EMPLOYMENT TRIBUNALS

Claimant: **Ms J Johnson**

Respondent: **Kenect Recruitment Limited**

Heard at: **Nottingham** **On:** **Thursday 10 May 2018**

Before: **Employment Judge Clark (sitting alone)**

Representatives

Claimant: **In Person**
Respondent: **Mr J Forrester, Solicitor**

JUDGMENT

1. The claim of unfair dismissal **succeeds**. The respondent shall pay to the claimant the sum of **£2,112.81**

2. The alternative claim for a redundancy payment **fails and is dismissed**.

3. The claim of breach of contract (Notice) **succeeds** but the claimant has suffered no loss and no award of compensation is made.

4. The claim of accrued but unpaid holiday pay **fails and is dismissed**.

REASONS

Background

1. The claim arises from the termination of the Claimant's employment with effect from 20 October 2017. It presents claims of unfair dismissal or alternatively the payment of a statutory redundancy payment; breach of contract in respect of notice period and other payments outstanding at the date of termination including holiday pay.

2. A central issue in this case is whether the claimant was employed by this respondent at the time of dismissal. The Respondent is Kenect Recruitment Limited ("KRL"). That is an entity which continues to exist and in respect of which there is no dispute did employ the Claimant in the past. Its business activities are structured through a number of legal entities, Kenect Personnel Limited ("KPL") being one. Matters are clouded by the fact that KRL also markets itself, or at least did until recently, under a "trading as" marketing identity of Kenect Personnel. It also operates a payroll provider, 121 Payroll Solutions Limited, through which the claimant,

if not all of its staff, were paid. I return to the circumstances of that in more detail below as it gives rise to a number of concerns.

3. The respondent says that the Claimant's employment transferred to KPL. It says KPL is a separate legal entity which has ceased trading. That is why the Claimant was made redundant. Whatever the merits of the claims the claimant may have against KPL, she has not sued them. It says she has sued the wrong entity. The resolution of that employment status question will be all but determinative of the central issues in the claim.

Preliminary Matters

4. At the outset of proceedings, the Claimant made an application for specific disclosure. She sought disclosure of the entirety of her personnel file for the entire period of her relationship with the respondent's business. In support she pointed to the unorthodox manner in which the Respondent employed individuals through subsidiary companies and/or payroll providers. I refused the application on the grounds that it was disproportionate to adjourn matters in view of the extent of the documentation that was already disclosed and the limited scope of the further information that was sought. I reached that conclusion albeit there were indeed a number of aspects of the Respondent's disclosure which raised concerns, not least the disclosure test that was said to have been applied was that it had disclosed "all relevant documents that it wished to rely on at the Tribunal". That is not the correct test.

5. As a further preliminary matter I explored with the Claimant was whether she had any intention to apply to add KPL as a second Respondent. The Claimant declined. We therefore proceeded to deal with the final hearing against this respondent only.

6. The hearing was concluded at 5:00 pm largely due to the time lost during the morning session dealing with the application. Judgment was necessarily reserved and, I regret, has been subsequently delayed due to the volume of other sitting commitments for which I apologise to the parties.

Evidence and Proceedings

7. As there was a fundamental dispute as to whether the claimant was employed by the respondent at the date of dismissal, the burden lay with her to establish that fact. Consequently, I heard evidence from her first together with her witness Laura Jones (the Claimant's daughter who was at the time also an employee of the Respondent). The claimant has recently reverted to her maiden name. She appears in the contemporary documentation as Janet Driscoll.

8. For the Respondent, I heard from Mr Jason Whittenham, the Managing Director of KRL. I understand he did not hold any office or employment with KPL.

9. I received a bundle running to 340 pages, a supplementary bundle from the claimant and heard closing submissions from both parties.

Facts

10. It is not the Tribunal's role to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues in the case and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

11. It is common ground that the claimant and respondent entered into a contract of employment with effect from 3 June 2015. The issue is whether it came to an end before the circumstances of her dismissal.

12. Initially, she was employed as a senior transport consultant in the Ripley branch with a salary of £28,000. She successfully completed her probation period. Her remuneration was paid through a subsidiary company of KRL, that is 121 Payroll Solutions Limited. It seems that arrangement was imposed and it arose, in part, in order to benefit from a tax expenses scheme, the tax savings achieved being charged at the rate of 50% for the benefit of the payroll company. That is one of a number of companies within the wider Kenect business enterprise. This may or may not be a formal company group structure but I find there are something in the order of a dozen associated companies which share overlapping shareholdings and individuals with significant control. I loosely refer to this as the "Kenect group". One of those companies is Charteris Consultancy Group Ltd. The Claimant moved to work in this business between 22 August 2016 and 27 January 2017. She had some sort of grievance with the Kenect group in the manner in which it handled payment for a period of sick leave which seemed to escalate to the point that she was asked not to continue in the Charteris Consultancy. It seems there were concerns at that time although it did not lead to any action and she moved back into KRL from late January 2017. There is no issue raised to suggest she lost continuity of service during this.

13. Throughout the time material to this case, the Respondent operated part of its business under a trading identity calling itself simply "Kenect Personnel". There is a subtle distinction between the markets that the various divisions of the respondent's wider recruitment business enterprise operated in. For example, Mr Whittenham described Charteris Consultancy as being a recruitment agency specialising in permanent placements of a more professional type. He described how Kenect Personnel was set up to recruit permanent employees for more commercial positions. Those both contrast with the provision of temporary labour which is the main business of other branches of the business.

14. I find the respondent's use of the "trading as" identity of "Kenect Personnel" continued to be used as a marketing brand throughout all material times of the Claimant's connection with the group and has continued for a considerable period after it ended, albeit it has now subsequently ceased.

15. The claimant was instrumental in developing the Kenect Personnel brand under her employment with KRL. It had three major clients. In the summer of 2017, the Directors of KRL invited the Claimant to participate in the further development of the brand by establishing what would become a subsidiary called KPL. To do this, KRL bought a company called Direct Placements Limited. It changed the company's name from Direct

Placements to Kenect Personnel in July 2017. It seems the due diligence prior to the purchase of Direct Placement Limited fell short as the major contract that it serviced, and that the directors of KRL expected to come to it, did not in fact continue after the purchase was complete. That is one factor relied on by the respondent to explain the subsequent failure of KPL. In effect, they did little more than buy an "off the peg" company. I find that the commercial trading activity of KPL was the same as was, and would have been, conducted under the banner of KRL trading as Kenect Personnel.

16. The claimant was invited to become a shareholder and director of KPL. Her commitment to this was to invest what was to her not an insubstantial sum of money of £12,500. She was told that this sum represented a 50% discount on the price of a 10% share in the business and that she would, in due course, be formally made a Director. The claimant was not a person of large financial resources and only had this sum available to her due to her then recent divorce settlement.

17. I find the claimant to be extremely naïve about business structures. She has no real understanding of the difference between a shareholder and a director, about the statutory and fiduciary role of a director or about corporate governance generally. She struggled with the difference between a trading as identity and the entity of a limited company. She undertook no due diligence and trusted what she was being told by the directors of KRL. Her ignorance and lack of independent advice must have been apparent to KRL directors. There was no understanding, or sense of, what the £12,500 was actually buying or what the other shareholders had invested save that the cost of purchasing direct placements was understood to be £35,000. I find, during the short time she officially occupied the role of a director of KPL, she was never included in any discussions with the other directors in their capacity as directors, had no say or involvement as to how the finances were controlled or business ran, was never invited to any meetings and was never consulted about any board matters, including in respect of the ultimate decisions that would lead to the winding up of KPL. I am compelled by the surrounding circumstances to conclude that her naivety and available funds was something that was taken advantage of by the other interested parties.

18. Despite this background, her commitment to her work was such that she saw this as a natural means of progressing her career. She invested in July 2017. She accepted and I therefore find that she was told and understood that "when everything was in place she would be sent a P45 from KRL to end her employment with it". I therefore find that (a) the terms of her directorship of KPL would be under a contract of employment; (b) that at some point in the future her employment with KRL would be terminated and, (c) that there was, therefore, necessarily going to be a period of time during which the claimant was an employee of both KPL and KRL.

19. That employment with KPL was governed by a detailed written contract. Versions of that contract appear in two places in the bundle. Page 58 is the version the Claimant received. Page 72 which is the version served by the Respondent in its disclosure. At first blush, there appears to be a fundamental difference between these two contracts. On page 1 of the

Claimant's version, the employer is identified as KRL, that is the Respondent in this case. It is headed "Service Contract" and then following that the detailed terms of the contract are set out. The equivalent cover page in the version served by the Respondent does not show KRL as the employer but, instead, KPL. The execution page of both versions repeats the identity as being KRL although I find this is because KRL was the other shareholder to KPL and the agreement incorporated the shareholders' agreement. Whilst accepting that she read the contract as a whole, the Claimant places much emphasis on this distinction and alleges that she therefore believed throughout that she was employed by KRL. I cannot accept that and she certainly did not raise this belief. One can immediately see, by turning over the title page, that the body of the contract identifies the parties as the Claimant and KPL. The surrounding circumstances, in particular her shareholding in KPL, the associated directorship and the common intention to end the employment with KRL at some point in the future, all point to this being no more than sloppy proof reading on the part of those involved in preparing the contract. There may be wider implications of this drafting error, but for present purposes I find the parties were at one in the intention to enter into a contract of employment between KPL and the claimant.

20. Her confusion may be explained further by the fact that although things were being put into place, there were a raft of other matters that had to fall into place to effect a "separation" of the business from KRL. Mr Smith of KRL explained this to the claimant in an email of 2 September 2017. At that time, it was clear that what he described as the complete separation of KPL from KRL had not yet taken place and would not do so until various matters with its bankers (and, I also find, VAT registration etc.) had concluded. At that stage, it was thought that would take another 4 weeks. I have seen no evidence that those contingent events ever in fact concluded.

21. The service contract was signed by the Claimant on 17 July 2017. Her legal relationship with KPL commenced on that date although the claimant was not officially appointed a director of KPL until sometime later, on 26 September 2017. Her directorship was terminated on 23 October 2017, approximately 4 weeks later.

22. The remuneration due to the claimant under the contract with KPL mirrored that which she received under KRL. She did not get it twice and I find it was in the contemplation of both parties that as and when the transition was complete, her employment with KRL would terminate and her remuneration would be paid by KPL instead.

23. Throughout all her time with the Respondent's business, the Claimant received payslips which did not identify the name of the employer. They are either blank as to its identity, or they identify "121 Payroll Solutions Limited". Aside from that deficiency, I find they do not change in substance through the significant changes that the employer relies on, nor specifically, do they identify the alleged change of employer. The claimant has also continued to receive direct bank transfer payments of her wages and expenses which identified the payer reference in respect of what appears to be salary as "Amber Client Account" and similarly in respect of expenses as being "expenses from Kenect Rec L". Her pay and the manner in which it was paid did not change on her taking up the

appointment to KPL.

24. Faced with dealing with the case that the respondent has advanced in these proceedings, and in an attempt to obtain some cogent evince of the identity of her employer, the claimant sought to obtain her tax records from HMRC. HMRC of course did have the full income tax records and, if the Respondent is correct, one might have expected them to say that she was employed by KRL and then, from July 2017 by KPL. Alternatively, if the claimant is correct, one might have expected them to show that she was still employed by KRL or possibly both. In fact, it shows neither. Instead it seems HMRC had been told that her employment changed regularly during the relevant period, sometimes being with 121 Payroll Solutions Limited, sometimes with Ocean City Recruitment Limited and other times linked to businesses which the claimant believes were clients of KRL and not part of the Kenect group. That information would have come from her employer, and not her, and I accept her evidence that this information came as a complete surprise to her. There may be implications of this practice beyond my jurisdiction but, insofar as I have to make findings in respect of this respondent's employment practices, I received no satisfactory explanation as to why it was that the Claimant's employment does not appear with either KRL or KPL. This HMRC record simply casts doubt on the extent to which I am able to rely on the respondent's evidence of who is employed by which entity at any point in time.

25. Whilst I accept there was a future common intention for the claimant's employment with KRL to terminate and for her to lead the KPL subsidiary company, I find that did not in fact happen. There was no termination and no P45 was ever issued by the respondent to indicate the ending of the claimant's employment with it. Coupled with the facts of the continuity of salary and expenses payments and wage slips in the manner that existed prior to July 2017, and the ongoing delay in establishing the "complete separation" of the two entities, I find that the employment relationship with KRL never in fact came to an end before she was dismissed on 20 October 2017.

26. I turn then to the circumstances of the termination of employment. Throughout his live evidence, I found Mr Whittenham had difficulty in distinguishing between "KPL" the company and "Kenect Personnel" the trading banner under which KRL operated. I find the reason was that there was actually only ever one such "business" operated. In other words, KRL was operating as Kenect Personnel prior to the formation of KPL and continued to operate during and after the demise of KPL. KPL never got off the ground as an independent trading company. The outside world would not know a difference. Both operated under the same marketing and even used the same phone number. Email and other correspondence identified with the non specific "Kenect Personnel" identity only.

27. Mr Whittenham gave evidence in terms of decisions he had to make about the continued existence of KPL as a viable business and yet, at the same time, he sought to distance himself from its day to day management. He maintained a number of times that he was giving evidence as a Director of KRL and was not a witness for KPL and, as such, was unable to deal with a number of relevant matters arising in the context of KPL as the alleged employer of the claimant. It is clear that the Directors and members of

KRL were intimately involved in the decision making as to what was happening in these two businesses. Strictly, KRL and/or certain of its shareholders and directors were in turn shareholders of KPL which became either an associated or subsidiary company of KRL. KPL had its own board of directors which did not include Mr Whittenham. The informal decision making within the wider group clearly happens because those in control view the total business activity as one business which has led to a blurring of the boundaries between one legal entity and the other and the roles its agents perform within each. I have seen internal correspondence which refers to the business as being done by "Kenect" which is KRL, and not KPL. Notwithstanding Mr Whittenham's clear direct involvement in KPL at various times and on various issues, he maintained he held a role as an operational director only and could not explain matters of HR or finance or payroll and could not offer any explanation as to why the claimant had never been issued with a P45 by any of the relevant companies. This insistence on his lack of engagement in the day to day management of KPL becomes even more curious when it comes to his very direct involvement in the disciplinary matter, to which I return later.

28. Nevertheless, Mr Whittenham describes how, as a group, the decision was taken to close KPL. I find there was no formal meeting of the board or company of KPL held to discuss this proposal in particular, one involving the claimant either in her capacity as a shareholder or director. I reject Mr Whittenham's evidence that discussions took place with her. There clearly were discussions about a number of topics but nothing that touched on the decision whether to wind up KPL or that would satisfy the requirements of a board meeting. I find as a fact she was viewed and treated only as an employee facing both a redundancy and a disciplinary allegation and she met with directors of the respondent in that capacity only.

29. Mr Whittenham held a redundancy consultation meeting with the claimant on 13 October 2017 in order to explain the situation. The company solicitor was present. The basis for its need was said to be the fact that "Kenect Personnel was in a position where it is not making enough money and it will be closing in the next few weeks". The confirmation email [201] sets out a desire to look for alternative roles within other businesses and the Claimant was asked to think about alternatives to redundancy; a subsequent meeting was arranged for 20 October. At that second consultation meeting the Claimant said how she had made the decision not to put herself forward for any alternative roles albeit I am satisfied the reason she reached that conclusion was because it had been made clear to her in the consultation that there was no place for her in the wider group, all of which was represented on the basis of Kenect Personnel not existing. She was therefore told that her role would become redundant and that her employment would be terminated with effect from 20 October 2017. She was told she would be paid her notice period in lieu.

30. I find this decision had the effect of terminating not just the new employment with KPL, but the continuing employment with KRL.

31. Mr Whittenham says how the four employees working on the Kenect Personnel business, the claimant being one, were offered the options of alternative employment in different parts of the business. I don't accept that accurately reflects the true picture. I am not satisfied that any of the other individuals had been employed by KPL. I find, on the balance of

probabilities that they remained employed by, or were appointed to, KRL. I have seen the apprenticeships agreement for the apprentice Ellie which identifies her employer as "Kenect Recruitment". Whilst that is non-specific, I find it is on balance a reference to KRL and not KPL. Two of the four employees working on the Kenect Personal brand continued in employment with KRL in revised roles, including a substantial pay rise for one who to the outside world appears to have taken on the claimant's previous role. The claimant's role and the apprentice came to an end. I find there was no equivalent redundancy consultation with the other members of staff. Mr Whittenham accepted there were no collective consultation meetings, no emails or documents about the situation existed or, to the extent there might have been some emails, they were not in the bundle. Nor were there any minutes of any discussions with any of the others. I do not accept the other two were at risk of redundancy and they have continued to service the Kenect Personnel business. There was however a discussion with Ellie in which she was told Kenect Personnel was broke. Around the same time, however, the respondent was recruiting for new recruitment consultants and managers. The nature of the work undertaken by the claimant and her colleagues I find was not sufficiently different to the nature of the work to be undertaken by these new consultants and managers to render it work of a different particular kind.

32. The claimant did not appeal the decision to terminate her employment.

33. After the claimant's directorship was terminated, attempts were made to dissolve the company at Companies House. The application was opposed by the Claimant by way of an objection.

34. Mr Whittenham explained in evidence how KPL was simply not operating after the claimant's termination. Again, I do not accept that paints an entirely correct picture. Whilst KPL was no longer actively trading, the reality was little different to how it had operated throughout the claimant's employment. I find there had been an extremely fluid approach to how costs and income were managed between the businesses and trading activities of KPL and KRL. Until at least May 2018, this Respondent continued to trade as Kenect Personnel. Mr Whittenham describes this as being because a lot of time and effort had been spent promoting the brand in the early days but I find the Claimant was, throughout her engagement with this business, operating under the banner of Kenect Personnel. Mr Whittenham denies that anyone was employed to do the work that the Claimant was previously doing. I find that the work was consumed by the other two consultants who remained employed. The costs of the Kenect Personnel work were met by KRL and the income generated by KPL was paid into KRL accounts. There was, as I have said, next to no difference in practice between the way Kenect Personnel operated under KRL, and the way it operated under KPL.

35. In terms of the final payments made to the Claimant, Mr Whittenham describes how a sum of £3,454.58 was paid to her on 5 November. He describes this as reflecting her pay up to 20 October and 3 weeks' notice. Under her contract with KPL, the claimant was entitled to 3 month's contractual notice but only after the end of the initial period of 12 months. In fact, at the date of dismissal she was still well within that initial period and unless one of the conditions set out in clauses 14.1 or 14.2 applied,

which does not appear to be the case, she was entitled to the balance of the initial period. Had there been a claim against that entity, there could have been a substantial shortfall in the contractual notice due. I have seen no equivalent written terms in respect of her employment with KRL. Her length of service is such that she would have been entitled to only 2 weeks' notice under statute and I decline to imply any longer period. Mr Whittenham was unable to explain why it was that the ET3 asserted that the Claimant was in fact paid her redundancy payment which was at odds with his witness statement, other than it being an error on the solicitor's part. He accepted the Claimant was entitled to a redundancy payment but that "we" could not afford to pay it and that if the business closed she could claim her redundancy payment from the state.

36. As to the £12,500 invested in order to acquire the shares in KPL, this was money the Claimant could ill afford and she was beset by nagging doubts about the appropriateness of this investment soon after making it. She approached the owner of KRL in order to ask that the deal didn't go through and she be given her money back. I am told that she has subsequently been refunded the £12,500.

37. The events leading to the decision to dismiss the claimant on grounds of redundancy take place at a time when the claimant was also subject to disciplinary sanctions. The issue originated with a complaint by the landlady of the respondent's Walton offices that the claimant, and it seems Mr Whittenham as well, had been smoking e-cigarettes immediately outside the offices on 4th October 2017 contrary to the terms of the lease. When challenged the next day, the claimant had then tried to contact Mr Whittenham. Mr Whittenham later visited the office. He invited the claimant to take the rest of the day off. She agreed. He retained her mobile phone and laptop in circumstances that, in hindsight, now look like the disciplinary process had started without the claimant being told. In a text message at 8pm on Thursday 5th October Mr Whittenham said:-

"Hi Jan, could you meet me in Burton branch on Monday at 9am so we can talk? Have the day off tomorrow please."

38. She asked if he would like her to work from home. He said no. He later put the meeting back to 10am. At 3:47am the claimant was removed from her login access as an "administrator' on the Kenect Personnel facebook page.

39. On Monday 9 October, the two met as planned and Mr Whittenham began to read from a script prepared by the respondent's solicitor. It became clear it related to her employment being at risk in some way. Before he could conclude his script, the claimant left the meeting abruptly, cutting it short and stating she was entitled to representation for such a meeting. She later sent an email suggesting a companion could be with her on Wednesday. Mr Whittenham sent a letter to the claimant inviting her to a disciplinary hearing on Wednesday 11 October at 11:30. That letter alleged gross misconduct. It referred to the claimant walking out of the meeting on the Monday. It seems this had overtaken the issue with the Landlady of the Walton offices. I note that Mr Whittenham signed the letter in the capacity of a director of KPL which he says he was not. I have not been shown any disciplinary procedure but I find it odd that a disciplinary process involving a statutory company director responsible to the board would take this form.

40. The hearing took place on 11 October, two days before the first redundancy consultation meeting. Mr Forrester, the respondent's solicitor, chaired the meeting. He introduced himself as working for Kenect and their associated companies. The dispute focused on whether the events of the Monday amounted to a meeting or not in view of the informality of the original invite arrangements. The hearing concluded with Mr Forster reserving his decision as to whether or not any disciplinary action would follow.

41. The decision reached, apparently by Mr Whittenham, was to find gross misconduct established but to issue the claimant with a final written warning which would remain live on her record for 12 months. I note the essence of the decision was that she had failed to comply with a reasonable management instruction. She is said to be a company director of KPL. The person giving the reasonable management instruction is someone who is not a director of KPL. The nature of the disciplinary relationship only makes sense in the context of Mr Whittenham being organisationally superior to the claimant. That is only the case in the sense of the KRL structure.

42. The claimant appealed against the decision but not before appearing to acknowledge the situation and offering her assurances that her conduct would be professional in the future. An appeal hearing took place on 31 October 2017. Obviously, other events had overtaken matters and this takes place after the employment had ended. The meeting was chaired by Mr Michael Halford who was a last minute change from Mr Julien Smith who was originally scheduled to hear it in his apparent capacity as director responsible for group HR matters. The outcome was delayed from 5 days to 4 weeks to 6 weeks. The claimant's appeal was dismissed. In upholding the original decision it relied on the fact that the claimants conduct:-

"fell well below that of a member of staff with your level of seniority"

43. It referred to Mr Whittenham as a "more senior member of staff". Mr Halford maintained the sanction was appropriate.

44. Since her dismissal, the Claimant has obtained new employment with effect from 13 November 2017. This is with MIG Counties Waste, one of the three clients of the respondent's Kenect Personnel business. She has been earning slightly less than she did in her previous employment but has continued in that post to date. She regards that employment as positive new employment and whilst it pays less, I find she is not actively continuing to seek alternative employment. To that extent, she has not mitigated the loss that flows thereafter the date of that appointment.

Discussions and Conclusions

Unfair Dismissal

45. The principle issue in the case is to identify whether or not the Claimant was employed by the respondent. In arguing that it was not, it effectively submits that this is a binary option. Whilst she was employed by it until July 2017, she then became employed by KPL. It says it has to be one or

the other. For her part, the claimant maintains she was never employed by KPL. In my judgment they are both incorrect.

46. Viewed in isolation, the commencement of the new role with KPL could form the basis to imply the termination of the previous role. In many employment situations, transfer or promotion to a new role is not always accompanied with an explicit termination of the old role. In most cases, the absence of such a termination will be in circumstances from which it will not only be permissible to imply that termination, it may well be necessary to do so. Equally and conversely, there are many employees who take on second or third simultaneous contracts of employment without affecting, and certainly without implicitly ending, the existing contracts of employment.

47. In this case, the facts as found show an intention to set up a new subsidiary. They show there was planned to be a process of transition from the "trading as" business to the new separate entity. The fact that the claimant commenced her office and employment with the new entity, KPL on 17 July 2017, does not mean that transition concluded on that date. I found it continued subject to a number of other contingent matters being put in place. I found that there was an explicit intention that the employment with the respondent would be terminated at some point in the future, but that never happened in fact. There is nothing inconsistent in the facts or law in the claimant holding the two positions simultaneously and to the extent there is any restriction in extraneous employment or business activities in the KPL contract, it was done in these circumstances with the implicit permission of the other contracting party.

48. I am satisfied that this is conceptually no different to the way in which the other Directors, agents and employees of the various businesses operate across the separate companies in various different ways. The employer's records of who is employed by which entity are exceptionally difficult to follow and do not at all displace my conclusion.

49. There can be no dispute that the Claimant's employment with the business as a whole came to an end on 20 October 2017. This respondent dismissed the claimant from both her contractual positions.

50. As the respondent employed the claimant at the date of her dismissal, the question then turns to whether it has established, the burden being on it, the reason for that dismissal and that it was a reason falling within s.98(1) of the Employment Rights Act 1996 as a potentially fair reason for dismissal.

51. The respondent has advanced a case in the alternative based on redundancy. In order to establish the potentially fair reason of redundancy, the employer must satisfy the tribunal that the circumstances underlying that reason satisfy the definition of redundancy set out within s.139 of the Employment Rights Act 1996. In my judgment, there are a number of difficulties in the respondent doing that in this case. First, the nature of the underlying "Kenect personnel" business continued from before the time of KPL, during its short life and has continued afterwards. The only material factor was the attempt to establish a separate subsidiary company. Secondly, two of the four employees apparently engaged in the work of Kenect Personnel continue in revised roles within the respondent's

business. Thirdly, whilst those matters do not necessarily prevent there being a diminution in the employer's requirements for employees to carry out work of a particular kind, they occur at a time when the employer was recruiting for new employees in roles which I have found were, on the face of it, comparable to that being undertaken by the claimant.

52. For those reasons I am not, therefore, satisfied that the respondent has established on the balance of probabilities that the claimant's dismissal arose by reason of redundancy. It has, consequently, failed to discharge its burden of establishing a potentially fair reason and, as a result, the dismissal is unfair without needing to go further.

53. Alternatively, if I am wrong in my principal conclusion, I must then consider whether the respondent acted reasonably or not in treating redundancy as sufficient reason to justify dismissing the claimant in the circumstances of s.98(4) of the 1996 Act. In that regard, I consider all and any relevant facts including notice of the prospect of redundancy, the consultation process and the consideration of alternative employment. That test, as always, is to be viewed through the prism of the range of reasonable responses available to a reasonable employer such as this in these circumstances. It is not for me to consider what I would have done in those circumstances.

54. Firstly, I note the short notice of dismissal. The first indication was 13 October and the dismissal took effect 7 days later. Sometimes short notice is unavoidable. In this case, the continuation of the underlying Kenect Personal business does not immediately provide explanation, still less justification, for the short notice. Nor does it explain why termination had to be brought forward and notice paid in lieu. I cannot see that this timescale is one that was reasonably open to a reasonable employer in the circumstances.

55. Secondly, the consultation proceeded on the basis of a closure of the Kenect Personnel business, which was not true and, in any event, it focused only on the claimant and her role from the outset. The process of consultation was artificially restricted by the fact that the claimant believed Kenect Personnel would not exist. Consequently, when it came to her sharing her thoughts on alternative opportunities in the wider business, she reflected on her career and concluded that she would not put herself forward for any alternative roles in other areas. This necessarily overlaps with the third consideration, that is alternative employment. There clearly were roles needed in areas of work associated with the Kenect Personnel business that she was qualified to undertake and which, had the truth been told to her, would have been likely to alter her responses in the consultation process. Denying the continuation of this business activity and stating that there were no suitable alternative roles were steps that fell outside the range of reasonable responses of a reasonable employer.

56. I am satisfied therefore that even if there is a redundancy in law, the dismissal in this case was unfair.

57. Either way the claimant is entitled to a basic award or an equivalent statutory redundancy payment, the calculation of either is identical and agreed in the sum of £1,467.

58. The compensatory loss is relatively shortlived. The claimant is entitled to

her loss of income from 20 October until she commenced her new employment on 13 November 2017, that is 24 days later or 3.43 weeks. She was paid 3 weeks' pay in lieu of notice. Her recoverable financial loss is therefore limited to 0.43 weeks' net pay. At £455.38 per week, that equates to £195.81. I am satisfied that the claimant has lost her statutory rights as a result of this unfair dismissal and it is appropriate to compensate her with a notional award of £450. The provisional compensatory award is therefore £645.81.

59. In view of my conclusion that the respondent has not established the reason for dismissal, I do not make any adjustment in respect of contributory conduct. Similarly, I make no adjustment under either limb of *Polkey*. This is not a case, on my principal finding at least, of unfairness arising from the procedure adopted. The second limb of Polkey, however, is likely to engage in this case in principle at least. There is evidence before me which gives rise to the real prospect that the claimant's employment could well have come to an end soon after the date it actually did such as would curtail ongoing losses. The issue, however, is whether that on balance would have happened before the 3.43 weeks that I have found the losses did in any event cease to flow. That is far too short a period to reach a positive answer, absent any very specific finding of fact such as the complete closure of the business. For those reason, I make no adjustment to the awards made. The respondent shall pay the claimant a basic award of £1467 and a compensatory award of £645.81.

Breach of Contract

60. I have found that the claimant was entitled to 2 weeks' notice. She was dismissed without receiving that period of notice and, to that extent the claim succeeds. She was, however, paid a sum equivalent to 3 weeks wages which exceeds the losses she would be entitled to claim in damages for that breach. She has therefore suffered no loss.

Accrued holiday.

61. The claimant has failed to prove this claim.

Employment Judge Clark

Date 30/8/2018

JUDGMENT SENT TO THE PARTIES ON

01 September 2018

.....

.....

FOR THE TRIBUNAL OFFICE