had carried out sufficient investigation into the case and had established the relevant facts. They had found sufficient evidence. They had obtained the necessary guidance on what was required and had interpreted it faithfully. Furthermore, they had carried out a fair procedure with the claimant and had taken into account his representations. They had given him ample time to obtain the relevant documentation to prove his right to work and had not misled him as to what documents were required. He was given every opportunity to provide the relevant information but failed to do so. Furthermore, the dismissal was procedurally fair. The claimant was clearly forewarned of the allegations and given an opportunity to state his case at investigation stage, dismissal stage and appeal stage. The procedure was carried out impartially and the claimant was given the right to be accompanied at all meetings. He was forewarned in advance of the disciplinary meeting that dismissal was a potential outcome.

40. In light of my conclusions as to the substantive and procedural fairness of the dismissal it is not necessary for me to consider the issues of contributory fault and so-called polkey reduction. If it had been necessary to do so I would have concluded that a 100% reduction would be merited in either case given the claimant's repeated failure to provide the necessary documentation despite requests and despite being clearly informed which types of documentation would be deemed sufficient. The claimant chose to follow his own interpretation of the rules rather than obtain legal advice or follow the respondent's guidance as to what it required from him.

41. In light of the above the claim for unfair dismissal fails and is dismissed.

42. I am asked to consider the separate contractual claim in respect of notice pay. This is a separate claim to which the statutory tests in the Employment Rights Act 1996 do not apply. The basic question is whether or not the claimant committed a fundamental breach of contract entitling the respondent to dismiss him summarily. I conclude that he did. By failing to diligently pursue the respondent's instructions as to the documents required and by failing over a protracted period to provide proper documents demonstrating his right to work in the UK despite the respondent's repeated requests the claimant committed a repudiatory breach of contract. This caused his dismissal and the respondent was entitled to dismiss summarily.

43. Further, the claimant's actions meant that the respondent had a reasonable belief that it was illegal to continue to employ him. This went to the root of the relationship of trust and confidence between the parties. A responsible employer must be able to satisfy itself that it is employing an employee legally. It should not be required to retain the employee during the notice period and thereby potentially condone illegal employment. The claimant's failure to provide proper evidence of his right to work in the UK went to the heart of the contract, undermined the implied term of mutual trust and confidence and meant that the respondent could not continue to employ him without potentially condoning a contravention of the relevant immigration rules and employing him illegally. As a matter of fact there was a repudiatory breach of contract by the claimant which entitled the respondent to dismiss him summarily.

44. In light of the above the claim for notice pay is also dismissed.

Employment Judge Eeley

Date 18th April 2018